

THE
FEDERAL CASES
COMPRISING
CASES ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES

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

BOOK 30

Case No. 17,747 — Case No. 18,313

APPENDIX

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WILLIAMSBURG—ZUSI (Case No. 17,747—Case No. 18,222)

ADDITIONAL CASES

ALLEN—WYLIE (Case No. 18,223—Case No. 18,313)

APPENDIX

CONTAINING ALSO THE LAWS OF OLERON, LAWS OF WISBUY, LAWS OF THE HANSE TOWNS, THE MARINE
ORDINANCES OF LOUIS XIV., TABLES OF CALIFORNIA LAND CLAIMS, ETC., NOTES CONCERN-
ING THE UNITED STATES CIRCUIT AND DISTRICT COURT REPORTS, AND
BIOGRAPHICAL NOTES OF ALL OF THE FEDERAL JUDGES

ST. PAUL
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1897

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PREFACE.

This volume, the last of the Federal Cases, concludes the regular series of Reports, and contains besides certain ADDITIONAL CASES, comprising charges to the Federal grand juries, rulings of a general nature concerning costs and fees, and a number of miscellaneous opinions from the appendices of the United States Circuit and District Court Reports, including the opinion of John Sergeant, Esq., of the Philadelphia bar, as arbitrator in the Pea Patch Island case (Case No. 18,311), a controversy between the states of Delaware and New Jersey concerning jurisdiction over the Pea Patch Island in the Delaware river. There are also included several cases received too late for alphabetical classification, territorial decisions from Hempstead, and certain cases from Hayward & Hazleton's Reports necessary to complete the representation of those volumes in the Federal Cases. Although necessarily arranged in a separate alphabetical order, these additional cases are numbered consecutively with those in the main series.

It was a part of the original design of the publishers to include in the Federal Cases all the miscellaneous matter contained in the original Circuit and District Court Reports, as well as all the cases, so that the series might absolutely supersede those Reports by giving all their contents in the most convenient form for reference. Most of this material is given in this volume in the form of an APPENDIX.

The Appendix contains the old Maritime Laws of Oleron, the Laws of Wisbuy, the Laws of the Hanse Towns, and the Marine Ordinances of Louis XIV. so frequently referred to by courts of admiralty, and a table of land claims and other miscellaneous matters from Hoffman's Land Cases; also bibliographical notes concerning the United States Circuit and District Court Reports, reprinting in each case the Prefaces to the respective volumes.

The Appendix also contains all of the resolutions and other proceedings upon the decease or retirement of the Federal judges found in the old Reports, and brief biographical notes of all of the Federal judges appointed prior to January 25, 1894, setting forth in each case the principal facts of the judicial or public life of the judge, and the

more important dates, when they could be obtained. In this connection it should be remembered that no authentic record of the Federal judges had been published prior to the publication of the chronological lists contained in the first volume of the Federal Cases. The data upon which these lists and also the biographical notes are based were obtained by an exhaustive examination of all published works accessible in the larger libraries, including general histories, histories of states, of counties, and of smaller communities, biographical and other encyclopedias, and publications devoted exclusively to Genealogy. The information thus secured was duly compiled and submitted in proof form to the judges and also the clerks of the various courts for correction. Special efforts were made in every instance to secure additional information by correspondence, and to verify and correct the information already obtained. An extensive correspondence was carried on for a period of nearly two years with all persons presumed or known to be interested in such matters. In this way many living representatives of judges long since deceased were found, and from them the information was secured for the biographical notes.

This Appendix, together with the miscellaneous matter in the first book of the Federal Cases, contains a great quantity of valuable matter of literary and biographical character, pertinent to this Series, as follows:

IN BOOK ONE:

1. A chronological table showing the constitution of the several circuits.
2. A list of the Federal judges, arranged chronologically by circuits and districts.
3. A list of the Federal judges arranged alphabetically.
4. A table of Reports by circuits and districts.
5. A list of Reports, periodicals, digests, text-books, etc., examined for reports and citations of the Federal Cases.

IN BOOK THIRTY:

6. Laws of Oleron, of Wisbuy, of the Hanse Towns, the Marine Ordinances of Louis XIV., a table of land claims, etc.
7. Bibliographical, biographical, and miscellaneous matter reprinted from the Circuit and District Court Reports.
8. Biographical notes of all the Federal judges appointed prior to January 25, 1894.

With the publication of the Index Digest of the Federal Cases, now in preparation, we shall have completed the undertaking begun many

years ago, of making available for the use of the bench and bar of the country the great mass of decisions written by the able jurists who have since the foundation of our government given the Circuit and District Courts of the United States such high rank among the judicial tribunals of the world. How great has been the labor involved can be only partially shown by the results. But the comments of subscribers have given gratifying evidence that the work has been amply appreciated; and the editors and publishers are satisfied with the numerous assurances that they have performed a useful office in rescuing from partial oblivion, and putting into general use, a great number of valuable authorities which can now be cited and quoted to advantage by general practitioners as well as lawyers specially concerned with questions of law and practice arising in the United States Courts.

WEST PUBLISHING COMPANY.

April 22, 1897.

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FEDERAL CASES.

BOOK 30.

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

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

Case No. 17,747.

WILLIAMSBURG FERRY CO. v. The
CHELSEA.

[29 Hunt, Mer. Mag. 74.]

District Court, D. Connecticut. 1853.

COLLISION—VESSEL AT DOCK—TUG AND TOW.

[A ferryboat was lying at a bulkhead on the Williamsburg side of the East river, protected by the long south pier, and undergoing repairs. On the outside of her lay a float upon which workmen were standing. The steamer C., in an eddy outside of the current near the navy yard, took in tow a schooner lashed to her starboard side, and started down the river against a strong flood tide. When she struck the tide, not being under strong headway, the current turned her head up the river; and, to bring her back to her course, her wheel and that of the schooner were put hard a starboard. But the tide was too strong, and was rapidly carrying them upon the pier above the ferryboat, to prevent which the C. ported her helm to wear round and pass the pier on her port side; but, in attempting this maneuver, the two vessels were carried directly upon the ferryboat, causing the damage complained of. *Held*, that the C. was in fault for starting out with her tow in the condition of the tide, and also for want of prudent and skillful navigation thereafter.]

[This was a libel in admiralty by the Williamsburg Ferry Company against the steamboat Chelsea to recover damages resulting from a collision.]

JUDSON, District Judge. The libellants are an incorporated company, under an act of the general assembly of the state of New York, and their steam ferryboats ply between Williamsburgh and Peckslip, New York; they were the owners of the steam ferryboat Oneota, which, on the 20th June, 1851, was made fast to the bulkhead, on the Williamsburgh side of the East river, at or near the foot of South Eighth street, in the village of Williamsburgh, undergoing neces-

sary and needful repairs; that directly above the Oneota she was protected by the long South pier which guards the Jackson street ferryboats as they enter their dock on the Williamsburgh side of the river; on the outer side of the Oneota lay a float or stage, made fast to the Oneota, upon which the men were standing while the repairs were being made; the pier immediately above the Oneota extends more than one hundred feet into the East river, at right angles with the bulkhead or wharf to which the Oneota was made fast; and, at the time of the collision, a plank ran from the pier to the stern of the Oneota, upon which the workmen passed and repassed while the repairs were going on. There was no controversy about the facts thus far. The answer of the respondents admits that they are the owners of the steamboat Chelsea, and, by way of defense, the answer alleges that, at the time of the supposed collision, the tide was running strong flood, and, from the formation of the docks, vessels bound up the East river would set in to where the Oneota lay. They alleged further, and made it a prominent part of the defense, that the Oneota was in an improper place, and that she had and detained alongside a stage or float, which could and should have been removed. It appears in evidence that, at twelve o'clock at noon, the steamboat Chelsea was at or near the navy yard, and in an eddy outside of the current of the river, where she took in tow the schooner Louisa of two hundred tons burthen, and making fast this tow upon the starboard side of the Chelsea, put on steam for pier No. 9, down East river at flood tide running up East river, that when the Chelsea with her tow struck the tide, she was heading on her proper course down East river, but not being on strong headway, the

tide struck her, turning her head up East river, out of her proper course; and to bring her back, the wheels of the Chelsea and the Louisa were put hard a-starboard. The flood tide proved too strong, and was rapidly carrying the Chelsea and the Louisa upon the long pier above the Oneota; and to prevent this, and to save the Chelsea and Louisa from this disaster, the Chelsea ported her wheel to wear round, and pass the pier upon her larboard side. But the scanty room and the strong tide, operating together, the Chelsea with her tow, were taken directly upon the Oneota, and her float produced the damage set forth in the libel. Substantially these are the facts, and the case is to be decided by the law arising on these facts. It is a controversy regarding the law, rather than a controversy as to the facts of the case. Then, according to the rules of law, where is the fault? The only fact about which there can be said to be any serious dispute, is as to the position of the Oneota at the time of the collision. The answer alleges, as has already been stated, that her position was an improper one; but the weight of the evidence establishes beyond doubt that she was in a proper place, a usual place for steamboats to be made fast for repairs and for other purposes, and the court so finds the fact. The Oneota then was not in fault. The damage was incurred by the Chelsea, but whether she is responsible depends on another inquiry. Was the collision the result of inevitable accident, or the force of the tide, without any want of skill or mismanagement on the part of the master of the Chelsea? If so, then there can be no claim for damage in this case. This is the principal inquiry, and, in order to dispose of this question satisfactorily, it will be necessary to recur to the position of the Chelsea before she weighed her anchor, to the state of the tide and current, the knowledge of their power upon a vessel at its full strength, and then the manœuvring of the Chelsea up to the time of the collision.

The Chelsea was at anchor in the Wallabout Bay, with the schooner Louisa made fast upon her starboard side. She was destined with her tow down East river to pier No. 9. The master of the Chelsea was an experienced pilot, accustomed to pilotage on the East river, and must be presumed to know the course and power of the tides and currents in the immediate vicinity of his steamboat. And the court is not left in doubt as to this knowledge, because, in the answer, it is alleged, and sustained by the oath of the party, "that at the time the tide was running strong flood, and from the formation of the docks there, setting vessels bound up the river into where the Oneota lay." On this point the evidence stands uncontradicted; that the Chelsea left her moorings at about twelve o'clock at noon, at flood tide, with her heavy tow on her starboard side, and pushed into this strong flood tide

running up the East river; and heading the Chelsea down the river, this strong flood tide struck her bows, and sheered her up the river in spite of her steam, and her helm hove hard to starboard. From the knowledge which every skillful pilot should possess of these influences, it must be deemed imprudent and unskillful in the master of the Chelsea to have left her moorings at that time, and in that state of the tide, particularly with so little headway on his boat. His boat thereupon became unmanageable. Sound judgment should have dictated a much safer course in waiting for a change of the tide, or of adopting the other alternative of getting up more steam and headway before throwing his boat into this strong flood tide. Then it is quite evident that the Louisa should have been taken in tow on the larboard side of the Chelsea, where the tide would have had much less power upon her, driving both out of their course. The next error committed by the Chelsea was in attempting to wear around by putting his wheel apart, after coming into the strong flood tide, setting his boat up the river. A much more safe and judicious movement should have been ordered by the master of the Chelsea, and that was, to have steered his boat up the river until she could have reached an easy point in the river, where he might have wore the ship to the larboard. Had this been adopted, the master would have sufficient headway on his boat to have regained his intended course in the direction of pier No. 9. But this was not done, and the master of the Chelsea ported his wheel to wear round to regain his intended course down the river. He assigns as a reason for this manœuvre, that he might have run foul of the end of the long pier, and injured, and perhaps sunk, his own boat. This was an insufficient reason; first, because by any proper skill, the Chelsea might have been carried up the river past the pier; and if his wheel had been kept hard a-starboard she would have gone clear, with very little loss of time; and second, the reason was insufficient, because no man has a right to destroy his neighbor's property in saving his own.

It is not only illegal, but immoral, to avoid an impending disaster, and throw it upon another. Suppose the Chelsea had, in that critical moment, yielded to this law of morality, and permitted herself to run foul of the pier, when, according to the convictions of her master, this was inevitable, what would have been the consequences? The Oneota would have been saved, and the Chelsea would have received the damage. It is believed that such a result might have been quite as consistent as to have shifted the misfortune from the wrongdoer to an innocent party. To save the Chelsea from this disaster, she is rounded to, by order of the master, for that avowed object, when the consequences of a collision with the Oneota were

even to him certain. It would have been more magnanimous, and I think much more just, for the Chelsea to have taken the risk of running foul of the pier herself; but even that might have been avoided if the master, instead of rounding to, had kept up the river, and saved both. But there is still another error, too manifest to be passed over. The moment the Chelsea found herself unmanageable, with these difficulties in her way, she should have let go her anchor, and that of the schooner also, and remained until the tide should favor her escape from hazard to herself and danger to others. This was neither done nor attempted. But it is said on the defense, that these were only errors in judgment, and that by the laws of the sea, a master is not required absolutely to adopt such course as to avoid the danger, but will be justified in doing that which at the time he honestly believes will be best; and to sustain this position, the case of *Crocket v. The Isaac Newton* [18 How. (59 U. S.) 531] has been cited. The steambot *Isaac Newton* in that case was justified, because the master of the schooner pushed her out into the tide without any wind to fill her sails, so that being entirely helpless, through the unskillful and imprudent conduct of the master of the schooner, the collision took place. That case, in principle, is like the present, and so far from aiding the defense, sustains most fully the libel in this case. As in that, there was want of prudence and skill in the master when she left a place of safety at such a time of tide, and no wind to give his vessel steerage way, so in this there was want of prudence and skill in going into the tide at such a time. This was the first great error of the Chelsea, and as this was followed up by the subsequent errors, which, in my judgment, were palpable errors, she must be deemed in fault, and the decree must be for libelants with an order of reference.

Case No. 17,748.

WILLIAMS MOWER & REAPER CO. v.
RAYNOR.

[7 Biss. 245.]¹

Circuit Court, E. D. Wisconsin. Aug., 1876.

CONTEMPT PROCEEDINGS — REMOVED CASE — ENFORCING PREVIOUS DECREES OF STATE COURT — APPEAL.

1. Where, in an action in a state court, an order was made for the production of sworn copies of books and papers, which was disobeyed, and contempt proceedings instituted and an order made therein, and subsequently the cause was removed to the United States court, the latter court will recognize and enforce the order of the state court in the contempt proceedings as appertaining to the action removed.

[Distinguished in *Kirk v. Milwaukee Dust Collector Manuf'g Co.*, 26 Fed. 506.]

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

2. But if an appeal from the order in the state court has been taken to the supreme court, the United States court will hold in abeyance proceedings for the enforcement of the order in question until the appeal is disposed of.

3. The fact that the contempt proceedings in the state court were not entitled in the cause removed, but in the name of the people of the state, will not prevent the United States court from reviewing the proceedings, if such proceedings were in reality in aid of the civil suit.

This action was commenced originally in the state court. On the 26th day of December, 1874, an order was entered in the action requiring the defendant to deliver to the plaintiff sworn copies of entries in certain books kept by the defendant, and of certain notes, contracts and other writings alleged to be in his possession, the purpose of which proceeding was to enable the plaintiff to prepare a complaint in the action. On appeal to the supreme court of this state, this order was affirmed. On the 6th day of January, 1876, the state court made an order that an attachment be issued against the defendant as for a contempt in not complying with the order of December 26, 1874, and pursuant thereto, an attachment was issued. Upon issue formed, an inquiry was instituted as to whether the defendant was guilty of the misconduct alleged; the result of which proceeding was that on the 12th of February, 1876, the defendant was adjudged guilty of contempt, in not obeying the aforesaid order of December 26, and he was ordered to forthwith deposit with the clerk of Milwaukee county court, where the action was then pending, the books mentioned in said previous order, and to pay to the Williams Mower and Reaper Company its costs in said proceedings, amounting to \$110.80, and it was directed that he be committed to the jail of Milwaukee county, there to remain until the said costs should be fully paid and this order of February 12th should be fully complied with. These contempt proceedings were entitled, "The State of Wisconsin ex rel. The Williams Mower and Reaper Company v. Wm. C. Raynor." On the 23d day of February, 1876, and within thirty days from the entry of the last mentioned order, but subsequent to the filing of a petition by the plaintiff for the removal of the cause to this court, an appeal was taken from the order of February 12, to the supreme court of Wisconsin, an undertaking for stay of proceedings was at the same time filed pursuant to the state statute, and that appeal is now pending. On the fourth day of March, 1876, the state court, on application of the plaintiff in the action of the Williams Mower and Reaper Company v. Raynor, made an order removing that cause to the United States circuit court, and the entire record including that of the contempt proceedings, is now in this court.

H. M. Finch, for plaintiff.
Jas. G. Jenkins, for defendant.

DYER, District Judge. Application is now made for an order requiring the defendant Raynor to forthwith file with the clerk of this court all of the books, papers, notes and writings mentioned in the order of the state court dated February 12, and that he pay to the plaintiff the money mentioned therein, and in all things comply with that order, or in default thereof that he be punished as in said order provided.

This application is made under that provision of the statute of the United States, relating to the removal of causes into the courts of the United States, passed March 3, 1875, which declares that all injunctions, orders, and other proceedings had in a suit prior to its removal, shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed. 18 Stat. p. 471, § 4.

Resistance is made to the application upon the general ground that the proceedings which culminated in the order of February 12, adjudging the defendant guilty of contempt, were not proceedings in the action of the Williams Mower & Reaper Co. v. Wm. C. Raynor, but were in their character essentially independent of that action, and had for their object the vindication of the defied authority of the state court; that they were not taken in the civil action nor properly entitled in that action, but were proceedings in the name of the state, and were not transferred to this court with the removal of the main action.

I was strongly impressed with this reasoning upon the argument. Reflection upon it, however, has led me to doubt its correctness. While the proceeding in question, as argued, had as one object the punishment of the party for disobedience of a previous order of the court, it at the same time enforced a civil remedy in behalf of the plaintiff in the main action. Though it was a proceeding entitled in the name of the state on the relation of the plaintiff in that action, and was in a certain sense independent of the action as a proceeding involving punishment for an alleged neglect or violation of duty, it was also, I think, a step taken in the original action to secure the production of the books and papers in question for the benefit of the plaintiff. It was a special proceeding in the action, and its connection with the action does not, as it seems to me, rest wholly in the defiance of the authority of the court which was exercised in that particular action. It necessarily involved the enforcement of a civil remedy to which it had been adjudged the plaintiff was entitled in the action, and the protection of an alleged right of the plaintiff for the purpose of enabling him to proceed therein. The intimacy of connection between the main action and the special proceeding is so great, that I am not prepared to admit that, if the former were to be dismissed or discontinued, the latter would still stand for prosecution as an independent pro-

ceeding. The sole object of the proceeding was not to vindicate the defied authority of the court. The argument of counsel would be complete as addressed to a case of purely criminal contempt, where the sole object was to support and maintain such authority. There is a well recognized distinction between those proceedings for contempt which are merely in the nature of civil remedies for the benefit of the party injured and those aimed at conduct which tends directly to interrupt the proceedings and impair the authority of the court. Like the case of *State v. Brophy*, 38 Wis. 424, where the supreme court of this state discuss this subject, the proceeding resorted to in the present case had not for its primary object the vindication of the authority and dignity of the court, but was to enforce a civil remedy and to protect the alleged rights of a party in a civil action. It was for the benefit of the party injured, and so not to be confounded with a prosecution for a criminal contempt. The last mentioned proceeding would be "one intended to punish conduct which impairs the authority of the court, and impedes the due administration of justice, and the other is one calculated to indemnify a party for the loss or injury produced by the misconduct alleged." The order which this court is now asked to enforce, substantially repeated the previous order of the state court in its requirement that the defendant produce or deposit for examination by the plaintiff the books and papers in question. It also required the payment to the plaintiff of the costs of the special proceeding, and ordered the defendant committed until he should comply with these requirements.

From these views it follows that the order in question is one which under the statute of the United States, may be recognized and enforced by this court, as appertaining to the action removed. I however regard the appeal from that order taken by the defendant to the supreme court of this state and now pending in that court, as a fact that this court ought to regard in its action which is now invoked, and will hold in abeyance proceedings for the enforcement of the order in question, until that appeal is in some manner disposed of.

Case No. 17,749.

WILLIAMSON v. The ALPHONSO.

[1 Curt. 376; 2 Liv. Law Mag. 364.]¹

Circuit Court, D. Massachusetts. May Term, 1853.

SALVAGE SERVICE—AUTHORITY OF MASTER.

[1. The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case

¹ [Reported by Hon. B. R. Curtis, Circuit Justice. 2 Liv. Law Mag. 364, contains only a partial report.]

of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it; but these circumstances affect the degree of the service and not its nature.]

[Cited in *The J. L. Bowen*, Case No. 7,322. Quoted in *The Hyderabad*, 11 Fed. 756; *The Alaska*, 23 Fed. 607; *The Brandow*, 29 Fed. 880; *Stone v. The Jewell*, 41 Fed. 104; *The Connemara*, 108 U. S. 357, 2 Sup. Ct. 756.]

2. The master has no right to compel the mate to perform a salvage service; and if he does perform one by the order of the master, without objection, he is to be considered as a volunteer.

[Cited in *The Cachemire*, 38 Fed. 522; *The Marie Anna*, 48 Fed. 747.]

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

[This was a libel for salvage by Augustus Williamson against the brig *Alphonso* and cargo. The district court decreed in favor of libellant (case unreported), and claimant appeals.]

F. C. Loring, for claimant.
Dana & Parker, for libellant.

CURTIS, Circuit Justice. This is a cause of salvage. The material facts are as follows: On the 29th day of August, 1852, the schooner *Fawn*, whereof the libellant was chief mate, sailed from the harbor of St. Thomas, in the island of St. Thomas, bound for Turks Island, in company with the brig *Alphonso*, bound for Rum Key. The courses of the two vessels being the same, till their arrival off Turks Island, there was an understanding between their masters that they would keep company up to that point. The *Alphonso* was a brig, of about 240 tons burden, and had a master, two mates, five fore-most hands, a cook, and cabin-boy. The wife and infant child of the master, and a young servant girl, were on board as passengers. Her cargo consisted of salt, tamarinds, and specie to the amount of about \$6,000; and the vessel and cargo were of the value of about \$15,000. The second mate of the *Alphonso*, who was shipped at St. Thomas, was able to do duty when he came on board, but he was suffering under an affection of the eyes, which disabled him, so that he did no duty after the first day out. About six o'clock of the evening of Sunday, the day of sailing, the first officer of the *Alphonso* was taken sick. His disease was yellow fever; and during the residue of the passage, he was unable to leave the cabin, and, with some lucid intervals, was deranged in mind. The wife of the master was seized, about the same time, with the same disease, and either on Monday night, or Tuesday morning, the master also; so that, after he went below on Monday night, he does not appear to have been on deck. Some time during the morning of Tuesday, the master ordered the crew to set the colors, union down, as a signal of distress. About four o'clock, p. m., this signal, having been observed on board the schooner, she lay to,

and waited for the brig; and when the latter came up, the master of the schooner went on board in his boat, found the master and first officer of the brig very sick with the fever, and was requested by the master of the brig to lie by, close to the brig, during the night. The master of the schooner declined to do this, considering it somewhat hazardous; but proposed to send his mate, the libellant, on board, and that both vessels should run into Turks Island, then about twenty-three miles distant. This was assented to; the master of the schooner returned to his vessel, told the libellant to go on board the *Alphonso*, and keep the light of the schooner in sight during the night; and gave him the course, distance, and bearings of the two vessels from Turks Island. The libellant made no objection, went on board, and took the command. During the night, both vessels lay to, probably because the land being low, and the navigation, in approaching Turks Island, somewhat dangerous, it was not prudent to run for the harbor in the night. The next morning, the vessels were in sight of each other; they made the land between seven and eight o'clock, a. m., and came to anchor in the harbor about one o'clock, p. m. The weather was fine and clear during the whole time. The master of the brig was taken on shore, and soon after died. The consul of the United States came on board, and took charge of the vessel; and the next day after her arrival, placed a person in command of her.

The libellant entered his action in behalf of himself, the owners, officers, and crew of the schooner; but the owners and master having disclaimed the suit, the libel was amended, so as to go for a salvage compensation to the libellant alone. The district court decreed five hundred and fifty dollars to the libellant; the claimants appealed, and assigned three reasons of appeal; upon which the cause has been argued here. The first is, that the libellant did not render a salvage service.

It is strongly urged, that both the peril and the service were too slight to bring the case within the technical definition of salvage. But I am not of this opinion. The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature. That such a peril of the sea was impending over the brig, I think appears. She was out of sight of land. Her master and both officers were disabled. A deadly, infectious, or contagious disease had seized two of them and a passenger. It does not appear that any one on board was able to navigate the ves-

sel. There is no presumption that any one before the mast understood navigation, and there is some direct negative evidence that no one was a navigator. The master, judging upon the actual facts, ordered a signal of distress to be made. Under these circumstances, I cannot say that this vessel was not in distress, nor that the peril was so slight that a relief from it cannot rise to the dignity of a salvage service. It is true, she was but a short distance from a port. But the land was not in sight, and the proof shows that there were dangerous shoals in the neighborhood; and it does not appear that the crew, unassisted, knew the bearings of the land, or the course to be steered. It is urged, that the schooner was in company, and therefore there was no real peril. That does not show that the peril, arising from the condition of the officers and crew, was not real; but only that the means of relief from it, by others, who were under no legal obligation to render assistance, were at hand. But in considering the nature of such a service, we must look to the peril which impended, if assistance were not given; not to the ease or difficulty of giving it, or the certainty that it could be obtained from salvors.

It was not argued, that there was any such contract of consortship between the brig and the schooner, as would repel a claim for salvage, upon the ground of a mutual legal obligation to give assistance, if either should fall into distress. Nor is there any thing in the evidence upon which to rest such a position. There was an understanding that the vessels would sail in company, and they did so; but undoubtedly, this meant no more than that they would sail out of port at the same time, and keep along together so far as both should deem it best to do so, without any legal obligation upon the subject. Independent of some usage of the trade, or of some special circumstances, it may well be doubted whether masters have a right to go further than this; and there is no reason in this case to suppose that either intended to go further.

My opinion therefore is, that the schooner rendered to the brig technical salvage service, to be compensated as such. It is, however, but one service, rendered by the owners, officers, and crew of the schooner, in lying by, sending on board the brig to ascertain her distress, and putting on board the libellant, to navigate and command her; and through this assistance, bringing her safely into port. As against these claimants, it must be viewed as one enterprise, to be paid for by one sum of money; though inasmuch as only the libellant makes a claim, it is also necessary to ascertain, as against the claimants, what is his distributive share of the salvage compensation.

And this brings me to consider the second reason of appeal, which is, that the amount awarded to the libellant is excessive. I do not consider that the schooner was subjected to any appreciable danger, in rendering the

salvage service. She lay by during the night; but I think she would have done so for her own safety, it being sworn that it is dangerous to approach Turks Island in the night. Certainly it does not appear, that her lying by was on account of the brig. In the morning, she sailed into her destined port, and the brig followed her. The master of the schooner carried one of the foremost hands from the brig to the schooner, so that the number of his crew was not diminished by the absence of the mate. In such a case, I consider the owners of the schooner not entitled to any large proportion of the salvage, though, from reasons of public policy, they cannot be altogether excluded therefrom. The master, who was the author of the enterprise, acted with promptness, discretion, and humanity. He went into the cabin among the sick, ascertained their condition and that of the brig, administered medicines, and exposed himself to some danger of infection. If he had chosen to make a claim, I do not perceive how I could have awarded to him less than to the mate, who, though longer on board the schooner, was acting under the responsibility of the master, and by his order. He does not appear to have been in the cabin at all, and consequently was exposed to but little actual danger, until after the salvage service was completed. But, on the other hand, the mate could not certainly know, when he went on board, how long it might prove necessary for him to remain, nor to what extent he would be exposed to the disease. It was suggested, that it did not appear, he knew the yellow fever was on board. It is not stated in terms by any witness. But I cannot suppose that the master of the schooner suffered him to go on board the brig in ignorance of the nature of the disease existing there, or that the boat's crew who brought the master back to the schooner, did not bring with them information of the cause of the distress of the brig, so that it became known to the mate. It is also urged, that he went by the order of the master, and not voluntarily. But the master had no power to compel him to go; and when a master orders either an officer or a man to perform a salvage service to another vessel, and he does it without objection, I think it must be taken, that he goes both by the order of the master and voluntarily. The order sanctions the act, and conveys the assent of the master and of the owners, whose agent he is; but it does not deprive the inferior officers, or the crew, of the merit of voluntary exertion. These are some of the considerations which have been relied on, as bearing on the quantum of compensation.

Considering the amount of the property at risk, which, though considerable, was not very large, the immediate proximity to the port, the presence of the schooner, which was bound to Turks Island, and lay by during the night, as I think, for her own safety; the state of the wind and weather, and the degree of danger to life, actual or reasonably

to be apprehended, my opinion is, that the sum of seven hundred and fifty dollars is a liberal salvage compensation for the actual service. Indeed, aside from the element of danger to life, I should view it as merely technical salvage compensation, and calling for slight compensation. That element is one of great importance; but under the circumstances of this case, it does not seem to me, that the danger, reasonably to have been apprehended by the mate, was considerable. Doctor Stedman, the only medical witness examined, says, it would depend upon the frequency and length of visits to the cabin. Before the completion of the voyage, it does not appear that the libellant had occasion to go into the cabin, and of course, the actual danger of infection was very small. Still, salvage compensation is greatly affected by motives of public policy; by the expediency, for the general good, of bestowing a liberal reward upon those who interpose in circumstances of trial and difficulty; and, speaking generally, there are few occasions more trying to the fortitude and courage of seamen, than those in which they are called upon to commit themselves to an infected ship upon the ocean. When this is done promptly, humanely, and successfully, the public interest requires that the reward should be liberal; and, as I have said, I consider the sum named, upon the actual facts, to be so. Of this sum, I consider the mate entitled to two fifths, or three hundred dollars. The evidence of payment of his claim is not sufficient. The small sum paid to him was neither offered nor received as a salvage compensation. It is highly probable, the libellant had not then thought of claiming salvage, having acted simply from motives of humanity. But this would not deprive him of a legal right, for which he has not received satisfaction. The sum actually paid to him should, however, be deducted from the sum decreed to him. The decree of the district court must be reversed, and a decree entered here, in conformity with this opinion. I do not allow costs to either party in this court. The costs incurred in the district court are to be paid by the claimant.

WILLIAMSON (BARRETT v.). See Case No. 1,051.

Case No. 17,750.

WILLIAMSON v. The BETSY.

[Bee, 67.]¹

District Court, D. South Carolina. March 23, 1795.

NEUTRALITY LAWS—FITTING OUT PRIVATEER.

[Where a privateer was illegally fitted out, and commissioned in this country by the

French minister, but was afterwards dismantled, and her register canceled, then sold to a foreigner, and fitted out and commissioned in a foreign port, *held*, that her proceedings under the latter commission were not in violation of the neutrality laws.]

BEE, District Judge. The actor was master of this brig, belonging to British subjects. On the 23d of November, 1794, she was captured on the high seas by the defendant, who commanded a privateer called the Port-de-Paix. The libel states that this privateer was armed and equipped for war, wholly or in part, in this port; and that J. P. Sarjeant is a citizen of the United States, or British subject; and, therefore, could not be legally commissioned, as a French citizen, to take prizes. That this brig having been brought into the neutral port where the armed vessel was unlawfully fitted out, ought to be restored to the original owners.

The plea to the jurisdiction sets forth that the privateer is owned by Sarjeant and Olmstead, both French citizens. That the crew are also French citizens, or, at least, shipped as such. That their vessel is a French bottom, equipped at Port-de-Paix, and not in any port of the United States, and that she was duly commissioned by General Laveaux on the 23d August, 1794. That she arrived here in September, and sailed in November following, with no additional equipment whatsoever. That no American citizen entered on board during her stay, though several British seamen did. The capture is admitted, far without the jurisdiction of the United States, and the 17th article of the treaty with France is relied on in support of the plea. It appeared in evidence that this vessel was formerly American, that she fitted and armed in this port in 1793, and was commissioned by Genet. That she was in the number of those proscribed by the president of the United States; and that in consequence of such proscription, she was stripped and dismantled in Wilmington (N. C.) and lay there a considerable time in that condition. Her American register was given up, and the bond for the same cancelled at his office. It appeared that, some time afterwards, this vessel arrived here from North Carolina with a clearance and manifest, as the Dolphin, and a bill of sale to one Gibson, of the island of St. Bartholomew. That she cleared and sailed from hence on 5th August last, as a foreign vessel, at which time, as well as on her arrival from North Carolina, she was unarmed, and in no manner equipped for war. Upon this evidence I am of opinion, that although the original fitting out here as the Vainqueur de la Bastille, under Genet's commission, was contrary to neutrality, and all acts done by the vessel, illegal and within the jurisdiction of this court, yet that the subsequent dismantling, change of property, and cancelling of her register, occasion a total difference; and that her subsequent proceedings cannot be questioned here. Let the libel be dismissed with costs.

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

Case No. 17,751.

WILLIAMSON v. BRYAN.

[2 Cranch, C. C. 407.]¹

Circuit Court, District of Columbia. April Term, 1823.

REINSTATEMENT OF CAUSE.

When an action of replevin has been discontinued by the non-appearance of either party, the court will not, at a subsequent term, reinstate the cause, unless it appears to be the fault of the clerk that the appearance was not entered.

[Cited in French v. Venable, Case No. 5,105; Reiling v. Bolier, Id. 11,671.]

Replevin. This cause had been discontinued at the last term, because the defendant had not appeared.

Mr. Dawson, defendant's counsel, made affidavit that he was desired by the defendant, before the last term, to enter his appearance for the defendant in all his causes, and thought he had done so, but now finds that his appearance was not entered in this case, and that the cause was discontinued for want of an appearance. Whereupon he moved the court to direct the cause to be reinstated, and brought forward upon the docket, and the continuance entered.

But THE COURT (THRUSTON, Circuit Judge, absent) said that the only cases in which they had granted such a request were those in which it appeared to be the default of the clerk that the appearance had not been entered.

Motion overruled.

Case No. 17,751a.

WILLIAMSON v. BUZZARD.

[Hempst. 243.]²

Circuit Court, D. Arkansas. July, 1834.

BOND FOR COSTS—SUFFICIENCY—TIME OF GIVING.

1. A bond for costs which omits the name of the non-resident plaintiff about to institute suit, is defective, and the suit should be dismissed.

2. Nor can bond be given after the institution of suit, so as to prevent dismissal.

Appeal from Hempstead circuit court.

[This was an action by Polly Williamson against Jacob Buzzard.]

Before JOHNSON, ESKRIDGE, and LACY, JJ.

OPINION OF THE COURT. This is an action of detinue brought by the appellant, a non-resident, against the appellee, which was dismissed at the cost of the appellant, on the motion of the appellee, on the ground that the bond for costs filed by the plaintiff in the court below was defective and insufficient. The condition of the bond, which is alleged to be defective, is in the following words: "The condition of the above obligation is such, that

whereas a non-resident of the territory of Arkansas is about to commence an action of detinue in the circuit court," &c., and omitting to insert the appellant's name as the non-resident about to bring the suit. After the judgment dismissing the suit was rendered by the circuit court, the appellant, by her attorney, presented to the court a new bond for costs, and moved the court for permission to file the same and to reinstate the cause upon the docket, which motion was overruled by the court.

The counsel, for the appellant, contends that the court below erred—First, in dismissing this suit for want of a sufficient bond for costs; and, secondly, in refusing to receive a new bond when tendered, and reinstate the cause on the docket. The statute (Geyer's Dig. 244) provides that "any person who shall not be a resident within this territory shall, before he institutes any suit in the courts of this territory, file or cause to be filed, a bond with sufficient security, with the clerk of the court wherein his suit is instituted, for the payment of all costs which may accrue in said suit." It has been repeatedly held by this court, that unless a bond for costs is filed by a non-resident before he commences his suit, he shall not be permitted, after the suit is brought, to file the bond, but the court, on motion, will dismiss the action at the plaintiff's costs. We are still satisfied that this is the sound and correct construction of the statute, and feel no inclination to disturb the long and well settled practice. The counsel for the appellant, however, maintains the propositions, that the bond for costs filed by the appellant before the institution of the suit is a good and valid bond. He admits that there is a latent ambiguity in the bond, but contends that this ambiguity can be explained by averment and proved by parol evidence. Admitting the correctness of this position, which we are not disposed to controvert, still we are of opinion that the bond in question was not such a bond as was required by the statute. The plaintiff, before he institutes his suit, is required to file his bond with sufficient security for the payment of all the costs which may accrue in the suit. What description of bond is here required? Will a bond containing a latent ambiguity upon its face, which may be enforced by averments and parol proof, be sufficient? We think not. It should be a bond in which there is neither a latent nor patent ambiguity; one requiring neither averment nor parol evidence for its explanation and support; a bond clear and explicit in its terms, and free from any substantial defect. We are, then, clearly of opinion that the bond originally filed by the plaintiff in the court below, was not such a bond as is contemplated by our statute, and that the judgment of dismissal was properly rendered on that ground.

The second point presented in this case is, whether a non-resident plaintiff, having filed a defective bond for the costs, shall be per-

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

² [Reported by Samuel H. Hempstead, Esq.]

mitted after the commencement of the suit to file a good and valid bond. We have reflected much upon this question, and the conclusion at which we have arrived is, that the best and soundest construction on the statute is to require a good, sufficient, and valid bond anterior to the institution of the writ, and permit no amendment after the suit is brought. The statute requires the bond before the suit is instituted, and a defective and imperfect bond cannot be said to be a strict compliance with the law. Neither justice nor sound policy, in our judgment, calls upon the court to relax the requisitions of the statute. There is no difficulty in preparing and filing a valid and legal bond, and to permit any other kind to be available might lead to consequences highly pernicious. Judgment affirmed.

Case No. 17,752.

WILLIAMSON et al. v. COLCORD et ux.

[1 Hask. 620; 1 13 N. B. R. 319.]

District Court, D. Maine. Dec., 1875.

ASSIGNMENT IN BANKRUPTCY — WHAT PASSES — CLAIM UNDER GENEVA AWARD — PAROL GIFT TO WIFE — EFFECT.

1. An assignee in bankruptcy takes the property of the bankrupt, subject to all legal and equitable claims of others.

2. A gift bona fide by parol prior to the Geneva award of a claim for the destruction of a vessel by the Confederate cruiser Florida, if proved, would be upheld in equity against subsequent creditors.

3. A parol promise, by a husband to his wife for love and affection to make such gift, does not work a gift and cannot be enforced.

4. A claim for the destruction of a vessel by a Confederate cruiser passes to an assignee in bankruptcy.

[Cited in *Re Gallagher*, Case No. 5,192.]

[Cited in *Leonard v. Nye*, 125 Mass. 463.]

In equity. Bill by [Joseph Williamson and others] the assignees of a bankrupt against [Josiah A. Colcord] the bankrupt and his wife, seeking to have a claim of the bankrupt, for the destruction of his vessel by the Confederate cruiser Florida, about to be paid from the fund arising from the Geneva award to the wife on her petition, adjudged to be a part of the bankrupt's estate that passed to his assignees. The respondents answered that in September, 1863, after the destruction of his vessel in March of that year, the bankrupt, having no creditors, actuated by love and affection, gave the claim to his wife, and that it thereby became her separate property and did not pass to his assignees in bankruptcy. Replication was made and proofs were taken.

Thomas B. Reed, for orators.

Clarence Hale, for respondents.

FOX, District Judge. This cause arises from the depredations committed on our com-

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

merce by the rebel cruiser Florida in March, 1863. At that time the bankrupt, Josiah A. Colcord of Stockton, in this district, was master and a part owner of the barque M. J. Colcord, which was destroyed by the Florida on the 27th of March while on her voyage from New York to Cape of Good Hope. The interest of said Colcord as master and owner is stated to have been something over \$11,000, for the recovery of which sum, under the Geneva award, a petition in behalf of Mrs. Colcord is now pending before the proper tribunal at Washington.

Capt. Colcord, sometime after his return to the United States, became a member of the firm of Colcord, Berry & Co. The firm proved insolvent, and having been adjudged bankrupts, the complainants were chosen and qualified as assignees in bankruptcy of said estate, and they have also filed their petition at Washington for the allowance to them of this claim for damages, for the benefit of said Colcord's estate, and have instituted this bill to have the respective rights and interest in the award, which may be made in this behalf, ascertained and determined between them.

The respondents in their answer allege that in Sept., 1863, Capt. Colcord "in consideration of love and affection and for other good and sufficient considerations did give, assign, transfer and set over to his wife, said Martha J. Colcord, said claim, arising from the loss of said barque, and that he has not since that time had or pretended to have any ownership or control over said claim, but that said Martha J. Colcord has exercised such ownership and control, and has always represented and held herself out as the owner of such claim."

Under the laws of this state, husband and wife may contract directly with each other; but when payment was made for property conveyed to her from the property of her husband, or it was conveyed by him to her, without a valuable consideration paid therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase. Rev. St. 1857, c. 61.

In *Mitchell v. Winslow* [Case No. 9,673], Mr. Justice Story decided that the assignee takes the property of the bankrupt, subject to all legal and equitable claims of others, and is affected by all the equities which can be urged against the bankrupt. This principle has since been reaffirmed scores of times, by the various courts administering the bankrupt law, including the supreme court of the United States. *Cook v. Tullis*, 18 Wall. [85 U. S.] 332. And if the bankrupt is estopped, his assignee is also estopped.

In 1863 the bankrupt was free from debt. I am therefore brought to the consideration of this cause, as if the parties were husband and wife, each claiming the benefit of the award, and the rules of equity, which would be applicable, if the case was pending between those parties must govern and control my decision in the present suit.

The subject matter of this controversy is of that uncertain and indefinable character, that the researches of neither counsel nor court have discovered any authorities directly applicable, and which are decisive of the questions here presented. The claim was not against a foreign government for indemnity for damages occasioned by its authority, as was the case of *Comegys v. Vasse*, 1 Pet. [26 U. S.] 193; but it is one degree more remote and contingent, being for recompense for injuries suffered from this rebel cruiser, which, as our government contended, had been permitted, through the negligence of the British authorities, to be constructed and equipped and to depart from British territory to accomplish its piracies, and by reason of such negligence indemnity was demanded from the government of Great Britain for the damages thus inflicted on our commerce.

Our own government was not responsible, and no valid claim could be made upon it for redress by the sufferers. Great Britain had not directly committed or authorized these depredations to be made, and it was only on the ground of her failure to comply with her obligations under the rules of international law, that any redress could be sought against her, for the wrongs thus sustained. It is difficult therefore to imagine a claim of a more precarious nature, wholly dependent on the willingness of Great Britain to acknowledge and make satisfaction for the consequences of her misdoings, or submit the same for decision to the arbitration of others, by which latter court her accountability was subsequently established.

It is claimed that, being of this character not manifested by any evidence whatever of a documentary nature, but the whole claim resting and being in mere expectancy and possibility, it was not susceptible of a donation, and therefore, that there could be no valid gift of the same to Mrs. Colcord by her husband. It is certain that there was nothing in his control or possession, which could be so given and delivered as to constitute, at law, a complete and perfect gift and confer a legal valid title to the donee; but equity recognizes many rights, expectancies and possibilities, as being the subject matter of a gift or transfer, so far as to confer an equitable interest therein, which a court of equity will acknowledge, sustain and protect as sufficient to divest the donor of any rights thereto, provided he has done all that was requisite to perfect and carry out his intentions.

In the light of the authorities referred to and commented upon in *White & T. Lead. Cas.* [Eq. 307, 308, 343, 344, 3d Am. Ed.],² I am inclined to hold that the subject matter of the present controversy was such that equity would sustain and protect the rights and claims of the wife thereto, if all was done that was requisite to accomplish the purpose of the husband to vest the same in his wife.

It is necessary therefore to critically examine the evidence and see what was said and done between the parties, at the time of this alleged gift, as it is not claimed, that any writings of any kind were executed by either party, or that there was then or at any subsequent time any symbolical delivery of any thing whatever, either documentary or otherwise.

The answers of both the bankrupt and his wife state, that this transfer was made in consideration of love and affection, and for other good and sufficient considerations; there is no averment, that there was any valuable consideration for the transfer, and although the wife and some of the other witnesses state, that she mentioned at the time, as a reason for the gift, that she had let her husband have some money to go into this barque, it is evident from all the testimony, that whatever he may have received from her was his own property, which had been remitted by him to her for the support of his family, and that the balance which remained unexpended was received and paid out by him on the barque's account; this money, never in any way became her property, and at the argument, her counsel properly abandoned all claim or right thereto in her behalf, and conceded that no advantage or support could be derived therefrom, and that the only consideration for the gift was that growing out of the relation existing between the parties, which, although not, either at law or in equity, deemed a valuable consideration, yet is always recognized both as of a good and meritorious nature.

Captain Colcord in his deposition taken in this case, testifies that in September, 1863, he was offered for his claim twelve per cent. of the amount. That he consulted with his wife in relation to accepting this offer, to which she was much opposed; that she remarked, that as the vessel was named for her, and she had let him have some money to put into the vessel, he had better give it to her; and his further statement is as follows: "I told her that I would give the claim to her cheerfully, and that she was welcome to all she could get from it." On being asked by his counsel to state further what was said, his language was, "I give you cheerfully all the claim, and you are welcome to every dollar you can get for the claim." The difference between these two statements is, that the latter imports a present gift, while the other is rather of a promissory nature of what he would do for her in the future. Mrs. Colcord's statement is substantially in accordance with the latter statement of her husband, and she adds that her two daughters were present in the room at the time, and she said to them, "Girls, remember that your father has given me these claims." The testimony of the daughters, who were then quite young, one who has since married being then only fifteen, substantially agree with the mother's statement, and they also testify that Capt. Colcord frequently

² [From 13 N. B. R. 319.]

spoke in the family of the claim as his wife's, and would allude jokingly to the large sums she would receive from it.

Opposed to this testimony is the statement of Capt. Colcord in his deposition given before the register, in July, 1873, in which he says "I gave the claim to his wife shortly after the vessel was burnt, but I do not recollect whether it was done in writing or not." The evidence of Mrs. Berry, a sister-in-law of Mrs. Colcord, tends to establish, from the admissions of Mrs. Colcord, that her husband, long subsequently to this alleged gift, undertook to manage and control the disposal of this claim, and that the wife made no objection thereto. Mrs. Berry testifies that at one time Mrs. Colcord told her that her husband had sold the claim; at a subsequent time Mrs. Colcord said that they had had a talk of selling but did not sell. In the last conversation Mrs. C. said that the witness was mistaken about hearing her say that Capt. Colcord had sold the claims positively, that he talked of selling them or had an idea of it. Alexander Staples states in his deposition that Capt. Colcord told him, in the presence of Mrs. Colcord, that he had sold out his claim—sold to Western parties. Mrs. Colcord then said, "You have just owned up," and seemed to express some surprise that he had not told her before.

When we consider the failure of memory of Capt. Colcord, in his not being able in 1873 to remember whether he had or not executed any writing to perfect this gift, and also that his first statement in his deposition was that he told his wife he would give her the claim, and the subsequent admissions of both him and his wife, that he had exercised acts of ownership over it, by claiming that he had sold it, or talked of selling it, it may not be an unreasonable conclusion for the court to draw, from all the evidence, that all that was in fact declared by him at that time was a purpose and intent on his part to give to his wife whatever he might thereafter realize from this claim, and that he was still to retain his control over it, and enforce it in such manner as circumstances might subsequently render proper, and that it was not his intent to cast upon her the whole responsibility of prosecuting and maintaining the claim in the future as might be requisite. All the facts to sustain the claim were peculiarly within his own knowledge, and it would be much less difficult for him to procure the required proof when wanted.

The language then employed, without any great restraint, may be considered of a promissory nature simply, as he first expressed it that he would give the claim to her, instead of an actual present gift, as it is quite evident, the examining counsel understood was important should be established. If the fair import of what then took place was a mere agreement and promise on his part that when he should realize the amount, he would give it to his wife, it would remain simply a prom-

issory arrangement, and would not constitute a complete and perfect gift, and would not be obligatory on him or his assignee in bankruptcy, in a court of equity.

The well known case of *Jones v. Lock*, 1 Ch. App. 25, is certainly a much stronger one than the present, as establishing a gift. In that case, a father put a check of £900 into the hands of his son, nine months old, saying to his nurse, "Look you here; I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it." His wife said, "Don't let him tear it;" and he answered, "Never mind if he does, it is his own, he may do what he likes with it;" he then took it away, saying to the nurse, "I am going to put this away for my son," and he locked it in his iron safe. Shortly after, he died, and the check was found amongst his effects. It was held by Lord Chancellor Cranworth that there had been no gift to, or valid declaration of trust for the son.

Waiving this view of the evidence, and conceding that the intention of Capt. Colcord at the time was to divest himself of all right of redress which he might have for these losses, and to vest the same in his wife, I am nevertheless of the opinion that as there was no valuable consideration therefor, and no delivery of any written transfer or document of any kind, all resting on mere words on his part; he had not by what then took place perfected and accomplished his purpose; there was still remaining the locus penitentiae, and he might at any time afterwards, before the wife had received the fruits of the intended gift, convey or transfer the same to any other party, or could enforce his claim before the courts created for that purpose, in his own behalf and for his sole benefit, and I think that such right passed to his assignee in bankruptcy.

Where the assignment from its own nature or that of the subject matter assigned does not pass the legal title, it can only be good as an executory contract, and requires the assent of both parties and the support of a consideration. In the present case the only consideration arose from the relation of the parties, husband and wife, which is a good and meritorious, but not a valuable one. *Edwards v. Jones*, 1 Mylne & C. 226. In *Ellis v. Nimmo, Lloyd & G. t. Sugd.* 333, Lord Chancellor Sugden held that the meritorious consideration of providing for a child was sufficient to authorize a court of equity to enforce an executory contract for that purpose against the donor; but this decision was subsequently abandoned by him, and was not approved by other equity tribunals, and "it is now the settled law of England that an executory agreement, founded on a meritorious consideration, will not be enforced against the donor." *Perry, Trusts*, § 86.

"At the present day, it seems to be established that even as against volunteers claiming under the settlor, whether with or with-

out any provision aliunde, a voluntary agreement, whether under seal or not, whether coupled with a valid trust of other property settled at the same time or not, cannot be enforced on the mere ground of meritorious consideration." Lewin, Trusts, 99.

Mr. Perry, in Perry, Trusts, § 109, says: "The tendency in the United States is to sustain and carry into effect an executory trust in favor of a wife or child, founded on a meritorious consideration, if the instrument is under seal, though the rule is not fully established, and perhaps upon thorough consideration would not be acted upon."

Mr. Perry says (section 111): "The courts say, that they will not execute a voluntary, executory agreement, unless it is under seal." He cites in support of this, Kennedy v. Ware, 1 Barr [1 Pa. St.] 445, in which it was decided "that an equitable assignment of a chose in action to a daughter by her father, in consideration of love and affection was void," and Caldwell v. Williams, 1 Bailey, Eq. 175, opinion of Harper, Ch., who says: "Some agreements which are termed voluntary, are executed in this court, when made in favor of a wife or children, but these are always agreements by deed or covenant, agreements under seal, which imports a consideration and renders them valid at law. There is no instance of an agreement being enforced, which is not only voluntary in the equity sense of the word, but is also nudum pactum at law."

In Pennington v. Gittings, 2 Gill & J. 208, it was held, that a mere executory contract cannot be supported on the consideration of love and affection, and a gift under such circumstances cannot be made good in equity. See, also, Dennison v. Goehring, 7 Barr [7 Pa. St.] 175.

[In 1 Lead. Cas. in Eq. 332] the doctrine appears to be, that there must exist a valid and obligatory contract at law, as a preliminary basis to any equitable interference, and then, that equity grants its extraordinary aid, only when there is an actual consideration, valuable or meritorious. When instead of a present gift or transfer, there is a promise or covenant to give, or a mere expression of an intention that the donee shall have that subsequently, which the donor reserves to himself, or keeps within his control or disposition for the time being, the question becomes one of contract, and a consideration becomes essentially necessary to give force to that which would otherwise be an uncompleted gift; hence the assignment of a debt, not sustained by a consideration or by the delivery of the instrument by which the debt is evidenced, will be invalid both at law and equity, unless an instrument of gift be executed and delivered as a substitute for the delivery of the evidence of the debt. Hitch v. Davis, 3 Md. Ch. 266; Whittle v. Skinner, 23 Vt. 534. In the Maryland case there was a meritorious consideration, the alleged gift having been

made by the father to the daughter, and sought to be enforced against his estate. In Dilts v. Stevenson, 17 N. J. Eq. 407, the marginal note is: "In equity where a widow seeks to establish a gift from her husband in his lifetime, she must adduce evidence beyond suspicion, and nothing less will do than a clear irrevocable gift, either to some person as trustee, or by some clear and distinct act of his, by which he divested himself of the property, and engaged to hold it as trustee for the separate use of his wife. To constitute a perfect gift, the donor must part with the possession and dominion of the property, and if the thing be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed." This being an imperfect gift, it cannot, to carry out the intention of the parties, be construed as a declaration of trust so as to make the donor a trustee for the donee. This was so decided by Lord Chancellor Lyndhurst in Meek v. Kettlewell, 1 Phil. Ch. 342, and he declares the authorities are conclusive on this question. It is but simple justice to state, that nearly all the authorities on these subjects of voluntary trusts and equitable assignments will be found collected in notes to the cases of Ellison v. Ellison, and Row v. Dawson, 1 Lead. Cas. Eq. 245; 2 Lead. Cas. Eq. 731. They are carefully analyzed by the learned authors, and the court has been greatly assisted in its examination of this cause by their labors. The objection was taken to this transfer that it fell within the provisions of chapter 81 of Acts of 1853 (10 Stat. 170), by which transfers of claims against the United States are made absolutely null and void, unless made and executed in the presence of two witnesses after the allowance of the claim, etc. It is a sufficient answer to this objection that at the time of the alleged transfer there was no claim against the United States to be assigned, and the case here is not within that act. And it has been also decided by the court of claims in Lawrence and Crowell's Case, 8 Ct. Cl. 253, that the purpose of the act must be restricted to matters before the treasury, and not to matters coming within the jurisdiction of other courts. Decree for complainants.

Case No. 17,753.

WILLIAMSON v. NEW ALBANY, ETC., R. CO.

[1 Biss. 198; 2 Redf. Am. Ry. Cas. 682.]¹

Circuit Court, D. Indiana. Oct. 26, 1857.

APPOINTMENT OF RECEIVER—TRUSTEE UNDER RAILROAD MORTGAGE—DUTIES—DEFAULT IN INTEREST—APPLICATION OF INCOME.

1. The appointment of a receiver of the property of a railroad company in the foreclosure of a mortgage, is not a matter of course, on default

¹ [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 2 Redf. Am. Ry. Cas. 682, contains only a partial report.]

³ [From 13 N. B. R. 319.]

of payment of interest, but is a matter resting in the sound discretion of the court.

[Followed in *Union Trust Co. v. Railroad Co.*, Case No. 14,402; *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 196, note; *M'George v. Big Stone Gap Imp. Co.*, 57 Fed. 270.]

2. A railroad corporation had given a deed of trust of all its property present and to be acquired, to secure certain bonds, which were negotiated. By the provisions of this deed, the trustee, on default of payment of either principal or interest of said bonds, or any part thereof, might take possession of said property, or, on the written request of the holders of at least one-half of the then unpaid bonds, might sell the same at public auction. Default was made in the payment of interest, but the trustee did not exercise his powers in the deed. The company issued their bonds and made their mortgages upon its property, and became indebted upon current expenses. The proceeds of the sales of the bonds having become insufficient to complete and operate the road, the president, on consultation with a large number of the bondholders, and by their advice, made other loans and applied the earnings in completing and operating the road, and meeting the most pressing claims. No mismanagement was shown. *Held*: Such an application of the income of the road was not a misapplication of the funds, but on the contrary greatly to the security of the bondholders.

3. Although the trustee might have taken possession of the property, or have sold under the powers in his deed, he may waive this right and file a bill to foreclose.

4. The court of equity, its jurisdiction being thus invoked, will look into the facts and exercise an equitable discretion; it will not enforce the strict penalties of the deed.

[Cited in *Cline v. Libby*, 46 Wis. 129, 49 N. W. 833.]

5. The action of the officers of the company with the consent of the trustee and part of the bondholders in the expenditure of its income, will be respected and sustained so far at least as to relieve the company from any penalty or charge of misapplication of the funds of the road.

6. Under the circumstances of this case, ordered, that the officers of the company set aside one-half of the net earnings of the road for the payment of the interest on the bonded debt; the other half for the payment of the floating debt, and a full monthly report be made to the court,—the complainant having the right to renew his application for the appointment of a receiver upon a new statement of facts.

[Cited in *Pullan v. Cincinnati & C. R. R. Co.*, Case No. 11,461.]

In equity. In his bill, the plaintiff states that the defendant owns, and has in operation, a line of railroad, commencing at New Albany, on the Ohio river, extending thence to Michigan City, on Lake Michigan, two hundred and eighty-eight miles; also a branch of said road, not yet in operation, extending from Gosport, in Owen county, to Indianapolis, of the length of forty-three miles; that in connection with the road and branch, the company has in use a large amount of rolling stock, consisting of locomotive engines and cars of various descriptions; also various machine-shops for making and repairing engines, cars and machinery; also various other property necessary to equip said road for a successful operation, in the transportation of passengers and freights; with cor-

porate powers to regulate the same, charge freight and passage money; which machinery in its operations is so combined as not to admit of a separation, on which account the complainant prays that the same may be sold or otherwise disposed of as an entirety, and in such manner that all of said corporate franchises may pass and vest in the purchaser or purchasers, as a body corporate.

The complainant further states that the said company, on the eighth day of February, 1851, being engaged in constructing that part of its railroad which lies between New Albany and Gosport, one hundred and twelve and seventy-one one hundredth miles, and being in need of money to build the road and properly equip it, resolved to borrow five hundred thousand dollars, to be secured by certain bonds, of one thousand dollars each, payable semi-annually in the city of New York, at ten per cent. per annum, subject to a clause that the holders thereof should have the right to exchange them at par for stock; that, to secure the payment of said bonds, a deed of trust was executed, which the complainant holds, whereby the company granted, bargained and sold to the complainant and his successors in the trust created, all the following then present, and then in the future to be acquired property of said company, pertaining to that part of the road which lies between New Albany and Gosport, to wit: the road made and to be made, including the right of way, and every description of property which pertained to the road, and which the company might acquire, on the following trusts.

If the company should fail to pay the principal or any part thereof, or the interest or any part thereof on the bonds when the same might become due, when demanded, then, after sixty days from such default, upon request of the holder of such bond, the complainant or his successor in the trust, should enter into and take possession of all and every part of said premises and property, and as the attorney in fact or agent of the company, by himself and agents or substitutes duly constituted, have and employ the same in making all needful repairs, alterations, and additions thereto; and after deducting expenses of such use, repairs, alterations, and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining unpaid; or the complainant, his successors in said trust, at his or their direction, might on the written request of the holders of at least one-half of the bonds then unpaid and unconverted into stock, cause the same premises, or so much thereof as should be necessary to pay the principal and interest of all the bonds then unpaid, to be sold at public auction in the city of New Albany, in the state of Indiana, or in the city of New York, giving at least forty days notice, &c. The bonds were duly executed, and the money loaned on the faith of the security, &c.

And the complainant says that the company

paid the interest which became due prior to the 1st of February, 1857. That the interest which became due on that day, they failed to pay, and that the whole of the coupons for the installment of interest which fell due on that day are unpaid, amounting to the aggregate sum of twenty-five thousand dollars, more than sixty days after the maturity of said coupons having transpired. After this, the holders of a large number of said bonds required the complainant, as trustee, to enter upon and take possession of said mortgaged premises; and other holders of said bonds, to an amount exceeding one-half thereof, requested the complainant in writing, to proceed according to the terms and conditions of said deed of trust, to make sale of the mortgaged premises. But he deemed it inexpedient so to do.

And the bill states, that several other loans were made of large amounts, at different rates of interest, by issuing and selling bonds, secured by deeds of trust on the property of the road on the same conditions as those specified in the first mortgage. On all of which subsequent loans the interest has become due and remains unpaid. He has not entered upon the property as above requested, to sell the same as authorized by the deeds of trust, because he says the company is much embarrassed in its affairs, being largely insolvent and owing a large floating, unsecured debt. That many of that class of creditors have prosecuted suits and judgments against the company, and are seeking to enforce satisfaction by the seizure and sale of the property on the road, &c.

That by reason of the premises, it is indispensably necessary to sell and dispose of said mortgaged premises, to the end that the proceeds may be applied as contemplated by all the deeds of trust.

All interest due prior to the 1st of February, 1857, has been paid; but that which became due on that date has not been paid, and for this default the bill was filed.

Stanberry, Ketchum & Lane, for complainant.

Smith, Crawford & McDonald, for defendant.

McLEAN, Circuit Justice. It is objected that as the complainant, under the trust deed, has power to take possession of the property, this proceeding in chancery is unnecessary and ought not to be sustained.

If this exercise of power under the deed be admitted, it is not perceived that it may not be waived.

To strengthen the application for a receiver, the affidavits of Mr. Lane, the counsel, and Mr. Williamson, the trustee, are filed, and the last report of the railroad company.

Mr. Lane states, that he lately visited New Albany in Indiana, where the principle office of the company is established, and he found the financial condition of the company

exceedingly poor; that the laborers on the road had not been paid their wages for a long time, and that there had been a strike, &c., and he proposed to the company that the laborers should be paid out of the first net earnings; and that the property of the road should be given up to the trustee, &c., but the president of the company rejected the proposal.

The affidavit of the complainant corroborates, in some degree, the facts stated by Mr. Lane, in regard to the embarrassed condition of the company, founded upon the representations made to him; he says that the interest has not been paid, as alleged in the bill; and that the bill is true. And he says that the company, in his opinion, are by no means able to pay the amounts due and to fall due on their various issues of bonds; that the property of the company is jeopardized by a large and constantly increasing floating debt; and that a very large number of those holding bonds of the company, issued under the various mortgages, of which this deponent is trustee, have served on him a written request according to the conditions of the mortgages, requiring him to cause the said road and its various appurtenances to be sold according to the terms of the mortgage. In the deed of trust it was required that at "the written request of the holders of at least one-half of the bonds then unpaid, he shall cause the premises to be sold." The words used in the above affidavit are not equivalent to the requirement of the deed. But the bill alleges, in the words of the deed, that the request was made, by at least one-half of the bond-holders, and the complainant swears to the truth of the bill.

James Brooks, president of the railroad company, filed an affidavit which admits the execution of the mortgages, and the issue of the bonds as stated by the complainant; but he says the proceeds of the sale of the bonds, the stock subscriptions and other means of said company, were insufficient to finish and equip the road for business; and it became necessary to have other means to finish the road, and put it in such condition as would enable the managers to earn the necessary amount of money to pay the principal and interest of its debt.

At that time the railroad securities had got in such bad repute, that it was impossible to borrow on the sale of bonds, except at such a sacrifice as would be ruinous to the company. The company was reduced to the alternative of abandoning the road in an unfinished state, which would have caused an almost total sacrifice to the bond-holders, or to state the difficulty frankly to such of the bondholders as could be seen, and go on and use the net earnings of the road with such other means as the company could command, and finish and equip it.

He further says that he saw a large number of the bond-holders from time to time, in his visits to New York, and with whom he

was in correspondence, who were fully advised of these difficulties; and they uniformly advised him to go on by all means and finish the road, and relay the flat bar track in good order for running, so as to pay the debts of the company. The deponent believes, and the complainant and bond-holders expressed to him the belief that, but for an unlooked for loss, by the failure of the crops of 1854 and 1856, the road could not only have been finished and put in good order, but the floating debt paid off, and the interest paid on the bonds. He denies that there has been the misapplication of a dollar of the funds of the road.

There are some judgments against the road for claims of damages for right of way, where the parties refused to abide by the awards made; but with the exception of this class of claims, there are few, if any, judgments against the company; and there never has been two hundred dollars worth of property of the road sold on execution. The net earnings of the road for the present year have been expended in paying for labor and materials, and in constructing and operating said road, and repayment of money thus expended.

He says and believes, that the road and appurtenances are more than sufficient to pay all of its debts, and that the security in the bonds has been increased nearly fifty per cent. since the first three millions of its bonds were negotiated. The deponent states that many of the bond-holders and others competent to judge, who have examined the work, expressed the opinion that more work had been done, in the construction of this road, than on any other road for the amount of money.

The United States engineers and the engineers of the state of Indiana estimated the cost of this road from New Albany to Crawfordsville, a distance of one hundred and sixty miles, at sixteen millions of dollars, which has been built by the company for less than five millions. And the entire road from New Albany to Michigan City, two hundred and eighty-eight miles, has been constructed for about seven and a half millions of dollars.

The managers of the road felt safe in assuring the laborers on it that they would be paid, as the work was not only done with the knowledge, but at the repeated and urgent request of the complainant, as well as a large number of the bond-holders, with whom deponent from time to time came in contact.

The floating debt of the company on the 1st of October, 1857, was about the sum of \$235,000, which shows a reduction of \$45,000 since the 1st of July last.

In the year 1855, the net earnings of the road amounted to the sum of \$372,402.25. This paid \$315,256.59, the interest on bonds, and left a surplus of \$56,125.36. The gross

earnings of the six months preceding the 1st of January, 1857, amounted to the sum of \$413,666.66, which left a balance, after deducting all expenses during the same time, of \$190,531.70.

The gross earnings of the road ending June 30, 1857, amounted to the sum of \$686,818.72, which, after deducting the expenditure for the same time, left the net earnings \$263,090.95; and this, the president of the road says is \$200,000 less than the sum estimated, which was caused by the failure of all the great staples of the country in the year 1856, reducing the amount of transportation, as is supposed, to that amount.

The interest now due is about \$273,000, which sum, together with the floating debt, and the accruing interest, may be provided for and paid, under prosperous circumstances, in a reasonably short time. After the payment of the floating debt, it is not doubted that the accruing interest will be punctually discharged, if no untoward circumstance should occur.

The case made in the bill is, the failure to pay the interest on the bonds in February last, and the embarrassed condition of the railroad company.

It seems to be considered that a receiver will be appointed, as a matter of course, under the mortgage where a default has occurred in the payment of any part of the interest or principal. If this be so, the chancellor, in such a case, can exercise no discretion. He can do nothing less than carry into effect the conditions of the bond.

It is not the province of chancery to enforce penalties, but to relieve against them. It is asked, may the court disregard the contract of the parties? Certainly not. But where there is a hard and an unconscionable contract, a court of equity will withhold its aid, and leave the party to his remedy at law. An individual promises to pay on a certain day, a thousand dollars, and, in default thereof, to pay two thousand. Would not a court of chancery relieve from this penalty? And the payment of the penalty is the contract of the party. What penalty could be more disproportionate to the default, than the one under consideration? A failure to pay any part of the installment of interest, subjects the company to the immediate payment of several millions of dollars, not payable except under the default for many years; and the same default subjects property to the amount of several millions to a sale at auction, on a short notice.

The appointment of a receiver, when directed, is made for the benefit of all the parties interested, and not for the benefit of the plaintiff, or of one defendant only. 2 Story, Eq. Jur. § 829. It is a matter resting in the sound discretion of the court.

In such cases courts of equity will pay a just respect to such legal and equitable rights and interests of the possessor of the

fund, and will not withdraw it from him by the appointment of a receiver unless the facts averred and established in proof show that there has been an abuse or a danger of abuse on his part. For the rule of such courts is not to displace a bona fide possessor from any of the just rights attached to his title, unless there be some equitable ground for interference. *Tyson v. Fairclough*, 2 Sim. & S. 142; 2 Story, Eq. Jur. § 835.

It is true the parties in the contract, under consideration, agreed that a default in the payment of any part of the interest or principal, when payable and demanded, should incur the penalty sought to be enforced. Yet, when the aid of a court of equity is invoked it will look into the facts and exercise an equitable discretion. And if the party claims and attempts to exercise the powers given him in the contract, which, under the circumstances, are unjust and ruinous, he may be enjoined.

Has there been any abuse of their powers, or a misapplication of their funds by this company, which authorizes the appointment of a receiver?

This step is to be taken by the bill, with the view of selling the entire road, and all its appurtenances, for the benefit of the bondholders.

The interest due in February last has not been paid, and since that time another installment of interest has become due, which has not been paid. All previously accruing installments of interest were paid or satisfactorily arranged. And the late large outlay for the completion of the road and its equipment, was not only approved by the complainant and many of the bondholders, but they urged the president of the company to go on with the work by all means, and finish and equip the road, so as to increase the revenue, and they agreed to receive bonds in payment of the interest then due.

Under the influence of this encouragement it seems the company prosecuted the work and completed the road, which is now in successful operation. In this way, as appears from the affidavits, was every dollar of the floating debt, complained of, created. It went to increase the securities of the bondholders by adding to the value of the road, and increasing the tolls for the payment of the interest and principal. But this is now insisted on as a misapplication of the funds of the road, which not only authorizes, but requires the appointment of a receiver.

But this does not, in my judgment, evince bad faith on the part of the company, but, on the contrary, showed a laudable desire to save the bondholders and all the parties interested from loss.

Had the road been in the hands of a receiver, no chancellor fit to deal with these subjects, it appears to me, could have hesitated to order the receiver to do, in this respect, what the company has done. In the

deed of trust it is specially provided that the trustee, if he take possession of the road, shall make repairs, additions, &c., and an offer is now made to pay this floating debt, so far, at least, as laborers are concerned, if the road be given up by the company. Whether the debt be due to laborers on the road or to others, is not material, seeing it was incurred under the urgent request of the trustee and several of the bondholders, and for the preservation and life of the road.

When property is purchased and placed upon the road, no lien being taken by the seller, it becomes subject to the mortgage lien on the road, so that it is not liable to an execution, except under the mortgage; and existing liens on the road, under the mortgages, can only be adjusted by a court of equity.

But it is said, the complainant, and a part of the bondholders, had no power to authorize the new expenditure in the completion of the road. Such an authority as was exercised will be respected and sustained by any chancellor, at least so far as to relieve the company from any penalty or charge of misapplication of the funds of the road.

By what authority does the complainant sue in this case and claim a right to have equities adjusted between parties who claim conflicting interests? But in a matter of this kind, so essential to the interests of the bondholders, there can be no difficulty in sustaining the company, as above stated. But still the default is admitted, and the failure to pay occurred under the circumstances stated; and the question now is whether this default requires the appointment of a receiver and a discontinuance of the agency which now controls the road; and this is to be done preparatory to the sale of the entire property of the road.

The bonds will not be due and payable for many years. They who made the loans looked to the interest, and the ultimate payment of the principal.

This procedure involves some fourteen or fifteen millions of property; the property of the railroad and of the bondholders. Care should be taken in this case, as in all others, to administer equity, without, if possible, a sacrifice of property.

From the exhibits in this case, there is a reasonable probability that, in the course of a short period, a vigorous operation of this road may enable its directors to pay the deferred interest and their floating debt; and the discharge of these will make the payment of the current interest on its bonds easy, out of the net profits.

If there were no other interests involved than that of the bondholders, such a course is so strongly recommended by equitable considerations, that no intelligent holder of such securities could object to it. The floating debt has accrued under circumstances which give a strong claim to the company for some indulgence in the payment of the deferred

interest, seeing the completion has added so much value to the security of the bond-holders, and increased the profits of the road; and, especially, as the work was done on the recommendation of the complainant, and a part of the bondholders.

So far as the conduct of the company has been developed in this somewhat informal examination, it is entitled to the highest commendation for its firmness, energy and success, in the accomplishment of this great work.

There is a strong probability that, in a very short time, the road will be in a condition to meet its engagements under the mortgages, which is all the bond creditors have a right to demand.

No change of agency could increase, I am convinced, the efficiency of that already employed on the road. A sale of the property would in all probability, sacrifice the stock of the road amounting to between two and three millions of dollars, and more than half if not two-thirds of the property of the bondholders. It might enable some one or more persons to purchase the road at an almost nominal consideration. These consequences, I admit, are not to stand in the way of an equitable right, enforced under circumstances of fairness and justice. But if such results may be avoided by a short postponement of the interest, and under a prospect of a speedy payment, I hold myself authorized to do so, under the facts above stated.

But I will afford to the bond-holders every reasonable assurance that can be required. I will admit an order to be entered that the motion of the complainant for the appointment of a receiver be denied, and that the said company, from and after the 1st day of January next, set aside one-half of the net earnings of the road, for the payment of the interest of the bonded debt of said company, —the other half to be applied to the payment of the floating debt of the company, a report of the gross and net earnings to be made to the court monthly by the secretary of the company; that is for the month of January, and at the close of the succeeding months, so soon as the returns can be received and made out, half of the net earnings to be paid into court for the bondholders. The company will report, also, in the court how the net earnings have been expended from the 1st of November to the 1st of January aforesaid.

But nothing in this order is to be understood as preventing the plaintiff from renewing his motion for a receiver at any time prior or subsequent to said 1st of January, upon any new statement of facts which he may be able to present.

The interest is payable on demand. If the bringing of the action be considered a sufficient demand, the coupons must be presented and filed, if payable to bearer, before payment will be ordered.

WILLIAMSON (PECK v.). See Case No. 10,896.

Case No. 17,754.

WILLIAMSON v. RICHARDSON.¹

Circuit Court, S. D. Georgia. May 27, 1867.

SPECIAL AND GENERAL AGENTS—COLLECTION OF MONEY—REVOCATION OF AUTHORITY—BONDS—PAYMENT—USAGE.

[1. An attorney employed, not to attend to all his client's legal business, but to collect a particular debt, is a special, as opposed to a general, agent; and those dealing with him are bound to ascertain the extent of his authority.]

[2. The appointment of a second attorney or agent to collect a debt is a revocation of the authority of the first one, and persons knowing of the second appointment are held to a knowledge of the revocation.]

[3. A bond given in 1869, payable in "dollars" generally, was payable in gold and silver only; but, after the passage of the legal tender acts, it could lawfully be discharged by legal tender notes.]

[4. A custom or usage of paying debts in Confederate notes in the insurrectionary states during the war of the Rebellion was illegal, and cannot be sanctioned as of any binding force.]

[This was an action at law by Madeline J. Williamson against John Richardson.]

ERSKINE, District Judge (charging jury). This is an action of debt on bond for twelve thousand dollars principal, and containing a penalty in like sum if conditions of the bond be not performed. At the date of the bond, the plaintiff was not a citizen of Georgia, and at the commencement of this suit she was a citizen of the state of Pennsylvania. The defendant made the bond to the plaintiff in the city of Savannah on the first of January, 1859, to secure the purchase money of a house sold to him by plaintiff, and situate in this city. It is stipulated in the bond that the interest, at the rate of seven per cent. per annum, on the twelve thousand dollars, shall be paid in the manner following, namely: The interest thereon on the first day of January of each and every year from the date of the instrument until the first day of January, 1863, inclusive, and upon which day there shall also be paid six thousand dollars, part of the principal sum. And on the first day of January in each and every year thereafter the interest as and at the rate aforesaid, on such part of the twelve thousand dollars as shall then remain unpaid, together with one thousand dollars, part of the principal sum, until the whole principal with the interest shall be paid. Such, I believe, is the substance of the bond. It is admitted that the interest up to the first of January, 1864, is paid. So, there is no question for you, gentlemen, on that.

Defendant admits that the remaining moie-

¹ [Not previously reported.]

ty, six thousand dollars and the interest, less (\$50), is still unpaid. Therefore the main question may be said to resolve itself into the inquiry whether the six thousand dollars falling due on the first of January, 1863, has or has not been paid.

The declaration contains two counts, the first having several branches. To these counts defendant has pleaded three pleas. Plaintiff has replied, and the parties at controversy came to issue. These pleadings have been read; but they are not for your consideration; it being the exclusive province of the court to pass upon the pleadings, while your appropriate duty is to weigh the facts presented, and a true verdict give, according to the evidence adduced before you. This being understood, and the whole testimony having been heard by you, I must trouble you with even a brief résumé of it, necessarily familiar with it in all its phases as you are.

Plaintiff offered the bond in evidence. Defendant objected, unless certain credits thereon indorsed should then also go to the jury. To this plaintiff objected, because, as she said, she was not bound to prove these credits, that being the duty of defendant. The court sustained the plaintiff, and she closed her evidence. If you find, gentlemen, that Gen. A. R. Lawton was the agent of the plaintiff to collect and receive payment of the bond sued on, then he was, in contemplation of law, a special, and not a general, agent, upon the proofs in the case. Although it be true that one may be a general agent who is put in the place of the principal to transact all his business of a particular kind, as a factor to buy and sell all goods, and a broker to negotiate all contracts of a certain description, an attorney to transact all his legal business, a master to perform all things in relation to the usual employment of his ship, and so in many other instances,—such one is a general agent in the line of business in which he is employed. And, in the case of a person employed specially in one single transaction, the rule is directly the reverse. The party dealing with such a one must ascertain the extent of the agent's authority, and, if he does not, he must abide the consequences. A general authority arises from a general employment in a specific capacity, such as a factor, broker, attorney, &c. I charge you that an attorney to transact all legal business of a man is his general agent in that capacity; while an attorney to collect a particular debt is a special attorney. Therefore, if you find that A. R. Lawton's authority to collect was limited to a particular debt, he was the special agent of the plaintiff, not the general agent.

If you find, gentlemen, that A. R. Lawton was a special agent, then it was the duty of Mr. Richardson, the defendant, to ascertain, by inquiry, the nature and extent of Lawton's authority; and, if he departed from or exceeded it, the defendant must bear the loss.

And if you find that A. R. Lawton was the attorney at law of the plaintiff to collect this bond, in this particular instance, and not her general attorney to transact her law business, and make collections generally, then he was a special agent; and, if his authority be departed from, the person dealing with him must be content to abide the consequences. An attorney at law is the agent of his client, and, when a claim is placed in his hands to collect, the only power granted to him is to receive the money, if the debtor will pay, or to enforce payment by suit; and consequently he cannot accept anything in discharge of the liability but cash. 12 Ala. 342. If you find that a second agent was appointed to perform the same duties, as to the same contract, as were intrusted to the previous agent, and this fact was known to the debtor, it is, in law, a revocation as to him of the powers of the first appointed agent. And, I may add, a power of attorney may be revoked by implication as well as by express declaration.

It is a principle well established that an attorney at law cannot commute or compound the debt for anything other than money without the assent of his client; and, if he does, the client is not bound. Nor can an attorney in any matter of trust, confidence, discretion, or judgment delegate his authority. The bond in evidence before you, gentlemen, is, as we have seen, for twelve thousand dollars principal, and was made on the first day of January, 1859,—some two years before the inauguration of the Rebellion, and about three years anterior to the passage of the law of congress known as the "Legal Tender Act" [Act Feb. 25, 1862; 12 Stat. 345]. When this bond was entered into, all contracts for the payment of dollars generally were payable in gold and silver; for, by the laws then in force, coin from these metals could alone be lawfully tendered in payment. "Dollars," in the bond, was of the same import as if the words "gold and silver" were therein mentioned. Upon the falling due of the six thousand dollars on the first of January, 1863, it could have been discharged in legal-tender notes, because prior to this time the paramount authority of the United States had declared the legal value of these notes.

You will doubtless recollect, gentlemen, that, during the progress of this case, counsel for defendant asked a witness, whether Confederate money was not received about that time (1863 or '64) generally in payment of debts, and whether it was not exclusively in general use? Counsel for plaintiff objected. Argument followed, and numerous authorities were cited on either side. When learned counsel will present questions of this nature, it is becoming that they be answered by the court. I expressed it then as the opinion of the court—an opinion strengthened by further reflection—that if such was the usage, it was wholly illegal, and could not be recognized.

No usage of any class of men can be supported in opposition to the established principles of law. To suffer a usage or custom of this sort to be set up would be sanctioning disobedience, and giving to disloyalty its unhallowed fruits. Yet here, in this court, it was attempted to be shown that in the year 1863, or 1864, in one of the states in insurrection, a usage or custom existed to pay monied obligations in a pretended currency, which had its origin in treason and rebellion against the lawful government of the United States. Besides, this alleged usage or custom is wanting in every requisite to make it valid; for, to be valid, it must be ancient,—of long standing and known; it must be peaceable, certain, continued, reasonable and compulsory.

It may not be wholly unnecessary to say to you, gentlemen, that it is a general principle of established law, that one owning property may, where no fraud, misrepresentations, or circumventions is put upon him, or in any wise enters into the transaction, alienate it absolutely, or qualifiedly for what currency or thing he pleases, or even give it away; but the case before you, for your present consideration, is of an entirely different character. Here a contract was made in 1859,—six thousand dollars of the principal debt to be paid some three years thereafter; and the question for your determination is, has this six thousand dollars been paid or not? I leave it with you to say.

Gentlemen: This has been a tedious case; and, although at first it seemed intricate, I think it no longer appears so. It has been most thoroughly argued by counsel; and it was a pleasing satisfaction to the court to observe how directly you gave your attention to the testimony, and to arguments presented to you. You will now retire and consider of your verdict.

Verdict: We find the bond declared upon to be the bond of the defendant, and assess damages to the plaintiff in the sum of twelve thousand dollars, with interest from the 1st day of January, 1864, two thousand dollars of the principal not yet due, one thousand to become due on the 1st day of January, 1868, with interest and one thousand dollars to become on the 1st day of January, 1869, with interest and costs of suit.

Case No. 17,755.

WILLIAMSON v. RINGGOLD.

[4 Cranch, C. C. 39.]¹

Circuit Court, District of Columbia. May Term, 1830.

REPLEVIN — WRONGFUL EXECUTION — TITLE OF PLAINTIFF—BURDEN OF PROOF—BILL OF SALE—FRAUD.

1. Replevin will lie for the goods of a stranger taken in execution as the goods of the debtor, if taken out of the actual or constructive possession of the plaintiff.

[Cited in *Calvert v. Stewart*, Case No. 2,327.]

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

2. Upon the plea of property in the defendant, the burden of proof is on the plaintiff.

3. An absolute bill of sale is fraudulent as to creditors, unless accompanied and followed by possession.

Replevin for the plaintiff's goods taken in execution by the defendant [Tench Ringgold], as marshal of the District of Columbia, at the suit of Thomas Carberry v. John Wells, Jr.

Mr. Morfit, for defendant, moved the court for a return of property, on the ground that it was in the custody of the law under a fieri facias against Wells at the suit of Thomas Carberry, and cited *Cromwell v. Owings*, 7 Har. & J. 55, 60, 61; *Meany v. Head* [Case No. 9,379]; *Pritchard v. Stephens*, 6 Term R. 522; *Thompson v. Button*, 14 Johns. 84; *Mills v. Martin*, 19 Johns. 7; *Ilsley v. Stubbs*, 5 Mass. 280; and 6 Com. Dig. 490.

Mr. Coxe, contra, cited *Clark v. Skinner*, 20 Johns. 465.

CRANCH, Chief Judge, delivered the opinion of the court (THRUSTON, Circuit Judge, dissenting).

This is a replevin for the plaintiff's goods, taken on a fieri facias, against John Wells, Jr., at the suit of Thomas Carberry, issued out of this court. Mr. Morfit, for the defendant, has moved the court for a return of the goods under the act of assembly of Maryland, 1785, c. 80, § 14 (and also for a venditioni exponas), because the goods were, as it is said, in the custody of the law, and therefore could not lawfully be replevied, whether the plaintiff in replevin [James Williamson] was, or was not, the owner of the goods at the time of the taking, and whether they were taken by the marshal out of the actual possession of the plaintiff in replevin, or out of the actual possession of Wells, the debtor in the execution.

It is understood to be admitted in argument, that the goods were the property of the plaintiff in replevin, at the time of the taking by the defendant, and that the defendant took them to satisfy the execution against Wells. It is not stated whether they ever had been in the possession of the plaintiff, nor whether they were taken from the actual possession of Wells, or from the actual or constructive possession of the plaintiff. If the goods never had been in the possession of the plaintiff, they must be returned to the defendant under the act of assembly of 1785, c. 8, § 14, upon a retorno habendo bond being given by the defendant; for that act strongly implies that the return to the defendant is to be ordered of course, unless the defendant obtained the possession "forcibly or fraudulently"; or that the possession having been first in the plaintiff, "was got, or retained by the defendant, without proper authority or right derived from the plaintiff;" in which case the court is authorized "to refuse to order a return to

the defendant, until a judgment is given in the action." But, upon such return, when ordered, the defendant must give bond and security to restore the goods to the plaintiff, if such should be the judgment of the court. If, therefore, the plaintiff cannot show that the defendant took the goods out of his actual or constructive possession, the return must be ordered, of course, to the defendant. *Cullum v. Bevans*, 6 Har. & J. 471.

The motion for a return, upon the ground, that goods in the custody of the law are not to be replevied, is, in effect, a motion to quash the replevin; for if the return should be ordered, it must be without bond; and such an order would be of course, if the plaintiff in replevin were the debtor in the writ of fieri facias; for the law, in that respect, is well settled in this country as well as in England. But it is not well settled, either there or here, that a man cannot maintain replevin for his goods taken out of his actual or constructive possession by an officer, to satisfy an execution against a third person. In some of the states it is well settled that he can. But in Maryland, the court of appeals has lately delivered a solemn opinion, that he cannot, in the case of *Cromwell v. Owings*, 7 Har. & J. 60, 61. In England, it will be found that every case adduced in support of the rule, that replevin will not lie for goods in the custody of the law, are cases where the plaintiff in replevin was the debtor himself. It is said to be a rule founded upon the policy of the law; and the reason given by Gilbert on Replevins (161), in the very passage relied upon in support of the rule, is, that "it would be troubling the execution awarded, if the party on whom the money was to be levied should fetch back the goods by a replevin; and, therefore, they construe such endeavors to be a contempt of their jurisdiction; and upon that account commit the offender." Goods seized and held by a trespasser, cannot, surely, be said to be in custody of the law, except as against the trespasser himself, when they are seized in execution. The policy of the law refuses him the right to question the validity of the judgment, or to deny his interest in the property, by any means that would defeat or delay the execution; but it does not refuse a third person the means of protecting his rights from illegal violation. The general rule is, that replevin will lie wherever trespass will lie for taking the plaintiff's goods. There is, however, this difference between trespass and replevin, that trespass will lie upon possession alone; but replevin requires property in the plaintiff. All that is necessary to support the action, is property in the plaintiff, either general or special, and a wrongful taking from the plaintiff's possession, either actual or constructive. The idea suggested by Blackstone, and repeated by several other elementary writers, that replevin will only lie for goods taken by distress, has no foundation.

I have not found it supported by a single adjudged case. On the contrary, the cases are abundant, from the time of the Year Books to the present moment, in which replevin has been supported for goods not taken by distress. Blackstone (3 Comm. 145b) says: "The wrongful taking of goods being thus most clearly an injury, the next consideration is, what remedy the law of England has given for it. And this is, in the first place, the restitution of the goods themselves, so wrongfully taken, with damages for the loss sustained by such unjust invasion; which is effected by action of replevin." "This obtains only in one instance of an unlawful taking, that of a wrongful distress." For this assertion, he cites no authority whatever; and it is believed none can be found. Baron Gilbert, whose Treatise upon the Law of Replevins was published some years before Blackstone's Commentaries, defines the writ of replevin thus: "A replevin is a justicial writ to the sheriff, complaining of an unjust taking and detention of goods or chattels, commanding the sheriff to deliver back the same to the owner, upon security given to make out the injustice of such taking, or else to return the goods and chattels." *Gilb. Repl.* 58. 2 *Sell. Prac.* p. 153, following Blackstone, says: "Replevin is a remedy grounded upon a distress; for goods are only replevisable when they have been taken by way of distress." But he cites no authority, except *Co. Litt.* 145, which gives no countenance to such a doctrine. It only shows that replevin is the proper remedy in cases of distress for rent; but not that replevin will not lie for goods not distrained. On the contrary, Lord Coke says, that when the defendant claims property, although upon the plaint the sheriff cannot try the question, "yet the plaintiff may have a writ, de proprietate probanda, directed to the sheriff, to try the property; and if, thereupon, it be found for the plaintiff, then the sheriff to make deliverance, (for so be the words of the writ); and if for the defendant, he can no further proceed. But that is but an inquest of office; and, therefore, if thereby it be found against the plaintiff, yet he may have a writ of replevy to the sheriff; and if he return the claim of property, &c., yet it shall proceed in the court of common pleas, where the property shall be put in issue and finally tried." This passage shows, that replevin will lie to try the title to goods, which have been wrongfully taken from the possession of the plaintiff.

In the action of replevin, neither the writ nor the declaration says any thing of the goods being taken as a distress. The injury complained of is, that the defendant took and unjustly detains the plaintiff's goods, not that he took them for any particular purpose. In the case of *Shannon v. Shannon*, 1 Schoales & L. 327, Lord Redesdale says: "Mr. Justice Blackstone's definition of the action of replevin is certainly too

narrow. Many old authorities will be found (in the books) of replevin being brought where there was no distress." "It is an action founded on a taking, and the right which the party from whom the goods were taken has to have them restored to him, until the question of title to the goods is determined." In the case of *Meany v. Head* [Case No. 9,379], Mr. Justice Story said: "At common law, a writ of replevin never lies, unless there has been a tortious taking, either originally or by construction of law, by some act which makes the party a trespasser ab initio." In *Ilsley v. Stubbs*, 5 Mass. 283, Mr. Chief Justice Parsons said: "The defendant, to support his plea, has argued, that replevin at common law does not lie, unless where goods are taken by distress as a pledge. It is true, that anciently, replevin was generally sued out to replevy cattle taken by distress as a pledge; but, in fact, replevin lies for him, who has the general or special property in chattels, against him who has wrongfully taken them." So, in *Shearick v. Huber*, 6 Bin. 2, which was replevin against the purchaser of the plaintiff's goods, at the sheriff's sale, under a fieri facias against a stranger, Mr. Chief Justice Tilghman said: "No doubt but replevin is the proper form of action; for although, in England, this form of action has been generally confined to cases of goods distrained for rent, yet, with us, it has been used in all cases where chattels, in the possession of one person, have been claimed by another." So, in *Woods v. Nixon*, Add. 134, the president of the court of common pleas said: "The practice, in Pennsylvania, has been to issue replevin in all cases where a man claims property detained from him." So, in 2 *Wheat. Selwyn*, N. P. 896, *Selwyn* says, "that Blackstone's definition is too narrow;" and Mr. *Wheaton*, in his note, says, "that replevin lies for any tortious taking of goods from the possession of the plaintiff, and not in case of a distress only, is well settled in England, and has been recognized and adopted as sound doctrine, by the supreme court of New York." *Dane*, in his *Abridgment* (volume 5, p. 515), speaking of Blackstone's definition, says: "It has been truly observed, that this definition is too narrow." "The writ is founded on a taking, and the plaintiff's right to have the goods restored to him until the question of title to them is determined." And *Daniel Dulany*, in his opinion given in the year 1771, in the case of *Coursey v. Wright*, 1 Har. & McH. 396, says: "The case supposed, would exemplify the very definition of replevin; 'a remedy, provided by the law, for the specific recovery of personal property unjustly taken and detained;' though Blackstone says, very erroneously, that replevin is only in one instance of unlawful taking, that of a wrongful distress." In the case of *Hopkins v. Hopkins*, 10 Johns. 373, Mr. Chief Justice Kent said: "The action of replevin is grounded on a

tortious taking, and it sounds in damages, like an action of trespass, to which it is extremely analogous, if the sheriff has already made a return (of the goods) and the plaintiff goes only for damages for the caption."

Comyns (Dig. "Replevin," A) says: "Replevin lies of all goods unlawfully taken." So, in the case of *Pangburn v. Patridge*, 7 Johns. 143, Mr. Justice Van Ness, in delivering the opinion of the supreme court of New York, said: "The opinion I expressed, on the trial of this cause, that replevin lies only in the case of an unlawful distress, was a mistaken one. The passage to that effect in Blackstone's Commentaries, is not warranted by the books. This action is usually brought to try the legality of a distress; but it will lie for any unlawful taking of a chattel. Possession by the plaintiff, and an actual, wrongful taking by the defendant, are the only points requisite to support the action; and none of the cases, defining the nature of the action, confine it specially to the case of a chattel taken under pretence of a distress. The old authorities are, that replevin lies for goods taken tortiously, or by a trespasser, and the party injured may have replevin or trespass, at his election. This is so laid down by *Gascoigne, J.*, 7 Hen. IV. p. 28b; and by *Danby, J.*, 2 Edw. IV. p. 16; and by *Brian, J.*, 6 Hen. VII. g; and these dicta are cited as good law, in *Brooke, Abr. tit. 'Replevin,'* pls. 36, 39, and in *Rolle, Abr. tit. 'Replevin,'* B. The same rule was admitted by the judges in *Le Mason v. Dixon*, 1 W. Jones, 173, and in *Bishop v. Montague*, Cro. Eliz. 824. Similar language is held in many of the modern authorities, and particularly by *Baron Gilbert*, *Baron Comyns*, and *Lord Redesdale*. The opinion of the latter is reported by *Schoales* and *Lefroy*, in which he lays down the law with peculiar accuracy and precision." The case from 6 Hen. VII. p. 9, is thus stated by *Brooke* ("Replevin," pl. 36): "A man takes my goods as a trespasser, I may have replevin, although the trespasser has property by the tort, for this is of the property which I had at the time of the caption; but I cannot have detinue, for that is of the property which is in me at the time of the action brought. (Per *Brian*.)" The case from the *Year Book*, 7 Hen. IV. p. 28b, is abridged by *Brooke*, tit. "Replevin," pl. 15, where he says: "By some, replevin will not lie for beasts taken contra pacem; but, per *Gascoigne*, he may have replevin or trespass." The case from 2 Edw. IV. p. 16, is thus abridged by *Brooke*, tit. "Replevin," pl. 39: "Per *Danby*: When a trespasser takes my goods, I may have replevin, for I may affirm the property in me, or I may have trespass, and disaffirm the property. Note. That by him, where a man delivers his goods to W. N., and a stranger takes them, yet the bailor may give them to another, and the gift is good. *Littleton*, contra, for the property is in the stranger; and he said well, as it seems; and yet, that replevin lies, is good law, for

this is of the property which was in him at the time of caption; but in the other case, the property was not in him at the time of the gift." These cases are also cited by Rolle, in his Abridgment, tit. "Replevin," B, 2, as good law. He also says (tit. "Replevin," c. 1): "If the cattle of a man are manuring and agisting my land, levant et couchant, and are taken by strangers, I may have replevin. 42 Edw. III. p. 18; 21 Hen. VIII. p. 14b; 11 Hen. IV. p. 17, and 2 Edw. III. p. 44." The case of Leonard v. Stacy, 6 Mod. 68, was replevin for goods, of which the plaintiff had been cheated.

It is admitted, on all hands, that "property in the defendant," or even "in a stranger," is a good plea. It follows, therefore, that when the property is taken by the defendant, from the possession of the plaintiff, under the claim of title, replevin is the proper action to try that title. But the plaintiff in replevin cannot be supposed to know, beforehand, what pretence the defendant may set up as an excuse for the taking; and whether that excuse be true or not cannot be known until the trial, so that it cannot be said, in any case where the taking of the plaintiff's goods has been from the possession of the plaintiff himself, that replevin will not lie. It is true, that in many such cases of taking, replevin cannot be maintained, because, upon the trial, it may turn out that the taking was lawful; but still, in those cases, replevin is the proper action to try the lawfulness of the taking, and the court will not quash the writ before that question is decided, unless the writ shall have been issued under such circumstances as to be a contempt of the court. Gilb. Repl. 161. This happens when the improper interference of one of the parties in the cause obstructs the execution of the judgment of the court. In such a case, it is considered as a constructive contempt. The general rule, then, is clearly established, that replevin will lie for every wrongful taking of the plaintiff's goods out of his possession. But there is said to be an exception to this general rule, and that is, where the goods are in the custody of the law.

It may be well here to inquire, in what cases goods are said to be "in the custody of the law."

1. When cattle are justly seized for rent arrear, or for damage feasant, and impounded, but not before they are impounded. Thus, Gilbert on Replevins (Ed. 1757, pp. 61, 62) says: "'Tis to be observed that there are two things complained of in this writ, viz., the taking and detention of the pledges, as the words of the writ express it, quæ cepit et injuste detinet; but what is principally controverted in replevin is, whether the taking be just or not. For there are but two cases wherein a distress, justly taken, whether for rent or damage feasant, can be unlawfully detained. The first is, where the arrears of rent, or amends for the damage, are tendered to the party distraining; and this tender must be made before the beasts are impounded; for,

when the beasts are in the custody of the law, the person distraining cannot be said unlawfully to detain what is in the custody of the law."

2. When goods are distrained for fines, or taxes, or by way of execution upon convictions before inferior tribunals, they are in the custody of the law; as in *Rex v. Burchet*, 8 Mod. 208; *Marriott v. Shaw, Comyn*, 274; and *Rex v. Monkhouse*, 2 Strange, 1184, which were convictions under the game laws. *Winard v. Foster*, 2 Lutw. 1191, where goods were taken by attachment, to enforce payment of the judgment of an inferior court. *Aylesbury v. Harvey*, 3 Lev. 204, where a silver cup was seized, upon a condemnation by justices of the peace, under the excise acts, for the non-entry of strong waters. *Gins v. Dams*, 2 Lutw. 1179, where cattle were taken by a warrant of two justices, for a poor rate; *Clift, Ent.* 636, for a militia fine; *Lev. Ent.* 152, on a conviction of fraud upon the excise; *Lukin v. Eve, Moore*, 89, for amercement in a court leet; *Co. Ent.* 570b, 572a, 573a; *Fletcher v. Ingram*, 5 Mod. 124; *Stephens v. Haughton*, 2 Strange, 847; *Tott v. Ingram*, 1 Brownl. & G. 185; *Id.* 189. So, for breach of a by-law, *Winch. Ent.* 90; 3 Wils. 155. So, for a poor-rate, *Milward v. Caffin*, 2 W. Bl. 1330. So, for a judgment of commissioners of sewers. *Pritchard v. Stephens*, 6 Term R. 522. These were all cases where the goods were clearly in the custody of the law, and yet there was no question that replevin would lie. In many of them the plaintiff recovered, and in all of them the causes appear to have been tried upon their merits, except the case of *Rex v. Monkhouse*, 2 Strange, 1184, where the court granted an attachment against the undersheriff for granting a replevin for goods seized under a conviction, by an inferior tribunal, for deer-stealing. It is a very short note of a case, and it does not appear whether the replevin was quashed, nor whether the officer was punished for the contempt. But in a preceding case (*Rex v. Burchett*, 1 Strange, 567), which was replevin for goods taken upon a distress, under the game laws, the court discharged the rule to show cause why an attachment should not issue against the officer who issued the replevin, and refused to set aside or quash the replevin (s. c. in 8 Mod. 208). The reason given for discharging the rule was, "that it was only a contempt to the inferior jurisdiction of the justices, and, in that case, the B. R. never interposes."

3. A third case, where goods are said to be in the custody of the law, is, where they have been seized in execution, upon a writ of fieri facias, or attachment issuing from a superior court. In this case, it is admitted, on all hands, that the debtor himself will not be permitted to replevy them out of the hands of the officer; but this cannot be on the ground that the goods are in the custody of the law, for they are equally in the custody of the law when distrained and impounded for rent arrear, or for damage feasant, or for taxes, or

for fines, or by way of execution of the judgments of inferior tribunals; and yet the books are full of cases of replevin for goods thus seized, and in custody of the law. It is only upon the ground of constructive contempts of court, out of court, that the superior tribunals in England have restrained the issuing of a replevin, where the debtor, or any party to a suit in those tribunals, has attempted to obstruct the execution of their judgments.

Thus, Gilbert on Replevins (161) says: "If a superior jurisdiction award an execution, it seems that no replevin lies for the goods taken by the sheriff by virtue of the execution, and if any person should pretend to take out a replevin and execute it, the court of justice would commit them for a contempt of their jurisdiction, because, by every execution the goods are in the custody of the law, and the law ought to guard them; and it would be troubling the execution awarded, if the party on whom the money was to be levied, should fetch back the goods by a replevin; and therefore they construe such endeavors to be a contempt of their jurisdiction, and, upon that account, commit the offender. But if any inferior jurisdiction issues an execution, a replevin will lie for the goods taken by that execution; because the inferior jurisdiction, being restrained within particular limits, the officer who took the goods is obliged to show that he took the goods within those limits; and that the inferior court, which issued the execution, did not exceed their authority in issuing it. Besides, an inferior court cannot commit for contempt out of the court; and hence it is that the officer of an inferior court is to show by what authority he took the goods. Thus, in a replevin the defendant was put to justify by a condemnation before a justice of peace for not entering of strong waters; and a warrant, on that, for levying 20s. fine on the plaintiff." *Aylesbury v. Harvey*, 3 Lev. 204.

The distinction here taken, between the proceedings of courts of superior and inferior jurisdiction, is very just, because every thing is presumed to be within the cognizance of a court of superior jurisdiction which is not clearly shown to be out of it; and nothing is presumed to be within the cognizance of the inferior tribunal unless clearly shown to be within it. Hence, *prima facie* the proceedings of a court of general jurisdiction are right; but those of a court of limited jurisdiction are wrong unless every thing appears upon the face of the proceedings which is necessary to give jurisdiction to the tribunal. Therefore, as the debtor is not bound to admit more than appears on the face of an execution issuing from a court of limited jurisdiction, and as such executions do not, on their face, show all that is necessary to support the jurisdiction, he is permitted to put the officer or the creditor upon the proof of that jurisdiction; and the means afforded him is a writ of replevin, to try the lawfulness of the distress, or of the caption of the goods. It is true that the

judgment and the execution of an inferior or limited tribunal, are as valid, in all matters within its jurisdiction, as those of a court of general jurisdiction; but the question, of jurisdiction of an inferior tribunal, is always open; and he cannot be "construed" to be guilty of a contempt, who only takes the usual legal means of trying the lawfulness of that seizure of his goods which has been made under the process of a court of doubtful jurisdiction. It is only where the issuing or the service of the writ of replevin can be punished as a contempt of the court from which the execution issued, that the books show that replevin will not lie for goods taken in execution. The books, however, are incorrect in saying that in such cases replevin will not lie. They only mean to say that the party serving the writ will be liable to attachment for his contempt in obstructing the execution of the judgment of the court, and that the court will, perhaps, quash the writ which is the means of that obstruction. The additional reason, therefore, given by Gilbert, is a sound one, why the rule is only applicable to goods taken by execution from the superior courts; to wit, that they only can punish for constructive contempts out of court. The ideas of Gilbert upon this point are strongly supported by Chief Baron Eyre, in giving his opinion in the case of *Cawthorne v. Campbell*, cited in *Anstr.* 206, 212. The question was upon the authority of the court of exchequer to remove into that court, from another court an action of trespass brought against the commissioners of excise. The chief baron placed the authority to remove the cause upon the ground of the action being a contempt of the prerogative of the king in relation to his revenue; and, in page 212, speaking of a case decided in the time of Henry the 7th, he says: "In this, they evidently proceeded upon a general analogy to the proceedings in other courts; for there is no court that suffers its process, either to be insulted, or to be materially interrupted; and whenever this is attempted, it is a contempt, upon which the court proceed to grant attachments in the first instance." "But that this jurisdiction is not a very novel thing, nor this a single instance, we may collect from other cases that are very clearly established; namely, that if a man, at this day, there being a seizure in order to condemnation, was to presume to replevy the goods, it would be a contempt of the court for which an attachment would be granted instantly." "So if a distress is taken for a fee-farm rent, or other duty to the crown, it is considered a contempt to replevy; and an attachment will issue upon it, as appears by the case of *Rex v. Oliver*, *Bunb.* 14." "Originally, therefore, it seems to me, that to call into question, or in any manner to interrupt the course of the prerogative jurisdiction, was treated as a contempt of the process of the court, and proceeded against immediately as such."

The only cases cited in support of the rule, that goods taken in execution cannot be re-

plevied, are cases of contempt; unless the loose dictum of Bacon in his Abridgment, tit. "Replevin," C, respecting Bradshaw's Case, and the dictum of Mr. Justice Powell, there referred to, can be called cases, when none of the facts of the cases are stated, nor any book referred to in which they can be found. Bacon says, upon his own authority, that "it was ruled, in the case of one Bradshaw, (T. 12, W. 3, in C. B.) that when an act of parliament orders a distress and sale of goods, this is in the nature of an execution, and replevin does not lie; but if the sheriff grants one, yet it is not such a contempt as to grant an attachment against him. And Powell, Justice, said, he remembered a case in the exchequer, where a distress was taken for a fee-farm rent due to the king, yet, upon debate in the court, no attachment was granted, though it was the king's case." In these cases there was neither an actual nor a constructive contempt of the authority of any court; for the first case supposes a distress and sale under an act of parliament; and the other was a distress for rent; when, therefore, it is said, that in such cases replevin will not lie, I understand the expression to mean no more than that replevin cannot be maintained. Thus, it is said generally, that replevin lies only for a wrongful taking; meaning that it can be maintained in such case only; not that it will not lie to try the question whether wrongful or not.

In the note in the new edition of Bacon's Abridgment (Phila. 1811, vol. 6, p. 56), it is said: "A replevin does not lie for goods seized by warrant of a justice of the peace upon a conviction for destruction of the game, &c. Semb: 2 Mod. Cas. 208, 209." This reference is, no doubt, to the case of *Rex v. Burchet* (B. R. 10 Geo. 1724), reported in 1 Mod. Cas. (8 Mod.) 208, 209, which was this: "One Burchett was convicted by a justice of peace for keeping dogs, nets, and ferrets to catch conies, not being qualified, &c. And by a warrant from the said justice, his goods were distrained for the forfeiture; and whilst they were in possession of the constable, and before they were sold, the town-clerk granted a replevin to take them from the constable. And now it was moved to set the replevin aside, because goods, thus taken by distress on such convictions, are irrepleviable; and for an attachment against the town-clerk. The court would not set aside the replevin; but made a rule to show cause why an attachment should not go." This case appears again in 1 Strange, 567, under the name of *Rex v. Burchett*, thus: "The court ordered an attachment nisi against the town-clerk of Guilford, and a defendant convicted on the game act, for granting and issuing out a replevin for goods distrained for the penalty; but on showing cause at the next term when Eyre, Justice, only was present, he discharged the rule, because it was only a contempt to the inferior jurisdiction of the justices, and, in that case, B. R. never interposes." This case, then, is a direct authority against the principle which it is cited to establish; for the court both refused

to quash the replevin and to issue an attachment of contempt for issuing it. There is also in the same edition of Bacon's Abridgment (volume 6, p. 56) this other note (a) to the Case of Bradshaw, there cited: "But now, in such cases, it is considered as a contempt for a party to replevy; and an attachment will issue upon it. *Rex v. Oliver*, Bunb. 14." I have not seen Bunbury's report of that case; but it is a case of a fee-farm rent due to the king, cited by Chief Baron Eyre, in the case in Anstruther, before mentioned. It was a prerogative case in the exchequer, and therefore gives no support to the rule respecting goods taken in execution from an inferior court; except, that it shows that contempt, and not mere custody of the law, is the ground of the rule. The note goes on further to say, that "replevin does not lie for goods distrained on a conviction for deer-stealing; and if a sheriff grants it, an attachment shall go against him. *Rex v. Monkhouse*, 2 Strange, 1184." The whole case in Strange is in these words: "The court granted an attachment against the under-sheriff of Cumberland for granting a replevin of goods distrained on a conviction for deer-stealing." This is the whole case; and yet it seems to be the principal authority upon which all the books rely to support the principle, that goods taken under an execution from an inferior court cannot be replevied; although in many preceding cases of that kind, as we have before seen, replevin was maintained. Mr. Durnford, in his note to the case of *Pearson v. Roberts*, in Willes, 672, in controverting the position of Chief Baron Gilbert, that replevin will lie for goods taken by an execution issued by an inferior jurisdiction, says, that "the two reasons given by Gilbert, by no means warrant it." "His first reason," says Mr. Durnford, "falls, if the officer took the goods within the limits of the particular jurisdiction, and if the inferior court did not exceed their authority in issuing the execution; in short, if it be a legal execution regularly executed." Surely Mr. Durnford could not mean to say that this is a reason why replevin should not lie to try the question, whether the goods were taken within the limited jurisdiction, and whether the court did not exceed its jurisdiction in issuing the execution. If he did, it is a *petitio principii*. As well might he say, that for goods lawfully taken as a distress for rent replevin will not lie, in order to try the question, whether lawfully taken or not.

The question which Gilbert was discussing, was not whether replevin could be maintained for goods lawfully taken in execution, but whether it will lie for goods taken in execution, whether lawfully or unlawfully; that is, whether the plaintiff will be permitted to commence that sort of action to try the lawfulness of the taking, and to get back his goods while that question shall be pending. Mr. Durnford's argument only goes to show, that the plaintiff would not be entitled to recover upon the trial, not that he might not commence the suit. "And with regard to the second reason," Mr. Durnford says, "it does not follow, because an in-

ferior court cannot commit for a contempt out of court, that therefore a replevin will lie; the want of authority to inflict one particular (and that an extraordinary) punishment for doing the thing, does not prove that the thing itself may be legally done."

Here is the begging of another principle; to wit, that the rule is not grounded, as Gilbert supposed, upon the doctrine of constructive contempts. If the rule be grounded entirely upon that doctrine, then the rule does not apply to those tribunals towards which there can be no constructive contempt. Mr. Durnford observes: "The only authority cited by Gilbert in support of this opinion, is the case of *Aylesbury v. Harvey*, 3 Lev. 204, of which," he says, "it is sufficient to observe, 1st, that this question was neither agitated at the bar nor decided by the bench; and 2d, that the judgment of the court was against the plaintiff in replevin." Now, it was because the question was not agitated nor decided by the bench, that Gilbert cited it as authority, that whenever the defendant in replevin justifies under the authority of a tribunal of limited jurisdiction, he must show that he took the goods within the limits, and that the inferior court did not exceed its jurisdiction; and that replevin will lie for goods taken under the authority of such a limited jurisdiction. For it will be seen, by the pleadings in that case, which are given at full length in Lev. Ent. 152, that the defendants had able counsel, and that their plea sets forth every particular necessary to give jurisdiction to the court, and to justify the caption of the goods; which particularity would have been unnecessary, if it were sufficient merely to show that the goods were taken under an execution issued by such a court. That such a point should not have been suggested, either by the bar or the bench, is strong evidence that such was not then the law. Mr. Durnford proceeds:—"But in opposition to this opinion" (of Gilbert) "may be placed *Bradshaw's Case*, 6 Bac. Abr. 55; *Rex v. Sheriff of Leicestershire*, 1 Barnard. 110; *Rex v. Monkhouse*, 2 Strange, 1184; and *Rex v. Burchet, Id.*, note 1." The Case of *Bradshaw* has been mentioned before, as being very loosely reported. It merely states, "that a distress and sale, under an act of parliament, is in the nature of an execution, and replevin does not lie; yet the issuing of it is no contempt." The particular circumstances of the case, and the grounds of the decision are not stated, nor what effect the decision had upon the cause; whether to quash the writ, or to guide the jury in their verdict, or to arrest the judgment. So loose a case cannot be considered as entitled to any authority. The next case arrayed against the chief baron, is *Rex v. Sheriff of Leicestershire*, reported, as it is said, in 1 Barnard. 110. This case I have never seen. Mr. Durnford has not given us the substance of it; but it is sufficient to say, with Lord Kenyon (1 East, 642), "that *Barnardiston* was a bad reporter;" and with Lord Mansfield, (2 Burrows, 1142,) that "it was marvellous to those who knew the serjeant, and his manner of taking

notes, that he should so often stumble upon what was right; but yet that there was not one case in his book which was so throughout."

The next case, which is to put down the authority of Gilbert, is *Rex v. Monkhouse*, before mentioned, and reported in two lines and a half. These, and the Case of *Burchet*, said to be in a note to the case of *Rex v. Monkhouse*, in *Strange*, 1184, but which is not in my edition, and which, no doubt, is the case which I have already cited from 8 Mod. 208, 209, and *Strange*, 567, constitute the whole array, in opposition to the deliberate opinion of Gilbert, in a well considered treatise upon the subject, supported by the large number of cases already cited, and many more, which I have omitted to notice, in which replevin has been maintained for goods taken by way of execution of the judgments of inferior tribunals. Mr. Durnford, indeed, cites two cases which are against him, and endeavors to avoid their force. The first is *Milward v. Caffin*, 2 W. Bl. 1330, which was replevin for goods taken under a warrant of distress, by two justices of the peace, for poor-rates. The defendant justified under the statutes of 43 Eliz. and 17 Geo. II. as overseers of the poor; and judgment was rendered for the plaintiff. Mr. Durnford supposes he evades the force of this case, by saying that the justices exceeded their authority; and that "the goods were not, in contemplation of law, taken under an execution." But that could not be ascertained until the trial; and it was to try that very question that the writ was issued and held to lie. If the justices had jurisdiction, the goods were taken under an execution; if they had not jurisdiction, they were not. This was the very point tried in the cause, and to try which the writ was issued; so that replevin will lie, whether the justices have jurisdiction or not, because it must lie before that question can be decided. The other case cited by Mr. Durnford is *Pritchard v. Stephens*, 6 Term R. 522, which was a rule to show cause why a replevin for goods taken under a warrant of distress, granted by commissioners of sewers, should not be quashed. The counsel in support of the rule, contended that the goods in question could not be replevied at all, and cited the following passage from *Callis*, 220, (a book which I have never seen:) "If, upon a judgment given in the king's court, or upon a decree made in this court of sewers, a writ or warrant of distringas ad reparationem, or of that nature, be awarded, and the party's goods be thereby taken, these goods ought not to be delivered by replevin, to be taken either out of this court, or out of any other court of the king; because it is an execution out of a judgment." And the counsel stated, that *Callis*, in page 197, takes a distinction between those goods that remain in the custody of the officer under the seizure, and those that afterwards come into the hands of a purchaser, saying that the former are not replevisable; and that *Callis* also, in page

195, in distinguishing inferior from superior courts, says of the former, "a replevin doth not lie, and ought not to be granted from the sheriff, or any of his deputies, for that the sewer is a judicial court of record, and of greater authority than the power of the sheriff, which, in these cases, is but ministerial."

The counsel, on the other side, said, "It is not necessary to controvert the opinions of Callis, which have been relied on by the defendant; (though it might be shown, if necessary, that those opinions are not tenable,) because no judgment was in fact given by the commissioners of sewers." The court said, that, "at all events, this was a reason why they ought not to interfere in this summary way, by quashing the proceedings, but should leave it to the defendant to put his objection on record in a formal manner; and in the course of the argument, Lorn Kenyon, C. J., expressed very strong doubts respecting the opinions cited from Callis." The rule was discharged, and we have heard no more of the cause. These opinions of Callis, respecting which Lord Kenyon expressed such strong doubts, are the very opinions which Mr. Durnford attempts to support, in his note to the case of *Pearson v. Roberts*.

But it is not true, as Mr. Durnford alleged, that the only authority cited by Gilbert was the case of *Aylesbury v. Harvey*. He cited also the case of *Winnard v. Foster*, Lutw. 1191; Rast. Ent. 275, (probably a misprint for 553;); Brooke, Abr. "Replevin," pl. 22; 38 Eliz. III., 3; Lev. Ent. 152, all strongly supporting his opinion. The case of *Winnard v. Foster*, Lutw. 1191, was replevin for a cow, a stack of hay, and a pike of hay. The defendant made cognizance as bailiff of the sheriff, and set forth, in his cognizance, that the cow and hay were in the possession of one Nathaniel Day. That one William Dawson, at a county court of the said county, produced a writ of justices to the sheriff, by which he was commanded to justice the said Nathaniel Day that he render to the said William Dawson £14, which he owed him, &c., &c., stating, in a minute manner, all the proceedings in the county court; the levying the plaint; the summons delivered to the bailiff, and his return; the failure of Day to appear; the order for attachment by his goods, and the service thereof upon the goods in question as the goods of the said Nathaniel Day. The plaintiff replied, that, at the time of the caption, he was in possession of the cow and hay as of his own goods and chattels, and denied that Nathaniel Day was possessed of them as his goods and chattels at the time of caption; upon which traverse the issue was joined; and the jury found the issue for the defendant as to the cow, and for the plaintiff as to the hay: and the plaintiff had judgment for the damages and costs as to the hay, and the defendant had judgment for the return of the cow, and for his costs. This case shows that replevin will lie for goods taken by attachment from an inferior court; and that it was supposed, at

least by the defendant's counsel, necessary to set out, in the plea, minutely, all the circumstances which gave jurisdiction to the court under whose process the defendant justified the caption. The ancient forms of entries and pleadings are evidence of the law.

Gilbert referred to Rastell's Entries, although the page (275) cited, is evidently a mistake, yet in folio 553, we find the form of an avowry for an amercement, or fine in the leet, hundred, or torn, in which everything necessary to show the jurisdiction is minutely set forth with all the circumstances of time, place, &c. He also referred to Lev. Ent. 152, which contains the pleadings at large in the case of *Aylesbury v. Harvey*, cited by him from 3 Lev. 204. He also referred to Brooke, Abr. tit. "Replevin," pl. 22, which contains an abridgment of the Year Book, 28 Eliz. III. 3, in these words (translated): "Replevin: the defendant avowed for this, that he had recovered 38s. in the court baron, by plaint there, and these beasts were delivered to him in execution of the judgment, and issue taken that they were not delivered to him in execution." These authorities, cited by Gilbert, are, to my mind, much more satisfactory in favor of his opinion than those cited by Mr. Durnford are against it.

It seems to me, very clearly, that the rule contended for, (to the extent to which it has been actually carried by adjudged cases,) is not founded upon the fact alone that the goods are in the custody of the law; but upon the right and duty of the court to enforce its judgment against the parties to the suit, and upon its power to punish, as for a contempt, any endeavor, by a party, to obstruct or defeat the execution. And I find my opinion strongly corroborated by that of the celebrated Maryland lawyer, Daniel Dulany, in the case, already alluded to, of *Coursey v. Wright*, in 1 Har. & McH. 394. The question, which he was discussing, was, whether Thomas Coursey could have brought replevin against T. Wright, while he, T. Wright, had possession of the property under his replevin against John Coursey. Mr. Dulany said, "I have little doubt but he might." "The transaction being inter alios, as it cannot affect the right, so neither can it affect the remedy, which is inseparable from the right. The cases in 5 Mod., Gilbert and Strange, proceed on a peculiar principle. When goods belonging to a defendant are taken in execution on fieri facias, or by distress on conviction, they being in the custody of an officer, acting under the mandate of authority, are in the custody of the law for the very purpose that justice may be done; but if the replevin, by the defendant, were allowable, the views of justice might be disappointed, and the very object of the judgment destroyed; but if the property of a stranger should be taken, it would be a wrong, and consequently the thing taken would not be in custody of the law. In the first instance it would be incongruous for the law to allow a process to defeat its ends;

but in the second, very agreeable to its principles that a man should not suffer an injury from the act of a stranger. Execution authorizes the officer only to make, or levy the debt or penalty, out of the chattels of the defendant; but in taking, for the purpose, the chattels of another person, he acts without authority. If the sheriff, on a *fi. fa.* against the effects of A, takes and sells the goods of B, the owner may sue him. 1 Burrows, 31. In replevin, if the plaintiff shows the cattle of a stranger for the cattle of J. D. and the officer takes them, he is a trespasser. 2 Rolle, Abr. tit. 'Replevin,' 431." "In case of distress for rent arrear, the goods, from the first taking, are in the custody of the law, and not merely in the distrainer (3 W. Bl. 146); but their being in this custody does not prevent the suit by replevin; on the contrary, the suit is most proper in the very instance. When replevin is brought, the defendant may defend his possession, if he has property, by the writ of *de proprietate probanda*. As he has the means to secure his possession, and as if the defendant in replevin should fail, the defendant may be entitled to a *retorno habendo*, it might be reasonable, (as full justice might be obtained without it,) to say that the defendant in replevin should not, during the pendency of the suit, bring replevin on his part, as it would tend to infiniteness. But the case of a stranger is very different. He cannot make himself party to the suit; entitle himself to the writ *de proprietate probanda* (2 Rolle, Abr. 431), or to a return, in any event of the suit. Not being provided for, or having the means of security afforded him on the suit, he consequently has a remedy by action against the possessor; for there cannot be an irremediable right; and it would shock the first principles of justice to allow that what A. B. may do shall deprive C. of his right. The true legal ground of replevin is the unjust taking and detaining of personal property; and of the remedy, that the owner may be specifically restored to it, and compensated for the injury from the unjust detention." "A denial of justice is injustice; suspension is deprivation for the time. Injury is not denominated from its degree." In Maryland, the opinions of Mr. Dulany, when deliberately given, have ranked almost, if not quite as high in the scale of authority, as cases adjudged in the highest tribunals of the state during his time. That which I have cited recommends itself to every reflecting mind by its sound sense combined with its sound law.

In the present case it is not necessary to decide whether replevin will lie for goods taken in execution issued by a court of limited or inferior jurisdiction, because the execution against Wells was from this court, which is a court of general jurisdiction. It became important, however, to investigate that doctrine, with a view to ascertain the ground upon which the rule rests, that goods taken in execution cannot be replevied, and

the extent of that rule. It is with that view only that the note of Mr. Durnford has been so minutely examined. With regard to the extent of the rule, I have found no adjudged case, except that of *Cromwell v. Owings*, 7 Har. & J. 55, in which the rule has been extended to a third person, whose goods have been taken out of his actual or constructive possession, to satisfy the debt of another person. All the cases of replevin cited in support of the rule, are cases in which the debtor himself was plaintiff in replevin. Such was *Pearson v. Roberts*, Willes, 672; *Milward v. Caffin*, 2 W. Bl. 1330, cited in *Pearson v. Roberts*, and all the cases cited in Mr. Durnford's note to that case, namely: *Aylesbury v. Harvey*, 3 Lev. 204; *Bradshaw's Case*, Bac. Abr. "Replevin," c.; *Rex v. Sheriff of Leicestershire*, 1 Barnard. 110; *Rex v. Monkhouse*, 2 Strange, 1184; *Rex v. Burchet*, Id. note 1; and *Pritchard v. Stephens*, 6 Term R. 522. So, also, were the other cases of replevin cited by the defendant's counsel in the case of *Cromwell v. Owings*, except the case of *Ladd v. North*, 2 Mass. 514, which was replevin by a third person; but no question was made whether it would lie. The case of *Thompson v. Button*, 14 Johns. 84, is decidedly against the rule in the extent contended for; because the replevin was sustained and judgment rendered for the plaintiff. But there the plaintiff was not the debtor in the execution, and the goods were taken out of the possession of the plaintiff. The case of *Eaton v. Southby*, Willes, 136, was a replevin by the vendee of the sheriff for corn sold under an execution against a former tenant, and distrained by the landlord for arrears of rent due from a subsequent tenant, the corn having been sold before it was reaped, and distrained after it was cut, and before it was fit, in the course of husbandry, to be carried away by the vendee. The question was, whether the corn could be distrained under those circumstances; and the court was of opinion that it could not, even if it had not been taken in execution, because the former tenant, being tenant at will, and his tenancy determined by his death, he had a right to keep the corn on the ground until, in the usual course of husbandry, it was fit to be carried away. The only part of that case applicable to the present, is the dictum "that goods taken in execution, or distrained for damage feasant, are in the custody and under the protection of the law, and therefore cannot be distrained for rent," which dictum, in regard to goods taken in execution, is not supported by the reference to *Co. Litt. 47a*.

The case of *Alexander v. Mahon*, 11 Johns. 185, cited in *Cromwell v. Owings*, was an action of trover, and was probably cited for a similar dictum, that goods, seized under execution, are in the custody of the law, and therefore not distrainable; and for the reason assigned. "For it is repugnant, *ex vi termini*, that it should be lawful to take the

goods out of the custody of the law." In that case the goods were lawfully taken in execution, and therefore were in the custody of the law; but it would be equally repugnant, *ex vi termini*, to say that goods unlawfully taken and detained, were in the custody of the law. The case of *Palgrave v. Windham*, 1 *Strange*, 212, was an action upon the case by a landlord against the officer who took the tenant's goods in execution, and removed them from the premises without paying one year's rent to the landlord; and I do not find in it any point or dictum applicable to the case of *Cromwell v. Owings*, in which it was cited. The case of *Buxton v. Home*, 1 *Show*, 174, was debt upon a judgment. The defendant pleaded that he was taken in execution and permitted to escape with the consent of the plaintiff, which plea was adjudged bad on demurrer. There seems to be nothing in that case applicable to the case in which it was cited, or to the present. The next case cited in *Cromwell v. Owings*, is *Farr v. Newman*, 4 *Term R.* 640, 651. The question, in that case, was, whether the sheriff, upon a *feri facias* against the executor, for his own proper debt, could make the money out of the goods of the testator in the hands of the executor to be administered; and so force him to a *devastavit*, after notice by a creditor of the testator that he had judgment against the executor, *de bonis testatoris*, and an execution which he was about to levy on the same goods. It was an action upon the case against the sheriff for a false return of *nulla bona testatoris* upon that execution. The judgment of the court, (Buller, J., dissenting,) was for the plaintiff. The page 640, referred to in *Cromwell v. Owings*, contains a part of Mr. Justice Buller's argument against the opinion of the court; and probably the following passage was cited: "How is the sheriff to try any one of these questions? It should be enough for him that the goods are in the possession of the debtor, and used by him as his own. When the plaintiff's execution came to the sheriffs' hands they could not take these goods under it. The writ commanded the sheriff to levy the debt of the goods and chattels of the testator in the hands of Reid and his wife to be administered. These goods were not then in their hands, but they were in the hands of the sheriff, and in *custodiâ legis*; and in *Holt*, 643, and 1 *Show*, 174, it was resolved by Holt, C. J., that goods being once seized and in custody of the law, could not be seized again by the same or any other sheriffs." "So the sheriff cannot take goods which have been distrained. *Tulley v. Peachey*, Hill, 23; *Geo. III.*" But to this Lord Kenyon, C. J., answered, in page 651: "As to the expression cited from Shower to show that goods once seized cannot be seized again, it must mean, when they are legally seized; for if any thing happen to disaffirm the first seizure, and to show that it was not legal, it is con-

sidered as no seizure in law; and the word seizure, is, in such a case, misapplied."

The case of *Turner v. Fendall*, cited from 1 *Cranch* [5 U. S.] 117, does not seem to have any bearing upon the case. Nor do the other cases of *Ball v. Ryers*, 3 *Caines*, 84, and *Sturtevant v. Ballard*, 9 *Johns.* 337. The case of *Ilseley v. Stubbs*, 5 *Mass.* 230, was replevin against a defendant who had obtained possession of the goods by replevin against a third person. The defendant pleaded that fact, and that his suit against the stranger was still pending. This plea was adjudged bad on demurrer. If there was any thing in that case applicable to the case of *Cromwell v. Owings*, it was against the party who cited it; for the judgment was in favor of the plaintiff in replevin against the defendant, who claimed protection under the rule, that the goods were in custody of the law, they having been delivered to him by replevin, and he having given bond to return them in case it should so be adjudged. But it is probable that it was cited for the dictum of Chief Justice Parsons, that "replevin lies for him, who has the general or special property in chattels, against him who has wrongfully taken them; but chattels, in the custody of the law, cannot, at common law, be replevied; as goods taken by distress upon a conviction before a justice, or goods taken in execution." "But if the goods are wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover against the officer. For the common law would not grant process to take, from an officer, chattels which he had taken by legal process already issued; but the common law has, in this respect, been altered by the statute of 1789 (chapter 26, § 4). This statute authorizes the suing of a replevin against the officer for chattels which he has attached, or seized in execution, provided the plaintiff in replevin be not the debtor. This alteration of the common law has been productive of much practical inconvenience, but it must rest with the wisdom of the legislature to decide whether the common law, in this respect, should or should not be restored. As a general principle, the owner of a chattel may take it, by replevin, from any person whose possession is unlawful; unless it is the custody of the law; or unless it has been taken by replevin from him, by the party in possession." All this is mere dictum, not at all necessary to the decision of the question before the court. It has already been shown that goods, in the custody of the law, may be replevied; as in the case of goods distrained and impounded for rent, or damage-feasant, or for poor-rates, or for fines upon convictions before justices of the peace, and other inferior tribunals; and that in every case where it has been adjudged that goods taken in execution could not be replevied, the debtor himself was the plaintiff in replevin. But the chief justice, (for whom while living I had the highest

respect, and whose memory I revere,) proceeded to say: "If goods are wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover against the officer." No goods can be taken by virtue of process which does not authorize the taking of them; nor can the process authorize a wrongful taking. *Burnley v. Lambert*, 1 Wash. [Va.] 308, 310, 312. If then the goods were wrongfully taken, they could not be taken by virtue of the process. The execution only authorizes the officer to take the goods of the debtor. If he take the goods of a stranger, he may take them under color of the execution, but not by virtue of the execution. If he took them by virtue of the execution he would not be a trespasser, which the chief justice admits he would be. Again, the chief justice says: "For the common law would not grant process to take from an officer, chattels which he had taken by legal process already issued." If the word "by" means "by authority of," then the taking by the officer was rightful; and if so, the proposition is correct as a proposition; but not as a reason why the owner of goods, wrongfully taken by the officer, should be confined to his action of trespass or trover. The chief justice further states that the common law in that respect was altered by the statute of Massachusetts which authorizes the suing of a writ of replevin against the officer for chattels seized by him in execution, provided the plaintiff in replevin be not the debtor. Of the correctness of that proposition I doubt. (1) Because it was never a rule of the common law, that goods, in the custody of the law, could not, for that reason alone, be replevied; as has been already shown. (2) Because no adjudged case has been found in the English books in which it has been decided, that a stranger to the execution could not maintain replevin against the sheriff for wrongfully taking his goods for the debt of another. (3) Because, at the time of the passing of the first colonial statute of Massachusetts, in 1641, the law was well settled in England, that, in many instances, where goods were in the custody of the law, they might be replevied; as in case of goods distrained and impounded, either with or without good cause. *Co. Litt.* 47b. Goods distrained for an amercement in a court-leet. *Lukin v. Eve*, *Moore*, 88, 10 *Eliz.*, Anno 1567; *Joyner v. Skype*, *Co. Ent.* 570b; *Pasc.* 36, *Eliz.* Anno 1593, in *communi Banco*, *Rótulo*, 1260. And *Lord Coke*, in his preface, says: "That for thy further satisfaction, learned reader, every precedent hath a true reference to the court, yeare, term, number, roll, and record where the precedent is to be found." And *Ashhurst, J.*, in *Farr v. Newman*, 4 *Term R.* 648, says that the form of proceedings and judgment "is of greater authority than even adjudged cases; because the writs and records form the law of the land." So, in *Kingston v. Bayly*, *Co. Ent.* 572a, *Trin.* 30, *Eliz.*, *Rot.* 1012, *C. B.* Anno 1588; *Hassell v.*

Wilkes, *Co. Ent.* 573a, *Mich.* 8 *Jac.*; *Rot.* 2119, Anno 1610; *Godfrey's Case*, 11 *Coke*, 43, *Mich.* 12 *Jac.*, Anno 1614; *Freeman v. Abbot of Ramsay*, cited in 11 *Coke*, 43a, from the *Year Book* 10 *Edw. III.*, fols. 9, 10, Anno 1336; *Griesley's Case*, 8 *Coke*, 38, *Trin.* 30, *Eliz.*, Anno 1588; *Porter v. Gray*, *Cro. Eliz.* 245, *Mich.* 33, 34, *Eliz.*, Anno 1591; *Tott v. Ingram*, 1 *Brownl. & G.* 185, 4 *Jac.*, Anno 1606; *Godfrey v. Builein*, 1 *Brownl. & G.* 189, 8 *Jac.*, Anno 1610; *Aylesbury v. Harvey*, 3 *Lev.* 204; *Lev. Ent.* 152, *S. C.* 36, *Car.* 2, Anno 1684, for goods taken upon a conviction under the excise acts. *Winnard v. Foster*, 2 *Lutw.* 1190, *Trin.* 3 *Wand. M.* Anno 1691, for goods attached for a debt in the county court. *Gins v. Dams*, 2 *Lutw.* 1179, *Hill*, 9, *Wm. III.*, Anno 1697, for goods taken under a warrant of two justices of the peace for non-payment of a poor-rate. *Fletcher v. Ingram*, 5 *Mod.* 127, *Trin.* 7 *Wm. III.*, Anno 1695, for an amendment by a court-leet, for not serving as constable. *Clift, Ent.* 636, for goods taken by distress for a militia fine. And even as late as 4 *Cro. 1*, Anno 1718, in the case of *Marriott v. Shaw, Comyns*, 274, replevin was maintained for goods taken for a fine upon a conviction by a justice of the peace under the game acts. All these were cases of replevin for goods in the custody of the law, and yet no question was made whether replevin would lie, although brought by the debtors themselves. These cases, (and many more might be cited,) extend from the *Year Book* of *Edward III.*, in 1336, to 4 *Geo. I.*, in 1718, more than three and a half centuries.

The first case, which I find, in which the question was started whether replevin would lie in such cases, is that of *Bradshaw*, mentioned in *Bac. Abr.* "Replevin," C, as having been decided *Trin.* 12 *Wm. III.*, in *C. B.*, where "it was ruled, that when an act of parliament orders a distress and sale of goods, this is in nature of an execution, and replevin does not lie; but if the sheriff grant one, yet it is not such a contempt as to grant an attachment against him." But, as before observed, it does not appear whether the court quashed the replevin, or whether judgment was given upon demurrer to the avowry, or whether it was an instruction to the jury upon the trial. At all events it was a rule applicable only to one of the many cases in which goods may be in the custody of the law; and was a case in which the debtor was plaintiff in replevin. This case, however, was ruled in the year 1700. The first statute of Massachusetts on the subject of replevin, was passed in 1641; and as the law then was that replevin would lie in cases of distress by way of execution of the judgments of inferior tribunals, the statute of Massachusetts of 1641 was rather in restraint of the common law, than in enlargement of it, when it authorized replevin in all cases of "cattle or goods impounded, distrained, seized, or extended, unless it be upon execution after judg-

ment, or in payment of fines." The act of 1720, which excepts distress made by a proper officer for any tax, fine, or forfeiture, was but an affirmation, in that particular, of the statute of 1641. Whether the statute of 1641 was construed, by the courts, to except the case of goods of a stranger taken in execution, does not appear. From the words of the act itself, it would seem to be the most natural construction to confine the exception to goods of the debtor, taken on execution; because it says, "after judgment." Against whom? The most obvious answer is, against the plaintiff in replevin. The 4th section of the act of 1789 (chapter 26) seems to corroborate this construction, for it takes for granted the right of the third person to replevy his goods wrongfully seized by the officer, and only regulates the manner and process, and designates the tribunal by which it shall be done. It says, "that when any goods or chattels shall be taken, distrained, or attached, which shall be claimed by a third person, and the person, thus claiming the same, shall think proper to replevy them," he may sue replevin from the common pleas, in the county where taken, distrained, or attached, and in a form prescribed in the act. 5 Dane, Abr. 517, 519. For these reasons, with great deference to the profound learning of the late chief justice of Massachusetts, I must doubt whether the statute of 1789 (chapter 26, § 4) altered the common law, in regard to the goods of a third person wrongfully taken in execution. It may, perhaps, be said that no such case is to be found in the English books, in which replevin has been maintained against the sheriff; and that, if "laid, as per schedule, and replevied," was a good return to a fieri facias, it would be found in the "Retorna Brevium." One answer, however, will serve for both those objections. In England, under the statute of Marlbridge (53 Hen. III. c. 21), the application for a replevin is to be made to the sheriff himself, who has the goods in his possession, under the fieri facias, and who, if a third person claims the property, has the power of summoning a jury of inquest to inquire to whom the property belongs. Dalton, 146; Gilb. Ex'ns, 21, cited in Farr v. Newman, 4 Term R. 633. If, upon that inquest, it be found for the third person, the sheriff will restore it to him, and be justified in his return of nulla bona upon the fieri facias, so that the whole purpose of replevin is thereby answered. If the jury should find that it is the property of the debtor, he may go on to sell it, and the finding will mitigate damages, in an action of trespass, if the goods seized should happen not to be the defendant's. Farr v. Newman, 4 Term R. 633. But, in this country, it has not been the practice of the marshal to summon a jury to try the question of property; if he has any doubt, he may require a bond of indemnity from the plaintiff. If the marshal here has no power to summon a jury to inquire of the property, justice seems to require that the owner should have his writ of replev-

in, if there be no positive rule of law to the contrary.

I have examined the dictum of the chief justice, in the case of *Ilsey v. Stubbs*, with the more minuteness, because it seems to be relied upon by the court of appeals in Maryland, as the main support of the dictum, in the case of *Cromwell v. Owings*, "that, in no case whatsoever, will replevin lie against an officer, for goods taken in execution under lawful process." This proposition extends to the case of a stranger's goods wrongfully taken out of the possession of the stranger himself, by an officer, to satisfy the execution against the debtor. The case of *Cromwell v. Owings* was that of a stranger's goods taken out of the possession of the debtor, and that was the only case decided. The general proposition, so broadly laid down by the court, was mere dictum. It is not authority, further than it was applicable to the case then before the court. That very respectable tribunal has taken the proposition to be universally true, that goods, in the custody of the law, cannot be replevied; and that goods, wrongfully taken by an officer of the law, under color of lawful process, are in the custody of the law, although the officer, in taking them, was guilty of a trespass, and although he is liable for damages for every moment that he detains them in that supposed custody of the law. This would, indeed, be an incongruity. There cannot be a wrongful custody of law. When goods are seized in the possession of the debtor, it may well be doubted whether replevin can be maintained; yet there does not seem to be any reason why it should not lie, (that is, be sued out,) to try the question of possession, at the time of the caption, as well as of title to the property. The possession may be equivocal, as in the case of *Clark v. Skinner*, 20 Johns. 465, where actual possession was in the debtor, but the right of possession was in the third person, the owner, the plaintiff in replevin. So, in *Thompson v. Button*, 14 Johns. 84, the goods were supposed by the court, to have been taken out of the possession of the plaintiff in replevin, and not of the debtor; and the court intimated a strong opinion, that if they had been taken out of the possession of the debtor, the replevin could not have been maintained. In the case of *Clark v. Skinner*, 20 Johns. 465, Mr. Justice Platt, who seems to have considered the case well, and who gave the reasons of his opinion very fully, said: "I am of opinion that replevin lies in favor of any person whose goods are taken by a trespasser. As to John Clarke, (the debtor,) the goods were in the custody of the law, and therefore irreplevisable; but, in my judgment, the law does not deny the remedy, by replevin, to any person whose goods are taken from his actual or constructive possession, by a wrongdoer." "The rule, I believe, is without exception, that wherever trespass will lie, the injured party may maintain replevin." "Baron Comyns says, replevin lies of all goods and chattels unlawfully taken;

(Com. Dig. 'Replevin,' A); though ('Replevin,' D) he says replevin will not lie for goods taken in execution." "This last proposition is certainly not true without important qualifications. It is untrue as to goods 'taken in execution,' when the fieri facias is against A., and the goods are taken from the possession of B. By 'goods taken in execution,' I understand, goods rightfully taken, in obedience to the writ; but, if through design or mistake, the officer takes goods which are not the property of the defendant in the execution, he is a trespasser, and such goods never were taken in execution, in the true sense of the rule laid down by Baron Comyns." "By constructive possession, I mean a right to reduce the chattel to immediate possession." And in page 470, he says: "The general rule is that the plaintiff must have a general or special property in him at the time of the unlawful taking, of which he complains; that is, he must either have the actual possession, or the right of reducing it to his actual possession, at the time of the tortious taking. If goods be taken on a fieri facias, as the property of the defendant named in the execution, and the writ is from a court of competent jurisdiction, and not void from any defect on its face, the officer, as against such defendant, is never a trespasser nor a wrong-doer. As to such defendant, the property is in the custody of the law, and he is precluded by the judgment against him." "But such reasoning has no application to the rights of a stranger whose property has been wrongfully taken on an execution against another person." "In every adjudged case that I have found, where it was held that goods 'taken in execution,' or goods 'in the custody of the law,' could not be replevied, that doctrine has been applied to cases where the defendant in the execution was plaintiff in the replevin."

In the case of *Mulholm v. Cheney*, Add. 301, the president of the court of common pleas in Pennsylvania, expressed the same opinion. In the above case of *Clark v. Skinner*, *Spencer, C. J.*, and *Woodworth, J.*, concurred with Mr. Justice Platt, but they rested their decision solely on the ground that the goods were to be deemed as taken from the actual possession of the plaintiff in replevin, who was not the defendant in the execution. The general rule, as before observed, is, that replevin will lie wherever trespass will lie for taking the plaintiff's goods. The facts necessary to maintain the suit, are, property in the plaintiff, either general or special, and a wrongful taking of the goods out of the plaintiff's possession, either actual or constructive. The possession must be such as would maintain trespass. If the original taking be lawful, or if the possession never was in the plaintiff, an unjust detention alone will not maintain replevin (*Gardner v. Campbell*, 15 Johns. 401; 2 Wheat. Selwyn, 896), unless attended by some act which would make the defendant a trespasser ab initio (*Meany v. Head* [Case No. 9,379]; 4 Bac. Abr. "Replevin," F). I am aware of the cases of *Badger v. Phinney*,

15 Mass. 359, and *Baker v. Fales*, 16 Mass. 147, but am not satisfied that they can be supported upon principles of common law, however correct they may be, under the statutes of Massachusetts. "The whole personal property is liable to execution, except wearing apparel." "But the absolute property of those goods must be in the debtor; and therefore, if the sheriff takes the goods of a stranger, though the plaintiff assures him they are the defendant's, he is a trespasser, for he is obliged, at his peril, to take notice whose the goods are; and, for that purpose, may impanel a jury to inquire in whom the property of the goods is vested; and this, it is said, shall excuse him in an action of trespass. 2 Bac. Abr. C, 4; Keilw. 119, 120; Brooke, Abr. tit. "Trespass," 99; Dalt. Sher. 146; Brooke, Abr. tit. "Pledges," 28; Dyer, 67b, in margin. When no other person has the right of possession, the property draws after it the possession in law, and possession is implied in him who has the right of possession. *Gordon v. Harper*, 7 Term R. 12, 13; *Ward v. Macauley*, 4 Term R. 489. The books are full of authorities that trespass will lie against the officer who takes a stranger's goods in execution, either out of the actual or constructive possession of the plaintiff. *Hallett v. Byrt*, *Carth.* 381, where Lord Holt says: "There is a difference between replevin and other process of law, with respect to the officers; for, in the first case, namely, in replevin, they are expressly commanded what to take in specie; but in writs of execution the words are general, namely, to levy of the goods of the party, and therefore 'tis at their peril if they take another man's goods; for in that case, an action of trespass will lie." So, in the Year Book, 11 Hen. IV. 91, cited in 2 Rolle, Abr. 552: "If a bailiff of a court attach the party by the goods of another man, trespass lies against him, for he ought to take notice of the goods of the party." "So, if he attach the servant, by the goods of his master, being in possession of the servant. 11 Hen. IV. 90b, 91b. The law is the same, if the sheriff, upon an execution, takes the goods of a stranger." *Wale v. Hill*, 1 Bulst. 149; *Cootte v. Lighthworth*, *Moore*, 457; *Thurbane's Case*, *Hardr.* 323; *Saunderson v. Baker*, 3 Wils. 309, 2 W. Bl. 832; *Bloxham v. Oldham*, 1 Burrows, 26, note; *Cooper v. Chitty*, 1 Burrows, 30; Brooke, Abr. "Trespass," 135; 19 Hen. VI. 80; *Ackworth v. Kempe*, 1 Doug. 40; *Cole v. Hindson*, 6 Term R. 234; *Shadgett v. Clipson*, 8 East, 328; and *Farr v. Newman*, 4 Term R. 633.

In the present case of *Williamson v. Ringgold*, the simple question submitted to the court is, whether the mere fact that the defendant took and detained the goods of the plaintiff, under color of an execution against Wells, is sufficient ground to justify the court in quashing the replevin. The court must suppose the strongest case against the defendant, namely, that he took the goods from the possession of Williamson, the plaintiff in replevin. Being of opinion that it is a general principle of the common law, that replevin can be maintained in all

cases where the plaintiff's goods have been wrongfully taken from his possession, and that the exception of goods taken in execution applies only to the debtor himself, I think that the motion to quash the replevin, on the ground that the goods were in the custody of the law when the replevin was served, and also the motion for a venditioni exponas, ought to be overruled.

MORSELL, Circuit Judge, concurred.
THRUSTON, Circuit Judge, dissented.

NOTE. See *Cullum v. Bevans*, 6 Har. & J. 469. See, also, *Burnley v. Lambert*, 1 Wash. 308, where the court of appeals of Virginia say: "But if an execution issue against the goods of A, and the sheriff seize and sell the property of B, will it be said that this is done by lawful authority? Surely not." See, also, *D'Wolf v. Harris* [Case No. 4,221]. Since the above opinion was delivered, the supreme court of New Jersey has decided in the same way, at May term, 1830, in the case of *Bruen v. Ogden* [6 Hal. 370], which was replevin by a third person against the United States marshal of the district of New Jersey, for the plaintiff's goods taken in execution for a debt due by the defendant in the execution; which was issued out of the district court of the United States for that district. This matter being pleaded by the defendant in replevin, in the state court, the plaintiff demurred, and the court held that, as the plea contained no averment that the vessel taken in execution, was the property of the debtor, or seized in his possession; and as the goods of a person in his actual or constructive possession, if seized under color of an execution against another person, are replevisable, the matters set forth in the plea were no bar to the action; and that the cause of action, as exhibited in the declaration and plea, was within the jurisdiction of the state court, and not within the exclusive jurisdiction of the courts of the United States. See the *National Gazette* of Thursday, 27 May, 1830. See, also, *Buffington v. Gerrish*, 15 Mass. 156, replevin of goods attached.

In this case of *Williamson v. Ringgold*, after the motion to quash the replevin was overruled, the cause came on for trial, at the same term, (May 19, 1830,) upon the plea of property in the defendant; "without that, that the property was in the plaintiff;" upon which traverse the issue was joined. The court decided that the affirmative was on the plaintiff to prove his property in the goods, and, at the prayer of the defendant's counsel, instructed the jury, that the bill of sale from Wells under which the plaintiff claimed title, was fraudulent as to Carberry, the creditor of Wells, the defendant in the execution, unless the possession accompanied the bill of sale and continued in *Williamson* the vendee.

Verdict for defendant.

Case No. 17,756.

WILLIAMSON et al. v. SUYDAM.

[4 Blatchf. 323.]¹

Circuit Court, S. D. New York. May 20, 1859.

CASE MADE—CHANGE TO BILL OF EXCEPTIONS.

Where, on a trial, in an action at law, a verdict was given for the plaintiff, subject to the opinion of the court on a case to be made, and a case was then made containing the questions of law, and a reservation to either party, of the right, after the decision of the court on the case, to turn the case into a bill of exceptions,

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

and a motion for a new trial was then denied, and judgment entered for the plaintiff, and the defendant then sued out a writ of error to the supreme court, but, through inadvertence, the case was annexed to the record without changing it into the form of a bill of exceptions, and neither party observed the defect, and the case was argued in the supreme court on its merits, but that court noticed the defect and affirmed the judgment below, because there was no bill of exceptions and no error on the face of the record, this court afterwards allowed the defendant to turn the case into a bill of exceptions, on payment of the costs in the supreme court.

[Distinguished in *Herbert v. Butler*, Case No. 6,397.]

This was a motion, in an action of ejectment, to allow the defendant [James H. Suydam] to turn into a bill of exceptions a case which had been made setting out the exceptions taken by him on the trial. The verdict was for the plaintiffs [William H. Williamson and others], subject to the opinion of the court, on a case to be made. A case was made, containing the questions of law, and a reservation to either party of the right, after the decision of the court on the case, to turn the case into a bill of exceptions or a special verdict. The court denied the motion for a new trial on the case, and judgment was entered for the plaintiffs. The defendant then sued out a writ of error to the supreme court, but, through inadvertence, the case was annexed to the record, without changing it into the form of a bill of exceptions. The cause was argued in the supreme court on the real questions involved, and no notice was taken by the counsel for either party of the irregularity in the form of the record; but the supreme court felt bound to notice the defect (see *Suydam v. Williamson*, 20 How. [61 U. S.] 427); and the judgment of this court was affirmed, because there was no bill of exceptions, and no error on the face of the record, without the expression of any opinion by the supreme court on the real merits involved in the case. The defendant then made this motion, so as to be in a position to sue out another writ of error.

David Dudley Field, for plaintiffs.

N. Dane Ellingwood, for defendant.

NELSON, Circuit Justice. The questions involved in this case are deemed very important to the rights of the defendant, and have become interesting, for the reason that the decisions of the highest courts of New York are in direct conflict with the ruling made in this case at the trial. As the omission to change the case into a bill of exceptions was an inadvertence, and was, apparently, not discovered by the counsel for either party, and as both parties supposed that the questions were properly raised on the record, I am inclined to grant the motion, but it must be on payment of the costs in the supreme court.

[NOTE. Another writ of error was sued out, and the judgment reversed. 24 How. (65 U. S.)

427. Subsequent proceedings were had, in which judgment was rendered for defendant, and plaintiffs sued out another writ of error, when the supreme court affirmed the judgment of the circuit court. 6 Wall (73 U. S.) 723.]

WILLIAMSON (UNITED STATES v.). See Cases Nos. 16,725 and 16,726.

WILLIAMSON, JR., The JESSE. See Cases Nos. 7,296 and 7,297.

Case No. 17,757

The WILLIAM TABER.

[2 Ben. 329.]¹

District Court, S. D. New York. April, 1868.

BILL OF LADING—NONDELIVERY—BARRATRY—DAMAGES—PRESUMPTION OF LAW—SALVAGE.

1. Where cotton was shipped at Galveston, on a vessel bound to New York, and bills of lading were given therefor, and, on the voyage, the vessel was barratrously run ashore, and part of the cotton was lost, and a part of it, which had been saved in a damaged condition, was libelled for salvage, and the owners of the cotton paid the amount of salvage decreed, and libelled the vessel on the bills of lading: *Held*, that the vessel was liable to the owners of the cotton for the value of the cotton lost, and for the injury to that which was saved, and for the money paid by them as salvage.

[Cited in *The Albany*, 44 Fed. 435.]

2. In case of loss or damage to goods covered by a bill of lading, the presumption of law is, that such loss or damage was occasioned by the act or default of the carrier.

In admiralty.

J. H. Choate, for libellants.

C. A. Peabody and W. H. Peckham, for claimant.

BLATCHFORD, District Judge. This is a libel filed by six several parties, owners of cotton in bales, shipped by the steamship William Taber, from Galveston, Texas, via Key West, in Florida, to New York, in March, 1867. The cotton was shipped under bills of lading, signed by the master of the vessel, and given to the agents of the several owners of the cotton. The claim made by the libel covers two grounds of action: (1) A claim for the nondelivery of cotton covered by the bills of lading, and for damage to cotton covered by the bills of lading, that was delivered; (2) a claim that the vessel should refund to the libellants a sum of money, which they were compelled to pay, as salvage on the cotton covered by the bills of lading, by the decree of the district court of the United States for the Southern district of Florida, sitting in admiralty, at Key West, in Florida, on the ground that the salvage was made necessary by the willful and tortious act of the master of the vessel, or some other person in charge of her, in running her ashore near Key West.

The nondelivery of some of the cotton, and the damage to some that was delivered, are

clearly proved, and the claimants have entirely failed to show that the loss or damage was by a peril of the sea, or by any cause for which the vessel is not liable. On the contrary, the evidence is entirely satisfactory to show that the loss and damage were caused by the willful act of the master or the engineer of the vessel, in letting water into her just after she had left Key West, on her way to New York, as a consequence of which she was run ashore. The running of her ashore made the salvage necessary, and, as against the salvors, the owners of the cotton were defenceless in the salvage court, and were obliged to pay the salvage money. The payment of this money being caused directly by the barratrous act of some person in charge of the vessel, the vessel is liable to refund it to those who paid it. The carrier created this lien on the cotton, while lawfully charged with its custody. The lien was a valid one, as between the owners of the cotton and the salvors, although the act by which it was created was a tortious act on the part of the carrier, as between such owners and the carrier. Indeed, the liability of the vessel to refund the salvage money on the cotton may be properly considered as a liability arising on the bills of lading, as the transaction amounts, in effect, to a loss of so much of the cotton by what is, in fact, held to be the default of the vessel. For, if the libellants had not paid the salvage money on the cotton in accordance with the decree of the court, enough of the cotton to pay the salvage would have been sold. This view brings the entire case within the well settled principle, that, in case of loss or damage to goods covered by a bill of lading, the presumption of the law is, that such loss or damage was occasioned by the act or default of the carrier, and the burden of proof is upon the carrier to show that it arose from a cause for which he is not responsible. The answer neither admits nor denies the averments of the libel as to the barratrous acts of the master, but states that the claimant leaves the same to be proved, and that there is no liability on the part of the vessel to the libellants for such acts, and that the reason why there is not is, that such acts are alleged to have been willful, fraudulent, and barratrous. But the law is well established, that where the owner of a vessel is under an obligation imposed upon him by virtue of his office as carrier, he is liable for the willful tort of his servant, if it was committed while in his employ, and in the management of the vessel or conveyance under his control; and this even though the wrong was done in direct opposition to the express commands of the owner. 1 Pars. Mar. Law, bk. 1, p. 394, c. 11. There must be a decree for the libellants, with costs, and a reference to a commissioner to ascertain the damages caused by the loss or damage to the cotton, and by the payment of the salvage money on the cotton.

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

WILLIAM TABER, The (GEIGER v.). See Case No. 5,300.

Case No. 17,758.

The WILLIAM T. GRAVES.

[8 Ben. 568; 9 Chi. Leg. News, 92; 14 Alb. Law J. 408.]¹

District Court, N. D. New York. Nov., 1876.²

LIEN—PRIORITY—REPAIRS—MORTGAGE.

The lien given by the law of the state of New York, for repairs to a domestic vessel, has priority over a mortgage on the vessel given before the repairs were made.

[Cited in *The Hiawatha*, Case No. 6,453; *The Guiding Star*, 9 Fed. 524; *The Venture*, 26 Fed. 287.]

Scott's Case [Case No. 12,517] disapproved.

Williams & Potter, for libellant.
Thad. C. Davis and Mr. Clinton, for claimants.

WALLACE, District Judge. This cause involves the single question whether title, acquired under the foreclosure of a mortgage on the vessel, is subject to the lien, for repairs subsequently bestowed upon the vessel, given by the laws of New York. The mortgage was duly recorded, pursuant to section 4192 of the Revised Statutes of the United States, and thereafter, while the vessel was in possession of the owner, the engine of the propeller was repaired by the libellant on the credit of the vessel at her home port in Buffalo. The laws of New York confer a lien for such repairs, which is to take preference of all other liens upon the vessel except seamen's wages. After the repairs were made the mortgage was foreclosed, and the vessel was purchased by the claimant upon the foreclosure sale. Subsequently this libel was filed, and process in rem issued to enforce the lien for repairs.

The question thus presented is of great practical importance. Since the 12th admiralty rule was modified in 1872, vessels, upon which there are mortgages, are daily seized upon process in rem issued from this court to enforce liens for supplies or repairs, conferred by the laws of New York; and doubtless a similar practice prevails in the other courts of admiralty, sitting within states where such liens are given by the local law. These laws exist in nearly all the states having navigable waters within their borders, or contiguous thereto, and the question now presented, with modifications arising from the terms of the local laws, has arisen in other courts of admiralty exercising jurisdiction over the lakes and the navigable waters connecting the same. The precise question was decided adversely to the priority of the lien for repairs, in the district court of the United States for the Northern district of Ohio. Scott's Case [Case No.

12,517]. I regret to be unable to concur in the conclusion there reached. The intimate commercial relations between the citizens of the several states upon the lakes, subjecting them of necessity to the contingency of adjudications in different courts of admiralty, render it highly important that these courts should apply a uniform rule of decision upon a question of this kind. Investments are made, securities taken, credit given, and commercial transactions conducted in reliance upon the legal rights of the parties, to them as declared by the decisions of the courts. The uncertainty introduced into these transactions, if the rights of the parties depend upon the adjudication of different tribunals which entertain different views, is so discouraging and depressing to commerce between the citizens of these states, as to render applicable the remark of Lord Ellenborough (2 East, 202), "It is often more important to have the rule settled than to determine what it is."

But the importance of the question involved, the expediency, in the interest of commerce, of protecting claims for supplies and repairs to vessels, the strong natural equity of such claims, and the hope that what I conceive to be the true rule, may be determined before precedents give stability to what I deem an error, have induced me to disregard the Case of Scott, and assign briefly the reasons which lead me to defer the mortgage to the claim for supplies.

No doubt exists as to the competency of state legislation to determine the rank of liens upon domestic vessels when it does not invade the jurisdiction of the courts of admiralty, or the legislation of congress concerning such liens; and courts of admiralty will enforce the lien given by the local law by process in rem where the cause of action is maritime in its nature; and where the claim is not maritime, they will recognize the lien in the distribution of proceeds in the registry of the court. *The St. Lawrence*, 1 Black [66 U. S.] 522; *Peyroux v. Howard*, 7 Pet. [32 U. S.] 321; *The Orleans v. Phœbus*, 11 Pet. [36 U. S.] 275. In enforcing the lien given by local laws, courts of admiralty are governed by the terms of these laws where they are explicit, and not by the general doctrines of maritime law. 2 Pars. Shipp. & Adm. 324. It follows that, inasmuch as the statute of New York gives preference in rank to the lien for repairs over all other liens, except for seamen's wages, the important inquiry is, whether the rule thus prescribed is repugnant to the rules which control courts of admiralty in assigning rank to liens, or repugnant to any legislation of congress over vessels of the United States.

The legislation does not trench upon any of the rules of the admiralty regulating priorities between liens, because neither of the liens involved are maritime liens. As to other liens, in dealing with questions of priority courts of admiralty are governed by equitable principles. Thus in accordance with the equitable rule which favors diligence in asserting

¹ [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 14 Alb. Law J. 408, contains only a partial report.]

² [Affirmed in Case No. 17,759.]

a lien, when several claims of the same rank exist and a decree has been obtained on one, that claim is accorded priority over the others. The *Globe* [Case No. 5,483]. And following the equitable rule that equality among creditors is equity, claims of the same rank will be discharged rateably if all cannot be paid in full, where no priority has been acquired by diligence. The *Wm. F. Safford*, *Lush*, 69. But it is a controlling rule in admiralty that priority between claims depends not upon precedence in date, but upon the favor due to the nature of the claim; priority in time must yield to priority in rank; the claim of the material man must give way to that of the seaman, and both to that of the salvor; and as between holders of bottomry bonds, the last in point of date is entitled to priority of payment, because the last loan furnished the means of preserving the ship, and without it the former lenders would entirely have lost their security. *Abb. Shipp*, 163.

Applying this rule in determining the question of priority between a mortgage and a claim for repairs, it seems very clear that the latter should be regarded with the highest favor, and should outrank the mortgage. "There is nothing," says Emerigon, "which is regarded with so much favor as debts for work and labor furnished to a vessel." If the repairs are done upon a foreign vessel, the claim constitutes a maritime lien, to which, of course, an earlier lien not maritime must give way. If they are done upon a domestic vessel, the same lien is conceded to the claim by the civil law, the particular maritime codes and the general maritime law of all nations, except in Great Britain and the United States, where the maritime lien, elsewhere universally acknowledged, has been displaced by the encroachments of the common law courts of England upon the jurisdiction of the admiralty.

It has been strenuously contended by many of the ablest jurists of our own country that the maritime lien still exists in the admiralty jurisprudence of the United States, and many learned judges have concurred in the opinion; but the question is now finally at rest, and the maritime lien is denied where the repairs or supplies are furnished to domestic ships. The *Lottawanna*, 21 Wall. [83 U. S.] 558.

The high favor with which the claim is regarded, and the strong natural equity which sustains it, is evidenced by the local laws enacted in England and in more than twenty of the states of this Union to place the claim upon the same footing with maritime liens.

If, however, the argument, that priority between liens not maritime is to be determined upon analogies derived from the law of maritime liens, should be deemed unsatisfactory, another reason exists why the lien here should rank side by side with maritime liens, and that is found in the complete assimilation in the character of the liens which is effected by the local law. When it is considered that the true meaning and efficacy of a maritime lien

is simply that it renders the vessel liable to the claim without a previous judgment of sequestration or condemnation, and without establishing the demand as at common law, and that the action in rem carries the lien into effect (*Ingraham v. Phillips*, 1 Day, 117; *Barber v. Minturn*, *Id.* 136), it will be seen, that no practical distinction exists between a maritime lien and a claim for repairs for which a lien is given by the local law, and that no reason exists why courts of admiralty should not treat the latter as a maritime lien. When the cause of action is of maritime cognizance, the action in rem may be prosecuted in the courts of admiralty, the vessel seized without a previous condemnation, and without establishing the demand, to enforce the lien given by the local law, precisely as in the case of a maritime lien.

It remains to inquire whether the lien given by the state law contravenes any legislation of congress concerning ships and vessels. As is said in *White's Bank v. Smith*, 7 Wall. [74 U. S.] 646: "Congress having created, as it were, this species of property, and conferred upon it its chief value under the power given in the constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of all persons dealing therein." The only statute of congress, bearing upon the present question, is that, by which mortgages on vessels are required to be recorded in the office of the collector of customs where the vessel is registered or enrolled, in order to be valid as against any person having no notice of the mortgage. It has been held that by force of this statute a mortgage is valid, notwithstanding state legislation, which requires additional formalities calculated to give notice to creditors or subsequent purchasers. *Aldrich v. Aetna Ins. Co.*, 8 Wall. [75 U. S.] 491. It has been argued that the states can pass no laws which can affect the validity of mortgages so recorded. That congress could invest mortgages on vessels with such invulnerability is probably true, but no such intent can fairly be implied from the language of the act. It is a registration act, and as such, excludes all state legislation upon the same subject; and this was the only point decided by the supreme court in *Aldrich v. Aetna Ins. Co.* [supra.] It has been held that liens given by the laws of a state for supplies furnished a domestic vessel take preference over a mortgage subsequently recorded. *Francis v. The Harrison* [Case No. 5,038]. This conclusion of necessity involved the proposition that the states are competent to create liens which will take preference of the lien of a mortgage recorded pursuant to the act of congress, and I see no reason to doubt their competency to determine the conditions of priority, so long as they do not infringe upon the legislation of congress by imposing additional requisites in the recording of mortgages.

My attention has been called to the cases of

The Skylark [Id. 12,928], The Grace Greenwood [Id. 5,652], and The Lady Franklin [Id. 7,983], where the mortgage was held to have priority. These cases are not applicable here, because the local law did not give a lien paramount to the mortgage.

A decree is ordered for the libellant.

[On appeal to the circuit court, the above decree was affirmed. Case No. 17,759.]

Case No. 17,759.

The WILLIAM T. GRAVES.

[14 Blatchf. 189.]¹

Circuit Court, N. D. New York. April 7, 1877.²

MARITIME LIENS—PRIORITIES—REPAIRS—MORTGAGE.

A mortgage was given on a vessel and was recorded in pursuance of section 1 of the act of congress of July 29, 1850 (9 Stat. 440), now section 4192 of the Revised Statutes of the United States. Afterwards, and while she was in the possession of her owner at her home port in Buffalo, New York, repairs were there done to her, on the credit of the vessel. The statute of New York gave a lien on the vessel for such repairs, in preference to all other liens, except seamen's wages. After the repairs were made the mortgage was foreclosed and the vessel was sold, and was purchased by the claimant, on the foreclosure sale. Afterwards a libel in rem was filed against the vessel to enforce such lien for repairs. *Held*, that such lien had priority over the title acquired under the foreclosure of the mortgage.

[Cited in *The Canada*, 7 Fed. 735. Quoted in *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 502.]

[Cited in *Tabor v. The Cerro Gordo*, 54 Fed. 392, 62 Conn. 579.]

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

This was a libel in rem, filed in the district court. After a decree for the libellant in that court [Case No. 17,758], the claimants appealed to this court.

Williams & Potter, for libellant.
Davis & Clinton, for claimants.

JOHNSON, Circuit Judge. The question presented in this case is one of interest and importance. After a careful examination, I am satisfied that it has been correctly decided by Judge Wallace, and that the arguments which his opinion presents ought to control the disposition of the cause. It would be quite useless to restate them, and I only desire to add a few words, in further elucidation of the force of the act of July 29, 1850 (9 Stat. 440), which provides for recording the conveyances of vessels. It enacts (section 1) "that no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the

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

² [Affirming Case No. 17,758.]

grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled; provided, that the lien by bottomry on any vessel, created during her voyage, by a loan of money or materials, necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this act." The obvious purpose of this proviso was to make it entirely clear that a bottomry bond did not come within the statute requiring certain instruments to be recorded. It might otherwise have been contended that it was, in some sense, a hypothecation of the vessel, and, therefore, required to be recorded. It will be observed, that the proviso is confined to liens by bottomry. If this proviso be construed to mean that such a lien only is out of the purview of the statute, and that all other liens are postponed to that of a mortgagee, then the claims of salvors, and all those having other strictly maritime liens, would be thus postponed, to the subversion of the whole principle upon which efficacy is given to such claims, and the overthrow of the best settled and most salutary principles of the maritime law. Indeed, any principle upon which this statute can be expounded to give such a priority to a recorded mortgage, would also extend to bills of sale and other conveyances recorded under the same law, and thus practically overthrow the whole scheme of the maritime law, upon the subject of maritime liens. This statute, I conclude, therefore, has no relation to the question involved; and the lien of the libellant is left to stand upon the statute of New York, which the courts of the United States do enforce in the courts of admiralty.

Judgment must be given for the amount recovered in the district court, with the costs of that court, and of the appeal in this court.

Case No. 17,760.

The WILLIAM YOUNG.

[Olcott, 38.]¹

District Court, S. D. New York. June, 1844.

COLLISION—STEAMER AND SAILING VESSEL—BURDEN OF PROOF—CHANGE OF COURSE.

1. In an action for damages to a sailing vessel by collision with a steamer, the burden of proof lies in the first instance on the libellant.

[Cited in *The New Champion*, Case No. 10, 146; *Messena v. The Neilson*, Id. 9,493a.]

2. If the collision is occasioned by an alteration of the course of the sailing vessel, it devolves upon her to prove the propriety or necessity of such movement.

[Cited in *The New Champion*, Case No. 10, 146.]

¹ [Reported by Edward R. Olcott, Esq.]

3. Each vessel is bound to observe the rules of navigation applicable to their respective positions.

4. The steamer is culpable in crowding upon the sailing vessel so as to render a danger probable in her situation, but is not required to protect her against the consequences of her own mistakes or negligences.

[Cited in *The Sunnyside*, Case No. 13,620.]

5. In this case, the two vessels being navigated in opposite directions, and approaching each other on lines nearly parallel, and spread wide enough apart to leave a passage safe to each from the other, and the sailing vessel changing her course, without necessity, to cross the bows of the steamer, so near to the latter that stopping and backing the engine did not avoid a collision, she cannot support an action for the damages thereby incurred.

G. A. Bucknell, for libellant.

H. B. Scoles, for claimant.

BETTS, District Judge. This was a case of collision, by occasion of which the sloop *Charlotte* was lost. The following facts are made to appear upon the pleadings and proofs: The sloop *Charlotte* was well equipped, and of sufficient strength for the safe navigation of the North river; was on a trip down the North river, a short distance below West Point; came in collision with steambot *William Young*, going up the river, with a tow attached to her, when opposite Buttermilk Falls. When the two vessels neared each other, the steambot was standing in close to the east shore, and running up along it, and the sloop was holding a straight course down near the middle of the river, with the wind N. W. and tide ebb, the breeze being free and sufficient for steering, so that she was enabled to hold that course, or to have placed herself further west, with facility and safety. The channel of the river was half a mile wide at that place. Supposing the steambot to be varying her direction more westward, the pilot of the sloop changed her course, heading off towards the east shore, beyond and inside of the steambot. The steambot had, at the time, the barge *Union* in tow on her larboard side; she was in the usual channel and route of steamboats ascending the river, and was passing through the water at about five miles an hour. The sloop was running at about the same rate. The steambot had met other vessels in the vicinity, all of which passed her to the west in safety. The position and course of the steambot would have carried her one hundred yards east of the sloop, if the latter had not changed her direction and veered eastward. On observing that movement, the pilot of the steamer rang the bell to slow her speed, and hailed the sloop in a loud call to luff, stopping the engines and ringing, also, to back her: and whilst the engines were working backwards, the sloop, heading directly east, crossed athwart her bows, and the collision occurred. There was not room between the steambot and the east shore for the sloop to have passed safely in that track, if she could have got around the bows of the steamer. Every practicable effort was made on board the steamer by the pilot and men to

avoid the collision, after they discovered the purpose of the sloop. The collision was by a slanting or glancing blow, the starboard side of the sloop, forward of the main chains, came in contact with the larboard bow of the barge, which was in tow by the steambot on her larboard side. The position and course of the two vessels in relation to each other on their near approach, and before any movement was made on either side in apprehension of a collision, afford a strong presumption against the allegations of the libellant and in support of the defence. The master of the *Convoy*, another sloop in the wake of the *Charlotte*, proves that the latter was a safe distance to the westward of the steamer, running down the river on a N. W. wind, on a line parallel with that pursued by the steamer. It is palpable that her starboard side could not, in that mode of their approach, have been reached by the larboard side of the steamer, had the latter, as is charged, suddenly altered her course and bore off to the west. The sloop, after the blow, passed directly ahead of the steambot, and struck her bowsprit on the shore, and receding back from the shock, sunk two or three hundred feet from the place of collision.

None of the witnesses impute any blame to the movement of the steambot. Some called by the libellant, who alleged the steamer was bearing more westward, admit that if she had kept her way after the sloop changed her course, the collision might not have occurred. The weight of evidence supports the testimony of the pilot of the steambot, who testifies that he did not change his course, which was to keep close along the range of the east shore. He was steering for North Point off West Point, in order to keep that position for the steamer. Several witnesses state that he was a skilful and careful pilot—that he was on the proper course, and it was easily within the power and the clear duty of the sloop to have luffed; and had that been done, all danger and difficulty in the navigation of the two vessels would have been avoided. The counsel for the libellant, upon this state of facts, insists that the case of *Hawkins v. Duchess & Orange Steamboat Co.*, 2 Wend. 452, is in point, and conclusive against the defence of the claimant. But it is to be observed that the evidence in that case established a want of reasonable precaution, and indeed showed positive, if not gross negligence on the part of the steamer, in holding her own headway, and compelling the sailing vessel to depart from her proper course, or abide the risk of a collision, when she might have prevented it by stopping and backing—the steamer, in that case, being held culpable for omitting to do what was promptly done by the steamer in this.

It is not to be assumed without evidence, even between a steamer and a sailing vessel, that in case of a collision the fault is necessarily with the steamer. Each vessel is bound to observe the established and notorious rules of navigation applicable to their respective positions. In a cause of damage, the party seeking

compensation must sustain the burden of proving the vessel proceeded against was blamable and in fault. That alone founds a complaint for compensation. 2 Dod. 85; 8 Law Rep. 295. Although a higher degree of responsibility is cast upon steamers, and they are bound, as a general rule, to keep out of the way of sailing vessels, yet the latter cannot justify a departing from their course on a probability of encountering an approaching steamer, unless she is crowding so much upon the track as to create an imminent danger of collision. The law requires that there should be preponderating evidence to fix the loss on the party charged. *The Ligo*, 2 Hagg. Adm. 356. In suits for collisions occasioned by a mischance imputable chiefly to the want of proper care and precaution on the part of the vessel damaged, the action will be generally dismissed with costs. *The Catherine of Dover*, Id. 154; *Bay-by*, Baron, 2 Crompt. & M. 22; 11 East, 60; 3 Car. & P. 528. I am of opinion the libellant has failed to establish the facts requisite to a judgment in his favor. He does not prove that the collision happened by means of any fault or negligence on the part of the steamboat. It was brought about by an attempt of the sloop unnecessarily to run across the bows of the steamer, and get between her and the shore, where there was not in fact room for her, and where, under the circumstances, she could not rightfully go. The libel must be dismissed, with costs.

Case No. 17,761.

WILLIAR et al. v. IRWIN.

[11 Biss. 57.]¹

Circuit Court, D. Indiana. Nov., 1879.²

AUTHORITY OF PARTNER — MILLING BUSINESS — PURCHASES FOR FUTURE DELIVERY — WAGES — CONTRACTS — CUSTOM AMONG COMMISSION MERCHANTS.

1. If one member of a firm of millers permits his co-partner to hold the firm out to the world as dealers in grain, and knowingly allows cards and letter heads to be used indicating such business, he will be liable with his co-partner on contracts for the sale or purchase of grain for future delivery, though such contracts are made without his actual knowledge, by his co-partner in the firm name.

2. A contract for the sale or purchase of grain for future delivery, legitimate on its face, cannot be held void as a wagering contract, merely by showing that one of the parties so understood it. To render it void it must be proved that both parties regarded it simply a wager on differences.

[Cited in *Ward v. Vosburgh*, 31 Fed. 13.]

[Cited in *Wall v. Schneider*, 59 Wis. 359, 18 N. W. 446.]

3. If a purchase or sale of grain for future delivery made in the form of a contract, is in fact simply a bet or wager on differences, the form it assumes does not affect its invalidity.

[Cited in *Ward v. Vosburgh*, 31 Fed. 13.]

4. A custom among commission merchants on a board of trade by which, if A sells for

one of his customers a certain quantity of grain for future delivery to B, who buys the same for one of his customers, and B then for another customer sells the same quantity for like delivery to C, who buys for one of his customers, and C afterwards for another customer sells the same amount for same delivery to A, who buys for another one of his customers—the commission merchants A, B and C can reciprocally surrender or cancel the contracts themselves, adjusting the differences in price, and returning margins, and each substitute his buyer customer and seller customer as parties to the contract, himself guaranteeing the performance of such contract—such a custom is founded in commercial convenience and is valid.

Baker, Hord & Hendricks and George A. Knight, for plaintiffs.

McDonald & Butler and Isaac M. Compton, for defendant.

The following authorities were cited by counsel: *Gregory v. Wendell*, 40 Mich. 432; *Bailey v. Bensley*, 87 Ill. 556; *Oldershaw v. Knoles*, 4 Bradw. [Ill. App.] 63; s. c. 6 Bradw. [Ill. App.] 325; *Nourse v. Prime*, 4 Johns. Ch. 490; s. c. 7 Johns. Ch. 85; *Horton v. Morgan*, 19 N. Y. 170; *Stewart v. Drake*, 46 N. Y. 450; *Worthington v. Tormey*, 34 Md. 182; *Price v. Gover*, 40 Md. 102.

GRESHAM, District Judge (charging jury). This is an action brought by the plaintiffs against the defendant as surviving partner of the firm of Irwin & Davis to recover an alleged balance due from said firm to the plaintiffs. The transactions out of which it is claimed this balance grew were certain sales of wheat for future delivery claimed to have been made by the plaintiffs as commission merchants at Baltimore for Irwin & Davis on the order of this firm.

The defenses are: First—That the alleged sales of wheat were not within the scope of the partnership business of Irwin & Davis; that they were the individual transactions of Davis with the plaintiffs; and, second—That the sales were wagering contracts and void.

And first, were the transactions out of which grew the alleged balance due to the plaintiffs, within the scope of the partnership business of Irwin & Davis? Irwin & Davis were partners in the purchase and manufacture of wheat into flour. To this extent the defendant Irwin admits that there was a partnership. He testified that the partnership was limited to this, and that his partner, Davis, who managed and carried on the business, had no authority to buy and ship grain to Baltimore or elsewhere on the firm account. The firm of Irwin & Davis was formed, Irwin says, as early as March, 1873, and it existed under the active management of Davis until his death in October, 1877. It is not denied that during all this time Davis did buy and ship grain to some extent in the firm name. Necessary conveniences existed in connection with the mill, for the loading of grain into cars for shipment. The letter and bill heads of the firm during all this time were "Irwin & Davis, Millers and

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

² [Reversed in 110 U. S. 499.]

Grain Dealers, Brazil, Indiana," and Davis regularly entered upon the books of the firm, transactions in the purchase and shipment of grain.

If you believe that the purchase and sale of grain was within the apparent scope of the partnership, and the parties dealt with Irwin & Davis in good faith, believing they were dealing with the firm, then the firm became liable for such transactions. If Irwin permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain, he became liable with Davis on contracts for the sale and purchase of grain for future delivery, and in that case it is not material that Irwin should have actual knowledge of particular sales or purchases in the firm name. And if Irwin knew that Davis was holding the firm out as dealers in grain, and did not protest or give public notice to the contrary, he is responsible as partner for all contracts made by Davis in the firm name, within the apparent scope of the business of dealing in grain. If Davis, as partner, did in fact buy and sell grain, and if in his correspondence with customers and others, including the plaintiffs, he employed printed letter heads or cards representing the firm of Irwin & Davis as grain dealers; this was a holding out of that firm as a partnership engaged in that business, and if before or at the time of the dealings with the plaintiffs, Irwin knew that the firm was thus held out as grain dealers, he is liable as a partner. If therefore, you believe from the evidence, that Irwin & Davis held themselves out as dealers in grain, as well as in flour, and that plaintiffs dealt with Davis, supposing they were dealing with the firm, and in so doing advanced them any money in fulfilling such contract, you should find for the plaintiffs in whatever sum the evidence may show them to be entitled to on account of such advancements, unless you think the defendant has shown that the transactions between the plaintiffs and Irwin & Davis were gambling transactions.

If you find that the dealings with the plaintiffs were within the scope of the partnership, you will next consider whether the dealings were gambling transactions. The burden of showing that the parties were carrying on a wagering business and were not engaged in legitimate trade or speculation rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that parties are gambling. A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only

so understood and meant it to be. The proof must go further and show that this understanding was mutual—that both parties so understood the transaction. If however at the time of entering into a contract for the sale of personal property for future delivery, it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely receive or pay the difference between the contract and the market price, the transaction is a wager and nothing more.

It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade. It is not sufficient for the defendant to prove that Irwin & Davis never understood they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is that the plaintiffs expected Irwin & Davis to execute their contracts—expected them to deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly. If the plaintiffs made sales of wheat for Irwin & Davis for future delivery, understanding that these contracts would be filled by the delivery of grain at the time agreed upon, Irwin & Davis are liable to the plaintiffs, even though they meant to gamble and nothing more.

The testimony tends to show that a general custom obtained among grain commission merchants in Baltimore to the following effect: When one commission merchant upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same or a larger quantity of the same kind of grain, for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then in such case the two commission merchants meet together and exchange or cancel the contracts as between themselves, adjusting the difference in the prices between the two contracts and restoring any margins that may have been put up; and that from that time forth, the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the grain of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer.

The evidence also tends to show a custom obtaining among commission merchants in Baltimore to the further effect that though

the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain, for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another, who owes like wheat for like delivery to the first commission merchant, that then, in such case they settle by what they call "a ring"—that is, they all reciprocally surrender or cancel their contracts, adjust differences in price between themselves, and surrender all margins that have been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been cancelled or surrendered; and that he guarantees to his customer the performance of the contract originally made in his behalf.

I say to you gentlemen that these customs are founded in commercial convenience; that they are not in contravention of the law, and that they are valid. In determining what the intention of the parties was in these transactions, you will carefully weigh all the evidence. Henry D. Williar, one of the plaintiffs, testifies that the plaintiffs expected Irwin & Davis to execute their contracts by delivering the amount of wheat sold. It seems that the plaintiffs sold for Irwin & Davis, for delivery in about two and a half months, 165,000 bushels of wheat. Did Irwin & Davis expect to deliver this amount of wheat within this time? Did the plaintiffs expect Irwin & Davis to enable them to deliver this amount of wheat within the time fixed for delivery? In this connection you will consider the previous dealings between Irwin & Davis and the plaintiffs, the ability of Irwin & Davis to engage in transactions of this magnitude, and the opportunity which the plaintiffs had had to know the extent or character of the business of Irwin & Davis and their financial standing and ability, and the importance of Baltimore as a grain market.

There remains a set-off, gentlemen, and if you find that, in legitimate dealings between the firm of Irwin & Davis and the plaintiffs, there was a balance in the hands of the plaintiffs, which balance was exhausted by Davis in keeping up margins in gambling transactions, the set-off will not avail the defendants. A man cannot recover back money which he loses in gambling transactions any more than he can enforce a gambling contract.

If you find that the plaintiffs are entitled to recover from the defendant, then it will be in your discretion to allow the plaintiffs interest. If you think, under all the circumstances, they are entitled to interest on all sums advanced for Irwin & Davis, it is in your discretion to allow interest or not.

Verdict for plaintiffs for \$17,622.78.

[The above judgment was reversed, and a new trial ordered, by the supreme court, where it was

carried on writ of error. 110 U. S. 499, 4 Sup. Ct. 160.]

Consult also *Jackson v. Foote* [12 Fed. 37], and reporter's note thereto.

Case No. 17,762.

The WILLIE G.

[1 Hask. 253; 1 11 Int. Rev. Rec. 117.]

District Court, D. Maine. Feb., 1870.

VIOLATION OF REVENUE LAWS—IMPORTATION OF LIQUOR—FORFEITURE OF VESSEL—FISHING LICENSE.

1. Whether the importation of more than thirty gallons of distilled spirits in bottles, contained in a cask, is an importation in packages containing less than thirty gallons under the act of July 13, 1866 [14 Stat. 98], *quære*.

2. A vessel, sailing under a fishing license, may touch at a foreign port and procure supplies, without incurring forfeiture under the acts of congress.

3. Taking on board in a foreign port and bringing into this country two barrels without hire or reward, but as a favor to a friend, supposed to contain crockery, but really containing liquors, is not engaging in trade within the meaning of § 32 of the act of Feb. 18, 1793 [1 Stat. 316], and does not subject the vessel and cargo to forfeiture.

In admiralty. Libel in rem by the United States, claiming a forfeiture of the schooner Willie G. and cargo, for a violation of the revenue laws: (1) Because she brought into this country distilled spirits in packages containing less than thirty gallons. (2) Because goods of the value of \$400 were unladed from her not in open day, and without a permit. (3) Because whilst under a license for the fisheries, she engaged in another trade or employment by importing goods into the United States. William Decker made claim to the vessel and cargo, and answered, denying the allegations of the libel.

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

Wales Hubbard and Josiah H. Drummond, for claimant.

FOX, District Judge. This schooner was seized, with her fishing outfits on board, in the harbor of Portland on the 23d day of April last by the collector of the port, for certain alleged violations of the revenue laws in Oct., 1867.

There is some conflict of testimony, but the following facts are proved to my satisfaction, viz.: The vessel in 1867 was, and still is, the property of the claimant, Wm. Decker of Southport, in this district. She was licensed for the fisheries, without any permit to touch and trade at a foreign port or place. Having taken her fare in the Gulf, on her homeward voyage she touched at Pirate Cove, in the Straits of Canso, for wood and water, and for no other object. Whilst engaged in getting these articles on board, an acquaintance of the skipper requested

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

him to take on board a couple of barrels of crockery for John Topham, a sailmaker, residing at Wiscasset, who was well known to the skipper. He at first demurred, but on being again applied to and informed that the barrels were on the wharf all ready to be put into the boat, consented, and they were received on board and brought in the schooner to Southport; and there landed in open day. One of the barrels was taken away by Topham, the other remained some time in Decker's storehouse and was afterwards given by Topham to Decker. It contained twenty to thirty bottles of gin, packed in bran. The barrels were marked "John Topham, Wiscasset, crockery." The skipper was not aware of their contents, and he received them as a favor for the party, without accepting or expecting any compensation for what he did. Decker did not know that the barrels were brought in the vessel until they were landed, and never claimed any freight therefor.

The libel contains three counts. The first, charges this vessel with having brought into this district a quantity of distilled spirits, in casks or packages of a less capacity than thirty gallons. By the act of the 13th of July, 1866, in force at the time this vessel arrived, "brandy and other spirituous liquors may be imported in casks or other packages, not less than thirty gallons." In the present case the liquor, gin, was in bottles, packed in barrels, which, it is admitted, were of a capacity of more than thirty gallons.

I certainly entertain some doubt as to the true construction of this act, and have reason to know that some of my judicial brethren share with me in the doubt, which is, whether it was the intention of congress, that distilled spirits should not be imported in less quantities than thirty gallons, or whether a less quantity may be imported, provided its exterior cask or covering would have contained thirty gallons. It does not become necessary for me to determine what is the true construction of this provision, as the treasury department, by a letter of the assistant secretary, under date of June 20, 1867, to be found in Internal Revenue Record, 1867 (volume 6, page 3), has declared: "That any quantity of spirituous liquors may be imported in packages, the outside envelope or covering of each of which is of sufficient capacity to contain not less than thirty gallons."

Upon being advised that such had been the construction given by the department to the law, and such construction not appearing to have been in any respect subsequently altered or modified, the first count in the libel was very properly abandoned and withdrawn by the district attorney, as it would be the grossest injustice for the government to claim a condemnation for an importation which had been previously authorized by the

secretary of the treasury and by his sanction communicated in the most public manner to all persons interested in navigation, and which is not known or understood to have been revoked or modified.

Before passing to the other counts, I would suggest, that the act of 1790 prohibited the importation of distilled spirits in packages less than ninety gallons, under forfeiture of the liquors and the vessel in which they were imported. [1 Stat. 145.] The act of 1866 authorizes the importation of spirits in packages not less than thirty gallons, under a penalty of a forfeiture of the liquors if imported in smaller packages, and this is the only penalty specified in the act. The act of 1790 is not in terms expressly repealed, but the provisions of the act of 1866 are to some extent inconsistent with it, authorizing much smaller packages, and declaring as a penalty the forfeiture of the liquors, if imported in packages less than those allowed. Congress having thus stated in distinct terms what shall be the penalty if distilled liquors are imported in lesser packages, when the question is fairly presented, it will require very careful examination and consideration to decide whether a vessel thus importing liquors in the prohibited packages, is therefor any longer liable to forfeiture; if the double forfeiture of both liquors and the vessel bringing them, provided for by the act of 1790, still remains, there seems to have been no necessity for expressly enacting in the act of 1866 that one of them shall continue; from this provision, it would rather be inferred that it was the intention of congress that there should be but a single forfeiture, that of the liquors thus illegally imported; the point does not here arise for decision, but I have made these suggestions that it may not be understood that it has entirely escaped the attention of the court.

The second count charges an unloading of goods of the value of four hundred dollars, not in open day, without a permit. This count cannot be sustained. The goods were unladen between 8 and 10 a. m., and were not of the value of four hundred dollars.

The real contest in the cause arises upon the third count, which charges this vessel whilst under license for the fisheries, with being employed in another trade, viz: importing goods into the United States, from a foreign port or place, whereby the vessel and cargo found on board at the time of her seizure are forfeited. This claim is under the 32d sec. of act of 28th Feb., 1793, by which it was enacted "that if any licensed ship or vessel shall be employed in any other trade than that for which she is licensed, every such ship or vessel, with her tackle, apparel, and furniture, and the cargo found on board of her, shall be forfeited." In the case of *The Two Friends* [Case No. 14,289], Judge Story decided, that the cargo found on board at the time of the seizure shall be forfeited, not merely that

which was on board at the time of committing the offence. In some cases, this construction of the law might prove detrimental to the public interest, as it holds out an inducement to officers not to seize the vessel at the time the forfeiture is incurred if the cargo then on board is but of little value, but the rather to postpone proceedings until she is found laden with a valuable cargo, belonging to her master or owners, and in the meantime, the vessel may be lost, or never return within reach of process, or the testimony against her vanish away, and thereby the government lose what it might have otherwise secured. In the present case, the seizure was made in April last, whilst the illegal importation was in Oct., 1867. During this period, the vessel had been engaged in fishing, and at times, without doubt had on board large and valuable cargoes of fish, none of which were seized, but only her fishing outfits for a new voyage. This delay, I am advised, was not from any negligence of the customs' officers, but was from their not having any information upon the subject until about the time of the vessel's seizure, which was then communicated to them by one Joseph R. McKown, who had for a number of years been in the employment of Decker the claimant, as skipper of the schooner Silver Moon, which vessel has at the present term, upon the information and procurement of said McKown, been condemned and forfeited to the United States.

Was this vessel employed in a trade, other than that for which she was licensed? I have heretofore decided, that a licensed fishing vessel does not incur forfeiture, by calling at a foreign port in the course of the fishing voyage for wood and water. I am not aware of any act of congress which forbids her so doing, or imposes on her any penalty therefor. In truth, it could hardly be thought possible, that congress would undertake to prohibit a vessel's touching at a foreign port for these articles, the very prime necessities of life, the want, or even the contraction of the usual supply, of which, to the crew, creates the greatest distress, and if destitute of them for any considerable period of time, all on board must perish. No one ever supposed that a vessel dismasted or leaking badly was not at liberty to make and enter the nearest port for repairs, whether a domestic or foreign one. Under ordinary circumstances it is the duty of the master so to do, and it is much more his duty, thus to proceed, when the very existence of his crew may depend on obtaining forthwith these necessities of life. In fact, there is nothing voluntary under such circumstances on his part. He is compelled by the very exigencies of his condition so to conduct, and he in so doing but yields to and obeys the law of necessity and self-preservation. Necessity knows no law, but prescribes the law.

In my opinion, it is not requisite that an imperative necessity for supplies of this de-

scription should be shown, in order to justify a fishing vessel's obtaining them at a foreign port, if they are suitable for the voyage, and the port is convenient of access, and the vessel procures only a sufficient quantity for the accomplishment of her fishing voyage. I hold that the obtaining of such supplies by her is not being engaged in another trade than that for which she is licensed. All that she has thus done is only in aid and furtherance of her legitimate business, and she is justified in doing that. This vessel was not prohibited from going into Pirate Cove for these supplies. The only purpose for which she stopped there was to procure them to aid in the completion of, and entirely as auxiliary to, the fishing voyage she was then prosecuting, and not with any design or purpose to undertake any new trade or employment. But whilst there she received on board and afterwards transported into this district two barrels, which it appears were filled with bottles of gin, although the skipper at the time was informed and supposed they contained crockery. The vessel was not detained an instant to receive these barrels on board; the business of her fishing trip was not for a moment in any way interrupted or interfered with; she did not proceed out of her regular course by reason of receiving or bringing these barrels; they were not taken for gain or profit, but merely as an act of favor and neighborly kindness exclusively from motives of friendship and good will, entirely a gratuitous service, without reward, or promise or expectation of any, in any way.

In the case of *The Nymph* [Case No. 10,388], the vessel was employed in the mackerel fisheries whilst licensed for cod fishing, and it was decided that she was thereby liable to forfeiture. Judge Story, had occasion to define the word "trade" as used in the 32d section of act of 1793. His opinion was that it is not there used, in a restrictive sense, as equivalent to traffic, but was rather intended as equivalent to "occupation, employment, or business for gain or profit." Admitting this to be the proper meaning of the word in this act, the claim of forfeiture here fails at the outset, as these barrels were not transported for gain or profit, or any expectation thereof. All the cases which I have examined, where a condemnation has been had under this section, are cases, where the vessel had been employed as a carrier of merchandise in the expectation of profit, in the usual and ordinary course of navigation, and they show that a single act of trading, not within the license, is ground of forfeiture. *The Active*, 7 Cranch [11 U. S.] 100, was licensed for the cod fishery and received on board a cargo of provisions with intent to proceed to some foreign port. *The Two Friends* [Case No. 14,289] was also licensed for the cod fisheries, and was found with a cargo of flour on board, intended for a foreign voyage. The

Three Brothers [Id. 14,009] was also a fishing vessel, which went into a port on the Labrador coast, and there purchased a quantity of fish of considerable value which were brought in her to Boston.

In all of these cases, either a new voyage for profit or gain was commenced, or the prosecution of the voyage, in which the vessel was employed, was for the time being delayed and interrupted, by the purchase and reception of merchandise to be transported in the vessel for the profit and advantage of her owners. In the language of Judge Ware, in *The Swallow* [Case No. 13,666], in his comments on these cases: "They are all clearly cases of engaging in a trade in the usual meaning of the word, and they undoubtedly show, that a single act of trading beyond the authority of the license is fatal." The present case differs from them in many essential particulars, and bears a strong similarity to *The Swallow* [supra], in which it appeared that the vessel, while licensed for the fisheries, on her way to the fishing grounds touched at the Green Islands and took on board twelve or thirteen sheep and carried them to Matinicus, and when returning, she took from Matinicus four or five neat cattle and carried them to Thomaston. She did not go out of her way and was detained not more than an hour or two in the business, and it was not done for hire or profit, but was an act of good neighborhood, which fishermen were in the habit of doing for each other. Judge Ware held this vessel was not thereby made liable to forfeiture, and in his opinion, that learned judge says: "Can it in propriety of language be said, that if a small fishing vessel, employed in the coast fisheries, while on her way to or from the fishing grounds, takes a few articles of provisions or a few cattle at one place and drops them at another without being diverted from her course or occupation, and without any contract of hire or compensation or expectation of compensation, except that of a reciprocation of the same offices of good neighborhood on another occasion,—can a vessel, under such circumstances, be said to be engaged in a trade, within the meaning of the law? This would be extending the restrictions of the law further than any decision has yet carried them. I cannot think that this kind of interchange of neighborly acts falls within the words or policy of the law."

This reasoning is quite applicable to, and should control the present case. The government is not without redress for the acts of the parties concerned in this illegal importation of the gin, but I do not think the vessel and her cargo, considering fishing outfits as cargo, which question is not free from doubt, are liable to forfeiture under the circumstances here developed.

I decree a restoration of the vessel and property seized on board, and a discharge of the stipulation given in the cause; but shall certify probable cause of seizure.

Case No. 17,763.

WILLIMANTIC LINEN CO. et al. v.
CLARK THREAD CO. et al.

[4 Ban. & A. 133.]¹

Circuit Court, D. New Jersey. March, 1879.

PATENT FOR INVENTIONS—THREAD WINDING MACHINE—COMBINATION OF OLD INSTRUMENTALITIES—ANTICIPATION.

1. A foreign patent is not admissible as evidence to anticipate an American patent of a date anterior to the enrolment of the foreign patent.

2. Old instrumentalities are patentable when combined for the first time in such a manner as to produce new and useful results.

3. The rule, that, a claim for a combination of old instrumentalities, in a machine, is not anticipated by a prior invention in which the combination of equivalent instrumentalities appears, when the inventor of the second patent has changed the mechanism so as to produce new and valuable results, stated.

4. The first and third claims of letters patent No. 26,415, granted to Hezekiah Conant, December 13th, 1859, and extended for seven years June 21st, 1873, for an "improvement in machines for winding thread on spools," held valid.

F. Adams, for complainant.

George Gifford, for defendant.

NIXON, District Judge. The pleadings in this case show, that an original bill of complaint was filed against the defendants on the 13th of July, 1872, for an infringement of the original patent; and that an extension of the same having been obtained, pending the suit, on application to the commissioner of patents, the supplemental bill was filed February 5, 1874, setting forth the fact. The bills charge, that the defendants have infringed the said letters patent, originally granted to Hezekiah Conant, for "improvement in machines for winding thread on spools," numbered 26,415, dated December 13, 1859, and ante-dated June 22, 1859, and extended June 21, 1873, for seven years from and after the expiration of the first term thereof.

The defendants in their answer deny: (1) That the threading machines used in their manufactory contain the inventions recited in any of the claims of the complainants' patent. (2) That Conant was the original and first inventor of what is claimed in his patent, having been anticipated by certain enumerated English patents. And (3) they claim that the thread-winding machines used by the defendants were the invention of one William Weild, to whom English letters patent were granted January 22, 1858; that said invention was prior to Conant's; and that the defendants paid royalty to the owner of the Weild patent.

At the hearing no stress seems to have been

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

laid upon the third defence, to wit, the alleged older invention of Weild—it appearing in the proofs that the patent, although granted on the 22d of January, 1858, was not enrolled until the 22d of July following, and foreign patents are not admissible as evidence against an American patent, anterior to the date of their enrollment.

The complainants' patent has reference to an improvement in machines for winding thread on spools, and exhibits six claims. Two models were produced on the argument marked "Complainants' Exhibits 5 and 6," and the counsel admitted that the defendants had used and were using machines containing the features represented in these models. The complainants insist that these machines contain the invention set forth in the first, third and fourth claims of the Conant patent. In the specifications of the patent, Mr. Conant says, that the object of his invention is to wind thread upon spools, with regularity and precision, layer upon layer, and each filling the whole length of the spool, without any attention on the part of the operator, further than to remove and replace the spools; to cut the thread and to fasten it when the spool is full; and to attach the thread to a fresh spool and set the machine in motion; and he thus describes the mechanism, which is claimed to be infringed by the defendants: "The nature of the first part of my invention consists in combining a pattern cam or traverse charger with nuts and right and left-hand screws or their equivalents for the purpose, the operation of the combination being such, that a thread guide shall have its motion reversed and its length or distance of motion regulated automatically," etc. "The nature of the third part of my invention consists in combining with a pattern cam, and right and left-hand screws and traversing nuts, a stop motion, substantially such as is hereafter specified, so that the whole apparatus shall be brought to rest when the bobbin is completely filled. The fourth part consists in making the lips of the levers that actuate the screw nuts or their equivalents, for the purpose they serve, adjustable, so that different lengths of spools may be wound properly by the same traverse charger."

He states his claims as follows: "(1) The combination, in the manner set forth, of a traverse charger, with right and left-hand screws, and with nuts which are alternately in gear with such screws, the combination operating as a whole substantially in the manner and for the purpose described." "(3) A stop motion, substantially as described, for causing the machine to come to rest when a spool is filled, in combination with automatic apparatus, substantially such as set forth, for regulating the length of motion and change of direction of motion of a guide, through which thread is delivered on to a bobbin or spool. (4) Adjustable lips, substantially such as set forth, in combination with a traverse charger, whereby spools of different

lengths may be wound by the use of the same traverse charger."

The claims are all for combinations of mechanism for the production of specific results in the winding of thread upon spools. The elements of the first, are right and left-hand nuts, right and left-hand screws, and a traverse charger. The prior use of such nuts and screws, and of a traverse charger is admitted. The two former are found in the Wibberly patent, and the latter in the Young patent, both of which are English patents and antedate the complainants'. The question here is whether their combination is new. Old instrumentalities are patentable, when combined for the first time, in such a manner as to produce new and useful results.

The defendants insist that this claim is anticipated both by the Wibberly patent and the Young patent; inasmuch, as in the former, the spool itself, when the machine is in operation, performs all the functions of a traverse charger, and, in the latter, there is an independent traverse charger, with which the thread guides are connected, so that each thread guide is caused to move to and fro, or traverse along its respective spool or bobbin.

It is not necessary to stop to inquire whether the spool in the Wibberly invention, is an equivalent for the traverse charger in the complainants' patent; for a specific traverse charger, in connection with right and left-hand nuts and screws, appears in the Young patent. If we should give the broad construction to the claim, insisted upon by the complainants, it is clearly anticipated by the Young invention, where the combination of equivalent instrumentalities appears. But it does not thence follow that the claim is void. The inventor has changed the mechanism so as to produce new and valuable results. His shaper or traverse charger is of peculiar construction, whereby the length of each succeeding traverse is not determined by the diameter of the barrel of the spool, or by even the presence of the spool upon the spindle, as in the Wibberly and Young machines, but by the varying lengths of the ribs on the periphery of the wheel. Whether the defendants' machines infringe the claim as thus construed will be considered hereafter.

The constituents of the third claim are the several elements of the first claim, in combination with automatic mechanism for a stop motion, which, by moving the belt from the driving pulley to a loose pulley, when the bobbin is nearly filled, brings the whole apparatus gradually to rest by its own friction. If this claim should be construed to include every stop motion, or means of stopping the machine with automatic apparatus, it would be void for want of novelty. The stop motion is not new per se, nor was Conant the first to combine a stop motion with a traverse charger, so as to stop the machine automatically. Wibberly does this, not by the shifting of the belt, but by means of a brake;

which is brought suddenly to bear upon the parts of the apparatus connected with the winding spindle.

Avoiding, then, the construction which renders the claim invalid, let us inquire what is the scope or purpose of the invention, as exhibited in the claim. It is a combination with a combination, and the patentee sets forth in the specifications of his patent, the methods which he employs, and the results he obtains, by their union. "It is important," he says, "that the winding should be stopped at the instant that the spool is filled, and the last course completed. First, for the reason, that the latter will then present a smooth surface from end to end of the spool. Second, because the machine will then have all its parts in the right position to commence winding another spool, and for this purpose, I have contrived a stop motion"—two modifications of which he then describes. To accomplish this result, he has mechanism for shifting the belt from the driving pulley to a loose one. Both the loose pulley and the brake are devices known in mechanics, to produce a stop motion in machinery. Being equivalent, there is no invention in substituting the one for the other. Wibberly used the brake; the complainants the loose pulley; and the defendants the brake, for the same purpose. It is quite as permissible for the defendants to substitute the brake for the loose pulley of the complainants, as it was for the latter to substitute the loose pulley for the brake of the Wibberly patent. That combination being common to the three machines, it follows that whether the defendants have infringed the third claim, depends upon whether their machine infringes the other combination of the claim, to wit, the first claim of the complainants' patent.

The fourth claim of the complainants is also a combination, and its three elements are adjustable lips so combined with right and left-hand screws and a traverse charger, that spools of different lengths may be wound by the use of the same traverse charger.

The attention of the court has not been called to any machine devised before the Conant, that possessed this adjustable quality. The defendants' expert Waters is of the opinion that its insertion required no invention, for the reason that there is no combined action between the adjustment of the lips and the other parts, while the machine is in operation. In this opinion, we think, he is mistaken. The result is new and useful, and Conant is entitled to be protected in the combination of the instrumentalities, or their equivalents, which he employs to obtain it. The defendants' machine, Exhibit No. 6, has, to some extent at least, the same capacity of adjustment, but their counsel insists that it is produced by substantially different means. In their machine the adjustability is in the traverse charger, while in the complainants' it is in the pallets or lips. The shaper of the defendants is of such peculiar construction, that adjustability

is brought about by the direct action of the screw with its nuts, without the intervention of the lips,—the defendants thus dispensing with one of the parts of the combination of the complainants' fourth claim. They accomplish the same result, to wit, adjustability; but the patent is not for the result. It is for the means whereby it is secured; and if their means are essentially different, there is no infringement.

The invention pertains to a machine, and the case falls in that class, where all the elements are old, and where the invention consists in a new combination whereby a new and useful result is obtained. A party guilty of infringing this claim, must be shown to have used all the necessary parts of the combination. It is clear from the inspection of the models exhibited, that there are great differences in form. But differences in form will not excuse the defendants, unless they construct and operate their mechanism in a substantially different manner.

The leading case of *Gould v. Rees*, 15 Wall. [82 U. S.] 187, is authority for nothing that the omission of one of the ingredients of the complainants' combination, takes the defendants out of the category of infringers of the claim in the present case.

The only remaining question is, whether the traverse charger in the defendants' machine is substantially identical with the traverse charger in the complainants'. It has long been settled, that the identity or diversity of two machines, depends, not in the employment of the same elements, or powers of mechanics, but upon producing of the given effect by the same mode of operation, or the same combination of powers. *Odiorne v. Winkley* [Case No. 10,432]; *Union Sugar Refinery v. Matthiesson* [Id. 14,399]. Or, to adopt the language of Mr. Justice Washington, of this circuit, in *Evans v. Eaton* [Id. 4,560], the rule is, "that if the two machines be substantially the same, and operate in the same manner, to produce the same result—though they may differ in form, proportions, and utility, they are the same in principle." The characteristic mode of operation, claimed for the Conant machine, and which, it is alleged, existed in no prior machine, is a traverse charger, and the half nuts and their fellow screws, so combined, that the thread guide is made to move through an exact distance in one direction and then in the opposite direction, with a certain definite increase of distance, until the spool is filled, without any regard either to the dimensions of the thread, or to the size of the spool. The defendants' machine produces the same result. Is it done by substantially the same mechanical means, or by the same law of action?

All, or nearly all, of the witnesses, are experts, on one side or the other. A case is rarely presented where there is a more substantial agreement as to the facts, or a more radical difference in the conclusions from them. The defendants have such advantage of the opinion of professional experts, as a majority

in numbers gives. Messrs. E. S. Renwick, Hervey Waters, and J. Boyd Elliot, scientific witnesses of deserved reputation, agree that the shapers in the two machines are entirely different in their structure, functions and mode of operation; while Mr. H. S. Renwick, of like reputation, supports Conant, the patentee, that they are essentially the same. They all swear with equal confidence and with apparently equal intelligence, to their respective opinions. The traverse chargers are certainly different in appearance. The complainants' revolves, while the defendants' slides. The one is, in form, a wheel, and the other, a plate, shaped like a truncated wedge, or isosceles triangle with its point cut off parallel to its base. The gradually increasing length of the teeth or ribs on the periphery of the wheel, determines the length of the traverse in the Conant machine. The same is determined in the defendants' machine, by projecting forward the plate for each successive course of thread, so that longer sections of the shaper shall be successively traversed.

But, turning from any further consideration of these mere variations in form, is not this the true test of infringement in this case: One machine with its peculiar mechanism being given, does it require invention to produce the other with its peculiar mechanism? Let a skilled mechanic, for instance, take the Conant machine, and watch it when in operation. He soon ascertains that its distinguishing feature is a shaper, furnished with a series of lips or steps, of gradually increasing length, and that the mechanism of the apparatus—and not the size of the spool or the dimensions of the thread, fixes and determines the number and length of the traverses. He substitutes for the steps around the periphery of the cylinder, a plate of a truncated wedge shape; or, in other words, he unrolls the cylinder until he gets a wedge shaped plate, like Fig. 5 of the second page of the drawings in Conant's original patent. He also observes another office performed by the Conant traverse charger, to wit, bringing the proper parts of the machine, after a traverse is made, into a relation that it can act again, by engaging the next step upon the wheel, and that this office is lost by the above-described change of form. He supplies the loss, by substituting the device of a spring, or some other mechanical contrivance, to furnish the necessary actuating force. In our judgment there is no invention in such substitutions. A machine thus reorganized and actuated, embodies the vital principle of the complainants' mechanism, and, inasmuch as the Conant patent, by the provisions of the laws of the United States, is entitled to priority over the English patent of Weild, under which the defendants claim to act, it must be held that the complainants are entitled to a decree for infringement of the first and third claims of their patent, and it is ordered accordingly.

[NOTE. Subsequently damages were awarded complainants to the amount of \$159,035.22.]

Exceptions filed by defendants were overruled, and a final decree for the amount awarded. 27 Fed. 865. An appeal was then taken to the supreme court, where the decree of the circuit court was reversed, and the cause remanded, with directions to dismiss the bill of complaint. 140 U. S. 481, 11 Sup. Ct. 847.
[For another case involving this patent, see 24 Fed. 799.]

WILLING (BARINGS v.). See Case No. 985.

Case No. 17,764.

WILLING et al. v. UNITED STATES.

[4 Dall. 374; 1 Wash. C. C. 125.]¹

Circuit Court, D. Pennsylvania. May 7, 1804.²

SALE OF AMERICAN VESSEL—NECESSITY OF NEW REGISTRY.

An American registered vessel, while at sea, sold in part to resident citizens of the United States without a bill of sale reciting her registry, and without a new registry until her arrival at her home port, does not lose her privileges as an American vessel.

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

Upon the record it appeared that this was an action upon a bond, dated the 16th of November, 1802, given by Willings and Francis and J. Miller, in the penal sum of 15,442 dollars to secure the payment of 7,720.41 dollars, being the amount of one half the duties payable on the cargo of the ship Missouri, on the 16th of May, 1803. The defendants pleaded (1) that the duties on the goods in question amounted only to 14,036.73 dollars, on account of one half of which (7,018.36 dollars) the bond was given; and (2) payment. The plaintiff replied: (1) That the ship was an American registered vessel, owned by the defendants, when she sailed from Philadelphia to Canton on the 1st of December, 1800; that after her departure she was in part sold to Jacob G. Koch and others, on the 12th of February, 1801; that on making the sale the ship was not registered anew, nor was there any bill of sale executed reciting her register; that the goods were imported into the port of Philadelphia subsequent to the sale, on the 16th of November, 1802; that the amount of the duties was 15,440.92 dollars, for one half of which, payable in six months, the bond was given. (3) Non solverunt.

The defendants rejoined that they admit the sale to Koch and others, and the importation of the goods after such sale; but they aver that the ship was at sea at the time of the sale, having her register on board, and that it was not, therefore, in the power of the defendants to deliver it up at the time of the sale; that on her arrival, the 15th of November, the defendants did execute a bill of sale

¹ [Reported by A. J. Dallas, Esq. 1 Wash. C. C. 125, contains only a partial report.]

² [Reversing Case No. 16,727. Judgment of circuit court affirmed by supreme court in 4 Cranch (8 U. S.) 48.]

to Koch and others, reciting the register, and the captain delivered up the register to the collector, whereupon the ship was registered anew, as the joint property of the defendants, and Koch and others; that on the 7th of January, 1803, Koch and others resold to the defendants, and executed a bill of sale reciting the register, last mentioned; and that thereupon the ship was registered anew as the property of the defendants, whereby she continued an American registered vessel, not liable to foreign duties, and that the domestic duties only amounted to 14,036.73 dollars, &c.

The plaintiffs sur-rejoined that they admit the ship was at sea when she was in part sold to Koch and others, but aver that she was not registered anew, nor was there a bill of sale, reciting the register, at the time of the sale, nor at the time of her arrival; that they, also, admit that the captain delivered to the collector, the register of the ship at the time of his arrival, but they insist that it was long after she had been in part sold, without being registered anew, &c.; that the registry of the ship, on the 22d of December, 1802, in the name of Koch and others and the defendants, was made after the resale by Koch and others to the defendants, when Koch and others had ceased to own any part; and that they admit that Koch and others, having previously resold, did, on the 24th of January, 1803, deliver up the register in their names, and the ship was then registered anew, as the exclusive property of the defendants, but they insist that at the time of the actual resale by Koch and others (15th November, 1801), she was not registered anew, nor did they then execute a bill of sale reciting the register; that the registry of the 24th of January, 1803, was made, under colour of a bill of sale executed by Koch and others to the defendants, long after the resale, and they had ceased to have any interest in the ship; and that at the time of the sale in part to Koch and others, of the resale by them to the defendants, of the arrival of the ship in the port of Philadelphia, and of her entry, she had ceased to be deemed a ship of the United States. The defendants demurred, generally, to the sur-rejoinder; and the plaintiffs joined in demurrer.

The general question, upon the demurrer, was whether a registered vessel of the United States, being sold, in part, to resident citizens of the United States, while she was at sea, without a bill of sale reciting the register, and without being then registered anew, was liable, with her cargo, to the payment of foreign, or only to the payment of domestic, tonnage and duties, on her return to a port of the United States? And the argument rested chiefly upon the terms and meaning of the 14th section of the registering act, which is, in these words: "And be it further enacted, that when any ship or vessel, which shall have been registered pursuant to this act, or the act hereby, in part repealed, shall, in whole or in part, be sold, or transferred to

a citizen or citizens of the United States; or shall be altered in form or burthen, by being lengthened or built upon, or from one denomination to another, by the mode or method of rigging or fitting, in every such case the said ship or vessel shall be registered anew, by her former name, according to the directions herein before contained, (otherwise she shall cease to be deemed a ship or vessel of the United States) and her former certificate of registry shall be delivered up to the collector to whom application for such new registry shall be made, at the time, that the same shall be made, to be by him transmitted to the register of the treasury, who shall cause the same to be cancelled. And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length, the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew. And in every case, in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States. And further, if her said former certificate of registry shall not be delivered up as aforesaid, except where the same may have been destroyed, lost, or unintentionally mislaid, and an oath or affirmation thereof shall have been made, as aforesaid, the owner or owners of such ship or vessel shall forfeit and pay the sum of five hundred dollars, to be recovered, with costs of suit." In the district court, judgment was rendered for the United States. [Case No. 16,727].

Mr. Dallas, U. S. Dist. Atty.

Rawle & Lewis, for plaintiffs in error.

For the United States. The general question is, whether the cargo of the ship Missouri was liable to the payment of foreign duties, on the 15th of November, 1802, when she returned to the port of Philadelphia. It will be attempted to maintain the affirmative on two grounds: (1) That she had not a register in force. (2) That she was not then entitled to be registered anew.

(1) The discussion does not turn upon the fact of American ownership, but upon the legal existence of an American register. The object of the law was to secure to American citizens, the exclusive benefit of American tonnage and navigation. The means employed were directed, to ascertain, first, the fact that the vessel was American built; and, secondly, to trace every change of ownership, in whole or in part. And the means being suited to the object, all theories, all arguments ab inconvenienti, must yield to the positive terms of the law, in this instance, as in numerous other instances of forfeiture under the navigation and revenue laws. In order to ascertain the changes, or transfers, of property, considerations respecting the transfer to an alien, whether the vessel was in port or at sea, on the one hand, and, on the other hand, respect-

ing the transfer to a citizen, whether the vessel was in port or at sea, naturally occurred. Now, no American vessel, wherever she may be, if sold to an alien, can be registered anew. In England a bill of sale to an alien is void, without the consent of three fourths of the owners endorsed upon the certificate. In America there is no such provision, but still, upon a clandestine sale of a part owner, the innocent owners are protected to the amount of their interest in the vessel. 4 Laws [Folwell's Ed.] 11 [1 Stat. 523]; Abb. 45; 13 Geo. III. c. 26; 2 Laws [Bior. & D.] p. 131, §§ 7, 16, 17 [1 Stat. 145]; Abb. 30; 26 Geo. III. c. 60, § 15. Again, an American vessel, if sold even to a citizen, must, upon every sale, in whole or in part, be registered anew, the old register must be surrendered, the bill of sale must be in writing, containing a recital of the register, and on every entry at a port of the United States the mesne transfers must be disclosed. 2 Laws [Bior. & D.] 131, §§ 14, 17 [1 Stat. 145]. In England a distinct provision is made for cases in which vessels are sold, when in port, and for cases in which they are sold while at sea. For the former it is required that an endorsement shall be made on the register, or that the vessel be registered anew, at the option of the remaining owners, without which the sale is void. 7 & 8 Wm. III. c. 22, § 21; 34 Geo. III. c. 68, §§ 15, 21. And for the latter, it is required, in order to render the sale valid, that the bill of sale shall recite the register; that a copy of the bill of sale be delivered to the commissioners; that notice of the transfer be given at the ship's port; and that the endorsement be made on the register, when the ship returns. *Id.* But in America, the only provision in the case of a sale of a vessel at sea is contained in the 14th section of the law. 2 Laws [Bior. & D.] 131 [1 Stat. 145], while the sale of a vessel in port is anxiously guarded as well by that section, as by the 14th, 11th, and 12th sections. The registering bond does not embrace the case of a sale while the vessel is at sea; the 17th section only requires a disclosure of the fact, without declaring any consequence; and, in short, it is only in the 14th section that any provision is made for a formal bill of sale, for a surrender of the old register, or for the taking out of a new one. And yet the policy which prescribes such guards against unlawful transfers, while a vessel is in port, operates more forcibly in the cases of a transfer, while a vessel is at sea. The legislative jealousy of sales abroad is manifested, indeed, by the provision, which disqualifies citizens, resident in foreign countries (with a few exceptions), from being holders of American registered vessels. 2 Laws [Bior. & D.] 132, § 2; *Id.* 134, § 4 [1 Stat. 145]. Then, if the policy of the law is general, so are the words of the 14th section of the act, embracing every sale of a vessel, in whole or in part, at home or abroad; and, to preserve the American privileges of the vessel, the requisites of the section are a new

register on the sale, a surrender of the old register, and a bill of sale, reciting the register. On the sale of the Missouri to Koch and his associates, her old register ceased to be in force. A new one might be obtained, provided, at the time of applying for it, the old one was surrendered, and a bill of sale, in due form, was produced: but, after vacating the old register by a sale, the ship ceased to be privileged, until a new register was obtained. A formal bill of sale is a *sine qua non*, in every case; and, emphatically, it is necessary in the case of a sale, while a vessel is at sea, as the act of congress provides no other guard against an unlawful transfer. Besides, why should the 17th section merely require, upon the entry of a vessel from abroad, a disclosure of the fact, whether there has been any antecedent change of ownership, if it was not to bring the case within the 14th section of the act? And if a vessel sold at home is subject to the rigor of all the regulations of the 14th section, on what principle can a vessel sold abroad pretend to an exemption? Is it not more within the policy, spirit, and language of the law to say that the vessel sold abroad shall, like the vessel sold at home, lose her privilege upon the sale; and, as the danger of unlawful sales is greater abroad than at home, she shall remain unprivileged, until the actual renewal of her register? In illustration of the argument on this point, the following authorities were cited: 3 Term R. 406; 3 Brown, Ch. 571; s. c. 5 Term R. 710; 7 Term R. 306; 2 East, 399; 1 Bos. & P. 484.

(2) Nor was the Missouri even entitled to be registered anew, at the time of her return to the port of Philadelphia. There did not then exist a bill of sale, reciting the register; and the recital might as easily be made from the record at the customhouse as from the certificate of registry carried with the vessel.

The construction now contended for has uniformly prevailed in the treasury department, and contemporaneous construction ought to be regarded in deciding upon a doubtful law. Parker, Exch. 215. Legislative construction is, also, in favor of the United States, for the very case of a vessel sold while at sea has been specially introduced into the system. 6 Laws [pub. by authority] 223, § 3 [2 Stat. 209]. The power to remit the foreign duties incurred by such sale has been vested in the secretary of the treasury, and legislative construction of a legislative act, where the words are doubtful, ought to be conclusive. Parker, Exch. 217.

For Willings and Francis. In the present case there is no suggestion of alien ownership, or *mala fides* of any kind. The meaning of the legislature, should, therefore, be perfectly clear, before a decision inflicting, in effect, a heavy penalty, on the plaintiffs in error, is pronounced. The general policy of the law is to give an advantage to the American citizen; and, if its language is at all obscure, he is entitled to the most beneficial

interpretation. In this view of the controversy, the recapitulation of a few plain rules will lead to a favourable result. (1) A vessel can have but one register at the same time. (2) The certificate of the registry is delivered to the master of the vessel, when he leaves the port, and must be deposited at the customhouse upon his return. (3) The register remains in force, until it has been legally vacated or cancelled. (4) On a change of property, whether in whole or in part, a new register must be taken out; but no new register can be granted until the old one is surrendered. (5) The execution of a bill of sale, reciting the register, will not authorize the granting of a new register, without such surrender of the old one; but both must concur for that purpose. In no part of the law is a particular time prescribed, either for the execution of a bill of sale, or for the application for a new register. The 14th section amounts to nothing more than a declaration that a vessel, which has been sold, in whole or in part, shall not enjoy the American privileges, until she is registered anew; but the word "when" is not used as an adverb of time, nor does the section require that the vessel shall be registered anew, at the moment of the transfer. If, therefore, the bill of sale is executed, and the old register surrendered, when an application is first made for the enjoyment of American privileges, the words and policy of the law are satisfied; nor will the court go beyond the words of a law to create a forfeiture. 1 Bos. & P. 483; 19 Vin. Abr. 512, pls. 8, 9; 3 Term R. 401; 2 East, 399. The 17th section of the act, however, seems to fix the sense of the legislature; for, it obviously contemplates the disclosure of a transfer, while the vessel was at sea; and if the oath, which it prescribes, is truly taken, there is no forfeiture of her American character.

The doctrine contended for, on behalf of the United States, would introduce the greatest mischiefs. Could congress mean (in an act too, for the benefit of American tonnage, and navigation) so to tie up the property in ships, that while they are at sea, they could not be sold, without incurring a forfeiture of their privileges? And is it consistent with justice and reason that the innocent shippers of a cargo on board an American vessel should be taxed with the payment of foreign duties, in consequence of successive transfers, to which they were neither parties nor privies? To these inconveniences the claim of foreign duties, in this case, adds the reproach that congress has required an impossibility; to wit, the immediate surrender of the register at the customhouse, while, in fact, it was on board of the vessel, at sea. As to a contemporary construction, it is not clearly and uniformly shown, in favour of the adverse doctrine; nor, if it were, could it prevail against the plain words and obvious meaning of the law. And, as to a supposed legislative construction of the act of

the 2d of March, 1803 (6 Laws [pub. by authority] 223, §§ 3, 4 [2 Stat. 209]), the act is merely affirmative; and even if it were declaratory of the legislative opinion, upon the previous state of the law, it could not be binding upon the judges, who must exercise their own judgments upon the law itself, independent of legislative exposition.

WASHINGTON, Circuit Justice. Although the pleadings, in this case, are lengthy, it has been agreed by both parties that the only question to be considered and decided, upon the whole record, is, whether the cargo, imported in the ship Missouri, is subject to the payment of foreign, or of domestic, duties? By the first section of the "Act concerning the registering and recording of ships, or vessels," passed on the 31st of December, 1792 [1 Stat. 287], it was provided that all vessels, registered pursuant to that law, should be denominated and deemed vessels of the United States; and all vessels of the United States are entitled, by law, to certain benefits and privileges denied to foreign vessels; so long as they shall continue to be wholly owned, and to be commanded, by a citizen or citizens of the United States. The ship Missouri was a duly registered vessel of the United States, and has always continued to be owned and commanded by citizens. She was, therefore, entitled to the benefits and privileges of her American character, when she arrived at the port of Philadelphia, in November, 1802; unless the partial sale made to American citizens, while she was at sea, deprived her of that character. Whether the transaction referred to produced such an effect, may, I think, be decided upon a joint consideration of the fourteenth and first sections of the registering act alone; though other sections will afford fair ground for reasoning and illustration. The fourteenth section is composed of several sentences, which must be distinctly, as well as collectively, considered, to ascertain the general meaning and result. The first sentence declares, that when a registered vessel is sold to a citizen, she shall be registered anew, by her former name, or she shall cease to be deemed a vessel of the United States, and that her former register shall be delivered up, at the time of applying for a new one. The second sentence declares; that in every such case of sale or transfer, there shall be a bill of sale, reciting at length the certificate of registry, otherwise the vessel shall be incapable of being registered anew. And the third sentence declares, generally, that in every case in which a vessel is required to be registered anew, she shall not be entitled to the privileges of a vessel of the United States, if she is not so registered.

It is difficult to conjecture, why, in the first sentence, the want of a new register should be declared, within a parenthesis, to deprive a vessel of her American character;

and that, in the third sentence, the same effect should be again declared, for the same cause. The latter declaration, however, is obviously tautology, for, if the former declaration can be said to have destroyed the privilege, eo instanti, when the sale was effected, it was useless and superfluous to repeat that the vessel should not, at any subsequent period, be entitled to enjoy it. The clear meaning, however, of both sentences, appears to be that the vessel should lose her American privileges, not simply upon the sale, but upon the neglect to obtain a new registry, after the sale. It is here, then, material to inquire in what manner, and on what terms, a new registry can be obtained? A bill of sale, reciting the old certificate of registry, must be produced to the collector. The old certificate of registry must, also, be surrendered. Now, though a bill of sale might be formally executed, in the absence of the ship, yet, the ship is bound, by law, to carry the certificate of her registry with her; and, consequently, it is impossible for her owner to surrender that instrument to the collector while she is herself at sea. If, however, the surrender of the certificate must be made, or the privilege must be lost, it is manifest that the law either requires the performance of an impossibility (which is not hastily to be imputed to the expression, and never to the intention of a law), or it prohibits, in effect, the sale of a ship at sea by one of our citizens to another.

There is no part of our navigation system that expressly avows this to be the intention of the legislature; and from what principle of public policy can it be inferred or presumed? The cargo is not liable to the claim of foreign duties, until an actual sale of the ship; and why should the owner of the cargo lose his privilege on account of the sale, which is an act of the owner of the ship alone? or be punished as for a fault, on account of the neglect of the owner of the ship to take out a new register; an omission which the owner of the cargo can neither prevent nor supply? Even, however, with respect to the ship, why, I repeat, should the privilege be lost, and her owner punished as for a fault, in omitting to deliver an instrument to the collector on shore, which the law directs to be kept on board her at sea? A consequence more injurious would not proceed from a sale to an alien; and yet, in the case of a sale to an alien, the act of congress declares the forfeiture of the American privilege in express words, as being incurred, eo instanti, on the sale; but no such declaration is made in the case of a sale to a citizen.

It appears to me that the 4th sentence of the 14th section of the act is also important, for it declares that "if the former certificate of registry shall not be delivered up as aforesaid, the owner, or owners, of the ship, or vessel, shall forfeit and pay the sum of \$500." And thus, if the construction con-

tended for by the attorney of the United States is correct, the law not only prohibits the sale of a vessel at sea by one citizen to another, on pain of forfeiting, at the moment of sale, the privileges of the vessel; but subjects the owner to a penalty, although it is physically impossible that he should do the thing, for the omission of which he is to be punished.

But an American vessel does not cease to be entitled to her privilege any more by the act of sale than by the act of altering her form or burthen; both cases being embraced by the provisions of the 14th section. Let us suppose, therefore, that the construction of the vessel should be altered, either in the port to which she belongs, or in any other port; would she lose her privilege before the owners could have an opportunity to apply for a new registry? And, if not, why should the privilege be lost before the opportunity occurs to make the application for a new registry, in the case of a sale? I can perceive no reason for a distinction.

As to the provisions of the 17th section, they are designed to compel a discovery of any transfers of a vessel, which may have been made during her absence from the port; in order that it might appear whether she continued to be a privileged vessel of the United States. If it appeared that she had been transferred to a foreigner, her privileges were forfeited from the moment of transfer; and if it appeared that she had been sold to a citizen, the officers of the customs were enabled, by a knowledge of the fact, to exact the foreign duties in future, should no application be made for a new registry.

I am, upon the whole, of opinion that the appellants are not liable for higher duties than are payable by vessels of the United States; and, consequently, the judgment of the district court must be reversed.

Judgment reversed.

This judgment was affirmed by the supreme court, 4 Cranch [8 U. S.] 48.

WILLING (UNITED STATES v.). See Case No. 16,727.

Case No. 17,765.

WILLINGS et al. v. BLIGHT.

[2 Pet. Adm. 283.]¹

District Court, D. Pennsylvania. 1800.

PART OWNER OF VESSEL—REFUSAL TO JOIN IN VOYAGE—EFFECT.

1. Freight is not legally demandable by recusant owner; but his share of the vessel must be secured to him.

[Cited in *Davis v. The Seneca*, Case No. 3-650; *Tunno v. The Betsina*, Id. 14,236. Cited in brief in *The Marengo*, Id. 9,066. Approved in *The Annie H. Smith*, Id. 420; *Coyne v. Caples*, 8 Fed. 639; *Scull v. Raymond*, 18 Fed. 549.]

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

2. Major part, in value, may fit out against consent of the minority; though they must communicate the design.

[Cited in *Davis v. The Seneca*, Case No. 3-650; *The Annie H. Smith*, Id. 420.]

This was a petition to permit the majority of owners to proceed with the brig *Amelia* on a voyage, after giving stipulation for value of the recusant owner's share. In this case the proceedings will shew the course originally taken by the parties.² The court was clearly of opinion that the cause was one of admiralty jurisdiction; and that it had power to authorize the majority of owners to fit out and expedite the vessel on a voyage to be designated in the stipulation, and it directed accordingly. The question of freight was accommodated; and the court gave no final judgment. An opinion was however intimated that no freight was legally demandable by a recusant owner, who would neither sell at a reasonable appraisement, nor make advances for outfit; but his share of the vessel should be secured to him, that as he gains no profit, he may incur no loss. It appeared unreasonable, that those who were prepared, and desirous to put their property into a

² To the Honorable Richard Peters, Judge of the District Court of the United States, in and for the Pennsylvania District: The petition of Willings & Francis, and Samuel S. Cooper, respectfully sheweth: That your petitioners are owners of three-fourth parts of the brigantine *Amelia*. That your petitioners are desirous of sending the same vessel on a voyage to St. Sebastians in the kingdom of Spain, and from St. Sebastians back to Philadelphia. That the remaining one-fourth part of the same vessel belongs to Peter Blight of the city of Philadelphia, merchant, who refuses to join in the said voyage, or to suffer the same vessel to sail on your petitioners' own account. Your petitioners therefore respectfully pray, that this honorable court conforming to the established law and usage of the admiralty, will grant a citation returnable at the next court day to the said Peter Blight, to shew cause, if any he hath, why your petitioners should not be admitted to give security for the safe return of the same vessel, and thereupon proceed with her on the said intended voyage. Willings & Francis, Samuel S. Cooper. August 16th, 1800.

The words "and from St. Sebastians back to Philadelphia," inserted in the libel on motion.

In the District Court of Pennsylvania. Willings & Francis, versus Peter Blight. The answer of Peter Blight of the city of Philadelphia, merchant, to the petition of Willings & Francis and Samuel Cooper, respectfully sheweth, that the respondent admits that the said petitioners are owners of three-fourths parts of the brigantine *Amelia*; but this respondent avers that before the filing of the said petition he had assigned all his property, real and personal, whatsoever and wheresoever, to George Blight, Thomas Murgatroyd, and William Cole, in trust for the benefit of his creditors, and therefore he is no longer owner of the remaining one-fourth part of the same vessel, nor entitled without the directions, authority and approbation of his said trustees to join in the voyage in the said petition mentioned, or to suffer the said vessel to sail on the said petitioners' own account. And this respondent further answering saith, that he believes his said trustees would be willing, as he himself would be, to join in sending the said vessel on any voyage

state of activity, should use their funds disproportionately for the benefit of a delinquent owner.

During the progress of the cause the following opinion was given by the court.

Whether the minority shall or shall not be compelled to sell, has not, in the opinion of the court, been here judicially determined. It is asserted (Beawes, Lex. Merc. 49) that if the majority of owners refuse to fit out, they are compellable to sell at a valuation; and so are part-owners, deficient and unable to fit out the vessel. This majority or minority, means those who hold the greater or less proportion of property. In the *Sea Laws* (3d Ed. 442), it is said, that "upon any probable design, the major part of the owners may, even against the consent, though not without the privity and knowledge of the rest, freight out their vessel to sea." "If it should so fall out that the major part, in number, protest against the voyage, and but one left that is for the voyage, yet the same may be effected by that party, if there be equality in partnership." "If it falls out that one is so obstinate, that his consent cannot be had, the law will enforce him either to hold or to sell his

for the general benefit of the owners, provided such voyage was truly and fully made known to them; but the said petitioners have not set forth to what place or places it is intended to send the said vessel after her arrival at St. Sebastians; and this respondent has been informed and avers that it is not intended that the said vessel should return from St. Sebastians immediately to the port of Philadelphia, but that she should be employed by the said petitioners in a long, hazardous and circuitous voyage, not mentioned or described in the said petition. And this respondent further answering saith, that the petitioners have not in their said petition offered to purchase the late share of the respondent in the said vessel assigned as aforesaid to his said trustees; nor have they offered to sell the said vessel and distribute the money among the owners in proportion; nor have they offered to give security for paying any part of the profits of the voyage or freight of the said vessel, to this respondent or his said trustees, nor have they offered to give security for the return of the said vessel within a limited time. Wherefore and because this court has not jurisdiction of the case, the same not being a civil cause of admiralty and maritime jurisdiction, inasmuch as the said vessel was at the time of filing the said petition and now is within the body of the district of Pennsylvania, and not upon the high seas. The respondent prays that the said petition may be dismissed with costs. &c. A. J. Dallas, Proctor for the Respondent.

And now this twenty-second day of August, 1800, it is ordered by the court that the petitioners be permitted to send the brigantine *Amelia* in the petition mentioned on a voyage from Philadelphia to St. Sebastians, and back to Philadelphia, upon their entering into stipulation in the sum of six thousand dollars with approved security, as well for the safe return of the same vessel to Philadelphia, as for the payment to the said respondent, his heirs, executors and administrators, of one-fourth of the freight* of the same vessel for the said voyage out and home, deducting all reasonable and just mercantile charges.

*Freight was inserted agreeably to the consent of the majority of owners.

proportion; but if he will set no price, the rest may rig her out, at their own costs and charges, and whatsoever freight she earns, he is not to have any share or benefit in the same. But if such vessel happens to miscarry, or to be cast away, the rest must answer him his part, or proportion, in the vessel. But if it should fall out, that the major part of the owners in value, refuse to set out the vessel to sea; there by reason of the inequality, they may not be compelled; but then such vessel is to be valued and sold: the like, whether part of the owners become deficient, or unable to set her forth to sea." The sixth article of the twenty-third section of the ordinances of Louis XIV. of France, enacts, that "no person may constrain his partner to proceed to the sale of a ship, except the opinions of the owners be equally divided about the undertaking of the voyage." Here "equally" means equality of property.

It is a principle discernable in all maritime codes, that every encouragement and assistance should be afforded to those, who are ready to give to their ships constant employment; and this, not only for the particular profit of owners, but for the general interests and prosperity of commerce. If agriculture be, according to the happy allusion of the great Sully, "one of the breasts from which the state must draw its nourishment," commerce is certainly the other. The earth, the parent of both, is the immediate foundation and support of the one, and ships are the moving powers, instruments and facilities of the other.—Both must be rendered productive by industry and ingenuity. The interests and comforts of the community will droop, and finally perish, if either be permitted to remain entirely at rest. The former will less ruinously Lear neglect, and throw up spontaneous products; but the latter require unremitted employment, attention and enterprise, to ensure utility and profit.³ A privation of freight, the fruit and crop of shipping, seems therefore to be an appropriate mulct, on indolent, perverse, or negligent part-owners. The drones ought not to share

³ The following authorities were cited and furnished by the counsel, on the questions which arose in this cause. The jurisdiction of the court of admiralty. Denied—Hardr. 473; Carth. 26. Allowed—1 Ld. Raym. 223; 2 Strange, 890; 2 Ld. Raym. 1285. Stipulation must be—1st. To secure safe return from the voyage, or pay value of share. 2d. Within a stipulated or reasonable time. Voyage must be designated. Though the vessel be put to sea without consent, the minority should be informed of the voyage intended. Moll. de J. Mar. 220; Lex. Merc. Red. 52. Freight, to dissenting part-owners. Denied—2 Ch. Cas. 36; 1 Vern. 297; Amb. 255. See 6 Vin. Abr. tit. "Mariners." Allowed—1 Show. 13, Id.; 6 Mod. 162; Fitzg. 197; Skin. 230. See, also, 1 Treatise on Commerce, p. 29. 2 Browne, Civ. & Adm. Law, p. 131.

†The cause having ended in a compromise, these authorities were not all read or examined.

in the stores, acquired and accumulated by the labour, activity, foresight and management of the bees. Although the hive may be common property, it is destructively useless to all, if not furnished with means of profit and support by industry and exertion; which should be jointly applied by all, before they participate in beneficial results. Nor should the idle and incompetent be permitted to hold it vacant and useless to the injury and ruin of the industrious and active.

This point seems not yet to be so decided as not to admit of question. The authorities in the British books, lead to opposite conclusions; and leave the subject liable to controversy

Case No. 17,766.

WILLINGS et al. v. CONSEQUA (three suits).

CONSEQUA v. WILLINGS et al. (two cases).

[Pet. C. C. 172.]¹

Circuit Court, D. Pennsylvania. Oct. Term, 1815.

SALE OF TEAS—INFERIORITY IN QUALITY—DAMAGES—HOW SETTLED—INTEREST.

1. The public sales of teas, in Holland, by the Asiatic Company, furnish evidence, but not conclusive, of the quality and value of teas disposed of at such sales; and the average price, brought by teas of the same quality and description, and not of that brought by all the teas of the same kind, affords this evidence.

2. Quære, if the usage in Canton is, that when teas are sold by samples, the examination and receipt of teas, delivered to a supercargo, after the samples have been furnished, discharges the Hong merchant from responsibility for quality. If this is the usage, the purchaser, in order to sustain a claim for damages, should prove that the teas furnished, are worse than the samples.

3. The rule of law, as to damages, is, that the sales of the plaintiff's teas, compared with those of similar teas, should be considered as ascertaining the rate of damages to be applied to the first cost of the teas in Canton. This rule is similar to that in case of insurance, where the rate of loss is ascertained from the prime cost of the articles lost.

[Cited in *Youqua v. Nixon*, Case No. 18,189; *Cheongwo v. Jones*, Id. 2,638.]

4. The adjustment of a claim for damages, in a particular case, upon other principles, does not exclude the Hong merchant from the benefit of the general rule; but such an adjustment may be opposed to the evidence of witnesses, to settle claims by damages on different principles.

5. It is generally in the discretion of the jury to give interest, in the name of damages.

6. Interest ought not to be allowed on unliquidated and contested claims, sounding in damages.

[Cited in *Barrow v. Reab*, 9 How. (50 U. S.) 371; *The Isaac Newton*, Case No. 7,090.]

[Cited in *Hinckley v. Beckwith*, 13 Wis. 37.]

The jury were impanelled to try five actions; three brought by Willings and Francis, and Willings and Francis and Curwen, and Willings and Francis and Kuhn, against Consequa; and two by Consequa against Willings.

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

and Francis. In the latter suits there was no dispute. The other suits in which Consequa was defendant, were brought for breaches of parol agreements, made at Canton by Consequa; to deliver to the agents of these plaintiffs, cargoes of teas of certain denominations, and of the best qualities; one of the cargoes, viz. that shipped in the Bingham, to be suited to the Dutch markets. Two of the cargoes; viz. those of the Bingham and Ganges, were sold at Amsterdam by the Asiatic Company, at their public sales; and the third cargo, sent in the Asia, was sold in Philadelphia. To prove the inferior quality of the teas, or of some of them, which were sold at Amsterdam, the same kind of evidence was given, as in the case of Gilpins v. Consequa [Case No. 5,452]. As to the cargo of the Asia, the evidence of persons acquainted with the teas, who examined them, was relied upon to prove their bad quality. Other evidence was given, upon which the points of law in this case arose, and which is stated, in the charge of the court.

WASHINGTON, Circuit Justice. The contracts upon which these suits are brought, have been fully proved; that they have not been fulfilled by Consequa, can hardly be denied. As to the cargo of the Asia, in addition to the acknowledgment of Consequa, that it was not of good quality; it was examined thoroughly, at Philadelphia, by unexceptionable judges, who have stated to you its quality and relative value, to other teas, then in market. As to the cargoes of the Bingham and Ganges, sold at Amsterdam by the Asiatic Company, at their public sales; it cannot be denied, that the prices at which those teas were sold, compared with the prices of other cargoes of good quality, sold at the same periods; furnish, at least, some evidence of their quality. It appears, that from the time of the arrival of a cargo of tea, in the Texel, it is taken under the care of the East India Company; is kept in their warehouses; samples of each chest are taken out and examined, and finally that those sales are attended by merchants, from different parts of Europe, amongst whom there are no doubt many competent judges of the article sold. It would seem reasonable therefore to conclude, generally, that the prices bid at those sales, for different parcels of teas of the same denomination, must bear some proportion to their quality; and consequently afford some evidence of that fact. In addition to this evidence, the jury have the testimony of a distinguished tea broker, who speaks very unfavourably of those teas, and considers them to be only of second or third quality.

But, although sales at auction may, in general, afford some evidence of the comparative value of the article sold, still as a standard of quality, they may not always be satisfactory, much less conclusive. The prices bid, may frequently depend upon the state of the market, or the age of the teas, either positively or

relatively, to other teas, sold at the same time, of superior quality and fresher. In forming their opinion of the disproportion between the plaintiffs' teas, and the best teas of similar denominations, sold at the same time; it will be proper for the jury to take all these circumstances into consideration, and, after duly weighing them, to fix the standard, by which the qualities of the teas delivered by the defendant to the plaintiffs ought to be estimated. This may be either the average of the highest prices, or something below it, as the jury may think just. If teas originally of good quality, do not injure by being kept as long as those were in the warehouses of the Asiatic Company then that circumstance will not merit their regard. One thing will be recollected, which is, that in comparing these teas with others of like denominations, sold at the same time; the average of the highest prices of these teas, or of such as do not greatly vary from each other, should be taken; except, so far as may be thought necessary to fix upon a lower sum, from the considerations before mentioned. The reason of this is, that if the average of the various prices bid for these teas, is taken; in comparing the plaintiffs' teas, which, by the contract, ought to have been of the first quality, with teas confessedly inferior, so far as the inferior teas composed the quantity from which the average is taken, and such must necessarily have formed a part of the quantity; it would not be a test of quality.

The next question is, whether the plaintiffs, by the conduct of their agents, dispensed with a strict performance of these contracts, on the part of Consequa. It is contended by the counsel for Consequa, that those agents, instead of relying upon their contracts, selected teas as their own judgment dictated, after trying the different samples sent to them: and that by the usages at Canton, the Hong merchant is, in such cases, only bound to provide a cargo, corresponding with the samples so approved of by the purchaser. This usage is attempted to be proved by the testimony of three American gentlemen, who have resided at different periods at Canton; and, if they are correct, it would follow, that whenever the purchase is made by samples, the purchaser, to maintain his action against the Hong merchant, must prove that the cargo was of an inferior quality to the selected samples. But, if the usage be as stated by these witnesses, it is difficult to account for the settlement made by Consequa in relation to the cargo of the Ganges; samples of which, were examined and approved of by the supercargo of that vessel. In this settlement, he gave up nearly nineteen thousand dollars, which the plaintiffs had no right to claim from him, according to the alleged usage. May not this conduct of Consequa, be considered as evidence of the usage upon this point, equal if not superior, to that of the witnesses who have testified respecting it? No man ought to be better informed than Consequa, in relation to the usage, in a case so frequently occurring in

the particular business in which he was engaged. If the jury should consider the subject in this light, and that it is better evidence of the usage, than that given by the three witnesses; then the circumstance of the plaintiffs' agents having purchased by samples, ought not to operate against the plaintiffs. But if, on the other hand, they are of opinion, that Consequa's conduct amounted to nothing more than a waiver of a legal right, in that particular case; then it cannot affect his rights in any other case, and the rule of law, which has been stated, must apply. It is however to be recollected, that that rule, however well established, does not apply to the cargoes of the Bingham or of the Asia, both of which were taken, exclusively, upon the judgment and selection of Consequa.

The last question is, what ought to be the rule by which the damages for the breaches of those contracts should be assessed? The rule laid down in the case of *Gilpins v. Consequa*, was, that the sales at Amsterdam of the plaintiffs' teas, compared with those of other teas of similar denominations, were to be considered as furnishing, not the amount of damages sustained by the plaintiffs, but the rate of the damages, to be applied to the first cost at Canton. Thus, if the difference between those sales was 20 or 50 per cent., to the disadvantage of the plaintiffs' teas, Consequa would have to pay, after that rate, as applied to the first cost at Canton. With this rule the court finds no cause to be dissatisfied; the reason of it is obvious. The contract is, to deliver teas of the best quality at Canton. If it be not complied with, the price of such teas, at that place, is the just measure of the damage sustained by the plaintiffs. For the seller has nothing to do with the foreign market, to which the article may be sent: he has no control over the property or its destination; and receives no premium or compensation whatever, to induce him to run any risque in relation to such a market.

The question is not varied, by the circumstance of the Holland market being referred to in the contract. This did not confine the plaintiffs to that market, but they were at liberty to sell where they pleased; and still the question would be, were the teas of the best quality, and were they fitted for the Holland market? These questions could as well be settled at Copenhagen or Philadelphia, as at Amsterdam. This case certainly is not as strong, as that of insurance, in which, if a loss takes place, it is settled according to the prime cost and charges; although the understanding of the insurer is, that the goods shall go safely to the port of destination, and to indemnify the insured in case of loss. The cases stated by the plaintiffs' counsel, to prove the incorrectness of the rule laid down in this case, are entirely dissimilar from it. The case of general average, proceeds upon a principle entirely different. The claims for compensation by the person whose goods have been thrown overboard, for the safety of the residue of the cargo,

is a charge upon the cargo so saved; and consequently upon its value at the place of destination. The owner of the goods saved, ought not to gain, nor ought the owner of the goods thrown overboard to lose, by an act performed for the benefit of all; which would certainly happen, if the former received the full value of his goods, at the port of destination, and paid the loss according to the prime cost of the articles thrown overboard: for this reason, the whole cargo is valued at the price it would bring at the port of discharge, and the nett amount, after deducting charges, including also the nett value of the ship and freight, furnishes the sum which is subject to contribution. The other cases put by the counsel, are those of the carrier of goods, who, it is said, must pay the value of the goods at the place of destination, in case they are lost, or of a failure to deliver goods contracted to be delivered at a certain time and place; in which case the price of the articles at the time and at the place of delivery, is to be the rule of compensation.

Admit, for the sake of the argument, that the law, in relation to the carrier, is as the plaintiff's counsel contended for; still it differs from the present, in this essential circumstance; in that case, the delivery is to be made abroad, and in this it was to be made at Canton. If in both the supposed cases, the price is to be regulated, by the foreign market, where they were to be delivered, it would follow, that the teas in this case, should be referred to the value at Canton, where they were to be delivered.

But although the general rule is such as has been stated, still the question ought to be decided, according to the law, or usage at Canton, so far as we have any information respecting it; but no evidence has been given, directly upon this subject. In such a case, is it not fair, to consider Consequa's conduct, as evidence of the usage? It is reasonable to conclude, that no person can be more familiar with the usage at Canton, in relation to this subject, than a Hong merchant, who is in the constant habit of making contracts of this kind; and who, no doubt, has been frequently called upon, to settle claims for the breach of them. If in such cases, the usage at Canton be, to apply the rate of loss, ascertained by the sales at the foreign market, to the first cost; it is inconceivable, that Consequa would have waved the benefit of that rule, and settled as he did, the loss on the congo teas, part of the cargo of the Ganges, by paying the difference between the sales of those teas, and the average of the high priced congo teas, sold at the same time and place. Yet he did so, without objection, and voluntarily promised to settle the loss upon the cargo of the Asia, by the same rule. It is certainly possible, that this conduct might proceed from an excess of liberality, or from ignorance, but neither is probable.

If this supposition, however, be well founded, and the law at Canton, be similar to what I take to be the general law, then, the waving of a legal right, by Consequa, in one case, cannot bind him in any other case; whatever

promises he may have made on the subject. But if the jury should consider his conduct, as evidence of the law, and usage at Canton; then it is obligatory upon him, and they ought to decide accordingly. It may be proper to observe, that the usage which has been proved, of returning a box of tea which has been imposed upon the purchaser, in violation of the contract, and recovering two boxes of good tea, in lieu of it, seems strongly to countenance the presumption, that a higher rate of compensation is allowed, than would result from the application of the general rule, laid down in the case of *Gilpins v. Consequa* [Case No. 5, 452].

As to interest upon the claims of the plaintiffs, I can only repeat, what the court stated, in the case just mentioned; that it is generally, in the discretion of the jury, to give interest in the name of damages; although it is not conformable to legal principles, to allow it on unliquidated and contested claims, sounding in damages.

The jury found verdicts favourable to the plaintiffs' claims in all the cases, from which resulted a balance of five thousand dollars, upon the whole account against Willings and Francis.

[NOTE. New trials were ordered in these cases at the April term, 1816. Case No. 3,128. For a report of the proceedings on the new trial, see *Id.* 17,767.]

Case No. 17,767.

WILLINGS et al. v. CONSEQUA (three suits).

CONSEQUA v. WILLINGS et al. (two cases).

[Pet. C. C. 301.]¹

Circuit Court, D. Pennsylvania. Oct. Term, 1816.

COMPETENCY OF WITNESS—CONTINGENT INTEREST—JOINT DEBTORS—EFFECT OF JUDGMENT AGAINST ONE—RELEASE—PARTY AS WITNESS—ASSIGNMENT OF INTEREST.

1. K. and another, as the agents of W. and F., gave a note for 22,000 dollars, to C. for merchandize, in which K. was interested. C. brought a suit against W. and F. on the note, stating it to be given by the procurement of their agents K. and another. It was agreed, that whatever damages might be recovered in a suit brought by W. and F. against C. should be set off against the note. It was alleged, that K., as a dormant partner of W. and F., might be sued, as such, by C., if the note should not be discharged by a recovery of damages from C., in the suits of W. and F., and if W. and F. should be unable to pay the note; and that he was therefore interested to increase those damages. The interest of K., in the event of the suits between W. and F. and C., is too remote to exclude him from being a witness; the objection is to his credit, and not to his competency.

[Cited in *Gant v. Reed*, 24 Tex. 49.]

2. When two or more persons are liable for a simple contract debt, a judgment obtained against one, is an extinguishment of the claim on the other debtors, in the same manner, as a bond, given by one of two persons liable on a

simple contract, is an extinguishment of the original debt.

[Cited in *Ferrall v. Bradford*, 2 Fla. 508. Cited in brief in *Moffett v. Bowman*, 6 Grat. 231. Cited in *Brown v. Johnson*, 13 Grat. 650, 651; *Ward v. Motter*, 2 Rob. (Va.) 565.]

3. A release to one of two joint obligors, extinguishes the obligation, and equity will not relieve in such a case, although it is most apparent, the extinguishment was not intended by the parties.

[Cited in *Reed v. Shaw*, 1 Blackf. 245, note.]

4. The general rule of law is, that a party to a suit, cannot be a witness. This rule is founded on the interest the party has in the suit, and when that interest is removed, the objection ceases to exist.

[Questioned in *Levy v. Burley*, Case No. 8, 300; *Yearsley v. Brookfield*, Id. 18,131.]

[Cited in *Sinks v. English*, 3 Blackf. 138; *Preble Co. Bank v. Russell*, 1 Ohio St. 318. Cited in brief in *Onion v. Fullerton*, 19 Vt. 319; *Loomis v. Loomis*, 26 Vt. 202.]

5. One of the plaintiffs in a suit may be examined as a witness, who had assigned all his interest in the subject in controversy, to his co-plaintiff, after the costs of the suit, as estimated by the clerk of the court, had been deposited with the clerk and an offer made to pay to the clerk any further sum, which he or the counsel for the defendant might require to cover the costs, and a release executed by the remaining plaintiffs, of all claims on him for the costs which had or might accrue, and for any claims for contribution to any sum which the defendant might recover against those who executed the release, and also a covenant, by the remaining plaintiffs, to indemnify him against all costs, charges, and damages which might accrue, in prosecuting the suit.

[Disapproved in *Stein v. Bowman*, 13 Pet. (38 U. S.) 219; *Bridges v. Armour*, 5 How. (46 U. S.) 94.]

[Cited in *Manchester Bank v. White*, 30 N. H. 460; *Evans v. Dela*, 35 Pa. St. 453; *Ward v. Motter*, 2 Rob. (Va.) 556.]

6. The clerk of the court, is a competent judge of the quantum of costs which can be recovered in an action; and money paid to him on account of the costs of a suit, is in the safe keeping of the court and subject to its disposal.

7. The court will not look to remote contingencies, in order to disqualify a witness from giving testimony.

8. The testimony of a witness, taken under a commission directed to five persons or any one of them, cannot be read in evidence, if another person than the commissioner, and who was not named in the commission, assisted in taking the examination of the witness.

[Cited in brief in *Patterson v. Greenland*, 37 Pa. St. 511.]

9. Quere. Whether the principles of the law of evidence, relating to sales made by a broker, as between a vendor and vendee, are applicable to a case between vendee and warrantor.

10. The deposition of a witness, on the part of the plaintiff, who had given certificates upon which a recovery was expected to be obtained, and who expected a commission of one per cent., on the amount to be recovered from the defendant, but which certificates were not evidence in the cause, is admissible.

11. Correspondence, between the parties in a cause and others, called for by notice, but which the party who called for it does not read, cannot be read by the party producing it.

12. In an action for damages for a breach of contract, no evidence of fraud is admissible,

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

and if, from evidence given in the course of the cause, the jury should be disposed to infer fraud, they should not permit it to influence their verdict.

[Cited in brief in *Born v. Shaw*, 29 Pa. St. 290.]

13. The laws and usages of foreign countries where contracts are made and to be executed, and which respect the validity, construction, and performance of those contracts, are regarded here, as rules of decision.

14. In a contract for the sale of articles without warranty, if there be no fraud on the part of the seller, he is not answerable for the quality of the articles.

[Cited in *Wetherill v. Neilson*, 20 Pa. St. 452.]

15. If the vendor warrants the quality of the articles he sells, he is bound to deliver them of the stipulated quality, and the examination and approbation of some of the articles by the vendee, when they are delivered, does not amount to a waiver of the contract.

16. If the vendee cannot examine the articles, but purchases them from an examination of samples, there is an implied warranty on the part of the seller, that the articles shall correspond with the samples. But, an examination of samples, when there is an express warranty, is not a waiver of the warranty.

[Cited in *Borrekins v. Bevan*, 3 Rawle, 44.]

17. The custom at Canton by which the sales of teas are regulated.

18. Usage at Canton by which compensation is made to purchasers of teas, which are afterwards found inferior to the quality they were represented to be at the time of sale.

19. It is the usage at Canton, to add interest on the amount of the articles sold, and for which compensation is made, to the other charges.

20. Where an attachment is laid on money in the hands of a third person, interest ceases from the time of the attachment until it is dissolved; but when a debtor, who is also a creditor, lays an attachment in his own hands, interest is chargeable, during the continuance of the attachment.

[Cited in brief in *Lyman v. Orr*, 26 Vt. 121.]

[21. Cited in *Taylor v. Carpenter*, Case No. 13,785, to the point that a person from abroad suing in this country is to enjoy no greater nor less rights than citizens.]

These causes, having been tried at the October sessions of the court, in 1815 [Case No. 17,766], and new trials having been ordered at the last sessions (*Consequa v. Willings* [Id. 3,128]), again came on for trial. In addition to the evidence given at the former trial, Mr. Kuhn was offered as a witness, and was objected to on the ground of interest, he being one of the plaintiffs in the suit of *Willings and Francis and Kuhn*, which the jury were charged to try. To get rid of this objection, the plaintiffs produced an assignment executed by the witness, dated a few days past, to *Willings and Francis*, his co-plaintiffs, of all his part and interest in their claim against the defendant in the suit wherein he is a party, and of whatsoever sum may be recovered in that action, with a power to the assignees, to use his name in the action. They also produced three releases to him, bearing date on the same day with the assignment, one from the Messrs. *Willings*, and the other from the administrator of Mr. *Francis*, who

had died since the last trial, from his liability for the costs which had accrued, or might thereafter accrue in the said action, and from all claim for contribution to any sum, which the defendant might recover in his actions against the releasors; the last release was given by Mr. *Thomas M. Willings* to the witness, from all claims and demands against him, by reason of the aforesaid assignment, or in case the claim against the defendant should not be established or recovered; and from all costs, charges, and damages which have accrued, or may accrue, in prosecuting the said suit or claim, with a covenant to indemnify him against the same. The costs of the suit up to this time, including those of this trial, and more than the amount thereof, were stated by the clerk to have been paid to him by Messrs. *Willings*; and the counsel for the plaintiffs, Messrs. *Willings*, offered on their behalf, to pay to the clerk any additional sum, which the defendant's counsel might require, and further, to give satisfactory security, for payment of all the costs of this suit. This deposit of the costs, was made before the jury were sworn, and the action was marked, in the clerk's docket, to be for the use of the Messrs. *Willings*.

It was contended, by the defendant's counsel, that the witness is still incompetent: first, on the ground of interest, and secondly, as being a party on record, in the suit in which he is to testify.

As to the first point, it was argued, that even if the witness had not signed the note to *Consequa*, upon which one of his suits against *Willings and Francis* is founded, yet as he was jointly interested in the credit, as a dormant partner with them in the loan of which the note is evidence, he is interested so to increase the damages claimed by *Willings and Francis*, as that thereby the claim on the note may be extinguished, or its amount diminished as much as possible. Because, if *Consequa* should recover the whole or any part of the note, in his present action against *Willings and Francis*, and not be able to obtain satisfaction from them, he might afterwards sue the witness for the money, as a dormant partner. If, on the other hand, *Willings and Francis* should recover damages, so as to extinguish or in part discharge this note, their release would discharge the witness from their claim for contribution.

Second. It was contended, that Mr. *Kuhn*, who is on record a party to the suit, cannot be a witness, and that no assignment of his interest can make him competent; not only because he still remains a party on the record, but because he is liable to the defendant, *Consequa*, for costs, notwithstanding the deposit which has been made. The costs of this court, cannot be ascertained, as it is impossible to say when the cause may end; and if it should go by writ of error to the supreme court, the witness will be liable to *Consequa* for the costs of that court, which the clerk of this court cannot ascertain. 2 Hen. & M. 467; 3 East, 7.

On the other side it was answered: First,

that the suit on the note for 22,000 dollars is brought against Willings and Francis only, and whether the plaintiff succeed or fail in his action, the judgment will be a bar to another suit against them united with the witness, and he may plead it in abatement, if he is sued alone. Second, Kuhn is a nominal party, since the assignment and deposit of the costs, and the offers which have been made, remove his interest in relation to that subject. 3 Bin. 306, 478, 481, 600; 1 Phil. Ev. 57; 2 Bay, 93.

WASHINGTON, Circuit Justice. The objections to the competency of this witness, are—first, that he is interested in the event of the suit; and secondly, that he still remains a party to the suit, notwithstanding the assignment.

First. The facts which form the basis of this objection, are as follows: Kuhn and Wharton, as supercargoes of the Asia, gave their note to Consequa, for 22,000 dollars, on which note one of these actions is brought, as upon a note given by Willings and Francis, by the procurement of their agents. The parties have agreed that these five suits should be tried by one jury, and that whatever damages shall be recovered by Willings and Francis, shall be set off against the sum due by them to Consequa, for which his two suits are brought. The argument then is, that as Kuhn is a dormant partner with Willings and Francis, in relation to the 22,000 dollars, and consequently may be hereafter liable to be sued as such for that sum, unless it should be discharged by a recovery of damages sufficient to extinguish the claims in the suits against Consequa, it is the interest of Kuhn to shelter himself against Consequa, by increasing the damages so as to discharge the note altogether, or at least to diminish its amount as much as possible.

Now there are two sufficient answers to this argument. The first is, that the interest of this witness, as stated by the defendant's counsel, is too remote and contingent to furnish an objection to his competency, whatever weight it may have to his credit. If Willings and Francis should not recover damages to extinguish this note, then a judgment must go against them, for its full amount, or for so much of it as the damages may not discharge; and if they should then be unable to satisfy that judgment, then Kuhn may be exposed to the chance of an action as a dormant partner with Willings and Francis. There are too many contingencies in the way, before Kuhn can be called upon, to make this a valid objection to his competency. But, secondly, if these contingencies should all happen, and Consequa should bring an action against Kuhn separately, he may be defeated by a plea of abatement, and the judgment in this action, for or against Consequa, would be a bar to any suit that he might bring against Willings and Francis and the witness. The judgment would as completely extinguish the original debt, as if

Willings and Francis had given a bond for it, which it would clearly have done, the rule that a bond given by a stranger, is no extinguishment of the simple contract of the real debtor, not applying to a case where it is given by one of two or more joint contractors.

But it is said, that though Consequa might have no remedy at law against Kuhn, he might be relieved in equity, by showing his ignorance that he was a dormant partner when he took the note or instituted the suit. I by no means admit that he could be relieved in that court. If the difficulty I am about to mention were out of the case, it would still depend upon a variety of circumstances, not known to this court, whether Consequa could make out a case fit for equitable interposition. By his own shewing it is certain that he did not give credit to Mr. Kuhn, and whether he knew that he was jointly concerned in that transaction or not, is unknown to this court. At all events, it was in his power to have dismissed this suit, though at the time it was brought he may have been ignorant of the partnership, and have instituted another against all the partners, after he was informed who they were; and his failing to do so, would indispose a court of equity to open its doors to him, after he had permitted those of a court of law to be closed against him. Where a release is given to one of two joint obligors, the obligation is extinguished at law as to all, and although it is most apparent that such was not the intention of the obligee, yet equity will not relieve. At all events, the liability of the witness to a claim, to be asserted by Consequa in a court of equity, is under all the circumstances of this case, too remote to affect the competency of the witness.

Secondly. It is objected, that he is a party plaintiff on the record. The general rule of law certainly is, that a party to a suit cannot be a witness. But it is equally so, that the interest which that party has in the event of the suit, both as to costs and the subject in dispute, lies at the foundation of the rule, and when that interest is removed, the objection ceases to exist. In this case, the assignment of Kuhn to Willings, has terminated his interest in the subject for which the suit is brought. As to the costs, they are paid by the assignee, now the only real plaintiff on record. But it is said Kuhn is still liable to an execution for the cost should Consequa recover; that the sum paid to the clerk, may be misapplied by him; and the quantum of costs, to this time, to future times to which this cause may continue in this court, and the costs of the supreme court, should it go there, cannot be now ascertained. To these objections it may be observed, that the clerk is a competent judge of the quantum of costs which can be recovered at this time, and the money paid to him is in the safe keeping of the court, and

subject to its disposal. Should future costs be incurred here, by another trial taking place, and this witness should then be offered, it will be time enough to inquire what further advance will be necessary. As to the costs of the supreme court upon a writ of error, which may be incurred in case such proceedings should take place, the court cannot look to such remote possibilities in order to disqualify the witness to give evidence.

It is always to be remembered that this opinion is given upon these facts: that more than the legal costs of this suit have been deposited by Mr. Willing, with the clerk; that Mr. Willing has offered to deposit any further sum which Consequa's counsel may require, and further to give satisfactory security to pay all the costs which have, or may be incurred. If after all this, the opposite party chooses to reject offers made with a view to remove all objections, it would ill become the court to allow the mere phantom of an objection, to prevent the examination of a witness who is substantially divested of all interest. The case of *Steele v. Phoenix Ins. Co.*, 3 Bin. 306, is in point, and I yield my entire consent to the principles there laid down. I shall not be afraid of adding another precedent, leaving it to the supreme court, where I perceive this cause is likely to go, to correct this court, if I am wrong.

A few words as to the policy of the doctrine on which this decision is founded. It is said that a plaintiff, knowing the injustice of his cause, and hopeless of success, may be induced by tempting offers to assign his interest to his co-plaintiff in order to qualify himself to be a witness, and after all, the consideration may be only feigned, and he may still continue a party in expectancy; and at all events he will testify under impressions long made and not easily to be eradicated by such an operation. All this may be true, but might not the very same reasons be urged against the competency of every witness, who has once been interested though not a party to the suit, but whose competency is restored by a release? If there be mala fides in the one case, may it not as well exist, in as strong force, in the other? May not interest make equally strong impressions in the one case, as in the other, and yet the objection come only to that of a bias in the mind, which may affect the credit of a witness, but not his competency? After all, the only safeguards in either case are, an examination of the witness on his voir dire, to test the reality and good faith of acts which rendered him disinterested, and the right which still rests with the jury to judge of his credit. The witness therefore is to be admitted.

The deposition of Mr. Miller, taken under a commission to five persons at Buenos Ayres, or to any one of them, three nominated by the plaintiffs and two by the defendants, was offered in evidence. It was objected to, because it was taken by one of the persons named in

the commission, in conjunction with the American consul at that place, who certifies that all the persons named in the commission but one were dead or removed, that the commission was delivered to him, and that he convoked the remaining commissioner and the witness before him, and that the examination of the witness was taken by himself and that commissioner.

WASHINGTON, Circuit Justice. This deposition is inadmissible, because the examination was taken in conjunction with a person not named in the commission, who voluntarily and unnecessarily obtruded himself into the business. The deposition of Mr. Voute, the tea broker at Amsterdam, which was read at the former trial without objection, was now objected to on the ground of interest. This was the witness relied upon by the plaintiffs, in part, to prove the qualities of the teas of the Ganges and the Bingham, which were sold at that market by the Dutch Asiatic Company, and the prices at which those, and other teas of the best quality were sold. The evidence given in support of the objection, was a letter from Hope & Co. to the plaintiffs, dated 18th of April, 1809, inclosing the certificates of this witness as to the qualities and sales of these and other teas. In this letter the writers say, that "Mr. Voute might charge you one per cent., on the amount of the sales of these cargoes, but he is willing to receive at that rate on what you may recover on these certificates, of which you will advise us, that we may settle with him for the same." Another witness, L. Estapre, states in his deposition, that these certificates were sent to the plaintiffs on their request, made in 1807. It was contended that the witness was interested on the event of the cause, to increase as much as possible the damages which may be recovered, because that would increase his compensation. *Gilb. Ev.* 124; *Phil. Ev.* 34-57; [*M'Veaugh v. Goods*] 1 Dall. [1 U. S.] 62; [*Innis v. Miller*] 2 Dall. [2 U. S.] 50; 4 Mass. 518. It was answered, first, that no evidence was given that the offer of Voute mentioned in the above letter was accepted; second, that the compensation spoken of is one per cent., not on what the plaintiffs might recover in an action, but what they might recover on the certificates, which have not and could not have been given in evidence in this action. Besides, this witness acted as a broker at the sale of the teas referred to in his deposition, and that in that character he is not disqualified to give evidence, though his commissions are to depend on the sum to be recovered. 2 H. Bl. 590; 2 Burrows, 497; 1 *Phil. Ev.* 100.

WASHINGTON, Circuit Justice. I shall consider Hope & Co. as the agents of the plaintiffs, and authorised to make this contract with the witness; intending to decide this question upon the objection of interest, I shall not stop to inquire, whether the principle of law in relation to sales made by a broker, as between vendor and vendee, is or

is not applicable to a case between vendor and warrantor. If the contract then was, as the defendant's counsel have contended for, there can be no doubt but the objection would be well taken; because, if, in consideration of furnishing the certificates, the plaintiffs were to pay one per cent. on the sum to be recovered, the witness would be interested in the event of the cause, since he might in a suit against the plaintiffs, give the verdict in evidence to show how much was recovered, on which his commission was to be charged. But this was not the contract. It was to pay a commission on the amount which the plaintiffs might recover on the certificates. These certificates cannot be given in evidence in this cause, and of course nothing can be recovered upon them. It follows, that the contract is not obligatory on the parties. In an action on the contract, it would be necessary to state it specially, and aver that so much was recovered on the certificates, in which, the evidence of a recovery in this action, would be insufficient to prove the breach. There can be little doubt as to the intention of the parties, which was, that the certificates should and would be used as evidence to induce Consequa to pay without a suit, or to be used, if coercion was necessary, if by law they could be. The deposition therefore is admitted.

The same points were made by the counsel, as on the former trial, and the evidence was nearly the same, except that the correspondence between the plaintiffs and their supercargoes was not read at this trial by the counsel for Consequa, although notice had been given to the plaintiffs to produce it, they declined however to read any part of it, and of course the plaintiffs could not read it. The material parts of the evidence are stated in the charge.

WASHINGTON, Circuit Justice. As the debts claimed by Consequa, are not disputed, I shall notice only the cases in which he is defendant. These actions are founded upon verbal contracts, for breaches of which the jury are called upon to give such damages as they may think the plaintiffs justly and legally entitled to. Our enquiries are naturally directed to the following points. What are the contracts laid in the declaration? How are they proved? How have they been fulfilled? And if not fulfilled, what damages are the plaintiffs entitled to? The court has already declared, that no evidence of fraud could be given in these actions, and none has been given, and if from the evidence, the jury should be disposed to infer it, it ought not, in any shape, to influence their verdict. *Gilpins v. Consequa* [Case No. 5,452].

The jury are charged with three actions for damages, and these respect the cargoes of the Asia, the Bingham, and the Ganges. I shall consider them in their order.

The Asia. The contract laid in the declaration is, that the defendant agreed to furnish for this ship, a cargo of teas of the first qual-

ity fitted for the Philadelphia market. This is precisely proved by Mr. Kuhn and Mr. Wharton, the supercargoes of this vessel. They state, that this contract was made in 1806, and that they were to pay for the teas, as much as other security merchants were to receive for similar teas that season. That muster chests were, according to custom, sent to their factory to examine, which they rejected; and, that after many repeated but vain attempts to make a selection, they were persuaded by the defendant to rely upon him, and that he would furnish a cargo of teas of the best quality. A cargo was accordingly put on board, without examination, which arrived at this place the following spring. A large proportion of this cargo was paid for in cash, and a credit of 16 months was given for the balance to the amount of 60,000 dollars, which credit, it was stated by the witnesses, was offered by Consequa not solicited by them.

The claim made in this action, is on account of the bad quality of 628 quarter chests of young hyson, and 309 of hyson tea. The former were examined in September, 1808, by a person acquainted with this article, who states that they were as indifferent as any teas he had ever seen, that they were worth no more than eighty-five cents per pound, at which he purchased them, but not suiting this market, he was obliged to send them to New York. He further states, that first quality teas of that denomination, were worth at the same time from one dollar ten cents to one dollar fifteen cents per pound. The 309 chests, were examined by competent judges in May, 1809; and they state, that 280 of them were inferior to fair market teas by ten cents per pound, and the remainder by five cents; and that fair market teas, are in value, fifteen per cent. below teas of the first quality. In addition to the above evidence, the acknowledgment of the defendant has been proved, made in 1807, that these teas were not so good as he agreed they should be.

The Bingham. The contract laid and fully proved as to this vessel, is, that the defendant promised to furnish a cargo of teas of the first quality, fitted for the Amsterdam market. The cargo, except 600 chests of congos, was selected by the supercargo, from samples sent to him to examine, and this selection was approved of by the defendant. This cargo was brought first to Philadelphia, and without being unladen was dispatched to Amsterdam. The evidence to prove the inferior quality of the 1,917 quarter chests, and 800 boxes of congos, for which damages are sought in this action, is derived from the deposition of Mr. Voute, the tea broker at Amsterdam, and the printed list of the sales of these teas by the Dutch Asiatic Company, compared with the sales of other teas made at the same time. The deposition states, that they were of very inferior quality and that the inferiority of price, compared with the price of other teas, is to be attributed to that

cause. It appears in evidence, that whenever the East India Company at Amsterdam, permit the importation of teas by others they are taken possession of by the officers of the company, on their arrival in the Texel. They are then conveyed in lighters to Amsterdam, and deposited in the warehouses of the company; samples of each chest are taken out by the broker, some weeks previous to the sale, for the purpose of being shown; printed lists of the teas to be sold, are issued, and by the merchants there, are distributed through the north of Europe. It is highly probable, therefore, that these sales are attended by competent judges of the qualities of this article, and that the prices given, are in a great degree apportioned to those qualities.

The Ganges. The contract laid in the declaration, as to the cargo of this ship, is the same as that of the Bingham, but the proof of it is not equally strong. The jury have not the testimony of Mr. Miller, the supercargo, and the plaintiffs are therefore obliged to resort to other evidence, in order to prove this contract. It is for the jury to judge, whether the proof is sufficient to satisfy their minds.

The first piece of evidence relied upon is that given by Mr. Wilcocks, who states, that Consequa agreed with Miller, to deliver him a cargo for this vessel of good teas; but good teas, and teas of the first quality are very different, and consequently, this proof is wholly insufficient to support the allegation of the declaration. In the next place, it is proved by Mr. Kuhn, that in 1807, he carried with him a statement made out by the plaintiffs, of their claim on account of the inferior qualities of the congo tea of the Ganges, in which Consequa was charged for the difference between the sales of those teas, at Amsterdam, and the sales of other teas of the best quality and of like denomination, made at the same time. That Consequa required a day or two for consideration, and for the purpose of consulting a friend, and he afterwards agreed to allow 19,000 dollars on account of this claim and another for cassia, sent in the same vessel. The claim for the teas and cassia amounted to about 22,000 dollars, and it does not distinctly appear, whether the deduction from that sum was made from the teas, which was stated at about 17,500 dollars, or from the cassia, or from both. If it was made from the cassia, then the inference derived from allowing the claim for the teas, as for those of the first quality, is strong, that the contract was to furnish congos of that quality; and if so, in relation to the congos, the presumption is almost inevitable, that the like contract was made as to the Campoy teas, for which this suit was brought.

It is contended by the defendant's counsel, that this settlement by Consequa, was nothing more than a concession made from motives of friendship for Messrs. Willings and Francis, and with a view to promote his own interest, not only by securing the consignment of the Asia's cargo, then in the

Tigris, but their future consignments. If these were his motives, the evidence would certainly lose much of its weight; and yet they will not account for his surrendering his rights, and submitting to injustice in silence. Interest or friendship may induce a person to acquiesce in a claim which he believes to be unfounded; but in order to give value to the concession, he ought at least to appear, to the other party, sensible that he is making it. It would therefore have been perfectly natural for Consequa, to have stated to the gentleman who presented him with the statement, that the claim was not well founded, because those teas were compared with others of the best quality, whereas, he had not agreed to deliver such, because they were selected by the supercargo from samples, and because he was charged the difference between the sales of those teas, and others of the best quality, instead of making that difference, the rate of compensation applicable to the first cost. Instead of this, he made the settlement without objection, and lost of course all credit for making it. The jury will judge, under all the circumstances attending this transaction, how far this conduct of Consequa ought to be considered, as evidence of an acknowledgment made by him of a contract to deliver a cargo for this ship of teas of the first quality.

The last piece of evidence, relied upon by the plaintiffs to prove the contract as laid, is, the price paid for those teas, being that of teas of the first quality. All the witnesses have stated, that where the highest cash price is paid, it is the uniform understanding at Canton, that the best teas are to be delivered.

But it is contended by the defendant's counsel, that this proves nothing in relation to the cargo of this vessel, because a credit was allowed to Willings and Francis of 70,000 dollars; and that in a country, where the interest of money is twelve per cent., the difference must be considerable between credit and cash sales.

On the other side it is answered, that Consequa does not appear to have contemplated a difference in cases where large cash payments were made in part, because in other cases, particularly in that of the Bingham, he did not wait for a credit to be solicited, but freely offered it to any amount. Upon the whole, the jury will judge what weight there is in the circumstance of the highest price having been paid for these teas. If they should not be satisfied that the contract to deliver teas of the first quality was made, their verdict of course must be for the defendant, in the action respecting the cargo of the Ganges. If on the other hand the jury are satisfied with the proof, they will find the breach proved by the same evidence which is relied upon in respect to the cargo of the Bingham. Whether the sales at Amsterdam furnish a satisfactory criterion of quality, they must decide. If not influenced by particular circumstances, such as the state of the market,

which may produce an unnatural difference between the best and indifferent teas, or the ages of the teas, which are compared together, those sales would seem to afford as safe a test of quality as any other. Thus stand the contracts upon which these actions are brought, and the breaches of them, for which the jury are called upon to give damages.

But the defendant insists that though the jury should be satisfied that such were the contracts, originally entered into by Consequa, yet they were afterwards changed into contracts of sale by samples, and that the plaintiffs have not proved that the cargoes did not correspond with those samples, without which they cannot recover. It is not pretended that the original contracts were waived, and new contracts substituted by any express agreement; but that the usage of Canton, operating upon the acts of the supercargoes in selecting the cargoes from samples, produced this effect.

In the first place, it is to be observed, that this argument, however sound it may be in itself, is inapplicable to the cargo of the Asia, and to 600 chests of congos of the Bingham's cargo, the whole of which were received without examination. We are then to enquire, whether in relation to the other teas this usage has been proved? If it has, it must govern our decisions. The laws and usages of foreign countries where contracts are made and to be executed, which respect their validity, construction, and discharge, are regarded here as rules of decision. This usage however ought to be clearly proved; not merely because it is entirely at variance with the general principles of law, but because it is absurd and irrational. A contract of sale, may be made in various ways. It may be made without a warranty of the quality of the articles sold, in which case, if there be no fraud on the part of the seller, he is not answerable to the purchaser, although he should be disappointed; for it was his own fault if he did not examine the articles, and satisfy himself of their quality, or if he did, then it is his misfortune that his judgment deceived him. If he is unwilling to trust his own judgment, he may insist upon a warranty of the quality, in which case the vendor is bound to deliver articles of the stipulated quality, and the examination of the articles by the vendee, and his selection of such as he approves, does not amount to a waiver of the contract. If the vendee cannot examine the articles, but purchases from an examination of samples, there is an implied warranty on the part of the seller, that the articles shall correspond with the samples. But an examination of samples, like the former case, will not amount to a waiver of an express warranty that the articles shall be of a particular quality. It is true, that in both cases a selection and acceptance by the vendee, may in some instances according to the circumstances, amount to performance or to evidence of performance of the contract. But the difference in the

two cases is all important. If the original contract be waived, and a new one substituted, the vendee must prove a breach of the new contract, and consequently must prove that the articles delivered did not correspond with the samples. But if the original contract continues, and the vendee prove that the articles were not of the stipulated quality, the vendor must prove performance, by showing that the articles delivered did correspond with the samples. Neither party has or probably could prove any thing as to this matter, in the case before the jury; and the defendant, being aware of the above distinction, has insisted, that by the usage at Canton the original contract is changed into a contract of sale by samples.

The asserted usage is not only contrary to the principles of general law, but is irrational in itself. It is to be recollected, that it is in proof that the American supercargoes, as well as the East India Company, always select their teas by samples sent to them to examine. It is entirely a matter of course. Now we behold this supercargo and the Hong merchant, entering into a solemn agreement one day, by which the latter engages to furnish a cargo of teas of the first quality, which they both know at the time, is to be annulled the next day, and to be converted into a perfectly different contract. The samples are sent, not to be rejected, but to be accepted; for if the former, why send them? and if they are accepted, then the above consequence is to follow. Instead of calling this a solemn contract, it deserves the appellation of a solemn farce. What then is the proof of this usage? Cushing, Bull, and Ross, depose, that it is the usage for the Hong merchant to furnish samples for the supercargo to examine, and unless the supercargo rejects all, the Hong merchant is released from any further responsibility than that of furnishing teas according to samples chosen. Now this proves nothing to the point we are considering, because neither of these witnesses state that this is the usage in the case of a special contract to deliver teas of a particular quality; nor does it appear that this subject was in the minds of the witnesses, inasmuch as the interrogatories make no enquiries in reference to such a case. If the contract is general, or if it be in fact a sale by samples, the usage is rational, and is not at variance with our law. Mr. Hossack is very positive, that this usage is applicable to the case of a sale with a warranty of quality; so says Mr. Blight, generally; and yet, when speaking of the usage, as applicable to the East India Company, he states, that where the sales in England show the inferior quality of the teas, documents are sent to Canton stating their quality; and if they were inferior to the quality contracted for, they are charged back according to their quality; that is, if they appear to have been third instead of first quality, the Hong merchant is charged the difference between first and third quality, in reference to the prime cost. He does not

know if the samples are returned, but he has heard they are. Now, as that company always select by samples sent to their factory, and for this purpose retain in their service a skilful taster, this practice would rather seem to contradict the usage; unless it appears that samples are always returned to Canton, to be compared with the sample chests, which are always marked and retained at the factory.

But, admit that this is the usage in relation to the East India Company, is it applicable to a different trade, carried on in a different way? The two witnesses last mentioned, Mr. Hossack and Mr. Blight, confine it to that company, and state that they always mark and retain the muster chests, by which they make their selection at their factory. On the other hand, they state that the American supercargoes return the muster chests to the Hong merchant, without any mark whatever on them, and that they go, undistinguished, into the general mass of the cargo. Neither of the parties then expect that the quality of the cargo is to be tested by the sample; and does not this afford a strong reason for believing, that a usage, which depends on that test, cannot apply to a trade so circumstanced?

In support of this idea, the plaintiffs rely upon the conduct of Consequa, in the settlement of the claim for the Congo tea of the Ganges, and argue, with at least a great deal of plausibility, that as those teas were selected by samples, he would not have made that settlement if the usage had been in his favour. Upon the whole, the jury must judge if this usage is sufficiently proved. If the contracts laid in the declarations, and the breaches of them, are proved to the satisfaction of the jury, and the asserted usage is not proved, the next question for the consideration of the jury, is, what ought to be the rule for assessing the damages to which the plaintiffs are entitled?

The rule laid down in this court, in former cases, was (*Gilpins v. Consequa* [Case No. 5,452]) that the difference between the sales of these teas, at the foreign market, and others of the first quality, is no otherwise to be regarded, than as it furnishes a test of the quality and the rate of loss to be applied to the prime cost. But a contrary usage is attempted to be proved by the plaintiffs, and I think they have not been more successful than the defendant has been in proving the usage which has just been considered and disposed of. The evidence principally relied on to prove this usage, is the settlement made by the defendant of the loss claimed in respect to the congos of the Ganges, and his promise to settle the loss, in respect to the cargo of the Asia, which has been mentioned, and I refer the jury to the observations before made upon the weight to which this act is entitled, in the scales of evidence. Two other witnesses, Mr. Simms and Mr. Jones, have given testimony, and although they prove instances of settlements made, or give slight evidence of a usage existing different from the rule established by this court, yet the usage attempted to be proved by them,

is different from that asserted by the plaintiffs, and upon the whole, terminates in disappointment. Mr. Hossack and Mr. Blight agree on the other hand, that the usage corresponds precisely with the rule before stated. The jury will therefore govern themselves by this rule, adding of course to the sum paid for the teas, premium of insurance, duties, and other expenses which are usual, and of which they are the proper judges. As to interest, I shall leave that question to the jury upon the evidence of Mr. Hossack, who states that the usage at Canton is to add interest to the other charges.

The claim of the plaintiffs, to disallow to Consequa interest upon the debts acknowledged to be due to him, in consequence of their attachments, cannot be admitted. Where an attachment is laid in the hands of a third person, interest is stopped until it is dissolved, because the garnishee, being liable to be called upon at any moment to pay the debt, it is presumed that he had not used it. But, where a debtor who is also a creditor, lays an attachment in his own hands, there is no such necessity existing, and of course no presumption can arise that he had not used the money. If he did use it, it is but just that he should pay interest for it.

The jury brought in a verdict in favour of Consequa for the amount of his debt, with full interest; they gave damages to the plaintiffs, against Consequa, in the cases of the Bingham and Asia, allowing interest against him; and found a verdict for him, as to the cargo of the Ganges. The balance found in favour of Consequa amounted to about 71,000 dollars. A compromise was afterwards made, in which Consequa allowed a compensation for the cargo of the Ganges, and these cases were finally adjusted.

WILLINGS (CONSEQUA v.). See Case No. 3,128.

Case No. 17,768.

WILLINK v. MILES.

[Pet. C. C. 429.]¹

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

EJECTMENT — EVIDENCE — ACKNOWLEDGMENT OF DEED — AUTHORITY OF OFFICER — EQUITABLE TITLE.

1. It is not necessary to produce the deed poll, from the person in whose name the application was made for a tract of land, in order to support the title of the plaintiff in an ejectment for the land; the plaintiff having obtained the warrant and paid the purchase money. [Cited in *Herron v. Dater*, 120 U. S. 472, 7 Sup. Ct. 624.]

2. The acknowledgment of a deed, before a person who styles himself a justice of the court of common pleas, is prima facie evidence that he was such; and it is not necessary to produce the commission of the justice, until

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

some evidence is given to render the fact questionable.

[Cited in brief in *Com. v. Gearing*, 1 Allen, 595. Cited in *Piland v. Taylor* (N. C.) 18 S. B. 72. Cited in brief in *Wright v. Waters*, 32 Pa. 516; *Spear v. Ditty*, 9 Vt. 283.]

3. An agreement signed by the agent of the lessor of the plaintiff in ejectment, for the sale and conveyance of the land to the defendant, cannot be given in evidence in a trial at law; it is, at most, only evidence of an equitable title.

4. A warrant, survey, and payment of the purchase money, are sufficient to give a legal right of entry in ejectment.

Ejectment for land on the north and west of Ohio and Alleghany rivers, and Conewango creek. The only question which was raised as to the plaintiff's title, was, whether the deed poll from the person in whose name the application was made, to the plaintiff, who obtained the warrants and paid the purchase money, was sufficiently proved; it having been acknowledged before a person who styles himself a justice of the common pleas of the county where the land lies.

THE COURT observed, that a conveyance in this case need not be shown, as was laid down in the case of the lessee of *Brown v. Galloway*, at the last term [Case No. 2,006]. But, if it were necessary, still the acknowledgment before a man who styles himself a justice of the common pleas, is prima facie evidence that he was such; and it is not necessary for the person who offers a deed so acknowledged, to produce the commission of the justice, or to give any further evidence to prove him to be a justice of the common pleas, until some evidence is given on the other side to render that fact questionable.

The plaintiff proved, that, in 1813, the defendant claimed the land in controversy, resided on it, and had erected valuable mills at the place of his residence. That the year before this suit was brought, the defendant demanded from the agent of the plaintiff's lessor, a deed for this land, still stating it to be the land on which he resided. But there was no positive evidence given of the defendant's possession at the time this ejectment was brought.

The defendant offered in evidence, an agreement signed by the agent of the lessor of the plaintiff, for the sale and conveyance of this land to him; and he relied upon the case of *Simm's Lessee v. Irvine*, to show that this vested in the defendant a legal title.

THE COURT refused to permit this paper to be given in evidence, as, at most, it was only evidence of an equitable title. The case relied on, falls very far short of this case. It was decided there, that as a warrant, survey and purchase money paid, gave a legal right of entry in ejectment, by the law and practice of this state, it was sufficient to maintain an ejectment in the circuit court of the United States. And even in that case, the compact between Virginia and Pennsylvania was made use of to strengthen the point there decided. This court, however, upon the au-

thority of that case, has uniformly decided that a warrant and survey, and payment of the purchase money, are sufficient to give a legal right of entry in ejectment. But the line of demarkation between legal and equitable titles, has been uniformly observed and strictly enforced in this court. As to the question of the defendant's possession at the time this suit was brought, the court submit it to the jury on the evidence.

Verdict for the plaintiff.

WILLIS (BANK OF CUMBERLAND v.).
See Case No. 885.

Case No. 17,769.

WILLIS v. BUCHER et al.

[3 Wash. C. C. 369.]¹

Circuit Court, D. Pennsylvania. April Term, 1818.

CONSTRUCTION OF WILL—ESTATE TAIL—PATENT FOR LAND—EVIDENCE OF ISSUE—EXECUTED CONVEYANCE.

1. A devise to A, and if he die without heir or issue, the estate to go to B, his brother, gives an estate tail to A, by implication.

2. Certain expressions in a will, showing an intention to dispose of his whole estate, may often enlarge an estate, which would otherwise be for life only, into a fee; as a devise to A, "freely to be possessed and enjoyed;" for here the implied intention is not inconsistent with the declared intention. But if real estate be given to A, expressly for life; or in tail, either expressly, or by a clear implication; there are no instances where such estates have been converted into a fee simple, by words of doubtful import, used in either.

3. The law never unnecessarily creates an executory devise; unless where the testator's intention would otherwise be defeated.

4. The entry in the books of the land office, that the balance of the purchase money was paid by the person "to whom the patent had issued," is evidence that a patent did issue; although the patent is not produced.

5. A deed to A, in consideration of a sum of money paid, or secured to be paid, in the usual form of a deed of bargain and sale, is to be considered as a conveyance executed; notwithstanding a covenant by the grantor, "to make a patent," which can only mean, to obtain one, and deliver it to the grantee.

6. The provisions of the insolvent laws of Pennsylvania, passed in 1799, do not extend to estates tail, so as to make a conveyance, executed according to that law, operate as a bar to an estate tail.

This was an ejectment for an undivided moiety of a tract of land, in York county, Pennsylvania. The title of the plaintiff was derived under a license dated in 1734, to David Priest, under which the land was surveyed, in 1737; and in the year 1746, William Priest, son of David Priest, had credit in

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

the books of the land office, for the whole of the purchase money paid, with the following memorandum annexed, "to whom the land is patented in full." On the 4th of August, 1747, William and Susannah Priest, conveyed this land, 200 acres, to Henry Willis; who, on the 13th of August, 1764, duly made his last will, and disposed of the land between his two sons, William and Henry, in the following words, to wit:—"As touching such worldly estate, wherewith it has pleased God to bless me, I give, demise, and dispose of the same, in the following manner and form," &c. After providing for his wife, the will proceeds;—"also, I give to my son William Willis, whom I constitute my sole executor, seventy acres of land, (by certain bounds,) to be taken off the plantation I now live on," &c.; "also ten acres of meadow ground," (particularly described:) "if the said William Willis should chance to die without heir or issue, the above said land must fall into the possession of his brother, Richard Willis." He then gives to his son William, a moiety of his horses and cattle, and adds a bequest to his daughter Mary, of £40, to be paid by his son William; and of the like sum to his daughter, to be paid by his son Richard; the will then proceeds to dispose of the whole of the remainder of his plantation, to his son Richard;—"and if the said Richard should chance to die without heir or issue, the above said lands and effects shall fall into the possession of my son William, by them freely to be possessed and enjoyed." In November, 1783, William Willis took out a patent for the eighty acres so devised to him, which recites that a patent had been issued for this land, which was lost or mislaid; nor did it appear, whether it had passed the seal or not. In 1794, William Willis conveyed a part of the land to Mr. McKenny and his heirs, under whom some of the defendants claim title; and on the 2d of April, 1796, he conveyed the residue of the tract to others, in fee, under whom the other defendants claim. On the 20th of November, 1800, William Willis died, leaving one child, Henry, who arrived at the age of twenty-one, on the 24th of April, 1799. Henry became insolvent, and took the benefit of the insolvent law of Pennsylvania, on the 20th of September, 1799. He made a general assignment to his trustees of all his estate, real and personal; and on the 8th of April, 1805, the surviving trustee conveyed all the right of Henry Willis, in and to the land which William Willis had conveyed on the 2d of April, 1796, to Jacob Wayne. Henry Willis died in the year 1806, leaving issue the lessor of the plaintiff, and one other daughter.

Binney & Tilghman, for lessee of plaintiff, contended, that William Willis took, under his father's will, only an estate in fee tail, by implication, with a remainder to his brother Richard, notwithstanding the introductory words in the will, the charge on William, of

the £40 to his sister, or any other expressions in any other parts of the will. They cited T. Raym. 426, 452; Willis, 369; Cro. Jac. 695; Ld. Raym. 568; 3 Wils. 244; Cowp. 234, 410; 8 Mass. 3; 11 Sandf. 388, to prove, that the words of a will are never construed to pass an estate, by way of executory devise, if the limitation can take effect as a contingent remainder. To show that tenant in tail, cannot, by agreement, bar the issue, Plow, Cont. 125. In answer to a point stated by the defendants in their opening, that Henry Willis permitted the defendants to make expensive improvements on the land, without discovering his title, which bound him and his issue, they cited 2 Ch. Cas. 108. To prove that a warrant, survey, and purchase money paid, constitute a legal right of entry, 2 Binney, 465.

Hopkins & Ewing, for defendants, contended: 1. That William Willis took a fee simple, by force of the introductory words of the will; the charge on the devise of £40 to his sister, and the expression "freely to enjoy and possess," which ought to be applied to the devise to William, with an executory devise to Richard, by force of the words "must fall into the possession of Richard;" which are equivalent to a limitation over, upon the happening of the contingency in the lifetime of Richard. They cited 7 Durn. & E. [7 Term R.] 589; 3 Durn. & E. [3 Term R.] 143, 256; 8 Durn. & E. [8 Term R.] 1; 2 Mass. 56, 562; 2 Fearne, Rem. 245; 3 Burrows, 1618; 6 Johns. 190; Cowp. 352; 1 Johns. 443; 3 Johns. 394. 2. That the lessor of the plaintiff has only an equitable estate for want of a patent; and that the estate in William Willis, under his father's will, was only an equitable estate, for want of a patent; and that the estate in William Willis, under his father's will, was only an equitable estate; and therefore, might be barred by a common deed of conveyance. See 7 Bac. Abr. 185; Amb. 510; cases cited, 2 Ch. Cas. 63; 1 Vern. 440; 2 Vern. 344, 131, 225; 1 Fonbl. 293. This was contended to be an equitable estate, in Henry Willis, the testator, and his issue; not only for want of a patent, but because the deed from William and Susannah Priest to Henry Willis, of the 4th of August, 1747, amounted to no more than articles of agreement, notwithstanding it contains words of grant. They referred to 3 Johns. 388; 1 Yeates, 393, 327. As to the nature of an estate where no patent has issued, 4 Binney, 145.

The defendants' counsel were about to offer evidence, in the opening, to prove, that Henry Willis was guilty of a fraud, in not disclosing his title to the purchasers of his father, at the time they did purchase, and in looking on, while the defendants were putting valuable improvements on the premises, without making any objection; which fraud, they contended, was sufficient to bar him and his issue. But the court stopped the counsel,

stating, that if their conclusion was even well founded, yet, such questions were not to be examined on the law side of the court.

WASHINGTON, Circuit Justice (charging jury). The first question is an unmixed one of law. What estate did William Willis take, under his father's will? The rule to which the counsel on both sides have appealed, and which is a landmark never to be lost sight of, is, that in the construction of wills, the intention of the testator is to be sought for and carried into execution, if it can be done without a violation of some established principle of policy or law. Thus, a devise to A and his heirs, gives a fee simple estate; but if the testator add, that upon the death of A, without issue, the estate shall go over to B, A takes an estate tail; because the limitation shows, that by the word heirs the testator meant heirs of the body, and not heirs general. In this case, the devise is to William Willis generally; and if he die without heir or issue, the estate to go over to Henry. As to the testator's intention, so far as it is to be discovered from this clause of the will, there can be no doubt; as the limitation over to Henry was not to take effect, so long as William had issue, he clearly intended that such issue should take the estate in the mean time. But this they could not do as purchasers, because there is nothing given expressly to them; and therefore, in a deed, William Willis could only have taken an estate for life. But in a will where the intention of the testator is to govern, the court will so construe the devise, as to vest an estate tail by implication, in William Willis, so that his issue may be enabled to take by descent. This, as a general principle, is not understood to be denied by the defendants' counsel; but the argument is, that there are expressions in other parts of the will, which show that the testator intended to give a fee simple estate to William, with a remainder over to Henry; which may well be supported as an executory devise, inasmuch as the expressions used in the limitation to Henry show, that the contingency was to happen in his lifetime, else the estate could not fall into his possession.

The parts of the will, principally relied upon to show an intention to give a fee to William Willis, are the introductory clause, expressive of his intention to dispose of all his estate; the charge upon William, of the legacy of £40 to his sister; and the words "freely to be possessed and enjoyed," subjoined to the limitation to William, upon the death of Henry without issue. There is no doubt, but a declaration of the testator's intention to dispose of all his estate, or the charge of a gross sum upon the estate devised, or annexed to the devise as a condition, have frequently been held to convert an estate into a fee, which, for want of words of inheritance being added, the court would have considered as nothing more than an estate for life. So a devise of an estate to A, "freely to be possessed and en-

joyed," will be construed to pass a fee simple. It is remarkable, that in all these cases, the implied intention of the testator, collected from this and similar expressions, is perfectly consistent with his declared intention. But if the estate be given to A for life, expressly; or to A in tail, either expressly or by clear implication; there is no instance where such estates have been converted into a fee simple, by words of doubtful import, like those noticed before, in other parts of the will.

Such a construction in this case, would defeat the obvious intention of the testator in two particulars: (1) By giving the estate to William and his heirs general, where the intention was to confine it to the heirs of his body;—and (2) to annex a condition to the limitation over to Henry, and thus to leave the estate to descend to the heirs of the testator, in case William should die without issue, after the death of Henry; when it is plain, that the testator intended the estate for Henry, in exclusion of the daughter, whenever the estate of William should be spent, by a failure of issue. Another objection to the construction is, that it unnecessarily creates an executory devise, which will never be done, except in a case where the intention of the testator cannot otherwise be carried into effect. If the limitation to Henry Willis, must depend upon the contingency of a failure of issue, during his life, as is strongly contended for by the defendants' counsel; there is still no necessity for construing the devise to William, to be an estate in fee simple; since William might, in that case, take an estate tail, with a contingent remainder to Henry, upon the event of William's dying without issue, during the life of Henry. But there is no necessity even for this construction. It was obviously the intention of the testator, to give to William an estate in tail, with a remainder to Henry, in fee; which intention, as to the quality of the estate given to the remainderman, may fairly be collected from the introductory words, relied upon by the defendants' counsel, for increasing the estate to William, as well as from the words, "by them freely to be possessed and enjoyed," in the devise to Henry, showing very clearly that the testator intended to divide this tract of land between his sons and their issue, respectively, with cross remainders in fee.

The argument of the defendants' counsel is, that William took an estate in fee simple, with a remainder over to Henry, by way of executory devise. If so, it may fairly be asked, what was the contingency, upon which the estate was to go over to Henry? If it be said, upon his dying without issue, then the answer is, that this is no contingency at all; because, the word "issue," explaining what heirs were meant by the testator, William took an estate tail, in like manner as if the devise had been to him and the heirs of his body. If the word "heir" be relied upon, then the argument admits of the same answer; because William could not die with-

out heirs general, during the life of his brother; and therefore, the word heir or heirs, would be construed to mean issue. There is therefore no contingency upon which an executory devise can be raised.

2. The next objection is, that no patent from the state of Pennsylvania, to William Priest or to Henry Willis, has been given in evidence, and that therefore the lessee of the plaintiff cannot maintain this ejectment. There are two answers to this objection. The first is, that the entry on the books of the land office, that the balance of the purchase money had been paid by William Priest, to whom a patent had issued, ought to be considered as evidence that a patent did issue, although it is not produced; and secondly, that a warrant and survey, and purchase money paid, gives a legal right of entry in Pennsylvania. This was decided in the case of *Simms v. Irwin* [3 Dall. (3 U. S.) 425]; and this decision has been always regarded and acted upon in this court.

3. The next objection is, that the deed of the 4th of August, 1747, was merely executory, and ought not to be considered as a grant of the estate to Henry Willis. This deed has all the requisites and the form of an absolute conveyance, by way of bargain and sale in presenti. It is stated to be made in consideration of a certain sum of money, the whole of which is either paid or secured. The covenant to make a patent, which constitutes the greatest difficulty in the case, may fairly be construed to mean, that the grantor should procure a patent, to be made out and delivered to the grantee. Taken literally, the covenant has no legal meaning, as the grantor could not himself make or grant a patent. But as the meaning of this word is perhaps as well understood by landholders as any other that can be used; it can scarcely be supposed, that the parties had in their minds any other conveyance than one which amounted technically to a grant from the state. This case differs materially from that of *Jackson v. Myers*, 3 Johns. 388. The covenants are different. In that, the consideration was not only not paid or secured, but the grantee covenanted, in consideration that the grantor should make him a good and sufficient deed, by a certain day, to assign to him certain bonds. In short, all was executory; besides which, deeds of bargain and sale were not used, at that time, in New-York, to pass lands, as the general opinion was, that they required enrolment; and this circumstance was considered, by the court, as a strong evidence of the understanding of the parties to that deed. This reason does not operate in this case. We are, therefore, of opinion, that this deed operated as a conveyance of the land to Henry Willis. But, if the court had any doubt as to the law of this point, we think the jury, after about 70 years of uninterrupted possession, under that deed, ought to presume a conveyance.

4. As to the effect of the insolvent law of

Pennsylvania, of 1799, we are of opinion, that it will not bear the construction put upon it by the defendants' counsel, which would render the land in question liable to Henry Willis's debts. The assignment, therefore, by Henry Willis, under this law, did not bar his issue.

We are, upon the whole, of opinion, that the law is in favour of the lessor of the plaintiff, and that such should be your verdict.

Verdict for defendants.

THE COURT, on motion, granted a rule, to show cause, why the verdict should not be set aside, and a new trial allowed.

Ewing, for defendants, opposed a new trial: 1. Because there had been three verdicts for the defendants, for the land in question; and the justice of this case is in favour of the defendants. The title of the plaintiff was supported by strict principles of law, and they will not be enforced by courts, on a motion for a new trial in an ejectment. 'It has only been of late, that courts grant new trials in ejectment, when the verdict is for the defendant; as the plaintiff may resort to a new action. Cases cited, Salk. 646; 1 Bos. & P. 338; 6 Bac. Abr. 662; 1 East, 583; 2 Binney, 129; 4 Term. R. 468; 1 Burrows, 11, 54; 2 Burrows, 664, 673, 674; 3 Burrows, 1306; 2 Term. R. 4; 1 Mass. 237; Cowp. 601; 2 Binney, 333; 3 Binney, 317. 2. That if the court grant a new trial, they will impose terms on the plaintiff, and oblige him to pay the costs of all the former ejectments, none of which have been paid. Bull. N. P. 111; Hurst v. Jones [Case No. 6,933]. 3. That Hannah Willis, the plaintiff, is an infant, and was born in the state of Pennsylvania, and was, for the purpose of having this suit instituted, removed into the state of Maryland. As a minor she could not change her domicile, so as to give the court jurisdiction; and that having, since the suit was instituted, returned to the state of Pennsylvania, the court will not aid the imposition which has been practised, by ordering a new trial. *Maxfield v. Levy* [Id. 9,321]; [*Bingham v. Cabot*] 3 Dall. [3 U. S.] 384; [*Milligan v. Milledge*] 3 Cranch [7 U. S.] 220; [*Logan v. Patrick*] 5 Cranch [9 U. S.] 288.

An affidavit, taken ex parte, was read; stating the facts of the birth of the plaintiff in Pennsylvania; her infancy and removal to Maryland, and subsequent return, and present residence in this state.

Binney & Tilghman, contra, contended, that the verdict was against both law and justice, and the whole community are interested in the preservation of the rights of courts to decide the law in civil cases. In the supreme court of the state of Pennsylvania, a new trial had been granted in an ejectment for this land; and the court said, they would grant new trials, where the verdict of the jury was against law. The case was, on both sides, considered as a question of law; the jury paid no attention to the argument; and

some of them went out of the court-room while it was going on. 1. That this is the first suit instituted by the present plaintiff; and this case differs from that brought in the court of Pennsylvania, in which an allegation of fraud was a part of the defence. The plaintiff claims under the will of her grandfather, and not under her father, to whom fraud was imputed. 2. The court will not impose the costs of suits, to which the plaintiff was not a party, and which were decided in another court. 3. As to the citizenship of the plaintiff, it was not objected to at the trial, and cannot now be brought into question, on an ex parte affidavit. There is nothing illegal in removing to another state, to give jurisdiction to this court; and a return to the state, after suit brought, does not change or affect the rights of the plaintiff. The only course the defendants' counsel could adopt, in reference to the jurisdiction of the court, would be, to move to dismiss the suit; and the affidavit could not be read to support the motion, although it might be the foundation of a rule to show cause.

WASHINGTON, Circuit Justice. When the motion in this case was made, it was considered that a new trial was a matter of course, as the verdict of the jury was in direct opposition to the express charge of the court, upon a plain matter of law. It gives us great satisfaction, that, during the sixteen or seventeen years, in which we have presided in this court, this is the second case, where, upon a dry point of law, a jury has given a verdict against the opinion of the court. It is not on the ground of dissatisfaction at the conduct of the jury, who are respectable men, and no doubt thought they were doing right, that the court will set this verdict aside. It is important that the law should be adhered to, and that the rights of courts should be preserved. We should sit here for a very poor purpose indeed, and should disregard our duty and our oath, if we should submit to verdicts against law. The safety, and happiness, and prosperity of every one, are deeply interested, that if a jury undertake to decide, and does decide against the law of the land, their verdict should be corrected; for if they err, and the court has no control over their decision, where is the remedy for any injury or wrong an individual may sustain by their verdict? But if we make a mistake, the court above will correct our errors.

We never interfere with the facts of a case, and always leave them to the jury, as proper for their examination and decision; stating such of them only as are necessary to apply the law, and expressing our opinion upon the law, so that either party may take an exception to it, and have the benefit of such exception. As to ejections, there may be cases, where courts, after two or three verdicts, will not interfere, and where the justice of the case is clearly with the verdict. But in this case, every thing is in favour of

the plaintiff,—both the law and justice are with her. The only thing claimed by the defendants, was founded on facts, which the court would not allow to be given in evidence on a trial at law; as the relief of the party upon them should be asked on the equity side of the court. The plaintiff here claims under the bounty of her grandfather, and not under her father, to whom these facts relate. The court, as at present advised, will not hesitate to set aside a verdict in ejectment, when against law.

With respect to the affidavit, it is not evidence for any purposes, either to continue the motion, or in reference to a new trial. If the case goes off to another court, the party will have all the advantage of the facts relative to the jurisdiction. The court would give the defendants leave to enter a special plea to the jurisdiction; or, upon notice, they might have the benefit of all the facts upon the trial; or a motion may be made to dismiss the suit, and they may bring forward proper evidence.

Rule made absolute.

Case No. 17,770.

WILLIS v. CARPENTER et al.

[14 N. B. R. 521.]¹

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

ESTOPPEL—OCCUPYING INCONSISTENT POSITIONS—
—INSTRUCTIONS—REVIEW ON APPEAL.

1. Where a person, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

2. If a party who took a bill of sale as security, deliberately proves a debt which assumes that he is the absolute owner of the goods, and persists in such false claim in an action by the assignee to recover the goods, and attempts to support it by his own oath, he is estopped from claiming them as security.

3. Instructions are entitled to a reasonable construction, and if correct, when applied to the facts submitted to the jury, they will be sustained in an appellate court, even though, if standing alone, or without any explanation, they would be incomplete in respect of some matter sufficiently explained in the evidence.

[Error to the district court of the United States for the district of Massachusetts.

[This was a proceeding by Charles Carpenter and others against Charles J. Willis. From a decree of the district court in favor of plaintiffs (case unreported) defendant appealed.]

J. B. Richardson, for plaintiff in error.

M. F. Dickinson, Jr., for defendants in error.

CLIFFORD, Circuit Justice. Owners of property may be estopped to set up their title to the same, if it appears that they failed to assert such title when it was claimed by another, and that they suffered such claimant,

¹ [Reprinted by permission.]

without objection, to sell the property to an innocent third person for a valuable consideration. Defenses of the kind have often been made with success, until it may be said that the rule of law is clear, that where one, by his words or conduct, willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Pickard v. Sears*, 6 Adol. & E. 469; *Freeman v. Cooke*, 2 Exch. 654; *Swain v. Seamans*, 9 Wall. [76 U. S.] 254. Process was issued in this case in the name of the plaintiffs, as assignees of the estate of Edgar C. Merrill, duly adjudged a bankrupt, in which they allege that the defendant, on the 1st day of February preceding the date of the writ, unlawfully, and without any justifiable cause, took the goods and chattels therein described, which belonged to the plaintiffs; and the charge is, that he unlawfully detains the same, to the damage of the plaintiffs in the sum of six thousand dollars. Service was made, and the defendant appeared and filed an answer, in which he denied every allegation contained in the writ and declaration. Pursuant to that issue the parties went to trial, and the jury, under the instructions of the district court, returned their verdict in favor of the plaintiffs, assessing the damages at one dollar. Judgment was rendered for the plaintiffs, and the defendant excepted and sued out the present writ of error.

Enough appears to show that Merrill—who was at the time, and for several years previously had been, a manufacturer of emery wheels, and who was also the patentee of an invention for the manufacture of artificial stone—employed the defendant to act as his selling agent; and that the defendant, in pursuance of that business, subsequently leased and occupied the store in Boston, more particularly described in the record; that the bankrupt, on the 26th of March, 1873, gave to the defendant a bill of sale of the emery wheels then in that store, for the sum of five hundred and ninety-eight dollars and ninety cents; and the parties agree that this suit is brought to recover the wheels conveyed by that bill of sale, or a large part thereof. Willis continued to act as the selling agent of Merrill till December 22, 1873, when he became bankrupt, and was so adjudged by the bankrupt court. It also appears that the defendant was present at the first meeting of the creditors, and that he proved a claim against the estate of the bankrupt amounting to five thousand seven hundred and eleven dollars and ninety-one cents, consisting of a promissory note and the annexed accounts. In that claim he credited the estate of the bankrupt with five hundred and ninety-eight dollars and ninety cents, for the emery wheels in the said store, and which are described in the bill of sale. On petition of the assignees, and due notice to the defendant, the claim was subsequently expunged and

rejected as false and fraudulent, the defendant failing to appear pursuant to the notice. Testimony was also given, by one of the plaintiffs, that the defendant told him, that he (Willis) owned the emery wheels, and that he held them by virtue of the said bill of sale. Opposed to that are the statements of the defendant, who testified that the bill of sale was given by the bankrupt to him as security for money which he loaned to the bankrupt at various times, and the expenses which he incurred in renting and fitting up the store, and in carrying on the business of selling the emery wheels and the artificial stone. All such pretenses were denied by the plaintiffs, and they gave evidence tending to show that the bill of sale was intended as a cover to protect the goods from attachment by the creditors of the bankrupt.

Evidence having been introduced by both parties, the district court instructed the jury, that if the defendant knowingly, willfully, and with intent to defraud the creditors of the estate of the bankrupt, swore to and proved a claim which contained a credit based upon the statement that he had bought the goods in question for five hundred and ninety-eight dollars and forty cents, when in fact they were worth about five thousand dollars, and when in fact he held the same only as security, he is now estopped from claiming to hold them as security. Beyond all question it is necessary to establish an equitable estoppel, to show that the party seeking to avail himself of that defense was misled by the acts, conduct, or declarations of the opposite party. Much discussion of that proposition is unnecessary, as the authorities are all one way. *Jewett v. Miller*, 10 N. Y. 402; *Turner v. Waldo*, 40 Vt. 51; *Andrews v. Lyons* [11 Allen] 93 Mass. 349; *Langdon v. Doud* [10 Allen] 92 Mass. 435; *Cole v. Bolard*, 22 Pa. St. 431. Suppose that is so, still it by no means follows that there is any error in the record, as the evidence reported shows not only that the defendant claimed the absolute title to the property, but that he actually proved a claim against the estate of the bankrupt, in which he gave a credit to the estate for the same at the sum specified in the bill of sale. Standing alone, the charge would be objectionable, for the reason that it does not in terms set forth the condition that the assignees were misled by deceptive acts and fraudulent conduct and declarations of the defendant. But the charge of the court does not stand alone, nor would it be correct to separate it from the rest of the bill of exceptions of which it forms a part. Instead of that it should clearly be construed in respect to facts to which it was applied when it was given to the jury; and when so applied, it is manifest that it was sufficient to enable the jury to come to a just conclusion, both as to the law and the facts of the case. Sufficient appears to show that the defendant deliberately proved a claim which assumed that he was the absolute owner of the goods, and that his claim was false and

fraudulent; nor was the defendant relieved from the consequences of his false conduct and deed—as shown by the fact that the truth was subsequently discovered by the assignees—for it appears he persisted in the false claim at the trial, and attempted to support it by his oath. Viewed in that light, it is clear that the evidence presented all the essential elements of an equitable estoppel, and that it was amply sufficient to justify the instruction of the court when applied to the facts given in evidence. *Bigelow, Estop.* 480; *Horn v. Cole*, 51 N. H. 287; *Knights v. Wiffen*, L. R. 5 Q. B. 660. Fraudulent acts of the kind find no countenance in any adjudged case within the knowledge of the court. On the contrary the rule of law is well settled that where a bailee fraudulently retains goods from the general owner, on grounds wholly different from any right which he possesses, he thereby waives a tender of his rightful claim to the same, by virtue of the principle of estoppel. *Boardman v. Sill*, 1 Camp. 410, note; *Jones v. Tarleton*, 9 Mees. & W. 675; *Weeks v. Goode*, 6 C. B. (N. S.) 367; *Everett v. Saltus*, 15 Wend. 474; *Adams v. Clarke*, 63 Mass. [9 Cush.] 215.

Instructions given by a court to the jury are entitled to a reasonable construction, and if correct when applied to the facts submitted to the jury, they ought to be sustained in an appellate court, even though if standing alone, or without any explanation, they would be incomplete in respect of some matter sufficiently explained in the evidence. Tested by these considerations, I am of the opinion that there is no error in the record. Judgment affirmed with costs.

WILLIS (GOODYEAR DENTAL VULCANITE CO. v.). See Case No. 5,603.

WILLIS (JAMIESON v.). See Case No. 7,204.

Case No. 17,771.

WILLIS v. McKENZIE.

[Cited in *Birch v. Simms*, Case No. 1,427. Nowhere reported; opinion not now accessible.]

WILLIS (O'NEALE v.). See Case No. 10,516.

WILLIS (OXLEY v.). See Case No. 10,639.

WILLIS (PARK v.). See Cases Nos. 10,716 and 10,717.

WILLIS (SIGSBY v.). See Case No. 12,849.

WILLIS (UNITED STATES v.). See Case No. 16,728.

Case No. 17,772.

WILLISON v. HOYT.

[4 Law Rep. 35.]

Circuit Court, S. D. New York. April, 1841.

CUSTOM DUTIES.

Necessity of stating in a protest at the customs every charge objected to.

This was an action against the defendant as ex-collector of New York, to recover an amount of duties alleged to have been improperly charged on goods imported by the plaintiff. The goods consisted of eight bales of silk striped Lama handkerchiefs, imported by the ship *Liverpool*, January 5th, 1841. The article was composed of silk, worsted, and cotton, and the collector charged it with the reduced woolen duty of 41 per cent., which the importer paid under protest. It was admitted, that the woolen duty was improperly charged.

Mr. Winthrop, for claimant, contended that the article was free, as silk was the most valuable component part of it, and therefore it was not subject to duty on the cotton, which formed another component part.

Mr. Butler, for defendant, said it might be a question whether, in order that an article should be free on account of the most valuable part of it being silk, the silk should not only be more valuable than any other component part of the article subject to duty, but also more valuable than each and all of the other component parts taken together. But in the present case he thought this question did not necessarily arise, as the claimant had entered the article as a manufacture of cotton, subject to a duty of 25 per cent., and in his protest made no objection to that duty, but simply protested against the article being charged the woolen duty of 41 per cent. He therefore contended, that the claimant was bound to pay at least the duty of 25 per cent. on the article, as in manufactures of cotton.

THOMPSON, Circuit Justice, said that, when making a protest, the party should clearly state in it what he objected to, and if he considered the article a different one from what the collector alleged it to be, he should so inform him, in order that the collector might be on his guard, and know what it is that the merchant objects to. In the present case the merchant did not protest against the duty of 25 per cent., and therefore the court thought a verdict should be rendered only for the difference between 25 per cent. and 41 per cent., which was all the merchant objected to at the time of the protest. Verdict accordingly.

WILLS (CONANT v.). See Case No. 3,087.

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Case No. 17,773.

WILLS et al. v. RUSSELL.

[Holmes, 228.]¹

Circuit Court, D. Massachusetts. June, 1873.

CUSTOMS DUTIES—VALUATION.

The value of an import is determined by the appraisal, and the duty fixed by law must be assessed by the collector upon the value so determined.

[Cited in U. S. v. Leng, 18 Fed. 22; U. S. v. McDowell, 21 Fed. 566; U. S. v. Doherty, 27 Fed. 733.]

Action [by R. A. Wills and others] against [Thomas Russell] the collector of Boston to recover duties paid by the plaintiffs under protest.

C. L. Woodbury, for plaintiffs.

George P. Sanger and P. Cummings, for defendant.

SHEPLEY, Circuit Judge. Plaintiffs imported into the port of Boston one hundred and thirty bales of gunny-cloth, subject to the duty provided by the twenty-first section of the act of July 14, 1870 [16 Stat. 262]. This section imposed a duty of two cents per pound on gunny-cloth valued at seven cents or less per square yard, and three cents per pound when valued at more than seven cents per square yard. The gunny-cloth was invoiced and entered at a value less than seven cents per square yard. In due course, and in conformity with law and treasury regulations, the invoice was sent by the collector to the United States appraiser for his report. The appraiser returned his report that the invoice was correct, and valued the gunny-cloth under seven cents the square yard. By order of the collector it was reappraised with a like result. The collector not being satisfied with the appraisal, acting upon other information which he supposed would justify his action, exacted a duty of three cents per pound; this duty the plaintiffs paid, duly protesting against the payment, and in due time, and in accordance with law, brought this action to recover the extra one cent per pound.

The statute gives the collector the right to order the appraisers to make a re-appraisal. It gives the importer the right to appeal to a new board of appraisers. The appraisement determines the value of the import. The collector determines the rate of duty fixed by law, and assesses it upon the value as found by the appraisement.

The collector cannot substitute his own appraisal in lieu of the one found by the legislative referees, the appraisers. The excess of duty exacted in this case was on an assumed value, which the collector was not authorized by law to make the basis of the duty. The importer was entitled to his goods on the pay-

¹ [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

ment of the duty on the appraised value; and, according to the agreed statement of facts, judgment is to be entered for the plaintiffs for the amount of the excess in gold, with interest and costs.

Judgment for plaintiffs.

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 WILLS (WILLIAMS v.). See Case No. 17,746.

WILMARTH (MOAN v.). See Case No. 9,686.

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Case No. 17,774.

WILMARTH v. MOUNTFORD et al.

[4 Wash. C. C. 79.]¹

Circuit Court, E. D. Pennsylvania. April Term, 1821.

MALICIOUS PROSECUTION—PROBABLE CAUSE—LARCENY—SALE—TRANSFER OF PROPERTY—EFFECT OF NONPAYMENT.

1. When goods have been purchased, to be paid for on delivery, and instead of payment in money, a promissory note, which has been dishonoured, given by the owner of the goods, is offered in payment; the property of the original owner of the goods is not changed; although he might have taken them to the place where they were to be delivered, and there laid them down, expecting immediate payment in money for them.

2. Even the delivery of goods to a pretended purchaser, who makes off with the goods, does not change the property.

3. It is not necessary for the defendant to fix the crime of larceny on the plaintiff. If by his folly or his fraud he exposes himself to a well grounded suspicion that he was guilty, this prosecution was founded on probable cause, which is a sufficient defence.

[Cited in Bacon v. Towne, 4 Cush. 239; Stone v. Stevens, 12 Conn. 225; Sherwood v. Reed, 35 Conn. 451; Grant v. Denel, 3 Rob. (La.) 17; Central Ry. Co. v. Brewer (Md.) 28 Atl. 618. Cited in brief in Prough v. Entriaken, 11 Pa. St. 83; Driggs v. Burton, 44 Vt. 140.]

4. There not being the slightest evidence against two of the defendants, the court directed the jury to find them not guilty, that they might be examined as witnesses for the other defendants.

Action for a malicious prosecution. The plaintiff produced the record of the indictment in the mayor's court of this city for larceny, which the grand jury returned ignoramus. The plaintiff proved that the defendant, Mountford, put into the hands of a constable of the city a warrant to arrest the plaintiff on a charge of larceny, issued by Mr. Badger, one of the aldermen. A search warrant for the goods supposed to have been stolen had previously been delivered to him, which proved ineffectual in the search. Upon the first mentioned warrant the plaintiff was arrested, and taken before Mr. Badger, and, upon the examination of Mountford and Wentz, he was bound over to appear at the mayor's court, to answer to a charge of larceny; and it appeared by the alderman's docket that these

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

two witnesses were held in fifty dollars each to prosecute. The plaintiff having arrested his case upon the above proof, the defendant's counsel moved that the jury should be directed immediately to find a verdict in favour of Wentz and Crowley, against whom there was not the slightest evidence given; with a view to their being examined as witnesses for the two other defendants. This motion was opposed upon the ground that there was some evidence against those defendants, particularly against Wentz, who appears, by the alderman's docket, to have been bound over to prosecute; and that the court never charges the jury to find an immediate verdict for a co-defendant, that he may be examined for the other defendants, if any, even the slightest evidence is given against him. Cases cited in favour of the motion, Peake, Ev. 152. Mr. Badger was called upon to explain the short entry in his docket, who stated, that the two witnesses were, in fact, bound over to appear as such, and not to prosecute; and that it has been his uniform and unvarying practice to bind over the witness to prosecute, instead of to testify.

BY THE COURT. There is no evidence against Crowley of any kind; and after the explanation given by Mr. Badger of the entry in his docket, the other defendant, Wentz, appeared as a witness merely, and as such was recognized to appear in the mayor's court. In that character, this action cannot be maintained against him. There is no evidence that he was a prosecutor, or that he voluntarily took any part in the prosecution. There is no evidence then, not the slightest, against this defendant, upon which the jury can possibly find him guilty. The jury therefore may at once find these defendants not guilty.

The jury found according to this direction, without leaving their seats, and Wentz was examined as a witness for the remaining defendants.

The following were the circumstances proved on the part of the defendants: F. Read, one of the defendants, becoming embarrassed in his circumstances, assigned over all his estate to the defendant Mountford and to Crowley, for the benefit of such of his creditors as should sign a release within sixty days; and possession was immediately delivered to the assignees. This assignment bears date the 16th of June, 1819, notice of which was published in Relf's Gazette, on the 18th. On the 21st of the same month, one Scholfield came to the store of Mountford, where the goods were kept for sale, and pretending that he was commissioned by a Mr. White of Virginia, to purchase for him goods of the description of those in the store; selected as many of them as amounted to about \$480, and requested Mountford to pack and send them to his lodgings at Judd's tavern, where he would pay the cash for them. The goods, accompanied by a bill, in which White is made debtor to Mountford and Crowley, assignees of F. Read, were, on the same day, taken to Judd's

tavern by Wentz, an apprentice of Mountford, with orders to receive the money or to bring back the goods, if the money should not be paid. Upon entering the room where Scholfield was, at the tavern, Wentz was desired to lay down the box on the ledge of the bar, which he did; Scholfield at the same time taking out his pocket book and opening it, as if to pay the money. At length he observed to Wentz, that there was a gentleman in the adjoining room who would settle with him for the goods, and that he would introduce him. Upon going into this room, the plaintiff was found sitting alone, to whom the bill was presented. In the mean time the goods were removed by the order of Scholfield. The plaintiff offered to the young man as payment, a note of F. Read's to himself, for rather a larger amount than that of the bill, and asked if that was not good? Wentz informed him that it was not; and that Read had nothing to do with the goods, having failed, and having assigned his estate to Mountford and Crowley for the benefit of his creditors. Scholfield soon left the room, and Wentz was unsuccessful in obtaining either a return of the goods, or payment for them. About this time, Mountford passed the tavern, and being informed by Wentz of the above circumstances, he called upon an attorney for advice, and was informed by him that the case amounted to larceny; upon which Mountford obtained from Alderman Badger a search warrant, which was put into the hands of a constable. The search proving ineffectual, a warrant was obtained for arresting the plaintiff upon a charge of larceny, by virtue of which he was taken, and bound over as before mentioned. When asked by the alderman his reason for having acted as he had done, the plaintiff replied that Read was indebted to him, and that he had resorted to this scheme to obtain payment. On a subsequent day, the assignee and the plaintiff called upon an attorney in order to arrange the business, when the plaintiff stated that he knew where the goods were, and that he could get them at any time. No arrangement however was made, as the plaintiff refused to return the goods except upon the terms of being permitted to come in under the assignment with the other creditors. The proposition the assignees could not accede to, without the assent of the creditors who had executed the release, the sixty days having then run out.

The defendant's counsel insisted that there was not only probable cause for the prosecution, but that the transaction amounted in law to larceny. That the property was not changed, and that the possession was obtained by an artifice, with intent to convert the goods to the use of the plaintiff against the owner's consent. Esp. 132; 2 East, P. C. 553, 671. They also denied that there was any evidence of malice.

C. J. Ingersoll and Mr. Phillips, for plaintiff.
Brown, Peters & Page, for defendants.

WASHINGTON, Circuit Justice (charging jury). This is an action for a malicious prosecution, and it is incumbent on the plaintiff to prove, not only that the prosecution was malicious, but that it was instituted without probable cause. Whether there was in this case probable cause or not, is a question for the court to decide; dependent, nevertheless, upon the opinion of the jury, whether the facts stated by the court as constituting probable cause have been proved or not. If there was probable cause for the prosecution, then the jury may presume malice, though no express evidence of it be given. In the case of *Munns v. Dupont* [Case No. 9,926], in this court, it was stated to the jury, that by probable cause is meant a reasonable ground of suspicion, founded on circumstances sufficiently strong in themselves to warrant a cautious man in believing that the accused is guilty of the imputed crime. To the definition given in this case, the court adheres.

The prosecution on account of which this action is brought was larceny, which is the wrongful taking and carrying away of the goods of another, with a felonious intent to appropriate them to the use of the taker, without the owner's consent. It will be proper in the first place to inquire, how far this definition is applicable to Scholfield? He commenced his operations with falsehood and artifice, with a view, as his subsequent conduct proves, to obtain the wrongful possession of the goods for his own use, or for the use of some other person, without accounting to the owner for the agreed value of them. It is not true, as was argued by the plaintiff's counsel, that the property in these goods was at any time changed, which by the contract was only to take place on the payment of the money. It was, by the express terms of it, a cash sale. The cash was not paid or tendered; and, consequently, the right of property was never divested out of the assignees. Neither was there a change of possession, with the assent, or by the act of the assignees, or of Wentz their agent. When at the request of Scholfield he laid down the goods, with the expectation, well warranted by Scholfield's actions, of receiving the money for them, they remained, constructively, in his possession; and to every legal intent they were as much in his possession as if he had placed them in his pocket. If a person go into a shop to buy a particular article, which is handed to him by the shopkeeper to examine, and he makes off with it, the delivery of the article would not constitute a change of property or possession; and the carrying away of the goods would, in such a case, be evidence of a felonious intent, formed at the time, or before, to convert the goods to the use of the taker, and would amount to larceny. It is true, that in this case, the possession of the goods was lost by Wentz; but it was taken, not transferred by him, which constitutes one of the ingredients in larceny. In short, here was a wrongful taking and carrying away of the goods of

another, with a felonious or fraudulent intent to convert them to the use of the taker, or of some other person, against the consent of the owner; and if, upon the trial of Scholfield, the opinion of the jury, as to the intent, should be as I have stated it, it would not have been an easy matter to extricate him from the charge of larceny. How then stood the case as to the plaintiff? He and Scholfield boarded at the same house. That they were acquainted, and had, previous to the pretended purchase for White, made some arrangement which they were subsequently to carry into effect, is obvious, not only from the circumstance of Scholfield's referring Wentz to the gentleman in the next room, as the person who would settle with him, but from the acknowledgement of the plaintiff himself to the alderman, that the scheme was resorted to for the purpose of getting payment of the debt due to him by Read. The plaintiff did not offer to pay for the goods; because the offer of a note of an insolvent debtor was no compliance with the contract made by Scholfield; and besides, it was refused.

It was contended for the plaintiff, that the transaction resolves itself into a claim of property; a creditor obtaining possession of the goods of his debtor, to compel the payment of a just debt. This argument is not supported by the facts of the case. Before this transaction took place, the goods in question had been assigned by the plaintiff's debtor to Mountford and Crowley, for the benefit of his creditors. The contract was made with the assignees. The bill which was presented to the plaintiff so stated it, and Wentz informed the plaintiff that the goods did not belong to Read, who had failed, but to his assignees. Suppose then that a creditor might legally seize his debtor's property, or get possession of it by artifice, and so pay himself, which cannot be admitted; still the argument would lose all its weight in this case, inasmuch as the property in these goods was completely changed, and that fact known to the plaintiff.

Again, it is insisted that the assignment was void by the act of assembly of this state, on account of its not having been recorded within thirty days. To this argument there is this conclusive answer given by the defendant's counsel. The assignment was valid at the time when this transaction took place, the thirty days not having run out; and on the 21st of June, 1819, the assignees were the owners of the goods, and might have sold and transferred a legal right to them, which the subsequent failure to record the deed could not set aside. Besides, the possession had passed from Read to the assignees, and was vested in them at the time when this transaction took place. If then the evidence is sufficient to connect the plaintiff with Scholfield, in the original concoction of a scheme founded in deceit, and contrived for the purpose of feloniously or fraudulently obtaining the possession of the goods of the assignees,

and appropriating them to his own use, without paying the sum at which they were agreed to be sold; it would be difficult to distinguish the plaintiff's case from that of Scholfield's. But it is not necessary that the crime of larceny should be fixed upon the plaintiff. If, by his folly or his fraud, he exposed himself to a well grounded suspicion that he was guilty of that offence; the prosecution had, at least, probable cause for its basis, and this is sufficient to defeat the present action.

Verdict for defendant.

Case No. 17,775.

WILMER et al. v. ATLANTA & R. AIR-LINE RY. CO. et al.

[2 Woods, 409; 3 Am. Law T. Rep. (N. S.) 29.]

Circuit Court, N. D. Georgia. Dec. 7, 1874, and May 25, 1875.

RAILROAD COMPANY—APPOINTMENT OF RECEIVER—DEFAULT IN INTEREST—CONFLICTING JURISDICTIONS—STATE AND FEDERAL COURTS.

1. A railroad company having its residence and principal office at Atlanta, Ga., conveyed to trustees, by one deed, all its line of road extending from Atlanta through South Carolina to Charlotte, N. C., and other property to secure the payment of the principal and interest of 4,248 bonds of \$1,000 each, issued by the railroad company. The railroad was an indivisible and inseparable piece of property, which could not be divided without injury to its value. The trust deed conferred authority on the trustees, and made it their duty, in case the railroad company failed to pay either the interest or principal of the bonds, to take possession of the property conveyed by the trust deed, and advertise and sell the same (or such part as might be necessary) at Atlanta to pay the sum in default. *Held*, that on default made in the payment of interest, and a demand upon the trustees by the bondholders that they should take possession of the trust property, and a failure of the trustees to do so, the court, on a bill filed by the bondholders to require them to execute the trust would compel them to take possession of the trust property or appoint a receiver for that purpose.

[Cited in Taylor v. Life Ass'n of America, 3 Fed. 470; Central Trust Co. v. Chattanooga, R. & C. R. Co., 62 Fed. 953.]

2. Such appointment would be made even though there was no probable deficiency of the trust property to pay the debts secured by the trust deed.

3. When it was represented that the trust property had fallen into the hands of two different receivers, accountable to three different courts to the manifest detriment of the trust estate, that fact of itself was considered a sufficient reason for the appointment of a receiver for the whole property, if the court had jurisdiction to make such appointment.

[Cited in Corning v. Dreyfus, 20 Fed. 428.]

4. The circuit court of the United States for the Northern district of Georgia has jurisdiction to appoint a receiver for the entire line of said company's road and other property included in the deed of trust, whether within or without the state.

[Disapproved in Texas & P. R. Co. v. Gay, 26 S. W. 610. Cited in Lycoming Fire Ins.

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

Co. v. Wright, 55 Vt. 530; Straughan v. Hallwood, 30 W. Va. 288, 4 S. E. 402.]

5. Two states may, by concurrent legislation, unite in creating the same corporate body.

6. Where a bill was filed, the prayer of which was, that this court would construe a trust deed executed by a railroad company, and compel the trustees to execute the trust or appoint a receiver to take possession of and administer the trust property, and service of subpoena had been made on the railroad company, which was the principal defendant, and a restraining order had been allowed and also served on the railroad company, enjoining it from delivering possession of the trust property to any one except a receiver appointed by this court in the case thus commenced: *Held*, that by these proceedings the court acquired constructive possession of the trust property, and that possession thereof, taken under color of process from another court, in a suit commenced after the proceedings above mentioned, was in contempt of the process and jurisdiction of this court, even though the other court first obtained actual possession of the property. Per Woods, Circuit Judge.

[Cited in Howlett v. Central Carolina Land & Imp. Co., 56 Fed. 162; Reinach v. Atlantic & G. W. R. Co., 58 Fed. 45; Wheeler v. Walton & Whamm Co., 65 Fed. 722. Approved in Adams v. Mercantile Trust Co., 15 C. C. A. 4, 66 Fed. 620.]

7. Contra, service of process gives jurisdiction over the person; seizure gives jurisdiction over the property; and, until the property is seized, no matter when the suit was commenced, the court does not have jurisdiction over it. Thus, when two suits between different parties, raising different controversies, and having different purposes in view, are commenced in courts of coordinate jurisdiction, and the possession of the property, which is the subject of the suit, is necessary to the relief asked in each case, that court which first seizes the property acquires jurisdiction over it, to the exclusion of the other, no matter when the suits were commenced or process in personam was served. Per Bradley, Circuit Justice.

[Approved in East Tennessee, V. & G. R. Co. v. Atlantic & F. R. Co., 49 Fed. 610. Criticised in Adams v. Mercantile Trust Co., 15 C. C. A. 4, 66 Fed. 620.]

This was a cause in equity which was first heard at chambers in Savannah, on the 5th and 7th of December, 1874, by WOODS, Circuit Judge, on the motion of complainants for the appointment of a receiver.

A. T. Akerman and L. E. Bleckley, for the motion.

P. L. Mynatt and H. H. Marshall, contra.

WOODS, Circuit Judge. The complainants, Skipwith Wilmer and August Richard, allege that they are the owners and holders of certain of the bonds known as first mortgage eight per cent. bonds of the Atlanta & Richmond Air Line Railway Company, which are secured by a deed of trust on all the property and franchises of the defendant company, and they file this bill in behalf of themselves and all other holders of similar bonds who shall be entitled to avail themselves of the benefit of the suit. The purpose and prayer of the bill is, that the trust deed, given to secure said bonds, may be so construed that the trustees therein named, or their substitutes to be appointed by the court, may

be compelled to execute the trusts created by the deed of trust, by taking possession of said railway and appurtenances, and all property granted by the deed of trust, and selling the same at public auction for the payment of the principal and interest of all the bonds secured by said trust deed, and that pending the suit, some suitable person may be appointed receiver to take possession of said railway and all its property conveyed by the trust deed, with power to operate and manage said railway, and receive all its earnings and income during the pendency of the suit, and with such other power as to the court shall seem right and proper.

The cause now comes on for hearing upon the motion of the complainants for the appointment of a receiver as prayed in the bill. It is alleged in the bill that the defendant company is a corporation created by, and existing under the laws of the states of Georgia, South Carolina and North Carolina, and having its principal office and place of business in Atlanta, in the state of Georgia. It further appears from the bill that, by an act of the legislature of Georgia, approved March 5, 1856, a railroad company, to be known as "The Georgia Air Line Railroad Company," was incorporated and authorized to build, equip and enjoy a railroad from Atlanta to the South Carolina state line, in the direction of Anderson court house. By an act of the general assembly of South Carolina, approved December 20, 1856, the Air Line Railroad Company of South Carolina was incorporated, with authority to construct a railroad from the line of the state of Georgia, in the direction of the city of Atlanta, to Anderson court house, and thence to some point of connection with the Charlotte and South Carolina Railroad, in the direction of Charlotte, North Carolina, and to equip and enjoy the same. The seventh section of this act of incorporation provides that it shall and may be lawful for the said company to combine or unite with any other railroad company having the right so to do, and to consolidate the management of the companies so combining, if they shall deem it necessary, and to make any regulations for the use of or combination of the interest or management of said roads as the public good may require, or to them may seem meet. By an act of the legislature of North Carolina, approved August 3, 1868, it was provided that the Air Line Railroad Company in South Carolina was authorized "to extend, construct, equip, and operate its road within the limits of North Carolina, from any point on the South Carolina line to the town of Charlotte, in North Carolina." These three acts being in force, the legislature of Georgia, by an act approved September 7, 1868, declared "that the Georgia Air Line Company be and they are hereby authorized to consolidate, combine, or unite with any other railroad company or companies directly or indirectly connecting therewith, or to unite the management of said companies, upon such

terms, conditions, and provisions as shall be agreed upon by and between such companies so consolidated or uniting, and thereupon such consolidated or united companies shall be invested in this state with all the rights and privileges conferred upon, and be subject to all the restrictions imposed by, the original charter of the said Georgia Air Line Railroad Company, and the amendments thereto, with the right to adopt such other or modified corporate name, and to increase and diminish the number of directors now provided, or as shall be determined on and agreed upon by such companies." And the legislature of South Carolina, by an act approved September 18, 1868, entitled "an act to amend an act entitled an act to incorporate the Air Line Railroad Company in South Carolina," declared, sec. 2, "that if said company shall, as authorized by its charter, consolidate or unite with any other company or companies, it may adopt such other or modified corporate name and increase or diminish the number of directors now provided for as shall be deemed best and agreed upon by such companies."

In pursuance of the authority granted by these acts of the legislatures of Georgia and South Carolina, it is alleged that, on June 20, 1870, the Georgia Air Line Railroad Company, and the Air Line Railroad Company in South Carolina, by an agreement in writing, duly executed between said companies, were consolidated and united into one corporation under the name of the "Atlanta & Richmond Air Line Railway Company," and from thenceforward became one body corporate under that corporate name, and the owner of all the property and entitled to all the rights, privileges and franchises which had belonged to the two companies out of which it was formed. It is further alleged that the Atlanta & Richmond Air Line Railway Company, having thus become the owner of all the property which had belonged to the two companies named, and being in need of a large sum of money to complete and equip its road, conveyed to trustees by deed of trust "the entire railway of said company, extending from the city of Atlanta, in the state of Georgia, to the city of Charlotte, in North Carolina, together with all its franchises, lands, buildings, machinery, rolling stock, materials and other property, real and personal, wherever situated, and however held, and whether now owned or hereafter acquired; and also the annually accruing net income of said company," the purpose of which said deed of trust, and it so declared, was to secure the payment of 4,248 coupon bonds of \$1,000 each, to be issued by the company, with interest payable semi-annually at the rate of eight per cent. per annum. It was made the duty of the trustees named in the deed of trust, upon default of payment of either the principal or interest of the bonds, to take possession of the trust property and its revenues and administer the same, and to sell the property or such part thereof as might be necessary to

pay the sum of money in default. The bonds secured by the deed of trust were duly executed and issued and negotiated by the Atlanta & Richmond Air Line Railway Company. The bill further states that on the 1st of January, 1874, the company made default in the payment of its interest that day due, that the interest coupons were presented for payment at the offices of the company in New York and Atlanta, and payment thereof was refused. More than sixty days having elapsed from the time of such default, the complainants, together with the holders of other 2,342 of said bonds, gave notice to R. A. Lancaster and Alfred Austell, the surviving trustees under said deed of trust, of the default in the payment of interest, and requested them to proceed and execute the trusts created by said deed, and take possession of the trust property and the revenues of the company, as authorized and required by the deed of trust, to sell the property and apply the net proceeds of the entire trust property to the payment of the principal and interest on the bonds secured by said deed of trust, as therein provided. Although five months have elapsed since the said request, the trustees have taken no steps towards the execution of said trusts or the enforcement of the bondholders' rights under the deed of trust, but have utterly failed and neglected so to do. It is further alleged that the Atlanta & Richmond Air Line Railway Company is managed not so much in the interest of its bondholders and stockholders as in the interests of the Richmond & Danville Railroad Company, whose president is also the president of the Atlanta & Richmond Air Line Railway Company; that it has been made subservient to the interests of the Richmond & Danville Company, greatly to its own injury and the damage of the complainants and other bondholders. It is also alleged that the Richmond & Danville Railroad Company claims to have some interest in the property covered by the deed of trust, and to have a lien thereon on said property, and that the complainants apprehend that the Atlanta & Richmond Air Line Company, and the Danville & Richmond Company are acting collusively in regard to said lien, and that it is their intention to undertake to enforce it to the great wrong and injury of complainants and other bondholders. It is unnecessary here to notice further the allegations of the bill. The motion is for the appointment of a receiver, to take possession of the entire line of the defendant company's road, running from Atlanta, Georgia, to Charlotte, North Carolina, over portions of three states.

The first question which presents itself for solution is, should there be a receiver for the property of the defendant company or any part of it? The rules which govern the discretion of courts in the exercise of this power are well settled. Where there is a trust fund in danger of being wasted or misapplied, a court of equity will interfere upon

the application of any of the creditors, either in his own behalf or in behalf of himself and the other creditors, and, by the appointment of a receiver, or in some other mode, grant relief. *Jones v. Dougherty*, 10 Ga. 274. The appointment of a receiver is not necessarily predicated upon the apprehended loss of the debt. It would be sufficient to allege that the trustee appointed refused to perform the trust. *McDougald v. Dougherty*, 11 Ga. 586. Where there has been negligence or improper conduct on the part of a trustee, and the fund is in danger, the appointment of a receiver upon the application of the cestui que trust is a matter of right. *Jenkins v. Jenkins*, 1 Paige, 243. The rule in courts of equity in regard to appointing a receiver of mortgaged property is, that it will be granted in all cases where the income is required to meet the incumbrance, and is at the present time being so applied as not to be legally applicable to reduce the incumbrance. 2 Redf. R. R. 361.

To apply these well settled rules to the question in hand: As already stated, the trustees have, for more than five months, neglected, although requested, and although the deed of trust made it their duty to do so, to take possession of the property of the defendant company. The bondholders have as clear a right to have executed that power of the trust deed, which requires the trustees to take possession of the property upon default in payment of interest as any other covenant in the deed. If the trustees refuse to perform this duty, the cestui que trust has the right to apply to the court to compel them to do it, or appoint some one who will. And this right is independent of any probable deficiency of the trust property to pay the debts secured by the deed of trust. The application for a receiver in such a case is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms.

It has been made to appear upon the hearing that the interest for January and July last is in default, amounting to \$339,840. It is also shown that upon an execution issued on the judgment of a court of the state of Georgia for little more than \$1,000, the railroad of the defendant company has been sold piecemeal in the several counties of the state of Georgia through which it runs. It is also shown that since the filing of the bill and the service of process in this case, and since the allowance of a restraining order, a suit has been instituted in the superior court of Fulton county, Georgia, in which a receiver has been appointed for so much of the property of the defendant company as lies within the state of Georgia; that suits have been instituted in the United States circuit court for North Carolina, and in the United States circuit court for South Carolina since the service of process in this action, in which receivers have been appointed for the property of the company in these states respectively. It is

true that the same person has been appointed receiver in North and South Carolina, but a different person is the receiver appointed by the state court in Georgia. Here are three distinct and independent courts claiming possession of different portions of the railroad and other property of the defendant company, and it is in the actual possession of two independent receivers, living in different states and accountable to different tribunals. The averment of the bill is, that this railroad property from Atlanta, Georgia, to Charlotte, North Carolina, is one inseparable and indivisible piece of property; that it is a portion of a great through route, and derives its chief value and business from that fact. The legislation already cited, of the three states through which it runs, shows that it was intended to be one undivided and unbroken line, and the deed of trust, which is the basis of this proceeding, covers the whole line of the road from one terminus to another. It is obvious that it would be a most unfortunate case that such a property should be held by two different receivers, accountable to three different courts. In fact, when we consider that a large part of the property of the company consists of rolling stock, which must necessarily pass from one end of the road to the other, and which must be used on the three divisions into which the road is divided by its administration in three different courts, it appears to be well nigh impossible to administer the affairs of the road and render accurate and satisfactory accounts. It is evident that such a divided control must result in crippling the operations of the road, destroying its business and reducing its receipts, and placing in jeopardy the security of its creditors.

This unfortunate condition of affairs, resulting from the action of three independent courts, would of itself be, as it appears to us, sufficient ground for the appointment of a receiver for the entire property by this court, if the power and jurisdiction of this court to do so is clear. First, then, has this court the power to appoint a receiver for real property outside the limits of the state? Involved in this question is another, to wit: Is the Atlanta & Richmond Air Line Railway Company one corporation in Georgia, and another and distinct corporation of the same name in South Carolina, or is it the same corporate body in both states? It seems to me quite clear that the purpose of the legislation of Georgia and South Carolina, in reference to this corporation, already set out in this opinion, was to create a single corporate body. Pursuant to the provisions of the acts of these two states, the two original companies did consolidate and combine, they took a new name, and organized a new and single board of directors. Having done this, the new consolidated company, under its new name, and acting by its one president, has executed a single deed of trust, covering the entire line of railway from Atlanta to Char-

lotte, and including all the personal property, which formerly belonged to the two companies that united to form the new one. It is clear that the legislation of the two states was passed to authorize the making of one corporate body out of two, and that the two corporate bodies so authorized have united, and have, ever since the 20th of June, 1870, the date of the consolidation, been acting as one company.

The only remaining question in this branch of the inquiry is, could the legislatures of two different states unite to create one corporate body? This question is distinctly answered by the supreme court of the United States in the case of *Railroad Co. v. Harris*, 12 Wall. [78 U. S.] 82. The court says: "We see no reason why several states cannot, by competent legislation, unite in creating the same corporation, or in combining several preëxisting corporations into a single one. The Philadelphia, Wilmington & Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland, Chief Justice Taney, in delivering the opinion of this court, said: 'The plaintiff in error is a corporation composed of several railroad companies which had been previously chartered by the states of Maryland, Delaware and Pennsylvania, and which, by corresponding laws of the respective states, were united together, and form one corporation under the name and style of the Philadelphia, Wilmington & Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore.'" We reach the conclusion then that the Atlanta & Richmond Air Line Railway Company is one and the same corporate body in Georgia and South Carolina, and the legislation of North Carolina hereinbefore referred to shows that it has the same rights and functions in that state that it has in South Carolina. The bill avers, and the proof shows, that this corporate body, existing in two states and owning property in three, has its residence and principal office at Atlanta, Georgia.

The inquiry then recurs: Can this court, having obtained jurisdiction over the person of this corporate body, exercise jurisdiction over its real and personal property outside the limits of the state, by the appointment of a receiver to take possession of the entire property, both within and without the state? There is a precedent for the exercise of such jurisdiction. In *Ellis v. Boston, H. & E. R. Co.*, 107 Mass. 1, the court appointed a receiver for the entire line of the defendant company's road, which extended from Boston, in Massachusetts, to Fishkill, in New York. It is well settled that realty out of the state may be reached by acting on the person. *Mitchell v. Bunch*, 2 Paige, 606; *Ramsay v. Brailsford*, 2 Desaus. 587, note. In the case in Paige, it was held that if the person of the defendant is within its jurisdiction, the court has jurisdiction as to his property

situated without such jurisdiction. When the property is situated outside the territorial jurisdiction of the court, the court may require assignments to be made by the defendant to the receiver. *Chipman v. Sabbaton*, 7 Paige, 47; *Cagger v. Howard*, 1 Barb. Ch. 369; *Story, Conf. Laws*, § 463; *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 15 How. [56 U. S.] 243.

As the property of the defendant company is one entire and indivisible thing, and as it is all covered by one deed of trust, there seems to be no good reason why this court should not appoint a receiver for the whole, even though a part of the property may extend into another state. The court having jurisdiction of the defendant can compel it to do all in its power to put the receiver in possession of the entire property. If other persons outside the territorial jurisdiction of this court have seized the property of defendant, the receiver may be compelled to ask the assistance of the courts of that jurisdiction to aid him in obtaining possession, but that is no reason why we should hesitate to appoint a receiver for the whole property. We think the courts of other jurisdictions would feel constrained, as a matter of comity, to afford all necessary aid in their power to put the receiver of this court in possession.

Finally, it is objected that the superior court of Fulton county, Georgia, and the United States circuit courts of South Carolina and North Carolina, respectively, have taken jurisdiction of the property of the company within their respective states, and their receivers are in possession, and this court ought not to interfere by the appointment of a receiver of its own. The record shows that the bill in this case asking this court to undertake the administration of this trust property, and to take possession of it by its receiver, was filed on the 30th of October, 1874. It is shown that service was made upon the defendant corporation on the 31st of the same month, and notice of the motion now on hearing was served on the same day. It further appears that on the 5th of November, upon the application of the complainants, and upon the showing that there appeared to be danger of irreparable injury from delay, a judge of this court directed that, upon the execution of a bond by complainants with sufficient sureties in the sum of five thousand dollars, conditioned according to law, a restraining order issue enjoining and restraining the Atlanta & Richmond Air Line Railway Company, its officers and agents, from handing over or delivering possession of said railway or its appurtenances, or any of its other property, to any person except a receiver appointed by this court in this suit. The bond was given by the complainants as required by the court, and the restraining order was issued, and on the 9th of November served on the Atlanta & Richmond Air Line Railway Company. The case in Fulton superior court was not filed until November

10th, and no prayer was made for a receiver until Garner, a defendant in that case, applied for one in his answer, which was filed on November 20th. The suits in the United States circuit courts of South and North Carolina were not commenced until the 16th of November.

Upon this state of facts, which court first acquired jurisdiction of this trust property? Is actual seizure of the property necessary to the jurisdiction of the court? In my judgment it is not. In this case I think the jurisdiction of the United States circuit court for the Northern district of Georgia first attached to the property, because the suit in that court was first commenced and service of subpoena made, and because, (1) one of the main objects of the suit was to obtain possession of the property, and such possession was necessary to the full relief prayed by the bill; and (2) because, by the service of the restraining order enjoining the defendant company from delivering possession of the trust property to any person except a receiver appointed by this court in this cause, the court acquired constructive possession, and from the moment of the service of the restraining order the property was in gremio legis. I think these positions are sustained by the authorities.

I subjoin a reference to a number of cases, in all of which the subject under consideration is discussed, and in some of which the precise point is decided and the views above expressed are sustained: *Smith v. McIver*, 9 Wheat. [22 U. S.] 532; *Wallace v. McConnell*, 13 Pet. [38 U. S.] 151; *Peck v. Jenness*, 7 How. [48 U. S.] 624; *Williams' Adm'x v. Benedict*, 8 How. [49 U. S.] 107; *Wiswell v. Sampson*, 14 How. [55 U. S.] 52; *Taylor v. Carryl*, 20 How. [61 U. S.] 533; *Green v. Creighton*, 23 How. [64 U. S.] 90; *Freeman v. Howe*, 24 How. [65 U. S.] 457; *Chittenden v. Brewster*, 2 Wall. [69 U. S.] 191; *Memphis v. Dean*, 8 Wall. [75 U. S.] 64; *Taylor v. Taintor*, 16 Wall. [38 U. S.] 370; *New Orleans v. Steamship Co.*, 20 Wall. [87 U. S.] 392, 393; *Atlas Bank v. Nahant Bank*, 23 Pick. 489; *Wadleigh v. Veazie* [Case No. 17,031]; *Ex parte Robinson* [Id. 11,935]; *Bell v. Ohio Life & Trust Co.* [Id. 1,260]; *Bill v. New Albany R. Co.* [Id. 1,407]; *Parsons v. Lyman* [Id. 10,780]; *Stearns v. Stearns*, 16 Mass. 171; *Conover v. Mayor of New York*, 25 Barb. 513; *Clepper v. State*, 4 Tex. 242; *Thompson v. Hill*, 3 Yerg. 167; *Bank v. Rutland & B. R. Co.*, 28 Vt. 478; *Merrill v. Lake*, 16 Ohio, 405; *Ex parte Bushnell*, 8 Ohio St. 601; *State v. Yarbrough*, 1 Hawks. 78; *Gould v. Hayes*, 19 Ala. 448; *High, Rec.* 38-41, and note. Especial attention is called to the cases of *Wiswell v. Sampson*, 14 How. [55 U. S.] 52; *Chittenden v. Brewster*, 2 Wall. [69 U. S.] 191; and *Bill v. New Albany R. Co.*, supra.

An examination of the cases cited will show that actual seizure of property has not been considered necessary to the jurisdiction

of the court in a case where the possession of the property is necessary to the relief sought. The commencement of the action and service of process, or according to some of the cases the simple commencement of the suit by the filing of the bill is sufficient to give the court jurisdiction, to the exclusion of all other courts. In this case, not only was the suit begun and process served before the commencement of any other suit, but the defendant railway company was actually enjoined by the order of this court from yielding possession of the trust property to any one except a receiver appointed by this court in this case. In my judgment, this restraining order gave this court constructive possession of the trust property, and a subsequent seizure of the same by any person on the order of any court whatever, in a suit subsequently begun, was a contempt of the process and jurisdiction of this court. If this court, upon the bill filed in this case, has the power to take possession of the entire property granted by the trust deed, as we have already decided it has, then the filing of the bill asking this court to take possession of and administer the trust property, and the service of process, excluded the jurisdiction of all other courts to take possession of and administer the same property or any part thereof.

Other questions than those noticed in this opinion have been argued at the bar, but it is not necessary to decide them in passing on this motion. I am of opinion that this court has jurisdiction to appoint a receiver for the entire property covered by the trust deed, and to administer the property for the benefit of all persons interested in the trust; that the jurisdiction of this court over the entire trust property attached before that of any other court; that all parties necessary to the hearing of this motion are before the court; that the bill and the evidence submitted establish a proper case for the appointment of a receiver, and the facts brought to the knowledge of the court imperatively demand its intervention; the interest of all parties requires that our jurisdiction, being thus exclusive over the subject matter, should be exercised, and that the motion for the appointment of a receiver for the whole trust property should be sustained.

In pursuance of the foregoing opinion, the court on the 19th of December, 1874, appointed John H. Fisher, Esq., receiver for the entire property covered by the deed of trust executed by the Atlanta & Richmond Air Line Railway Company. Fisher gave bond, as required by the order of the court, but was unable to get possession of that part of the trust property lying in Georgia. On the 24th of May, 1875, he applied to the United States circuit court, from which he received his appointment, then being held by Mr. Circuit Justice BRADLEY, and Mr. District Judge ERSKINE, for a writ of assistance to

enable him to get possession of so much of the trust property as lay within the Northern district of Georgia.

Upon this application the following opinion was delivered:

A. T. Akerman and L. E. Bleckley, for the motion.

P. L. Mynatt and N. J. Hammond, contra.

BRADLEY, Circuit Justice. This is a bill filed on behalf of first mortgage bondholders of the Atlanta & Richmond Air Line Railway Company, praying for a sale of the railway and appurtenances, and for a receiver to take possession of the property pending the suit. A receiver, Mr. John H. Fisher, was appointed by Circuit Judge WOODS, on the 9th of December last. On proceeding to take possession of the property, the receiver found a large and important portion of it, to wit: the depot and terminus in Atlanta, and the railway line in Fulton, and some other counties in Georgia, in the possession of one Lemuel P. Grant, as a receiver appointed by the superior court of Fulton county, a court of the state of Georgia having equity jurisdiction. Grant refused to surrender possession, and Fisher, under an advisory order of ERSKINE, District Judge, applied to the superior court of Fulton county for an order directing its receiver to surrender the property. This application was also refused. Fisher, the receiver appointed by this court, now applies by petition for a writ of assistance to put him in public possession of the property, and for an attachment as for a contempt against Grant, and other officials and directors of the railway company, for conspiring to keep the property out of the possession of the officers of this court. To this petition several answers have been filed by the parties implicated, and the question is thus presented whether this court can, and if it can, whether it will take the property in question out of the possession of a receiver appointed by a state court. Under ordinary circumstances, such a proposition would not be listened to for a moment. But the complainants and the receiver of this court rely on the special circumstances of the case as taking it out of the ordinary rule. Those circumstances may be briefly stated as follows:

The bill in this case was filed October 30, 1874, and a copy and notice of motion for injunction and receiver were served on the railroad company the next day. On the 5th of November, Judge ERSKINE granted a restraining order, which, on the 9th of the same month, was served on the company, and on Grant, then a director of the company, appointed on behalf of the city council of Atlanta, of which he was a member. On the 11th it was served on Buford, the president, and on Sage, the general superintendent, and was brought to the notice of Garner, a director. As before stated, the application for a receiver was not decided until the 9th of

December, 1874. Meantime other proceedings had taken place in the state courts, and especially in the superior court of Fulton county, which produced the complications that have arisen. In December, 1866, one Samuel B. Hoyt recovered a judgment in the Fulton county court against the Georgia Air Line Railway Company, of which the Atlanta & Richmond Air Line Railway Company is the legal successor by change of name, for the sum of \$1,000 and costs, and fieri facias was duly issued under the laws of Georgia, not only in Fulton county, but Gwinnett, Habersham and Hall counties, and several levies were made on the railroad line in April, August and September, 1874, and the road was sold in distinct parcels to one William A. Russell. The sales were severally made in June, September and October, 1874. On the 5th of November, Russell transferred his interest to Garner, a director, as above stated, for the whole line of railroad in Fulton, Gwinnett, and Hall counties. Garner was put into possession by the sheriff on the 9th of November, 1874. On the next day, the 10th, the Atlanta & Richmond Air Line Railway Company, by its managing director, P. A. Welford, filed a bill in the superior court of Fulton county against Hoyt, the judgment creditor, Russell, the purchaser at sheriff's sale, Garner, the assignee, etc., to prevent their proceeding to take possession of the road. On the 20th of November, Garner filed a cross-bill in the same court, asking for the appointment of a receiver, which resulted in the appointment of Grant, on the 21st, and his taking possession on the 26th of the same month. Grant had resigned his position as director of the company on the 11th of November.

It thus appears that the bill in this court was filed before that in the superior court of Fulton county, but that a receiver was first appointed by that court, and that he was in possession when the appointment of receiver was made by this court. It also appears that the object of the two suits was different; in this court, it being the foreclosure of the mortgage and the sale of the property to satisfy the same, the possession sought being auxiliary to the main purpose; in the state court, the object was to set aside the proceedings and sale under the judgment of Hoyt, and to prevent Garner from keeping possession of the road. On the 2d of January, 1875, the complainants in this court filed an amended bill, making parties of Hoyt, Russell, Garner and Sage, and alleging that the proceedings in the superior court of Fulton county were collusive, and intended to frustrate the proceedings of this court. But suppose that the allegations of the amended bill are true, can this court arrest proceedings in a state court on the ground of their collusiveness? Must not the state court itself be applied to? We cannot assume or entertain the proposition that the state court will not do justice in matters within its jurisdiction. We are bound to suppose that it will not allow a collusive

use of its process to be made by parties, but that it will set aside and declare null all such fraudulent proceedings.

Then the question remains pure and simple: Does the priority of commencing suit in this court for the foreclosure and sale of the mortgaged premises give the court constructive possession of the property, so as to nullify the subsequent possession taken by the state court, the respective objects of the two suits being different? It is too well settled to admit of controversy, that where two courts have concurrent jurisdiction of a subject of controversy, the court which first assumes jurisdiction has it exclusive of the other. But where the objects of the suits are different, this rule does not apply, although the thing about or in reference to which the litigation is had is the same in both cases. Thus an action of debt on a bond, an action of ejectment on the mortgage given to secure it, and a bill in equity to foreclose the equity of redemption, may be pending at the same time unless prohibited by some statutory regulation. The land mortgaged may be seized in execution by the sheriff in an action at law, even while the ejectment or the bill to foreclose is pending. A bill to foreclose is a personal proceeding, although it has reference to a specific thing. Its object is to put an end to an existing equity, and to procure a sale of the mortgaged premises. Possession may be taken in the course of the proceeding, but until it is taken, can it be said that the property is sacred from the touch of other persons or courts? The present case, then, is resolved to this: Had the Fulton county court power to appoint a receiver, and place him in charge of the property, whilst a bill to foreclose was pending in this court; or was it an interference with the jurisdiction of this court? It is perfectly evident that the controversy before that court is a different one from the controversy before this court. There it is a question of the validity of a sale under execution, and of the possession given by the sheriff in pursuance thereof; and that question arises between the Atlanta & Richmond Railway Company and the assignee of the purchaser. Here it is a question of the rights of bondholders, under a mortgage given by the Atlanta & Richmond Air Line Railway Company and the company, and arising between the bondholders and the company, and its officers and employes.

The controversy not being the same, nor the parties the same, there is no conflict of jurisdiction as to the question or cause. But, inasmuch as both controversies have ultimate respect to the possession of the railroad of the Atlanta & Richmond Air Line Railway Company, there has arisen a conflict of jurisdiction as to the thing or subject matter. It is important to know, therefore, whether this court had jurisdiction over the subject matter, namely, the railroad, when taken possession of by the receiver of the Fulton county

court, so as to make that taking an invasion of the jurisdiction and powers of this court. If it had, it will enforce that jurisdiction and assume the actual possession to which it gives the right. If it had not, then it will not interfere with the actual possession of the receiver of that court, though the rights represented by the litigants in this court be superior to those of both litigants in the state court, as those rights can be asserted when the possession of the state court has ceased. The reason that it will not interfere in such case is, that interference might create a collision between the two courts, which would be unseemly and contrary to the comity which should exist between them. The two courts are coördinate in jurisdiction, neither being superior to the other, and both being charged in the respective cases before them with the due administration of the laws of the state of Georgia. The test I think is this: Not which action was first commenced, nor which cause of action has priority or superiority, but which court first acquired jurisdiction over the property. If the Fulton county court had the power to take possession when it did so, and did not invade the possession or jurisdiction of this court, its possession will not be interfered with by this court; the parties must either go to that court and pray for the removal of its hand, or having procured an adjudication of their rights in this court, must wait until the action of that court has been brought to a close, and judicial possession has ceased. Service of process gives jurisdiction over the person. Seizure gives jurisdiction over the property; and until it is seized, no matter when the suit was commenced, the court does not have jurisdiction. The alleged collusion and fraud of the parties cannot alter the case. It is a question between the two courts; and we must respect the possession and jurisdiction of the sister court. We cannot take the property out of its hands, unless it has first wrongfully taken it out of our hands. This, as we have shown, has not been done. The application for a writ of assistance and for an attachment must be denied.

Our views may be somewhat variant from those of Judge WOODS, as expressed by him when the receiver was appointed. That question was different from the one now before us, which relates to the powers of that receiver to interfere with the possession of a portion of the road, in the hands of another receiver. Our decision does not necessarily conflict with his order, although our views may differ from his as to the power of the receiver. And in differing from Judge WOODS, we do so with much respect for his opinion. The question must be admitted to be one of some nicety; but we prefer that course which avoids collision with a state court when it coincides with our own convictions as to the law.

The authorities on the subject have been somewhat carefully consulted, especially the

following: *Smith v. McIver*, 9 Wheat [22 U. S.] 532; *Wallace v. McConnell*, 13 Pet. [38 U. S.] 151; *Williams v. Benedict*, 8 How. [49 U. S.] 111; *Hagan v. Lucas*, 10 Pet. [35 U. S.] 400; *Payne v. Drewe*, 4 East, 538; *Taylor v. Carryl*, 20 How. [61 U. S.] 583; *Pulliam v. Osborne*, 17 How. [58 U. S.] 471; *Buck v. Colbath*, 3 Wall. [70 U. S.] 334; *Watson v. Jones*, 13 Wall. [80 U. S.] 679.

[For the proceedings on final hearing, see Case No. 17,776.]

Case No. 17,776.

WILMER v. ATLANTA & R. AIR LINE RY. CO. et al.

[2 Woods, 447.]¹

Circuit Court, N. D. Georgia. Sept. Term, 1875.

RAILROAD FORECLOSURES—BONDHOLDERS' BILL—PARTIES—DEFAULT IN INTEREST—JURISDICTION OF COURT—APPEAL BOND.

1. Where certain bondholders whose bonds were secured by a deed of trust filed in behalf of themselves and all other bondholders whose bonds were secured by the same deed, who chose to come in as complainants and bear their share of the expenses of the suit, a bill against the trustees named in the deed, to have the trust administered and the trust property sold and its proceeds distributed, and the other bondholders were numerous and some of them unknown: *Held*, that it was not a valid objection to the making of a decree in accordance with the prayer of the bill, that all the bondholders were not made actual parties; they might be allowed to come in as complainants, or might propound their claims before the master.

[Cited in *McFadden v. May's Landing & E. H. C. R. Co.*, 49 N. J. Eq. 185, 22 Atl. 935.]

2. A trust deed, executed by a railroad company to secure bondholders, construed.

3. Where a railway is conveyed by a trust deed or mortgage to secure bonds, and it cannot be divided and sold in pieces without manifest injury to its value, the whole may be sold before the principal is due, on default in the payment of interest.

4. If two railroad corporations, created by different states, join in making a trust deed conveying their joint property to secure bonds issued by them jointly, and suit is brought to enforce the trust in the district where one of the corporations resides, and it is served with process, and the other corporation, being a non-resident of the state or district where the suit is brought, enters its appearance and files an answer jointly with the other, both will be bound by the decree of the court.

5. The Atlanta & Richmond Air Line Railway Company conveyed to trustees by a single deed all its line of road extending from Atlanta, Georgia, through South Carolina to Charlotte, North Carolina, to secure the payment of a series of bonds issued by the railway company, and the railroad was an indivisible and inseparable piece of property which could not be divided without injury to its value: *Held*, that the court had jurisdiction to decree that the trustees should sell the entire line of road, according to the terms of the trust, notwithstanding a large part of the road lay beyond the territorial jurisdiction of the court; and that a sale and deed under such decree

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

would convey a good title to the whole property.

6. Penalty of bond for appeal fixed under rule 32 of the supreme court.

See *Wilmer v. Atlanta & R. Air Line Ry. Co.* [Case No. 17,775]. Before the final hearing, the receiver appointed by this court succeeded in obtaining possession of so much of the trust property as lay within the state of Georgia without the aid of the court. At the September term, 1875, the cause came on for final hearing before WOODS, Circuit Judge, upon the pleadings, evidence and report of the master. In the meantime, Mr. L. E. Bleckley, who was originally of counsel for complainants, had been appointed a judge of the supreme court of Georgia. His place was supplied by Mr. H. R. McCay.

Mr. McCay, A. T. Akerman, and O. A. Lochrane, for complainants, with whom appeared P. H. Butler, as of counsel.

H. H. Marshall, John Collier, and P. L. Mynatt, for defendants.

WOODS, Circuit Judge. The substance of the bill having been stated in the opinion given in this case upon the motion for the appointment of a receiver [Case No. 17,775], it is unnecessary here to recapitulate its averments. The company known as the Atlanta & Richmond Air Line Railway Company, and the same which is made defendant to the bill of complaint, answers the bill and admits the averments thereof as to the legislation of Georgia, South Carolina and North Carolina; admits the union of the said "Georgia Air Line Railroad Company" and "The Air Line Railroad Company in South Carolina," under the corporate name of the Atlanta & Richmond Air Line Railway Company, which is the name of this defendant, and that this defendant now possesses and has since said union possessed all the property of the said two railroad companies, including the line of road extending from Atlanta, in Georgia, to Charlotte, in North Carolina. The defendant company exhibits what it calls the "agreement of union or consolidation," and prays that it may be taken as a part of its answer. The answer of the defendant company also admits that, under the name of the Atlanta & Richmond Air Line Railway Company, it issued the bonds mentioned in the bill, and to secure the same, principal and interest, executed upon its entire property and line of road extending from Atlanta to Charlotte, the deed of trust mentioned in the bill of complaint, and a copy of which is appended thereto as an exhibit. The answer of the defendant company further admits the averments of the bill to the effect that "said railroad with all its appurtenances is in the nature of an entirety; that it constitutes one and a continuous line of railway from Atlanta to Charlotte; that its unity and continuity are the most important elements of its value, and that to sepa-

rate it from its appurtenances, or those from it, or any part from any other part, would greatly impair the whole." Answers have been filed to the bill by the trustees, Austill and Lancaster, admitting generally its averments. An amendment has been filed to the bill making Samuel B. Hoyt, Wm. A. Russell, B. Y. Sage and T. S. Garner parties defendant, and making certain allegations and charges against them which it is unnecessary, particularly, to state. These new defendants have also answered the bill. The Richmond & Danville Railroad Company and the United States Security Company were also made defendants, and it was alleged that they claimed to have some lien upon the property of the defendant railroad company, but that the same was inferior to the lien of the complainants. A decree pro confesso has been taken against these last named defendants for want of an answer. At the March term, 1875, of this court, Julius M. Patton was appointed a special master to report, among other things, the number, character and description of the outstanding bonds of the defendant, the Atlanta & Richmond Air Line Railway Company, the amount of interest due on the same, the names of the present holders, and description of the bonds held by each. The master has filed his report, in which he states that 4,248 first mortgage bonds of \$1,000 each were issued and negotiated by the Atlanta & Richmond Air Line Railway Company. He reports that twenty-one of these bonds are held and owned by the complainants Wilmer and Richard, 4,095 by other persons, whose names and the number held by each he gives. All these bonds were presented to and counted by the master. On the first day of July, 1875, there was due for interest on the 4,116, so presented to and reported by the master, the sum of \$658,565, not including any interest on the coupons due and unpaid. This report was filed on the 16th day of August, and has not been excepted to.

The complainants produce the original deed of trust, and the report of the master, and pray for a decree, declaring that by the true construction and intent of said deed of trust the trustees therein named have the right and power, and it is their duty under the facts set forth in the bill, to take possession of the entire trust property and sell the same for the purpose of paying off the principal as well as the interest of the bonds thereby secured, and that they may be compelled to execute said trust accordingly, and according to the directions of the deed of trust, by taking possession of and selling all the property covered thereby, at public outcry, in the city of Atlanta, for the purpose of paying off both the principal and interest of said bonds.

Objection is made to any such decree by the Atlanta & Richmond Air Line Railway Company, and other defendants.

1. It is objected that the decree moved for cannot be made until all the persons entitled

to participate in the fund raised from the sale of the property are made parties to the proceedings, and that such persons so interested have not yet been made parties. The answer to the objection is found in the 84th equity rule, which provides: "Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making them all parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants, in the suit properly before it. But in such case the decree shall be without prejudice to the rights and claims of the absent parties." This case is the very one provided for by this rule. Here are four thousand bonds payable to bearer, secured by the deed of trust, to enforce which is the purpose of the suit. Necessarily the parties interested in the fund to be recovered by a sale must be very numerous, and many of them must be unknown. To require all of them to be made actual parties, and in case of the death of any, that the suit should be revived in the name of the personal representative of the deceased party before any final decree could be rendered, would be to deny the bondholders any relief in this court. The course and practice of courts of equity are not so exacting and oppressive. The rule and the general equity practice provide that the case may proceed when the court has sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants. There is no complaint here that any interest except that of the bondholders who are not parties is not represented. But the interests of all the bondholders are represented: 1st by those who are actual parties complainant; and 2d by the trustees of the trust deed who are made the defendants. The trustees were expressly appointed to represent the bondholders, and if the suit had been brought by them, it would not have been necessary to make all the bondholders complainants or defendants. The course is to file the bill in behalf of all who choose to come in as complainants and bear their share of the costs of the suit, or allow them to propound their claims and interest before the master. 2 Redf. R. R. 486; 2 Redf. Am. R. Cas. 692, 630; *Campbell v. Railroad Co.* [Case No. 2,366]. This has been the course pursued in this case, and I am clear that all the parties necessary to the decree asked are before the court.

2. The next objection to the decree prayed for is, that there can be no sale of the trust property or any part of it, to pay either the principal or interest of the bonds, until the year 1900, when the principal of all the bonds is due. One of the solicitors for the defendants, however, admits that there may be a decree for interest in default and a sale of so much of the property covered by the deed of

trust as is necessary to pay the interest due, but insists that no more can be sold.

The terms of the deed of trust ought to be very clear to justify the court in holding that there could be no sale, even for interest, until the year 1900. Here are bonds to the amount of \$4,248,000, bearing eight per cent. interest, payable semi-annually, and due as to principal in thirty years. The property covered by the deed of trust to secure these bonds is not estimated to have cost over \$7,000,000. If no interest were paid until the maturity of the bonds, the principal and interest would then amount to over \$20,000,000, calculating interest on the coupons as they mature. For this vast sum the bondholders would have a security on property which only cost \$7,000,000. In the mean time, during nearly the life of a generation, the railway company would hold the money of the bondholders, and, although it had agreed to pay interest semi-annually, could refuse to comply with its contract, and the bondholder would be without any effectual remedy. I do not believe there is a railroad company so bold, as to ask a loan of money on a deed of trust which could bear such a construction, or a capitalist so foolish as to grant the loan.

There are certain expressions in the deed of trust which give some faint color to the theory under consideration, but there are other clauses which indicate a contrary purpose most unmistakably. The trust deed declares explicitly that, "should default be at any time made in the payment of any part, either of the accruing interest or of the principal sum secured to be paid by any bond or bonds issued under the authority aforesaid," the trustees shall take possession of the property mentioned in the deed of trust, and proceed to sell the same at public auction in the city of Atlanta, and shall apply the net proceeds of the sale in the payment of the interest due on the bonds, and to the extinguishment of the principal of such of the bonds as may then be due. It seems to me that this provision of the trust deed completely overturns the idea that there can be no proceeding for a sale of the trust property, or any part of it, until the maturity of the principal of the bonds. One of the solicitors of defendants, while not agreeing with the construction of that deed just noticed, insists that until the bonds mature there can only be a sale of so much of the trust property as may be necessary to discharge the interest due and unpaid. But in the view I take of the case it is unnecessary to pass upon this dispute. It is clear to my mind, and it is conceded by one of the solicitors for defendants, that there may be a sale of trust property sufficient to satisfy the interest due and unpaid.

On the other hand, complainants insist that a default in the payment of interest makes both principal and interest due, and that the court should order a sale for the whole amount of both principal and interest. Without going into a critical examination of the language

of the deed of trust, I content myself with saying that it seems very clear that when the interest is in arrear, the trustees may sell the entire trust property. The trust deed seems to contemplate but one sale, and on such sale, a full and complete settlement of the trust.

Conceding, then, that there must be a sale to pay the interest due and unpaid, the question arises, Should there be a sale of the entire trust property, or only a part of it? I think this question is settled by the averment of the bill admitted by the answer of the defendant railroad company, and nowhere in the pleadings denied, that the railroad with its appurtenances is in the nature of an entirety, and constitutes one and a continuous line, and that its unity and continuity are the most important elements of its value, and that to separate any part from any other part would greatly impair the whole. This averment of the bill is not only admitted by the answer of the defendant company, but there is not a scrap of evidence in the record to show that it is not entirely true. And, as a general rule, it must be evident that to cut up a railroad and sell it piecemeal would destroy its value. While a sale of a particular part might be made, in some cases, without serious detriment to the part sold; yet from that fact, it would by no means follow that the residue would remain uninjured. That where a mortgage or deed of trust is given to secure the interest and principal of notes or bonds, and the mortgaged property cannot be sold in parts without injury to its value, the whole may be sold on default of the payment of interest before the principal is due, is sustained by the following authorities: *Salman v. Clagett*, 3 Bland, 125, and other cases there cited; *Seaton v. Twyford*, L. R. 11 Eq. 591; *Dunham v. Railway Co.*, 1 Wall. [68 U. S.] 254; *Olcott v. Bynum*, 17 Wall. [84 U. S.] 44; *Pope v. Durant*, 26 Iowa, 233.

Upon the case as presented, I am therefore of opinion, if any part of the road is sold, the whole may and should be sold. If a sale of the whole is made, it will be then time to consider what shall be done with the proceeds. That is a question which, it seems to me, does not, under the practice of courts of equity, present any grave difficulty.

It is objected to a sale of the whole property of the defendant railroad company that the property is owned by two distinct corporations, one of which, a resident of South Carolina, owns the property of the railroad in that state, and that there can be no merger of railroad corporations extending through several states which will so destroy their individuality as to confer on the united corporation all the franchises of the several parts; that a corporation cannot be chartered by two states so as to have a common individuality in both. The inference drawn from this proposition is, that this court can only order a sale of the railroad property in Georgia which is owned by the Georgia corporation, which alone is a party defendant to the bill, and that the

court cannot order a sale of the property in South Carolina, which is owned by a distinct corporation which is not before the court. It would seem to be a sufficient reply to this proposition to say that the Atlanta & Richmond Air Line Company has answered, admitting the union and consolidation of the two companies into one company, has contracted as one and not as two companies, has issued bonds and secured them by a deed of trust as one company, covering its entire line of road and property, and has agreed that the whole might be sold by one sale, at Atlanta, in the state of Georgia. Even if this proposition of defendant's solicitor were true, we think the facts would estop the South Carolina company from setting up its separate existence and separate property, and we think that it has, by the answer of the Atlanta & Richmond Air Line Company, entered its appearance in this cause. But is it true that a corporation cannot be chartered by two states so as to make one and the same corporate body? When this case was up on motion for the appointment of a receiver, I passed upon this question, and held that two states might, by concurrent legislation, unite in creating the same corporate body. It is unnecessary to repeat what I then said. See *Railroad Co. v. Maryland*, 10 How. [51 U. S.] 376; *Railroad Co. v. Harris*, 12 Wall. [79 U. S.] 92.

Counsel for defendants refer to the following cases as establishing the doctrine upon which they rely: *Ohio & M. R. Co. v. Wheeler*, 1 Black [66 U. S.] 286; *Marshall v. Baltimore & O. R. Co.*, 16 How. [57 U. S.] 325; *Railway Co. v. Whitton*, 13 Wall. [80 U. S.] 270; *Tomlinson v. Branch*, 15 Wall. [82 U. S.] 460; *Railroad Co. v. Jackson*, 7 Wall. [74 U. S.] 262; *Delaware Railroad Tax Case*, 18 Wall. [85 U. S.] 206. I have examined these cases and cannot find in them anything to overturn the positive declaration of the court in *Railroad Co. v. Harris*, supra. On the contrary, *Delaware Railroad Tax Case*, supra, strengthens the view of the court in that case. I am of opinion, therefore, that the Atlanta & Richmond Air Line Railway Company is one and the same corporation, both in Georgia and South Carolina, and that this one corporation is properly before the court.

But concede that there are two corporations under the name of the Atlanta & Richmond Air Line Railway Company, one created by and residing in Georgia, and the other created by and residing in South Carolina. It is made perfectly clear by the pleadings and evidence that these two corporations, if there be two, have joined under their common name in executing the bonds and deed of trust in the bill mentioned, over the common property of the two corporations. Now the Georgia corporation has been served with process and is before the court, and the South Carolina corporation has entered its appearance, and both the corporations have united in a common answer to the bill. The

court, therefore, has jurisdiction over both; for while the South Carolina corporation, if it exists as a distinct corporate body, has the right to demand that it shall be sued only in the district where it resides or is found, it may waive this right and enter its appearance as a defendant in any district it pleases. Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. [56 U. S.] 242. It has appeared in this court in this cause as a defendant, and it therefore may be bound by its decree.

It is further insisted by the defendants' counsel that as a large part of the property covered by the deed of trust is beyond the territorial jurisdiction of this court, we are without power to order the sale. The paper executed by the Atlanta & Richmond Air Line Railway Company is a deed of trust to trustees, conveying to them all the railway and other property of the company, with power to sell the whole at the city of Atlanta, in the state of Georgia, if default should be made in payment of interest or principal. Now it cannot be seriously contended that these trustees could not without the aid of this court, by following the direction of the deed of trust, have sold the entire line of the defendant company's road and have conveyed a good title to the whole, extending as it does from Atlanta to Charlotte. Is the power of the trustees any less, because this court has been asked to construe the deed of trust and to order them to execute the trust? If the trustees, under the direction of this court, sell the whole road, they do so by virtue of the power vested in them by the deed of trust. We are not asked to foreclose a mortgage. We are not asked to confer on the trustees any power which they do not already possess, by virtue of the deed of trust, or to impose upon them any new duties, but simply to tell them what their powers are under their deed, and require them to exercise their powers for the benefit of the cestui que trust. The complainants may, by reason of obstacles existing in the other states through which the railroad runs, be compelled to file ancillary bills in those states; nevertheless, I think it is proper and that this court has jurisdiction to order in this case a sale of the entire line of road.

I think what has just been said is an answer to the argument, that under the Code of Georgia, a mortgage can only be foreclosed when the entire principal or an installment of it is due. No foreclosure is asked here. The complainants seek only to exercise what they think to be their rights under the deed of trust, by a sale according to the terms of the trust deed. The conclusions I have reached are the following:

1. That the Atlanta & Richmond Air Line Railway Company, whether it is a single corporation or two corporations of that name, is properly before this court.

2. That it is the meaning of the deed of trust, that the road of the company, or so

much as may be necessary, may be sold to pay interest coupons due and unpaid, without waiting for the maturity of the bonds.

3. That the road is an entirety and cannot be sold piecemeal without injury to the value of the road, and therefore the entire road may and should be sold.

4. That the trustees, by virtue of their power under the deed of trust can, by the direction of this court, sell the entire road lying in three states, and convey a good title to the whole.

5. That the trustees ought to be required to make the sale in accordance with the directions of the deed of trust.

6. When the proceeds of the sale are brought into the court, the court will direct how the residue, remaining after the payment of the interest due, shall be disposed of.

In accordance with the foregoing opinion, a decree was made by which there was a finding of the amount of interest due and unpaid, and the trustees were ordered to sell at Atlanta, Georgia, in the manner, and after the notice prescribed by the trust deed, the entire line of the defendant company's road, extending from Atlanta to Charlotte, North Carolina.

The Atlanta & Richmond Air Line Railway Company prayed an appeal from this decree to the supreme court of the United States, which was allowed, and the penalty of the appeal bond was fixed at \$800,000. This sum was arrived at as follows: It was made to appear that the property conveyed by the deed of trust would not probably sell for more than the principal and interest owing upon the bonds at the date of the decree, and that the cause would remain pending in the supreme court at least two years before final hearing, and that the interest which would accrue upon the bonds during that time would amount to a little more than \$798,000. Under rule 32 of the United States supreme court (6 Wall. [73 U. S.] v.), the penalty of the bond was therefore fixed at \$800,000, and it was ordered that upon the execution by the appellant of a bond in that sum, with sureties to be approved by the clerk, the appeal should supersede the execution of the decree.

Case No. 17,777.

WILMER v. The SMILAX.

[2 Pet. Adm. 295.]¹

District Court, D. Maryland. 1804.

BOTTOMRY — WHEN LIEN ATTACHES — DEVIATION.

[The bottomry lien attaches from the date of the bond, although the ship, by reason of the default of the parties procuring the loan, never performs the voyage described in the bond, but undertakes a different voyage; and the principal of the loan may be recovered in an action in rem. after the completion of that voyage, and as against a claimant who purchased the ship with knowledge of the facts.]

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

The libel in this cause was founded on a bottomry bond for two thousand dollars, hazarded on a specified voyage, which voyage was never performed; but instead thereof, the vessel performed a different voyage, and was afterwards sold by Smith (who executed the bottomry) to Grace, the claimant, who alleged himself to be a bona fide purchaser, claiming an exemption from the bottomry, on two grounds—1st, that the bottomry never attached; and, 2dly, if it did attach, that the remedy thereon could not be pursued in rem. after an intermediate voyage, to injure a fair purchaser. The claimant wholly failed in the proof of his being a fair purchaser: indeed the evidence produced, afforded strong ground to presume that the sale set up was nominal and fraudulent; but his counsel strongly pressed the opinion that the bottomry never attached, as the contemplated risk was never run, and especially if it did, that not pursuing the remedy in time, that is, when the vessel returned to port, but permitting her to go a second voyage it could not now be pursued—there was no question raised as to maritime interest.

BY THE COURT. Your argument amounts to this—that if a mortgagee, does not instantly on his debt falling due, take possession of the mortgaged premises, he loses his security. The hypothecation of a ship by the maritime law, is on the same footing as a mortgage of chattels on land is by the common law. And the plain distinction in cases of this kind, is between liens arising by implication of law, and those which result from express pledge: the former may be lost by parting with possession, on which they depend, or evidence of other equivalent circumstances, but the latter depend on very different rules. The bottomry stipulates, that the vessel shall, with all convenient speed, proceed upon the voyage on which the money was taken up, and if lost during that voyage, that the obligee shall lose his money. The objection that the bottomry did not attach is founded upon the defendant's own allegation, of the breach of his own contract and duty. I cannot conceive that that circumstance can alter the nature of the contract. It was originally a contract of bottomry, or it was not. If it was, the act of one of the parties, cannot alter its nature. The written contract is plainly a contract of bottomry; and it can never be permitted to a defendant, to rely upon his own default, to injure the rights and diminish the security of a fair creditor.

The libellant's counsel considering this case, like the case of an insurance, which does not attach where the contemplated risk has not been run, again pressed it on the court. I did not see sufficient cause to change my opinion. On mature deliberation and revision of that opinion, I can see no reason to think it erroneous. The contract of bottomry, has probably been in use from the earliest periods of foreign commerce, and its long recognition stands in the place of all reason, as it re-

spects public policy. In questions resulting from that contract, as constituting the *ius pignus vel hypotheca*, the interest of individuals is more to be regarded than that of the public. And it is not to be doubted, that he who takes upon himself the hazard of loss for the benefit of another, will adopt the best method of securing himself, and look to all the securities the law allows, and in aid of that personal responsibility and sufficiency which the law creates by the very act of a loan, will rely on the thing. "*Quia plus cautionis in re est, quam in persona.*" Dig. c. 106. The contract of bottomry may be either for a limited time, or upon a whole voyage; and in both, the lender has the same securities, to wit, the person of the borrower, and the thing on which it is loaned: and runs the same risk, to wit, a total loss, if his money is effectually hazarded. I say effectually, for it must be out of his own separate power to recall the hazard and rescind the contract; and I hold it to be effectually hazarded when the contract is once completed, and the employment of the money depends upon the sole volition of the borrower.

The general analogy between this species of contract and that of insurance is very striking, but there are some differences very material to be attended to. The insurer parts with no funds or property until the misfortune arrives. The lender on bottomry deprives himself of his funds and property from the moment of the contract, and risks their entire and total loss—he hazards his money too, to a person who by the application to borrow on bottomry, announces a decline or embarrassment of his affairs. The contract of insurance by its terms imports, that the obligation on the underwriters to make good a loss arises only when that loss happens. The contract of bottomry, on the other hand, implies an immediate pledge and security defeasible upon a future event; the first is a personal contract simply—the latter a contract of pledge, as well as personal security; in cases, therefore, between the insurer and the lender upon bottomry, the latter is preferred. There has not been, to my knowledge, any judicial decision upon the immediate question whether a bottomry in such a case attaches. Nor can I find such a question ever stirred by English elementary writers. A strong evidence that the objection is not solid, since the very term "bottomry" imports hypothecation by the maritime law; but there is much stronger evidence than any which results from the silence of jurists, to be drawn from principles which must be admitted to apply between insurers and lenders upon bottomry. I will suppose in this case for a moment, that the brig *Smilax* was insured for the voyage she actually sailed; and that upon her return voyage she was so materially injured by perils of the sea as to warrant an abandonment to underwriters as for a total loss, and a contest arose between the lender on bottomry, who should have the benefit of the salvage goods. If the insurer,

in this case, must give way, I think it will not be contended that the owner can stand against the bottomry creditor. That the insurer in such case, is to be postponed to the creditor on bottomry, is I think, very clear. By an abandonment, the insurer is placed in the situation of the insured whom he represents, and can have no greater right than the insured had. The lender upon bottomry loses remedy only when the ship, &c. is wholly lost; and where a part is preserved, they are esteemed as his proper goods, being presumed to be the product of his money. He therefore takes preference of the insurer. See 1 Valin, Comm. 262, iii. But in this case it is admitted, that if the voyage on which the money was intended to be hazarded, was not proceeded on, it resulted from the voluntary determination of the borrower. It cannot be denied, that when he undertook to perform that voyage, he virtually promised not to go on another, or exercise the lender's hazard. Good faith and common honesty required, at least, that he should not do any act to injure the lender, or increase his risks. The lender on bottomry looks for this integrity, and to the security so pledged. He is deceived in the honesty of the borrower, who may be insolvent, and upon that failure to discharge a moral duty, is attempted to be bottomed a principle which shall go to the further length of depriving the creditor of his security, on which he must be supposed principally to have relied. Thus by fraud, in the only act in his power, a foundation is laid to erect a more extended superstructure of iniquity, that the fraud which cannot be directly perpetrated, may nevertheless form a legal stock, on which to engraft other frauds, and produce more extensive injuries. Is there any case, or principle, or opinion, in any system of law, which will warrant a claim of protection, founded on an admitted violation of duty? Can there be any colour for such doctrine in a court of equity, and against a fair and equitable creditor?

Does the underwriter, or the lender upon bottomry insure the honesty of the man with whom he deals, or does the law hold out a temptation to him to commit iniquity that he may reap its fruits? The only hazard or peril which the insurer or lender upon bottomry runs, is the perils of the sea. They are answerable for no act of fraud or misconduct of the insured on the borrower. If they were at any time to be so affected, I can see no reason why at every period of the voyage they should not equally be affected. The true rule is, that the lender upon bottomry loses all remedy, if the vessel does not return to port, by perils of the sea, &c. or is lost without the fraud or fault of the owner. If a declining to proceed on the stipulated voyage at all destroys the hypothecary right of the lender, it would equally be destroyed, if when she performed one half of the voyage, the borrower changed her route and destination, for in such case the whole risk, according to arguments of the claimant's counsel, was not run; and

the same reason would apply with equal force, in any case where the route was changed by the misconduct of the borrower, as carrying enemies' goods, being captured, taken out of her course, &c. or in any similar case. That the lender on bottomry has his remedy from the time of his contract, is not only proved by general principles—by the decisions that the borrower cannot insure his interest—that the lender may insure his principal—but by express decisions on the point.

On the 5th of September, 1754, Captain Candole borrowed of Mr. Barratier one thousand livres on bottomry of the polacre St. Estienne, giving his brother Francis Candole security for a voyage to the Levant, at the interest of ten pounds per cent. for six months, and so pro rata until her return, not exceeding three years. After navigating one year, the captain died at land, and the command of the vessel devolved on Faudon, his mate. In January, 1756, the vessel arrived at Cypress, the 20th of the same month, the crew presented a request to the French consul that the vessel might be examined, offering to re-embark if she was judged navigable. The examiners reported, that the vessel might sail many years, if refitted: the expense of a proper refit was estimated at from eleven to twelve hundred piastres. On the 23d, the consul ordered Faudon to proceed without delay to repair his vessel—he remonstrated that he had no money—the consul renewed his order. On the 3d of February, Faudon not being able to obtain the money necessary for repairing the vessel, declared that he abandoned the vessel to be sold by the consul, for the most advantage, to those interested. In consequence, the consul sold the vessel for nine hundred piastres, out of which he paid the crew. The purchaser refitted the vessel and employed her in commerce. On the 22d of June, 1756, the assignee of Barratier, the lender of bottomry, brought a suit against the heir of Captain Candole and his security, for the whole sum lent, together with the maritime interest up to the time of the sale. The defendant alleged that the vessel being unnavigable, the plaintiff could only recover the amount of sales, deducting the amount of wages, &c. The plaintiff replied, that the vessel was not found wholly unfit for sea, but only required repairs; and that if the captain had not found money to refit, it was a matter which concerned them only, and not the lender on bottomry or insurers. Upon this statement of facts, the admiralty of Marseilles, on the 19th of July, decreed for the whole sum lent, and the whole maritime interest.

This case is very peculiar—the length of time the vessel had been employed in navigation afforded strong presumption that the reparation which had become necessary was from the ordinary perils of the ocean. The original captain was dead; the substitute was at a very remote place, out of all probable correspondence with his owner—where credit might naturally be supposed difficult to obtain—and where there was no imputation of

fraud or wilful misconduct. But it was a duty imposed by law on ship-owners who take up money on bottomry, or insure them, to keep them sea-worthy, from port to port. Going to sea when not properly provided, is an increase of the risk of the lender or insurer, which the owner has no right to produce. And, says Valin, in observing on this case, I have no doubt of the correctness of the judgment upon the facts stated. Such excuses are always suspicious; but if the insufficiency of the ship really arose from perils of the sea and was fully proved, it would justify the defendant.

Let this decision, and the facts on which it rest, be compared with the case before the court, and who will say that there is a pretext to support the claimant's defence? On this point Zouch is explicit (Elem. 398): "Item quæsitum est an fœnoris nautici præstatio evitanda sit, cum navigatio impedita est, culpa nautæ debitoris? Responsum. Quod ex præcipite debitoris audacia contingebat; creditori ascribi, publici juris rationem non permittere." And this is a consequence drawn from a rule of maritime law, derived from the civil law, which is a full answer to every argument of the risk not having been run, in consequence of the voluntary change of the voyage by Smith. "De conventionem præstandi periculi quæritur, an id damnum præstandum sit, quod cui culpa sua contingit? Et visum quod qui navigationis periculum in se suscepit, intellegitur periculum quod casu, non quod culpa domini contingit in se suscipere." Z. B. 428. So in case of freight unladen before the voyage commenced. These principles are so strongly supported by all the considerations of equity, justice and moral rectitude, that I should reluctantly embrace a contrary rule—I feel very confident in their legal correctness, but even laying them out of the case, I think there is enough to support the decree.

The only ground taken to deprive the libellant of his lien, is, as before noticed, that the risk contemplated was not run. The evidence upon which the argument rests will not, on strict legal principles, warrant the inference deduced—What is the contract? The libellant loans to the owner of the Smilax, for her outfit to sea, the sum of two thousand dollars, on two conditions—one, that she shall with all convenient dispatch proceed to sea upon a specified voyage; and the other, that if lost in the prosecution of that voyage, the money loaned is not to be reimbursed.

The contract of pawning, or pledging, by way of bottomry, must necessarily precede the right to take possession of the ship, since that relates to future acts and events, which must take place before the ship can be seized or taken possession of. The right to exercise the power of reducing into possession, is necessarily contingent, but the right is not the less perfect when the contingency happens; the vessel must therefore be considered as mortgaged and bound from the date of the bottomry bond, to take effect in possession,

like any other contingent interest, when the contingency happens. It is an interest which he might lawfully insure, and would not be open to the objections of a wagering policy—I speak of the principal sum only. If the vessel had duly proceeded upon the stipulated voyage and performed it, it is not doubted but the libellant's claim would be sustainable. I cannot conceive a reasonable ground of discrimination between a case, where a right is admitted upon the happening of two contingencies upon which it is limited to take effect, and the case of a right limited to take effect upon the happening of one, out of two alternative events, on which it is limited to take effect, and which is the case before the court. The lender only authorized his money to be put at hazard upon a particular voyage, in the event that that voyage was proceeded upon with all convenient dispatch; but she did not proceed agreeably to the contract, on that voyage, but prosecuted another and different voyage. The right of the lender then, by the terms of the contract, to call for his money back, was complete the moment the vessel sailed upon the new voyage. But from the moment of the loan, until the time the vessel commenced her new voyage, the money was risked by the lender, and at least during that time, being at hazard, it was embraced by the contract.

It is to be remembered, that this opinion is applicable to the case of a libellant claiming a return of his loan, and does in no shape involve the consideration of the question of interest, or the power of this court to moderate maritime interest—agreeably to the circumstances, and in proportion to the actual hazard incurred by the lender.

WILMINGTON & N. R. CO. (KEMBLE v.).
See Case No. 7,684.

WILMINGTON & R. R. CO. (RANDOLPH v.). See Case No. 11,563.

WILMOT (BARSTOW v.). See Case No. 1,066.

WILMOT (VANDOVER v.). See Case No. 16,848.

Case No. 17,778.

In re WILMOTT.

[2 N. B. R. 214 (Quarto, 76); 1 Am. Law T. Rep. Bankr. 121.]¹

District Court, N. D. New York. Oct. 19, 1868.

BANKRUPTCY—DISCHARGE.

A bankrupt must make application for his discharge within one year from the date of adjudication in bankruptcy.

[Cited in Re Greenfield, Case No. 5,774; s. c. Id. 5,775; Re Sloan, Id. 12,945; Re Brockway, 23 Fed. 584.]

In bankruptcy.

¹ [Reprinted from 2 N. B. R. 214 (Quarto, 76), by permission. 1 Am. Law T. Rep. Bankr. 121, contains only a partial report.]

HALL, District Judge. The application of the bankrupt for his final discharge, presented this day, Oct. 19, 1868, bears date on the 15th inst., and sets forth that the applicant was duly adjudged a bankrupt on the 29th day of September, 1867. The motion for the usual order of the creditors of the bankrupt, and all others in interest, to appear and show cause against such discharge, was made ex parte; and, without any opposition or argument upon the question, the court is called upon to decide whether it is proper to grant the order upon an application made after the expiration of one year from the adjudication in bankruptcy. The right of a bankrupt to apply for and obtain a discharge is expressly given by the bankrupt act [of 1867 (14 Stat. 517)], and it must rest entirely upon the provisions of the statute. The act provides: "That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts," &c. This provision would seem to require that the application for a discharge should be made within the year after the adjudication in bankruptcy, and such is the interpretation given to it by Avery and Hobbs in their work on Bankruptcy (page 210), where they say: "The bankrupt must apply for his discharge within one year from the date of the adjudication in bankruptcy." The order to show cause will not be made upon the present motion, but it may be renewed if the bankrupt's counsel can furnish authority for a different decision.

Case No. 17,779.

Ex parte WILSON.

[2 Cranch, C. C. 7.]¹

Circuit Court, District of Columbia. July Term, 1810.

IMPRISONMENT FOR DEBT—DISCHARGE.

The court will not, on motion, discharge a prisoner for debt, who has the benefit of the bounds, because the creditor refuses to pay the daily allowance.

Motion by Mr. E. J. Lee, for W. Wilson, to order the marshal to discharge him from the prison-bounds, the creditor having failed to furnish him with his daily allowance, according to the act of congress of 3d March, 1803, § 5 (2 Stat. 237). The allowance was demanded by the marshal on the 25th of June, 1810, and refused. The daily allowance for prisoners in execution for debt, was fixed by a general order of the court, on the 13th of June, 1803.

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

THE COURT refused to make such an order for the discharge of Mr. Wilson in this summary way, because if he has a right to depart the prison-bounds he is at liberty so to do; if he has not, the order of the court would not justify the marshal in discharging him.

See Ex parte Wilson, 6 Cranch [10 U. S.] 52.

WILSON, Ex parte. See Case No. 894.

Case No. 17,780.

In re WILSON.

[5 Biss. 387; 18 Int. Rev. Rec. 93; 5 Leg. Gaz. 294; 8 N. B. R. 396; 5 Chi. Leg. News, 549; 5 Leg. Op. 153; 21 Pittsb. Leg. J. 22.]

Circuit Court, N. D. Illinois. Aug., 1873.

BANKRUPTCY—SUSPENSION OF PAYMENT—SINGLE NOTE—SOLVENCY—PRIMA FACIE CASE.

1. The non-payment by a merchant for fourteen days, without legal excuse, of a single piece of commercial paper, is an act of bankruptcy, without reference to whether he is actually insolvent.

[Cited in Marble v. Jamesville Manuf'g Co., 163 Mass. 171, 39 N. E. 1002.]

2. It is no answer to a petition in bankruptcy that the respondent is solvent, and the only justification for non-payment of commercial paper is a legal one, as that he was not liable upon it.

3. One of the objects of the bankrupt law [of 1867 (14 Stat. 517)] was to compel merchants to pay their commercial paper as it fell due, under penalty of being adjudged bankrupt, if non-payment was continued without legal excuse for fourteen days.

4. In an involuntary petition it is not necessary to negative all the circumstances which might excuse the non-payment. For a rule to show cause it is sufficient that a prima facie case be made. And where the petition alleged that the debtor had suspended payment on his commercial paper for more than fourteen days and had not yet paid the same, that he was a merchant, and that the petitioners knew of no reason for the non-payment except the neglect or inability of the debtor, *held*, it was prima facie an act of bankruptcy.

[Cited in Re Hadley, Case No. 5,894.]

In bankruptcy. Petition for review.

The original proceeding was a petition in bankruptcy filed by P. Vanvalkenburg & Co. against Guy Wilson, a merchant doing business in Chicago, alleging as an act of bankruptcy, that on the 2d of June, 1873, he suspended payment of his commercial paper, and had not resumed payment of the same within a period of fourteen days thereafter, nor at any time since. The commercial paper referred to was a promissory note for \$509.79, due June 2, 1873, and held by petitioners. The petitioners stated that they knew of no cause for the non-payment of this note except neglect or inability of the said Wilson. The affidavit accompanying the petition did not

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

show any other act of bankruptcy, or that the respondent was actually insolvent.

On this petition the district judge made the following order:

"There being no sufficient evidence of actual insolvency, I do not deem it proper to enter a rule to show cause on this petition. I hold that suspension of payment for fourteen days on a single piece of paper does not alone show insolvency. Petition dismissed." [Case unreported.]

The petitioners thereupon filed this petition for review.

McClellan & Hodges, for petitioners.

The application for the rule is *ex parte*, and the only question for the court to pass upon is, are the petition and accompanying depositions in due form, and do they properly allege an act of bankruptcy?

All matters of defense or in explanation can only be offered by the debtor in response to the rule, and any possible excuse the debtor may have need not be anticipated and negatived by petitioner, and the suspension of a single piece of commercial paper by a merchant, and non-resumption for a period of fourteen days, is *prima facie* an act of bankruptcy. *Katzenberg v. Lowenstein* [Case No. 8,574]; *In re Weikert* [Id. 17,361]; *Heinsheimer v. Shea* [Id. 12,729]; *In re Hollis*, and *In re Kenney* [Id. 6,621]; *In re Nickodemus* [Id. 10,254]; *In re Thompson & McClellan* [Id. 13,936]; *In re Wells* [Id. 17,387]; *In re Chandler* [Id. 2,591]; *In re Chappel* [Id. 2,612]; *Shaffer v. Fritchery* [Id. 12,697]; *McLean v. Brown* [Id. 8,880]; *In re Skelley* [Id. 12,921]; *Baldwin v. Wilder* [Id. 806]; *In re Kenyon & Fenton*; ² *In re Carter* [Case No. 2,470]; *In re Hercules Mut. Life Assur. Soc. of the U. S.* [Id. 6,402]; *In re Ess & Clarendon* [Id. 4,530]; *In re Manheim* [Id. 9,033]; *In re Munn* [Id. 9,925]; *In re Raynor* [Id. 11,597].

DRUMMOND, Circuit Judge. The 39th section of the bankrupt law as amended by the act of July 14, 1870 [16 Stat. 276], declares that any one who "being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days," has committed an act of bankruptcy, and may be adjudged a bankrupt on the petition of one or more of his creditors.

The 39th section sets forth various acts which constitute bankruptcy, one clause of which has just been cited. There was a difference among judges as to the true construction of the original clause of the 39th section, and to remove this doubt it was amended by the act of 1870, and the question is now presented whether the petition brings the parties,

both creditor and debtor, within this amended clause of the 39th section.

It has in several cases been stated that there may be a suspension of payment of commercial paper for a period of fourteen days, which does not of itself constitute an act of bankruptcy. For instance, the paper may not be valid, or there may be a set-off against it; or, from some cause, the party may not be legally bound to pay it. In such cases the courts have held that the suspension of payment does not constitute an act of bankruptcy, because in point of fact there is actually no indebtedness, or if there is, it is offset by an indebtedness on the other side, so that there is no legal obligation to pay.³

The ground upon which the district judge decided the case was that the fact of one piece of commercial paper being unpaid was no sufficient proof of insolvency. The question then arises, whether on that ground can be based the refusal of a rule to show cause.

The point, it will be observed, is, whether a party has, *prima facie* upon the papers as they appear, committed an act of bankruptcy within the meaning of the 39th section, and whether insolvency is an indispensable element entering into and constituting the act of bankruptcy. I think it is not.

The real question is, whether, being a merchant or trader, he has suspended payment of his commercial paper for fourteen days, within the meaning of the law. Of the various acts which the 39th section declares to constitute acts of bankruptcy, most of them do not refer to insolvency at all. For instance, the departure from the state, district or territory of which the debtor is an inhabitant, with intent to defraud his creditors, is an act of bankruptcy. Where a debtor conceals himself to avoid the service of legal process in an action for the recovery of a debt or demand provable under the bankrupt act, he commits an act of bankruptcy. The concealing or removing any of his property to avoid its being attached, taken, or sequestered on legal process, is an act of bankruptcy. So with many other acts declared to constitute bankruptcy, as where the debtor has been actually imprisoned for more than seven days in a civil action founded on a contract for the sum of one hundred dollars or upward. In all these cases insolvency is not an element.

Then comes the further definition which the district judge has apparently applied by analogy to the particular circumstances of this case: "Or who being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any gift, grant, sale, conveyance," etc.

Some of the courts have intimated that "suspension of payment" means a general suspension of payment, and not the suspension of payment of a single piece of commercial

³ For such cases consult *In re Thompson* [Case No. 13,936]; *In re Chandler* [supra]; *M. & M. Nat. Bank of Pittsburgh v. Brady's Bend Iron Co.*, [Id. 9,018]; *In re Munn* [supra].

² [See note at end of case.]

paper; and it is in carrying out that view that the district judge has held there must be an allegation of insolvency.⁴ But the question is, whether it is competent for a man, being a merchant, to suspend payment of any of his commercial paper and bid a creditor defiance, and then to turn round and allege in answer to an application to declare him a bankrupt, that he is solvent and therefore a proceeding in bankruptcy can not be instituted against him.

I hold that allegation to be no answer to a petition in bankruptcy under such circumstances. It is not enough for him to show as a reason why a decree in bankruptcy should not go against him, that he is solvent, and because of spite or caprice, or some other similar cause, he does not choose to pay his commercial paper. The reason which alone can prevent the non-payment of commercial paper and its continuance for fourteen days, from constituting an act of bankruptcy, must be a legal reason, such as to enable a court to say that it is not within the scope and meaning of the bankrupt law, because the debtor was legally justified in not making payment.

Upon the face of this petition no legal reason appears for the non-payment of this commercial paper within fourteen days after maturity, and the petitioners say they know of none. If there is any legal reason, it is for the debtor to show it before the bankrupt court. Prima facie a case is made out against the respondent, and the question of solvency or insolvency is not material.

A solvent merchant cannot, therefore, refuse to pay his commercial paper, and then defend himself from a petition in bankruptcy on the ground that he is solvent. One of the very objects of the bankrupt law was to compel merchants to pay their commercial paper as it fell due, by holding over them the consequences of its non-payment, if continued for fourteen days.

Possibly there should be a different rule, because if a man is solvent he can be proceeded against in the ordinary way, but the bankrupt law has not so provided. Insolvency does not constitute an element of the act of bankruptcy in this case, as it does not in most of the cases set forth in the 39th section.

If it be said that we can suppose a suspension of payment of commercial paper for fourteen days which does not constitute an act of bankruptcy, the answer is that it is not possible for the petitioner to recapitulate all the various circumstances which might negative any supposed case, and thereby exclude it from the operation of the bankrupt law.

The district judge has required an allegation of insolvency. Something else might be required to be negatively set forth in the petition, which, if it existed in point of fact, would show that the act was not one of bankruptcy.

We cannot, therefore, require that the petitioner should set forth by negative allegations, all the particular circumstances which by possibility might show the non-payment to be within the meaning of this clause of the bankrupt law. It is sufficient that a prima facie case is made upon the petition.

It is for the debtor to make explanation or defense.

Again, if it be said that the non-payment for the given period must be a "general" suspension, where is the line to be drawn? On how many pieces of commercial paper must payment be suspended in order to constitute an act of bankruptcy? The statute has not declared that suspension of payment on any particular number of notes or bills of exchange shall constitute an act of bankruptcy, but the language is, "his commercial paper," and it will be found impracticable to adopt a rule which limits the non-payment to some certain number of notes or bills of exchange in order to constitute an act of bankruptcy.

For these reasons I think the order of the district judge was erroneous and must be reversed; and that the petitioners are entitled to a rule to show cause.

By section 12 of the amendment to the bankrupt act passed June 22, 1874 [18 Stat. 178], section 39 of the original act is so changed as to require a suspension of payment of commercial paper forty days to constitute an act of bankruptcy.

[NOTE. The following case, entitled "In re Kenyon & Fenton," cited in the brief of McClellan & Hodges in the principal case, is reported from 6 N. B. R. 238, by permission:]

In re KENYON & FENTON.

[6 N. B. R. 238.]

Superior Court, Territory of Utah. 1873.

BANKRUPTCY — MANUFACTURERS — ACT OF BANKRUPTCY — PAYMENT OF WAGES.

1. The publishers of a daily paper and proprietors of a book and job printing office are manufacturers, within the meaning of the bankrupt act.

2. Payment of wages to employes, though made in the regular course of business, is an act of bankruptcy if done in contemplation of insolvency; for although the law prefers an employe to the amount of fifty dollars, this preference must be secured by and through the proceedings in bankruptcy, and not outside of them, or independent of and in spite of the act. The negotiable paper of a firm of manufacturers is commercial paper within the meaning of the act, regardless of the purpose for which it was given.

The question before the court arises upon two separate demurrers filed by said several alleged bankrupts to the said petition for adjudication of bankruptcy against them.

The said petitioner, among other things, alleges that said firm are publishers of a daily paper in Salt Lake City, in said territory, known as the "Salt Lake Daily Review," and have also conducted a book and job printing office connected therewith, in which are manufactured cards, notes, billheads, blank books, posters, show bills, and other articles, &c.; that said firm, within six months, to wit, on the twenty-sixth of December, eighteen hundred and seventy-one, in said territory, being manufacturers, have suspended and have not resumed payment of their commercial paper with-

⁴ For such case, see In re John Clemens [Case No. 2,878].

in a period of fourteen days, which paper is therein set forth; and that being in contemplation of insolvency said Kenyon executed a mortgage or transferred all his right, title and interest in the business, material, effects and assets of the said Daily Review and the said job office to said Fenton, with the intent to delay the operation of said bankrupt act; and that being in contemplation of insolvency, and within six calendar months, to wit, on the seventeenth day of November, eighteen hundred and seventy-one, and at sundry other times since then, made payments of money to sundry persons therein named, with the intent to give a preference to their creditors; and that within six calendar months, to wit, on the second day of November, eighteen hundred and seventy-one, the said firm being manufacturers, suspended, and have not resumed payment of their commercial paper within a period of fourteen days, therein describing the same and showing it to be negotiable paper.

The said demurrers substantially charge that said petition is not sufficient in law, and in this: First. It does not aver that the alleged bankrupts are manufacturers within the meaning of the bankrupt act. Second. It does not aver that the notes mentioned in said petition were the commercial paper of said bankrupts nor that they were made in the course of their trade as manufacturers within the meaning of said act. Third. There is not a sufficient allegation that said mortgage, and the said payments made by said bankrupts, were made with the intent to prefer any of their creditors. Fourth. That there is no allegation that said mortgage and payments were made in the contemplation of bankruptcy, etc. Fifth. That there are not sufficient facts alleged to entitle the petitioner to the relief prayed for under the said act.

Charles G. Loeber, for Kenyon.
D. Cooper, for Fenton.
James L. High, petitioner, pro se.

McKEAN, C. J. The respondents must be regarded as manufacturers, and the promissory notes set forth in the petition as their commercial paper. The petition contains all necessary averments, and, therefore, the demurrers should be overruled.

HAWLEY, J. To understand the questions raised by said demurrers, it becomes necessary to enquire into the nature and extent of the character of a manufacturer and trader within the meaning of the bankrupt act. The character of a trader embraces a wide field of operation. It is of no consequence in what one may trade, the only question is, does he buy and sell articles which are subject to trade and commerce? In *re Cowles* [Case No. 3,297]. Selling horses or other stock or the products of a farmer does not constitute him a trader within the meaning of the act. But if a farmer buys horses or other stock or products of a farm to sell again, and this constitutes a part of his business, he then becomes a trader, and subjects himself to this provision of the bankrupt act. In *re Chandler* [Case No. 2,591]. The term "manufacturer," under the bankrupt act, has a legal meaning; and this legal meaning must be governed by legal rules. It is true, that every one who manufactures, is not to be embraced within the legal phrase. A farmer is not to be considered a manufacturer in the commercial sense, when he confines his business to the manufacture of the milk of his cows into butter and cheese; nor when he converts the products of his farm into beef and pork. But it does not follow, that when he makes it a part of his business to buy milk and manufacture the same into butter and cheese, or to purchase the products of other farms and other stock than those of his own, and manufactures the same into beef and pork, that he

is not a manufacturer within the meaning of the act. When the manufacturing becomes the principal part of even a farmer's business, which requires him to buy articles or products and to manufacture them for sale, he thereby becomes a manufacturer and trader within the meaning of the act. A buyer of leather, who makes it his business, or a part of his business to manufacture the same into boots and shoes, or harness, and sells the same, though he be a nursery-man or a gardener or a farmer, is a manufacturer and a trader within the meaning of the act. If other construction than this should be given to the act, the spirit and letter of the same could be destroyed by assumptions the most frivolous as well as those the most false. If it should be admitted that the publishers of a weekly or daily paper were not manufacturers within the meaning of the act, yet if they should buy paper, ink, and other material, and make the same into cards or billheads, or blanks and blank books, and conduct a business of this kind, as in this case it is averred the bankrupts have done, they are manufacturers and traders within the meaning of the act; for these articles so manufactured are not necessary parts of the business of publishing a newspaper. The petitioner avers that said alleged bankrupts are publishers of said newspaper, and manufacturers of books, cards, billheads, etc. Though it is not necessary to decide that the printing and publishing of a daily newspaper is manufacturing in the strict sense of the law, yet my brother judges have expressed the opinion it would be, and I am inclined to the same conviction. A newspaper publication is as much the result of manufacture as that of books or cards or billheads. To make a distinction between them, when in fact there is no distinction, would seem to be an utter disregard of the objects as well as the legal intentment of the law; for they buy, manufacture, and sell.

The second cause of demurrer, to wit, that there is no allegation that said notes set forth were the commercial paper of the said firm, certainly has no foundation; for the averment of the petitioner is explicit that said firm within six calendar months, to wit, on the second day of November, eighteen hundred and seventy-one, being manufacturers as aforesaid, suspended, and have not resumed payment of their commercial paper within a period of fourteen days. This allegation is in the language prescribed by the thirty-ninth section, and fully sets forth the making and suspension and non-resumption of their commercial paper for a period of fourteen days. What other or further averment is necessary is not comprehended, and we must therefore hold this averment sufficient.

The third cause of demurrer in part is that the averment that said Kenyon mortgaged his said interest in the property named to his co-partner, Fenton, who is made a party defendant in the proceedings in bankruptcy, with the intent to prefer his said partner, seems to be well taken; for a transfer of one partner to another, of a firm, is not such a transfer that puts the property out of the firm in the strict sense. The removal of the property by mortgage out of the hands of one and into the possession and ownership of the other partner does not remove the same in legal contemplation from liability to the firm's creditors. But the other clause of this specification, that said payments were made by said firm within six calendar months with intent to prefer creditors, is a sufficient charge under the act. Therefore, this cause of demurrer, being good only in part, and not obnoxious to the petition in another material point, it cannot be sustained. The fact that said payments were made to the employes of said firm, in their said business, while other employes, with the petitioner, were not paid, does not relieve against this act, or cause for proceedings in bankruptcy against them. They

have no right to prefer one of their employes against the rights of other creditors, whether employes or otherwise. The law prefers an employe to the amount of fifty dollars, but this preference must be secured, if at all, by and through the proceedings in bankruptcy, and not outside of them, or independent of, and in spite of the act. Whenever a person or a firm find they are unable to pay his or their debts in full, or his or their commercial paper at maturity, it is his or their duty to apply to the court in due form of law under the bankrupt act, to distribute his or their assets among his or their creditors equally, without other preference than the said act provides.

But counsel insist that, because the petitioner has embraced certain elements of section thirty-five with those of section thirty-nine of the act, therefore his petition in these respects is obnoxious to the demurrer. The petitioner manifestly has a right so to do. These two sections must, as they uniformly have been, be construed by the courts together: for in effect section thirty-five so provides, as follows: "And if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or acting in contemplation of insolvency, and that such payment, sale, assignment," etc., "is made to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede or delay the operation and effect of, or to evade any of the provisions of this act," etc., the same "shall be void," etc. The thirty-ninth section provides "that any person residing," etc., "and owing debts," etc., "being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance or transfer of money or other property, estate, rights or credits, or give any warrant to confess judgment, or procured or suffered his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as endorser, bail, surety or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a banker, broker, merchant, trader, manufacturer or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days, shall be deemed to have committed an act of bankruptcy," etc. From the recital of these parts of the said two sections, it is manifest that they must be construed together, particularly in proceedings in voluntary bankruptcy. To decide otherwise would be a violation of the letter as well as the spirit of the act.

The fourth cause of demurrer assigned that there is no sufficient allegation that the said payments were made in contemplation of insolvency, with intent to give a preference, etc., cannot be sustained; for the averments in the petition are that the said firm, within the period of six calendar months, within said territory, to wit, on the seventeenth day of November, eighteen hundred and seventy-one, being in contemplation of insolvency with intent to give preference, did make payments to sundry persons (naming them) and at sundry other times therein named, within said territory, and also averring that they were manufacturers, etc. A more specific compliance with the provisions of the act could not be made than is made by the petitioner.

The fifth cause of demurrer is a general one and goes to the whole petition; it, therefore, follows, from what has already been said, that it cannot be sustained.

The assertion by counsel that the notes in said petition set forth were given by said firm as publishers of said daily paper, and not as manufacturers as aforesaid, is not borne out by the allegation and averments in said petition contained. The petitioner avers that the said firm were manufacturers of books, blank books, cards, billheads, etc., as well as publishers of said paper, and also avers that said firm made said notes and delivered them, etc.; that is, they put them in circulation as commercial paper. Thereby the same became their commercial paper under the act and under the law merchant, and cannot be restricted in its character by the appliance of a technical construction such as counsel have sought to give it. Whether it was uttered by said firm as the publishers of said daily paper, or as manufacturers of books, blank books, cards, billheads, etc., it matters not, for the same being negotiable and put into circulation, either as publishers as aforesaid or as manufacturers as aforesaid, or as publishers and manufacturers as aforesaid, it becomes their commercial paper within the meaning of the bankrupt act, as well as under the law merchant. A more restricted construction would be an utter disregard of the spirit and letter of the law, and do violence to the best interests of the business community. In re Chandler [Case No. 2,591]; In re Nickodemus [Case No. 10,254]; In re Hollis [Case No. 6,621]. The term "commercial paper," within the meaning of the bankrupt act, includes negotiable notes, bills of exchange, negotiable bank checks, certificates of deposit used in commercial transactions known as the "law merchant." In this sense congress used the term in the act, and not in the restricted sense of counsel in the argument of this case. By usage and by statute, negotiable paper is to be regulated by custom and the law merchant. If a "banker, broker, merchant, trader, manufacturer or miner" allows his paper to go to protest and suspends payment for fourteen days, or if he has fraudulently stopped payment, in either case he has committed an act of bankruptcy. A fraudulent stoppage of payment is an act of bankruptcy, and his creditors may proceed against him at once, without waiting fourteen days. But when there is only stoppage or suspension of payment, without fraud, then the same must continue without resumption, fourteen days before the act of bankruptcy is complete. This provision in the thirty-ninth section is so clear that it seems strange that counsel should insist upon a different construction. In re Jersey City Window-Glass Co. [Case No. 7,292]; In re Ballard [Case No. 816]; In re Lowenstein [Case No. 8,574]; Doan v. Compton [Case No. 3,940]; Davis v. Armstrong [Case No. 3,624]; Heinsheimer v. Shea [Case No. 6,328]; In re Hollis [Case No. 6,621]. Paper not given in the ordinary course of the business of a banker, merchant, manufacturer, trader or miner, it has been held, is not commercial paper within the meaning of the act. In re Lowenstein [Case No. 8,574]; In re McDermott Patent Bolt Manuf'g Co. [Case No. 8,750]. But In re Chandler [Case No. 2,591], holds the contrary doctrine. It is sufficient, however, if the debtor's commercial paper was incurred in his character of banker, merchant, trader, manufacturer or miner. It does not matter whether the same was given for a loan of money, for goods, or to his or their employes, or otherwise, nor whether the maker, acceptor or endorser, as principal debtor or otherwise, is liable thereon, if it appear in the petition that it is the debtor's commercial paper of the class enumerated in section thirty-nine of the act. In the case at bar it so appears with sufficient averments. We must, therefore, overrule the demurrer and grant leave to the bankrupts to reply to the allegations contained in the petition.

STRICKLAND, J. The petition appears to be sufficient upon its face, and the paper is ne-

gotiable paper. Then the only question remaining is, are these parties within the purview of the law,—are they manufacturers? If so, the paper as a matter of course is their commercial paper. I believe them to be manufacturers. The demurrer is not well taken.

Case No. 17,781.

In re WILSON et al.

[16 Blatchf. 112.]¹

Circuit Court, S. D. New York. March 26, 1879.

BANKRUPTCY—COMPOSITION PROCEEDINGS—OBJECTIONS—REVIEW IN CIRCUIT COURT—DISCRETION OF REGISTER AND DISTRICT COURT.

1. Under the statute in regard to compositions in bankruptcy (Act June 22d, 1874, § 17, 18 Stat. 182), a debtor may be excused by the creditors from answering inquiries, even though he is present at the meeting of creditors.

2. On a review in bankruptcy the circuit court cannot consider objections to a proceeding in composition, that were not taken in the district court.

3. It is no valid objection to a composition, that it is unsecured and payable in instalments, and that the property of the debtor is restored to him, to be dealt with at his pleasure.

4. When questions of policy and expediency have been fairly before the creditors and disposed of by them, and their action has been approved by the register and the district court, such action will not be interfered with by the circuit court, on review.

[Cited in Re Joseph, 24 Fed. 138.]

5. The provisions of the composition in this case considered and held not to violate the statute or to be improper.

[In review of the action of the district court of the United States for the Southern district of New York.

[In the matter of Samuel Wilson and Thomas Greig, bankrupts. From an order of the district court for the confirmation of a composition (Case No. 17,785) the case was brought to this court on petition of review.]

Alexander Blumenstiel, for Brigg, Entz & Co.

Gershon A. Seixas, opposed.

BLATCHFORD, Circuit Judge. The record shows, that, at the first meeting of creditors in regard to the composition, on April 24th, 1878, it was stated, by the counsel for the debtors, that Mr. Greig was prevented, by sickness, from attending the meeting, and that Mr. Greig's physician was in attendance to testify to facts in support of such statement. The physician was then examined and was cross-examined by five counsel for various creditors, and, among them, by the counsel for Brigg, Entz & Co., the creditors who bring this petition of review. During such examination, Mr. Greig appeared. The meeting was then adjourned to April 25th, 1878, at 9.30 a. m. On that day, between 9.30 and 10 a. m., Mr. Greig appeared, but he retired be-

fore 10 a. m., and before the opening of the meeting, and was not present at its opening. A resolution was then moved that Mr. Greig be excused from further attendance at such meeting and at any adjournment thereof, and from submitting himself to any examination at such meeting. The counsel for Brigg, Entz & Co. objected to the resolution. The vote in its favor was 40 creditors, representing \$75,613.75, out of a total of 46 creditors, representing \$94,487.30. The resolution was declared to be passed. Mr. Wilson, the other debtor, was then examined, and, among others, by the counsel for Brigg, Entz & Co. The resolution of composition was then presented to be voted on, and the counsel for Brigg, Entz & Co. objected to the taking of a vote on it, because Mr. Greig was not present to answer inquiries. The objection was overruled by the register. The resolution of composition was then put to vote, and was passed by 34 creditors out of 36 whose claims exceeded \$50 each, and who were represented or assembled at the meeting, and by an aggregate indebtedness, including claims under \$50 each, of \$75,613.75. Two creditors, representing \$13,376.27, voted in the negative. It was then agreed that the counsel for Brigg, Entz & Co. might raise, on the final hearing, any objections which he could raise on the application for the second meeting.

At the second meeting, held on the 8th of May, 1878, the counsel for Brigg, Entz & Co. presented the following objections to the confirmation of the resolution of composition: (1) That, although Mr. Greig was present at the first meeting, he did not answer any inquiries made of him, and it did not appear that he was prevented from being at such meeting by reason of any satisfactory cause, and the resolution passed, purporting to excuse him from further attendance at the first meeting, was without authority of law, under the circumstances above set forth; (2) that it appeared that the resolution of composition was not for the best interest of all concerned, and that the resolution could not proceed without great injustice and undue delay to the creditors. On the 8th of May Mr. Brigg and Mr. Entz were examined by their counsel and Mr. Wilson was examined. On the 9th and 10th of May Mr. Wilson was further examined, and a witness was examined. On the 11th of May Mr. Wilson and Mr. Greig were examined by counsel for creditors other than Brigg, Entz & Co. On the 13th of May Mr. Wilson and a witness were examined. On the 29th of May Mr. Wilson was further examined. On the 13th of June Mr. Brigg was further examined. The record shows that the counsel for Brigg, Entz & Co. was present on the 8th of May, but it does not show that he was afterwards present except on the 13th of June.

In regard to Mr. Greig it is contended, that, even though the debtor might be excused from attending, when absent, he could not be excused from answering, when present. The provision of the statute is, that "the debtor,

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

unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same and shall answer any inquiries made of him." The good sense of this provision is, that the debtor may, for a cause satisfactory to the meeting, be excused from answering inquiries. Of course, he cannot answer inquiries then and there made, unless he is present. But, even if he is physically present, he may be unfit to answer inquiries. The present is a case of that kind. While the physician was testifying as to the propriety of examining Mr. Greig, Mr. Greig came in. The creditors and their counsel had an opportunity of seeing him, in connection with the testimony of the physician, and thereupon they voted to excuse him from attending and from being examined at the first meeting. He was examined sixteen days afterwards, at the second meeting. The testimony of the physician showed satisfactorily that Mr. Greig was not in a fit mental condition to be examined at the time the resolution excusing him was passed. But, he was only excused from being examined at the first meeting. He was present and was examined at the second meeting. If the counsel for Brigg, Entz & Co. had applied for leave to examine him, the privilege, doubtless, would have been granted. Although such counsel may not have been aware that Mr. Greig was being examined, yet he was present before the register on the 13th of June, and the proceedings before the register were kept open until the 6th of August. The objections filed in the district court by the counsel for Brigg, Entz & Co. in respect to Mr. Greig are wholly confined to what took place at the first meeting, and the record shows no objection in the district court in respect to the non-examination of Mr. Greig at the second meeting by the counsel for Brigg, Entz & Co. This court cannot, on review, consider objections that were not taken in the district court.

The views of this court, expressed by Chief Justice Waite, in *Re Wronkow* [Case No. 18,105], are applicable to the objection above considered. In that case, one objection taken in this court to the resolution of composition was, that one of the bankrupts was, at the first meeting of creditors, excused from attendance, without sufficient cause. This court said: "The law itself does not make it obligatory upon the bankrupt to be present except at the first meeting. He is to be present unless prevented by sickness or other cause satisfactory to the meeting. Of the sufficiency of the cause the creditors themselves are to decide in the first instance, and their decision should not be disturbed by the court, except for good cause shown. It must in some form appear that wrong has been done to the minority creditors, by reason of the vote which was given. After the district court has affirmed the action of the majority, this court, in the exercise of its supervisory jurisdiction, ought not to interfere except in a very clear case. While the rights of the

minority creditors should be carefully watched and protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed to prevail, unless obtained without sufficient consideration, or by some unfairness or undue influence. In this case, the excuse presented for one of the debtors was his absence in California, where he resided. This was fairly submitted to the meeting. It seems to have been fairly considered. The meeting was well attended. All the objections made were fully presented and duly deliberated upon. The result was a vote in favor of the sufficiency of the excuse." In that case, the objecting creditors did not attend the first meeting. Here, they were present at it and took part in the proceedings in reference to excusing Mr. Greig. The objection is overruled.

The composition was 35 per cent. in money, without interest, payable in 5 instalments, of 7 per cent. each, in 3, 6, 9, 12 and 15 months respectively, to be evidenced by the promissory notes of the debtors. The resolution contained the following provision: "The injunction heretofore granted in these proceedings, restraining the debtors from disposing of their property, shall be vacated and annulled." The proceedings in bankruptcy were not to be discontinued until the entire 35 per cent. had been paid. By the 8th clause of the resolution it was provided, that one Jones be appointed custodian and special receiver of the property of the debtors, by the bankruptcy court, but subject to the restriction, that he should not take any of said property into his custody or possession, until the debtors should have defaulted in the payment of one or more of the composition notes. Security in \$10,000, to be given by Jones, was provided for.

The petition of review sets forth, as reasons why the composition was not for the best interest of the creditors: (1) That it was in deferred payments, and wholly unsecured, and provided for the return of all the property to the debtors on the delivery of the notes, without any security, either that the composition would be paid, or that the debtors would not dispose of all the property before the maturity of any of the notes; (2) that the debtors were not proper custodians of their assets, because they had fraudulently contracted their debt to Brigg, Entz & Co.; (3) that the delivery of the property to the debtors placed the composition at the risk of their future business, and compelled the creditors to give up the assets in hand and trust them to the debtors without security; (4) that, in addition to the dishonesty of Mr. Greig, it appeared that he was mentally unfit to take charge of said property; (5) that the 8th paragraph of the resolution is in violation of the provision of the statute, and deprives the creditors of the right, in case of default in the payment of any of said instalments, to enforce their original claim, or to have re-

course to the other provisions of the statute, in the enforcement of the composition, and compels them to assent to the appointment of Jones as receiver, and substantially compels the court to make such appointment, upon Jones giving a bond in the fixed sum of \$10,000, irrespective of the real amount of the assets which may be on hand at the time of such default.

The point of the objections is, that, the composition being unsecured and payable in instalments, and the property being restored to the debtors, to be dealt with at their pleasure, the composition ought not to be confirmed. The construction of our statute, and of the English statute, which is the same in this respect, has always been, that there is no inhibition against the confirmation of such a composition. *Ex parte Burrell*, 1 Ch. Div. 537, 552; *In re Reiman* [Case No. 11,673]; *In re Van Auken* [Id. 16,328]; *Ex parte Hamlin* [Id. 5,993]. The question is, whether the composition is "for the best interest of all concerned." It may be, although it is unsecured and is payable in instalments, and the property of the debtors is left free to be managed and disposed of by them.

The objection to the composition, taken on the record in the district court, was, that the composition was "not for the best interest of all concerned," and that it "could not proceed without great injustice and undue delay to the creditors." This general objection is, in the petition of review, formulated under these heads: (1) Deferred payments; (2) unsecured; (3) property left in the control of the debtors; (4) the debtors not proper custodians of the property, because they had fraudulently contracted their debt to Brigg, Entz & Co.; (5) mental unfitness of Mr. Greig to take charge of the property. This is the substance of the first four objections stated in the petition of review. The questions involved in them were all questions of policy and expediency, and were all fairly before the creditors. It must be presumed that they considered the objections and yet voted in favor of the composition, by the requisite vote. The register and the district judge approved of the composition, and of its terms. The district judge, in his decision,—*Hudson v. Adams* [Case No. 6,832],—considered all the questions in detail, except those relating to the debt to Brigg, Entz & Co., and to the mental unfitness of Mr. Greig, and arrived at the conclusion that the composition was for the best interests of all concerned. In regard to the review of such a decision, it was said, in *Re Wronkow*, before cited: "It is next insisted that the compromise is not for the best interest of all concerned. The requisite majority of the creditors, at the first meeting, thought it was. The same thing occurred at the second meeting, called specially to consider that very question. The register coincided in the opinion of the creditors, and so reported. The district court, upon full argument, has decided in the same way.

This court ought not to interfere under such circumstances, unless specific errors in the action of the creditors, or the court below can be pointed out, which, if sustained, would change the judgment. Mere general questions of expediency must ordinarily be considered as settled, when the requisite majority of the creditors, the register, and the district court all agree. Nothing short of fraud or gross error in judgment should call into exercise the jurisdiction of this court in such a case. That does not appear here. This court is simply called upon to decide, upon the whole case, that the creditors and the district court have come to a wrong conclusion as to what is for the best interest of all concerned." These views are the law of this court and cover the present case.

The question as to the contracting of the debt to Brigg, Entz & Co., and the question as to the mental fitness of Mr. Greig, were questions arising out of the evidence taken before the register. They were points which either were, or were not, urged before the district judge, under the general objection filed with the register. If they were urged, they were questions of expediency, and were passed upon. If they were not urged, they might have been, and must, on this review, be regarded as having been waived in the district court, so that, because not passed upon by the district court, they cannot be passed upon by this court, in review.

As matter of fact, however, I am, on consideration of the evidence, of opinion that the debt to Brigg, Entz & Co. was not fraudulently contracted.

As to Mr. Greig's mental condition, the physician testified, on the 24th of April, that Mr. Greig was not then in a fit mental condition to be examined; that the probabilities of a change of his condition were good, if he had a proper amount of rest; that he was not then fit to carry on business; but that freedom from business anxieties, rest and proper treatment, would be very improving, with a fair prospect, in time, of a restoration of his capacity to attend to business. Seventeen days after that Mr. Greig was examined. No creditor, after that, took any objection as to the mental condition of Mr. Greig, although adjourned meetings were held on seven different days after the 11th of May, and the proceedings were not closed before the register until August 6th.

The entire 8th paragraph of the resolution is in these words: "And, for the purpose of better securing the payment of the several instalments of composition, according to the tenor of the preceding resolutions, we do hereby further resolve, that James W. Jones, of the city of New York, be appointed custodian and special receiver of all the property and estate of the debtors, shown in the statement of debts and assets filed by them at the meeting of creditors at which these resolutions are passed, together with the increase and the profits and the avails thereof; and

we do hereby request his appointment by this court as such receiver; provided, however, and such appointment shall be made subject to this limitation and restriction, that said Jones shall not take any of said property into his custody or possession until the said alleged bankrupts shall have defaulted in the payment of their composition notes, or any of them, as hereinbefore provided to be given; and it is further provided, that the said James W. Jones, before entering upon the duties of his trust as such receiver as aforesaid, shall execute and file in this court a good and sufficient bond, in the penalty of ten thousand dollars, with one or more sureties, to be approved by the court, conditioned for the faithful performance by said Jones of his duties as such receiver as aforesaid." The 7th paragraph of the resolution provides as follows: "The injunction heretofore granted in these proceedings, restraining the debtors from disposing of their property, shall be vacated and annulled. In all other respects, the proceedings in bankruptcy shall remain as they are now, and shall be deemed to be pending until the composition is completed, for the purpose of any application which the creditors, or any of them, may see fit to make, upon the default of the debtors in the payment of any of the composition notes so to be given as aforesaid." I do not think the 8th paragraph of the resolution violates any provision of the statute, or works any of the results set forth in the 5th objection contained in the petition of review. The provisions of the 8th paragraph are stated therein to be for the purpose of further securing the payment of the several instalments of the composition. Taking the 7th and 8th paragraphs in connection, the creditors are not, in case of default in the payment of any instalment, deprived of any right which they would have had if the 8th paragraph had not been contained in the resolution, nor is the court prevented from appointing some other person than Jones as receiver, nor from requiring from Jones, or from any other receiver, a bond in such sum as it may deem proper. The 8th paragraph purports to relate only to what shall be done with the property, after default in the payment of some one of the notes. In that regard it looks toward security. Before default, the property is to remain with the debtors, in consonance with the plan of the composition. It would remain with the debtors even without the 8th paragraph. Whether the property be in the hands of the debtors, or in the hands of Jones, or whatever becomes of it, the creditors are not, by the 8th paragraph, deprived of any of the rights which the petition of review alleges they are deprived of. The case of *In re Jane-way* [Case No. 7,207] is cited. In that case, the composition provided, that, as soon as the resolution should be recorded, all the property should revert to the debtors, the same as if no proceedings in bankruptcy had taken place, and that an order of discontinuance

might be entered, at the option of the debtors, without further notice to the creditors. The notes were to be deliverable within ten days after the order of confirmation, and, before any note should be given, the property might revert to the debtor, and the proceedings be out of court. The court refused to sanction such a composition, on the ground that it was no composition. The present case is not like that. The construction given to the terms of the composition by the petition of review is, that it provides "for the return of all the property to the debtors, upon the delivery of the notes." Such is the proper construction.

The provisions of the 8th paragraph are not of the substance of the composition. They request certain action to be taken by the court in case of default. The court is not compelled to comply with the request. It is still free to enforce the composition, or proceed with the bankruptcy, in like manner as if the 8th paragraph were not part of the resolution. These were the views of the district court, and they are approved. The prayer of the petition of review, for the reversal of the order of August 20th, 1878, is denied, with costs.

Case No. 17,782.

In re WILSON.

[2 Hughes, 228.]¹

Circuit Court, E. D. Virginia. 1875.

BANKRUPTCY—DISCHARGE—SUFFICIENCY OF ASSETS.

1. Under section 33 of the bankruptcy act [of 1867 (14 Stat. 517)],—section 5112, Rev. St.,—the assets coming into the hands of the assignee in bankruptcy, exclusive of exemptions, must be equal to thirty per cent. of the claims proved against the bankrupt's estate, to entitle him to a discharge.

[Cited in *Re Waggoner*, 5 Fed. 917.]

2. Assets in bankruptcy are the proceeds of the bankrupt's property which come into the hands of the assignee, and are applicable to the payment of his debts.

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

In this case nearly all the estate of the bankrupt [N. F. Wilson] was covered by the exemptions allowed him by law, and was decreed to him as such. But it was more than equal to thirty per cent. of the debts proved against him. Many cases had arisen presenting this state of things in a partial degree. This case, however, presented clearly the question, whether or not the estate surrendered by the bankrupt should be estimated in gross in determining his right of discharge under the thirty per cent. clause; and the district court, by agreement, made a pro forma decision, in order that the question might be finally settled on appeal by the circuit court.

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

BOND, Circuit Judge. Wilson, a voluntary bankrupt, seeks his discharge, which is resisted by the creditors, because, as they allege, his assets are not equal to thirty per centum of the claims proved against his estate. It seems that the bankrupt returned in his schedule property in amount equal to the debts proved against him, but he claimed its possession as a homestead exemption under the statute of Virginia, which claim was allowed him by the district court. Assets, within the meaning of the 33d section of the bankrupt act, are the proceeds of the bankrupt's property which come into the hands of his assignee, and are applicable to the payment of his debts. Here manifestly nothing came into the assignee's hands available for that purpose. If the bankrupt was entitled to hold this property exempt from liability for his debts, as the district court determined he was, how can it be considered assets applicable for the payment of those debts? If a stranger had been entitled to the possession of it, certainly it could not be regarded as assets in the hands of the assignee. How does the case differ when the bankrupt is entitled to hold it exempt from liability for the payment of his debts? Can that be said to be available for the payment of debts which the law says shall be exempt from liability for such payment? The district court allowed the bankrupt's discharge, but we think as the assent of creditors is not alleged, and no assets whatever came into the hands of the assignee applicable to the payment of his debts, the decree of the district court granting the bankrupt his discharge must be reversed with costs.

Case No. 17,783.

In re WILSON.

[6 Law Rep. 272.]

District Court, D. Massachusetts. Sept., 1843.

VOLUNTARY BANKRUPTCY—DISCHARGE—CONCEALMENT OF PROPERTY.

[The omission by the bankrupt of any notice, in his schedule, of property which had been attached, and a receipt given for its value, in a suit still pending, will not bar his discharge under the act of 1841 (5 Stat. 440), unless the omission was with a willful intent to conceal his property.]

In bankruptcy. This was the case of a petition by [George Wilson] a bankrupt for his discharge, a majority of his creditors having objected thereto, the bankrupt obtained a trial by jury. The objections filed by the creditors were: 1. That the bankrupt had been guilty of fraud and of wilful concealment of his property and rights of property contrary to the provisions of the law. 2. That he had preferred some of his creditors contrary to the provisions of said act. 3. Because he wilfully omitted and refused to conform to the requisitions of said act. 4. Because he had admitted false or fictitious debts against his estate. The principal

ground relied on by the creditors, was, that in March, 1842, all the stock of the bankrupt, except groceries and furniture, was attached by the Kinderhook Bank, when a receipt was given on a valuation of \$900, and the suit is now pending. The receptor took the property, and the bankrupt took no notice of it in the schedule annexed to his original petition. There was considerable testimony upon this and other points, the bankrupt taking the ground that he acted under a mistake as to his duty in this particular.

Mr. Fiske, for creditors.

Mr. Gray, for bankrupt.

SPRAGUE, District Judge, in his charge instructed the jury, that they must be satisfied that the bankrupt wilfully concealed his property. If he acted in good faith, but under a mistake, his discharge ought not to be withheld.

The jury returned a verdict in favor of the bankrupt.

Case No. 17,784.

In re WILSON.

[2 Lowell, 453; 1 13 N. B. R. 253.]

District Court, D. Massachusetts. Dec., 1875.

BANKRUPTCY—PETITION OF PARTNER AGAINST COPARTNER—INVOLUNTARY PROCEEDING—DISCHARGE.

1. A proceeding in bankruptcy by a partner against his copartner is not an involuntary proceeding, within section 9, Act 1874, c. 390 (18 Stat. 180).

2. Therefore, a partner, who is in bankruptcy upon the petition of his copartner, cannot obtain his discharge without the assent of creditors or the amount of assets required in voluntary proceedings.

[Cited in Re Duncan, Case No. 4,132; Re Austin, Id. 662.]

W. F. Wilson was adjudged bankrupt upon the petition of one Harrington, alleging himself a partner with Wilson, and that the firm was insolvent. Wilson denied the partnership, and a jury trial was had, which resulted in a verdict for the petitioner. Wilson now applied for his discharge, but filed no assent of creditors, and had not paid a sufficient dividend to enable him to dispense with the assent, if any is required. A creditor objected on this ground, and alleged certain frauds besides.

E. Avery, for the bankrupt, cited Act 1874, c. 390, § 9 (18 Stat. 180); In re Penn [Case No. 10,927].

N. B. Bryant, for the creditor.

LOWELL, District Judge. An able argument has been addressed to me, that section 9 of the new statute absolves the defendant from obtaining the consent of his creditors,

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

on the ground that, as to him, the proceedings are compulsory.

It is true that this defendant did not consent to be adjudged bankrupt in connection with one whom he denied to be his copartner, and that rule 18 requires, in such cases, notice and other proceedings, including jury trial, if demanded, precisely as if the petition were by creditors; and that the discharge of each partner is separate and distinct from that of any other. Still I am of opinion that these are not involuntary or compulsory proceedings under section 9 of the act of 1874. That statute requires a considerable number of creditors to join in a petition, and, as has been pointed out by Judge Blatchford, precisely the number required to assent to the discharge of a voluntary bankrupt; so that the theory of the statute appears to be that those creditors who have chosen to put a person into bankruptcy against his will are presumed to assent to his discharge, if he has committed no actual fraud or misdemeanor against the meaning of the statutes. That presumed assent is not given when one partner petitions.

Again, creditors can only proceed for certain acts of bankruptcy; but a partner may petition on the ground that the firm is insolvent. Rule 18, indeed, seems to imply that a partner may allege acts of bankruptcy against the firm; but the statute speaks only of insolvency as the ground for a voluntary petition; or rather it says that, partners may petition or be petitioned against like individuals; and an individual can only petition on the ground of his insolvency. I apprehend it would be very difficult to find any case in which a partner would not be estopped to petition for joint acts of bankruptcy. No such petition has ever been brought in this court.

If, then, partners are insolvent, either has a right to insist that the firm shall go into bankruptcy, and the statute does not even say the other shall be notified; but the court very wisely has adopted notice as a rule of practice to prevent fraud and surprise. If the insolvency is proved, the case is made out. No involuntary case, of the ordinary kind, can be made out by such evidence. In truth, the verdict in such a case as this simply establishes that the recusant partner ought to have joined in the voluntary proceedings.

Then look at the consequences. One partner, disposed to do his whole duty by his creditors, brings the petition; the other resists it, and is rewarded by a gift of his discharge; or the partners put forward one to take the burden, and compensate him in some way for the risk; or they take in a partner for the very purpose of playing this part.

It was argued that the words "compulsory" and "involuntary" describe two classes of cases: one by creditors, and one by partners. But it is plain that the words are used

throughout this statute as strict synonymes. See especially section 6, where "compulsory" is evidently so used. Upon the whole, I am satisfied that section 9 refers only to the ordinary case of petitions in invitum.

If this case should be taken to the circuit court, I wish it to be distinctly understood that I have not passed upon the allegations of fraud. Discharge refused.

Case No. 17,785.

In re WILSON et al.

[18 N. B. R. 300.]¹

District Court, S. D. New York. Aug. 15, 1878.

BANKRUPTCY — COMPOSITION PROCEEDINGS — EXAMINATION OF BANKRUPT—SECURITY FOR COMPOSITION NOTES—TIME OF PAYMENT.

1. In composition proceedings, the debtor, though present, may, by a vote, of the creditors present, be excused from examination on account of illness.

2. The fact that security provided for a composition does not certainly secure the full payment of the composition, does not make the composition uncertain.

3. The circumstance that there is no security given for the payment of the composition notes is merely one of the facts in the case to be considered with, and in the light of, all the other facts on the question whether the composition is for the best interests of all concerned.

[Cited in *Re McNab & H. Manuf'g Co.*, Case No. 8,906.]

4. On the question whether, the composition being in other respects fair and just, the debtor should be allowed to keep his property, the principal element is his personal and business character.

5. The question as to the time within which, and how rapidly, the debtor can pay the composition is one for the creditors to consider, and their judgment will not be reversed, unless valid reasons for so doing are shown.

[In the matter of Samuel Wilson and Thomas Greig, bankrupts.]

G. A. Seixas and W. B. Winterton, for the motion.

B. F. Foster, Foster & Adams, and A. Blumensteil, contra.

CHOATE, District Judge. This is a motion for the confirmation of a composition. There has been no adjudication, and the proceeding is upon creditors' petition. Thirty-four creditors out of forty-six have voted in favor of the composition. Two creditors oppose the composition. Their debts amount to about thirteen thousand dollars. The creditors who have voted for it represent about seventy-six thousand dollars of debts. The total debts are ninety-five thousand dollars.

Several objections are urged.

1. It is objected that one of the debtors (Greig), though present at the first meeting, was, by a vote of the creditors present, excused from examination on account of illness. The

¹ [Reprinted by permission.]

statute provides: "The debtor, unless prevented by sickness, or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him." It is now insisted that, though the creditors may excuse his attendance, they cannot excuse his answering questions, if present, though disabled by sickness. Mr. Greig's inability to proceed with the examination fully appeared. It is claimed that this is a fatal irregularity. This objection is frivolous. The statute is clearly broad enough to sustain the action of the creditors in this respect.

2. The composition proposed and accepted was thirty-five cents on the dollar in the debtors' promissory notes at three, six, nine, twelve, and fifteen months from the date of the order of confirmation, each for seven cents on the dollar. It provided that the injunction restraining the debtors from disposing of their property should be vacated; that "in all other respects the proceedings in bankruptcy shall remain as they are now, and shall be deemed to be pending until the composition is completed, for the purpose of any application which the creditors, or any of them, may see fit to make upon the default of the debtors in the payment of any of the composition notes;" that upon payment of said notes the proceedings should be discontinued. It contained also the following clause: "And for the purpose of better securing the payment of the several instalments of composition according to the tenor of the preceding resolutions, we do hereby farther resolve that James W. Jones, of the city of New York, be appointed custodian and special receiver of all the property and estate of the debtors. * * * And we do hereby request his appointment by this court as such receiver, provided, however, that such appointment shall be made subject to this limitation and restriction, that said Jones shall not take any of said property into his custody or possession until the said alleged bankrupts shall have defaulted in the payment of their composition notes, or any of them." The resolution then goes on to require a bond in ten thousand dollars from Mr. Jones, with sureties to be approved by the court, to secure the faithful performance of his duties as receiver. It is objected to this composition that it is fatally indefinite; that the security provided for is not certain in its character; that Jones as receiver or trustee would be obliged only to pay such sum as he should realize from the assets; that the provision for a receivership does not really secure the thirty-five per cent. This objection cannot be sustained. The terms of the composition are definite and certain; thirty-five per cent. in money secured by the promissory note of the debtors. The further provision for a receivership in a certain case is not of the substance of the composition. It is simply a request for certain action to be taken by the court in case of default. It may or may not be acted on without affecting in any way the composition. Even, however, if it were regarded as something to which the creditors were certainly entitled, it is not obnoxious to

the objection of uncertainty. If Jones should be appointed receiver in precisely the form prescribed in the resolutions, his powers and duties as such receiver would be well defined and certain. The fact, if it be so, that security provided for a composition does not certainly secure the full payment of the composition, does not make the composition uncertain. It may make the security or the composition notes less valuable than they would be if fully and beyond all question collaterally secured. The case of *In re Reiman* [Case No. 11,673], cited in support of this objection, is not in point. There the composition notes were to be "satisfactorily endorsed," without providing by whom they were to be endorsed, or how or by whom it was to be determined whether the endorsement was "satisfactory." This was of the very substance of the composition, and very properly it was held to be too indefinite. The difference between the two cases is too clear to need further comment.

3. But the principal objection taken is, that this composition is not for the best interests of creditors, because under it the whole property of the debtors is surrendered to them, and nothing is given to the creditors except promises to pay thirty-five cents on the dollar, with no security whatever, except the debtors' promises. Neither the language of the bankrupt law, nor the construction that has been put upon it by the courts, prevents the acceptance of a composition merely because the assets are still in the possession of the debtor, or are restored to him by the terms of the composition, and the composition is wholly promissory in its character and without security. See *In re Van Auken* [Case No. 16,828]; *Ex parte Hamlin* [Id. 5,993]. The court must be satisfied that it is "for the best interest of all concerned." Rev. St. § 5103 A. The circumstance, therefore, that there is no security given for the payment of the composition notes is merely one of the facts in the case to be considered with, and in the light of all the other facts on the question to be determined, whether the composition is for the best interests of all concerned. In *Van Auken's Case* above cited, it was said that the arrangement must be "judicious and reasonably safe to all the creditors." In this case it does not appear, nor is it urged, that the debtors are not proper persons, in character and business ability, to manage their own affairs, except so far as such incapacity may be necessarily inferred from their present insolvency, and there is no evidence impeaching their integrity. The overwhelming vote of the creditors that it is for their best interests that the debtors should continue to manage and dispose of their stock of goods, and go on with business in order to enable them to pay the promised composition, deserves very great weight with the court on this question.

It does not appear that the debtors are able to give any security except upon their stock of goods. To mortgage or pledge this might seriously impair their ability to realize on it, and to pay the composition. It is not claimed that

more than sixty-five cents on the dollar could be realized on the property of the debtors if wound up in bankruptcy. It is urged that the creditors are giving up sixty-five per cent., and getting nothing for it; that, therefore, the creditors are getting no equivalent for what they surrender, and that such an arrangement cannot be for their best interests, however it may be as to the best interests of the debtors. But it is not true that the creditors are giving up the sixty-five per cent. That is irrecoverably gone already. The debtors are admitted to be insolvent with assets insufficient to pay more than thirty-five cents on the dollar. What the creditors are giving up, or rather what is taken from them by this composition, is the right to have those assets administered by an assignee in bankruptcy, instead of being administered by the debtors themselves for the purpose of realizing their value. It cannot be said either that the creditors do not get any advantage by the composition besides that of having the debtors administer the estate, if that is one, as from the action of the creditors it may be inferred that the large majority of them believe it to be. For a possibility of dividends uncertain in amount and time of payment, but very certainly not worth more than thirty-five cents on the dollar, represented in their hands by dishonored notes, they get paper for all that their claims are worth in a form in which they can negotiate and use it in their business, and with a reasonable certainty that it will be paid at maturity because backed up by property in the possession of the makers. Thus the composition, if reasonably safe and judicious in what the debtors undertake to do, and fair in amount, is for the best interest of creditors in that it gives them liquidated and negotiable promises in place of unliquidated and unmerchantable claims.

On the question whether, the composition being in other respects fair and just, the debtors should be allowed to keep their property, the principal element is their personal and business character, and on this point I am entirely satisfied. In case of default either by the mode suggested by the creditors or by the issue of a warrant and the appointment of an assignee, the creditors still have the security of the assets. I think the composition is for the best interests of all concerned, and this objection of want of security is in this case not sustained.

4. It is also objected that there is unreasonable delay in this case, the debtors having fifteen months to pay thirty-five per cent.; whereas, it is said that the greater part of the value of the assets could be realized by an immediate sale. It was a question for the creditors to consider within what time and how rapidly the debtors could pay the composition, and I see no reason to reverse their judgment. As to an immediate sale, that may well have been thought unwise, and likely to defeat the purpose in view, of enabling the debtors to go on with their business in order to pay the stipulated composition.

5. The objection that this being an involuntary case, and there being no adjudication, the proceedings may be at any time discontinued on the motion of the petitioning creditors, and thus the court be left powerless to enforce the composition in case of default, is not well founded. It is based on an imaginary danger.

Objections overruled, and composition confirmed.

[On review in the circuit court, the views of this court were affirmed. Case No. 17,781.]

WILSON (BANK OF ALEXANDRIA v.).
See Cases Nos. 855 and 856.

WILSON v. BANK OF NORTH CAROLINA. See Case No. 894.

WILSON (BANK OF THE UNITED STATES v.). See Case No. 943.

Case No. 17,786.

WILSON v. BARNUM.

[1 Wall, Jr., 342.]¹

Circuit Court, E. D. Pennsylvania. July 5, 1849.

FEIGNED ISSUE—PRACTICE.

Where a feigned issue for trial of a fact is directed by the court, no declaration of any sort is requisite. The case is put on the trial list and the jury sworn to try the issue, in the words of the order of issue itself.

The court having directed from its equity side, an issue of fact for trial by a jury, Mr. St. G. T. Campbell and Mr. S. V. Smith for the plaintiff, filed a formal declaration, in the old fashioned way, setting forth a fictitious conversation that had been moved between the parties, a consequent dispute, wager, &c.

Mr. Hirst and Mr. W. W. Hubbell made an objection to the declaration as not embodying, in a full and issuable way, the matter directed to be tried. After some argument on both sides, as to whether the declaration did do this or not, the discussion was cut short by the opinion of the court thus given.

GRIBER, Circuit Justice. The old fashioned and cumbrous machinery by which these issues of fact have been hitherto managed is entirely useless; and the matter to be tried is only involved by it in a mass of words signifying nothing. Now, especially, since wagers of all sorts, have been discontinued as illegal by the supreme court of Pennsylvania (*Edgell v. McLaughlin*, 6 Whart. 176), there is no propriety in the old form; and it may as well be swept away at once, as the relic of a barbarous age. In the present issue, and in all future ones in this court, the matter can be put on the trial list at once, and the jury be sworn to try in the form and in the words set forth in the order of issue. There is no necessity of a declaration or pleading of any sort.

¹ [Reported by John William Wallace, Esq.]

Case No. 17,787.

WILSON v. BARNUM.

[1 Wall. Jr. 347; 1 2 Fish. Pat. Cas. 635; 6 West. Law J. 464; 48 Jour. Fr. Ins. 203.]

Circuit Court, E. D. Pennsylvania. Nov. 13, 1849.

VALUE OF GRANT OF PATENT—INJUNCTION—SECOND TRIAL—DIVIDED COURT.

1. The grant of a patent at the patent office, is not of itself, or in virtue of section 7 of the act of July 4, 1836 [5 Stat. 119], a bar to an interlocutory injunction in favour of a person claiming to be a prior patentee of the same thing; such person not having received notice at the patent office to appear and be heard, and the court on a hearing before it, being well satisfied that the last patent is an interference with the one granted before.

[Cited in *Morse Fountain Pen Co. v. Estebrook Steel Pen Manufg Co.*, Case No. 9,862.]

2. The district judge sitting for the circuit court, and being himself well satisfied of an infringement,—although, of numerous experts examined, a majority thought differently from him on that point,—may grant an interlocutory injunction to restrain the use of a patented machine as an infringement of a prior one; the machine last patented not having been granted after notice from the patent office to the complainant, to appear and be heard.

3. Where a jury has had a case before it and disagreed, a second trial cannot be had by another jury from the residue of the panel. The case must go over in order that it may be tried on a new venire.

4. Where the district judge, sitting for the circuit court, and being satisfied of an infringement, had granted an interlocutory injunction till trial, to restrain the use of a machine, and the president judge, after hearing the evidence before the jury on the trial, differed from his brother, who after hearing the same evidence, still retained his former opinion, and the jury could find no verdict; the full court, in its subsequent action on the injunction, need not consider itself either as bound or as unable to dissolve it: but the action upon it may be modified; the modification being largely regulated by what probably would have been the original action of a full court.

This was a bill for an interlocutory injunction, to restrain the defendant from using a patented machine which it was said interfered with another machine previously patented to the complainant. The defendant did not deny the originality of the complainant's invention, but asserted his own to be no infringement of it. The complainant's patent was an ancient one. The defendant's had been granted under the act of July 4, 1836 (section 7), which directs, that whenever a person applies for a patent, an examination shall be made by the commissioner of patents into the originality of the alleged invention; and allows the issuing of a patent only in case the commissioner is satisfied that the invention is original. If, on examination, the commissioner thinks that there is an interference, he then gives (Act July 4, 1836, § 8) notice to the patentee with whose invention he supposes that the interference takes place, and lets him be heard. In this case the com-

missioner did not consider that there was an interference, and of course the complainant had no notice of the intended issue to the defendant.

Mr. Hirst and Mr. Stoughton of New York, relying, among other grounds, including those of fact, upon this first provision of the act, opposed the grant of an injunction. The defendant, they contended, has a patent which gives him a prima facie case everywhere. He has a right to trial by jury. It was impossible to regard his machine as so palpably or so probably an infringement, as to warrant the summary process of injunction, when the commissioner of patents, who has every means at command for ascertaining originality, and employs them all, has regarded it as too manifestly original to cause a question. The act of the commissioner may not have been a judicial decree in form; nor have the technical conclusiveness of a precedent, and a res adjudicata. But it deserves every respect short of that, and will receive the highest respect as the investigation and a decision on the matter by an officer of state, to whom the investigation and decision are primarily and particularly intrusted. It is quasi judicial, at least.

Mr. W. H. Seward of New York, Mr. St. G. T. Campbell and Mr. S. V. Smith, mentioned several cases where the commissioner had issued patents, after notice to prior patentees who came in and defended their rights, which patents had been afterwards pronounced, judicially, to be infringements. In this case there had been no notice to the complainant or to any body. The commissioner issued the patent upon first impressions. He had not perceived any infringement, only because none had been shown to him. His act was extra-judicial; and if it were not, would be at best but a judgment without either writ, plea, issue or argument. Even if there had been a hearing, the grant could not be a legal objection. It could not be pleaded nor put in evidence. It would at best be an extra-judicial opinion of more or less weight. If this court—after a judicial examination—is thoroughly satisfied of the interference, it will not regard such an act as conclusive on its conscience.

KANE, District Judge, sitting for the circuit court. There are cases under the present laws, in which the court would enter reluctantly upon the discussion of the validity of a patent. Some of the provisions of the act of 1836, give a quasi-judicial character to the action of the commissioner of patents; and it has accordingly been held, I believe generally, as well as justly, that the patent itself is to be taken as prima facie evidence of the novelty and usefulness of the invention specified in it. There are other cases, in which the official action of the patent office claims properly, a still higher degree of consideration. Whenever antagonist patentees, or third persons generally, have been first

1 [Reported by John William Wallace, Esq.]

called in, it is reasonable to consider the action as a preliminary adjudication upon their rights. And this for the obvious reason, that they have been parties, or but for their own fault might have been parties, to the proceeding on which the adjudication was based. But this is the limit, beyond which comity cannot be required to go. It cannot be asked, that a third person shall have his legal rights impaired, or his legal remedies impeded, by any proceeding to which he was not, and could not have made himself a party. To hold ourselves concluded by the action of the patent office, where that action has been without notice, would be as perilous to the interest of inventors as to that of the publick. We had a case in our own court not long since, where an injunction was sought against the real inventor, on the faith of a patent granted to a surreptitious claimant. The grant of a patent to the defendant can therefore have no other effect on the present discussion, than as it indicates the opinion, which highly respectable and skilful officers have formed, on an ex parte examination of the case.

² [We come then to the principal question: Does the machine, now in use by the defendant, embody the principle of the complainant's patent? The judicial definition of a patent, or of the principle it involves, in a case under trial, is properly, if not necessarily, a limited one. It regards primarily, and as a matter of course, the circumstances of the pending controversy. The identity or the difference between two machines is sought, in the first place, by a comparison of them either in their elements or as a system; and we are commonly said to define their mechanical principles, when, after making such a comparison, we indicate the essential particulars in which they are alike, or otherwise. A new comparison of the patented machine with another, not before the subject of adjudication, as it presents new points of similarity or variance, calls for a different expression of the principle of the patent. The aspect of the invention changes as we approach it in a new direction, and parts become prominent that were subordinate before, and that involve perhaps important relations to the question in dispute. For this reason, the cases upon the Woodworth patent, which are found in the Reports, as well as those which have been determined in this court, give, for the purposes of the present inquiry, an imperfect definition of the principle of the invention. In all of those cases, the machine complained of carried the planks through it on an unvarying plane, which was tangential to the revolving motion of the planing knives, and the planing knives were set on the periphery of the revolver; in both of these particulars resembling the Woodworth machine. In Mr. Barnum's, the cutting tool is set on the face of a rotating disc, and the plank advances in a plane par-

allel, it is said, with the disc, till the operation of planing is completed, and is then deflected from the machine; thus, at the first glance, differing throughout, as well from the Woodworth machine, as from other machines, with which the Woodworth has been compared on former occasions.

[What then shall we regard as the principle of the Woodworth invention, when viewing it in connection with the machine of the defendant? We shall, perhaps, be led to the answer by tracing the history of this important class of labor-saving machines. Before the present century, it had been deemed an object of much interest to adapt some combination of machinery to the work of smoothing the surface of boards. The mechanical difficulties in the way were these: (1) That the cutting tools, if made to work parallel to the external surface of the plank, encountering all the sand and grit that adhered to it, soon lost their edge, and became incapable of producing a uniform surface; (2) that if the tools were made to cut otherwise than parallel to the surface, so as to pass through the gritty exterior, instead of along it, the plank would be alternately driven down as the tools struck it, and lifted up as they left it, and would thus have a constant and rapid vibration under the action of the machine.

[The engine devised by Mr. Bramah, in 1802, was so contrived as to get rid of the first of these difficulties. His cutting knives were placed on the side or surface of a circular rotating disc; but beyond them, at the extreme periphery, he placed a set of projecting rough cutters, which struck the plank as it advanced in the same plane with the disc, and before it reached the planing knives, and removed the outer surface to which the grit adhered. His machine was imperfect, however, for, in consequence of the elasticity of the plank, as well as of the machinery, and the vibration due to the rapid but intermitting action of his tools upon the plank, his cutters, after completing their work, would, as they revolved, come in contact again with the finished surface, and score it irregularly.

[Woodworth's machine was the next which I need to refer to. He affixed his cutters to the periphery of a revolving cylinder, and advanced the plank towards them, under strong pressure, in a plane tangential to their motion; thus making the cutters describe a curve upwards from the finished surface, through the rough surface of the plank, and preventing the plank from vibrating sensibly during the operation. This machine did its work effectively and well. The plank, moving firmly along the tangent plane of the rotating cylinder, passed beyond the reach of the cutters, and was disengaged from the action of the machine at the moment the work was perfected.

[This was imitated in the Gay and the MacGregor machines, in which a flattened cone or dished plate wheel was substituted for the cylinder. By this change the corrugated sur-

² [From 6 West. Law J. 464.]

face, which is left by the Woodworth machine, was avoided; the action of the cutters being very nearly in a line parallel to the surface of the plank, and therefore producing shavings, instead of the chips which are thrown out by the Woodworth cutters. But as the curve in which the cutters acted became one of a larger circle, the deflexion between it and the plane of the plank's motion was, of course, less rapid than in the Woodworth machine, thus increasing, in some degree, the liability of the finished part of the plank to receive the same injury from vibration which was the characteristic defect in the action of the Bramah machine. Nevertheless, when the Gay and MacGregor machines were before this court some three years ago, it was held that they infringed upon the Woodworth principle, inasmuch as they contained the revolving cutter acting upon a plank in the tangent plane of the revolver.

[The next machine to be described is that of the defendant. Its appearance is in many respects similar to Gay's, though it differs materially in others. It has the Bramah disc, with its two sets of rough and finishing cutters; but the plank is made by a very ingenious contrivance to advance along a metallic guide, either in a straight or slightly curved line, till it comes beneath the axis of the disc, when by a turn in the guide it is bent outwards over a small roller, and thence passes from the machine in a line similar to that by which it approached it. The finishing cutters begin to act upon the plank in a line very nearly parallel to its surface, and complete their work as the plank turns over the roller. We have thus a machine that cuts in a right plane upon a curved surface; the revolving disc, at the moment of finishing the work, forming a tangent plane to the curve of the advancing plank. We have, too, a roller, over which the plank is forcibly bent, and which, by its resisting pressure against the elasticity of the plank, holds it steady under the action of the cutters. That is to say, we have a machine just the converse, as well as the equivalent, of that invented by Woodworth. One general expression may include them both,—a planing machine, in which the cutters and the material move against each other in a curve and in its tangent plane, respectively; the material being kept from vibrating by roller pressure. It is true that in one machine it is the cutter which follows the curved path, while the material moves along the plane, and that in the other the cutter moves in a plane, and the material is acted on in the curve; but there is no other difference.

[Is this then, a difference of principle? Can it be said that the essential character of a machine is varied by a mutual interchange of form and direction between the two elements of which it is a combination, while both object and effect remain as before? Does not the question, in its very terms, suggest Lord Tenterden's illustration in the Percussion

Lock Case [Minter v. Wells], Webst. Pat. Cas. 128, of those analogous contrivances, the bringing up of an anvil against the hammer, and the bringing down of the hammer against an anvil? We may recognize differences of details in the defendant's machine, both as to the means and the effect; and these may properly be patented as improvements upon the Woodworth invention, perhaps highly meritorious ones. But, considered as independent combinations, I cannot escape the conclusion, that, whether the plank or the cutter have the curvilinear motion, if the other moves in a plane, and the two are made to act and react upon each other, for the same object, and with the same effect, the machines are in principle identical.]²

My only embarrassment in awarding an injunction, has been owing to the fact, that of the highly educated mechanics whose affidavits have been taken in the cause, the greater number have expressed an opinion different from that expressed by me. The consideration which was pressed in the argument, that the responsibility of deciding this question, might with propriety be devolved on a jury, has had no influence with me. That judicial morality might be impeached for infirmity, which could shrink from awarding to a party his remedy after ascertaining his rights. "The right of a party to the most speedy and effectual protection against a meditated wrong, is as complete as his right to redress for wrongs already inflicted; and the accident of position confers no right on one party, whether he be plaintiff or defendant, at the expense of the other. The special injunction in equity, like the arrest on mesne process at law, may be abused to the injury of an opponent; but it is no less on that account the duty of the judge to further them both, when, in the exercise of his best discretion, he believes that they are called for by the merits and the exigency." This was the language of the court when on a former occasion this patent was before us, and my experience since has not taught me that it ought to be modified. The preventive interposition of equity, is very often the only effective resort of a meritorious patentee, and where the facts of the case are not controverted, I am by no means satisfied that it is not the safest for both parties. There is no conflict of evidence here; the question is one of deduction and opinion. Were the case at this time under trial at bar, it would be the office of the judge to interpret the specification, and define the principle of the invention. This is the only point of difficulty, and it must be encountered by the judge, when he sits on one side or other of the court. To send the cause to a jury, would be to delay its adjudication for many months, leaving the complainant in the meantime with his legal rights suspended, and swelling the measure

² [From 6 West. Law J. 464.]

of the defendant's liabilities. I should do injustice to both parties, were I, with my present views of the merits of this controversy, to refuse the injunction. Injunction awarded.

At the following sessions, the validity of the patent came on to be tried upon an issue directed to a jury; but after a thorough examination and argument, the jury could not agree and were discharged.

Mr. Hirst and Mr. W. W. Hubbell, having now shewn that a great number of licenses, about to expire within a fortnight, were waiting for renewal upon the decision of the right, and that it was otherwise very important to their client and the publick, that the right should be decided at once; moved for a second trial at this same term, by a new jury selected out of the existing panel, instead of waiting as they would otherwise have to do, until the next session, a term of six months.

Mr. St. G. T. Campbell opposed the application.

GRIER, Circuit Justice. An application of this same sort was made to me in a case while I presided in the district court at Pittsburgh, where the case went off by withdrawing a juror. A decision from one of the Ohio or Indiana courts was then cited in support of the motion. In consequence of that decision, I looked thoroughly into the matter at the time, and was satisfied that the decision was not founded in principles of the common law and was wrong. I have no doubt that a settlement of this patent right, at once, is important, but it cannot be tried now except by consent. There must be a second venire. Motion refused.

On a subsequent day, it having appeared by a communication from the bench that the court, after full argument on the evidence, were divided on the question of infringement, and the jury having been unable to find a verdict, Mr. Hirst and Mr. W. W. Hubbell, moved to dissolve the injunction absolutely. It had been granted by the district judge, they argued, in the absence of his brother, who now after full examination, came to the conclusion that there was no infringement. Had the latter judge been present when the injunction was applied for, the court being divided, would not have granted it; and if it could, would not. A jury had moreover refused to pronounce that there was any infringement. This, supported by the action of the patent office, which regarded the invention as original, and by the patent which gave a prima facie right, made a clear case for a jury alone.

W. H. Seward, St. G. T. Campbell, and S. V. Smith, in favour of continuing the injunction, argued that the act of either judge, sitting for the circuit court, was the act of the court. As a circuit court, each judge is of

absolute equality. It is impossible to say, what the circuit judge's opinion would have been, had he heard the argument for the injunction. That is a matter past and gone, and of which no judicial cognizance could now be taken. Each judge was satisfied of the correctness of his own opinion: and whether each chose to rely on his own, or each to defer to his brother's, the court would still be equally divided. In that state of things, what could be done? Simply nothing. The injunction would stand of its own force. The inability of the jury to find a verdict, Mr. Seward argued, was of no significance. They had been summoned to settle the matter, and they had not settled it, but left it where it was. Had they even found a verdict it would have been of little value unless approved by the court, who, if disapproving of it, would have set it aside. No verdict was of no value.

GRIER, Circuit Justice, expressing the high respect he entertained for the opinion of his Brother KANE, particularly upon questions relating to patents, and KANE, District Judge, stating that from the time he found that a difference of opinion existed between him and the presiding judge upon the question of infringement, his inclination was to have the matter disposed of, as if the court had been full when the injunction was applied for; and both members of the court—in the difference of opinion which existed between them, and which it seemed could not be removed—being desirous of protecting both parties to the suit from any errors which might exist by either dissolving absolutely, or absolutely continuing the injunction, made an order to this effect: That the injunction should be dissolved if the defendant in ten days should give security in \$10,000 to keep an account, &c. and pay, &c. in case of a final decree being entered against him. On his failure to give such security, then in case the complainant should in ten days afterwards give security in \$20,000, the injunction to stand; and in default of his giving such security, to be dissolved without condition.

[For other cases involving this patent, see note to Gibson v. Van Dressar, Case No. 5,402.]

Case No. 17,788.

WILSON v. BASTABLE.

[1 Cranch, C. C. 304.]¹

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

JUDGMENTS—EQUITABLE RELIEF.

Equity will not relieve against a judgment at law, upon plene administravit, on the ground that the defendant at law could not produce

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

vouchers to support his plea, unless there be in the bill an allegation of fraud, mistake, surprise, or accident.

Motion to dissolve an injunction, to stay proceedings at law upon a judgment rendered on the issue of plene administravit. The only equity stated in the bill was, that the defendant at law could not support his plea for want of vouchers. No fraud, mistake, accident, or surprise, was alleged.

E. J. Lee cited the case of *Wilson v. Bell*, 2 Call, 104; *Dunlop v. Shelton* (before Chief Justice Marshall); *Robinson v. Bell*, 2 Vern. 146; and *Stephenson v. Wilson*, Id. 325.

Mr. Swann, for the defendant, cited *White v. Bannister's Ex'rs*, 1 Wash. [Va.] 168. Injunction dissolved.

[See Cases Nos. 1,097 and 17,789.]

Case No. 17,789.

WILSON v. BASTABLE.

[1 Cranch, C. C. 394.]¹

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

JUDGMENTS—EQUITABLE RELIEF—INJUNCTION.

A general allegation of difficulty in procuring vouchers, or of unavoidable delay in settling an administration account without stating from what circumstances that difficulty and delay arose, is not sufficient ground of equity to enjoin a judgment at law.

E. J. Lee, for plaintiffs, cited 1 Har. Ch. Prac. 33; 1 Fonbl. 13, 34, 340; *Silk v. Prime*, 1 Brown, Ch. 138, note; *Perkins v. Bayntun*, Id. 375; *Law Va.* p. 165, § 33, and *Act Va.* 1806, respecting misleading by executors and administrators; also, *Waring v. Danvers*, 1 P. Wms. 295; *Cockroft v. Black*, 2 P. Wms. 298; *Croft v. Pyke*, 3 P. Wms. 183; *Jacomb v. Harwood*, 2 Ves. Sr. 268; and *Robinson v. Cumming*, 2 Atk. 411.

Mr. Swann, for defendant.

[See Cases Nos. 1,097 and 17,788.]

CRANCH, Chief Judge. The bill states that the defendant commenced a suit at law against the plaintiffs as administrators of Cumberland Wilson, deceased, upon a promissory note for £100, to which action the plaintiffs pleaded plene administraverunt, "but from the difficulty and unavoidable delay they met with in getting vouchers for those to whom they had paid money for the estate, and getting the estate account settled, they were not able to produce evidence at the trial of the said suit, that they had fully administered, by reason whereof a verdict and judgment were had against them for the debt aforesaid and 40 dollars damages and 13 dollars 33 cents costs." That since the judgment they have settled their administration account with the Dumfries district court, "by which it will appear that they had fully

administered the assets which had come to their hands, and that the estate was indebted to them on the 24th of October, 1801, \$17,566." That since the said settlement they have received \$896, which reduces the balance to \$16,570. That at the time the judgment was obtained in October, 1800, there was due to them for money paid by them for the estate more than \$17,566. That they have paid the \$40 damages and the \$13.33 costs, "and that the defendant owes the said Cumberland \$60." That the defendant brought suit in this court on the judgment and obtained judgment thereon, without allowing credit for the \$40 damages and \$13.33 costs, and will proceed to issue execution thereon, unless prevented by a court of equity;—they therefore pray an injunction, and general relief.

An injunction was granted by one of the judges of this court. The answer of the defendant states that his action was founded on an accepted bill of exchange of Cumberland Wilson. That the trial at law was fair, and contends that the plaintiffs are not entitled to relief in equity; it neither admits nor denies the settlement of the administration account, nor the plaintiffs' allegation of difficulty and unavoidable delay in obtaining vouchers and settling their accounts. But it insists that the defendant's claim was among the first to be preferred in marshalling the assets. It neither admits nor denies the payment of \$40 damages and costs; but says he is ignorant on that subject, and is willing to admit it, if paid. At March term, 1805, this court ordered the master to state the administration account of the plaintiffs, noting the times of the respective payments, and certifying the vouchers; upon report it appeared that the sums alleged by them to have been paid by them, in the administration of the estate, were principally sums due to themselves, a large part whereof, and more than sufficient to absorb all the assets, was for bills of exchange, upon which Mr. W. Wilson was indorsed, and which he had taken up more than three years before the death of his testator, and more than five years before the trial of the cause in the Dumfries district court. A strong presumption arises from this circumstance that the vouchers were in his own hands—and if any difficulty did arise in obtaining them in time to produce them at the trial at law, it must have arisen from his own negligence. It at least throws the burden of proof on him to show special circumstances of accident, before any equity can arise in his favor. If he had a right to retain all the assets for the satisfaction of his own debt, he might have availed himself of it at law. The bill does not state any one specific fact of accident which prevented him from doing so, and such an accident cannot be presumed, especially in such a case. Excepting the allegation of the payment of the \$40 damages and the costs, which were not credited in the second judgment, I see no

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

ground of equity in the bill. A general allegation of difficulty in procuring vouchers, or of unavoidable delay in settling accounts, without stating from what circumstances that difficulty and delay arose, is too vague and indefinite even to support an injunction in the first instance.

THE COURT, at March session, 1806, dissolved the injunction, except as to the \$40 damages and \$13.33 costs, which were admitted by the defendant's counsel to have been paid. Since that time, no evidence has been produced, and the cause having now come to a final hearing, the court can only dismiss the bill with costs.

The allegation, that the defendant was indebted to the intestate in the sum of \$60, is an amendment to the bill, I believe made since the dissolution. It is, however, a naked allegation, without circumstances and without proof. In the account taken by the master, it appears that the plaintiffs have paid a judgment for more than \$2,000, rendered since that recovered by the defendant. This, probably, would at law be deemed an admission of assets. But at all events, as the bill is totally deficient in equity, except as to the amount paid for the damages and costs, and as no proof, whatever, had been adduced in support of any circumstance of accident, the injunction must be perpetual as to the \$40 damages and the \$13.33 costs, and the bill must be dismissed with costs as to the residue.

WILSON (BASTABLE v.). See Case No. 1,097.

Case No. 17,790.

WILSON v. The BELVIDERE.

[1 Pet. Adm. 258.]

District Court, D. Pennsylvania. 1806.

SHIPPING — LOADING OF CARGO — DUTY OF MATE.

[1. It is not the duty of a mate, in loading casks of wine from a lighter, either to work at the fall, or bear off with his own hands the cask from the side, as it is about to come aboard; though both duties are sometimes performed by mates from commendable motives.]

[2. Lightermen, to whom is committed the charge of transporting goods from the shore, and slinging them in the lighter, for hoisting aboard, are responsible for any defect or negligence in the manner of slinging.]

[Cited in Spurr v. Pearson, Case No. 13,268.]

[3. Mates, being appointed by the master, though approved by the owners, are the master's deputies, and the master must share the responsibility when casualties occur; so, also, must the seamen, unless the goods are lost by defective tackle, etc.]

[4. Where a cask of wine was lost while being hoisted aboard by the mate and crew, held that the master, mate, and crew must share the loss with all the rest of the ship's equipage, in proportion to their monthly wages; and the fact that the master had paid off the seamen did not in any wise affect the contribution of the mate.]

At a foreign port of delivery and re-loading, where mariners are bound to deliver and re-

load; a cask of wine having been brought along side, and slung, in a lighter, by men not of the crew, was hoisted on board by part of the crew, and the mate, who occasionally assisted at the tackle fall, when the labour was hard. On its arrival at the point of passage over the waist of the ship, which was high, the cask suddenly turned athwart-ships, slipped out of the slings, was stoven, and the wine lost. The wages due the seamen were paid to them without deduction, and the value of the wine was charged solely against the mate. It was alleged that it was the mate's peculiar duty to bear off the cask from the side, while hoisting; which had he performed, the accident would not have happened. Several casks, slung in the same way, had been hoisted in, and no casualty occurred. Many masters of ships were examined. It was the general opinion, as to the duty of the mate, that the bearing the cask off the side was not particularly incumbent on him, though it was often done by a mate, where the hands at the fall were no more than competent to that service. He might order a hand to this duty; but where skids, or other fixtures, for the purpose, were provided, it was not always necessary; and much depended on slinging the cask,—the business of the lightermen.

BY THE COURT. When quarrels and personal dissensions arise between masters and mates, I have often had occasion to make enquiries into the appropriate and respective duty of both. I have generally found great difficulty in ascertaining nice points of alleged duties, (many of them made on the spur) on which my decision must depend. In the present case, proof of two things is required: (1) That the mate was bound to bear off the cask in question. (2) That if it had been so borne off, it was so well slung, that no accident would have occurred. It appears to me that the mate was not obliged, manually either to work at the fall, or bear off the cask from the side; though both are sometimes done by mates, from motives very commendable.

The second requisite, to wit, the slinging the cask, is not in proof, and would in its consequences be merely conjectural. If it was ill slung, the lightermen were solely responsible for the whole loss. Several casks slung in like manner, and none of them borne off the side, had arrived safe into the hold. It therefore depends upon the general principle, and this case is only of consequence, as that applies. If the mate has been guilty of gross negligence, in any point peculiarly his duty, he alone is responsible. And so it is with the master or any officer, or seaman. It does not appear, in this case, that the mate was grossly negligent. On the contrary, he had reason to presume, while engaged at the tackle fall, that this cask was well slung, and would arrive at its berth as others had done. Lightermen to whom is committed the charge of transporting goods from the shore, and slinging them in the lighter, are responsible for this

part of the business. So if stevedores are employed, they are responsible for the stowage of a ship. The mate must attend to the taking in, and delivery of the cargo. He must take an account of it, according to established custom. He must exercise a general superintendence under the master, over the whole business; and if any special directions are given, he must obey them: where none are given, he must use common care and discretion, according to the best of his judgment; but he is not solely answerable for casualties. Masters often attempt to fix the sole responsibility on mates, to screen themselves, who, of all others, should constantly exercise the most care, and marked attention. If their engagements, in other duties, or their avocations, throw on the mates the executive duties, they being, (though approved by the owners) selected by the masters, and their deputies, the masters must share responsibilities when casualties occur. So must the seamen generally;—I say generally, because if goods are lost by bad ropes, or other defects of tackle, or furniture, against which they remonstrate, they are acquitted. The law emancipates the watchful, when they warn against impending misfortune,—but it mulcts in contribution the negligent and incautious. The mate in the case before me, must bear his contribution, with all the rest of the ship's equipage, the master included, in proportion to their monthly wages. If the master has improvidently, or with design, paid off the seamen, it has no operation to affect the mate. His contribution is not more or less, on that score. It is a business resting entirely between the master, and those with whom he has thought proper to accommodate. This is often used as a means to introduce the seamen as witnesses, for purposes required by the party who deems their testimony necessary.

Wages decreed, deducting a contribution.

WILSON (BENNETT v.). See Case No. 1, 326.

Case No. 17,791.

WILSON v. BERRY.

[2 Cranch, C. C. 707.]¹

Circuit Court, District of Columbia. May Term, 1826.

ARREST OF JUDGMENT—VARIANCE.

A variance between the *capias ad respondendum* and the declaration is not a ground for arresting the judgment.

The *capias ad respondendum* was issued in trespass on the case. The declaration was in covenant upon a sealed instrument covenanting to pay certain debts amounting to \$846.47, with interest. The defendant [B. M. Berry] appeared and pleaded "covenants performed," &c., upon which there was an issue, and a verdict for the plaintiff.

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

Mr. Frost, for defendant, on the 20th of June, 1826, moved in arrest of judgment, on account of the variance between the writ and the declaration, and cited 3 Bl. Comm. 393; 1 Chit. 438, 443.

Mr. Swann, for plaintiff, contended that judgment cannot be arrested for error in process.

CRANCH, Chief Judge. This is a motion in arrest of judgment for variance between the writ of *capias ad respondendum* and the declaration; the writ being in trespass on the case, and the declaration being in covenant. "Arrests of judgment arise from intrinsic causes appearing on the face of the record; of this kind are (1) Where the declaration varies totally from the original writ; as where the writ is in debt, and the plaintiff declares in an action upon the case for an assumpsit; for the original writ out of chancery being the foundation and warrant of the whole proceedings in the common pleas, if the declaration does not pursue the nature of the writ, the court's authority totally fails." 3 Bl. Comm. 393. In England, pleas in abatement to the count could only be pleaded in actions by original writ. After declaration, formerly, the defendant might demand oyer of the writ, and then, the same being set forth on the roll, if there were any variance between the count and the writ, and a record or specialty, &c., mentioned in the count, the defendant might plead such variance in abatement, or demur; move in arrest of judgment, or sustain error. 1 Chit. Pl. 438; Hole v. Finch, 2 Wils. 394; Com. Dig. "Abatement" G, 8; 3 Instr. Cler. 62; Reg. Pl. 277, 278. But, as the variance between the writ and count could in no case be pleaded without craving oyer of the writ (Hole v. Finch, 2 Wils. 394, 395), and the defendant cannot now have such oyer, such variance or defect is no longer pleadable in abatement, and if it be pleaded in abatement, the plaintiff may sign judgment, or move the court to set the plea aside. 1 Chit. 438; Murray v. Hubbard, 1 Bos. & P. 646, 647; Gray v. Sidneff, 3 Bos. & P. 395; Deshons v. Head, 7 East, 383; Boats v. Edwards, 1 Doug. 227; Spalding v. Mure, 6 Term R. 364. Nor will the court set aside the proceeding, in respect of the variance, as oyer of the writ cannot now be craved. Hole v. Finch, 2 Wils. 393; Oakley v. Giles, 3 East, 167; 1 Chit. 247, 249; Boats v. Edwards, 1 Doug. 227. It is one of the general requisites of a declaration, that it corresponds with the process (Com. Dig. "Pleader," C, 13), and, in bailable actions, with the *ac etiam* and affidavit to hold the bail (1 Chit. 248).

Regularly the declaration should correspond with the process; but as, according to the present practice of the courts, oyer of the writ cannot be craved, and a variance between the writ and declaration cannot, in any case, be pleaded in abatement (1 Saund. 318, note 3; Gray v. Sidneff, 3 Bos. & P. 395; Spalding v. Mure, 6 Term R. 364), and as

there are several instances in which the court will not set aside the proceedings on account of a variance between the writ and declaration, many of the older decisions are no longer applicable in practice. In the king's bench, when the proceedings are by special original, the venue must be laid in the county, into which the original was issued, or, in bailable cases, the bail will be discharged; but in the common pleas the bail would not be discharged by such variance. *Smithson v. Smith*, Willes, 461; *Id.*, Barnes, 94; *Stroud v. Lady Gerrard*, 1 Salk. 8; *Doo v. Butcher*, 3 Term R. 611; *Hole v. Finch*, 2 Wils. 393; *Bac. Abr. tit. "Pleas," I, 11*; *Tidd, Prac. 582, note i.*; *Benson v. Derby*, 1 Ld. Raym. 249, cont. *Chitty (volume 1, p. 254)* says: "Upon common process by bill in the king's bench, or upon a *capias*, or original *quare clausum fregit* in the common pleas, the plaintiff may declare in any cause of action whatever, although the writ in each case is in trespass. *Foster v. Bonner*, Cowp. 455. But in bailable actions, the declaration must correspond with the cause and the form of action in the affidavit, and the *ac etiam* part of the *latitat* or other process, for otherwise the defendant will be discharged out of custody upon filing common bail; but this will be the only consequence, for the court will not, in such a case, set aside the proceedings for irregularity." And, even "when the proceeding has been by special original, if there be a variance between it and the declaration, the defendant will be discharged on entering a common appearance; but the proceedings will not be set aside merely on account of a variance in the cause of action; and therefore the only consequence of the mistake is, that the plaintiff loses the security of the bail." In *Hole v. Finch and Jackson v. Doleman*, cited in 2 Wils. 393, the court said: "One reason why the court should not interpose is, that after the defendant hath appeared, and is in court, there is an end of the mesne process; and if the defendant craves oyer, it must be of the original writ; he cannot have it of the mesne process; and if application was to be made to the master of the rolls, he certainly would not refuse to order right originals to be made out in both these cases." In the case of *Murray v. Hubbard*, 1 Bos. & P. 647, *Eyre, C. J.*, said: "The arrest, however, is not the operation of the writ, but of the mesne process, which is out of the question, after appearance." "The objection to the mesne process being cured by appearance in the true name, the writ, whenever it is properly called for, will be found to be a writ against the party by his true name." "The case, therefore, comes to this, that so long as it is the practice of the court to issue the mesne process first, and to allow an original to be sued out afterwards, if necessary to substantiate the proceedings, no advantage can be taken, after appearance, of a misnomer in mesne process." In *Gray v. Sidneff*, 3 Bos. & P. 348, *Lord Alvanley, C. J.*, in

delivering the opinion of the court, said: "It has been long the practice not to grant oyer of original writs; and though, perhaps, such refusal may be considered in the first instance to have been a strong measure; yet it was the necessary consequence of assuming jurisdiction without original." "When courts adopt a fiction, they must necessarily support it. The court of king's bench would not allow a party to say that he was not in the custody of the marshal; nor the court of exchequer, that he was not the king's debtor. By this doctrine, no right is taken away from the subject, nor is he proceeded against in any way injurious to himself. If such a plea were to be allowed, the master of the rolls would issue a new writ agreeable to the declaration. If the court thinks itself at liberty to proceed without an original, it will never permit a mode of proceeding to be adopted which will have the effect of compelling the plaintiff to sue out that original which the court feels itself justified in acting without." See, also, *De-shons v. Head*, 7 East, 383; 1 Saund. 318, note 3. In England, neither the original writ, nor the mesne process is entered on the roll, so as to form any part of the record either in the king's bench or common pleas. A record in the king's bench commences in this form: "London, ss. Memorandum that on Monday next, after three weeks of St. Michael, in that term, before our lord the king at Westminster, came R. B. by D. S. his attorney, and brought here into the court of our said lord the king, then and there, his certain bill against C. D. in the custody of the marshal, &c. of a plea of trespass on the case; and there are pledges of prosecution, to wit, John Doe and Richard Roe; which said bill follows in these words, to wit: London, ss. R. B. complains of C. D. in the custody of the marshal of the marshalsea of our lord the king, before the king himself being, for this, to wit," &c. See 1 *Modus Inrandi*, 1; *Barker v. Thorold*, 1 Saund. 40. A record in the court of common pleas commences in this form: "Essex, ss. Elizabeth Savil, late of, &c. in the county aforesaid, administratrix, &c. was summoned to answer to Thomas Wallford of a plea that she render to him £300, which she detains from him; whereupon the said Thomas, by John Reynolds, his attorney, says," &c. A record in the king's bench, when sent up by writ of error, is headed thus: "Pleas before our lord the king at Westminster, of the term of the Holy Trinity, in the second year of the reign of our lord James the Second, now king of England," &c. *Rot. Cur. Reg. 139*; *Grey v. Briggs' Adm'r*, 1 Lutw. 889. A record from the common pleas is headed thus: "Pleas at Westminster, before George Treby, knight, and his associate justices of our lord the king of the bench, ss. In the term of St. Hilary in the tenth and eleventh years of the reign of our lord William the Third," &c. *Rot. Cur. Reg. 1337*.

It appears by the case of *Longvill v. Hun-*

dred of Thistleworth, 6 Mod. 27, that judgment cannot be arrested for variance between the original writ and declaration, unless the writ be made part of the record by oyer. There is no case in the books where judgment has been arrested for variance between the declaration and the process. In the case of *Bragg v. Digby*, 2 Salk. 658, "the defendant without praying oyer of the original writ, pleaded variance between the writ and count, showing particularly wherein; and the plaintiff demurred; and it was adjudged that the defendant should answer over; for he ought to have demanded oyer of the writ before he could take advantage of the variance; because, although the writ is in court, yet not being upon the same roll with the count, the defendant cannot plead to it without demanding oyer." And in *Ellery v. Hicks*, 4 Mod. 246, upon a motion in arrest of judgment on the ground of a variance between the original writ and declaration, "the exception was disallowed, because the defendant cannot take advantage of an ill original, without demanding oyer of it; which had not been done." See, also, *Stephens v. White*, 2 Wash. (Va.) 212; Mr. Justice Lyon's opinion. In *Lindo v. Gardner*, 1 Cranch [5 U. S.] 344, there is a note of the reporter, intimating that in Maryland the *capias ad respondendum* is considered as part of the record; but this is the mere dictum of the reporter, unsupported by any authority. In the case of *Lowry v. Lawrence*, 1 N. Y. Term R. [1 Caines] 71, the court said "that the declaration must be captioned (entitled) of the term when the writ is returned served;" and the court must (from the recital at the head of the declaration, that "heretofore, to wit, on the third Tuesday of July, in July term, 1801, came William Lowry and brought into the said court then and there his certain bill," &c.) "necessarily intend the fact that the writ was returned in July term, 1801, and of course the action, both in fact and technically speaking, commenced previously to that time."

This reasoning shows that the writ itself was not considered as part of the record; because, if the writ itself had been officially before the court, the judges would not have resorted to inference for proof of the time of its issuing or of its return, but would have looked at the writ itself.

Finch, in his "Common Law" (folio 54b, French Ed., p. 172, English Ed. 1759, lib. 3, c. 1), says "such is the commencement of the suit" (that is, the original writ). "The proceeding until judgment consists of two parts, the parol and the process, and this is proved by the form of the writ of error; because in the record and process, and the giving judgment of the plaintiff, &c. Reg. Brev. 116; 8 Coke, 157b. The parol which is called the 'plaint,' is that which depends in plea, namely, all the time until judgment; for after judgment the suit is not said depending. And all this is entered of record in a roll, which is

called the 'plea-roll'; but the entry of the original writ in the roll is but superfluous, forasmuch as the writ always remains of record, and is sufficient by itself; but it shall not have any roll, although the contrary is used. Variance in any part of the original writ shall be amended at any time." "Stat. 14, Edw. III. c. 6; 9 Hen. V. c. 4; 4 Hen. VI. c. 3; 8 Hen. VI. cc. 12, 15; 5 Geo. I. c. 13;" 8 Coke, 156b. And again, in page 177 (folio 56a), he says: "After the count, the defendant, for his aid to plead better, shall have oyer, if he demand it, of every thing which is not parcel of the record, as of the writ and return thereof; of an obligation and the condition, and the like." In *Arthur Blackamore's Case*, 8 Coke, 156b, 157a, Lord Coke says: "So at the common law the judges might amend as well their judgment as any other part of the record, &c., in the same term (Co. Litt. 260a; 5 Coke, 74b), for during the same term, the record is in the breast of the judges, and not in the roll. But at the common law the misprision of clerks, in another term, in the process, was not amendable by the court; for in another term the roll is the record; and therefore by 14 Edw. III. c. 6, it is enacted, &c., that no process shall be annulled," &c. "But this statute doth not extend to an original writ, nor to a writ which is in the nature of an original, for that is not included in this word 'process.'" "Recordum" (in the writ of error), contains "the plea-roll;" "Processus, all the proceedings out of it till judgment." 8 Coke, 157b. "And the first part of the record is the count." 8 Coke, 161a. Blackstone (3 Bl. Comm. 272, 273) says, the original writ, issued out of chancery, "is the foundation of the jurisdiction of the court; being the king's warrant to proceed to the determination of the cause. For it was a maxim, introduced by the Normans, that there should be no proceedings in the common pleas before the king's justices without his original writ; because they held it unfit that those justices, being only substitutes for the crown, should take cognizance of any thing but what was thus expressly referred to their judgment." Fletch. Trustees, bk. 2, c. 34; Gilb. Com. Pl. Introduction, x; Gilb. Com. Pl. 2; Fletch. Trustees, 58. See, also, Finch, 198, as to the definition of process, mesne process, and judicial process. Finch, 168, says: "Until the original writ be returned the suit is not said depending." "nor can the courts hold plea but upon an original returned before them." Gilbert, in his *History of the Practice of the Common Pleas* (page 26), says: "The appearance of the plaintiff and defendant in propria persona, at the return of the writ, is recorded by the philazer" (the officer who issues process), "because he was to continue the process of the court, till the prothonotary took it upon the declaration, this prothonotary sets forth the authority by which the court proceeded, that the court might appear to have cognizance of the cause, and that they pur-

sued their warrant; and therefore in all actions where the first process is by summons, though he did not appear at the return of the summons, and they had issued several mesne writs, yet they only took notice of the summons, and said *summonitus fuit ad respondendum*, and so in trespass, *attachiatus fuit ad respondendum*." See, also pages 96, 97. And in page 42 Gilbert says further: "But where there is a variance between the original and the count, or the bond, and oyer prayed, there the variance may be pleaded, because it was usual for the pleaders to show it to the court and have the writ abated; these, taken down by the prothonotary, were the original of those pleas in abatement; but when the recital of the writ and the count itself were entered on record, if there were any material variance, the defendant might take advantage of it, not only by way of plea, but by motion in arrest of judgment after the verdict, or by a writ of error; because the writ being the foundation and warrant of the whole proceedings, if the plaintiff did not pursue it by his count there was no authority to the court to proceed in such cases."

A mistake in the recital of the writ is immaterial after verdict; and if there be a variance between the recital of the writ, and the count, the court, unless the contrary appears, will, after verdict, intend that there was a good original; and that the plaintiff's clerk had made a mistake in the recital of it. *Redman v. Edolph*, 1 Saund. 317, 318. Again, in chapter 10, p. 86, Gilbert says "that matter amendable, and matter of form, as the law now stands, will not arrest judgment." And in page 87 he says: "That part of the count which recites the writ, was amendable at common law;" and in page 93: "The writ" (meaning the original writ) "is amendable if there be false Latin, if it be only in the form of the writ; but if it be in the substance it shall not be amendable; for the statute gives the court leave, where they have sufficient authority to proceed, to amend the form, but not to make an authority for themselves by altering the substance of the writ." See, also, *Tidd, Prac.* 124, and *Davis v. Owen*, 1 Bos. & P. 343, that the *capias* is no part of the record, and may be amended.

The result of my reflections is this: In England, the reason why a variance, between the original writ and count, was fatal, was because the original writ was the foundation of the authority of the court to take cognizance of the cause, and the warrant to the judges to proceed to judgment. It was necessary that they should pursue their authority strictly. Their acts, if not warranted by the writ, were void. But as these writs have, for a long time, been grantable of common right, (*ex debito justitiæ*), and as the jurisdiction of the courts has been so long established, and precisely ascertained, it became apparent to the whole nation, that a particular warrant to the judges, in every case, was

wholly unnecessary, and had become a mere matter of form. The judges themselves, finding that justice was often defeated or delayed by exceptions taken to the accidental variance between the count and the writ, even after the parties had pleaded and gone to trial upon the merits, decided that the defendant should not take advantage of such variance without oyer of the writ; and finally that oyer should not be granted when that was the object; and that if a variance appeared between the recital of the writ and the count, they would, after verdict, intend that there was a good original, which had been misrecited by the misprision of the clerk, so that, at this time, no advantage can, in England, be taken of any such variance. In that country the judicial power is not separated from the executive. The king is the source of all judicial authority. In theory, he himself is supposed to exercise judicial power. The judges are his delegates or substitutes, and can hear no cause unless it be referred to them by the king, or be brought before them by his order. Hence the necessity, at first, of original writs. But in this country the judicial power is a separate branch of the national sovereignty. It does not emanate from the executive; and after being organized by the legislature it is independent of both. It exercises its functions *suo jure*, although the jurisdiction of each particular tribunal is described and defined by the legislature at the time of its erection. It is not necessary that each particular case should be referred to the court by a higher authority. It requires no original writ to warrant its proceedings. Every person has access to it, as of common right. It is bound to hear and determine every case, brought judicially before it, of which it has jurisdiction. The writ which is issued to compel the appearance of the defendant, is what, in England, is called "process," issued from the court itself, and not an original writ issuing from another tribunal. Although it may be called the "original writ" because it is the first writ which issues in the cause, yet it has not the qualities of the English original writ; and no variance between it and the count can abate it, because it is not the foundation of the authority of the court; and if it could be thus abated, the abatement of the process, issuing from the court itself, could not deprive the court of that cognizance of the cause which it must have had before it issued the process.

There is no instance, in the English books, of a plea in abatement, or of an arrest of judgment for variance between the count and the process. Such variance is seldom noticed, unless it affect the interest of third parties, as in bailable cases, or unless it be very material. The mode of taking advantage of such variance, is not by plea, but by motion, either to discharge the bail, or to set aside the proceedings for irregularity. It is a motion to the discretion of the court; not

as a matter of strict right; and the court varies the remedy according to the justice of the case. 1 Chit. Pl. 248, 254. When we find that the English courts have deemed it necessary for the purposes of justice to throw obstacles in the way of taking advantage of a variance between the original writ and the count, and that no advantage, by way of plea, or motion in arrest of judgment can there be taken of a variance between the process and the count, it would seem strange that we, who have no original writ sent to us as the foundation of our jurisdiction, should decide that the process is abated by its variance from the declaration; or that judgment should be arrested for that cause. The English doctrine, respecting the original writ, is wholly inapplicable to our courts; and a doctrine which for its injustice and inconvenience, has been reprobated there, ought not to be gratuitously assumed here. The reason why, in England, judgment was arrested for variance between the original writ and count, was, that the court had no jurisdiction of the cause actually prosecuted; and it is never too late, before judgment, to show that the court has no authority to give the judgment which is asked. But in this country an error in the process does not affect the jurisdiction or authority of the court, especially when the defendant has appeared upon that process and pleaded to the action. The process is only the means of bringing the defendant into court. If he appear and do not object to the process, nor move to be discharged on account of its irregularity, but submit himself to the jurisdiction of the court, it is immaterial by what sort of process he is brought in.

But it may be asked, shall a man arrested for trespass, be obliged to answer to the plaintiff in an action of debt? In answer, it may be asked, why not here as well as in England? No inconvenience is felt there in this course of proceeding. The only objection would be on behalf of the bail, and he might be relieved on motion.

I think it quite immaterial whether the *capias ad respondendum*, be, or be not, part of the record; for if it be, a variance between it and the count is not fatal, for the reasons before stated; and if it be not a part of the record, the variance does not judicially appear, and cannot be noticed by the court.

The motion in arrest of judgment is overruled.

Case No. 17,792.

WILSON v. BLODGET et al.

[4 McLean, 363.]¹

Circuit Court, D. Indiana. May Term, 1848.

REMOVAL OF CAUSES—CITIZENSHIP.

A suit cannot be removed from a state court into the circuit court of the United States,

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

where a part of the plaintiffs or defendants are citizens of the state where the suit is brought, and of some other state.

[Cited in *Field v. Lownds*, Case No. 4,769; *Fields v. Lamb*, Id. 4,775.]

[Cited in *Shelby v. Hoffman*, 7 Ohio St. 453; *Bryant v. Rich*, 106 Mass. 192; *Washington, A. & G. R. Co. v. Alexandria & W. R. Co.*, 19 Grat. 601; *Beery v. Irick*, 22 Grat. 488.]

[This was a suit by C. L. Wilson against Blodget and others. Heard on motion to dismiss.]

Mr. Niles, for plaintiff.

Smith & Sullivan, for defendants.

McLEAN, Circuit Justice. This case was removed from the state court under the act of congress, and a motion is now made to dismiss it, on the ground that some of the defendants are citizens of the state. Blodget & Co. are citizens of Massachusetts; and it appearing that the defendants, who are citizens of the state, are mere agents, and against whom no decree is prayed, and whose names may be stricken out of the pleadings, as they are not necessary parties, it is contended the jurisdiction should be sustained. It is clear that no suit can be removed from the state court by either party where some of the parties, plaintiffs or defendants, are citizens of the state where the suit is brought, and others of a different state. The motion to dismiss is granted.

Case No. 17,793.

WILSON v. BOYCE.

[2 Dill. 539.]¹

Circuit Court, E. D. Missouri. 1873.²

LIEN OF THE STATE OF MISSOURI UPON THE RAILROADS FOR STATE BONDS—LEGISLATION OF THE STATE CONSTRUED.

1. Under the act of the Missouri legislature of March 3d, 1857, bonds issued by the state to the several railroad companies receiving them "constituted a first lien or mortgage upon the road and property" of said companies. *Held*, that the lien of the state under this statutory mortgage extended to lands which had before that time been granted by congress to aid in the construction of the road, and by the state to the railroad company, and that the lien of the state was not confined to the road and such property immediately connected with the road as was necessary for its operation.

2. A title to such lands derived from the state (which subsequently foreclosed its lien) is superior to a title derived from the railroad company, by deed made by the company, after it had accepted the provisions of the act of March 3d, 1857, giving the state a first lien on the "road and property" of the company.

This is an action of ejectment for a tract of land in Scott county, in this state. The tract in dispute is part of a large body of land acquired by the state of Missouri under the act of congress, entitled "An act granting the

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

² [Affirmed in 92 U. S. 320.]

right of way, and making a grant of land to the states of Arkansas and Missouri to aid in the construction of a railroad from a point on the Mississippi, opposite the mouth of the Ohio river, via Little Rock, to the Texas boundary, near Fulton, in Arkansas, with branches to Fort Smith and the Mississippi river," approved February 9th, 1853 (Railroad Laws, p. 5). The lands thus granted by the act of congress were afterwards granted by the state to the Cairo & Fulton Railroad Company of Missouri, by act of the general assembly of February 20th, 1855. The plaintiff [Blakely Wilson] and defendant [Peter Boyce] each claims under the Cairo & Fulton Railroad Company of Missouri as a common source of title. The plaintiff claims to have derived the title of the Cairo & Fulton Railroad Company of Missouri by means of the following instruments:—(1) A deed from the Cairo & Fulton Railroad Company, of date May 23d, 1857, to John Moore, John Wilson, and Albert G. Waterman, in trust, with power of sale. [This paper bears date May 23d, 1857, though the resolution of the board, which is the authority on which it rests, was made March 8th, 1858, and the certificates of acknowledgement are dated respectively April 30th, May 7th, and 14th, 1858, so that for some reason the document was given a false date.] (2) An instrument purporting to be a deed from Moore, Wilson, and Waterman, trustees, of date November 25th, 1859, to one H. S. Hamilton. (3) A deed bearing date March 29th, 1860, from H. S. Hamilton to Walter A. Stevens. (4) A deed of date November 23d, 1860, from Walter A. Stevens to Blakely Wilson, the plaintiff. The defendant, who is tenant in possession, claims that Thomas Allen, his landlord, has derived the title of the Cairo & Fulton Railroad Company of Missouri by means of two certain statutory mortgages put upon its property by the railroad company, and by the proceedings that were subsequently had for the foreclosure of said mortgages.

The first of the two mortgages was created under the act of the general assembly, entitled "An act to expedite the construction of the Cairo & Fulton Railroad of Missouri," passed December 11th, 1855. The first section of the act made provision for the issuing of the bonds of the state, and the delivery of them to the railroad company, to aid the company in the building of its road. The second section forbade the delivery of the state bonds to the company until the acceptance thereof should be signified to the secretary of state by a certificate of the company filed in the secretary's office. The third section provides that "each certificate of acceptance so executed and filed as aforesaid, shall be recorded in the office of the secretary of state, and shall thereupon become and be, according to all intents and purposes, a mortgage of the road, and every part and section thereof, and its appurtenances to the people of this state, for securing the payment of the principal and interest of the sums of money for which such

bonds shall from time to time be issued and accepted as aforesaid." State bonds, amounting to \$250,000, were delivered to the railroad company under this act after March 3d, 1857. The second of the two mortgages arose under the act of the 3d day of March, 1857, entitled "An act to amend an act to secure the completion of certain railroads in this state, and for other purposes," approved December 10th, 1855. By the 20th section of the act there was "granted to the Cairo & Fulton Railroad Company an additional loan of \$400,000." By the 17th section it was provided that "all bonds issued under the provisions of this act shall constitute a first lien or mortgage upon the road and property of the several companies so receiving them, in the same manner as provided by the act approved February 22d, 1851, to expedite the construction of the Pacific Railroad, and of the Hannibal & St. Joseph Railroad, and the act approved December 10th, 1855, of which this is amendatory." On the 19th day of October, 1857, the board of directors adopted a resolution accepting the provisions of the act of the 3d day of March, 1857, as required by the 16th section of the act and afterwards, in due time filed a copy of it in the secretary's office, and thereupon the amount of bonds granted by the act were issued and delivered to the railroad company, and the company in due form filed in the secretary of state's office the certificates of acceptance required by the 4th section of the act of February 22d, 1851. The railroad company having made default in the payment of the interest on these bonds, and remaining in default for a number of years, the general assembly passed the act of the 19th day of February, 1866, called the "Sell-Out Law" (Laws of Adjourned Session of 1866, p. 108), by which provision was made for the foreclosure of the mortgages and for the sale of the mortgaged property. Pursuant to the provisions of the act just cited, a sale of everything that belonged to the railroad company in foreclosure of these mortgages was made, at which the state became the purchaser, and the state thereupon re-sold to McKay, Reed, Vogel, and Simmons, who afterwards sold and conveyed to Allen, the defendant's landlord. The plaintiff's counsel, in the progress of the trial, conceded that if the state's mortgages covered the property in dispute, the defendant's landlord had, by means of the proceedings shown in evidence, acquired a good title.

Mr. Clover, for plaintiff.

Dryden & Dryden, for defendant.

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

DILLON, Circuit Judge. This is an action of ejectment. The parties have stipulated that the title to the land in controversy was at one time in the Cairo & Fulton Railroad Company, and it is under the company that each party claims to derive title—the plaintiff under a deed made by the trustees of the

company, November 25th, 1859, to one Hamilton; the defendant under an alleged first mortgage lien in favor of the state of Missouri and its subsequent foreclosure, and the sale of the land by the state to the grantors of the defendant's landlord.

It was admitted on the trial by the learned counsel for the plaintiff, that if the state had a lien upon this land by virtue of the statutory mortgages in its favor, created either by the act of December 11th, 1855, or the amendatory act of March 3d, 1857, the title was subsequently acquired under a foreclosure of its lien by the state, and by it conveyed to the grantors of the landlord of the defendant. One question, if decided in favor of the defendant, as we think it must be, is decisive of the case, and that is: Did the lien or mortgage in favor of the state under the act of 1855, or 1857, embrace or extend to the lands of the company which were granted by congress to the state, and by the state to the company, to aid in the construction of its road?

The point of the controversy is just here: The plaintiff admits that the state had, by virtue of these acts, a first lien upon the road and all the lands necessary to its use and operation as a railroad, but denies that this lien extended to the lands of the company, which had been granted to it by congress to aid, by a mortgage or sale thereof, in the construction of its road. On the other hand, the defendant contends that to secure the state for the bonds issued to the company under the acts named, the state stipulated for, and the company consented to give, a first lien, not only upon the road and its appurtenances, but as well upon the other property of the company, including its lands.

By the act of December 11th, 1855, when accepted by the company as it was, there was created a first mortgage in favor of the state upon "the road and every part and section thereof, and its appurtenances." But, by the amendatory act of March 3d, 1857, the language was changed, and it was provided that "all bonds issued under the provisions of this act shall constitute a first lien or mortgage upon the road and property of the several companies so receiving them, in the same manner as provided by the act approved February 25th, 1851, to expedite the construction of the Pacific Railroad, and the Hannibal & St. Joseph Railroad, and the act approved December 10th, 1855, of which this is amendatory."

All of the state bonds to the Cairo & Fulton Railroad Company were issued after the act of 1857 was passed and its provisions had been accepted by the company; and the act was accepted by the company prior to the time when it authorized the execution of the conveyance of its lands in trust to Moore, Wilson, and Waterman. Indeed, the conveyance to these trustees in terms refers to the acts of 1853 and 1857, and recognizes the priority of the state to the extent provided for

in these acts; but in reciting that upon which the lien of the state attached, the language of the act of 1855 is followed, and the word "property," used in the act of 1857, omitted, apparently *ex industria*.

It is unnecessary to consider whether the lien provided for in the act of 1853 upon "the road and every part and section thereof, and its appurtenances," extended to the lands which had been granted by congress, because the state was equally entitled to the security provided for in the act of 1857, which was "a first lien or mortgage upon the road and property of the company."

This legislation has been construed by the supreme court of Missouri. *Whitehead v. Vineyard*, 50 Mo. 30. In the case just cited that court decided that, by the act of 1857, the state's lien extended to "all the corporate property of the companies named in the act," to lands as well as to the road proper, and even to lands subsequently acquired by the companies, as well as to those owned by them when the act was passed. We do not stop to inquire whether the nature of the case is such (the state having been a party in interest) that the construction of the state legislation by the highest tribunal of the state should not conclude us; for it will be admitted that a different judgment is not to be here pronounced, resulting in disturbing or overturning titles held good in the state tribunals, unless the opinion of the state supreme court is clearly erroneous.

Upon the best consideration we have been able to give to the subject, we concur in the opinion that by the act of 1857, however it would have been under the act of 1855, the lien of the state extended to the lands as well as to the road proper and its appurtenances.

We mention briefly the reasons that give support to this conclusion:—

1. The anxiety of the state to have full security is manifest on the face of all the enactments relating to the subject, and hence the provision for a first lien or mortgage, which was not only to be upon the road, but upon the property of the company.

2. The terms "road and property" are general and comprehensive, and as the word "property" was specially inserted in the latter enactment, it must be supposed, particularly in legislation of such great moment, that it was advisedly done either to close doubts, or to extend the lien to property which would not be embraced by the words "road and its appurtenances." The lien extends not only to the road, but in addition to the property of the company—to property which would not or might not be embraced by the language "road and appurtenances." What property was meant? What so likely as the lands of the struggling companies, which, without the aid of the state by bonds, were unable to go on with their enterprises, and what more appropriately than lands falls within the comprehensive term property?

3. If the lands of the company be excluded from the mortgage, it is difficult to give a construction to the act which will give any adequate or considerable significance to the word property.

The plaintiff's counsel argues that the act of 1857 "gave the state a mortgage upon nothing other than the road and property of the company held for the purpose of the road," and he adds: "The term property can be well satisfied without giving it the interpretation of including all the land granted the road, not for its purposes of a railroad corporation, but in aid of the construction of the road. The term property is evidently meant to include, and to include nothing more, than the road-bed, rails upon it, turn-outs, depots, erections, buildings, franchises, locomotives, passenger and freight cars, hand cars, tenders, tools, machinery, materials, etc. and all property as part and necessary part of the entire establishment, movable or immovable, essential to the production of tolls and revenue."

But would not all this, or substantially all this, unless it be the franchise of being a corporation, be covered by a mortgage upon the road of the company, or the road and its appurtenances?

Under this view the defendant's landlord has the title, and this makes it unnecessary to determine whether the plaintiff would also fail for the reason that the deed to Hamilton was never executed or delivered by the trustees so as to be operative as a conveyance of the lands described therein.

Judgment for the defendant.

NOTE. A special finding of facts was made, and the case taken to the supreme court, [where the above judgment was affirmed. 92 U. S. 320]. Further, as to legislation of the state of Missouri in aid of railways, and the rights of the grantees of the state, see *Murdock v. Woodson* [Case No. 9,942].

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WILSON (BOYD v.). See Case No. 1,751.

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Case No. 17,794.

WILSON v. BRINKMAN et al.

[2 N. B. R. 468 (Quarto, 149); 1 Chi. Leg. News, 193; 2 Am. Law T. Rep. Bankr. 65.]¹

District Court, E. D. Missouri. March Term, 1869.

BANKRUPTCY—INSOLVENT MERCHANT—UNLAWFUL PREFERENCES.

1. A merchant or trader who cannot pay his debts, in the ordinary course of his business, is insolvent.

2. A creditor who knows that his debtor cannot pay all his debts in the ordinary course of his business, has reasonable cause to believe his debtor to be insolvent, and will not be allowed to secure, by confessions of judgment and the levy of executions, any preference over other creditors, and the assignee in bankruptcy

may recover the property seized and taken upon executions under such judgments, or the value thereof.

[Cited in *Martin v. Toof*, Case No. 9,167; *Goodenow v. Milliken*, Id. 5,535; *Haskell v. Ingalls*, Id. 6,193; *Strain v. Gourdin*, Id. 13,521.]

A petition was filed by creditors against August Brinkman, of Cape Girardeau, alleging several acts of bankruptcy, by the confession of judgment to several creditors with a view of giving them a preference, and by procuring and suffering his goods to be taken in execution with a view of giving a preference. At the hearing of the rule to show cause, these charges of acts of bankruptcy were withdrawn, and the act charged that he, August Brinkman, being a merchant and trader, had fraudulently suspended payment of his commercial paper and had not resumed within fourteen days. This charge was confessed and the party adjudged a bankrupt, and the plaintiff was subsequently appointed assignee. The assignee after his appointment filed his bill in chancery against the defendants, alleging that on February 4th, 1868, the said August Brinkman, being insolvent, and in contemplation of insolvency and in contemplation of bankruptcy, he being then a resident of Cape Girardeau county, did, with a view of giving a preference to the defendants, Ernest Brinkman, Louis Stortz, and Fritz Johns, who were then creditors of said August Brinkman, and had good reason to believe him insolvent and to be acting in contemplation of bankruptcy and in contemplation of insolvency, go to Commerce, in Scott county, and there confessed judgments in favor of said Ernest for three thousand six hundred and forty dollars, of Fritz Johns for two hundred and sixty-two dollars and sixty-five cents, of said Louis Stortz for three hundred and ten dollars, and that on said several judgments executions were issued to the defendant, Herman Bader, who was then sheriff of Cape Girardeau county, and delivered to said sheriff, who on February 11, 1868, levied the said writs by seizing the stock of goods in the store of said August Brinkman in Cape Girardeau, together with the books, notes, and accounts, and also by levying the same upon certain real estate; that said sheriff sold the stock of goods for the sum of three thousand one hundred and nineteen dollars, on February, 1868, and sold said real estate for the sum of fifty dollars, and collected of said notes and accounts the sum of two hundred and seventy-seven dollars and twenty-five cents, making a total of three thousand four hundred and forty-six dollars and twenty-five cents; that said August Brinkman did thereby suffer and procure his goods and property to be seized on execution, with a view of giving a fraudulent preference to his said creditor, and with a view to prevent his property from coming to his assignee in bankruptcy and from being distributed under the provisions of the bankrupt act. The defendant Bader answered,

¹ [Reprinted from 2 N. B. R. 468 (Quarto, 149), by permission. 2 Am. Law T. Rep. Bankr. 65, contains only a partial report.]

setting out the delivery to him of the writs fieri facias, and his proceedings thereunder, showing a balance in his hands after deducting costs and commissions, and submitting himself to the judgment of the court. The defendants, Ernest Brinkman, Stortz, and Johns, answered, setting forth that the debts for which said judgments were confessed were honestly due them; denying that they had reason to believe that said August Brinkman was insolvent, or that he was acting in contemplation of insolvency or in fraud of the provisions of the act of congress [of 1867 (14 Stat. 517)], and denying that said judgments were voluntarily confessed by said August Brinkman, with a view of giving a fraudulent preference; and alleging that August Brinkman was induced to give said confessions of judgment by the earnest solicitations of the defendants, and by the operating upon his fears, and thus inducing him to go to Commerce with them and to confess said judgments, and claiming that they, by thus procuring said judgments and causing said executions to be levied, had exercised only their legal rights in the premises.

To this answer the plaintiffs filed a replication, and the case was heard upon bill, answer, replication, and proofs. Depositions were taken upon both sides. The evidence showed that the judgments were confessed by August Brinkman by his appearing in person before the Scott circuit court, and authorizing judgments to be entered upon notes given by him immediately before the date of the judgments for debts then due by him, in good faith and for a good consideration; that said August Brinkman was in fact insolvent and unable to pay his debts in the ordinary course of his business; that he was hard pressed by some of his St. Louis creditors, and that attachments had been threatened and even issued, but not levied, for fear there was not sufficient ground to sustain them. The testimony offered by the plaintiff tended to show that August Brinkman well knew his condition, as did also his judgment creditors, and that he was determined to take care of his friends; and that in going to Scott county he was not influenced by fear of any of the parties in favor of whom he confessed the judgment. The testimony offered by the defendants tended to show that in confessing the judgments, he was influenced by the pressure and urgent solicitations of the judgment creditors; that the attorney of the creditors sent for him to come down to Commerce, and induced him to confess said judgments, and that said confessions were obtained by the pressure brought to bear upon him, and were not voluntary upon his part.

Jones & Davis, for complainants, cited *Black & Secor's Case* [Case No. 1,457], and *Craft's Case* [Id. 3,316].

C. C. Whittlesey and Lewis Brown, for respondents, cited 5 Johns. Ch. 428; *Thompson v. Freeman*, 1 Term. R. 155; *Smith v. Payne*,

6 Term. R. 152; *Swope, Levy & Co. v. Arnold* [Case No. 13,702]; and *In re Kerr* [Id. 7,728].

TREAT, District Judge. Upon a review of the facts of the case, without going through all the testimony presented, it is sufficient to say that it appears that August Brinkman knew that he was insolvent, and unable to pay all his debts, and, being hard pressed by some of his creditors, he determined to take care of his friends, who procured the executions to be issued with the purpose of getting ahead of the other creditors. The evidence really presents a case of a confederation between a debtor in failing circumstances and some of his creditors, by which the debtor confessed judgments with the intention of giving a preference to some, over the other, creditors. It is claimed by the respondents that the confessions of judgment were procured by their urgent solicitations, and by a pressure brought to bear upon the debtor, and by appealing to his fears, so that the confessions were not voluntary upon his part, but extorted from him by a kind of duress. The evidence shows no such case, but presents one of a purpose formed to accomplish what the bankrupt act forbids. Under the present act there is no discrimination between cases of voluntary or involuntary preference. This matter has been well considered in the decision lately made by the United States district court in Michigan, in the case of *Foster v. Hackley* [Case No. 4,971], which discusses fully the provisions of sections thirty-six and thirty-nine of the act, and concludes that where the creditor has reasonable cause to believe that the act done was in fraud of the bankrupt act, or that there was an intention to prevent the property of the bankrupt from being equally distributed, that a fraud is worked, and the operation of the act is impeded; and that a conveyance of all his property by a debtor to one creditor, or set of creditors, is evidence of such intention; for if the transaction will, in fact, impede the operation of the statute, the parties must be supposed to know the consequence of their acts.

It is immaterial whether the confessions of judgments were voluntary or involuntary, and procured by pressure upon the debtor, and as the judgment creditors sought to procure a preference over other creditors, the assignee may proceed to recover the property which has been seized and sold by the sheriff under the executions issued upon these judgments. It is claimed that the preference thus supposed to be obtained was not a voluntary preference given by the debtor, but was obtained from the debtor by operating upon his fears, and that the presence of the prosecuting attorney, who was also the attorney of the creditors, operated to produce such fears. But the attorney tells us that when he saw the bankrupt he assured him that there was no danger; and it is apparent from the evidence that, whatever threats may have been made, they did not proceed from these judgment

creditors; and then the bankrupt proceeded to do an act which exposed him to penalties provided in the act. A trader is insolvent when he cannot pay his debts in the ordinary course of trade and business. Here was a debtor in failing circumstances, against whom attachments had been issued, who enters into a contrivance to defeat the attachments and the impending levy thereof. The whole proceeding was fraudulent and void under the provisions of the statute. A decree will be entered for the value of the property sold by the sheriff; and as no evidence is presented of such value, except the amount of the sales made by him, the decree will be for the gross amount of the sales as returned in his answer, and the judgment creditors must be left to pay the costs of their own suits. The court, upon the statement of the counsel for the parties, that the suit had been conducted by a sort of amicable arrangement, for the purpose of fairly testing the questions of law, so far modified its decree as to adjudge the sheriff to pay over to the assignee the net instead of the gross amount of sales.

Case No. 17,795.

WILSON v. THE CHANCELLOR LIVINGSTON.

[Nowhere reported; opinion not now accessible.]

Case No. 17,796.

WILSON v. CHILDS.
ANSHUTZ v. CAMPBELL.

In re WEAMER.

[8 N. B. R. 527; 10 Phila. 275; 30 Leg. Int. 321; 6 Chi. Leg. News, 27; 5 Leg. Op. 182; 21 Pittsb. Leg. J. 17.]

District Court, W. D. Pennsylvania. 1873.
BANKRUPTCY—EXECUTION CREDITORS—PRIORITY—INJUNCTION.

1. The right of an execution creditor or a landlord, upon a warrant of distress, is paramount to that of the assignee in bankruptcy, where the execution or warrant of distress was issued before the commencement of proceedings in bankruptcy. *Marshall v. Knox* [16 Wall. (83 U. S.) 551] cited and followed.

2. An injunction will be refused when there has been a failure to file a bill in equity, as there is, in such a case, nothing upon which a motion for an injunction can rest.

McCANDLESS, District Judge. As nearly the whole of this week has been occupied with the argument of these cases, there is no time to elaborate an opinion upon the points submitted. All the court can do is to state the result, and the simple principle which must govern us in these, and in all like cases in the future. The recent decision of the supreme court of the United States in the case of *Marshall v. Knox* [16 Wall. (83 U. S.) 551], must control us. It is there held, that

¹ [Reprinted from 8 N. B. R. 527, by permission.]

where an execution has issued from a state court, and a levy has been made before the commencement of the proceedings in bankruptcy, the possession of the assets cannot be obtained by the assignee. The latter, in such cases, is only entitled to such residue as may remain in the sheriff's hands, after the debt for which the execution issued has been satisfied. As by the laws of Pennsylvania the execution is a lien upon all the personal property of the defendant from the moment it reaches the sheriff's hands, the right of the execution creditors, or of a landlord, upon a warrant issued before the commencement of the proceedings in bankruptcy, is paramount to the assignee in bankruptcy, and will control the fund as against the general creditors. But inasmuch as no bills in equity have been filed in any of these cases there is nothing upon which a motion for an injunction can rest, it for this reason must be disallowed, independent of any question upon the merits. The preliminary order is dismissed.

Case No. 17,797.

WILSON et al. v. CITY BANK.

[3 Sumn. 422.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1838.

FEDERAL COURTS—JURISDICTIONAL AVERMENTS—ALIENAGE OF PARTY—CORPORATIONS—CITIZENSHIP OF CORPORATORS.

1. It is not sufficient to give jurisdiction to the courts of the United States, to allege, that a party is an alien. There must also be an allegation, that he is a subject or citizen of some one foreign state.

[Cited in *Prentiss v. Brennan*, Case No. 11, 385; *Hinckley v. Byrne*, Id. 6,510.]

2. Nor is it sufficient to give jurisdiction, where a corporation is a party, to allege, that all the corporators are citizens of the United States. There must be an allegation, that the corporators are all citizens of some one or more state or states of the United States.

[Cited in *Commercial Bank of Commerce v. Green*, Case No. 3,059.]

3. The circuit court has jurisdiction to aid in enforcing the judgment of a state court.

4. In the case of a bill against a banking corporation, to account for certain property held by them, as collateral security for debts due them from a third person, and to apply the surplus, after satisfying themselves, to the plaintiff's debt, the debtor is a necessary party to the bill.

[Cited in *Greene v. Sisson*, Case No. 5,768; *Kellum v. Emerson*, Id. 7,669; *Florence Sewing Mach. Co. v. Singer Manuf'g Co.*, Id. 4,884.]

Bill in equity. The bill alleged, that the plaintiffs (*Fletcher Wilson*, *Melville Wilson*, and *Gabriel Shaw*, bankers and co-partners, under the firm of *Thomas Wilson & Co.*) were of London, in England, and aliens to each and all of the United States; that *S. G. Williams*, June 1, 1837, being then of Boston, but now of New York, out of the jurisdiction

¹ [Reported by Charles Sumner, Esq.]

of this court, was indebted to the plaintiffs in the sum of £7,000 on a balance of account, and refusing to pay the same, the plaintiffs sued out a writ against the said Williams, in the court of common pleas for the county of Suffolk, in Massachusetts; and subsequently recovered damages against him for \$30,000 and upwards, on which execution issued, and was delivered to the sheriff, who returned nulla bona; that Williams, before execution issued, left the state, insolvent, and has not since been within its jurisdiction. That the said Williams heretofore transferred stocks, lands, goods, and choses in action to the defendants, a corporation, all the members whereof were citizens of these United States, to secure the payment of certain notes he owed to them; that such property was more than sufficient to pay claims of the defendants, and that the residue ought to be applied to the payment of the plaintiff's claim. The bill concluded with a prayer, that an account might be taken of the principal and interest due on the plaintiff's claim against Williams, and of what was due from him to the defendants, and of the property held as security therefor; and that the same be applied to the payment thereof, and the residue to payment of the plaintiffs' judgment; and that the defendants be restrained from conveying the property.

To the bill the defendants put in a demurrer, on various grounds. (1) Because the bill alleged that the plaintiffs were aliens; but did not allege that they were citizens or subjects of any foreign state. (2) Because the bill alleged that the defendants were a corporation created by a law of Massachusetts, and that all the members were citizens of the United States; but did not allege that they were citizens of Massachusetts. (3) Because the bill sought to enforce the judgment of the court of common pleas of Massachusetts, a court foreign to the United States court. (4) Because the bill sought an account between the plaintiffs and Williams, and also between the defendants and Williams; and that Williams' property should be applied to the payment of their respective claims; yet did not make him a party, and expressly alleged that he was out of the jurisdiction of the court.

F. C. Loring and P. Blair, for defendants, in support of the demurrer.

I. As to the first ground of demurrer. The words of the constitution of the United States, relative to the jurisdiction of the judiciary, are "controversies between a state or citizens thereof, and foreign states, or citizens or subjects." The judiciary act is broader in its language, giving jurisdiction generally, where an alien is a party. But this has always been restricted in construction to the provisions of the constitution. There may be aliens who are not citizens or subjects of any foreign state, recognized by the law of nations; as, for instance, persons born and residing in piratical settlements, not rec-

ognized by any state or country. *Abercrombie v. Dupuis*, 1 Cranch [5 U. S.] 243; 3 Day, 294; *Society for Propagation of Gospel v. Wheeler* [Case No. 13,156]; *Brown v. Keene*, 8 Pet. [33 U. S.] 114.

II. As to the second ground of demurrer, they cited *Picquet v. Swan* [Case No. 11,134]; *Birethpaut v. Bank of Georgia*, 1 Pet. [26 U. S.] 238; *Story, Eq. Pl.* 384; *Emery v. Greenough*, 3 Dall. [3 U. S.] 369; *Bingham v. Cabot*, 3 Dall. [3 U. S.] 382; *Strawbridge v. Curtis*, 3 Cranch [7 U. S.] 267; *Hope Ins. Co. v. Boardman*, 5 Cranch [9 U. S.] 57; *Kitchen v. Strawbridge* [Case No. 7,854]; *Butler v. Farnsworth* [Id. 2,240]; *Kirkpatrick v. White* [Id. 7,850].

III. As to the third ground of demurrer. That the several states are in some respects foreign to each other, has been held in a variety of cases; a familiar instance of which is, that a bill of exchange drawn in one state on a person in another is a foreign bill. That the United States courts are foreign to the state courts, was held by *Parsons, C. J.*, in *Bissell v. Briggs*, 9 Mass. 461. The circuit court has no jurisdiction to enjoin the judgment of a state court, nor a state court to enjoin a judgment of the circuit court. *Diggs v. Wolcott*, 4 Cranch [8 U. S.] 179; *McKim v. Voorhis*, 7 Cranch [11 U. S.] 279. These courts are foreign to each other, in the same sense in which the courts of the several states are foreign to each other. Their powers are derived from different sovereignties. Would a court of the state of New York give the relief sought in this case? Would the court of chancery in England lend its aid to enforce a judgment of a court of Scotland, or Ireland, or of a foreign power? There, no authority has been found to maintain such a position. The court of chancery will not aid the jurisdiction of an inferior court.

IV. As to the fourth ground of demurrer. That Williams can be made a party is fully established in the case of *Picquet v. Swan* [supra], and also by numerous other decisions in the United States courts. See, also, the 11th section of the judiciary act [1 Stat. 78]. That he is an essential and necessary, and not a mere formal or passive, party seems obvious. The bill seeks that accounts may be taken between him and the defendants, and also between him and the complainants, and that his property may be applied to the payment of the amounts to them respectively found to be owing. How are these accounts to be taken in his absence? How is the debt alleged to be owing to the defendants to be ascertained? It must depend entirely on the answer of the defendants, and they may state it to be what they please, and Williams has no opportunity to contradict or contest it. How is the plaintiffs' debt to be established? Their judgment may have been paid in whole or in part; or they may hold collateral security for its payment; or there may be an agreement, not unusual, that the judgment shall not be enforced within a lim-

ited time. But if this suit can be brought to a final decree without making him a party, a large amount of his property may be conclusively disposed of in the payment of fictitious claims, and be irretrievably lost to him. The general rule is, that a suit cannot proceed where a party, whose interests are sought to be affected, is out of the jurisdiction. Story, Eq. Pl. §§ 83, 84, 416, 543; *Browne v. Blunt*, 2 Russ. & M. 83; *U. S. v. Howland*, 4 Wheat. [17 U. S.] 108; *Roveroy v. Grayson*, 3 Swanst. 145; *Pierson v. Robinson*, 3 Swanst. 140; *West v. Randall* [Case No. 17,424]; *Russell v. Clark*, 7 Cranch [11 U. S.] 69; *Caldwell v. Taggart*, 4 Pet. [29 U. S.] 190.

C. P. and B. R. Curtis, for plaintiffs, spoke against the demurrer.

I. As to the first ground of demurrer. The judiciary act gives jurisdiction where an alien is a party. The bill avers, that the plaintiffs are aliens. It pursues the language of the act of congress, of course this act is interpreted as consistent with the constitution, and the word "alien" is, therefore, held to be "a foreign citizen, or subject." *Picquet v. Swan* [supra]. So, by the averment in the bill, that the plaintiffs are aliens, the language of the judiciary act, and the meaning of the constitution are both satisfied. None of the authorities cited by the defendants' counsel seem to have the least application.

II. As to the second ground of demurrer: (1) All the cases where the plaintiffs were citizens, and the defendants also, were citizens of the United States, are to be laid aside, because there the jurisdiction depended on the fact, that the parties were citizens of different states, and of course it ought to appear of what particular state they were citizens; here, the jurisdiction is claimed because an alien is a party. (2) Those cases are to be laid aside, in which an alien has sued a citizen who was abroad; for there the difficulty arose out of the absence of the defendant from the jurisdiction, so that he could not be served with process; while here, the only party to be served with process exists within this district, is created by a law of Massachusetts, has been served with process, and has appeared. In this case all the plaintiffs are aliens, all the persons defendant are citizens, and the only party which can be served with process is found in this district, has been served, and is before the court. (3) Those cases are to be laid aside, in which it is held, that the court has jurisdiction only where one party is a citizen of the state where the suit is brought, for that applies only where both parties are citizens. These views seem to dispose of the cases cited on the other side.

III. As to the third ground of demurrer. There is certainly a broad distinction between enjoining a judgment of a state court, and aiding the judgment creditor, to procure satisfaction of his judgment. It is not true,

that *Parsons, C. J.*, decided in the case in 9 Mass. 462. that the United States courts are foreign to the state courts. The whole extent of his decision is, that the judgments of the courts of other states are not domestic judgments in Massachusetts, and he expressly says, that such judgments are not to be considered as foreign judgments. Page 469. The case of *Bean v. Smith* [Case No. 1,174] is in point for the plaintiffs.

IV. As to the fourth ground of demurrer. It is admitted that *Williams* is a proper party, but not that he is so far a necessary party, that the court cannot proceed without him. As to the objection that his interests will be affected in taking an account of what is due from the defendants to him, this by no means necessarily follows. For if the defendants state an account, and pay over to the plaintiffs the balance they admit, *Williams* will not be precluded from calling on them for a new account, and not being a party to the first suit, he would be in no way affected by the proceedings therein, except just so far as the defendants had discharged themselves by paying his debt to the plaintiffs. It is true that a court of equity will not ordinarily undertake to do any equity unless they can settle the whole controversy; but we take it to be clearly settled, that the courts of the United States are, from their peculiar constitution, subject to such extreme difficulties in following out strictly the rules of the English chancery courts as to parties, that they very early found it necessary to depart from those rules, or suffer their own usefulness to be crippled and all but destroyed, and that it is now a fixed principle in this court, that the court will entertain jurisdiction, and do all the equity they can, between the parties before the court, although it is not possible thus to terminate the whole controversy. In *Child v. Brace*, 4 Paige, 309, the chancellor decided, that it was not absolutely necessary to make the co-defendants in the judgment, parties, and it seems to us that most of the reasons which apply to one defendant apply to all. In *U. S. v. Howland*, 4 Wheat. [17 U. S.] 108, the court do not seem to consider it absolutely necessary, that the debtor should be before the court, though it is undoubtedly proper, that he should be made a party if possible.

STORY, Circuit Justice, held, that the demurrer was good, as to the first, second, and fourth causes of demurrer; but not for the third.

1. The bill ought to have alleged, that the plaintiff was a subject or citizen of some one foreign state.

2. The allegation ought to have been, that the incorporators were all citizens of some one or more state or states of the United States.

3. The circuit court has jurisdiction to aid in enforcing the judgment of a state court.

4. That *Williams* was a necessary party to the bill.

WILSON v. CITY BANK OF ST. PAUL.
See Case No. 16,842.

WILSON (CLARK v.). See Cases Nos. 2,840 and 2,841.

Case No. 17,798.

WILSON v. COLMAN et al.

[1 Cranch, C. C. 408.]¹

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

PROOF OF PARTNERSHIP—PAROL EVIDENCE.

To prove a partnership, parol evidence cannot be given of the contents of printed cards, bearing their joint names, nor are the cards themselves evidence unless traced to the defendant. Nor can general reputation of partnership be given in evidence.

Indebitatus assumpsit for board, lodging, and washing, of Michael Coleman & Owens Lyons, and Richardson their apprentice. The witness spoke of printed cards which he had seen bearing their joint names.

Mr. Jones, for defendant, Lyons, objected to evidence respecting the cards, unless they were produced and traced up to the defendant.

THE COURT (DUCKETT, Circuit Judge, absent) said they must produce the cards; they could not give parol evidence of their contents.

John Hewitt, for plaintiff [Eliza Wilson] asked the witness whether the defendants were not generally reputed partners.

Mr. Jones objected, and THE COURT decided the question to be improper.

Case No. 17,799.

WILSON v. CROMWELL.

[1 Cranch, C. C. 214.]¹

Circuit Court, District of Columbia. Dec. Term, 1804.

ACCEPTANCE—FRAUDULENT POSSESSION.

If the plaintiff obtain possession of the defendant's acceptance, by a fraudulent practice, he cannot recover upon it.

Assumpsit on acceptance of an inland bill. The defendant proved that upon the assumption of J. H. Barney in writing, to pay the debt, the acceptance was given up by A. & W. Bowyer to the defendant to be cancelled. That afterwards, the plaintiff, under pretence of a wish to see the bill, to calculate the interest upon Barney's assumption, got possession of it, and then gave up to Barney his assumption, and insisted upon keeping the bill.

Mr. Baker, for plaintiff, contended that A. & W. Bowyer, to whom the bill was sent for collection, were only special agents to receive the money of Cromwell, and, in default of payment, to bring suit. That if such was the only authority of the Bowyers, and they gave it up without any other consideration than J. H. Barney's assumption, they exceeded their

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

authority, and it was improperly obtained; and therefore it was proper in the plaintiff to get possession of the bill in the manner he did. And that it would support the action; and prayed the instruction of the court to that effect. Esp. N. P. 109.

But THE COURT refused to give such instruction; and upon the prayer of Mr. Morsell, for defendant, THE COURT instructed the jury that if they should be of opinion that the Bowyers came into possession of the bill by authority of the plaintiff for the purpose of collection, and they gave it up to the defendant to be cancelled, without any fraud on the part of the defendant, and the plaintiff afterwards obtained possession of the bill by a fraudulent and deceitful practice, the plaintiff could not recover upon it. And that if they should be of opinion that the note was fairly given up by Bowyer to the defendant to be cancelled, and the plaintiff obtained possession of it by any false pretence, it would be evidence of a fraudulent obtaining of the possession.

Case No. 17,800.

WILSON v. CURTIUS et al.

[2 West. Law J. 511.]

Circuit Court, D. Louisiana. 1845.

PATENTS—PLANING, TONGUING, AND GROOVING MACHINE.

[The Woodworth patent of 1828 (extended in 1842), for a planing, tonguing, and grooving machine, held valid and infringed.]

[Cited in Wilson v. Rousseau, Case No. 17,832; Id., 4 How. (45 U. S.) 704; Smith v. Mercer, Case No. 13,078.]

This was a case commenced by a bill in equity, on the 12th day of December, 1844, to restrain the defendants [Curtius and Grabau] from infringing the patent right granted to William Woodworth in 1828, and extended for a further term of seven years in 1842. The invention is for planing, tonguing, and grooving plank and other materials, by means of the combined use of a revolving cutter wheel or cylinder in the centre, to plane and reduce the plank to a given thickness; two side cutter wheels to tongue and groove the edges of the plank; and, also, by the use of pressure rollers, to confine plank to their proper place. Upon filing the bill, a motion was made by complainant [James G. Wilson] for an injunction, which was granted by the court; but afterwards was dissolved upon a re-hearing, on the ground (among others) that the affidavit was insufficient to support it, inasmuch as it did not state with certainty the infringement by the defendants; and that complainant did not swear, at the time of filing the bill, that he believed Woodworth was the "original and true inventor;" &c.; and upon the further ground that the defendants made a declaration on oath, that the said invention was not the original invention of the said Woodworth; and denying, under oath, the novelty and utility of the same.

Upon the dissolving of the injunction the defendants filed their answer, in which they made the following defence: 1st. "That the patent granted to Wm. Woodworth was originally invalid, because all the several parts of Woodworth's machine, and the application of these parts were publicly known, long prior to the issuing of the patent right to him." They were "known in the year 1799, and were sufficiently described by Samuel Bentham in the Repository of Arts." 2d. "That as early as the year 1824, at Syracuse, in the state of New York, one Uri Emmons did invent and put in operation a cylindrical planing machine, embracing all the essential combinations and parts of Woodworth's machines." 3d. "That complainant had not such title to the exclusive right in said invention as to enable him to bring suit," &c. 4th. "That the compromise and agreement entered into between Emmons and Woodworth was in fraud of public rights, and therefore rendered both patents void." 5th. The Woodworth patent "is void and cannot be maintained because of the uncertainty and ambiguity in the description and in the claim." They further averred that "the machine of Woodworth was without utility, and therefore void, and that the specification is unintelligible and insufficient, if not contradictory." "That the extension of said patent was not authorized by law; that the extension was made by the administrator of William Woodworth; whereas the law only permits the patentee himself to apply for and obtain the same." "That the machinery of the respondents is not in principle, combination or mode of operation like Woodworth's; that their machinery was substantially different from that patented."

The case rested in this situation till the 7th day of April instant, when complainant filed an affidavit, made by himself, setting forth the infringement by the defendants, by describing what parts and combinations of defendants' machine were like the one patented; and that he really believed William Woodworth was the first and true inventor, &c. &c. Complainant also filed affidavits, made by other persons, to contradict the answer of the defendants, and moved for a revival of the injunction. The cause was set down for hearing on Friday, the 11th inst., at which time defendants filed many new points, and raised questions of law. The only one which was considered at all serious by complainant was this, "That on the 28th of November, 1829, Woodworth, the patentee, transferred and assigned all his right, title and interest in the original and extended term to Halstead, Twogood and Tyack, in and throughout a great part of the South, including Louisiana; and that under the proviso of the 18th section of the act of congress, of 4th July, 1836, these defendants were protected against any claims set up under the patentee in the original, or under the administrator in the extended term." Defendants also filed affidavits to show the substantial difference between the machine used by the defendants and the one patented by Woodworth. It is to be observed,

however, that these affidavits only stated in general terms "that the machines were substantially different," without specifying any particulars; and were held by the court as having no weight in the case.

F. Perin and C. Roselius, for complainant.
W. S. & F. Upton, for respondents.

The argument was commenced on Friday, the 11th, and continued to occupy the court until Tuesday, the 15th. And on Friday, the 18th, the court gave a verbal decision, sustaining the bill and granting the injunction as prayed for, without putting complainant to the expense and trouble of giving security. The court promised a written opinion in the case, touching fully all the points discussed.

Case No. 17,801.

WILSON et al. v. DANDRIDGE et al.

[1 Cranch, C. C. 160.]¹

Circuit Court, District of Columbia. March 26, 1804.

CHANCERY ATTACHMENT—PRACTICE.

In a chancery attachment in Virginia, the court may order the attached debt to be paid over to the plaintiff, on his giving security to refund, &c., although the plaintiff's right may be doubtful.

Attachment in chancery. Motion by Mr. Swann, to order Ricketts & Newton, the garnishees, to pay the money to the plaintiffs on security to return, &c., under the second section of the act of Virginia of December 26, 1792 (Old Rev. Code, p. 122).

Mr. Jones, for Ricketts & Newton, two of the defendants. This court has no jurisdiction to make an order that Ricketts & Newton should pay the money to the plaintiffs on their giving security, because the person (Comark) named as executor, has disclaimed the office of executor, and administration has been committed to James H. Hooe, who is made a defendant, and has answered. There is, therefore, no absent debtor. Even if Comark had acted as executor, under the will and probate in St. Domingo, yet he would have no control over the debts due to the testator in this district, according to the decision of the supreme court of the United States in the case of Fenwick v. Sears' Adm'r, 1 Cranch [5 U. S.] 259.

Mr. Swann, contra. The second section of the act is explained by the fifth section. The words of the second section, are, "any absent defendants, and others within the state indebted to such absent defendants." The decision of the supreme court in Fenwick v. Sears' Adm'r applies only to administrators, not to executors. The latter derive their authority from the will. The executor, therefore, is the real debtor, although the probate was in a foreign country.

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

Mr. Jones, in reply. The only evidence of the debt due from Ricketts & Newton, to Dandridge, is from their confession; the whole must be taken together, exactly as they have stated it. Hooe has obtained administration since filing the bill, and has been made a party at this term. It would interfere with the priority due to the bond debts, &c.

Mr. Swann. This is the business of the administrator to look to.

Motion granted.

Case No. 17,801a.

WILSON v. EADS.

[Hempst. 284.]¹

Superior Court, Territory of Arkansas. July, 1835.

SPECIAL BAIL.—STAY OF EXECUTION—LIABILITY FOR DEBT.

1. Special bail for the stay of execution before a justice of the peace, become liable to pay the debt, in case it is not paid by the principal, or made out of his property, on the issuing of execution at the expiration of the stay, and nothing can discharge the bail except payment of the judgment.

2. Bail cannot complain of what is for his benefit, or by which he is not injured.

Error to Hempstead circuit court.

[This was an action by Berry A. Wilson against Thomas Eads.]

Before JOHNSON, and YELL, JJ.

JOHNSON, J. On the 24th day of January, 1829, Wilson, the plaintiff in error, recovered a judgment against Robert B. Musick, for the sum of eighty-three dollars debt, and five dollars and sixty cents damages, and the costs of the suit, and on the same day, Eads, the defendant in error, appeared before the justice and acknowledged himself jointly bound with Musick for the stay of execution. On the 24th of July, the stay of execution having expired, Wilson caused execution to be issued against Musick and delivered it to the proper officer, who made return thereon, on the 19th day of August, 1829, in the following words: "No goods or chattels are found in my township to levy on, nor is the body of the defendant Robert B. Musick." A second execution issued on the 19th of August, on which a part of the debt was made, and returned on the 18th of September, and a third execution issued on the last-mentioned day, and was returned on the 1st of October, on which nothing was made. On the 26th of August, 1829, Wilson sued out from the justice who rendered the judgment, a scire facias against Eads as special bail, which was duly served upon him. On the 30th of September, 1829, the justice rendered judgment that execution issue in favor of Wilson against Eads and Musick jointly. To this judgment Eads sued out a writ of certiorari from the Hempstead circuit court, where the judgment of the justice

awarding a joint execution against Eads and Musick was reversed, and judgment for costs given in favor of Eads; and to this judgment this writ of error is prosecuted.

It is admitted that the judgment obtained by Wilson against Musick, is regular and free from error. The only inquiry now before the court, relates to the judgment against Eads, the defendant in error.

The counsel for the defendant in error contend that the judgment is erroneous upon two grounds: First, because the execution against Musick was not returned in twenty days from its date, and a scire facias issued forthwith against Eads. And secondly, because the plaintiff Wilson caused two other executions to be issued against Musick, and thereby released the defendant Eads. It is material to inquire into the nature and extent of the obligation entered into by the special bail for the stay of execution, upon a judgment rendered by a justice of the peace. The act of the legislature, passed the 26th day of October, 1825 (page 20), provides: "That any person who shall hereafter become special bail for any defendant against whom judgment may be rendered, so as to entitle such defendant to stay of execution, such bail shall, before the justice of the peace, acknowledge himself jointly bound with such defendant in the full amount of such judgment and costs, which judgment the justice shall enter upon his docket, and at the time limited for the stay of execution shall issue execution against the principal, and if the principal shall not satisfy the execution, and if the bail shall not show property, and constable cannot find property of the principal to satisfy said execution, then, and in either case, it shall be the duty of the constable to return said execution to the justice within twenty days of the date thereof, whose duty it shall be to issue scire facias against such bail requiring him to show cause why execution should not forthwith issue against him for the judgment and costs aforesaid; and if he fails to show sufficient cause the justice shall issue execution against both principal and bail." Ter. Dig. 364. From the provisions of this act it is manifest that the obligation into which the special bail for the stay of execution enters, is, that he will pay the judgment, provided an execution shall be issued against the principal at the time limited for the stay, and the amount of the judgment cannot be made out of the principal. There is no provision in the act that the special bail may discharge himself by the delivery of the body of the principal. He becomes jointly bound for the amount of the judgment in consideration of the time given for the principal, and if it cannot be made on execution against the principal, his liability is fixed, and from which nothing can discharge him except the payment of the judgment.

The execution against Musick was not returned within twenty days, and this is relied upon as a ground for discharging the special bail from his responsibility. The provision of

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

the statute requiring the return of the execution within twenty days was introduced solely for the benefit of the plaintiff in the execution, and the failure of the officer to return it within that time cannot possibly operate to the prejudice of the special bail.

The alias executions taken out against Mulsick might and did operate for the benefit of Eads, but could not possibly prejudice his rights. Judgment reversed.

Case No. 17,802.

WILSON v. The ENVOY.

[8 Leg. Int. 10; ¹ 1 Phil. 138.]

District Court, E. D. Pennsylvania. Jan. 8, 1851.

COLLISION—SCOW WITH VESSEL AT ANCHOR.

[A heavily laden scow allowing herself to be cast off by a steam tug, while in motion in the tideway, and with a sheer towards the shore, in a crowded harbor, stands as her own insurer against the hazards of a collision with an anchored vessel; and, if the scow is sunk by striking against the stem of such a vessel, it can be no ground of liability on the part of the latter that her anchor may have been hanging afloat, contrary to good seamanship, so as to cause increased damage to the scow.]

KANE, District Judge. There is no need of discussing the conflicting evidence of this case in order to decide it; the conceded facts are quite enough. A section-scow, made up of two rectangular boxes held together by a shifting hinge, was bringing some sixty tons of iron to one of the wharves on the Delaware in tow of a steam tug; and, according to the reprehensible practice of our tow masters, she was cast adrift in the tide-way, with a sheer towards the shore. Utterly unable to take care of herself, she was driven by the tide and wind against the ship Envoy, and sunk. Her owners claim damages, because they say the disaster would not have occurred, or would, at least, not been fatal, if the scow had not encountered the flukes of the Envoy's anchor, which was hanging from her bow below the water, as they contend, improperly.

The respondents controvert both fact and inference. They say the Envoy was about to shift her position at the wharf, and had raised her anchor for that purpose, but that it was not under water, though it might have been so without contravening either law or usage, and that, whether it was so or not, the scow could not have escaped destruction from the collision, which her management or want of management invited. Of the probability of this last inference, my experience in cases of this sort has convinced me abundantly. A heavily laden scow like this, driven by tide and wind, must go to the bottom almost as a matter of course, if she comes against the bows of a ship at anchor. But my decree will not rest on that ground. I

¹ [Reprinted from 8 Leg. Int. 10, by permission.]

hold it to be the law, that a vessel which is purposely thrown adrift in a crowded thoroughfare stands her own insurer against the hazards of collision. The principle, which requires of every vessel that she shall use her best efforts to avoid running foul of another, has its very strongest illustration in just such a case as this. Nor do I think it needful to inquire, what might not perhaps be a question of difficulty, though one to which no evidence has been addressed, whether the custom of carrying the anchor afloat as it is asserted the Envoy's was, instead of catting it, is not seaman-like and lawful. For I do not understand the admiralty rule that when both parties are to blame, they shall bear the damages jointly, as having application to all sorts of faults alike. I understand the fault, of which that rule is predicated, to be such an one as induces, or contributes to the collision. I do not suppose it to be the law, that the party aggressor can be admitted to set off against the wrong he has done to another, the injuries which were consequent on it to himself, nor even to claim a sort of hotch-pot adjustment of the two sets of grievances, because he would have suffered less if the party assailed had conformed more exactly to rules.

I therefore dismiss the libel with costs; regarding the libellants as the party causing the collision, and the mode of carrying the respondent's anchor, even if improper, as contributing only incidentally to the damage which the libellants have brought on themselves. Decree accordingly.

WILSON (FISCHER v.). See Case No. 4,812.

Case No. 17,803.

WILSON v. FISHER.

[Baldw. 133.] ¹

Circuit Court, E. D. Pennsylvania. April Term, 1830.

JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—ASSIGNEE OF JUDGMENT.

A citizen of New York obtained a judgment against a citizen of Pennsylvania in a court of the state, which the plaintiff assigned to a citizen of Pennsylvania, whose executors assigned it to the complainant, an alien. *Held*, that he could sustain a bill in equity in this court, notwithstanding the intermediate assignment to a citizen of Pennsylvania.

[Approved in *Milledollar v. Bell*, Case No. 9,549. Cited, *contra*, in *Hampton v. Truckee Canal Co.*, 19 Fed. 4.]

William Brownjohn, a citizen of New York, had obtained a judgment against Charles Hurst, a citizen of Pennsylvania, in the supreme court of this state. This judgment was assigned to William Hurst, a citizen of New York, in trust for himself and his broth-

¹ [Reported by Hon. Henry Baldwin, Circuit Justice.]

ers and sisters, citizens of Pennsylvania. Under this assignment J. H. Hurst, a citizen of Pennsylvania, became entitled to two-thirds of this judgment. After his death his executors, also citizens of Pennsylvania, assigned the interest of J. H. Hurst to the complainants, who are aliens. Myers Fisher, also a citizen of Pennsylvania, claimed a part of this judgment, by an assignment from J. H. Hurst, and received some part of the money arising therefrom. His executors, the defendants, are also citizens of Pennsylvania. The prayer of the bill is for an account of moneys received under the judgment of Brownjohn. The only question raised on the pleadings was, whether the complainants could sue in this court.

Mr. Price, for defendants, contended, that inasmuch as both parties claimed under J. H. Hurst, a citizen of Pennsylvania, and the defendants were citizens of the same state, the case came within the proviso to the eleventh section of the judiciary act, which prohibits suits in this court by assignees, in cases where the party originally entitled to a note or chose in action could not sustain a suit. 1 Story's Laws, 57 [1 Stat. 78]; *Sere v. Pilot*, 6 Cranch [10 U. S.] 334. The complainant represents J. H. Hurst, not Mr. Brownjohn, the plaintiff in the judgment; he had parted with all his interest in the judgment, and so far as citizens of Pennsylvania become entitled to the proceeds, the privilege of suing in this court was extinguished for ever, by being suspended for a time. The judgment is a chose in action, within the meaning of the law, and comes within the proviso.

Mr. Rawle, Sen., for complainant, without inquiring whether a judgment was a chose in action, contended, that it was sufficient to give jurisdiction that the judgment was originally due to a citizen of New York, who was competent to sue in this court, by an action of debt to enforce its payment, or by a bill in equity in a case growing out of it. It is immaterial through whose hands it may have passed by assignment; if the right to the debt is transferred to an alien, or a citizen of another state, he may sue here, not as representing his immediate assignor, but the plaintiff in the judgment. The cases of *Turner v. Bank of North America*, 4 Dall. [4 U. S.] 8, and *Mantelet v. Murray*, 4 Cranch [8 U. S.] 46, could not be sustained, because it did not appear on the record that the original payees of the notes were aliens or citizens of a different state from that in which the defendant resided. But that objection does not apply here, as the bill avers Brownjohn to have been a citizen of New York at the rendition of the judgment. The act of congress refers to the capacity of the party to whom the debt was originally due, to sue in the federal courts, his right passes to the last assignee, who, if he is an alien or a citizen of another state, has the same right to sue here, as if he was the plaintiff in the

judgment. If the assignment is colourable merely, to give jurisdiction to the court, the court will not sustain the suit. But if made bona fide, and any interest passes to the assignees, and the assignment is real and not fictitious, the court will take cognizance of the case. *M'Arthur v. Smalley*, 1 Pet. [28 U. S.] 623, 625. Full effect is given to the proviso in the act of congress if the assignee is in the same situation as the party originally entitled to the debt; it would be straining the law beyond its obvious meaning, to put him in a worse. Here the complainant being an alien, the defendants citizens of Pennsylvania, he comes within the enabling part of the law; and as a suit might have been prosecuted in this court, if no assignment of the judgment had been made, he does not come even within the letter of the proviso. As the judgment merged the cause of action on which it was obtained, the court will require no averment of its nature, or to whom the debt was originally payable.

HOPKINSON, District Judge. The bill, in this case, is filed by John Wilson and Israel Wilson, aliens, against Redwood Fisher and others, executors of Miers Fisher deceased, and sets forth: "That on the 2d of July, 1787, Mary Brownjohn, Gabriel W. Ludlow and others, executors of William Brownjohn deceased, all citizens of the state of New York, obtained a judgment in the supreme court of Pennsylvania, against Charles Hurst, a citizen of the state of Pennsylvania, for the sum of 6175 pounds 12 shillings and 11 pence, money of Pennsylvania; part of which has been levied and received by the plaintiffs out of the real estate of said Charles, and part thereof, to wit, 1715 dollars 83 cents hath been received by the defendants in this suit. That when this money was received by the defendants, the complainants were ignorant of the rights of Jonathan H. Hurst to a proportion of the said judgment. That on or about the 12th of May, 1796, the said judgment, by a decree of the chancellor of New York, was assigned by the said Gabriel W. Ludlow, the survivor of the said executors of William Brownjohn to William Hurst, then of the city of New York, in trust for himself, and for the said Jonathan H. Hurst, and others, his brothers and sisters, each being entitled to one-sixth part. Jonathan afterwards became entitled to two third parts of the said judgment, and died, leaving a will by which he appointed Edward Hurst and Alfred Hurst his executors; who, on the 24th of April, 1829, in consideration of 1500 dollars, assigned to the complainants the said two-thirds of the said judgment." To this bill the defendants have pleaded to the jurisdiction of this court, alleging that Jonathan H. Hurst was, at the time of his death, a citizen of Pennsylvania; that his said executors, at the time of the assignment made by them to the complainants, and at the time of the filing of this bill, and the institution

of this suit, were citizens of Pennsylvania. To this plea, the complainants have demurred, and for cause show, that the judgment set forth in their bill, two-thirds of which were assigned to them as set forth in their bill, was obtained by the parties, plaintiffs therein, as executors of William Brownjohn deceased, all citizens of the state of New York, against Charles Hurst, a citizen of Pennsylvania. The complainants in this bill are all aliens; the defendants are citizens of the state of Pennsylvania; and the record therefore presents parties who have an undoubted right to sue in this court, under the provisions of the eleventh section of the judiciary act of 1789 [1 Stat. 78], describing the persons who may sue in the federal courts. But the question arises under a clause in the latter part of that section, by which it is declared as follows: "Nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made."

We do not find it necessary to decide in this case whether a judgment is such a chose in action as to fall within this prohibition or restriction of our jurisdiction. The question now to be disposed of may be determined on other grounds. On the one part it is insisted, that as the present defendants are citizens of Pennsylvania, and both J. H. Hurst and his executors, by virtue of whose assignment the complainants have derived the right now prosecuted, were also citizens of Pennsylvania, who therefore could not have prosecuted this suit against these defendants in this court, it is a case directly within the provision of the act of congress. On the part of the complainants it is answered, that although their right is derived immediately from J. H. Hurst, yet that he derived that right by an assignment from the executors, who were citizens of the state of New York, and had a clear right to prosecute their suit in this court; and the question is thus presented, whether the assignment mentioned in the act of congress has reference to that under which the plaintiff claims directly, or to that by which the right was divested out of the party originally entitled to it. The suit cannot be maintained here unless it might have been prosecuted here, if no assignment had been made; that is, as we understand it, if it had remained with the original parties to the transaction, contract or cause of action. The law does not declare that no assignee shall prosecute his suit in this court unless his assignor might have done so; but, unless a recovery of the right claimed might have been had in

this court if no assignment of it had been made; and of course in every case in which a recovery might have been prosecuted in the courts of the United States if no assignment had been made, it may be so prosecuted after such assignment to a party competent to sue here.

The question now under consideration has received, as far as we can find, no direct adjudication; but the clause of the act of congress under which it arises has several times come under the notice of the courts. In the case of *Sere v. Pilot*, 6 Cranch [10 U. S.] 322, the question turned on a distinction set up between an assignment made by operation of law, and one by the act of the party, the plaintiff claiming by virtue of a general assignment of the effects of an insolvent. The chief justice states the objection to be, "that the suit was brought by the assignees of a chose in action, in a case where it could not have been prosecuted if no assignment had been made." The terms in which the objection is taken and stated, show a disposition to keep to the words of the law, and to oust the jurisdiction only in cases falling clearly, if not literally, within them. In *Mantelet v. Murray*, 4 Cranch [8 U. S.] 46, we come still nearer to the construction we have adopted. It is there said: "If it did not appear upon the record that the character of the original parties would support the prosecution, the objection is fatal." The court here seem to refer the question of jurisdiction to the character of the original parties to the contract, or chose in action, for the recovery of which the suit is prosecuted, without regarding any subsequent or intermediate holder, provided that the plaintiff himself is qualified to sue. The provisions of the act of congress are met if we have good parties on the record; and the right claimed to be recovered might have been prosecuted here if no assignment of it had been made. The parties to the contract, or chose in action, and the parties to the suit, are looked to by the act of congress; and we may suggest many doubts and difficulties that would arise if the character of the various persons through whose hands the chose in action might have passed are to be inquired into. So far as we may speculate upon the intention and policy of the legislature in making this enactment, they will be fully answered by this construction.

We are of opinion that the jurisdiction of this court is well maintained in this case; and that judgment on the demurrer be entered for the complainant.

Case No. 17,804.

WILSON v. GRAHAM.

[4 Wash. C. C. 53.]¹

Circuit Court, E. D. Pennsylvania. April Term, 1821.

PRIZE JURISDICTION—EFFECT OF CONDEMNATION—PARTIES NOT SERVED—PLEADING—PRAYERS FOR RELIEF.

1. Libel to carry into execution a sentence of the circuit court of Rhode Island against Graham, a resident citizen of Pennsylvania, for the value of a box of merchandise, condemned by that court, and which was charged to have come into his hands after condemnation. Plea, that the defendant had not been served with process in the district of Rhode Island, and was not a party to the proceedings in that court.

2. The circuit court of Rhode Island had no jurisdiction against Graham in personam, as he was a citizen of Pennsylvania, and was not served with process in that state.

[Cited in *Clarke v. New Jersey Steam Nav. Co.*, Case No. 2,859; *Tenney v. Townsend*, Id. 13,832; *Otis v. The Rio Grande*, Id. 10,613.]

3. The decree of that court is conclusive against the merchandise, and upon a proper application to this court, the court would not hesitate to give it effect against the appellee, in respect to the merchandise; if it should appear that he had, or has, possession of them or their proceeds. As to the thing, Graham, and all others claiming it on the ground of property or possession, were parties to that suit, and were represented by it in that court, although they were not served with process, or had not heard of the proceedings.

[Cited in *Hunter v. Marlboro*, Case No. 6,908.]

4. Where a specific relief is asked for, even though there be a prayer for general relief, the circuit court cannot grant a relief which is inconsistent with, or entirely different from, that which is prayed.

5. The respondent is, however, not bound to put his defence upon the answer, and reserve it for a final hearing; but may, if it be a fit subject for a plea, put it into that shape, in order to save the expense of going into a general examination.

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

This was an appeal from a pro forma decree of the district court. The appellant filed a libel in that court, in behalf of himself, the owners, officers and crew of the private armed brig *Yankee*, setting forth that certain prize proceedings were duly instituted and prosecuted in the district and circuit courts of Rhode Island by Oliver Wilson, commander of the *Yankee*, against the ship *Francis*, her tackle, &c. goods, wares, and merchandise on board, wherein it was so proceeded, that, at the June term, 1819, of the circuit court of the United States for the said district, it was decreed as follows, viz.: "That it appearing by the record and proceedings in this cause, that the said Oliver Wilson by his complaint, duly verified by proof, hath shown that a certain

box of merchandise, consisting of silks, marked, &c. captured in the ship *Francis*, and condemned, as lawful prize to the captors, in the case of the libel of said Wilson, at the June term, 1813, was delivered to one James Stewart by the inspector of the district of Bristol, by mistake, and by the said Stewart received and carried away; and further (here reciting the monition and attachment against Stewart, and his being in contempt), that afterwards it was shown to the court at the November term, 1816, that the said box of merchandise, or the proceeds thereof, were in the possession of Peter Graham, of Philadelphia, &c." the decree then proceeds to recite a monition to Graham, his being in contempt, and a decree against him at the November term, 1818, that he pay into the registry of the court, for the use of the complainant, the amount of the value of said box of merchandise, upon due proof being made of such value and possession by said Graham. And at a subsequent term it was decreed (the said Graham still being in contempt) that he pay into the registry of the court the sum of \$2,000, the value of said box of merchandise, and in default thereof, that execution issue against him. The execution is then set out at large, with the return that it was wholly unsatisfied; the said Graham, nor any goods and chattels to him belonging, being to be found within the said district. The libel then proceeds to pray the advice and assistance of the court for enforcing and effectuating the said decree against the said Graham.

To this libel Graham put in a plea, stating that he never was duly monished and cited to appear before the said court at Rhode Island; to answer or defend in the suit wherein the said decree was rendered, or to bring in the box of merchandise in the said decree mentioned; and that the said court of Rhode Island had no jurisdiction to hold any plea, civil or maritime, against him personally, touching the matter in the said libel and decree mentioned; because, he saith, that he, the said Peter Graham, was a resident and inhabitant of Pennsylvania, and personally abiding therein at the time of issuing the monition in the said libel mentioned, and so continued to reside till after the return thereof; and that he was not an inhabitant of the said district of Rhode Island, and was not found therein at the time of serving the same, and was not monished therein, and did never appear, or authorize any one in his behalf to appear thereto: wherefore, &c. To this plea the libellant put in a general demurrer.

The record of the district and circuit courts of Rhode Island set forth the proceedings against the *Francis* and her cargo, and the sentence of condemnation of parts of the latter, amongst which was the box of merchandise in question, and that the same was by mistake delivered to Stewart instead of box No. 105, which the decree had ordered to be restored to him, and which was afterwards delivered to him. It further states that the

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

proceedings against Graham were instituted and carried on at the suggestion and instance of the proctors of Stewart and of Wilson.

C. J. Ingersoll and J. R. Ingersoll, for appellant, contended: (1) That this court was bound to carry into effect the sentences and decrees not only of other federal courts of the United States, but of the admiralty courts of foreign countries. 2 Browne, Civ. & Adm. Law, 120; 1 Vent. 32; 1 Com. Dig. 274; [Harris v. Johnston] 3 Cranch [7 U. S.] 315; Abb. Shipp. (Story's Ed.) 16; [U. S. v. Crosby] 7 Cranch [11 U. S.] 116; [Fairfax v. Hunter] Id. 632; 2 Sir Leo. Jenkins, 714, 754; [Gelston v. Hoyt] 3 Wheat. [16 U. S.] 322, note. (2) That the Rhode Island court had jurisdiction over the box of merchandise in question, and consequently over all persons claiming any interest in the same, and as an incident had jurisdiction also over any person to whose hands the possession of the said merchandise or its proceeds might come. 2 Brown, 113, 332; [Rose v. Himely] 4 Cranch [8 U. S.] 241; [Hudson v. Bigelow] Id. 293; 2 Term R. 649; 7 Ves. 593; 1 Salk. 32; 3 Term R. 267. (3) That this jurisdiction was duly exercised. No motion to Graham, personally, was necessary. But, in point of fact, one did issue, and was returned executed by the marshal of this district. (4) That the decree now sought to be enforced was final and conclusive, and cannot now be questioned. [Phelps v. Holker] 1 Dall. [1 U. S.] 261; Kirby, 119; 1 Caines, 460; 5 Johns. 37; 9 Mass. 462; 13 Johns. 206; 15 Johns. 121; [Mills v. Duryll] 7 Cranch [11 U. S.] 484; [The Francis] 8 Cranch [12 U. S.] 348; 1 Com. Dig. 275; Skin. 93; Doug. 592; 3 C. Rob. Adm. 58; 4 C. Rob. Adm. 293, 294; 3 C. Rob. Adm. 299, Append. The process against Graham was not original, but was founded on the decree against the property. The counsel also cited [Jennings v. Carson] 4 Cranch [8 U. S.] 2; 2 Wheat. [15 U. S.] Append. 2-4; Hall, Prac. 81; Mariot, Formula, 187; 2 Law J. 133; [The Adeline] 9 Cranch [13 U. S.] 284, 291; [The Edward] 1 Wheat. [14 U. S.] 264; The Ariadne [Case No. 526]; [Penhallon v. Doane] 3 Dall. [3 U. S.] 54.

It was insisted upon by Chauncey and Binney, for the respondent, that the Rhode Island court had not jurisdiction over a person who resided out of that district, and was not served with its process within the same; and they relied upon the eleventh section of the judicial law, and upon the principles laid down by the court in the case of *Ex parte Graham* [Case No. 5,637], decided in October, 1818. They admitted the conclusiveness of the sentence condemning the box of merchandise in question, and that it would be considered in any suit against the same. But the decree now sought to be enforced is in personam against a person residing in another district, and not served with process within the district. They cited 4 C. Rob. Adm. 44; 3 C. Rob. Adm. 53; 2 Browne, Civ. & Adm.

Law, 332, 434; [Pawlet v. Clark] 9 Cranch [13 U. S.] 291; [Jennings v. Carson] 4 Cranch [8 U. S.] 18; 4 C. Rob. Adm. 41, note 45.

WASHINGTON, Circuit Justice, after stating the case as above, proceeded to deliver the opinion of the court.

This case turns exclusively upon the question, whether the circuit court for the district of Rhode Island had jurisdiction in the case, wherein the decree which this libel seeks to enforce was made? If it had, then it is clearly conclusive upon this court, and it must be carried into effect against Graham. If there was a defect of jurisdiction in that case, it is admitted by the appellant's counsel, that the decree ought not to be enforced by this court. In the case *Ex parte Graham* [Case No. 5,658], which terminated in the discharge of the appellee from arrest, under the process of attachment issued by the circuit court of Rhode Island in this very case, the following points were resolved: (1) That the federal, circuit and district courts of one state, have no authority to issue process into any other state to compel an appearance in those courts, whether in a matter at common law, in equity, or of prize or no prize. (2) That the jurisdiction of those courts, though sitting in prize causes, is limited in point of locality by the bounds of their respective districts, except in a few cases particularly provided for by law. (3) That it is essential to the jurisdiction of those courts, that the person, or thing, against which the proceedings are directed, should be within their local jurisdiction; except in the latter case, when the thing is considered as being constructively within their jurisdiction; as where it is in possession of the captors, though in a neutral country. (4) That if a prize proceeding be instituted against the person, the jurisdiction is excluded, unless it be in a court of the district whereof the person is an inhabitant, or in which he is found at the time of serving the process.

If these principles be correct, (and after an attentive reconsideration of them, we think they are,) it follows, that the circuit court of Rhode Island had no original jurisdiction over the person of Peter Graham, because, the process of that court could not legally issue into this district, and be here served upon him; nor was it served upon him in that district: he was not bound to appear and to make himself a party to the suit. Can he then be personally bound by a sentence, given in a suit in which he was not a party, nor was heard, or could be heard in his defence? Such a doctrine, cannot, we think, be maintained. It is repugnant to the immutable dictates of justice, as well as to the express provisions of the eleventh section of the judicial act, which provides "that no civil suit shall be brought before either of the said courts, against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabit-

ant, or in which he shall be found at the time of serving the writ." For, if the court can exercise jurisdiction in a case, and over a person who has not, and could not be legally served with its process, the above provision was quite nugatory, and afforded no protection to those for whom it was designed. We have no doubt but that the learned judge who passed that decree; presuming that, in respect to the process, all had been rightfully done (for Graham had no person to represent him in court, and to place that matter in its true light;) had no reason to question his jurisdiction.

I admit that that court had unquestionable jurisdiction over the box of merchandise alleged to be in the possession of Graham, and as to that or its proceeds, the sentence of that court is conclusive; not only as to its correctness, but as to every thing which it professes to decide. And this court would not hesitate to execute that decree against the appellee, were a proper application made for that purpose; and if it appeared in proof, that he had, or has the thing, or its proceeds in his possession. As to the thing, Graham, and all other persons claiming an interest in it, either on the ground of property or of possession, were parties to that suit, and were represented in court by the thing which was the subject of the court's jurisdiction; although they were never served with process, nor had even heard of the suit. It is upon this ground that the res, or its proceeds, may be followed by the decree of this court into the hands of any person who may have the same in his possession, and who is personally within its jurisdiction. But whether the appellee has, or ever had in his possession, the merchandise mentioned in the decree, or its proceeds; is a fact which this court cannot consider as established by the decree of the circuit court of Rhode Island, inasmuch as the appellee was no party to that suit.

It is contended that the decree against Graham was not founded on original process, but was merely an incident to the original suit, in which the box of merchandise was condemned to the captors. This is not quite correct, since the sentence against Graham was not for the thing condemned, or its proceeds, but for a gross sum. But were it otherwise, still the suit against Graham was an original one, in which the question to be decided was, not whether the goods were legally condemned to the captors, but whether they had come to the hands of the person against whom the suit was prosecuted? And this is the very question which, for the reasons before mentioned, that court was incompetent to decide. At every turn that this case is presented to our view, it is met by the objection, that the circuit court of Rhode Island had not cognizance of the matter upon which its sentence was founded.

Again, it is said, that as the libel in this case, setting forth the sentence of condemnation, as well as the decree in personam

against Graham, and the plea, by avoiding the charge of possession, and merely alleging matter in bar of the relief prayed, admits the fact that the appellee was so possessed; there can be no solid reason why the court should not now execute that decree.

The conclusion of the counsel is clearly drawn from mistaken premises. The libel sets forth no part of the proceedings of the Rhode Island court, but the complaint of Wilson, supported by proof, that the box of merchandise imported in the Francis, and condemned as lawful prize to the captors, was delivered by mistake to Stewart—the proceedings against him—the suggestion, and proof that the said merchandise, or the proceeds thereof, came to the hands of Graham, and the process against him, followed up by the decree to pay \$2,000 into the registry of that court, and the execution founded thereon returned unsatisfied. The prayer of the libel is, that the said decree against P. Graham, may be carried into execution by a decree of this court. It is manifest therefore that although the sentence of condemnation is mentioned, it is merely by way of recital in the complaint of Wilson against Stewart—that the only decrees set forth in this libel are those against Stewart and Graham; and that the latter is the only one which the libel prays the aid of this court to execute. Now it is perfectly clear, that, according to the practice of the court, where a specific relief is asked for, even although there be a prayer for general relief (which there is not in this case), the court cannot grant a relief which is inconsistent with, or entirely different from that which is asked for. Much less can the court, in a case where the libel seeks execution of a decree which is specially set forth, execute a different decree, which is not even stated in the libel as an existing and final decree. If the practice were otherwise, it would be not only unnecessary to state the relief which is desired, but it would be mischievous to do so, as it could only serve to deceive the other side. Neither is it correct to say that the plea, by not denying possession of the merchandise, admits it. In the first place, that fact is not charged in the libel, nor is it proved by the decree, for the reasons before mentioned. And even if it were charged, still it must have been upon the conclusive effect of the decree, from which the respondent could in no other way have extricated himself, but by showing that the court which pronounced it had not jurisdiction in the case.

I will not say that the respondent in the district court might not have stated all the matter of the plea in an answer, and also have denied the fact of possession. But then the latter part of his defence would have been merely gratuitous, and not being responsive to the libel in that respect, it could not have availed him. It is, after all, to be remarked, that the respondent is never bound to reserve to the final hearing, any matter which

amounts to a bar of the relief prayed; but may, by a plea, demand the judgment of the court upon such matter, so as to save the expense of a general examination.

The decree of the district court must be affirmed, with costs.

Case No. 17,805.

WILSON v. The GRAND TURK.

[Cited in *Strodes v. The Collier*, Case No. 13,272. Nowhere reported; opinion not now accessible.]

Case No. 17,806.

WILSON et al. v. GRISWOLD.

[9 Blatchf. 267; 1 15 Int. Rev. Rec. 27.]

Circuit Court, S. D. New York. Dec. 30, 1871.

CHARTER PARTY — IMPLIED WARRANTY OF SEAWORTHINESS.

W., by a charter party under seal, hired from G. a vessel, for a specified term, to be run, as a freight and passenger vessel, between New York and San Domingo, for so much per month, W. to supply, man and navigate the vessel, and G., in case of damage to her by the perils of the seas, to repair her, and no claim for charter money to be made during the time she should be unfitted for use on such route by such damage. The charter party contained no covenant that, at the time of the charter, the vessel was seaworthy. W. sued G., in covenant, averring such a covenant, and alleging a breach of it, in that the vessel was not seaworthy, so that the voyages stated in the charter party could not be commenced. G. demurred to the declaration: *He'd*, that there was an implied covenant by G. that the vessel was seaworthy, or fit for the service for which she was hired, and that W. could aver such a warranty and declare on it, in covenant.

[Cited in *Hubert v. Recknagel*, 13 Fed. 913; *The Edwin T. Morrison*, 27 Fed. 141; *The Director*, 34 Fed. 64.]

[This was an action of covenant by Allston Wilson and others against John N. A. Griswold.]

William R. Darling, for plaintiffs.
Charles M. Da Costa, for defendant.

WOODRUFF, Circuit Judge. The plaintiffs declare upon a charter party, under seal, whereby the defendant charters to the plaintiffs, and the plaintiffs hire, the defendant's vessel, the steamer *Norwich*, for the term of four months from the date thereof, with the privilege to the plaintiffs of continuing the charter for an additional four months, the vessel to be run by the plaintiffs as a freight and passenger vessel, between the city of New York and a port or ports in San Domingo, at a fixed compensation of \$1,500 per month, payable, \$750 at the beginning, and \$750 at the end, of each month, the plaintiffs to coal, victual, officer, man and navigate the vessel, with covenants by the plaintiffs against negligence or mismanagement in the care, conduct and navigation of the ves-

sel, and a covenant by the defendant, that, in case of damage by fire, collision, the breaking of machinery, or injury to the steamer, or other unavoidable accident, caused solely by perils of the seas, he will repair the same without delay, "so that the said steamer may resume service under this charter, and, if the said steamer shall become unfitted by such damage for use upon the said route, no claim for charter-money shall be made for the time she shall be so unfitted for business." There are many other provisions in the instrument, but there is no express covenant or stipulation, that, at the time of the charter, the said vessel is tight, staunch, and strong, well fitted and furnished, seaworthy, and fit for the uses and purposes in the charter party stated. The pleader has, nevertheless, averred such a warranty and covenant, and alleges a breach thereof, in that she was not tight, staunch, strong, well fitted and furnished, and was not seaworthy or fit for the uses and purposes in the charter stated, but was leaky, rotten, and utterly unseaworthy, and unfit, from inherent weakness and defects, for the purposes and voyages in the charter party stated, or to go to sea at all with cargo or passengers, by reason whereof, the voyage was never commenced, but the vessel was returned to the defendant. Various items and amounts of damage are averred and claimed by the plaintiffs.

The defendant, having obtained oyer of the instrument, demurs to the declaration; and thereupon two questions have been discussed by the counsel for the respective parties: (1) Whether, in this case, there was an implied covenant or warranty by the defendant, that the vessel was seaworthy, or was fit for the service for which she was hired, and which voyage, as one of the terms of the contract, he agreed to perform; (2) whether it was competent for the plaintiffs, in declaring, to aver such a warranty, if implied, or whether they should have proceeded in assumpsit, for the breach thereof.

(1) The general rule, that, in a contract of affreightment, there is an implied covenant or undertaking by the owner of the ship, that the ship is seaworthy, is not questioned. But, it is claimed that this is only incidental to his obligation, as a common carrier, to carry the goods safely, and that, therefore, when the owner lets his ship to hire without any undertaking either to carry goods, or to assume any duties, either in the navigation or supply of the ship, or in the conduct of the business in which she is to engage, the hirer acts at his peril, and the principle applies to him, as to a purchaser, "caveat emptor."

Looking to the terms of this charter, the purposes for which the ship was hired, the service prescribed to the hirers by the very terms of the instrument, and the obligation of the owner to repair, if, by perils of the sea, &c., she became unfit, every reason to infer a covenant of seaworthiness and fitness for the purpose, which can exist in any case of char-

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

ter, exists in this case; and, that such was the actual intent and meaning of the parties, inferrible from the contract, seems to me to admit of no doubt.

The text writers, in declaring, as all, without exception, to which I have referred, do, that the chartering of a vessel for the transportation of goods implies an undertaking that she is seaworthy, point out no distinction between a charter wherein the owner mans, victuals and navigates the ship, and a charter wherein the charterer assumes to do this. Nor is there any sound reason for such a distinction. In case of an ordinary bailment for hire, there is an implied undertaking or warranty that the subject of the letting and hiring is without faults or defects which prevent the due enjoyment or use of the thing. Story, Bailm. § 390; Edw. Bailm. 311; Sutton v. Temple (opinion of Lord Abinger) 12 Mees. & W. 52, 60. And so of a letting of a furnished house (Smith v. Marrable, 11 Mees. & W. 5); and selling a horse (Harrington v. Snyder, 3 Barb. 380). With especial reference to the chartering of a vessel, see, also, Add. Cont. p. 413; Abb. Shipp. 421, 422; 1 Pars. Shipp. & Adm. 284, 285; 3 Kent, Comm. 204, 205; Lyon v. Mells, 5 East, 428.

(2) As to the form of action, it is wholly immaterial whether the covenant be implied or express. If, from the specialty executed by the parties, the law implies such a covenant, it is, as respects the form of action therein, as if it were incorporated therein in terms. In a legal sense, the law does incorporate the covenant therein. Assumpsit would not lie, for the reason, that, whatever the parties stipulated, was by their sealed instrument. See cases cited below. And, although it was competent for the pleader to have set out the instrument in totidem verbis, and alleged thereupon the want of seaworthiness as a breach, I see no reason why he might not in this, as in ordinary cases, declare upon it according to its legal effect. Randall v. Lynch, 12 East, 179; Lent v. Padelford, 10 Mass. 230; Grannis v. Clark, 8 Cow. 36; Barney v. Keith, 4 Wend. 502.

The plaintiffs must have judgment on the demurrer, but leave is given to the defendant to withdraw the demurrer and plead, upon the usual terms.

Case No. 17,807.

WILSON v. HARBAUGH.

[1 Cranch, C. C. 315.]¹

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

DEATH OF PARTY—SUBSTITUTION OF ADMINISTRATOR.

In case of the death of a plaintiff, the filing of letters of administration by his administrator is such a proceeding in the case before the tenth day of the second court, as will justify the court in retaining cognizance of the cause, under Act 1785, c. 80, § 1.

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

The plaintiff's death was suggested, July, 1805.

Mr. Morsell, for defendant, then objected that the appearance of the executor was not entered within the first ten days of this term, and relied on the acts of assembly of 1785, c. 80, § 1, and of 1787, c. 9, § 7. The act of 1785, says, if there be no appearance or other proceeding before the tenth day of the second court, &c., the action shall be struck off.

Mr. Van Horne. The plaintiff's letters of administration were filed on the 7th day of this term. This is a "proceeding." The words of the act of 1787, "where new parties are to be made," gives a further time. The act of 1785, meant to give a year.

Mr. Morsell, in reply. The word "proceeding," in the act of 1785, applies only to the case of the death of the defendant. The words "to be made" in the act of 1787, are only applicable to cases happening after the passage of that act.

THE COURT was of opinion that the filing of the letters of administration was such a proceeding in the case before the tenth day of the second court, as justified the court in retaining cognizance of the cause.

WILSON (HARMANSON v.). See Case No. 6,074.

WILSON (HEYER v.). See Case No. 6,446.

WILSON (HITCHEN v.). See Case No. 6,541.

Case No. 17,808.

WILSON v. HURST.

[Pet. C. C. 140.]¹

Circuit Court, D. Pennsylvania. April Term, 1815.

EXECUTION—MOTION TO QUASH—REVIVOR OF JUDGMENT.

1. A fieri facias issued in 1806, under which there was a levy and condemnation of the real estate of the defendant, and afterwards a venditioni was taken out. The levy, inquisition and venditioni were quashed. Afterwards the defendant died. In 1813, a fieri facias was issued, and a levy made on sundry lots in the hands of persons, purchasers thereof since the judgment. This execution was quashed on the ground that the judgment ought to have been revived, against the defendant's executors, in order to make it the foundation of this process; although it might have been different, had an alias fieri facias been taken out, and continuances entered.

[Cited in Thompson v. Phillips, Case No. 13,974.]

2. The court will not willingly listen to a motion to set aside an execution, on the ground that other property, in the hands of purchasers from the defendant after the judgment, and liable to contribute, might have been levied on.

3. Quere, if notice ought not to have been given to the plaintiff, that there was such property, in order to furnish him with an opportunity to levy upon it.

In the year one thousand seven hundred and ninety-one, judgment in this action was confessed. In one thousand eight hundred and five, a scire facias was sued out and judg-

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

ment confessed in April, 1806. In October, 1806, a fieri facias was issued and levied on two lots; which upon an inquisition returned, were condemned. On the motion of the plaintiff, in 1813, this levy, inquisition, and the venditioni exponas issued on it, were quashed. In October, 1813, a new fieri facias was issued, without a scire facias. Hurst died in 1804. The fieri facias was levied on sundry lots, in the hands of purchasers under Hurst, since the judgment was rendered. An inquisition was taken, and they were condemned, and a venditioni exponas was issued. Levy obtained a rule to quash the execution, and all the proceedings founded on it. First, because the fieri facias issued without a scire facias to revive it, against the executors of Hurst; and secondly, because the execution should have been levied upon other lands, in the hands of other purchasers under Hurst; that all might contribute. 1 Ld. Raym. 244; 2 Inst. 471; 3 Croke, 14; [Graff v. Smith] 1 Dall. [1 U. S.] 485.

WASHINGTON, Circuit Justice. Had this execution been an alias, and the first execution, issued in 1806, been continued down, or the court could direct the continuances to be entered; the case would be different from what it is. But it is a new or original fieri facias, and having issued since the death of Hurst, the judgment ought to have been revived against his executors, by scire facias. As to the other point, it need not be decided. But the court will not willingly listen to a motion to quash an inquisition or venditioni exponas, on the ground, that there are some other purchasers unknown to the plaintiff, whose lands might have been levied on. At this rate, a plaintiff may be kept for many years, in pursuit of his rights; by new parties being suggested, as subject to contribution. It would seem reasonable, that those who move to quash on this ground, should have notified the plaintiff, that there were such other persons and such other lands, liable to contribution; in order that the plaintiff might have had an opportunity of including them in his levy. However, the court do not mean now to lay down any definite rule on the subject.

Rule made absolute to quash the execution, for the first cause.

[See Case No. 17,809.]

Case No. 17,809.

WILSON v. HURST.

[Pet. C. C. 441.]¹

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

WRITS — CONCLUSIVENESS OF RETURN — PLEA OF PAYMENT — ASSIGNMENT OF WORTHLESS BONDS — PRACTICE.

1. The return of the marshal to a writ, cannot be traversed in an action between the parties to the suit in which the writ issued.

[Cited in Lowry v. Coulter, 9 Pa. St. 353. Cited in brief in Paxton v. Steckel, 2 Pa.

St. 94. Cited in Phillips v. Elwell, 14 Ohio St. 244.]

2. Bonds, assigned to be applied to the discharge of a debt for which a suit is brought, although they are not returned to the assignor, cannot be given in evidence on the plea of payment, it being proved that the consideration of the bonds had failed, and that they had been acknowledged by the assignor to be of no value.

3. A payment which might have been pleaded to the original scire facias to revive a judgment, cannot be given in evidence on a second scire facias.

4. On the plea of "no assets," the practice in Pennsylvania is, for the jury to find for the defendant, and for the plaintiff to pray judgment de terris, etc. and of the assets, quando, etc.

[Cited in Smith v. Charlton, 7 Gratt. 465.]

This case came before the court at the April sessions, 1816, and upon a demurrer, which was adjudged good, a respondeas ouster was awarded. The defendants pleaded payment and no assets. In support of the first plea, they contended, that Charles Hurst, having been arrested under a capias ad satisfaciendum issued on the original judgment in 1791, was discharged by order of the plaintiff; and they offered to examine a witness to prove this fact.

BY THE COURT. The marshal having returned the capias ad satisfaciendum, non est inventus, that return cannot be traversed in this action.

It was stated by the counsel, in answer to this, that the real defendants in this case are the terre tenants, and that the rule stated by the court is not applicable to third persons, not parties to the original judgment.

BY THE COURT. We know of no party defendants but the person or persons so named in the record, and they are the legal representatives of Charles Hurst, the party to the original judgment, which the scire facias in this case is brought to revive. If the terre tenants have any equitable defence to make, it cannot be asserted in this suit. The plaintiff consented that the witness should be examined, but he proved nothing material to the point.

The defendants then gave in evidence, that in the year 1798, the agent of the plaintiff received an assignment of two bonds to be applied to the discharge of this judgment, which bonds had not been returned to Charles Hurst. It was proved, however, by the plaintiff, that the consideration of those bonds was land sold to the respective obligors, which could never be found, and, in consequence thereof, the contract was set aside by agreement of the parties; and Charles Hurst applied to the agent of the plaintiff to return the bonds, as they were worthless. This the agent promised to do, but at that time he could not lay his hands upon them, and it was afterwards neglected or not thought of.

THE COURT informed the jury that these bonds could upon no principle be considered as a payment. They were nothing more than blank paper. But if they had been good and available, and had even been paid in the year 1800, when they were to become due, the evidence would be inadmissible in this case, since

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

it appears, that in the scire facias to revive the original judgment, Charles Hurst, so far from pleading this payment, confessed judgment in 1806, and it is to revive that judgment that this scire facias was brought. Nothing which could have been pleaded in bar to the original scire facias, can be pleaded or given in evidence in this case.

THE COURT directed the jury to find for the plaintiff, on the plea of payment, and for the defendants, on the other plea.

NOTE. THE COURT at first directed the jury to find generally for the plaintiff. But it was stated by Mr. Fisher and some others of the bar, that the established practice was to find for the defendant, on the plea of no assets, and then for the plaintiff, to pray judgment de terris, &c., and of assets quando acciderent, which is entered as a matter of course. THE COURT so directed.

[See Case No. 17,808.]

Case No. 17,810.

WILSON et al. v. IZARD et al.

[1 Paine, 68.]¹

Circuit Court, D. New York. April Term, 1815.

ARMY — ALIEN ENEMIES AS VOLUNTEERS — DISCHARGE — VOLUNTEERS TO SERVE AT PARTICULAR POST — POWERS OF PRESIDENT.

1. Alien enemies who had enrolled themselves as volunteers, and been accepted by the president, under the act of the 6th of February, 1812 [2 Stat. 676], not entitled to be discharged; there being no law enjoining the president from accepting them.

[Cited in Re McDonald, Case No. 8,751.]

2. It seems that the president had a right to accept volunteers, to serve at a particular post as well as for general service, the act being silent on the subject. At any rate he had a discretion in the premises, not to be controlled by a court of justice.

3. The insertion in their enrolment of the officer's name under whom the volunteers were to serve, was meant merely to ascertain the post where they were to serve by designating its commander, and not to attach them to his personal command, so that he could not be changed.

W. Sampson and J. Anthon, for plaintiffs.
N. Sanford, for defendants.

LIVINGSTON, Circuit Justice. By the return made to the habeas corpus issued in this case it appears, "that the complainants had enrolled themselves as privates in a corps of volunteers, under the command of Lieutenant Colonel Denniston; that as such their services have been accepted by the president of the United States, agreeable to the act authorizing him to accept and organize certain volunteer military corps, passed the 6th of February, 1812, and an act supplementary thereto, passed the 6th of July in the same year; and that the parties are now doing duty as private soldiers in the city and harbour of New-York,

as stipulated in the original instrument by which they enrolled themselves." On referring to this instrument of enrolment, which is annexed to and made part of the return, it appears that the complainants, among others, did thereby "volunteer and offer their services to the United States, pursuant to the act of congress of the 6th of February, 1812 (4 Bior. & D. Laws, 374 [2 Stat. 676]), to serve under the command of Brigadier General Armstrong, for the sole purpose of defending the city and harbour of New-York, for one year only." This roll was signed by one of the complainants as an artificer. It is not stated in the return that the parties have received pay as privates, nor that they have taken the oath prescribed by the 18th section of the act "to raise an additional military force," "to observe and obey the orders of the president of the United States, and the orders of the officers appointed over them, according to the rules and articles of war." But, as it is averred in the return that the president has accepted them, and that they are in actual service, it is fairly to be presumed, until the contrary be made to appear, that they receive pay, and have taken the oath just recited.

On this state of facts, it has been contended that these volunteers are entitled to their discharge.

First. Because they are alien enemies, which is a fact not appearing on the return, but sworn to at the time of the allowance of the habeas corpus. This objection is at once disposed of by saying, that the president is not enjoined by any law, either from enlisting alien enemies in the armies which have been ordered to be raised during the present war, or from accepting of the voluntary services of persons of that description. Whether British subjects may not thus commit themselves with their natural sovereign, or whether it be good policy to employ them, are questions of legislative, not of judicial consideration.

A second ground of relief is, that the president is not authorized to accept of volunteer corps for the defence of a particular place, but only for general purposes; so that they may be ordered, in case of necessity, to any part of the United States.

On this point the act in question is silent, and as far as the power delegated by it to the president may be misused, it is unimportant which construction prevails; for in either case there will be a latitude of discretion, as must ever exist in such cases, which will afford ample scope for very serious abuses. As commander in chief of the army, it does not appear to have been reposing too much confidence in the president to leave it to him to accept of these volunteer corps, either for the defence of particular forts or cities, which must be garrisoned throughout the war, or for the general defence of the Union. For the first of these purposes it would be more easy to obtain volunteers, and when obtained they

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

would feel better reconciled to the service, and in general be more useful and zealous in the defence of their own firesides, than they would be if marched to a great distance from home, and employed to defend remote parts of the United States. But this court does not think it necessary to express any opinion whether the president has a right or not to accept of volunteers for the defence of a particular city or harbour, because under the powers vested in him by this act, he has a discretion in the premises, in the exercise of which he cannot and ought not be controlled by any court of justice. If he abuses this discretion, he must be amenable for his acts, if at all, in some other way. But however the public interests may be affected by accepting of soldiers for the discharge of a particular duty, it does not lie in the mouth of the men who have thus made a good bargain with the president, to allege as a reason for their not being bound, that he had exceeded his powers. So long as they receive pay, and are employed agreeably to their offer, this court feels disposed to consider them as regularly in service under the act in question, and can perceive no cause whatever of complaint on their part. It might be added that, for aught that appears, the president may have accepted of them for general purposes. If so, it will not be denied that he has a right to use them for the defence of the harbour of New-York, and that so long as they are thus employed, they are doing duty within the terms of the offer which they made of their services.

Another complaint is, that Wilson, one of the parties in the instrument of enrolment which is produced, has engaged as an artificer; whereas by the return it appears, that he is doing duty as a private soldier, as stipulated in the original instrument of enrolment. The court is not prepared to say that this return furnishes any evidence of the employment of this man contrary to the offer which he made of himself. A company of artificers may, for aught that appears, be called a company of soldiers, and may be compelled, for any thing that appears to the court, to do duty as such. This man has certainly sworn, as well as the others, that he will faithfully serve against the "enemies of the United States," and it is presumed that, in day of battle he might, although he be called an artificer, be compelled to fight against the enemy. Again, it is said these men engaged to serve under Brigadier General Armstrong, and are now placed under another officer. This gentleman having, at the time of this enrolment, the command of the city and harbour of New-York, his name must have been inserted for no other purpose than for designating the extent of the duty to which they obliged themselves; or, as is more probable, merely for the purpose of stating who was the then commander in chief over the city and harbour. It never could have been supposed that it imposed any obligation on the government to continue General Arm-

strong in this command; or that, in case of his death or employment elsewhere, they were exonerated from any further service, and that all subsequent detention would be unlawful. But if this be no satisfactory answer, one completely so will be furnished by the oath which these men have taken, which must have been subsequent to their enrolment, and to the president's acceptance. By that oath they oblige themselves to "obey the orders of whatever officers are appointed over them." If they had any claim before to an exclusive service under General Armstrong, by this oath they surrendered that privilege, and became bound to continue in service, under such other officer or officers as might be appointed to command them.

It is the opinion of the court that the parties be remanded.

WILSON v. The JAMES ROY. See Case No. 7,201.

Case No. 17,811.

WILSON v. JANES et al.

[3 Blatchf. 227; Merw. Pat. Inv. 236.]¹

Circuit Court, S. D. New York. Nov. 24, 1854.

PATENTABLE INVENTION — NOVELTY — COOKING STOVE OVENS—ACTION FOR INFRINGEMENT —SETTING ASIDE VERDICT.

1. Where a patented improvement in a cooking stove consisted in "the placing the fire-chamber in the middle of the oven, so that the latter may receive the heat of three sides thereof at once," the oven being a single chamber extending around three sides of the fire-chamber, as distinguished from stoves with three compartments around the fire-chamber, one on each side and one behind, divided by partitions behind the fire-chamber, quere, whether the change was a patentable discovery.

2. The verdict of the jury, given for the plaintiff, on the trial of an action for the infringement of a patent, being against the evidence, both as to the novelty of the invention and as to the question of infringement, it was set aside by the court.

This was an action on the case for the infringement of letters patent granted to the plaintiff [Carrington Wilson] October 10th, 1834, and extended for seven years, for an improvement in cooking stoves. It was tried in October term, 1851, before NELSON, Circuit Justice, and a jury, and a verdict was found for the plaintiff. The defence was, that the plaintiff was not the original and first inventor of the thing patented, and that the discovery was well known and in public use prior to his application for his patent. A motion was now made by the defendants [Adrian Janes and others] for a new trial, on a case made, on the ground that the verdict was against the evidence. Objection was also made to the patentability of the alleged invention.

¹ [Reported by Samuel Blatchford, Esq., and here reprinted by permission. Merw. Pat. Inv. 236, contains only a partial report.]

Carrington Wilson, in person.
Charles O'Connor, for defendants.

Before NELSON, Circuit Justice, and
BETTS, District Judge.

BETTS, District Judge. The decision of this case will be placed upon the ground that the verdict was against evidence. It was, in our view, without competent evidence to support it, even if no proofs had been produced on the part of the defendants.

The patent was for an improvement in cooking stoves. The court, in its instructions to the jury, construed the patent to claim the invention of placing the fire-chamber in the middle of the oven, so that the latter might receive the heat on three sides at once. The substance of the claim is, that the patentee makes the heat of three sides of the fire-chamber available for cooking. He has one oven, with three doors, extending all along the sides and back of the fire-chamber. The summary in his specification on this head is, "the placing the fire-chamber in the middle of the oven, so that the latter may receive the heat of three sides thereof at once." All the testimony given by the plaintiff on the trial was directed to this particular of his claim. He proved, by two witnesses, that a stove with an oven on three sides of the fire-chamber was useful; and, by one witness, that, prior to seeing the plaintiff's stove, he had seen ovens having the articles to be baked located on one side of the fire-chamber, and others in which the articles were placed on opposite sides of the fire-chamber, the whole being three rectangular compartments of equal length, the fire occupying the middle compartment, and that he had not, before seeing the plaintiff's stove, known of one which had the front side of the fire-chamber on a line with the front side of the oven, and the oven connected behind the fire-chamber.

The plaintiff does not, by his specification, nor did he by testimony on the trial, show any peculiarity of construction in his oven or fire-chamber, or point out any shape or size of the parts, or method of arrangement, that is original with him, other than leaving the space behind the fire-chamber open, as a part of the entire oven—that is, instead of forming three ovens or compartments around the fire-chamber, he removes the partitions behind the fire-chamber, and makes a single cooking space, instead of the three spaces into which that part of the stove in common use is divided. We are not convinced, if this be an original idea with the plaintiff, that the change is a patentable discovery. Ordinarily, a patent is prima facie evidence that the discovery claimed is new and useful; and any person who undertakes to use any thing similar to it, and producing like effects, must disprove the title of the patentee to his grant. But we suppose that a patent for a discovery which is manifestly frivolous cannot be sustained, and that it is competent for the court to declare a patent to be inoperative for such cause, when that is apparent upon the face of the specification. As, if the plaintiff had taken

out a patent for the discovery of making a fire in a grate, or for placing a blower or cover before it, to quicken its kindling, or for exposing to the side of a heated fire-chamber, objects intended to be affected by the heat, a court could hardly be required to adjudge itself to be so judicially blind to the state of the arts and the usages of life, as to be unable to discover, except through the teaching of witnesses, that the things patented were in common use, and therefore could not be monopolized by a patent.

We do not, however, feel it necessary to dispose of this case on that view. The evidence given by both parties on the point of novelty is before us, and we think it is clearly shown, that the use of the fire-chamber for heating circumjacent ovens, was a thing long and familiarly known in the arts when the patent was issued. One witness testifies to a plan of cooking range that was made public in 1798; and it appears that a similar contrivance was described, with drawings annexed, in Webster's Encyclopædia of Domestic Economy. That range was constructed with a fire-chamber inside of the shell or general exterior of the stove, and compartments were heated from each side of the fire-place, one for baking, and one containing water to be heated, these being contiguous to the sides of the fire-place; while, behind the fire-chamber, was a third compartment, with an open space heated in the same manner, and the hot air in which came in contact with the boiler. Other witnesses proved the construction and use of similar cooking ranges, the fire-chamber in which was placed inside of the body of the oven, and heated, from its three sides, other compartments fitted up for baking, boiling, etc., the materials used for the oven being tin or sheet iron. A patent granted to Eliphallet Nott, January 9th, 1834, describes an oven constructed in a manner substantially the same with that claimed by the plaintiff; so, also, does a patent issued March 29th, 1834, to Stephen J. Gold. No testimony was produced by the plaintiff countervailing these proofs.

The defendants further gave evidence, that the ranges built by them did not contain the single oven surrounding the three sides of the fire-chamber, in the manner claimed by the plaintiff to be his invention, but consisted of two ovens or compartments, one placed on each side of the fire-chamber, and of a third one behind it, in which was contained a metal pipe, used for heating water to be distributed over the house. The defendants' ranges, with the two ovens of that construction, were built and in public use, in New York, several years anterior to the grant of the patent to the plaintiff. No evidence was given by the plaintiff rebutting that proof, or showing that the defendants used the three sides of their fire-chamber for heating a single oven in the manner claimed by the plaintiff.

Without placing the decision of the case upon the construction of the patent, we think it is clearly shown that the verdict of the jury, both as to the novelty of the plaintiff's invention and as to its infringement by the defendants, is de-

cidedly against the evidence given in the cause. The verdict must, therefore, be set aside, and a new trial be granted, the costs to abide the event of the suit.

Case No. 17,812.

WILSON et al. v. The JEWESS.

[N. Y. Times, Nov. 29, 1854.]

District Court, D. Connecticut. Nov., 1854.

MARITIME LIENS—MATERIALS AND REPAIRS—SALE PENDING REPAIRS—LOCAL STATUTES—PRIORITY OVER MORTGAGE—NOTICE OF MORTGAGE—RECORD IN COLLECTOR'S OFFICE.

[1. Where material and repairs were being put upon a foreign vessel in the port of New York, and, before completion thereof, she was sold to her master, who lived in New York, the material and repair men have a lien, first under the general admiralty law, and afterwards under the local statutes.]

[2. A lien for materials and repairs will have priority over a mortgage owned by one who was presented to the material and repair men as a part owner of the ship, and, who, by his bearing, himself confirmed the impression that he was one of the owners.]

[3. The record of a mortgage in the office of the collector is not constructive notice to material and repair men.]

[This was a libel in rem by James S. Wilson and others against the steamer Jewess, for materials and repairs.]

INGERSOLL, District Judge. The libel is for materials furnished, and repairs put on the steamer by the libellants. Previous to her arrival here, she was owned in Baltimore, and is admitted to have been then a foreign vessel, and, as such, liable in rem for the repairs. After she came to New York, the libellants proceeded to put these repairs on her, and, while they were so in process, she was sold by the owners to her captain. It is claimed that he belonged to New York, and therefore that the steamer then became a domestic vessel. The captain at the time mortgaged her to the original owners, to secure the purchase money, and also to the claimant, Trowbridge, to secure advances made by him.

Two questions arise in this case: First. Have the libellants a lien on the vessel? Secondly. Was their lien prior to the mortgagees'?

To this first question the reply is that, when the libellants commenced furnishing the vessel with supplies, she was foreign, and needed them; therefore a lien would arise in favor of those who furnished them with supplies, which lien would last as long as the foreign

character of the vessel continued, and after the purchase of the vessel by Wright; and whether he has continued a resident of the city or not would make but little difference, as the local law or lien existed against the ship, she not having departed from the state. I therefore find in favor of the libellants on that question, and hold that they have a lien on her.

As to the next question, it becomes a matter of more difficulty to decide whether the Baltimore owners and Trowbridge should be treated as mortgagees, or that the libellants should have a priority of lien. On that point we have two decisions of district judges which are adverse to each other. Judge Hall gave his opinion that "material men" have a priority over mortgagees, and Judge Betts held that mortgagees have a priority over "material men." I can, however, give my judgment without clashing with either of the learned judges referred to. Although Judge Betts lays it down as a principle of law that mortgagees have a preference over material men, yet he admits that circumstances will arise wherein such priority will not exist; as, for instance, where mortgagees are in part owners, or held out to be such.

The question then recurs, are there any such circumstances in this case to bring the mortgagees within the distinction laid down by Judge Betts. I find that there are. It appears that Mr. Trowbridge was introduced to several of these material men as an owner, and his deportment and acts were such as to induce them to believe that he was one of the owners of the vessel to which the supplies were furnished. The act of the Baltimore owners of the vessel in sending her to this port for supplies, in charge of the registered master, and he being regarded as the master of a foreign vessel, also operated to mislead the material men into the idea that they were dealing with the owners, and not with the mortgagees. If such are the facts, the libellants had no notice that the claimants were mortgagees, unless the record in the office of the collector amounted to that notice. Does that record amount to a notice? I think not, because from an examination of the act of congress, which provides that conveyances and mortgages should be recorded, it appears that the record is only a notice to persons holding title to or interest in vessels, by express conveyance or instruments under law. I therefore find the record question in favor of the libellants. I shall therefore decree in favor of the libellants, with costs, and order a reference to ascertain the amount due.

Case No. 17,813.

WILSON v. JOHNSTON.

[1 Cranch, C. C. 198.]¹Circuit Court, District of Columbia. Nov.
Term, 1804.

REPLEVIN—WHEN TRIABLE.

Actions of replevin, in Alexandria, may, on motion, be tried at the first term.

Replevin, of goods distrained for rent.

Motion by Mr. Taylor, to set the cause forward on the docket, under the Act of Assembly, so as to be tried this term. New Rev. Code, p. 155, § 18.

E. J. Lee, for plaintiff in replevin.

Granted.

Case No. 17,814.

WILSON v. JORDAN et al.

[3 Woods, 642.]²Circuit Court, N. D. Alabama. April Term,
1878.FRAUDULENT CONVEYANCES—DEED BY INSOLVENT
TO WIFE—EXECUTORS—BREACH OF TRUST—
CONTRACT WITH CONTESTANT OF WILL.

1. J. who was insolvent, conveyed to his wife real and personal property of the value of \$7,700, for a consideration estimated at \$1,537. *Held*, that the consideration was so grossly inadequate as, under the circumstances, to establish conclusively the fraudulent character of the conveyance.

[Cited in *Dodson v. Cooper*, 50 Kan. 681, 32 Pac. 371.]

2. A testator devised a large estate to various legatees to the exclusion of the heir. The heir filed a bill, in which the validity of the will was assailed. Pending this bill, the executor and the heir entered into a contract with each other, to the effect that, in case the will should be set aside, the executor was to pay the heir a certain fixed sum out of the estate and retain as his own all the residue, to the exclusion of the legatees under the will. *Held*, that such a contract was a flagrant breach of trust by the executor, and was against public policy and void.

In equity. Heard upon pleadings and evidence for final decree. The bill was filed by the complainant [Robert H. Wilson] as assignee in bankruptcy of Fleming Jordan, to set aside as fraudulent two deeds made by Jordan on September 29, 1866, one to his wife, Lucy Jordan, and the other to Frederick B. Moore. Both these deeds conveyed personal as well as real property. They were attacked by the complainant on the ground that the consideration for the conveyances was grossly inadequate, and that they were executed to hinder, delay and defraud the creditors of Jordan. The consideration of the deed to Lucy Jordan was the release of her inchoate right of dower in the lands conveyed by her husband to Moore, and the consideration of the conveyance to Moore was the cancellation of a debt due to Moore from

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

² [Reported by Hon. William B. Woods, Circuit Judge, and here reprinted by permission.]

Jordan, evidenced by certain bills of exchange of which Jordan was the drawer, and Moore the holder, amounting to \$28,000.

S. D. Cabiniss, F. P. Ward, and David P. Lewis, for complainant.

L. P. Walker, D. D. Shelby, Milton Humes, and Geo. S. Gordon, for defendants.

WOODS, Circuit Judge. The evidence shows conclusively, indeed it is not controverted, that on September 29, 1866, the day when the deeds to Frederick B. Moore and Lucy Jordan were executed, Fleming Jordan was largely insolvent. At that time he owed at least \$80,000, and all his property was not worth more than \$25,000 or \$26,000. On the day just mentioned he conveyed, substantially, all his real and personal property to Frederick B. Moore, and to his wife, Lucy Jordan, and others. Lucy Jordan knew that her husband was insolvent at the date of the conveyance to her, for she so testifies. The real estate conveyed to her by the deed in question is estimated by one witness, Joseph C. Bradley, at \$5,000, by another witness, Larkin A. Warthan, at \$9,550, and it was valued for taxation for the year 1867, by Lucy Jordan herself, at \$9,000, and taxes paid by her on that valuation. Two items of the personal property conveyed by said deed, namely, six mules and two hundred barrels of corn, are estimated by the witness Warthan to be worth \$2,020, the mules \$1,020, and the corn \$1,000. Besides these articles of personal property, the deed to Lucy Jordan also conveyed to her one wagon and gear, fifteen head of cattle, twenty head of hogs, one horse-cart, one rockaway and harness, and all the household and kitchen furniture at the residence of the grantor. Lucy Jordan, in her evidence, puts the value of the mules at \$900, and other witnesses put the price of corn at from sixty to seventy-five cents per bushel. According to the lowest estimates made by the witnesses, the mules and corn alone were worth \$1,500.

The return of property for 1867 made by Lucy Jordan for taxation, shows that she returned for taxation cattle over five head in number, valued at \$150, household and kitchen furniture in excess of \$300, valued at \$700, and vehicles, not excluding those used for agricultural purposes, valued at \$50. The value of these articles amounted, in the aggregate, to \$1,200. It is true, it is not directly shown that they were the same articles conveyed by the deed of Fleming Jordan the year before, but the inference that they are so is not a forced one. If this property, returned by Lucy Jordan for taxation in 1867, was not the property conveyed to her by Fleming Jordan in 1866, it certainly stood her in hand to show it. It was a fact peculiarly within the knowledge of herself and husband, yet neither of them has attempted to deny the identity of the property. Estimating the corn and mules at \$1,500, and the other personal property conveyed at \$1,200, the esti-

mate put upon it by Lucy Jordan for taxation, the value of the personal property conveyed by the deed of September 29, 1866, foots up at \$2,700. Estimating the mules and corn at the price named by Warthan, to wit, \$2,020, the entire value of the personal property conveyed foots up \$3,220. There are but two estimates of the value of the real estate conveyed to Moore, in which Lucy Jordan released her dower. One is that of Warthan, who placed it at \$10,500, and the other of Joseph C. Bradley, who placed it at \$7,000. The only evidence to show the residue of the lands conveyed by Fleming Jordan to Warthan. Lightfoot, Reynolds and Larkins, was the sum for which Jordan testifies he sold them at that time. These lands sold for \$2,225. Therefore, taking Warthan's estimate, the entire value of the lands in which Mrs. Jordan released her dower, as a consideration of the conveyance to her, was \$12,750; according to Bradley's estimate, was \$9,225.

Now, what was the inchoate right of dower of Lucy Jordan, in other lands, worth on September 29, 1866. The statute of Alabama has fixed the utmost limit to its value. If, at the date just named, Mrs. Jordan had actually been a widow eighteen years of age and in perfect health, the present value of her vested dower estate in these lands would have been, according to the law of Alabama, only one-sixth of their value, in fee simple. See Walk. Rev. Code, §§ 2229-2231. According, therefore, to Warthan's estimate of the value of the lands, Mrs. Jordan's dower therein, if she had been a widow in youth and health, would have been \$2,125; according to Bradley's, it would have been \$1,537. When it is remembered that on September 29, 1866, the date of her release of dower, Mrs. Jordan's husband was living, that he was only five years her senior, and that she was fifty-seven years of age, the value of her inchoate right of dower almost entirely disappears. But suppose it to be worth what it would have been if she had been actually a widow eighteen years of age, and in good health, how does its value compare with what she received for it? According to the highest estimate of the value of her dower, and the lowest estimate of the value of the personal property only, conveyed to her by the deed of September 29, 1866, she received in personal property alone \$575 more than her dower was worth. Taking Bradley's estimate of the lands in which dower was released, the mules and corn alone, at the lowest estimate put upon them by any witness, came within \$37 of paying all that her dower was worth, if she had been actually a widow and only eighteen years old. The truth is, that the inchoate right of dower of Mrs. Jordan, in the lands conveyed by her husband, was almost worthless. If we are to exercise our own judgment in such matters, we know that, if put up to sale, it would have brought nothing. The purchasers of the land would doubtless

have paid a small sum for it, but not near one-sixth of the value of the estate in fee.

These facts show how grossly inadequate was the consideration paid by Mrs. Jordan for personal property worth from \$2,000 to \$3,000, and for lands estimated at from \$5,000 to \$9,550. When we reflect that at the time of this transaction Jordan owed more than three times what he had means to pay, and that he knew, and his wife knew, that he was insolvent, and that he, on the day he made the conveyance to his wife, conveyed everything else he owned in the world to his brother-in-law, Moore, it needs no further consideration to establish the fraudulent nature of the deed to Mrs. Jordan. So gross an inadequacy of consideration, taken in connection with the insolvency of Jordan, is alone sufficient to show the fraud of the conveyance. *Kempner v. Churchhill*, 8 Wall. [75 U. S.] 362; *Ratcliff v. Trimble*, 12 B. Mon. 32; *Borland v. Mayo*, 8 Ala. 104; *Prosser v. Henderson*, 11 Ala. 484. The release of her dower was more than thrice paid for by the personal property which she received, and the conveyance of the land to her was left without any consideration whatever. Taking any of the estimates of the value of the property, the consideration which Mrs. Jordan received for the release of her dower, was nearly equal in value to the entire estate in fee in which she released her dower. We think the facts clearly show that the difference between the property conveyed to her and the consideration paid "was so great as to shock the common sense of mankind, and furnish in itself conclusive evidence of fraud." *Hoot v. Sorrell*, 11 Ala. 400.

I have thus far considered the case as if Fleming Jordan had such title in the lands conveyed to Moore as gave his wife a right of dower therein in case she survived him. But that Fleming Jordan had such title is strenuously denied by the complainant. To entitle Mrs. Jordan to dower, her husband must have held the legal title during coverture, or must have had a perfect equity therein. Walk. Rev. Code, § 1624. Jordan had no legal title. On his own showing he had only a contract for a deed. Had he such an equity as entitled his wife to dower?

The facts about this contract, as claimed by the complainant in this case, were these: Fleming Jordan was one of the executors of the will of Fleming J. McCartney, deceased. Mathew H. Bone and wife, the latter being the only heir of McCartney, having filed their bill against Jordan, as executor, and others as legatees under the said will, Jordan entered into a contract, by which it was agreed between him and Bone and wife, that in the event the will should be set aside and the probate revoked, Bone and wife were to take \$40,000 of the estate, and sufficient in addition to pay off certain sums in which they were indebted, amounting to between \$2,000 and \$3,000, and that Jordan was to have the residue of the estate to pay off its

debts and to distribute among the legatees under the will. Jordan, on the other hand, claimed that the contract he made was for his own benefit exclusively, and that he, individually, was to have and retain all the residue of the estate remaining after the share of Bone and wife was taken out and the debts of the testator were paid. This would leave in his hands a residuum of about \$60,000.

In the view I take of this branch of the case, it is unnecessary to pass upon this disputed question of fact. Taking Jordan's own version of the contract between himself and Bone and wife, can such a contract be sustained? Fleming J. McCartney, the testator, reposing confidence in the fidelity and integrity of Jordan, had made him one of the executors of his will, to take the title to and distribute his estate among the legatees under his will. While holding this trust his title as executor was attacked by a stranger to the will. Pending this attack, and while the suit was undetermined, Jordan, according to his own showing, entered into an understanding with the party assailing his title, by which it was agreed that if the title were declared void, they would divide the property of the testator between them, Jordan taking the lion's share, to the exclusion of all the beneficiaries under the will. Now, if Jordan made this contract, he was guilty of a most flagrant betrayal of his trust. His contract was in violation of the clearest dictates of public policy.

"No party can be permitted to purchase an interest in property and hold it for his own benefit, when he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use." *Van Epps v. Van Epps*, 9 Paige, 237; *Hawley v. Cramer*, 4 Cow. 717. Much less can an executor whose duty it is to defend his title to the trust property, make a contract with the party assailing the title, by which, in case the assault prevails, the property of the estate is to be divided between them. When such a contract is made and carried into execution, the executor will be declared a trustee for the legatees under the will. "Where trust and confidence are reposed by one party in another, and such other accepts the confidence and trust, equity will convert him into a trustee, whenever it is necessary to protect the interest of the confiding and do justice between them." *Tiff. & B. Trusts*, 481.

It is a rule in equity, of universal application, that no person can be permitted to purchase an interest in property, where he has a duty to perform which is inconsistent with the character of purchaser. The rule is applicable to all classes of persons standing in fiduciary relations, or relations of confidence. As stated by the supreme court of the United States, in *Michoud v. Girod*, 4 How. [45 U. S.] 503, "the general rule stands upon our

great moral obligation, to refrain from placing ourselves in relations which, ordinarily, excite a conflict between self-interest and integrity." And, if an agent employed to purchase for another, purchases for himself, he will be considered trustee of his employer. *Story, Eq. Jur.* 316. So, if an agent discover a defect in the title of his principal to land, he cannot misuse the discovery to acquire the title for himself; if he do, he will be held a trustee for his principal. *Ringo v. Binns*, 10 Pet. [35 U. S.] 269. So, also, where an individual is employed as an agent to purchase up a debt of his employer; he is bound to purchase it at as low a rate as possible; if, therefore he purchase it upon his own account, he will be deemed as acting for his principal, and will be entitled to no more than he paid for it. *Reed v. Norris*, 2 Myne & C. 361, 374; *Hitchcock v. Watson*, 18 Ill. 289; *Moore v. Moore*, 5 N. Y. 256. Where a trustee, after the acceptance of the trust, causes a sale of part of the trust property under execution, for his own benefit, and becomes himself the purchaser, he will be considered as having purchased in his character of trustee for the benefit of those concerned in the trust. *Harrison v. Mock*, 10 Ala. 185. Where an executor has, under a decree of foreclosure of a mortgage due to the estate, purchased the premises, he holds in trust; if he sells the premises at a large advance, such excess will belong to those for whose benefit the mortgage was held. *Martin v. Branch Bank, Decatur*, 31 Ala. 115.

It is impossible to enumerate all the cases where the law raises an implied trust between parties standing in a confidential relation to each other. The law is very astute in discovering such relation, and exact in requiring fidelity to it. Reasoning from the foregoing authorities, can a clearer case for the application of the doctrine of implied trusts be found than the case under consideration? I think not. So, whether Jordan made the understanding with Bone and wife, for the benefit of all the legatees under the will of McCartney, as they claim, or for his own exclusive benefit, as he claims, is immaterial. In either case, he is a trustee for the benefit of the legatees under the will. There has been no such acquiescence in his claim by the legatees as estops them from settling up the trust, for the evidence shows a decree in their favor against Jordan, rendered by the state chancery court, establishing the trust. If Jordan held the lands conveyed to Moore in trust for the legatees under the will of McCartney, as it seems to me clear he did, his wife had no contingent right of dower therein. And the only consideration for the conveyance made to her by her husband on September 29, 1866, was her inchoate right of dower in other lands, the fee of which sold for \$2,225. Under the most favorable circumstances for the dowress, the present value of dower in these lands, ac-

ording to the rule laid down by the Code of Alabama, would only be \$370. When it is remembered that in this case the husband was living, and his wife was fifty-seven years of age at the date of her release of dower, the value of that release shrinks to an almost inappreciable sum. I am therefore led to the conclusion that Jordan, being hopelessly insolvent, and knowing it, and his wife knowing it, his conveyance to her of property valued at from \$8,000 to \$12,000 for so grossly inadequate a consideration, establishes, conclusively, the fraudulent character of the transaction, and that the conveyance is null and void. This conclusion is strengthened by the fact that, on the same day, Jordan made a conveyance to a near relative of substantially all his remaining property and effects.

It only remains to consider whether the conveyance of the personal property included in the deed from Jordan to Moore was fraudulent and void. After a patient consideration of the evidence upon this point, I am not satisfied that the fraud in this conveyance has been made out. The consideration was certainly ample. By the conveyance of a tract of land to which he had no title, either legal or equitable, and a small lot of personal property worth \$1,500 or \$2,000, Jordan pays off bills of exchange of which he was the drawer, amounting to \$28,000, and for which his vendee had paid \$4,500 in money. The title of Jordan to the land must have been considered doubtful, for he had twice offered it in payment of the bills, and his offer had been declined. By the purchase of the land, Moore became the creditor of Jordan to the amount of \$28,000, and Jordan had the right, in September, 1866, to make the conveyance to him in payment of the debt, even though such conveyance resulted in a preference of Moore to the exclusion of all other creditors. It is true there are some circumstances of suspicion surrounding the conveyance, which I will not notice; suffice it to say, that they do not establish satisfactorily the fraud of the conveyance. There must be a decree dismissing the bill as to Moore, and declaring the deed of Jordan to his wife to be fraudulent and void, and directing the property to be turned over to the complainant as assets of the bankrupt estate of Jordan, and to be administered accordingly.

Case No. 17,815.

WILSON v. KEDGELEY.

[1 Cranch, C. C. 477.]¹

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

TRESPASS VI ET ARMIS—BEATING SLAVE.

Trespass vi et armis lies by the owner of a slave against a stranger who beats the slave per quod servitium amisit.

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

Trespass vi et armis, for beating his slave, whereby he lost his services.

F. S. Key moved in arrest of judgment, that trespass vi et armis does not lie by the master in such a case. But it ought to have been trespass on the case.

Motion overruled. See Esp. N. P. 380, 598; 3 Bl. Comm. 393.

WILSON (KEMMIL v.). See Case No. 7,685.

WILSON (KING v.). See Case No. 7,810.

WILSON (KINGSTON v.). See Case No. 7,823.

WILSON (LADD v.). See Cases Nos. 7,976 and 7,977.

Case No. 17,816.

WILSON et al. v. LAWRENCE.

[2 Blatchf. 514.]¹

Circuit Court, S. D. New York. Nov., 1852.

CUSTOMS DUTIES—VALUATION—DATE OF PURCHASE—PROTEST.

1. The doctrine of the cases of Pierson v. Lawrence [Case No. 11,158]; Pierson v. Maxwell [Id. 11,159]; Focke v. Lawrence [Id. 4,894]; and Cornett v. Lawrence [Id. 3,241],—applied to the facts of this case.

[2. Where orders for goods are accepted by foreign vendors at the ruling market price, but the price advances greatly before the goods are delivered for shipment, and the invoices made out, the purchase is to be considered as made, within the meaning of the tariff acts, at the date of the invoice, and not at the date the orders are accepted; and the appraisers may raise the valuation accordingly.]

[3. In an action to recover duties paid under protest, the importers cannot avail themselves of any objections to the action of the customs officers, except those specified in the protests.]

This was an action [by Daniel M. Wilson and others] against [Cornelius W. Lawrence] the collector of the port of New York, to recover back an alleged excess of duties paid him. A verdict was taken for the plaintiffs, subject to the opinion of the court.

Elias H. Ely, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. This is another of the cases of iron importations. The iron in this case was imported by the plaintiffs in April, May and June, 1849. It was purchased by them from the Coalbrookdale Company, and Stitt, Brothers, of Liverpool, through an agent of the vendors in New York, by written orders addressed to the vendors in December, 1848, and January, 1849. On the trial, the agent testified that the course of business was to supply the iron at the prices which ruled when the order was booked and

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

accepted. That date is not given in the proofs, but it is to be assumed that the arrangement was completed in due course of the mails. Letters from the vendors to the plaintiffs, of contemporaneous dates with the invoices, were put in evidence, advising the plaintiffs that the iron ordered had then been shipped at Liverpool. It was further proved that the price of iron materially advanced in Liverpool, between the times the orders were received and the dates of the invoices and shipments, and that the invoices represented the prices at which it was agreed the iron should be furnished to the plaintiffs at Liverpool. The plaintiffs, when the invoice price was objected to at the custom house as being below the market value in Liverpool at the dates of the invoices, offered to show to the appraisers the correspondence above referred to, and claimed the right to enter the goods at the invoice valuations, based upon that correspondence and the actual purchase-prices on such contracts. Eight several entries were made. The appraisers raised the invoice prices to the market value at Liverpool, and duties were exacted on that valuation. The duties on the increase in valuation amounted in the whole to \$538 80, against the payment of which the plaintiffs made, on the first entry, the following protest in writing: "We do hereby protest against the payment of duties on the extra 10s. per ton, added to the invoice per Wisconsin, from Liverpool, by the U. S. appraisers, as said invoice was made out and charged at fair market value at the time of purchase. We pay the additional duty to get possession of our iron, reserving our rights to future decisions on the subject." The other seven protests, written on the respective entries, varied somewhat from the terms of the first one, and were substantially as follows: "We protest against the payment of duty on any valuation exceeding our invoice, and only pay the duty on the value as appraised, to gain possession of our goods." The action is brought to recover back the extra payment of \$538 80.

This statement of the case brings all the points raised upon it by the counsel for the plaintiffs within the principles adopted in the several other cases reviewed and decided at the present term, relative to the rights of importers under purchases of this character and protests of like import. *Pierson v. Lawrence* [Case No. 11,158]; *Pierson v. Maxwell* [Id. 11,159]; *Focke v. Lawrence* [Id. 4,894]; *Cornett v. Lawrence* [Id. 3,241].

In our opinion, the iron was not purchased by the plaintiffs, within the meaning of the duty acts of congress, until it was acquired by them in a condition for shipment; and we think, especially, that under their protests they cannot legally raise any question as to any proceeding at the custom-house, except as to whether the appraisement was according to the fair market value of the iron at Liverpool at the dates of the respective invoices. No proof was offered impugning the

justness of the custom-house valuation in this respect, and, upon the reasons assigned in the cases before referred to, we hold that the plaintiffs cannot, under their protests, avail themselves of any other objection to the payment of the duties which were exacted. Judgment for the defendant.

WILSON (LEAY v.). See Case No. 8,174.

Case No. 17,816a.

WILSON v. LEIBERMAN.

[2 Hayw. & H. 312.]¹

Circuit Court, District of Columbia. Oct. Term, 1858.

ACTION FOR TRESPASS—PARTY WALLS.

1. On the resurvey of property it was found that the dividing wall of nine inches was built wholly nine inches or more on the defendant's lot. When the defendant desired to rebuild, he pulled down the dividing wall, and was building a party-wall on the resurveyed party line, when he was enjoined from doing so; the court deciding that after the wall had remained where it was for over 12 years, it could not be pulled down and rebuilt on the resurveyed party line, but must be rebuilt on the old site.

2. Also that where a 9-inch party-wall is torn down it cannot be rebuilt by a 14-inch wall.

[This was an action at law by John Wilson against Charles H. Leiberman.]

Jos. H. Bradley, for plaintiff.

J. M. Carlisle, for defendant.

Prior to 1807 a certain Clotworthy Stephenson was the owner of lots 16 and 17, square 254. In 1807 he built a house three stories high on lot 17, with a gable end towards lot 16, having stacks and chimneys and fireplaces protruding toward the lot 16 for the convenience of the building against it. In the same year he conveyed to Mrs. Wheaton, under whom the plaintiff claims "one divided and ascertained moiety of lot 17, in square 254" and on the back of the deed was endorsed a memorandum (as appears by the record, for the original deed was not produced) of the same date, with the deed signed by the grantor and by Joseph Wheaton, the husband of the grantee, and who, as there was evidence tending to show, bought the property for her and caused it to be settled upon her, by which memorandum the terms upon which the grantor should have the use of the wall in building on "the adjoining lot" were stated. Stephenson, the grantor, after the Wheatons went into possession, continued to reside on the residue of his property there; having it enclosed, and part of the enclosure being the wall in question. In 1821 the defendant's house was built, having this for one of its walls. In 1853 the plaintiff purchased the

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

Wheaton's title, and took a deed conveying by metes and bounds the half of lot 17 adjoining lot 16. The defendant's deed, and the deeds under whom he claimed described this property by metes and bounds as part of lot 16 with the appurtenances. After the plaintiff's purchase in 1853 an accurate survey of the square showed that the division wall stood wholly nine inches or more within lot 17. The plaintiff claimed the land according to the survey. For the purpose of building on it he caused the old house to be torn down, intending to build, and to make the wall next to the defendant 14 inches instead of 9, as it had been before, and to place the centre of the new wall with the increased thickness precisely on the line ascertained by the new survey, which would bring it some distance inside of all the defendant's fire-places. On the other hand, the additional width to the plaintiff's lot would add greatly to its value. It seems not unreasonable, therefore, that a narrow strip of land, in itself of small value, should have given rise to so much litigation. In 1852 Leiberman procured an injunction against Wilson to prevent the taking down of the old wall unless it should be found unsound, and to prevent his building a new wall otherwise than on the site of the old one, if it should be taken down. The old wall was unsound and was taken down, and rough boards nailed up in its place, and so the premises (vacated by Leiberman) continued for a year, when Leiberman rebuilt the wall, and as was stated by his counsel, rebuilt it 14 inches thick, instead of 9 inches, as the other walls of his house are, in order to be sure that it should be strong enough to support Wilson's projected house, but when the new wall was about 10 feet above the pavement Leiberman was stopped by an injunction at the suit of Wilson, preventing him from rebuilding any other than a 9 inch wall, he therefore dropped off to a 9 inch wall. Wilson then brought this suit for trespass, and Leiberman brought his suit to recover damages for cutting away the side of his house and leaving it for a year without rebuilding it.

The case tried is the former, and it has resulted, as to the law, in the court having restricted the plaintiff Wilson to damages for the alleged trespass in occupying for several days before the bringing of the suit so much of the ground as was not covered by the old 9 inch wall.

The points of law interesting to the public in this city are—First, that a man may enjoy the comforts of his own hearth, when he has done so for more than 12 years, without fear of an action for damages founded upon accurate survey made by his neighbors; and, secondly, that when a 9 inch party wall is torn down it cannot be rebuilt by a 14 inch wall, whatever the building regulations may be supposed to say to the contrary; the first builder being the person who exercises the power under these regulations.

Verdict for the plaintiff one cent damages.

WILSON (LENOX v.). See Case No. 8,247.

Case No. 17,817.

WILSON v. LE ROY et al.

[1 Brock, 447.] †

Circuit Court, D. Virginia. June 7, 1820.

CHARTER PARTY — BLOCKADED PORT — EFFECT OF
TAKING LICENSE FROM ENEMY —
NEW CONTRACT.

1. A charter-party was entered into during the war between England and the United States, and during the blockade of the Chesapeake by the British fleet, by which the plaintiff let his ship to the defendants, to carry flour from Norfolk to Cadiz; and covenanted to deliver the flour, "excepting always restraints of princes and rulers;" and the freighters covenanted to pay the freight. The ship was provided with a Sidmouth license, but the charter-party does not express it; yet the fact was well known to the defendants, who, as well as the plaintiff, relied on the protection afforded by that license. The date of the charter-party, was the 31st of January, 1813. After the ship was loaded, it was ascertained that the license would afford no protection against the blockading squadron. The defendants, on the 3d of March, by letter, directed, that the ship should not proceed to sea under existing circumstances; on the 19th of June, they directed, that she should continue ready to prosecute the voyage as soon as the blockade should be raised; and, finally, in the January following, the blockade still continuing, they directed, that the flour should be delivered to their order, which was done. *Held*, that the procurement of the license, vitiates the contract as much as if it had been inserted in the charter-party.

2. Although freight cannot be recovered, yet the various directions given by the defendants amounted to a new contract, which may be enforced; and the ship owner was entitled to an equitable compensation for his labour, and the expenses incurred by him prior to the 3d of March; from that time, to the 19th of June; and after the last day, to January, 1814, when the flour was delivered by the plaintiff to the order of the defendants.

The plaintiff, George Wilson, in October, 1815, exhibited his bill against the defendants, Le Roy, Bayard & M'Iver, merchants, and residents of the state of New York, and against Moses Myers & Son, residents of Norfolk, in Virginia, who held in their hands effects of, and were otherwise indebted to, the said Le Roy, Bayard & M'Iver, in the chancery court held in Williamsburg, Virginia. At the May term, 1816, of that court, the cause, on the petition of the defendants, Le Roy & Co., was removed to this court, under the authority of the act of congress. In December, 1817, those defendants filed their answer, and the cause came on to be heard at the May term, 1820. The opinion of the court gives so full a view of the facts and circumstances of the case, that it is deemed unnecessary to give a farther statement.

MARSHALL, Circuit Justice. The bill states that, on the 21st of January, 1813, the plaintiff, being owner of the Woodrop Simms,

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

chartered her to James Dykes & Co. agents, for Robert Pollard, who was agent for Le Roy, Bayard & M'Iver, to carry a load of flour from Norfolk, to Cadiz, for a freight of \$3, per barrel, and five per cent. primage. Having received a full cargo, 3,407 barrels, he was about to despatch her, when on the 3d of March, he received a letter from Dykes & Co. forbidding him on the part of Le Roy, Bayard & M'Iver, from sending her to sea, under existing circumstances, (meaning the blockade,) and if he did, he would be held responsible. This letter was answered on the same day, expressing his readiness to prosecute his voyage, but that he should conform to the instructions he had received, holding Le Roy, Bayard & M'Iver, answerable for freight, &c. The blockade still continuing, the plaintiff on the 17th of June, 1813, wrote to Robert Pollard, proposing to change the voyage of the ship, on terms which he expressed. Robert Pollard rejected these terms, and insisted on the ship's going to sea so soon as she could sail, without violating the blockade. The blockade still continuing, and the warm weather commencing, the plaintiff was compelled to land the flour. The blockade appearing to be as lasting as the war, the flour was kept in store, and the plaintiff offered to abandon the voyage, on being paid a sum which he thought a reasonable compensation for his trouble and expense. On the 11th day of January, 1814, he received a letter from Moses Myers & Son, as agents, demanding the flour, and proffering their own responsibility, to comply with the decision of a court, as to the quantum of compensation. The flour was delivered, and this suit brought. It is prayed that a master may be decreed to report, what sum is due, and that it may be paid. The charter-party lets the vessel, engages to receive the cargo to proceed with the first fair wind, and to deliver, &c. (excepting always "restraints of princes, and rulers,") for which the freighters covenant to pay, &c: the owner to allow 45 running days, for loading and delivery: and to receive demurrage at the rate of 10 guineas per day. The letter of 3d of March, 1813, forbidding Wilson to send the ship to sea, "under existing circumstances," was exhibited in evidence. The answer admits the contract, &c., but alleges, that before she proceeded to sea, the blockade commenced. The ship was provided with a Sidmouth license, but the blockade embraced such vessels, as well as others, which fact became notorious, by the sending back of such vessels.

Upon these facts, the plaintiff claims the full freight, as if the voyage had been performed, because he was stopped by the agent of the defendants, when ready to proceed upon it. If this be not allowed, then he claims compensation for his labour and expenses, performed and incurred at the request, and by the direction of the defendants. The defendants insist, that they are responsible for

nothing: that the plaintiff has not entitled himself to freight, because the voyage was not even commenced: and because, the whole contract was rendered so illegal, by the British license, with which the ship was furnished, that neither party can recover under it. The Woodrop Simms was furnished with a license, granted by the British government, then at war with the United States, to protect her in the voyage, mentioned in the charter-party. It is not denied, that if, by contract, Wilson had expressly stipulated, that the vessel should sail under the protection of such a license, the charter-party would have been vitiated, and the plaintiff would have been incapable of recovering on it.² But it is

² See *Patton v. Nicholson*, 3 Wheat. [16 U. S.] 204. Action of assumpsit for \$750, for the sale of a certain paper, called a sawyer's license, to which the defendant pleaded non-assumpsit. Evidence offered to the jury, to show, that both parties were citizens of the United States, and that the license was sold by the plaintiff, to the defendant, in Alexandria, D. C., to be used for the protection of the schooner Brothers, an American vessel, during the war, against enemy's vessels, on a voyage from Alexandria, to St. Bartholomews, to be cleared out for Porto Rico. Marshall, C. J., said, that the opinion of the court was, that the use of a license or pass, from the enemy, by a citizen, being unlawful, one citizen had no right to purchase of, or sell to, another, such a license, or pass, to be used on board an American vessel. "In the several cases during the late war, of *The Julia*, 8 Cranch [12 U. S.] 181; *The Aurora*, Id. 203; *The Hiram*, Id. 444, 1 Wheat. [14 U. S.] 440; and *The Ariadne*, 2 Wheat. [15 U. S.] 143,—the court determined, that the use of a license, or passport of protection, from the enemy, constitutes an act of illegality, which subjects the property sailing under it, to confiscation in the prize court. The act of the 2d Aug. 1813, c. 535 [Colvin's Laws], and of 6th July, 1812, c. 452, § 7 [Colvin's Laws], prohibiting the use of licenses, or passes, granted by the authority of the government of the United Kingdom of Great Britain and Ireland, repealed by the act of 3d March, 1815, c. 766, were merely cumulative upon the pre-existing law of war. The Saunders [Case No. 12,372]. It follows, as a corollary from this principle, that a contract for the purchase or sale, of such a license is void, as being founded upon an illegal consideration. That no contract whatever, founded upon such a consideration, can be enforced in a court of justice, is a doctrine familiar to our jurisprudence, and was, also, the rule of the civil law. It is upon the same principle, that every contract, whether of sale, insurance, or partnership, or growing out of a commercial intercourse, or trading with the enemy, is void. Thus, it has been held by the supreme court of New York, that a partnership, between persons, residing in two different countries, for commercial purposes, is, at least, suspended, if not ipso facto determined, by the breaking out of war between those countries; and that, if such partnership expire by its own limitation, during the war, the existence of the war, dispenses with the necessity of giving public notice of the dissolution. *Griswold v. Waddington*, 15 Johns. 57." Mr. Wheaton's note (a) to *Patton v. Nicholson*, supra. A vessel and cargo, which is liable to capture, as enemy's property, or for sailing under the pass, or license of the enemy, or for trading with the enemy, may be seized, after her arrival, in a port of the United States, and condemned as prize of war. The delictum is not purged, by the termination of the voyage. *The Caledonian*, 4 Wheat. [17 U. S.] 100.

insisted, that the fact of the license being on board, did not contaminate the charter-party, which contains no stipulation respecting it, nor annul the contract of which it is not an ingredient; the more especially as the voyage had not commenced, and the owner of the vessel might have parted with the license before she sailed.

This argument assumes a fact upon which its whole force depends. It is, that the license was not an ingredient in this contract. It is true, it is not mentioned in the charter-party. But if the consideration be contrary to law, it is not necessary that such illegal consideration should be expressed in the instrument. It may be pleaded and shown in evidence. That this Sidmouth license did form an ingredient in the contract, that the plaintiff would have failed in his engagement, and, supposing the contract to sail under the protection of a license to be legal, would have been responsible in damages, had his vessel sailed without such protection during the war, is, I think, satisfactorily proved. The contract itself, and the circumstances under which it was made, would go far in preparing us to believe the well and mutually understood views of the parties. I will not undertake to say what influence this mutual understanding might have been entitled to, had it not been communicated by the parties to each other; but if it was communicated, if the plaintiff declared, that his vessel was furnished with such a license, and the defendants chartered her on that declaration, the plaintiff was bound to make his vessel such as he described her to be, at least, so long as the license was material. I think the testimony shows, that these reciprocal communications were made by the parties. The defendants were about to make a voyage which required a British license, and a license for a particular port. They would, of course, inquire for a vessel furnished with such a license, and their inquiries would be answered, by any person disposed to make the contract, that his vessel was so furnished.

The letter from Robert Pollard to James Dykes & Co., authorizing the transaction on the part of his friends in New York, dated January 25th, 1813, contains these expressions: "I will thank you to charter a good vessel that will take from 3500 to 4000 barrels for Cadiz, if practicable, at a rate not higher than \$2.75 a \$3 per barrel, having a Sidmouth license; but if this cannot be done, to take up one for Lisbon, having such a license." In a letter, dated the 30th of the same month, James Dykes & Co., referring to a previous letter, say, "Dickson lately failed in exchanging his Sidmouth license to Lisbon, for one to Cadiz; in consequence, we have chartered the 'Woodrop Simms,' to load flour for you to Cadiz, at \$3 per barrel, &c. Her Sidmouth is dated the middle of August, which made her owner, Mr. George Wilson, very tenacious about time." The charter-party is dated the 31st of January, and is executed by James Dykes & Co., for Robert Pollard, agent for

Le Roy, Bayard & M'Iver. Wilson, therefore, must be supposed cognizant of the authority, under which Dykes & Co. acted; and that authority contains the instruction to charter a vessel, furnished with a Sidmouth license, for Cadiz. These papers, with the circumstances under which the contract was made, circumstances which, in themselves, are testimony never to be disregarded, prove, I think, that the possession of the Sidmouth license, was communicated, and was the inducement to the contract. If so, it has the same influence, as if it had been mentioned in the charter-party, so long as it was on board, and as it was material that it should be on board.

It has been insisted for the plaintiff, that, admitting the testimony to prove the fact, it is not alleged in the pleadings, and the proof must, therefore, be disregarded. It is undoubtedly true, that a decree must be according to the allegations, as well as the proofs in the cause; but it is not necessary, that every circumstance attending a general fact, should be minutely alleged. In this case, the defendants say that the vessel was provided with a Sidmouth license, but do not aver, that this license formed an ingredient in the contract. If I should be of opinion, that the defendants could not, on this account, avail themselves of this defence, and that, in consequence thereof, the plaintiff would be allowed to claim the whole freight agreed on in the charter-party, so that the real justice of the cause would be defeated, I would certainly permit them to amend their answer on equitable terms; but not to amend it, so as to defeat the justice of the case. But I do not now think this part of the case material, because the blockade, having been imposed and declared, after the charter-party was signed, I do not think, the letter of the 3d of March, 1813, gave Wilson any right to claim freight, on the principle, that the voyage was arrested by Le Roy, Bayard & M'Iver. The blockade justified their interference. And as the voyage was never made, and the freight never earned, the owner of the vessel cannot recover on the charter-party, whether the parties to that instrument were bound by it or not. But as the view I take of the effect of the charter-party, has some influence on those circumstances, on which the decision of this court may depend, I will observe, that in that contract there was nothing morally wrong. The *George* [Case No. 5,327]. It is annulled by the law, upon principles of policy; and this operation of the law upon it, was unknown to the best informed among us, until the decision was made in the supreme court of the United States. See cases cited in note [supra]. The parties, therefore, are, in fact, innocent. The contract was made with a belief that it was valid, and, therefore, I think, that although it could not have been enforced, it will not infect and vitiate any other contract between the parties. On the 3d of March, the defendants forbade the "*Woodrop Simms*" to proceed to sea, and afterwards, on the 19th of June, she was or-

dered by them, to continue ready to prosecute the voyage, so soon as the blockade should be removed, which, the letter says, was daily expected. The expenses, then, which were incurred, and the services which were rendered, perhaps, from the 3d of March, certainly from the 19th of June, were incurred and rendered by the direction of the defendants. Had the defendants, on understanding that the license would not protect the Woodrop Simms, from the effect of the blockade, allowed her owner to land his cargo, he might have employed his vessel, perhaps, in the bay navigation; certainly he would have been liberated from all the extra expenses of retaining his vessel in a state of preparation for sea.

While things were in this uncertain state, a proposition was made by Wilson, to vacate the contract, and abandon the voyage, on certain terms, which are stated generally, but as the proposition itself, is not before the court, they cannot be particularly stated. This proposition was not accepted, but afterwards, on the 11th day of January, 1814, a proposition to abandon the voyage, was made on the part of the defendants, who demanded the delivery of the flour, offering to abide by the decision of a court. On this letter, the flour was delivered, and upon this part of the transaction, the claim of the plaintiff, in my opinion, rests. He was in possession of the cargo, and had a right to hold that possession until he could perform his voyage. Whether he performed this voyage, with or without the license, he could have retained the flour at Cadiz, until the freight was paid. If the blockade should be of equal continuance with the war, he might at the expiration of the war, have made the voyage without the license; and I am not prepared to say, that in that case he might not have recovered the stipulated freight, even on the charter-party. In the mean time, the cargo might be, and, probably, would have been, totally lost to the defendants. These advantages were given up with the flour. It could not have been expected by either party, that they should have been given up for nothing. The fair construction then of the contract, under which the flour was restored to the defendants, is, I think, that some equitable compensation should be made, with a view to all the circumstances of the case. This is rather a fit subject for the consideration of the parties themselves, or of friendly arbiters, than of a court. It is a case of hardship, and of loss on both. Each ought to concede something. If the court must decide it, I am not certain what will be my ultimate decision, but I shall now direct an account to be taken, of the expenses incurred by Wilson, from the date of the charter party, to the time of restoring the flour, stating separately those which were incurred, in taking the cargo on board, and prior to March 3d, 1813, those which were incurred between the 3d of March, and 19th of June, and those which were incurred after the 19th of June. In addition to this report, I could wish to be informed how

cases of this character have been generally settled by the parties.

June 7th, 1820, the order of the court was as follows: "This cause came on, &c. On consideration whereof, the court doth direct an account to be taken by one of its commissioners, of the expenses incurred by the plaintiff, from the date of the charter party, in the proceedings mentioned, to the time of restoring the flour, the cargo of the Woodrop Simms, by the plaintiff, to the defendants Moses Myers & Son, stating separately those which were incurred in taking the cargo on board, and to the 3d March, 1813, those which were incurred between the 3d March, and the 19th June, 1813, and those incurred after the said 19th June, which account he is directed to report to the court, &c." In obedience to this order, Commissioner John Cowper, made a report of the expenses incurred by the plaintiff, during the three periods specified in the order. The expenses incurred from the date of the charter-party, to the 3d March, amounted to \$1943 24 cents. This however included "the cost of a Sidmouth license, \$1000;" those incurred for the second period, amounted to \$633 50 cents; and those after the 19th June, to \$359 52 cents, making the aggregate sum of \$2936 26 cents, principal. He also calculated the interest on those respective sums, from the 3d March, the 19th June, and 31st July, 1813, to 3d December, 1820, the time of the report, making an aggregate of principal and interest of \$4281 98 cents. The court rejected the charge for the Sidmouth license, and the interest on it amounting to \$1465, and rendered a decree for the balance.

9th June, 1821, MARSHALL, Circuit Justice, without expressing any further opinion, directed the following decree to be entered: "This cause came on to be finally heard on the papers formerly read, and on the report of the commissioner, and was argued by counsel. On consideration whereof, the court, disapproving of so much of the report, as allows one thousand dollars for the Sidmouth license, with interest thereon, and approving the residue thereof, doth adjudge, order, and decree that the defendants do pay to the plaintiff, the sum of two thousand, eight hundred and sixteen dollars, ninety five cents, and his costs by him about his suit in this behalf expended."

Case No. 17,818.

WILSON v. LIFE ASS'N OF AMERICA.

[3 Cent. Law J. 715, 765; 1 6 Ins. Law J. 240.]

Circuit Court, E. D. Missouri. Oct. Term, 1876.

LIFE INSURANCE — ACTION ON POLICY — ADMISSIBILITY OF DECLARATIONS OF ASSURED.

The case of Wilson v. Life Ass'n of America, was lately decided in the United States circuit court in Missouri [by Treat, District Judge], up-

¹ [Reprinted from 3 Cent. Law J. 715, 765, by permission.]

on the proposition that the declarations of the insured husband, made after the date of the policy, as to his health existing, or matters of private history occurring, prior to the date of the policy, are not admissible as evidence in a suit by the wife upon her policy.

[Compare Evers v. Life Ass'n of America, 59 Mo. 429.]

WILSON (LINDENBERGER v.). See Case No. 8,361.

WILSON (LOVEJOY v.). See Case No. 8,551.

WILSON v. LUDLOW. See Case No. 8,052.

Case No. 17,819.

WILSON v. McCLEAN et al.

[1 Cranch, C. C. 465.]¹

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

EVIDENCE—STATEMENT OF GROUNDS FOR BELIEF.

When a witness states the grounds of his belief of a material fact, his belief, together with the reasons of his belief, are proper evidence to be left to the jury.

In a deposition the deponent said he "*believed the goods were for the house of McClean & Winterberry, as they were shipped to McClean & Winterberry at Alexandria.*"

Mr. Youngs, for defendant, moved the court to strike out the words above (in italics), which the court refused, because the witness has stated the grounds of his belief.

DUCKETT, Circuit Judge, absent.

WILSON (McIVER v.). See Case No. 8,833.

Case No. 17,820.

WILSON v. MANDEVILLE et al.

[1 Cranch, C. C. 433.]¹

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

LIMITATION OF ACTIONS—MERCHANT'S ACCOUNTS.

The statute of limitations, does not apply to accounts between merchants.

Assumpsit for goods sold and delivered. Pleas general issue, and limitation of five years. Va. Law, Dec. 19, 1792, p. 107, § 4.

E. J. Lee, for plaintiff, moved for leave to withdraw the general replication and put in a special replication, that the money in the several promises, &c., became due "on trade and merchandise had between the plaintiff and defendants as merchants, and wholly concerned the trade of merchandise." This replication was taken verbatim from that in Webber v. Tivill, 2 Saund. 122.

Mr. Lee cited Scudemore v. White, 1 Vern.

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

456; Chievely v. Bond, 4 Mod. 105; Catling v. Skoulding, 6 Term R. 189.

Mr. Youngs, for defendant, contended that the exception in the statute applies only to actions of account.

THE COURT permitted the general replication to be withdrawn and the special replication to be filed, being of opinion that the exception did not apply to actions of account only, but to assumpsit upon open accounts. See the cases cited in notes to the case of Webber v. Tivill, 2 Saund. 124.

[See Case No. 17,821.]

Case No. 17,821.

WILSON v. MANDEVILLE et al.

[1 Cranch, C. C. 452.]¹

Circuit Court, District of Columbia. Dec. 18, 1807.²

LIMITATION OF ACTIONS—MERCHANTS' ACCOUNTS—PRACTICE.

1. The statute of limitations does not apply to accounts current of trade and merchandise between merchants, and it is not material that all dealings between the parties had ceased for more than five years before the bringing of the suit.

2. After judgment for the plaintiff upon demurrer to the replication to the plea of limitations, the court will not permit the defendant to withdraw the demurrer, and rejoin specially, unless he can show by affidavit, that it is necessary to the justice of the case.

Assumpsit. The declaration consisted of three counts: (1) Indebitatus assumpsit for goods sold and delivered. (2) Quantum valent. (3) Indebitatus assumpsit in the sum of \$135.47, "for the hire of a certain negro man named Herbert, by the plaintiff, before that time hired to the defendants at their special instance and request, and they the said defendants according to that hiring, had used and labored the said negro man; and being so indebted the said defendants in consideration thereof," &c., "promised to pay," &c. Pleas: (1) Non assumpsit. (2) The act of limitations, non assumpsit infra quinque annos. Replication: "That the money in the several promises and undertakings aforesaid above mentioned in the declaration, at the time of making the promises and undertakings aforesaid, became due and payable on an account current of trade and merchandise had between the said plaintiff and the said defendants as merchants, and wholly concerned the trade of merchandise." Rejoinder: "That in the month of January, 1799, the partnership of Mandeville and Jameson was dissolved, and public notice given of such dissolution, of which the plaintiff had a knowledge at the time; and that at the time of the said dissolution of the partnership aforesaid, all accounts between the said plaintiff and

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

² [Affirmed in 5 Cranch (9 U. S.) 15.]

the said Mandeville and Jamesson ceased, and since which time no accounts have existed, or been continued between the said plaintiff and the said defendants, and this they are ready to verify," &c. Surrejoinder: "That the goods, wares, and merchandise in the said declaration mentioned, were by the said plaintiff sold and delivered to the said defendants, and the said negro in the said declaration mentioned was hired by the said plaintiff to the said defendants, before the 9th day of January, in the year 1799, the time when the said defendants in their said rejoinder state their said copartnership was dissolved, and this," &c. Demurrer: "Because the surrejoinder is a departure in this, that it is no answer to the defendant's rejoinder."

E. J. Lee, for plaintiff, cited *Scudemore v. White*, 1 Vern. 456; *Chievly v. Bond*, 4 Mod. 105; *Catling v. Skoulding*, 6 Term R. 189.

Mr. Youngs, for defendant, cited *Webber v. Tivill*, 2 Saund. 124; *Welford v. Liddel*, 2 Ves. Sr. 400.

[See Case No. 17,820.]

CRANCH, Chief Judge. Upon this demurrer the first question is whether the replication is substantially good. If it be consistent with the declaration and goes to fortify it, and to avoid the effect of the defendants' plea in bar, it is good; but if it be inconsistent with the declaration, or be no answer to the defendants' plea, it is bad, and judgment must be against the plaintiff. The declaration charges that the defendants are indebted to the plaintiff in a certain sum, for the time of a negro. The replication avers that the money became due and payable on an account current of trade and merchandise had between the plaintiff and defendants as merchants, and wholly concerned the trade of merchandise. The question then occurs, whether money due for the hire of a negro, can become due and payable on an account current of trade and merchandise between merchants, and whether such account can be said wholly to concern the trade of merchandise. There can be no doubt that money due for the hire of a servant may be a proper charge in an account current between merchants; the servant may even be employed as a porter in a merchant's warehouse; or he may be employed in other confidential business concerning the trade of merchandise, so that such an account may, strictly and literally, "wholly concern the trade of merchandise." If the defendants had taken issue upon the facts averred in the replication, and the plaintiff should have produced in evidence an account current, rendered to him by the defendants, giving credit to the plaintiff for the hire of the negro, I imagine it would have been good evidence to show that the money for the negro hire was due on an account current of trade and merchandise. In order to recover by law the amount of an account current, it is often necessary, according to

the forms of legal proceedings, to divide it into distinct parts, classing charges of the same kind together, and framing a particular count in the declaration for each class. It may happen that only one item of the account may apply to one count of the declaration; and that item alone would not constitute an account current; yet it is evident that the money due for that item may be due upon an account current, and such may be the present case. The replication therefore is not inconsistent with the declaration.

The next question is whether the defendants' rejoinder is good. The facts stated in this plea are, that in January, 1799, all accounts between the plaintiff and the defendants ceased: and that since that time, no accounts have existed, or been continued, between the plaintiff and the defendants. It is evident that this rejoinder is no answer to the replication, unless by implication, (derived from the negative pregnant, "no accounts have existed between the plaintiff and defendants since January, 1799,") that the accounts had been settled and stated and the balance paid. Because if such settlement had not taken place, the account must have continued to exist notwithstanding the dissolution of the co-partnership, and although no further dealings were had afterwards between them. But if the meaning of the rejoinder be, as it seemed to be understood by the defendants' counsel, that all dealings ceased at that time between the plaintiff and defendants, and that no new mercantile transactions had since taken place between them, the question will occur whether, a cessation of dealings for five years before the bringing of the action, takes away from the plaintiff the benefit of the exception in the statute, in favor of merchants' accounts. No case has been cited which sanctions such a doctrine.

The result of the cases collected in the notes to the case of *Webber v. Tivill*, is that where there are mutual accounts, and some of the items credited are within the six years, the plaintiff need not rely on the exception in favor of merchants' accounts, but may rely upon those items as evidence of an acknowledgment of there being an unsettled account and a promise to pay the balance. But when no items are within the six years, then it behooves the plaintiff to rely on the exception in favor of merchants, and to plead it; and then it is immaterial whether any part of the dealings were within the six years or not, for the case is wholly out of the statute. These principles are acknowledged by Lord Kenyon, in the case of *Catling v. Skoulding*, 6 Term R. 189, and are in substance stated by Sergeant Williams, in his notes to the case of *Webber v. Tivill*. If this rejoinder is to be considered as an implied averment that the accounts were settled and discharged, it is bad, because it is not a direct averment, but is a negative pregnant, and because it amounts to the general issue. So that whatever may be the meaning of the rejoinder, it

is bad. This being the opinion of the court, it is unnecessary to inquire whether the sur-rejoinder be good or bad. The judgment must be for the plaintiff on the demurrer.

Opinion given nem. con.

Mr. Youngs, after the decision upon the demurrer, moved the court for leave to withdraw the demurrer and take issue on the plaintiff's replication to the plea of the statute of limitations.

But THE COURT refused, unless the defendant could show, by affidavit, that the plea of the statute was necessary to the justice of the case; namely, that his evidence was lost, &c.

Judgment affirmed in supreme court of the United States. 5 Cranch [9 U. S.] 15.

Case No. 17,822.

WILSON v. MARSHAL OF THE DISTRICT OF COLUMBIA.

[1 Cranch, C. C. 608.]¹

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

HABEAS CORPUS—IMPRISONED DEBTOR.

When a debtor is in the prison bounds, the court will not award a habeas corpus to discharge him on the ground that his creditor has refused to pay his daily allowance.

Motion for habeas corpus to bring up W. Wilson, a debtor confined in the prison bounds of Alexandria, upon a *capias satisfaciendum* in a civil cause, to be discharged. The marshal having demanded of the creditor the daily allowance according to the act of congress of March 3, 1803 (2 Stat. 237), which the creditor refused to pay. Notice of this motion had been served on Colonel Simms, the agent of the creditor.

E. J. Lee, for Wilson. There is no difference between imprisonment within the walls of the prison-house and the walls of the prison-yard. The statute says that the party keeping within the bounds shall be "adjudged in law a true prisoner."

THE COURT refused to issue the habeas corpus, saying that they would not in this *ex parte* summary mode undertake to decide the question of law. Mr. Wilson, if he chose to run the risk of involving his sureties, might depart; or if the marshal was satisfied, he might discharge him; or if the marshal refused, he might bring his action of false imprisonment.

Mr. Lee afterwards applied to the supreme court of the United States, who refused to award a habeas corpus, not being satisfied that a habeas corpus is the proper remedy in a case of arrest under civil process. 6 Cranch [10 U. S.] 52.

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

Case No. 17,823.

WILSON et al. v. THE MARY.

[Gilp. 31.]¹

District Court, E. D. Pennsylvania. Dec. 12, 1828.

PUNISHMENT OF SEAMEN — POWERS OF MASTER — IMPRISONMENT IN FOREIGN JAILS — ADVICE OF CONSUL.

1. The master may confine a refractory seaman on board of his vessel, inflict reasonable personal correction, or discharge him without payment of his wages, according to the enormity of his offence.

[Cited in *Wilkes v. Dinsman*, 7 How. (48 U. S.) 129.]

2. The practice of imprisoning disobedient seamen in foreign gaols is of doubtful legality, and to be excused only by a strong case of necessity.

[Cited in *Jordan v. Williams*, Case No. 7,528; *The William Harris*, Id. 17,695; *Jay v. Almy*, Id. 7,236; *Wilkes v. Dinsman*, 7 How. (48 U. S.) 122; *The Elwin Kreplin*, Case No. 4,427.]

3. If the imprisonment of a seaman in a foreign port is improper, the expenses of it, or of the employment of a person in his stead, are not to be deducted from his wages.

4. The advice of an American consul, in a foreign port, gives to the master of a vessel no justification for an illegal act.

[Cited in *The William Harris*, Case No. 17,695; *Jay v. Almy*, Id. 7,236; *Tingle v. Tucker*, Id. 14,057; *The Elwin Kreplin*, Id. 4,427; *Coffin v. Weld*, Id. 2,953.]

The libellants [Edward Wilson and John Richards] were seamen on board of the American brig *Mary* [Dodd, master], which arrived in the harbour of Port-au-Prince on the 28th August, 1828, and remained there until the 22d October, following. On several occasions, while the brig lay in port, the crew were guilty of much insubordination, and the captain, after consulting the American commercial agent, as he alleged, caused the libellants to be confined in the common gaol. This was done more than once, and, the last time, for a period of three weeks, during which a person was employed to do their work. On the arrival of the vessel at Philadelphia on her return, the captain refused to pay the libellants the full amount of their wages, having deducted therefrom, and charged them with, the whole expenses incurred on account of their imprisonment at Port-au-Prince, and the sum paid to the person employed there in their stead. The present proceeding was instituted to recover the sum thus withheld.

Mr. Grinnell, for libellants.

Mr. Phillips, for respondent.

HOPKINSON, District Judge. The practice of imprisoning disobedient and refractory seamen in foreign gaols is one of doubtful legality. It is certainly to be justified only by a strong case of necessity. It is not among the ordinary means of discipline put into the hands of the master. I am inclined to think there should be

¹ [Reported by Henry D. Gilpin, Esq.]

danger in keeping the offender on board, or some great crime committed, when this extreme measure is resorted to. It should be used as one of safety, rather than discipline, and never applied as a punishment for past misconduct. The powers given by the law to the master, to preserve the discipline of his ship, and compel obedience to his authority, are so strong and full, that they can seldom fail of their effect; they should be clearly insufficient, before we should allow the exercise of a power which may so easily be made an instrument of cruelty and oppression, and may be so terrible in its consequences. A confinement in an unwholesome gaol, in a hot and pestilential climate, may be followed by death or some disabling disease. In this case the libellants were taken from the prison when the brig sailed on her return; and although one of them was able to do his duty, the other was prevented by sickness for the whole voyage. I would rather altogether deny a power which can be so seldom necessary, than trust it in hands, in which it is so likely to be abused, and so difficult to be regulated. The master may, without the aid of foreign police officers and dungeons, in which he cannot control, even if kindly disposed, the treatment of his men, take measures of great strength to enforce the discipline of his ship. He may there confine a refractory sailor; he may stop his provisions; he may inflict reasonable personal correction, according to the enormity of the offence and the obstinacy of the offender; and, if he be incorrigibly disobedient and mutinous, he may discharge him, and withal he incurs a forfeiture of his wages. A firm and judicious exercise of these powers can hardly fail of reducing the most perverse to obedience.

Without deciding the general question, whether the master of a vessel may, under any circumstances, imprison a seaman in the gaol of a foreign port, under the control and discipline of a foreign police and its officers, for the mere maintenance of his own authority, I will examine the facts of this case under the principles above mentioned. (The judge thought the evidence was not such as to warrant the imprisonment, and proceeded.) If the imprisonment in this case was unauthorised, the men cannot be charged with the expenses attending it; especially with their boarding which the master was bound to provide. Nor is it just to forfeit their wages; or, what is the same thing, charge them with the pay given to another hand. They have been punished for their misconduct, by their imprisonment, and to inflict these penalties would be to double the punishment.

I will take this occasion to notice an error which, I fear, has frequently, as in this instance, misled our masters of vessels. They seem to believe that they may do any thing, provided they can obtain the assent of the consul to it; which assent consuls are apt to give with very little consideration. When the master, on his return, is called upon to answer for his conduct; he thinks it is enough to produce a consular certificate approving his proceedings; or

to say, he consulted the consul, or acted on his advice. This is altogether a mistake. It is certainly a very prudent precaution to consult the consul, in any difficulty, and if the case were fully and fairly stated to him, and his advice faithfully pursued, it would afford a strong protection on the question of malicious or wrongful intention, but it can give no justification or legal sanction to an illegal act; nor deprive those, who have been injured, of their legal rights and remedies.

WILSON (MASON v.). See Case No. 9,257.

Case No. 17,824.

WILSON et al. v. MAXWELL.

[2 Blatchf. 316.]¹

Circuit Court, S. D. New York. Oct., 1851.

CUSTOMS LAWS — ASCERTAINMENT OF QUANTITY — ALLOWANCE OF TARE — PENALTIES — APPRAISEMENT OF PACKAGES.

1. The tariff act of July 30th, 1846 (9' Stat. 42), did not vary the law previously in force regulating the method of ascertaining the quantity of merchandize imported. Such quantity is still to be ascertained by the rules prescribed in sections 58 and 59 of the act of March 2d, 1799 (1 Stat. 671, 672).

2. Accordingly, where soap in boxes was imported in 1850, *held*, that the dutiable weight was the gross weight of the soap and boxes, deducting only 10 per cent. as tare, as prescribed by section 58 of the act of March 2d, 1799, and that the importer was not entitled to an allowance of the actual weight of the boxes as tare. [Cited in *Cobb v. Hamlin*, Case No. 2,922.]

3. But, the soap having been entered at the custom-house at a valuation based upon its net weight, after deducting the actual weight of the boxes, and the custom-house valuation, upon an allowance of only 10 per cent. on the gross weight as tare, having exceeded the invoice valuation by more than 10 per cent., and the collector having then imposed an additional duty or penalty of 20 per cent. upon the custom-house valuation, claiming that such penalty was authorized, in consequence of such excessive valuation, by section 8 of the act of July 30th, 1846 (9 Stat. 43): *Held*, that the penalty was illegally imposed.

4. The weight of the boxes, cases or packages in which goods are imported is not the subject of appraisement, within the meaning of section 8 of the act of July 30th, 1846.

5. The case of *Grinnell v. Lawrence* [Case No. 5,831], cited and applied.

This was an action to recover back money paid to the defendant [Hugh Maxwell] as collector of the port of New York. The facts were these: The plaintiffs [William S. Wilson and Francis Brown] imported from Marseilles into New York a quantity of castile soap in boxes, and entered it at the custom-house, in July, 1850, at the invoice weight of 11,749 pounds, and at the net weight, deducting the weight of the boxes as tare, of 9,436 pounds. The weight returned by the public weigher was 11,760 pounds, from which a

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

deduction of 10 per cent., or 1,176 pounds, was made for tare, leaving the net or dutiable weight at 10,584 pounds. The valuation of the importation on the entry, according to the net weight on the invoice, was \$550. The valuation on the return of the weigher, after taking off the 10 per cent. tare, was \$619 94, being an excess over the invoice valuation of \$69 94, or more than 10 per cent. The price or value of the soap itself was not changed by the custom-house valuation. The plaintiffs claimed the right to enter the soap at its net weight of 9,436 pounds, deducting the actual weight of the boxes, but the collector imposed duties on 10,584 pounds, allowing only the 10 per cent. tare. He also imposed an additional duty or penalty of 20 per cent. upon the custom-house valuation of \$619 94, because that exceeded the invoice valuation by more than 10 per cent. The plaintiffs paid, under protest, this additional duty or penalty, and also the duty on all beyond 9,436 pounds of soap, and then brought this action to recover back the amount so paid. A verdict was taken for the plaintiffs, subject to the opinion of the court.

John S. McCulloh, for plaintiffs.

J. Prescott Hall, Dist. Atty., for defendant.

Before NELSON, Circuit Justice, and BETTS, District Judge.

BETTS, District Judge. We think that the collector adopted the true interpretation of the law, in relation to the tare allowable. When duties are imposed on merchandize by the weight or measure, the importer is not required to pay for a greater quantity than actually arrives in the United States. *U. S. v. Southmayd*, 9 How. [50 U. S.] 637; *Marriott v. Brune*, Id. 619. But it lies with congress to prescribe the rules by which the quantity or value of merchandize imported shall be ascertained. Accordingly, it rests in its discretion to fix the particulars to be regarded in determining the quantity by weight of goods imported in boxes, casks, bags or other packages, and to exclude or include the boxes, &c., in the computation. If no regulation in that respect is adopted, the true principle is to consider the merchandize alone as subject to duty. *Marriott v. Brune*, Id. 619.

It is contended that the treasury circulars of March 24th, 1847, and January 5th, 1848, give the importer a right to the deduction of the actual tare on the importation of articles invoiced and entered by weight. We do not think that those circulars admit of such an interpretation. It would seem that the secretary of the treasury understood that the act of July 30th, 1846 (9 Stat. 42), in its arrangement of the method of imposing duties, had in effect supplanted the provisions of the 58th section of the act of March 2d, 1799. (1 Stat. 671), and he enjoined regulations to meet the case of importations of goods by weight in boxes, casks, &c. The regulations, however,

expressly prohibit the allowance, by way of tare or draft, of a greater deduction than was given by the act of 1799; and, if the plaintiffs adopt the treasury circulars as the foundation of their right to tare, they must be confined to the limits of those instructions.

But we do not understand that the tariff act of 1846 has in any manner varied the law previously in force regulating the method of ascertaining the quantity of merchandize imported. The 4th section of the act of 1846 recognizes the existence of the 58th and 59th sections of the act of 1799 as the means of determining the weight or gauge or quantity of goods imported, when the invoice does not contain the weight or quantity or measure. We do not suppose that this 4th section has operation only in case of an entire omission, in the invoice, of any statement of weight or measure, but are inclined to think that the provision is intended to apply the then existing law to importations which would have been subject to it previous to the act of 1846, although the invoice is made up on a valuation only, without any statement of quantity. Otherwise the government might be concluded by the invoice, in case it gave the weight or quantity, and would have discarded all authority to test the accuracy of that statement. We think that the language of the 4th section of the act of 1846 may be satisfied, without attaching to it an implication evidently so directly at variance with the whole policy of the revenue laws. The language is rather indirect and involved, but the want of perspicuity seems to arise out of the aim of the person who drew the section to conform the system of ad valorem duties, made universal by the act of 1846, to the provisions of the then existing laws, which require the weight or measure of particular classes of merchandize; and, under the impression that importations of such articles may, under the new act, be made on an invoice of value alone, it directs the weight or measure of them to be made at the expense of the owner, agent or consignee. The section appears to have been introduced out of greater caution, and for the purpose of avoiding the construction contended for by the counsel for the plaintiffs, and which the circulars of the treasury department tend to countenance. The revenue laws, as modified from time to time by congress, are construed and administered as an entire system, the later acts not superseding the prior ones, unless they are in conflict with them or expressly repeal them. *Aldridge v. Williams*, 3 How. [44 U. S.] 1. The 7th and 8th sections of the act of 1846 recognize this principle, in the one case modifying the existing tariff law, and in the other referring to it as supplying the mode of ascertaining the dutiable value of imported commodities. The 4th section, in our view of the subject, effects two purposes only, both of them in consonance with and in furtherance of the existing law. First. In respect to goods subject to weight,

it removes all doubt as to the application of the act of 1799, under this new arrangement of duties, when the invoice does not contain the weight, by directing the goods to be weighed. Secondly. It provides that the owner or consignee shall bear the expense. When the invoice does contain a statement of weight, it must, under the directions of the 8th section of the act of 1846, be proceeded with conformably to the act of 1799.

The weight returned by the weighers in this case, pursuant to the 38th section of the act of 1799, determined the quantity of soap subject to duty, and the collector properly imposed and collected duties on 10,584 pounds, because, although that was beyond the actual weight of the soap itself, yet the whole importation, including its boxes, is made subject to duty, excepting only 10 per cent. therefrom for the assumed weight of the boxes. It was in the discretion of congress either to impose duties on the gross weight, or to deduct from that a fixed rate of tare, or to permit the importer to have the allowance of actual tare. The law in this instance specified the mode or rule by which the tare should be determined, and the importer can claim nothing beyond that.

The remaining question is, whether the collector could legally impose an additional duty or penalty of 20 per cent. on the appraised valuation of \$619 94, the price or value of the soap itself not being changed. The 8th section of the act of July 30th, 1846, declares, that it shall be the duty of the collector to cause the dutiable value of imports to be appraised, estimated and ascertained, in accordance with the provisions of the then existing laws, and that, if the appraised value thereof shall exceed, by 10 per centum or more, the value declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected and paid, a duty of 20 per centum ad valorem on such appraised value. It is to be observed, that the valuation adopted in the entry was not changed by the appraisers, so as to affect the justness of the entry valuation. No point is made on the part of the government, that the weight given in the entry was not accurate, and it was found to correspond with the custom-house weight within a small fraction. The only question presented is as to the right of the plaintiffs to enter the importation according to the true weight, without obtaining the consent of the collector and naval officer to the allowance of the actual tare. Does the deficiency in weight in the entry, arising from an erroneous claim of tare, constitute an excess of value over the value declared in the entry, so as to subject the whole importation to an additional duty of 20 per cent.? The principle involved in this inquiry was considered and decided by this court in *Grinnell v. Lawrence* [Case No. 5,831]. The court there say: "The eighth section of the act of July 30th, 1836, imposes this duty" (the additional duty or penalty of

20 per cent.) "in cases where the appraised value of the goods imported shall exceed, by 10 per cent. or more, the value as declared in the entry." The "appraised value," as used in this act of 1846 and in that of August 30th, 1842, and, indeed, in all of the revenue acts, means the value of the goods, to be estimated and ascertained by the appraisers, either according to the "actual cost," "actual value" or "market value," as the case may be, exclusive of charges. The doctrine adopted by the court in that case was, that the enhanced valuation which called for and authorized the additional duty of 20 per cent. had relation alone to the goods imported, and did not include those extraneous particulars which the appraisers added to the appraised value of the merchandise, under the special direction of the various tariff acts, in order to make up the dutiable value of the importation. In that case, charges were so added; in this case, the weight of cases or packages is added; but neither of them are subjects of appraisement. So far from that, in this instance, the "actual cost," "actual value" or "market value" of the boxes is not a matter upon which the judgment of the appraisers is in any way exercised. On the contrary, the gross weight of the importation is ascertained by the weigher, and then the proper officer of the custom-house, by an arithmetical process prescribed by statute, fixes the deduction to be taken from the gross weight, and the remainder is the dutiable quantity.

Our judgment upon the second point, therefore, is, that this importation was not subject to the additional duty of 20 per cent. exacted by the collector, and that the plaintiffs are entitled to recover that amount, with interest from the time of its payment. Judgment accordingly.

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WILSON (MEEKER v.). See Case No. 9,392.

WILSON (MILLS v.). See Case No. 9,616.

WILSON (MITCHELL v.). See Cases Nos. 9,671 and 9,672.

WILSON (MOYNAHAN v.). See Case No. 9,897.

WILSON (NEW YORK & L. S. CO. v.). See Case No. 10,198a.

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Case No. 17,825.

WILSON v. The OHIO.

[Gilp. 505.] ¹

District Court, E. D. Pennsylvania. Nov. 24, 1834.

ADMIRALTY JURISDICTION—NAVIGABLE TIDE RIVERS—SEAMENS' WAGES.

1. A contract for wages on board of a steam-boat, plying between ports of adjoining states, on a navigable tide river, may be enforced by a suit in rem, in the admiralty.

[Cited in *The Mary*, Case No. 9,190.]

[Cited in *Holt v. Cummings*, 102 Pa. St. 215.]

¹ [Reported by Henry D. Gilpin, Esq.]

2. The pilot, deck-hands, engineer, and firemen on board of a steamboat are entitled to sue in the admiralty for their wages.

[Cited in *Thackarey v. The Farmer*, Case No. 13,852; *The Sultana*, Id. 13,602.]

HOPKINSON, District Judge. The question in this case is, whether the hands of a steamboat, that is, the pilot, the firemen, and deck-hands, navigating the river Delaware, between the city of Philadelphia and the state of Delaware, carrying passengers and merchandise, are mariners entitled to attach the vessel and recover their wages in this court. I have turned to my opinion in the case of *Smith v. The Pekin* [Case No. 13,090], which was a libel for wages. The libellant had shipped at Smyrna, in the state of Delaware, as cook and steward, to ply between Smyrna, Brandywine, and Wilmington, in Delaware, and the port of Philadelphia. A plea was filed to the jurisdiction of the court, on the ground taken in this case. It was fully argued, and the authorities carefully collected. After a deliberate examination of the law, I was well satisfied, that the service was a maritime service, and the court had jurisdiction of the case, and decreed accordingly. I adhere to that opinion.

As to the capacities, in which the libellants in this case were severally employed on board of the Ohio; the pilot, the deck-hands, the engineer and the fireman; I think they are all entitled to sue in the admiralty for their wages. In the case of *The Pekin*, the libellant was the cook and steward of the sloop, and might, in strictness, be said to have nothing to do with navigating her. In the case of *Ross v. Walker*, 2 *Wilson*, 264, it is said to be established, that any officer or common man who assists in navigating the ship, (except the master,) even the surgeon, is a mariner, and may sue in the admiralty for his wages. So of the carpenter; in short, any one, whose services are employed to preserve the ship, or those on board of her, is deemed, to this intent, to be a mariner.

Decree: That the libellant, Henry Wilson, recover and have paid to him the amount of wages claimed.

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WILSON (PATRIOTIC BANK v.). See Case No. 10,810.

WILSON (PHILLIPS v.). See Case No. 11,109.

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Case No. 17,826.

WILSON v. PIERCE.

[15 *Law Rep.* 137.]

District Court, N. D. California. March, 1852.

ADMIRALTY PROCEEDING—FOREIGN ATTACHMENT—NONRESIDENT DEFENDANT—JUDICIARY ACT.

1. The 11th section of the judiciary act of 1789 [1 Stat. 79] applies to the courts of the United States sitting in admiralty, as well as when sitting in equity and common law.

2. The libellant brought his libel in personam against the respondent, and joined other parties as trustees. Process of foreign attachment issued, according to the prayer of the libel, against the respondent and the supposed trustees. The marshal returned, as to the defendant, non est inventus, and that he had attached his goods, effects, and credits, in the hands of the trustees. The respondent, by his proctor, pleaded specially to the jurisdiction of the court, that the defendant was a citizen of another state, and then domiciliated therein, and was not found within that district at the time of serving the writ. *Held*, that it was a civil suit, against an inhabitant of the United States, commenced by original process, and, as such, within the prohibition of the 11th section of the judiciary act.

[Disapproved in *Atkins v. Fibre Disintegrating Co.*, Case No. 600. Approved in *s. c.* Id. 602, but overruled in *s. c.* 13 *Wall.* (85 U. S.) 306. Disapproved in *Cushing v. Laird*, Case No. 3,508.]

3. The case of *Clarke v. New Jersey Steam Nav. Co.* [Case No. 2,859] considered.

[This was a libel by Allen T. Wilson against Henry A. Pierce.]

HOFFMAN, District Judge. This was a libel in the admiralty, founded on an alleged breach of a maritime contract. The libel, after setting out the cause of action, prays that process in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction in suits in personam, may issue against the said defendant, to compel him to appear and answer on oath, all and singular, the matters, &c.; and that the court will be pleased to decree that the said defendant pay to the said libellant his damages, and that the said libellant be satisfied out of the goods and chattels, lands and tenements, moneys and credits of said defendant in the hands of Upham & Post, (garnishees,) and for his costs and charges. Process of foreign attachment issued in accordance with the prayer of the libel, and the marshal returned that the defendant was not found, and that he had attached his credits and effects in the hands of the garnishees named. To this process the defendant, by his proctor, appeared under protest to the jurisdiction, and filed his exceptions to the libel, on the ground that the defendant is a citizen of another state, and now domiciliated therein.

It is not claimed that the defendant was an inhabitant of this district, or that he was found here at the time of serving the writ. The important question then to be determined, is: Can a process of foreign attachment legally issue in the admiralty against a citizen and inhabitant of the United States, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ? The proceeding by way of foreign attachment, which in England rests only on the customs of London and Exeter, is demonstrated by the court in *Manro v. Almeida*, 10 *Wheat.* [23 U. S.] 473, to be a familiar and authorized method of exercising admiralty jurisdiction. It does not owe its origin to any local customs of England, but it is derived from the same sources as

those which furnish the other elements of admiralty powers. The authority, therefore, to attach the property of non-residents, which in court of common law results either from special custom or statutory provisions, (Com. Dig. "Attachment," B, D) in this court is derived from the usages and practice of courts of admiralty and civil law, which, as contradistinguished from those of courts of common law, regulate the modes of proceeding in the maritime tribunals of the United States. Act 1792.

The supreme court, in the case above cited, in deciding that the process of foreign attachment has the clearest sanction in the practice of the civil law, rely not only on the fact that it has been resorted to in one, at least, of the courts of the United States,—*McGrath v. The Candalero* [Case No. 8,809]; *McGrath v. The Candalero* [Id. 8,810]; *Bouysson v. Miller* [Id. 1,709]; *Ryan v. The Cato* [Id. 12,134],—but also on the explicit declaration of a work of respectable authority and remote origin, which has been universally recognised as among the best books on the practice of admiralty courts. In *Clerke, Praxis Adm.* (pt. 2, tit. 28), it is said: "If the defendant has concealed himself, or has absconded from the kingdom so that he cannot be arrested, if he have any goods, merchandise, ship, or vessel, on the sea or within the ebb and flow of the lord high admiral, a warrant is to be impleaded to this effect, viz: to attach such goods or ship of D., the defendant, in whose hands soever they may be, and to cite the said D. specially as the owner, and all others who claim any right or title to them, to be and appear on a certain day to answer unto P. in a civil and maritime cause."

By comparing the foregoing extract with the decision of which it forms the basis, it will be seen that the supreme court held that the process of foreign attachment might issue against the credits and effects of an absconding debtor who had fled beyond the jurisdiction, and against whom no means of redress remained unless by process of attachment. Such, in fact, were the allegations of the libel, and by the marshal's return it appears that the motion had been served by leaving a copy at the "late dwelling-house of Almeida, the defendant." The case of a similar process, against an "inhabitant" of the United States and a resident of another district, was not before the court. Dr. Brown, however, in his treatise on Civil and Admiralty Law, (volume 2, p. 434,) speaks of the easy and effective remedy (by process of foreign attachment), provided by the ancient practice of the admiralty court in cases where the person against whom a warrant has issued cannot be found, or lives in a foreign country. This proceeding, though not authorized according to Huberus, (Huberus de in Jus Vocando,) by the example of the civil law, he commends as salutary and effective; and though in latter times it has fallen into dis-

use in England, he laments the great mischief accruing to commerce from the want of it. *Browne, Civ. & Adm. Law, ubi supra.* If, then, the point to be decided were, whether the process of foreign attachment is in accordance with the principles, rules and usages of courts of admiralty, the case of *Manro v. Almeida* [supra], as well as those of *Bouysson v. Miller* [supra], and *The Invincible* [Case No. 7,054], would leave no room for doubt.

But it is urged that the prohibition contained in the 11th section of the judiciary act of 1789 presents an insuperable obstacle to the exercise of jurisdiction in the case under consideration. By that section it is provided that "No person shall be arrested in one district for trial in another, in any civil action, before a circuit or district court, and no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." It is not denied that the defendant in this case is an inhabitant of the United States, and that he is not an inhabitant of this district, nor is it asserted that he has been found within it at the time of serving the writ. If this proceeding had been instituted on the common law side of this court against a defendant similarly situated, there can be no doubt that the court would have been without jurisdiction. In the case of *Picquet v. Swan* [Case No. 11,134], it was concluded, after an elaborate investigation by Judge Story, that the process of foreign attachment, though in accordance with the local practice, could not issue from the circuit court against a defendant, unless he were in the one or the other predicament stated in the clause of the judiciary act above cited,—that is, unless he were either an inhabitant of the district or found within it, and this doctrine was affirmed by the supreme court in *Toland v. Sprague*, 12 Pet. [37 U. S.] 300.

If, then, the restriction contained in the judiciary act applies to civil suits at common law before the circuit courts of the United States, does the same prohibition apply to a civil suit before the district court in admiralty? It may be urged that the jurisdiction and modes of proceeding of the admiralty courts of the United States, rest exclusively on the grant in the constitution, and the rules furnished by the process act of 1789 and 1792;—that as, by those acts, the forms of proceeding are required to be according to the practice of the civil law and the rules and usages of courts of admiralty, and as the writ of foreign attachment is in accordance with such practice, rules and usages, the prohibition clause of the judiciary act has no application. But by the same process act (29th Sept. 1789), the forms of writs and modes of proceeding in the supreme courts of the states, respectively, were adopted into the judicial proceedings of the United States, on the com-

mon law side. And in the cases of *Picquet v. Swan* [supra] and *Toland v. Sprague* [supra] above cited, the very point adjudged was, that though the practice of the state courts authorized the proceeding by foreign attachment, yet that practice can have no effect where it contravenes the positive legislation of congress;—and that the state practice can be followed only where the court independently of it possesses jurisdiction; the process acts not having enlarged the jurisdiction, but only furnished rules for its exercise. The analogous provision, adopting in admiralty and maritime cases the practice of the civil law, must, it seems to me, receive a similar construction. If this reasoning be well founded, it follows that the process act, which prescribed the modes of proceeding in the admiralty cases, conferred no additional jurisdiction on the district courts, and that, if the prohibition contained in the judiciary act applies to courts sitting in admiralty cases, the prohibition was not removed, nor was the jurisdiction enlarged by the subsequent adoption of the civil law practice and that “of courts of admiralty.”

Does, then, the prohibition alluded to embrace the district courts sitting as a circuit court of admiralty? At first sight, the language would seem to admit no other construction. The terms of the clause are: “No civil suit shall be brought before either of said courts, (the circuit and district courts,) against an inhabitant of the United States by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.” In the case under consideration, the party sued is an inhabitant of the United States; the suit is confessedly in personam, for it is under the supposed sanction of the supreme court rules regulating actions in personam that the attachment issued. That the attachment is an original process is evident, not only from the fact that it can only issue, by the rules of the supreme court, as part of, and together with, process to be served upon each person, but also from the cases of *Picquet v. Swan* and *Toland v. Sprague*, where the process of foreign attachment to compel appearance was issued from the circuit court and was held to be illegal, and contrary to the prohibition contained in the section of the judiciary act under consideration.

But it is urged that, notwithstanding the language of the act, there is high authority to support the position that the process of foreign attachment can be resorted to in the admiralty to compel the appearance of non-residents, whether found within the district or not; and the cases of *Manro v. Almeida*, before cited; *Clarke v. New Jersey Steam Nav. Co.* [Case No. 2,859]; *Same v. Merchants' Bank*, 6 How. [47 U. S.] 344, have been cited. The case of *Bouysson v. Miller* [supra], is also referred to. But the case of *Manro v. Almeida* does not necessarily determine the point now before the court. In that case, as

has been seen, the attachment issued against an absconding debtor, and the monition was returned served by leaving it at his “late dwelling-house.” The court did not decide that, notwithstanding the 11th section of the judiciary act, an attachment could issue against an “inhabitant of the United States” who was not an “inhabitant” of the district where suit was brought, but who was domiciliated in another state, and who had not been personally served within the district. The object of the prohibition in question was, undoubtedly, to secure the inhabitants of the United States from suits in the United States courts, except in the districts they inhabited, or in which they might be found. It may well be that this exemption does not extend to the case of an absconding debtor who has fled from the district he inhabited, and from the United States, and against whom no other redress remained.

But the case of *Clarke v. New Jersey Steam Nav. Co.* affords a much stronger confirmation of doctrine contended for by the libellant, and has occasioned me the greatest perplexity and embarrassment. The point actually decided in that case was, that the district courts, as courts of admiralty, may award attachment against the property of foreign corporations found within their local jurisdiction, so as to compel the appearance of the corporation to answer the suit, or to subject the property attached to the final decree of the court. The whole argument turned upon an alleged distinction between the case of a private person and that of a corporation, and the court held that no such distinction existed. But it must be confessed the reasoning of the court proceeds upon the assumption, that process of attachment well lies in admiralty suit against the property of private persons whose property is found within the district, although their persons may not be found therein,—and the court observe, that ever since the case of *Manro v. Almeida* the question has been deemed entirely at rest. But it has been attempted to be shown that that decision does not necessarily extend to the case of an inhabitant of another district not found within the district where suit is brought; nor does Judge Story say in express terms that it covers such a case. The prohibitory clause in question does not seem to have been cited on the argument as presenting any obstacle to the jurisdiction, although certainly some decisions under it are cited in the opinion of the court. But the opinion of the court contains some expressions which, if taken without qualification, would seem decisive of the present question. “The jurisdiction of the admiralty,” observes the learned judge, “may be executed not only against persons found within the district, but also by attachment against their property found within it, although their persons are not there. In each case where the court acts upon the property, it acts solely in rem. and it is at the option of the owner whether he will appear and allow the proceedings to go in personam or not.”—“Unless

there be an appearance and a general defence, the decree of the court ultimately binds and acts in rem only upon the thing which is attached." *Picquet v. Swan* [Case No. 11,134]. That such is the effect of the decree, cannot be questioned; but the point for consideration is: Is the suit on that account a suit in rem, or rather does it cease to be "a civil suit brought against an inhabitant of the United States," within the meaning of the 11th section of the judiciary act?

The title of the suit is certainly in personam, for it names Henry A. Pierce as defendant. The supreme court rule, which is supposed to authorize this proceeding, is a rule prescribing the process in suits in personam, and by it the attachment can only issue as part of, or together with, process to be served upon the person. But if a proceeding by attachment, when the defendant does not appear and contest the suit, is to be treated like a proceeding in rem, and if, being such a proceeding, it is not within the clause prohibiting the bringing of any civil suit before the United States courts against an inhabitant of the United States, except in the district whereof he is an inhabitant, I have been unable to perceive why the same argument would not justify a proceeding by attachment in the circuit courts as well as in the admiralty; and yet in the former it has been adjudged to be illegal. See *Toland v. Sprague*, above cited. In all cases, if the defendant has never appeared and contested the suit, the proceeding is to be treated to all intents and purposes as a mere proceeding in rem, and not as personally binding on the party in possession. In *Bissell v. Briggs*, 9 Mass. 468, Chief Justice Parsons remarks: "If the goods, effects and credits attached are insufficient to satisfy the judgment, and the creditor should sue on that judgment in this state to obtain satisfaction, he must fail, because the defendant was not personally amenable to the jurisdiction of the court rendering the judgment." In *Kilburn v. Woodworth*, 5 Johns. 37, it was held that no suit could be maintained in New York, on a judgment obtained by default in Massachusetts, in a suit by attachment against a defendant domiciliated in New York. In *Story, Conf. Laws*, § 559, the same doctrine is laid down, nor is it necessary to cite further authorities to the point. If, then, it is urged that the decree in attachment suits in cases of default acts in the admiralty only in rem, and therefore is not within the prohibition of the 11th section, why is the judgment of the circuit court in a similar case, which it appears has only the same effect, any more within its operation? And yet that it is so has been, as we have seen, expressly decided. In *Toland v. Sprague*, 12 Pet. [37 U. S.] 330, the court say: "The right to attach property to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to process in personam." If this observation applies to suits in admiralty,—and I am unable to see why it does

not,—it would seem decisive of this case. It is not pretended that the defendant here is personally amenable to the jurisdiction. The court adds, "That even in case of a person being amenable to process in personam, an attachment against his property cannot be issued against him, except as part of, or together with, process to be served upon his person."

It is precisely in this form, and in accordance with this principle, that the supreme court rule directs process of attachment to be issued in the admiralty. It seems hardly supposable that process against the person should be required to precede or accompany the attachment, had the supreme court contemplated the issuing of an attachment in cases where the writ against the person would necessarily be a mere nullity. The more reasonable supposition would rather seem to be, that it was intended to restrict the issuing of attachments to the cases where, in the language of the court above cited, "the persons are amenable to the jurisdiction." If the clause in the 11th section has any application whatsoever to the district courts sitting in admiralty, it must, I think, be conceded that the person in this case was not so amenable.

The decision actually made in the case of *Clarke v. New Jersey Steam Nav. Co.* may perhaps be supported on grounds consistent with the view taken of the case before this court. Judge Story, as has been seen, held that an attachment might issue in the admiralty against the goods of a foreign corporation. It may be that the case of a corporation is not within the prohibition of the judiciary act. There is certainly some difficulty in affirming a corporation, as such, to be an "inhabitant" of any district, *Flanders v. Aetna Ins. Co.* [Case No. 4,852]; *Hope Ins. Co. v. Boardman*, 5 Cranch [9 U. S.] 57; [*Commercial & Railroad Bank of Vicksburg v. Slocomb*] 14 Pet. [39 U. S.] 60; [*Runyan v. The Lessee of John G. Coster*] Id. 122; [*Irvine v. Lumberman's Bank*] Id. 293; and some considerations may be urged to an attachment against the goods of a foreign corporation not applicable to a similar process against the goods of an individual. The proper process against corporations aggregate was, at common law, by *distringas*. *Bac. Abr.* "Corporations," E. 2. And if they have neither lands nor goods, it seems there is no way to make them appear, either in a court of law or equity. *Thusfeld v. Jones*, *Skin*. 27; 1 Vent. 367. The process of *distringas* is closely analogous to that of foreign attachment. [*McCormick v. Sullivant*] 10 Wheat. [23 U. S.] 196. And it may be that on these considerations an admiralty attachment may issue against the goods of a foreign corporation, even where the same process could not be allowed against the goods of a non-inhabitant not found. With regard to the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. [47 U. S.] 350, it is enough to say, that the exception to the jurisdiction, on the grounds we are now con-

sidering, was not taken, and the authorities are clear that the privilege is personal, and is waived by a general appearance. Pollard v. Dwight, 4 Cranch [8 U. S.] 421; Knox v. Summers, 3 Cranch [7 U. S.] 496; [Logan v. Patrick] 5 Cranch [9 U. S.] 288; Harrison v. Rowan [Case No. 6,140]; [Gracie v. Talmer] 8 Wheat. [21 U. S.] 699. In the case of Bouysson v. Miller [supra], the objection we are considering was not taken nor passed upon by the court.

The only decision which I have been able to find directly bearing on the principal question before the court, is *Ex parte Graham* [Case No. 5,657]. In that case the question arose, whether the provisions of the 11th section applied to the district courts as courts of admiralty in prize cases; and it was held, by Mr. J. Washington, that they did. It was urged that the restraints contained in that section were incompatible with the essential jurisdiction of an admiralty court, more especially in prize causes; and a distinction was attempted to be drawn between the courts of common law and equity and the admiralty jurisdiction in prize causes. But the court repudiated the doctrine, and declared, "that it is confidently believed that such a distinction is unauthorized by the laws of the United States." "The jurisdiction of these courts," says Mr. J. Washington, "in prize causes is limited as to persons, by the express provisions of the 11th section of the judiciary act before referred to. Prize proceedings against an inhabitant of the United States is unquestionably a civil suit, and, if it be against the person instead of the thing, the jurisdiction is excluded, unless it be instituted in the court of the district whereof he is an inhabitant, or is found at the time of serving process. The manifest policy of the judicial system of the United States was to render the administration of justice as little oppressive to suitors as possible, and corresponds entirely with the construction which confines the process of the courts within the limits of the district in which the court sits, and from which it issued."

The case from which the above citations are taken undoubtedly differs from the one under consideration. But the opinion of the court sufficiently establishes the important points that the provisions of the 11th section apply to the district courts sitting in admiralty, and that the limitation is not removed nor the jurisdiction enlarged by the process acts. If these doctrines are correct, it seems to me the present case is disposed of. It may further be observed, that the prohibition in question is by the act extended to all civil cases before either of said courts. If the admiralty jurisdiction of the district court be excluded from its operation, the only cases cognisable by the district courts to which it can apply, are suits against foreign consuls, and where an alien sues for a tort only in violation of the laws of nations or of a treaty of the United States;—cases

which, from their own nature as well as their unfrequent occurrence, would hardly seem to call for so express and solicitous a restriction of the jurisdiction of the court.

It may be contended that by the second supreme court rule the foreign attachment is expressly allowed as mesne process to be used in suits in personam, and that, inasmuch as these rules were prescribed by the court in virtue of acts of congress, they are to be regarded not only as of the highest authority, but as legislative enactments intercepting and repealing the 11th section of the judiciary act. But if any inference is to be drawn from the general language of the rule, it would rather seem to be, that the supreme court did not contemplate the issuing of an attachment in any case against a non-inhabitant, for it is required to be accompanied in all cases by a warrant of arrest,—which, against a person not an inhabitant, and not alleged to be within the district, would be an idle formality. The object of the rules was, to prescribe rules of practice in the admiralty courts of the United States, not to enlarge their jurisdiction; and unless the language of the rules admits no other construction, or its provisions no other application, it should not be deemed to have repealed an important provision of the fundamental and original act under which the courts of the United States went into operation. By the twenty-third rule of the supreme court, it is required that the libel, if in rem, should state the property to be within the district, and if in personam, the names, places of residence and occupation of the parties. If the first allegation in suits in rem is necessary to show that the court has jurisdiction, (except perhaps in prize cases,) the last allegation would seem to be required for the same purpose, and may not unreasonably be supposed to have been required that the court might see on the face of the libel that the case was not within the prohibition of the judiciary act.

It is urged, however, that the practice of issuing foreign attachments, in cases like the present, obtains in all the admiralty courts of the United States, and, therefore, must have a solid foundation in law. Whether such be the universal practice, I am ignorant. I have attempted to investigate its legal foundation, and after great consideration, have been unable to take the case out of the clause in question. But if the practice be as is represented, it must excite some surprise that neither in the elementary writers nor in the rules of court, so far as I have discovered, is any mode of proceeding indicated by which, in the case of non-residents, the opportunity of appearing is secured to the defendant. In all statutory provisions regulating proceedings by attachment, some time is always allowed for actual or constructive notice; and by the custom of London, it seems four successive defaults were first incurred, and then the plaintiff only obtained

execution for the money in the hands of the garnishee, on finding pledges to return it if the defendant, within a year and a day, disprove the original debt. Com. Dig. "Attachments," A. But in this case the proceeding contemplated is to go on to decree upon default therein, after the time usual when the defendant is personally served, (ten days,) and to have satisfaction thereof forthwith out of the moneys attached. Such a proceeding would be virtually *ex parte*, and, it seems to me, would never be allowed in a court of justice. It is urged, however, that the evil is, or might be as great, in all suits in *rem*. But suits in *rem* are instituted in only a limited number of cases, and are to enforce a charge on the specific thing seized. The presumption of the law is, that the party in possession of it for the owners, has the means, as well as interest, to defend it from all claims brought against it specifically, and the rules of the admiralty recognise the master as a proper party to appear and defend the suit. The claims brought to be enforced in *rem*, are, in almost all cases, the obligations created or liabilities incurred by the master, and if personal notice is to be served on any one, it should be on him; and this is effectually done by seizing his ship. But on other accounts the master is, in suits in *rem*, the proper party to be notified. By the maritime law he is regarded not so much as the agent or mandatory of the owners, as the administrator of the property, that is, the vessel, intrusted to his care and management. He acts for the owners rather in the character of a gerant or active partner of a *société en commandité*, or limited partnership, than as their agent. The *Phœbe* [Case No. 11,064], and authorities cited. Occupying this relation, there is, therefore, a theoretical propriety, as well as no practical danger, in treating a notice to him in suits in *rem* as sufficient.

But the case of a foreign attachment is wholly different. The bailee in whose hands the goods are attached, has not the information necessary to enable him, nor the motives to induce him, to defend an action against the bailor, having no reference to the subject of the bailment, except that the goods are attached. Still less has a debtor, where the debt is attached in a suit by a third person against his creditor, any motive to do more than appear in the court and apply the money due from him according to its decree. I think, therefore, that the practice in suits in *rem* cannot be invoked to authorize the mode of proceeding contemplated in suits commenced by attachment, and have arrived at the following conclusions:—1st. That, on principle and authority, the 11th section of the judiciary act must be deemed to apply to the United States courts sitting in admiralty, as well as in equity and at common law. 2d. That this is a civil suit against an inhabitant of the United States, commenced

by original process. 3d. That, as such, it is within the prohibition of the act.

I have considered the questions involved in this case with the care and attention demanded by its importance, and due to the great name of the illustrious judge, some of whose observations I have felt obliged to receive with some qualifications. If there be any statutory provisions or adjudged cases which I have not noticed, my attention has not been called to them. In differing from a casual observation of Judge Story, I may well feel some distrust of the accuracy of my own conclusions. If I have been led into error, I can only regret that the means of correcting it are not more easy and expeditious.

Case No. 17,827.

WILSON v. PORTER.

[2 Cranch, C. C. 458.]¹

Circuit Court, District of Columbia. April Term, 1824.

ACTION ON NOTE—DECLARATION—INDORSEMENT BY AGENT.

A declaration upon a note payable to J. S., and averring that J. S., "acting by authority, and as agent of said defendant, indorsed the said note for and in behalf of the said defendant, by writing thereon the name of him the said J. S. as agent of the said defendant;" should also aver that the note was made payable to the said J. S. as the agent, and for and in behalf of the said defendant, otherwise the note will not appear to be indorsed by the said J. S. in the character in which it was made payable to him; and so no title in the plaintiff.

Assumpsit [by James C. Wilson] against [David Porter] the defendant as indorser of Edgar Patterson's note for \$49.23, payable to John Shreve or order, sixty days after date, and indorsed, "for the Union Steamboat. John Shreve." The declaration contained a count upon the note, stating it to have been made by E. Patterson, payable to John Shreve, and that the said John Shreve, "acting by authority, and as the agent of the said defendant, indorsed the said note for and in behalf of the said defendant, by writing thereon the name of him the said John Shreve, as agent for said defendant."

Mr. Worthington, for defendant, objected to the note going in evidence.

THE COURT, however, (*nem. con.*) overruled the objection, but intimated an opinion that if a verdict should be obtained on that count, the judgment might be arrested, as it did not appear by that count that the note was made payable to Shreve in the same capacity in which he indorsed it; so that it would appear to be a note payable to Shreve, but indorsed by Porter; and so no title in the plaintiff.

Mr. Marbury then contended that the defendant would be liable as drawer of a bill on Patterson, the maker, in favor of the plaintiff, and

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

that Patterson would be considered as having accepted the bill.

CRANCH, Chief Judge, suggested that Patterson could not be considered as the acceptor, because he promised to pay only to the order of Shreve in his individual character; and Shreve's order was not made in that character, but as agent of Porter.

Mr. Marbury then abandoned the count upon the note, and relied upon the count for goods sold and delivered to the defendant, and gave evidence that Commodore Porter was owner of the Union Steamboat; that Shreve was his agent for the management of that boat, which plied as a passenger boat between Georgetown and Alexandria; and that the plaintiff furnished articles for the use of the boat.

Verdict for the plaintiff, \$49.23.

WILSON (POTTER v.). See Case No. 11,342.

Case No. 17,828.

WILSON v. PREWETT et al.

[3 Woods, 631.]¹

Circuit Court, N. D. Alabama. April Term, 1878.²

MARRIAGE SETTLEMENT — VALIDITY — FRAUD ON HUSBAND'S CREDITORS—EVIDENCE.

1. To make an ante-nuptial settlement void as a fraud on creditors, both parties to the settlement should concur in, or have notice of the intended fraud.

2. The husband and wife, parties to such a settlement, are deemed, in the highest sense, purchasers for a valuable consideration.

3. But if the settlement is not bona fide, the fact that it is made for a valuable consideration will not save it.

4. A marriage settlement cannot be made a cover for fraud. If the purpose is to delay or defraud creditors, and both parties are cognizant of it, the consideration of marriage will not support the settlement.

5. If the amount of property settled is extravagant, or grossly out of proportion to the station or circumstances of the husband, and he is embarrassed by debt, and the other party knows it, this, of itself, is sufficient notice of fraud.

6. To ascertain the purpose of the grantor in a marriage settlement, evidence of fraudulent transfers by him to other persons at or about the time of the settlement, is admissible.

7. Actual knowledge, on the part of the prospective wife, of the fraudulent purpose of the grantor in the marriage settlement, is not necessary to avoid the deed. A knowledge of facts sufficient to excite the suspicions of a prudent person and put her on inquiry, amount to notice, and are equivalent to actual knowledge.

8. P. was indebted in the sum of about \$90,000, and owned property worth about \$50,000. In alleged consideration of marriage, he conveyed to his prospective wife property of the value of \$32,776, and in addition thereto, he conveyed to her other property of the value of \$13,300, to be held by her in trust for two favored creditors. This conveyance included all

his property, except three thousand six hundred and eighty acres of land worth two dollars per acre, which was covered by a deed of earlier date which had never been canceled. The deed of marriage settlement left \$70,000 of debts unprovided for. The prospective wife knew, before the marriage and before the execution of the marriage settlement, that P. was embarrassed by his debts, and for that reason had demanded an ante-nuptial settlement before she would consent to marry him. *Heid*, that the deed of settlement was in fraud of creditors and void.

9. Where a deed in favor of two persons is obtained by the fraud of one, although without the privity of the other, the deed is void as to both.

In equity. Heard on pleadings and evidence for final decree. The purpose of the bill was to obtain a decree of the court, setting aside as fraudulent, and null and void, a marriage settlement, made on April 27, 1866, by the defendant Richard Prewett, on Josephine Prewett, whom he afterwards, on May 6, 1866, married. Prewett was fifty-eight years of age. About the first of February, 1866, he proposed marriage to Josephine Prewett, who was the widow of his nephew, and was twenty years of age, and childless, and was the owner of property worth less than \$1,000. Josephine Prewett consented to marry him. A short time afterward, for what reason the evidence did not disclose, she wrote Prewett, withdrawing her consent to marry him. About the first of April following, Prewett renewed his addresses. Josephine again agreed to marry him, this time on condition that he made a settlement of property upon her, in consideration of the marriage. To this Prewett assented, and agreed to settle on her a large amount of real estate and some personal property, but without specifying any particular property. On April 27, Prewett executed the deed of marriage settlement, which is attacked in this case. It conveyed to Josephine Prewett, in consideration of the contemplated marriage, real estate which it is conceded was worth \$30,000, and personal property worth \$2,776. The lands lay partly in Franklin county, but mainly in Lawrence county, Alabama. The personal property conveyed embraced live stock, farming utensils, household furniture and seed cotton, all on the land conveyed. At the date of the marriage settlement, Prewett was indebted in the sum of \$90,000. Property of the value of \$13,300, in addition to that already mentioned, was conveyed by the deed of settlement, to be applied to the payment of \$18,000 of this indebtedness. No other provision was made by Prewett for the payment of his debts. The deed of settlement included all the property to which Prewett had any title, except 3,680 acres of land which he had previously conveyed, by deed, to one Bates, his son-in-law, as will be hereafter more fully stated, and personal property of the value of \$600 or \$700. On November 20, 1865, Prewett had, by deed of that date, conveyed to his said son-in-law, James R. Bates, for the recited consideration of \$25,982, 4,400 acres of land, which included the 3,680 acres of land just mentioned.

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

² [Reversed in 103 U. S. 22.]

The consideration was made up of an account said to be due to Bates from Prewett, amounting to about \$18,000, and the residue of the purchase price was to be paid to Prewett in money. The account was for eleven years' services as overseer, with interest computed from the close of each year, eight years' hire of a slave, with interest computed in the same manner, and the price of a horse, \$250, and \$220 interest thereon. There were no payments or credits on the account. Prewett testified that this deed, some time after its execution, and before the execution of the marriage settlement, was returned to him by Bates, and their contract in reference to said 4,400 acres of land rescinded. Bates, however, did not re-convey the land to Prewett, nor was the deed therefor canceled even, and Prewett must have considered the deed as of some effect, for in June, 1866, after the marriage settlement, he returned no property of his own for taxation, so that the marriage settlement included all the property of Prewett not covered by deeds of conveyance, except \$600 or \$700 worth of personal property. On July 16, 1866, Prewett, by deed of that date, conveyed to Bates 3,680 acres of land, parcel of the 4,400 acres mentioned in the deed of November 20, 1865, in satisfaction of the said debt due from Prewett to Bates, on the account before mentioned, the amount of which was stated by the parties at \$18,560.80. These lands, it was agreed, were worth \$2 per acre. On May 6, 1866, Richard and Josephine Prewett were married. On June 25th following, Prewett gave in for taxation, in the name of his wife, all the lands embraced in the marriage settlement, and returned no property whatever of his own for taxation. On July 16, 1866, the day when the last conveyance was made by Prewett to Bates, Josephine Prewett made her last will, whereby, in the event of her dying without issue by her then husband, she devised and bequeathed to one Hodges, all her estate, real and personal, in trust, to pay over to Richard Prewett, her husband, all the annual rents, issues and profits thereof, and in case of her dying leaving issue of her said marriage with Richard Prewett, she devised to the said Hodges a child's share of her estate, real and personal, in trust for the said Richard Prewett, upon the like terms and conditions as she had devised her entire estate, in case of her dying without issue living of her marriage with said Richard Prewett. Prewett testified that he was not informed of the contents of this will until 1870. On December 29, 1868, Richard Prewett filed his petition in bankruptcy, and the only property returned in his schedule was his wearing apparel, valued at \$50. In her answer, filed December 17, 1866, to a bill in equity, brought against her and others, in the state chancery court, to set aside this marriage settlement made on her by Richard Prewett, Josephine Prewett said that "at the time of the execution of said deed (the marriage settlement), as well as at the time she contracted to marry the said Richard, she knew that he was embarrassed and indebted, but to what extent,

and to whom, she did not know, and does not now know. * * * It was because of her knowledge of the embarrassed condition of the said Richard that she stipulated at the time of her engagement of marriage aforesaid, for the promises, covenants and undertakings of the said Richard, particularly set out and described in the deed of conveyance aforesaid." The answers of both Richard Prewett and Josephine Prewett, which are under oath, deny, that there was any fraudulent purpose in the execution and delivery and acceptance of the deed of settlement, and aver the entire bona fides of the transaction.

S. D. Cabiniss and F. P. Ward, for complainant.

L. P. Walker, D. D. Shelby, Milton Humes, and Geo. S. Gordon, for defendants.

WOODS, Circuit Judge. The attack on the marriage settlement is made by the assignee in bankruptcy of Richard Prewett, representing his creditors, and the charge is, that the settlement was made by Richard Prewett, and accepted by Josephine Prewett, with the purpose to hinder, delay and defraud the creditors of the former, and is, therefore, null and void. The bill prays that the deed may be so declared, and the property described therein turned over to the assignee, and by him administered as assets of the bankrupt estate.

The principles of law which apply to a case like this are well settled. "Nothing can be clearer, both upon principle and authority, than the doctrine that to make an ante-nuptial settlement void as a fraud upon creditors, it is necessary that both parties should concur in, or have cognizance of, the intended fraud. If the settler alone intend a fraud, and the other party have no notice of it, but is innocent of it, she is not, and cannot be affected by it. Marriage, in contemplation of law, is not only a valuable consideration to support a settlement, but is a consideration of the highest value, and from motives of the soundest policy, is upheld with a steady resolution. The husband and wife, parties to such a contract, are, therefore, deemed, in the highest sense, purchasers for a valuable consideration, and so that if it is bona fide and without notice of fraud, brought home to both sides, it becomes unimpeachable by creditors. Fraud may be imputable to the parties, either by direct co-operation in the original design at the time of its concoction, or by constructive co-operation from notice of it, and by carrying the design, after such notice, into execution." *Magniac v. Thompson*, 7 Pet. [32 U. S.] 348. See, also, 1 Bish. Mar. Wom. § 775; Co. Litt. 9 (6); *Schouler, Dom. Rel.* 263; *Ford v. Stuart*, 15 Beav. 493; *Nairn v. Prowse*, 6 Ves. 752; *Peachy, Mar. Settl.* 56; *Armfield v. Armfield*, 1 Freem. Ch. [Miss.] 311; *Sterry v. Arden*, 1 Johns. Ch. 261; *Verplank v. Sterry*, 12 Johns. 536; *Johnston v. Dilliard*, 1 Bay, 232, 234; *Huston v. Cantril*, 11 Leigh, 136; *Tunno v. Trezevant*, 2 Desaus. Eq. 264; *Whelan v. Whelan*, 3 Cow. 537. In *Cadogan v.*

Kennett, 2 Cowp. 432, which was an action of trover brought by the plaintiff's trustees, under the marriage settlement of Lord Montford, against the defendant, who was a judgment creditor of Lord Montford, and the sheriff's officers, to recover certain goods taken by them in execution, Lord Mansfield said: "If the transaction be not bona fide, the circumstance of its being done for a valuable consideration will not alone take it out of the statute. I have known several cases where persons have given a full and fair price for goods, and where the possession was actually changed. Yet, being done for the purpose of defeating creditors, the transaction has been held fraudulent and void." * * "The question in every case is, whether the act done is a bona fide transaction, or whether it is a trick or contrivance to defeat creditors." "A man who is indebted may, on his marriage, make a settlement of his property, provided the settlement is made honestly and in good faith, and the wife's knowledge of his indebtedness will not alone render it void. It is however, clearly established that marriage cannot be made the means of committing fraud. If there is intent to delay, hinder or defraud creditors, and to make the celebration of a marriage part of a scheme to protect property against the rights of creditors, the consideration of marriage cannot support the settlement." *Bump, Fraud. Conv.* 308, citing *Bulmer v. Hunter*, L. R. 8 Eq. 46; *Ex parte McBurnie*, 1 De Gex, M. & G. 441; *Betts v. Union Bank*, 1 Har. & G. 175; *Campion v. Cotton*, 17 Ves. 264; *Richardson v. Horton*, 7 Beav. 112; *Colombine v. Penhall*, 1 Smale & G. 228. Notice of the fraud may be inferred from the facts and circumstances of the settlement. *Colombine v. Penhall and Bulmer v. Hunter*, supra. If the amount of property settled is extravagant, or grossly out of proportion to the station and circumstances of the husband, this, of itself, is sufficient notice of fraud. *Ex parte McBurnie*, supra; *Croft v. Arthur*, 3 Desaus. Eq. 223.

In an able opinion, in the case of *Davidson v. Graves*, reported in *Riley, Eq. Cas.* 232, Justice Nott, of South Carolina, says: "There is no case that I have seen, where a man has been permitted to make an intended wife a mere stock to graft his property upon, in order to place it beyond the reach of his creditors. A marriage settlement must be construed like every other instrument. The question may always be raised, whether it was made with good faith, or intended as an instrument of fraud. Even though marriage may be a part of the consideration, fraud may be mingled with it, and that may be as well inferred from internal evidence as from circumstances aliunde. Marriage is put on the footing of a pecuniary consideration. And it is said, if a person sell his property for a full consideration and squander the money, his creditors have no redress. From which it is inferred, that marriage will afford the same protection. But, in the case of a bona fide

sale, the seller has parted with his property, the purchaser has parted with his money, and the law will presume that the object was the payment of his debts. But the purchaser is not answerable for the misapplication of the money. It is not so with a marriage settlement. The seller does not, in fact, part with his property. It is still intended for his own enjoyment. Neither does he receive in return anything that will satisfy his creditors. His wife will not be received in payment of his debts. It is not to be understood that because marriage is equivalent to a pecuniary consideration, it is to be considered in the nature of an actual purchase. A settlement is not intended as the price of the wife, but as a provision for a family. It must, therefore, be reasonable, and with a due regard to the rights of others. A creditor has an equitable claim to the property of the debtor."

Applying these rules of law to the facts of this case, it is to be determined whether the purpose of Richard Prewett, in making the conveyance to the woman whom he proposed to marry, was to hinder, delay or defraud his creditors, and, if it were, whether Josephine Prewett had notice of such purpose before the marriage. As to the first question, the evidence leaves no doubt in my mind touching the fraudulent intent of Richard Prewett. To ascertain the intent of the settler we are authorized to consider fraudulent transfers to other persons at or about the time of the transfer assailed: *Bump on Fraudulent Conveyances*, 545, and numerous authorities there cited. The evidence shows that Prewett had been insolvent ever since the close of the late war; that he was largely insolvent on November 20, 1865, when he made a conveyance to his son-in-law, Bates, of 4,400 acres of land. The consideration named in this deed was \$25,982 in money. Prewett testifies that this was not the real consideration, but that it was the discharge of his debt to Bates, and the payment by Bates of the residue in money. He further says, that at the date of this deed no formal account was stated between him and Bates, but the debt was supposed to be \$17,000 or \$18,000; but that afterwards, in July, 1866, the account was stated, which showed that there was due from Prewett to Bates the sum of \$18,560.80. The account is in evidence, and it bears upon its face the earmarks of a trumped-up account. There is not a word of evidence to show that any contract had ever been made by Bates for his own services, or for the hire of his slave, or for the sale of his horse; that any note had ever been given, or any account kept. In fact, Prewett says the account was never stated till eight months after the date of the deed of November 20, 1865. It is a remarkable fact, too, that for a period of eleven years this account should be allowed to run, without a single credit or payment. That such an account could be bona fide seems incredible. And yet, upon such an account, at that time uncertain in amount, and without the payment of a cent

of money, and without taking from him any evidence of debt, Prewett conveys lands to Bates which he estimated to be worth \$26,000. If this were the deed assailed, no court would have any hesitation in pronouncing it fraudulent. We find, then, that in November, 1865, Prewett, being hopelessly insolvent, is attempting to cover up a large part of his property by a fraudulent deed to his son-in-law. For some reason the device was abandoned, and the deed returned to Prewett, but there was no re-conveyance of the land to him, and in the following April Prewett executed the marriage settlement. He owed his creditors \$90,000. His available means amounted to little over \$50,000. Of these means he devoted \$13,000 to the payment of two favored creditors, he retained lands worth about \$7,000, which must have been under the cloud of the deed of November, 1865, which was never canceled, and which he afterwards conveyed to his son-in-law, Bates, in payment of the account heretofore referred to, and he conveyed to his intended wife all the residue of his property, worth, according to the agreed facts, \$32,776, leaving about \$70,000 of debts unprovided for.

The mere statement of these facts reveals the purpose of Prewett. He commenced his attempts to defeat his creditors, by a fraudulent deed, in November, and he closes by a deed by which he, in effect, secures to himself the enjoyment of more than three-fifths of his property, by a conveyance to his intended wife, and leaves creditors to the amount of \$70,000 entirely unprovided for. The effect of this deed was to hinder, delay and defraud his creditors, who were not mentioned in the marriage settlement, for it conveyed all the property which he had not before conveyed, and left such creditors nothing. Prewett must be held to know what he was about, and to intend the natural consequences of his act. The pretense that he was insolvent in April, 1866, but did not know it, is absurd. He owed \$90,000, which was bearing interest, and he had but \$50,000 of property to pay it with. The disposition of \$33,000 of this property, all that he had not covered by a former deed, in such a way as to place it beyond the reach of his creditors, while, at the same time, he received no pecuniary equivalent which he could apply to his debts, shows clearly his purpose to defraud his creditors. Prewett was, at the date of the settlement, embarrassed and largely insolvent. The property settled on his proposed wife was out of all reasonable proportion to his means, even if he had owed no debts. The property settled was equitably the property of his creditors. The deed of settlement conveyed, substantially, all his property not covered by a previous conveyance which was still in force, and it left creditors to the amount of \$70,000 entirely unprovided for. When, in December, 1868, Prewett filed his schedule in bankruptcy, he reported his wearing apparel, valued at \$50,

as his only assets. We find, then, that the fraud upon the creditors, designed and consummated by Prewett, was gross and palpable. But fraud brought home to the settler is not of itself sufficient to avoid the settlement. The grantee must participate in the fraud, or at least have cognizance of it. It is, therefore, to be inquired, whether Josephine Prewett had, before her marriage with Richard Prewett, notice of the fraud which Prewett contemplated, and which he carried into execution by means of the marriage settlement. We know, from her own answer, that before the execution of the marriage settlement she was advised that Prewett was indebted, and that he was embarrassed, and it was, as she says, on account of his indebtedness and embarrassment that she demanded a marriage settlement before she would consent to marry him. Why did she make this demand? Clearly because she feared that the creditors of Prewett might sweep away his property and leave her destitute. With this knowledge Prewett presents to her a conveyance, which transfers to her property worth \$32,776. Could she, bona fide, knowing that Prewett was indebted and embarrassed, accept a conveyance for so large a sum? Could she shut her eyes and say she did not know the extent of his debts, did not know of his fraudulent purpose, and, therefore, she received the deed in good faith?

Actual knowledge of the fraudulent intent is not necessary. A knowledge of facts sufficient to excite the suspicions of a prudent man or woman, and to put him or her on inquiry, amounts to notice, and is equivalent to actual knowledge in contemplation of law. *Atwood v. Impson*, 5 C. E. Green [20 N. J. Eq.] 150; *Tantum v. Green*, 6 C. E. Green [21 N. J. Eq.] 364; *Jackson v. Mather*, 7 Cow. 301; *Smith v. Henry*, 2 Bailey, 118; *Mills v. Howeth*, 19 Tex. 257. It has even been held that the means of knowledge, by the use of ordinary diligence, amounts to notice. *Farmers' Bank v. Douglass*, 11 Smedes & M. 469. But in this case it is not necessary to go so far. The indebtedness and pecuniary embarrassment of Prewett, and the large estate conveyed by the deed of settlement, put Josephine Prewett on inquiry, and she is chargeable with knowledge of every fact which she could have learned on inquiry. She might have learned all that the evidence in this case discloses about the amount of Prewett's debts and property, and such knowledge would have made clear Prewett's fraudulent purpose. She is, therefore, chargeable with notice of the fraud, and her acceptance of the deed of settlement, after such notice, makes her a party to the fraud, and renders the marriage settlement null and void. The creditors of Prewett, whose bona fide debts were provided for by the marriage settlement, can take no benefit from the fraudulent instrument. When a deed in favor of two persons is obtained by the fraud of one, although without the privity of the other, the deed will

be void as to both. *Whelan v. Whelan*, 3 Cow. 537; *Hunt v. Bass*, 2 Dev. Eq. 292; *Huguenin v. Baseley*, 14 Ves. 273; *Townsend v. Harwell*, 18 Ala. 301. Although they had no notice or knowledge of the fraud contemplated by Prewett, yet the fact that the grantee, under whom their rights are claimed, not only had notice of the fraud, but was a beneficiary under the fraudulent deed, avoids the instrument as to the beneficiary as well as to the grantee.

The result of these views is, that the marriage settlement made by Richard upon Josephine Prewett, must be declared void for all purposes, and the property conveyed thereby turned over to the assignee in bankruptcy for administration.

[On appeal to the supreme court, the decree of this court was reversed, and the cause remanded, with directions to dismiss the bill. 103 U. S. 22.]

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WILSON (RAHILLY v.). See Cases Nos. 11,531 and 11,532.

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Case No. 17,829.

WILSON v. RAILROAD CO.

[See Case No. 17,856.]

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WILSON (RAMSAY v.). See Case No. 11,545.

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Case No. 17,830.

WILSON v. ROBERTSON.

[Brun. Col. Cas. 109; 1 Overt. 464.]

Circuit Court, D. Tennessee. 1809.

CONTRACT TO CONVEY LAND - DAMAGES FOR BREACH.

The measure of damages in an action for breach of a covenant to convey lands, the title to which was not in the defendant, is the value of the lands at the time of judgment.

The defendant had given an obligation to make Clark a deed in fee simple, to six hundred and forty acres of land, his choice out of two thousand acres on the waters of Stone's river, to join some corner of the tract. The bond was given about twenty years ago, and the title was to be made so soon as grants should issue. It did not appear that the defendant had any such land on the waters of Stone's river. The only question was as to the measure of damages: whether it should be the value of the land at the time the bond was given, when grants were obtained, or at this time. The jury found a special verdict. That neither at the time of the contract, when grants issued, nor at any time since, has the defendant had such land as the bond calls for. That such land at the time the bond was given, and when grants should have issued, was worth, with the interest thereupon, \$340, and at this time \$1040.

¹ [Reported by Albert Brunner, Esq., and here reprinted by permission.]

Overton, for defendant, said he was prepared with authorities to show that judgment ought to pass for the lesser sum. The special verdict does not find fraud, and the court cannot presume it. See 3 Johns. 281; 1 Johns. 551; 1 Caines, 379; 7 Johns. 605. If fraud had been found by the verdict it would not be contended that the larger sum ought not to be the measure of damages.

PER CURIAM. The jury have found that the defendant had not the land he contracted to convey; in contemplation of law it was therefore a fraud. If the defendant had such land as he has attempted to prove (though he had not a legal title to it), if he offered to show land, to which he was entitled by contract for locating, by showing this he may perhaps have relief in equity; but, it having been found by the jury that he had no title, there must be judgment for the value of the land as it was estimated at this time. See 2 Hayw. 334, 336 366; [Simms v. Slacum] 3 Cranch [7 U. S.] 300; 1 Johns. 223; 2 Burrows, 1110; Bull. N. P. 132; 2 Call, 95; 3 Caines, 221; 4 Mass. 109; Hardin, 41; Add. 23; [State of New York v. State of Connecticut] 4 Dall. [4 U. S.] 5; [Williamson v. Kincaid] Id. 20; 3 Call, 326.

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Case No. 17,831.

WILSON et ux. v. ROSE.

[3 Cranch, C. C. 371.]¹

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

DECEDENT'S ESTATE - DEBT DUE BY EXECUTOR - INCLUSION IN LIST OF DEBTS - RUNNING OF LIMITATIONS.

1. If a debt by an executor to his testator be not barred by the statute of limitations at the time of the death of the testator, the executor is bound to give in the claim in the list of debts; and the statute of limitations ceases to run in favor of the debtor from the time of his accepting the trust as executor.

2. The right of a person interested in the administration to proceed in the orphans' court, according to the Maryland statute of 1798, c. 101, subc. 8, § 20, against an executor who neglects to give in a claim against himself, accrues upon the death of the testator; and from that time only, the limitation of twelve years begins to run, if it runs at all in such a case.

3. If an executor fails to give in a claim against himself, his administration-bond is liable to be put in suit.

This was a proceeding by petition in the orphans' court under the testamentary law of Maryland of 1798, c. 101, subc. 8, § 20, by James C. Wilson and Ann his wife, who was one of the distributees, or legatees, of the estate of Thomas B. Beall, against John Rose, one of the executors of that estate, charging him with neglecting to give in a claim against himself in the list of debts due to his testator.

The orphans' court, under the provisions of

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

that section of the law, directed the following issues to be sent to this court to be tried, namely: "(1) Whether or not the said John Rose, the defendant, was indebted to his testator, the said Thomas B. Beall, on the 30th of September, 1820, the day of the death of the said Thomas? If yea, in what sum of money? (2) Whether or not the recovery of the said debt, if any, was not barred by the statute of limitations, as used and practised in the county (of Washington) on the said 30th September, 1820? (3) Whether or not the recovery of the said debt, if any, was not barred by the statute of limitations, as used and practised in the said county on the 8th day of April, 1828, the day on which the said James C. Wilson &c. filed their petition against the said John Rose, in the orphans' court aforesaid? (4) Whether or not the said John Rose, as one of the executors of the said Thomas B. Beall, and having accepted the trust, and taken upon himself the burden and execution of the will of the said Thomas, was not in duty bound to give in all claims against him by the testator, in the list of debts, to the said orphans' court; whether or no the recovery of the said claim was barred by the statute of limitations, as used and practised in the said county on the 30th of September, 1830, the day of the death of the said Thomas; or on the 8th of April, 1828, the day on which the said James C. Wilson and wife filed their petition in the said orphans' court against the said John Rose? And whether the said John Rose, having failed to give in to the said court, any claim against himself by his testator, his testamentary bond has not become liable to be put in suit?"

On the trial of the several issues, and each of them, the orphans' court requests the honorable judges of the circuit court of the District of Columbia for Washington county, to direct and instruct the jury, whether or not the said Thomas B. Beall, the testator, on the 30th of September, 1820, had any "just claim" against the said John Rose, his executor; and whether the said Rose, having "accepted of the said trust" of executor, and having taken upon himself the burden and execution of the said will, was not bound to give in to the said orphans' court, all claims against him, in the list of claims due to his testator; whether the recovery of the same was or was not barred by the statute of limitations; and whether, on the said Rose failing to give in such claim, his testamentary bond may not, under the provisions of the act of assembly aforesaid, be put in suit." The debt, due by the defendant Rose to Thomas B. Beall, arose upon a covenant under seal, and accrued in 1810. The testator, Thos. B. Beall, died September 30, 1820. The preliminary question was, whether the limitation of twelve years, in the Maryland statute, was a bar to this proceeding in the orphans' court, founded upon the neglect or failure of the executor, Rose, to give in the claim against himself in the list of claims due to his testator. More than

twelve years had elapsed between the time the debt became payable and the filing of the petition in the present proceeding; but twelve years had not elapsed when the testator died, and the defendant accepted the trust and office of executor.

R. P. Dunlop and Mr. Jones, for the petitioners, contended that it was a trust in Mr. Rose, and that the statute of limitations does not run against a trust. There was no person who could bring suit at law against him upon his covenant, after he became executor. The statute of limitations does not run against the claims of legatees in such a proceeding in the orphans' court. This is not a suit upon the covenant, nor for final distribution; it is only to decide whether the claim is to be accounted for by the executor as assets, it is only to establish the claim. It is a suit of a peculiar jurisdiction. The statute of limitations goes only to the remedy. It is the *lex fori*. It is no bar out of the jurisdiction of the forum. It applies only to actions at law. Courts of equity, however, have adopted it; but the orphans' court has not.

Mr. Marbury and Mr. Swann, *contra*. The statute of limitations ought to be applied to all new remedies or forms of action. *Bank of Columbia v. Sweeny* [Case No. 881], in this court at the May term, 1826, and in supreme court, 2 Pet. [27 U. S.] 671. This is not a technical trust. The limitation began to run in the lifetime of the testator, and nothing can stop it. The legatees stand in the place of the testator, and the limitation continues to run against them, as it did against their testator. By the Maryland statute, the thing in action cannot be given in evidence, if it be of 12 years' standing. The orphans' court has as good a right to adopt the statute of limitations as a court of equity has.

THE COURT (*nem. con.*) was of opinion, that the statute of limitations was not a bar to this proceeding in the orphans' court, for the reasons stated by CRANCH, Chief Judge, who said:

The cause of this suit is the neglect of the executor to return this debt as assets. That duty accrued in 1820, upon the death of the testator. Twelve years had not elapsed from that time to the institution of this suit in the orphans' court. The debt was not barred at the time of the death of the testator. It was a subsisting valid debt, which the executor was bound to return in the list of debts. His not having done so is the cause of this suit; and if the orphans' court, in analogy to courts of law, should admit the statute of limitations as a defence, it could be pleaded to this suit only. The limitation ceased to run as to this debt, when it was collected and came into the hands of the executor. It then became assets. No cause of action upon the covenant then existed. The debt was satisfied.

The jury was then sworn to try the issues, and upon this verdict, this court certified to

the orphans' court: That John Rose, one of the executors of Thomas B. Beall, was indebted to him on the 30th of September, 1820, in the sum of \$752.76, and that he then had a just claim against him to that amount. That the said Rose was bound to give in to the orphans' court, the said claim against him in the list of debts due to his testator, and that the recovery of the said debt was not barred by the statute of limitations, on the 30th of September, 1820, nor on the 8th of April, 1828, the time of filing the petition in this cause in the orphans' court. And that the said John Rose, having failed to give in such claim, his testamentary bond is liable, under the provisions of the act of assembly aforesaid, to be put in suit.

Case No. 17,832.

WILSON v. ROUSSEAU et al

[1 Blatchf. 3.]¹

Circuit Court, N. D. New York. Oct. Term, 1845.

PATENTS FOR INVENTIONS—INFRINGEMENT.

In this case the judges of this court were opposed in opinion upon ten several questions, which were certified to the supreme court of the United States. The case in that court is reported in 4 How. [45 U. S.] 646. The arguments of counsel on the case in this court are here given, with a view to a better understanding of the full scope and bearing of the answers of the supreme court to the several questions certified, the same arguments having been presented in both courts and by the same counsel.

This was an action on the case [by James G. Wilson against Louis Rousseau and Charles Easton] to recover damages for the infringement of letters patent. The questions in the case arose on demurrer. The judges of this court were opposed in opinion upon ten several questions which were raised by the demurrers. [Case unreported.] Those questions were certified to the supreme court of the United States for its opinion, and the decision of that court upon them is reported in 4 How. [45 U. S.] 646. The opinion of the court was delivered by Mr. Justice Nelson. It will be seen, by referring to it, that the seventh, eighth, ninth, and tenth questions certified are simply answered, without the assignment of any reasons for the conclusions of the court, and neither the arguments nor the points of the counsel who argued the cause in the supreme court are given by the reporter. It has therefore been thought that it would not be unprofitable to give at some considerable length the positions assumed by the same counsel in this court on the argument of the demurrers, (and the same arguments were presented in the supreme court.) as tending to assist in a better understanding of the full scope and force of the very important decisions made by the supreme court in the case.

The declaration contained two counts. The

first count set forth the issuing of letters patent to William Woodworth, December 27th, 1828, for fourteen years from that day, for "a new and useful improvement in the method of planing, tonguing, grooving, and cutting into mouldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness, and also for facing and dressing brick, and cutting mouldings on or facing metallic, mineral, or other substances;" the death of William Woodworth, intestate, at New-York, February 9th, 1839; the appointment of William W. Woodworth, his son, as his administrator, February 14th, 1839; the application of William W. Woodworth, as administrator, July 20th, 1842, to the commissioner of patents for an extension of the patent for seven years; the action of the proper board of commissioners, November 16th, 1842, extending the patent for seven years from the 27th of December, 1842; an assignment by William W. Woodworth, as administrator, to the plaintiff, August 12th, 1844, of the exclusive right to make, use, and vend two machines, under the patent as so extended, to be used in the town of Watervliet, Albany county, New-York; and the infringement by the defendants by the use of the patented invention in Watervliet since the assignment to the plaintiff.

To the first count the defendants pleaded the general issue and three special pleas. The first special plea to the first count set forth, that William Woodworth, on the 4th of December, 1828, after the discovery of his improvement, assigned to one James Strong the one half of his interest in it, by an assignment in writing, under seal, which was duly recorded in the patent office; that on the 28th of November, 1829, by an instrument in writing, under seal, Woodworth and Strong assigned to Daniel H. Twogood, Daniel Halstead, and William Tyack, all their right to the patent for certain territory, embracing, among other places, said county of Albany; that said instrument contained an habendum clause as follows: "To have and to hold the rights and privileges hereby granted, to them and their assigns, for and during the term of fourteen years from the date of the patent," and also this further clause: "And the two parties further agree that any improvement in the machinery, or alteration or renewal of either patent, such improvement, alteration, or renewal shall enure to the benefit of the respective parties in interest, and may be applied and used within their respective districts as hereinbefore designated;" and that said instrument was recorded in the patent office, October 9th, 1837.

To this plea the plaintiff demurred, assigning the following special causes of demurrer: First. That the assignment made by Woodworth and Strong to Twogood, Halstead, and Tyack, November 28th, 1829, having been executed before the passage of any law authorizing an extension of the terms of

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

letters patent, did not vest the grantees with any interest in the rights secured by the extension of the patent for seven years. Second. That the plea did not show that the defendants were assignees of Twogood, Halstead, and Tyack, or ever derived any advantage from the assignment to Twogood, Halstead, and Tyack. The defendants joined in demurrer.

The second special plea to the first count set forth, that William Woodworth, prior to the 1st of November, 1836, disposed of his entire interest in the patent; and that at the time of his death on the 9th of February, 1839, he had no interest in the patent.

To this plea the plaintiff demurred, assigning the following special causes of demurrer: First. That the validity and sufficiency of the extension of the patent were not affected by anything alleged in the plea, nor was the plaintiff's right to judgment barred or affected by the matters alleged in the plea. Second. That William W. Woodworth, in his capacity as administrator, had good right, by law, to apply for and obtain an extension of the patent, and that the extension of the patent could, by law, be made on his application, and to him, and not otherwise. The defendants joined in demurrer.

The third special plea to the first count set forth that William Woodworth died on the 9th of February, 1839, and that at the time of his death he had no interest in the patent.

To this plea the plaintiff demurred, assigning two special causes of demurrer, the same as to the second special plea. The defendants joined in demurrer.

The second count of the declaration set forth the issuing of the patent, the death of Woodworth, the appointment of his administrator, and the extension of the patent for seven years, as in the first count; the extension of the patent for seven years from the 27th of December, 1849, by an act of congress passed February 26th, 1845; the surrender of the patent on the 8th of July, 1845, by William W. Woodworth, as administrator, on account of defects in the specification, and its reissue on that day on an amended specification; an assignment in writing, under seal, by William W. Woodworth, as administrator, to the plaintiff, on the 9th of July, 1845, of his right and title to the said re-issued patent of July 8th, 1845, for the residue of said first extension of seven years, so far as regarded, (among other things,) the exclusive right to use two machines in the town of Watervliet, Albany county, New-York; and the infringement by the defendants, by the use of the patented invention in Watervliet, since October 1st, 1845.

To the second count the defendants demurred, assigning the following special causes of demurrer: First. That it did not appear by the second count that the plaintiff was the assignee of an exclusive right to make, use, and vend said improvement within the town of Watervliet, or that he was invested, as to

that territory, with all the rights of the original patentee. Second. That the re-issued patent of the 8th of July, 1845, was void: 1st. For uncertainty in the amended specification; 2d. For ambiguity in the same; 3d. For multiplicity of claim in the same; 4th. Because it appeared that the re-issued patent of the 8th of July, 1845, was not for the same invention for which the patent of December 27th, 1828, was granted. Third. That the decision of the board of commissioners, upon the application for the extension of a patent under the 18th section of the act of congress of July 4th, 1836, commonly known as the patent act, is not conclusive upon the question of their jurisdiction to act in the given case. Fourth. That the commissioner of patents could not lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and during the existence of an extended term of seven years. The plaintiff joined in demurrer.

The questions upon which the judges were opposed in opinion will be severally stated hereafter. They will also be found at length in the report of the case in 4 How. [45 U. S.], together with the certified statement of facts, and copies of the letters patent and specifications, and of various papers referred to in the statement and questions. The first cause of demurrer to the first special plea to the first count raised the second and third questions; and the second cause, the fourth question. The causes of demurrer to the second and third special pleas to the first count raised the first and fifth questions. The first cause of demurrer to the second count raised the sixth question; the first, second, and third subdivisions of the second cause the seventh question, and the fourth subdivision the eighth question; the third cause, the ninth question; and the fourth cause, the tenth question. For the sake of convenience the arguments will be presented in the order of the questions as certified, rather than in their order as raised by the pleadings in this court.

William H. Seward, for plaintiff.

Level, smooth, and impervious wooden floors are among the necessary parts of all our dwellings. They were prepared until 1828 with manual labor, and with very imperfect instruments. A skilful and vigorous mechanic would prepare ten or fifteen planks, equal to one hundred feet, in a day, at a cost of two dollars. William Woodworth invented a machine by which five thousand feet of lumber are prepared for floors in one day, at an expense of ten dollars.

Point I. Whether the 18th section of the patent act of 1836 authorized the extension of a patent on the application of the executor or administrator of a deceased patentee. The laws of the United States regard property in letters patent for inventions as personal prop-

erty in contradistinction to real property. If a patent be granted for fourteen years, and the patentee die during the term, the property in it becomes vested in his personal representatives. The 18th section of the patent act of July 4, 1836 (5 Stat. 124), declares a new and further right in behalf of an inventor who has obtained a patent. This new right is a title to an extension of the original grant for seven years more, if the patentee, at any time before the expiration of his patent, shall show to the proper authority, by a certain form of proof, that such an extension would be "consistent with the public interest," and "just and proper, by reason of his failure," without neglect or fault on his part, "to obtain from the use and sale of his invention, a reasonable remuneration for the time, ingenuity, and expense bestowed upon the same and the introduction thereof into use." The effect of such an extension, when made, is that the original letters patent "have the same effect in law as if they had been originally granted for twenty-one years." By the operation of the 18th section, such a new and additional right as has been described vests at once in every inventor when he obtains his patent; that is to say, a contingent right to an extension for seven years. The consideration of this new and additional right is of the same nature, if not identical, with that of the right to demand the original patent, and belongs as exclusively to the same inventor. That consideration is the unremunerated merit of a discovery useful to the commonwealth. If the original patent had been for twenty-one years, and the inventor had died during that period, the administrator would have taken the benefits of the unexpired term. Why should not the administrator apply for and obtain the extension, on the death of the patentee during the same term? The argument on the other side is that the letter of the statute provides for an application by the patentee, prescribes conditions to be performed by him, and directs a grant to him, without at all alluding to the possibility of his death. But the statute recognizes the application for an extension, not as a petition for a boon, but as a demand, which must be granted whenever certain circumstances exist. The inventor, then, has a right to an extension in certain cases. If it were of such a nature that courts of common law could enforce it by proper remedies, it would be a legal right. But it is a right contingent on the favorable adjudication of the board of commissioners, which is invested with legislative discretion in regard to the application, and it is also an equitable right, because any claim or interest in regard to it which may be created among individuals by contract, can be enforced in courts of equity alone.

But, where not affected by assignment or testamentary direction, chuses in action, whether legal or equitable, and whether absolute or contingent, always pass by mere

operation of law to the personal representative of a deceased owner, without any words of perpetuity. An administrator, though not named in the obligation, may sue on a bond executed to his intestate. So any personal right, whether arising by express agreement, or by mere implication of law, whether absolute or conditional or contingent, may be asserted with the same effect by an executor, as by the party to whom in life the right belonged. The administrator's right of succession to personal property is absolute and universal. This transmissibility has only one exception. The right to damages for personal torts does not descend. Rights conferred by law, or created by legislation, whether rights of one citizen against another, or of a citizen against the commonwealth, are as truly rights of property, as those created between citizens by contract. In such cases the law is a contract, or creates a contract, as has been well settled. Therefore, such rights are subject to the principle of transmission to personal representatives, like all other rights of personal property. If the state grant the use of a bridge for a term of years, on condition that the grantee shall erect the bridge, and, at the expiration of his term, devote it to the public, is not this a contract, which, if performed by the grantee, will descend to his representatives and carry the franchise to them? Nor is there anything in the intangibility of the right to an extension of a patent, or in the uncertainty of its future establishment, which exempts it from the principle of this law.

An executor or administrator is entitled to all the personal property of the decedent, not only to such as is susceptible of manual possession, but also to things in action, whether in law or in equity; and this includes not only property not in the possession of the deceased at the time of his death, but also interests vested in him by condition, remainder, limitation or election, and such interests equally in equity as in law. 9 Petersd. Abr. 298. The right to an extension of a patent is an interest concerning personal property, in equity, depending on the election of the patentee and on a condition beyond his control. Such an interest must necessarily pass to the administrator, unless the statute, expressly or by implication, limits its duration to the life of the patentee. The statute contains no such express limitation. No limitation is implied by the provision that the patentee shall desire an extension; for the desire here described is an election, which can be made by an administrator. Nor is a limitation implied by the provision that the patentee shall apply; for the application is only a legal proceeding to assert a personal right, and an administrator may institute such a proceeding.

But it is chiefly insisted that a limitation is implied by the provision that proof shall be made by the oath of the patentee concerning his profit and loss resulting from the invention. This direction concerning the oath

of the patentee is merely incidental and a matter of detail, which must give way when necessary to secure effect to the essential portion of the statute. The essential thing is, that it must appear that the inventor has not been adequately rewarded. It must appear also, that the application is for his benefit, as between him and the world at large. But, in view of the policy of the act, he lives in the person of his administrator, and an application by the administrator is virtually an application by the inventor. The law requires the patentee to exhibit his profits and losses. They must be exhibited, even though he be dead. His administrator has his books and accounts, and is therefore presumed to be competent to show what the law requires. If he can do this, the object of the provision concerning proof is attained. If he cannot, the application must fail. It would alike fail, for the same cause, if made by the inventor himself. If, in some cases, an administrator might be unable to satisfy the board, that circumstance would constitute no reason why one who could fully satisfy the board should not apply.

The object of the patent laws is, as defined in the constitution, "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their writings and discoveries." The 18th section of the act of 1836 implies that, in order to promote the progress of science and the useful arts, it is necessary to extend a patent, when the public interests will permit, if the inventor have, without fault on his part, failed to obtain a remuneration during the term of fourteen years. The act is, therefore, remedial. But, if the position of the defendants be correct, the law will altogether fail in those numerous cases where a patentee dies without obtaining an extension. Now, since there is no express limitation on the life of the patentee, imposing on us the necessity of adopting so suicidal a construction of the 18th section, and since portions of the statute may seem to conflict with each other, all that can be claimed by our adversaries is that, in this respect, that section is ambiguous. Admitting such ambiguity, only for argument's sake, we humbly submit that our construction is in harmony with the policy of the statute. Again, our construction brings the 18th section into harmony with the other details of the statute. The 6th section provides that any inventor, (without alluding to his possible death,) may apply for and obtain letters patent. The 10th section declares that if the inventor shall die before a patent issue, then the right of applying for and obtaining such patent shall devolve on the executor or administrator of such person, in trust for the heirs at law of the deceased, or of his devisees, in as full and ample a manner, and under the same conditions, limitations, and restrictions, as the same was held or might have been claimed or enjoyed by such person in his life-time; and when ap-

plication shall be made by such legal representative, the necessary oath or affirmation shall be so varied as to be applicable to him. Again, the 13th section provides that, if a patent shall prove void by reason of mistake or accident, the patentee may surrender it, and obtain a renewed patent for the unexpired portion of the original term; and the statute expressly declares that the executor or administrator of a deceased patentee may apply in such a case. Now, the most accomplished casuist would fail to find a reason for a policy in that case, distinguishable from the policy of extension provided for in the 18th section. Again, the statute is beneficent. It is, therefore, to be construed rigorously against the public and beneficently towards inventors. It would be a mockery of national magnanimity and justice to offer the extension of a patent to the unrewarded inventor while in life, and yet plead his death in abatement of an application for an extension on behalf of his children. The construction insisted upon by our adversaries does violence to natural sentiments of justice. The commonwealth has, by the discovery, received a beneficial consideration. It pays an equivalent to the inventor. Would it not be absurd and capricious to say that the equivalent shall be conferred on the inventor if he live fourteen years, but shall be denied him if he do not live so long? Again, the 18th section provides for the transmission of the benefits of the extension to assignees. It would be very strange indeed if an assignee should be remembered with justice and kindness by his country, and the inventor's children be cast out from her favor. The language of the British statute in regard to the extension of patents is to the same effect. Executors and administrators are not expressly named, while in fact they apply for and obtain such extension. St. 5 & 6 Wm. IV. c. 83, § 4; Hind. Pat. 600.

But, it is urged that executors and administrators seem to have been intentionally excluded, because they are not mentioned in the 18th section, while they are expressly named in other sections, such as the 5th, 6th, 10th, and 13th. The remark is founded on the principle that the entire law is the symmetrical production of one mind, and that uniformity of language must therefore be expected, where there is uniformity of purpose. But the reason fails in construing statutes enacted by popular legislatures. It is insisted, moreover, that the powers vested in the board of commissioners are special and administrative, and are, therefore, to be strictly exercised. This is very true. But how strictly? Certainly not so strictly as to defeat the statute. The letter must be preserved, but not if it kill the spirit of the law.

The question thus discussed was necessarily involved in the decision of the board of commissioners, when the extension of 1842 was granted in this case. That board acted judicially and decided the point in our favor. In the case of *Van Hook v. Scudder* [Case No.

16,853], in the circuit court of the United States for the Southern district of New-York, the late Mr. Justice Thompson, in June, 1843, held that an administrator or executor might make application for the extension of a patent after the death of the patentee, and that the patent might lawfully be extended on such an application. The same view of the statute was adopted by Mr. Justice McKinley in the case of *Wilson v. Simpson* [Id. 17,834], in equity, in the circuit court of the United States for the Eastern district of Louisiana, and by Judge McCaleb in the same court in the case of *Wilson v. Curtius* [Id. 17,800]. Mr. Justice McLean considered the same question, on the same extension of this patent, in the case of *Brooks v. Bicknell* [Id. 1,945], in the circuit court of the United States for the district of Ohio, and decided that the construction of the act in this respect had been rightly settled by the board of commissioners. The question was several times presented to the lamented Mr. Justice Story. At first he adopted the opinion of Judge McLean from courtesy; but afterwards, in the case of *Woodworth v. Sherman* [Id. 18,019], he said that, on the fullest reflection, he had come to the opinion that Judge McLean was right in his decision that an administrator was competent to apply for and receive this grant, and that to hold otherwise would be going contrary to the whole spirit and policy of the patent laws.

Point II. Whether by force and operation of the 18th section of the act of July 4th, 1836, entitled "An act to promote the progress of the useful arts, &c.," the extension granted to William W. Woodworth, as administrator, on the 16th day of November, 1842, enured to the benefit of assignees under the original patent granted to William Woodworth on the 27th day of December, 1828, or whether said extension enured to the benefit of the administrator only, in his said capacity. The policy of promoting science and the arts by granting letters patent is feebly shadowed forth in the books of common law. It is certain that letters patent originally no such object. They were chiefly employed to grant to favorites of the crown, estates, honors and franchises at the expense of the public welfare. Certainly, very imperfect notions of the present policy of letters patent existed until near the close of the reign of Elizabeth. That queen granted to a favorite of hers, named Ralph Bowes, a monopoly of the manufacture of playing-cards for twelve years, and afterwards extended the franchise for twenty-one years longer. In the letters patent she did not pretend that he had invented those instruments of amusement, or any process of manufacturing them. This monopoly was tested in the case of *Darcy v. Allein*, 11 Coke, 84b, and it was declared void, because injurious to the public welfare. A severe examination of all existing monopolies was made in parliament at an early period in the reign of James I. But this was done by royal concession, and not at all under a claim of legislative power. On that occasion a large number of letters patent

were condemned and abrogated, and none were saved but such as had short terms, and were granted to inventors, for useful discoveries. At last, the statute of 21 Jac. I. c. 3, was passed. See *Hind. Pat.* 592. This statute, which constituted the British code of the law of letters patent for two hundred years, originated, as is seen, not in the policy of promoting science and the arts, but merely in a jealousy of royal power. It established that policy not by direct and affirmative enactments, but by way of excepting those patents which could be defended on public considerations. The grounds of these exceptions were: 1st, that the patentee was the inventor; 2d, that the discovery was useful; 3rd, that the monopoly would operate as an encouragement to genius; 4th, that the term of the monopoly did not extend longer than fourteen years.

This was the British law of patents when the American constitution was founded. An obvious necessity dictated that the power to provide for the promotion of the arts and sciences should be vested in the federal government, rather than in the authorities of the respective states. And it is remarkable how distinctly every feature of the policy of the statute of James I. is impressed on the constitution of the United States. Article 1, § 8. Congress shall have power. What power? Power to promote the progress of science and useful arts. How? By securing the exclusive right of property in writings and discoveries. To whom? To authors and inventors. For how long? For limited times. Congress exercised its constitutional power in the act of April 10th, 1790 (1 Stat. 109), and that law was expressed in the very words of the statute of James I. The act was revised in 1793, and amended in 1800, 1819, and 1832. Neither the statute of James I., nor the act of 1793, provided for the case of an improvement of an invention already patented; nor for the conflict of claims between the inventor of the principle and the discoverer of the improvement. Nor did either the British or the American code provide for the re-issue of void letters patent; nor for an extension under any circumstances of the limited term for which letters patent were issued. As early as 1793, however, it was perceived that a controversy might arise between the patentee of a machine, and a person who should discover an improvement of it. Congress, therefore, in that year enacted that any person who should have discovered an improvement in the principle of any machine, or in the process of any composition of matter, which should have been patented, and should have obtained a patent for such improvement, should not be at liberty to make, use, or vend the original discovery, nor should the first inventor be at liberty to use the improvement. 1 Stat. 321. Here we recognize for the first time improvements of patents, in the law regulating the rights of scientific property.

In England, as well as in America, until a very recent period, a defective description of the invention rendered the letters patent void.

An attempt was made by American judges, as early as 1812, to correct this great injustice. It was held by them that letters patent might be valid, although the specification were defective, unless the defect arose from an intention to deceive the public. *Whittemore v. Cutter* [Case No. 17,600]; *Park v. Little* [Id. 10,715]. But this view was abandoned in submission to stringent British decisions on the same subject, and it was thereafter held here, as in England, that a defective specification rendered letters patent absolutely void, no matter how innocent of fraudulent design the inventor, or how beneficent his invention. *Morris v. Huntington* [Id. 9,831]. The evil could now be corrected only by a proceeding which the letter of the law did not direct or recognize, namely, an amendment of the specification and a re-issue of the letters patent. In a case which came before Mr. Justice Thompson in 1824, he held, that there was no insuperable objection to entering a vacatur of the patent, if it had been taken out inadvertently and by mistake; that all the proceedings in the state department were *ex parte*, and were conducted ministerially rather than judicially; and that there was no good reason why the patent might not be surrendered and cancelled of record, a new and correct specification be filed, and a second, that is to say, a re-issued patent for the unexpired portion of the fourteen years be issued to the patentee, whereby the inventor and the public would be secured in their rights. The department of state promptly adopted the opinion of Judge Thompson, and the principle was sanctioned by the supreme court of the United States. *Grant v. Raymond*, 6 Pet. [31 U. S.] 218; *Shaw v. Cooper*, 7 Pet. [32 U. S.] 292. It was also engrafted by congress upon the patent system of this country in 1832, by a law which declared that whenever any patent should be invalid or inoperative, for the reason that any of the terms or conditions prescribed in the third section of the act of 1793 had not, through inadvertence, accident or mistake, and without any fraudulent or deceptive intention, been complied with on the part of the inventor, it should be lawful for the secretary of state, upon the surrender to him of such patent, to cause a new one to be granted to the inventor, for the same invention, for the residue of the period, then unexpired, for which the original patent was granted, upon his complying with the terms and conditions prescribed in the third section of the act. 4 Stat. 559. The law remained thus until 1836. The security offered to inventors, as authorized by the constitution and granted by congress, consisted of the following provisions, namely: a patent for an invention for the term of fourteen years; a patent for an improvement of an invention already patented; and a right to an altered and renewed or re-issued patent for the same term, in lieu of one which should prove void by reason of a defective specification. The act of 5 & 6 Wm. IV. c. 83, passed in 1835, through the efforts of Lord Brougham, contained a provision for the surrender of letters patent for a defective specification, and for the renewal

of them on an amended specification, similar in all respects to our own law of 1832.

There was yet another advance to be made. This was accomplished in 1836. Congress, in that year, revised the entire patent system, and abolished all existing laws. A new code was enacted. 5 Stat. 117. Under the former system an inventor was held, in regard to time, to the strict letter of the contract between himself and the government, as expressed in his letters patent. By that contract, he had agreed to surrender his discovery to the public forever, in consideration of being secured in the exclusive enjoyment of it for the limited time appointed by law. Previously to 1836 the term was inflexibly fixed at fourteen years. If an inventor improved his own invention or that of another, he could obtain a patent for the improvement, but only for the term of fourteen years. If a patent proved defective and void, it could be amended, altered and renewed, and thus be made valid and effectual, but only for so many years or months or days as might remain of the fourteen years originally stipulated. No public authority had power, on any consideration, to extend the duration of a patent. No law existed recognizing a right in the inventor to an extension, and of course no such right existed. If, now and then, a patent was extended for seven or perhaps fourteen years, the act of extension was effected not by any subordinate authority, nor by virtue of any existing law, nor in acknowledgment of any right or claim on the part of the inventor, nor in accordance with any established policy. But, on the contrary, the extension was an exception to the policy of the country, and constituted a gift, conferred by a high and solemn act of legislative power. But a change at length came over the spirit of the age. In England as well as in America, after a long trial of the same absolute limitation of patents to the term of fourteen years, it was found that when an invention was really useful, such numerous and powerful interests were often combined against the inventor, that, with the aid of fraud and litigation, letters patent too often failed to secure to the inventor the enjoyment of his property during the limited time so strictly measured. The English statute of 5 & 6 Wm. IV. c. 83, was passed on the 10th of September, 1835. That statute provides that in certain cases after a full hearing of and enquiry into the whole matter by the judicial committee of the privy council, his majesty, if he shall think fit, may grant new letters patent for an invention already patented, "for a term not exceeding seven years after the expiration of the first term, any law, custom or usage to the contrary in any wise notwithstanding." The principle of that act was adopted by the congress of the United States at the very next session of that body. The provision thus made for extending patents, constitutes the 18th section of the act of July 4th, 1836.

All the difficulties which have arisen in the present case, and all which can be raised in regard to the construction of the 18th section, will vanish when a distinction is simply and plainly taken between the "extension" of letters patent and the "renewal" of letters patent. Legislative bodies may use terms loosely, but courts apply them strictly. A "renewal" renovates a patent which has become void, and restores it to the same condition in which it was when it became void, and for the same period of duration. An "extension" differs altogether from this. It seizes upon the franchise at the expiration of the fourteen years, and extends it seven years more; and it has this effect whether the franchise ran its course of fourteen years by virtue of original letters patent or of renewed letters patent. Hence it follows that the "extension" to be made under the 18th section is a relinquishment by the state to the inventor of a portion of an estate which he had solemnly dedicated to the public use; whereas, what is conceded to him by a renewal is what was granted ineffectually before. The claim of the inventor, recognized by the 18th section, arises, not as in other cases, out of his acknowledged title to his invention, for he has conveyed that to the public, nor yet out of the palpable obligation of the government to render effectual the defective guaranty for which it received so valuable an equivalent. But his claim arises now out of a principle of national magnanimity. The legislature is bound to secure individual rights, and could not justly deny a patent for a new invention, or for an improvement of an invention. Nor could congress, with more justice, refuse a renewed patent, when the first should prove useless, for that would be to seize the inventor's property without allowing him any reward, after pretending to give him a solemn guaranty for its enjoyment. And congress could not declare that the renewed patent should be for the sole use of the patentee to the exclusion of assignees, because that would be unjust, fraudulent, and a palpable violation of the constitution. But when the inventor has renounced his discovery to the public, by a contract fairly made and valid in law, a claim for a modification of that contract and for a further remuneration by a prolongation of the franchise, on the ground of disappointed expectation or effort, however just or reasonable, is at least without precedent. Nevertheless, the 18th section is neither capricious, nor unreasonable, nor impolitic. It does not authorize extensions without just claims and enlightened purposes. Those who maintain that, by virtue of the 18th section, assignees of the original term acquire an interest in the extended term, without any express agreement, seem to overlook the nature, alike, of the occasion provided for by that section, of the action prescribed, of the claims of the party procuring that action, and of the policy of the law. For it is on the desire, not of an as-

signee, but of the patentee, that an extension may be granted in proper cases. The patent to be extended must belong not to an assignee but to the patentee. And the patentee must not merely desire an extension. He cannot be passive. He must act. He must make application in writing and set forth the grounds thereof. Those grounds are to be exhibited, not by any stranger, or even by an assignee or privy in interest, but by the patentee. The 18th section acknowledges that however the patentee may have leased or sold his franchise, in whole or in part, for the term of fourteen years, an equity in remainder belongs to him, and that the right to a prolongation of the term, if it exist in any body, exists in him. It is unimportant to enquire whether the right in the thing patented, after the fourteen years, has reverted to the inventor, or whether he be deemed never to have parted with it. The law expressly declares it his, in saying—"if the patentee shall desire an extension of his patent."

Again, the act directs the commissioner of patents to demand forty dollars in advance, as a condition of receiving an application for an extension, and he shall exact that sum, not from an assignee or a stranger, but from the applicant, who, it has been shown, can be no other than the patentee. Congress distinctly say that this money is to be paid by him as in the case of an original application for a patent. These directions are given for a public transaction, in the nature of a suit to the government for a right. This suit is, in form, a judicial proceeding, a prosecution to obtain a grant or franchise beneficial to the applicant, and, possibly, injurious to the public. After the inventor has instituted his prosecution by an application in writing showing the grounds thereof, and after he has paid the legal fee in advance, he is next required to summon the parties interested to appear before the court. Not only is the government there, for its administrative agents constitute the court, but notice must be given to all the world, and care must be taken to bring the notice home to those persons who are most interested adversely to an extension. The duty of thus calling adverse parties before the court is devolved, with all its burthensome expense, not on any public officer or agent, nor on any assignee or person subordinately interested in the property, but on the patentee. A board is constituted, which is a court, for it "receives" an application, "considers" it, "hears the patentee and any person appearing to show cause in opposition," and, with the latitude of judicial discretion, "decides" upon "evidence produced," at a time and place previously given to the parties, and "certifies its judgment and opinion," that the same may become a public record. This view of the judicial character and functions of the board is sustained by the opinion of Mr. Justice McLean, in the case of *Brooks v. Bicknell* [Case No. 1,945].

Thus far the patentee is the actor or prose-

cutur. Nor does his action stop here. Besides all other evidence, the court appeals to his conscience, by requiring a statement, on oath, of the ascertained value of the invention. Of its ascertained value to whom? To the public? No. To assignees and grantees? No. To the patentee and his assignees together? No. But of its ascertained value to the patentee. For that value is to be ascertained by an account of his receipts and expenditures, and of those alone. And the receipts and expenditures thus stated must show a true and faithful account of profit and loss, not by assignees and grantees, but of profit and loss in any manner accruing to him, the patentee, from and by reason of the said invention. Why this elaborate, perplexing and expensive exhibition of the accounts of the patentee exclusively, embracing every item of profit and of loss, arising from whatever cause or in whatever manner? The object is explained in the next clause of the section, to wit: that it may appear "to the full and entire satisfaction of the board, whether it is just and proper, that the term of the patent should be extended, because the patentee has, without neglect or fault on his part, failed to obtain from the use and sale of his invention, a reasonable remuneration for the time, ingenuity and expense bestowed by him upon the same, and the introduction thereof into use."

Who can fail to see that as the inventor alone is invited into court to prefer an application, and is charged with all the responsibilities, expenses and burthens of a public suitor, so the claim investigated is his own, exclusively, and founded upon his own merits, services and sacrifices for the public good? If it be shown that he was not the inventor, his application fails. If it be shown that he has received an adequate recompense, his suit is of course denied. It encounters the same fate, if the failure to obtain such recompense resulted from his own fault or neglect. On the other hand, if he be the inventor, if the discovery be useful, and if he have failed to receive remuneration without such fault or neglect, then, so far as individual interests are concerned, it is just and proper that his application should prevail. And the result must be the same, whether he has used his improvement more or less, whether he has licensed one person or one hundred thousand persons to use his invention, whether he retains the entire property in his franchise or has sold it for every hamlet, town, county and state in the Union. Nor will the case be varied, although assignees have enjoyed the franchise, with or without interruption, whether they have become enriched or impoverished, with or without merit or neglect of their own. Their transactions, their profits and losses, find no place in the "true and faithful account" which the patentee must exhibit. If the board be fully and entirely satisfied of the justice of the claim of the patentee, and

not otherwise, and upon that consideration alone, (but not without due regard to the public interests,) they certify their judgment to that effect to the commissioner of patents. The commissioner is required thereupon to extend the patent for the term of seven years from the expiration of the first term.

The patent thus extended "shall have the same effect in law as though it had been originally granted for the term of twenty-one years." What is thus made to continue twenty-one years, instead of fourteen, its original limitation? The franchise secured by the letters patent. What is that franchise? If we consult the 5th section, we find it is a grant to the inventor for himself, his heirs, executors, administrators or assigns, of the full and exclusive right and liberty of making, using and vending the invention. It is a grant which excludes all men from participating in the enjoyment of the property described. It is a grant to the inventor in praesenti, on the day of the extension. It leaps backward, over all intervening time, to the date of the first patent, and gives that grant the same effect, from that time, as if it had been originally made for twenty-one years. And it looks forward to the possible death of the inventor, or his future assignment of the whole or portions of this new and additional franchise, and includes the patentee and, contingently, his future heirs, executors, administrators and assigns. The heirs, executors, administrators and assigns thus provided for are not the persons who would have been such, had he died or assigned without that extension, but those who shall in fact, and by operation of law, or of his own grant, be his heirs, executors, administrators or assigns, in the event of his future death or assignment. The original patent is not continued from its expiration, with all the accidents, incidents and accessions attached to and gathered round it during its course, but the extension relates back to the commencement of the patent, overleaps all assignments, incidents and accessions, and leaves them as they were, because they are not prolonged or extended, nor is it declared that they are to have the same effect as if the patent had been originally granted for twenty-one years. If the patent were not extended, all assignments and licenses would of course expire with the patent. They must equally expire although the patent is prolonged, for they are not prolonged.

Again, the portions of the 18th section which have been considered manifest a designed neglect and disregard of assignees and licensees. No matter how much any one assignee, or all the assignees, may desire the extension of a patent—no matter though the whole of the original franchise may have been assigned to one person, and he may desire an extension—no matter though assignees of a part, or even of the

whole, make application in writing, and set forth the grounds thereof—no matter what grounds they set forth—no matter though, among such grounds, they show that they have furnished all the capital which has been used in perfecting the discovery and bringing it into use—no matter though they prove, by indisputable evidence, that they have been not merely just, but even generous to the inventor, and liberal to the public, and have been impoverished by their generosity, while the inventor has become opulent, and the country has grown in wealth and prosperity by the expenditure of their capital in bringing the invention into use—no matter though they show all this, and show besides, that the patentee, although indemnified by them, refuses to apply on their behalf and to set forth his accounts on oath, yet the assignees must be dismissed without a hearing. It thus appears, that not only is the patentee a necessary agent in obtaining the extension, but that the policy of the law is to encourage genius by furnishing additional stimulants to inventors, not to assignees, or even to patrons of inventors, and that the law can have effect only at the solicitation of the inventor, in consideration of his exclusive merits and for his benefit and his benefit alone. Why this careful consideration of the inventor? And why this studied neglect of the assignee? Simply because the constitution disclaims all care of assignees, while it positively enjoins the protection of inventors.

But it is insisted by the defendants, that this manifest effect of the 18th section is overcome and defeated by the qualifying sentence at the close of the section, to wit: "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein; provided, however, that no extension of a patent shall be granted after the expiration of the term for which it was originally issued." Before examining particularly this portion of the section, it must be remarked that congress have constitutional power to promote science and the arts by securing rights of property in writings and inventions to authors and inventors only. A construction, therefore, of the 18th section which shall give it effect to secure such a right, primarily, to a mere assignee, without equivalent paid by him to the author or inventor, would certainly be unconstitutional. It is only by the special authority granted in the constitution that congress can interpose. And they can interpose only for the purpose of promoting science, and only by securing the discovery to the inventor. The British government is not restricted by a written constitution. Hence the king there grants letters patents to introducers and to assignees, and he may even deny letters patent to inventors, or refuse to extend them, and may compensate the discoverer of a useful invention by a

sum of money, as was done in Arkwright's case, or oblige an assignee to secure an annuity to the inventor, as in Whitehouse's case. But here congress can do nothing but secure the discovery, and must secure that to the inventor alone.

Again, it must be apparent that neither the entire 18th section, nor the much disputed provision quoted from it, was framed exclusively, or even chiefly, or at all directly, with reference to rights in patented property existing at the time of the passage of the law. The 18th section is merely a part of a broad and comprehensive general system, in many respects new, established by congress for the purpose of regulating, in all cases whatever, for all time to come, the exercise of the constitutional power of the government to secure adequate rewards to authors and inventors. The disputed clause of the 18th section, therefore, as well as the whole section, and the entire statute, must be regarded as directly and chiefly prospective, and providing for future, rather than present patents, patentees, assignments and assignees. Although the proviso, the section, and the act, embrace rights and parties existing at the date of the enactment, their operation in that respect is merely incidental. If there be a conflict between the retrospective application of the provisions and their prospective application, the former must of course give way. Under the pressure of a temporary inconvenience, resulting from what may seem a rigorous application of the law to existing cases, we must carefully avoid fixing upon any part a permanent construction inconsistent with its just and enlightened purposes.

Having thus ascertained the spirit of the provision let us enquire into its possible prospective operation. The 6th section of the statute, following the previous policy of the government, provides for issuing patents in future for a term of fourteen years, as was done before. The 11th section, having reference to patents to be granted under the 6th, declares that they shall be assignable. This provision must be construed as simply declaratory of the assignability of patents to be thereafter granted in pursuance of the law. It may, indeed, be held to recognize the assignability of patents already existing, but, manifestly, it was designed to be chiefly prospective in its operation. So, the 18th section provides, that in certain cases, patents may be extended for seven years, and the disputed clause of that section, following the policy of the 11th section, provides that such extended patents shall be assignable and defines the rights to be acquired by assignees. Let it be remembered that a patent does not imply an irrevocable contract with the government that, at the expiration of the period, the invention shall become public property. The legislature has the power to revive or extend the grant. *Evans v. Eaton* [Case No. 4,559]. Now the 18th section is pertinent and effectual, if it be held that the assignees intended are such as shall become so after the passage of the law, and who

would clearly take their interests subject to the law. Adopting this construction, the 18th section disturbs no contracts, nor does it interfere with any present interest, except for enlightened purposes; while it suffers existing patentees, without injustice to any person, to profit by the provision made chiefly for those who were afterwards to come upon the public stage. It would be a great violence to the law to divert its application unnecessarily; so as to alter the force, form or effect of any existing contract of assignment; it would be absurd to do so, when such diversion would defeat the very policy of the whole enactment, and criminal, if it would conflict with the constitution. The 18th section may further be admitted to have in view assignees of patents existing at the date of the law, and which might afterwards be extended, and, in regard to them, the section excludes the possible inference that, by granting a new term, congress were disturbing the interests existing under the old. All this may be allowed, without conceding that congress intended, by the 18th section, to give to assignees of the original term, without merit or consideration on their part, the benefits of the new one. But the defendants ask—why then did congress insert the provision at all, since they must have known that they could not disturb rights already vested, and since, if the patent, which was assignable, should be extended, it would follow that the extended patent would also be assignable? Legislative caution against misconstruction is neither unusual nor unreasonable, and it might well be doubted whether extended patents would be assignable, unless expressly declared so by law. The statute of 27 Hen. VIII. c. 11, solemnly declared that a patent lawfully issued to one person should not be invalidated by a subsequent patent granting the same thing to another. This was only an affirmation and application of a fixed principle of the common law.

Let us now imagine a case of the prospective application of the 18th section. The case shall be supposed to come before this court in 1855. The letters patent were issued in 1840. The patentee will have obtained an extension in 1854 for seven years. He will have assigned all his interest in that extended term to an assignee, who shall bring an action against the patentee himself for exercising the franchise. The court will of course sustain the title of the assignee. This is one sensible and effectual application of the 18th section. I submit another. A patent was issued before 1836 and assigned, with an express agreement by the patentee, that if congress should pass a law authorizing the extension of the patent for seven years, then the assignee should, for a sufficient consideration, have all the benefit of that extension. This is a sensible and pertinent prospective application of the 18th section, in regard to letters patent existing when the act of 1836 was passed. If these explanations of the provision in regard to assignees be sensible, and sufficient to allow it fair and

practical effect in harmony with the spirit of the act and of the constitution, it ought not to receive another explanation which would be unreasonable, or inconsistent with the palpable object of the legislature.

But the defendants insist that inasmuch as the law of 1836, and especially the 18th section, operates upon existing patents and contemplates their extension, therefore the provision in relation to assignees equally contemplates a prolongation of their terms of assignment. If, indeed, when a patent shall be extended under the 18th section, (whether a patent existing in 1836, or one granted afterwards,) there shall then be in force a valid assignment of the patent, or of any interest in it, for the extended term, the assignee will, in that case, as has been shown, have the benefit of the extension; for the benefit of the extension enures to assignees, to the extent of their interest in the thing patented. In the case supposed the assignee would have an interest in the thing patented, reaching into the additional term of extension. But it must be remembered that the act by no means declares that the benefit of the extension shall enure to assignees beyond the extent of their interest in the thing patented.

The spirit of the constitution forbids congress to pass a law impairing the force of a contract. To abridge the term of fourteen years would be to impair the contract. To add seven years to it would equally be to impair it. Is the question affected by the circumstance that the party injured would be the patentee? Not at all. That circumstance strengthens the argument; for the patentee is the only person known to the government by merit or claim. If I convey an estate for life in lands, can the legislature enact that my grantee shall also have the remainder? Would not such a law impair my contract? If a patentee leases a machine for the fourteen years, reserving an annual rent, and congress declares that the lessee shall have it seven years longer without rent, or even on paying the same rent, would not that impair the contract contained in the lease?

Before the act of 1836, the extent of interest which an assignee could take in any thing patented, was a term of fourteen years and no longer. For assuredly, a man could take an interest in a thing for no longer time than the thing itself could endure. *Ex vi termini*, any assignment made before the act of 1836, ceased with the expiration of the first term, and when a patentee, whose patent was granted before the passage of the law, obtains an extension by virtue of the law, he takes the extended franchise, as he did the original grant, absolutely, and in entire exclusion of all persons to whom he may have assigned or granted an interest in the thing patented, for that interest was bounded by the duration of the original franchise. Now, to construe the act so as to confer the benefits of the extension on a previous assignee whose estate was limited to fourteen years, would involve the absurdi-

ty of altering a solemn contract, not merely without a motive, but in opposition to the motives of the legislature; an enlargement, by mere implication, of the assignee's interest in the thing patented, beyond its fixed bounds; and, in brief, a grant to a stranger, without equivalent, without consideration, without merit, of a portion of that property which once belonged wholly to the inventor, which he had unluckily surrendered to the assignee and to the public without adequate consideration, and which congress designed to restore wholly to the inventor for seven years, in consideration of so great a misfortune. And the grant thus supposed to be made is wrested from the meritorious inventor, and given to the assignee, although he not only never stipulated for it, but never contemplated the possibility of an extension of the patent.

Suppose a patentee to have assigned the entire franchise during the first term. In that case, according to the defendants' construction, the extension would enure to the exclusive benefit of the assignee. Can we suppose any thing more absurd than an application in such case by the patentee, in his own name, at his own expense, in his own person, on an exhibition of his own profits and losses, on the ground of his own merits and misfortunes, fortified by his own oath, for an extension of the patent for seven years for his own benefit, when all the benefits of the extension must pass instantly and irrevocably to his assignee? If this seem unreasonable, add to the statement the possible circumstance, that the patentee has been impoverished by the expense of his invention, while the assignee has become opulent by speculation in the fruits of the inventor's genius. Now, even if such unequal rewards were the result of fair and lawful trade, the lot of the inventor would be hard. But if the assignee have purchased the whole invention, and, by becoming bankrupt, or otherwise, have defrauded the inventor of a just compensation, yet even this circumstance would not at all prevent the entire benefit from enuring to the fraudulent assignee. This argument is believed to have always brought those who sustain the defendants' construction, to the very unstatesmanlike and unlaywerlike conclusion, that no extension of a patent can be granted, when the entire franchise has been assigned for the term of fourteen years. And yet the fact, that the assignee has defrauded the patentee of the whole invention for the whole term, would manifestly be the most conclusive evidence which the inventor could submit to the board in support of his claim to an extension. If however, it shall now be insisted that an extension can be granted in such a case, I respectfully ask—how can the assignee compel the patentee to apply for and receive an extension, and why were assigned interests, so important and meritorious, left by congress at the caprice of a patentee?

Why may not the assignee apply for an ex-

ten- sion? Let us pursue this idea. The law and the letters patent expressly authorize the patentee to grant and assign his original franchise. Nay more. According to the 18th section, he must have used all possible diligence, and granted and assigned all he profitably could, even the whole of the franchise, if in his power, or else he cannot obtain an extension. But just in proportion to the extent of his compliance with the law are the advantages of the extension reduced. And if he has been diligent enough and successful enough to sell the entire franchise, then all the benefits of the extension shall enure to strangers. Do the congress of the United States promulgate their laws by riddles? Is the statute book a volume of paradoxes?

It is urged, moreover, by the defendants, that the law clearly intended that assignees should share in the benefit conferred on the patentee, and have some advantage from the extension of the patent for seven years, for it provides, in express terms, that the benefit of the renewal shall enure to them, thus using a word which shows that it was not the intention of the legislature merely to protect interests which previously existed in assignees and grantees, but to give them a share in the benefit conferred on the patentee by the renewal of the patent. Now, I submit most humbly that it is by no means clear that it was the intention of the legislature to give gratuitously to assignees what is thus supposed. The supposed assignees were either assignees of interests in the extended term, by express contract, or they were not. If they were, their interests are saved. If they were not, then they can take no share in the benefits granted, unless they are created such assignees by operation of law, that is, by force of the 18th section. But that would be a violation of the contract, and, therefore, void. Congress are not to be supposed to intend what is unreasonable, unconstitutional or impossible. With the utmost deference I must insist, that if the law intended what is thus supposed, it intended to confer an unconstitutional boon. Admitting that previously existing interests are protected, certainly they are protected only to the extent in which they exist. The right of an assignee to share in the benefit of an extension depends on his having an interest, by virtue of his assignment, in the thing patented. And the right is co-extensive with the interest. If it reach into the new term for a county or a state, then the assignee has the benefit of the extension for that territory. If it reach into the new term one year or five or seven years, then the assignee has the benefit of the extension for that period.

But again, the words of the 18th section are as follows:—"And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein." Had the clause stopped at the word "patented," the privileges of assignees and gran-

tees under the first term, independently of the language of their respective grants or assignments, without regard to the intention of the parties at the time of making them, and with or without consideration, as the case might be, would have been prolonged by the mere force of the act of congress, in the event of an extension. But the words "to the extent of their respective interest therein" are added to the clause, and the question now is as to their meaning and effect. Our opponents say that they refer to the fractional parts into which a patent-right may be divided, and extend the rights of the assignees of such parts, as well as those of assignees of the entire interest, as the case may be, during the extended term. On the other hand we contend that fractional assignments are protected without these words, and that consequently for this purpose they are, at best but surplusage. Suppose a patent-right divided among as many grantees as there are states in the Union, and suppose the clause ran: "and the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented," and there stopped—could it be doubted that in the event of an extension, it would enure to the assignees within their respective states, and no further? Could it be pretended that words of limitation were necessary to prevent the assignee for Maryland from invading the territory of the assignee for Pennsylvania? Courts under such circumstances could have no hesitation in deciding that the clause, without the words of limitation, prolonged the duration without widening the sphere of the grant or assignment. The clause being perfect, then, for the protection of assignees of the whole interest, or of fractional interests, without the words particularly referred to, we must look for some office for them to perform other than that insisted on by our adversaries.

We contend that they are words of limitation, added to the clause which gives the benefit of extension to assignees and grantees, for the very purpose of narrowing the broad construction that could be put upon it without them, had it stopped at the word "patented." The words are placed where we find them to prevent the benefit of extension from enuring to assignees and grantees independently of the language of their respective grants or assignments, without regard to the intention of the parties at the time of making them, and with or without consideration, as the case might be. Their office is to limit the benefit of the extension to those who have acquired an interest therein, by the language of their grant, according to the intention of the parties, and for a consideration. The words in question fully accomplish this purpose, just and proper in itself, and perfectly consistent with and indeed necessary to the policy of the law. They accomplish, as we have seen, no other object.

Another objection urged against our claim is, that assignees may suffer serious injustice

by the grant of a new and further term to the patentee, unless they are also embraced in it, for, relying on the assurance given by the law, that the monopoly would be thrown open to the public at the expiration of fourteen years, they may have erected costly machinery, and encountered extraordinary expenses, in which case the law of 1836 would enable the patentee to deal with them most severely and oppressively, and to exact from them a heavier sum for the extended term of seven years, than they would have been willing to give for the original term of fourteen.

What is the effect of any extension of a patent? Nay, what is its object? Does it not concede a monopoly, a designed monopoly? Could such a monopoly exist at all, unless it excluded participation? Is it not the very nature of a monopoly, that the patentee may, if he will, deal severely, nay oppressively, with every body? And why is an assignee, who has participated in the profits of the first monopoly, entitled, without paying any consideration, to exemption from the severity and oppression which congress deem it just to allow the patentee to practise towards all other citizens of the commonwealth? The whole force of the argument rests then in the assumption that the assignee may have incurred expense in erecting, during the first term, machinery which would be useful after its expiration, if the monopoly should be opened, as was anticipated when he took his assignment. Upon the point thus presented I offer the following remarks:

First. The act has reference chiefly to prospective cases. In all such cases the assignee takes his assignment without relying, or being at all entitled to rely, on the expectation that the monopoly will be thrown open at the expiration of the first term. On the contrary, he acquires his interest with full knowledge, that if the patentee shall fail to obtain remuneration, he will be entitled to an extension for seven years. All these chances enter into his bargain, and are considered in fixing the price he pays for his assignment. This injustice, against which congress are supposed to have guarded, could by no means happen, except in the very few cases in which patents existing in 1836 should be renewed; while the provision designed to guard against this temporary and inconsiderable inconvenience is one which would defeat the benign operation of the statute in a large class of cases. Certainly, the argument of the defendants is one against the policy of the law, and not merely against its right construction.

Secondly. Not every invention requires the erection of costly machinery or an encounter with great expense. An invention for combining colors would require no machinery and no expense. Yet the assignee of such a patent would participate with the patentee in the benefits of an extension, without paying any equivalent, and without the apology of

fancied injustice. Such partiality to the assignee would be injustice, not only to the inventor but to the public.

Thirdly. When the first term of a patent is about to expire, any citizen may gather capital, erect costly structures and provide water or steam power with machinery, to use the invention for profit, and thus be ready to operate as soon as the fourteen years shall have ended. Nevertheless, the patent may be extended and the citizen, thus ready, be disappointed, and perhaps ruined. Why should not congress consider his case as favorably as that of an assignee, reimbursed, at least in part, by former profits, for similar expenditures?

Fourthly. Neither the patentee, nor his assignee, before the act of 1836, contemplated an extension, because it was not legally possible. When the assignee stipulated for his franchise for the first term, he could stipulate for no more than the patentee had, namely, a term limited to fourteen years. He paid the patentee for no more. If his intention to be ready with machinery, to prosecute the same operations when the patent should expire, constituted a part of his motive to the purchase, it was a contemplated advantage over his fellow-citizens. The extension disappoints his expectation. But it is a disappointment by the intervention of the government; such as all citizens must endure without complaint, when the law is changed for the general good.

Fifthly. The same argument of supposed injustice lies against the grant of the original patent. My neighbor invents a machine and omits to obtain a patent for it. Obtaining a knowledge of it, and deeming it useful, I encounter expense and erect costly machinery, and actually put the machine in operation. The inventor obtains a patent and arrests my wheels by injunction. He may deal severely and oppressively with me. Has congress furnished me any security against such oppression?

Sixthly. The same argument would apply in case of a renewal of a patent void for a defective specification. My neighbor obtains letters patent which the courts pronounce void. I have erected costly machinery and used the invention. He surrenders his void patent and obtains a valid one. Can I complain?

Again. Every patent must be extended before the expiration of the original term. If a patent be extended six months before its close, and if the assignee, having the whole right for the first term, have also a right to sell, may he not make and sell machines enough before the first term shall expire, to supply the entire market for the new term of seven years, and thus defeat the benign purpose of the legislature, and deprive the patentee of all benefit from the extension?

Once more. If, indeed, the benefit of the extension enure not to the patentee but to the assignee, and if the former be merely a

trustee for the latter, then, when there has been an assignment of the whole term, the patentee, being authorized by the 18th section, may obtain an extension, and sell franchises, and when the sales are made, the assignee, having laid dormant during all the proceedings, may prosecute the patentee and strip him of the bounty of his country. This is the condition in which William W. Woodworth, the administrator, now is, if he be not entitled to the benefit of this extension for the children and heirs at law of the inventor. If this be the true construction of the law, well might the inventor shrink from his country's justice, for, like Roman gratitude, it would crush the recipient with its weight.

It is urged, also, that the enhanced value of an invention is often produced by the industry and expenditure of an assignee, in bringing it into public use and more general notice. And yet it is forgotten that the board of patents disregard entirely all industry and all expenditure, save only those of the inventor. The rigorous construction of the laws in relation to the conduct of inventors before obtaining letters patent, seemed to oblige them to mature their discoveries unaided and even in secrecy. Congress, seeking to meliorate this evil, enacted by the 7th section of the law of March 3d, 1839 (5 Stat. 354), that the inventor might sue out a patent, although he might previously have sold to other persons a right to use his machine, provided the sale was made not more than two years before his application, and provided also he had not abandoned or dedicated his invention to the public. This law secured to such a purchaser the right so bought by him to use a specific machine. The supreme court decided, in the case of McClurg v. Kingsland, 1 How. [42 U. S.] 202, that the right acquired by such a purchaser was not confined to the particular machine actually constructed or manufactured before the application for the patent, and that the purchaser might construct and use one after the patent was obtained. And it is insisted here, that there is an analogy between the rights of the assignees in the present case, and the rights of purchasers under the 7th section of this act of 1839, as thus expounded by the supreme court.

Now a sufficient answer to this position will be found in the language of the law of 1839. These are the words:—"Every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or any other person interested in such invention." Now this law defines the right of a person who, before even an application for a patent, has purchased from the inventor a specific machine, not the right to

make and vend such machines to others. The law speaks of the purchase of a machine, not of letters patent, or of a franchise. An inventor owns his discovery absolutely and forever. He may rely on this title alone, unprotected by law, or he may compromise with the state, and surrender all after fourteen years, to secure the public protection during that time. Having at first chosen the former way, he sells a specific machine, of course with an implied license to use it, to a person acting in good faith and paying an ample equivalent. Afterwards the inventor finds his error and applies for a patent. Congress grant the application so tardily made, but stipulate that the patentee shall not defraud the purchaser to whom he has sold a specific machine with a license to use it. Nothing could be more just. Nor does the case of *McClurg v. Kingsland* [supra] give a wider scope to the 7th section of the act of 1839. There a workman, with capital and facilities furnished by his employer, discovered and perfected an improved mode of making iron rolls, and it was, with his consent, used by the employer, without letters patent, in consideration of the benefits thus received. Afterwards the workman changed his service, obtained letters patent, assigned them, and the assignee brought an action against the employer. It was held that the employer had not only a right to use the specific machine, but to sell the rolls that he made with it. But it was not adjudged that he had a right to vend to others to manufacture and sell. In other words, his implied or constructive license was protected, but it was not enlarged.

Now, it is argued, that if the rule is just in one case, it is just in another; and that if it be said in *McClurg v. Kingsland*, that the purchaser might not know that the inventor would ever apply for a patent, and had no reason to suppose that any obstacle would afterwards be interposed to the free and undisturbed use of the right he had purchased, the same must be said in the case now before the court, because the purchaser could not know that the inventor would ever apply for a renewed term, and, when he purchased the right for the whole term of the existing monopoly, had no reason to suppose that any new obstacle would afterwards be interposed to prevent the free, undisturbed, and continued use of the right; and that it would make the legislation of congress in these two laws contradictory in principle, and inconsistent with justice, in cases like the present, if the construction contended for by the plaintiff is given to the act of 1836. But there is no analogy whatever between the cases. Here the assignees bought in 1820, after the patent to Woodworth. They bought under the patent, and were limited to the term thereby granted. What right of the assignee, then, is that which he is entitled to enjoy, without any new obstacle being interposed by the inventor? The right for fourteen years. Certainly the law, according to our construction, does not invade, but expressly secures that right. The inventor, then, raises no new

obstacle to oppose the enjoyment of it in the most absolute manner. It is manifest, however, that the argument on the part of the defendants assumes a supposed further right of the assignee to use the invention freely and without disturbance after the expiration of the fourteen years. He might doubtless have indulged such an expectation when he bought the fourteen years; but every other citizen had just such an expectation without buying any right at all. In regard to the future beyond the fourteen years, the assignee had bought, if any thing, only what the law had already given to him in common with every other citizen. The new obstacle is raised against the enjoyment of that right and of that right alone—against a right held by the assignee in common with every other member of the state—against a right created and existing independently of the assignment. The obstacle, therefore, is created by law, and not interposed by the inventor. It is assumed, moreover, that the assignee has invested some money, or otherwise incurred expense during the first term, in view of a prospective continuance after the monopoly shall have ceased, and the conclusion is, that if the monopoly be renewed he ought to be favored. Is not then the entire argument perfectly answered when we say, that the just and practical inference in regard to patents is, that competition after the monopoly shall expire will render the use of the invention unprofitable to the inventor as well as to his assignee? The prospective continuance supposed to have been contracted for was, therefore, a prospective continuance by him, not as assignee under an extended monopoly, but as one manufacturer in competition with everybody.

Another argument urged is, that it is unjust in congress to take up the franchise again and prolong it after it has expired, because individuals, when they bought specific products or machines, expected to use them without disturbance after the expiration of the patent. This is true, but the argument, if it have any force, invalidates the interposition of congress altogether. Again, the argument confounds things entirely distinct, under a rule not applicable to all. When a party sells a machine, and the right to use it, he necessarily gives a license to use the products. That license cannot be revoked. If there be a patent for a composition of paint, the paint compounded cannot, when spread upon a house, be reached by the inventor, although the patent be extended. But certainly he would have a just and lawful right in such case to claim that no more paint should be compounded by the use of his invention.

It is also insisted, that the defendants' construction of the 18th section in regard to assignees, is in conformity with previous legislation of congress on the same subject, and reference is made, in support of this position, to an act passed in January, 1808, entitled "An act for the relief of Oliver Evans,"

whereby a new patent was granted to him after the expiration of his original one, and in which act there was an express provision, that no person who had before paid him for a license to use his improvement should be obliged to renew it, or be subject to damages for not renewing it. This argument, like most others founded on analogies, would, at best, be very inconclusive. The law referred to is almost a solecism; while many congressional precedents will be found on the other side of the question. Oliver Evans obtained a patent on the 18th of December, 1790, for a discovery in the art of manufacturing flour and meal. Three years and eleven months after the expiration of the first letters patent they were renewed and extended by an act passed January 26, 1808. In consideration, it is presumed, of the lapse of time, (which cannot occur under the act of 1836,) a provision was made for assignees under the first term, as has been stated; but it will be remarked that no saving was made for those who had built machines after the expiration of the patent and before its renewal. And now it is my duty to vindicate the distinction I have taken between the renewal and the extension of letters patent. That cannot properly be called an extension which does not take place until the franchise to be affected has ceased. The act of granting a new term in such a case must be a renewal or revival as well as an extension. In this law of 1808, however, the legislature avoid using words expressing either the idea of a renewal or that of an extension. On the other hand. A patent was granted to Amos Whittemore, on the 5th of June, 1797, for manufacturing cotton and woolen cards. It was extended by an act of congress passed March 3d, 1809, two years before the expiration of the first term. This law contains no restriction in favor of assignees of the original term. Congress declare that the letters patent are extended. No such words as renewed or renewal are found in the statute. The same Oliver Evans obtained from congress an extension of a patent for an improvement in the steam-engine. The law was on the 7th of February, 1815, before the expiration of the first term. The act does not protect assignees, although the patentee is prohibited from receiving more for the use of his invention under the extended term than was paid by assignees under the first term. No such inaccurate expression as renewed or renewal is found in this statute. The letters patent are extended. A patent to Samuel Parker, for improvements in currying leather, was extended for 14 years by an act passed March 3d, 1821, within the first term. The statute lays no restriction on the patentee, and confers no benefit on assignees. Here too the legislature employ the word extend. On the 2d of March, 1831, congress renewed and extended a patent which had been granted to John Adamson, for a floating dry-dock. Although the patent was renewed after the original term had expired, and although the erection of proper machin-

ery for the use of the invention was vastly expensive, the grant is, nevertheless, without restriction, and saves no interest of assignees. And here, as in the act concerning Oliver Evans in 1808, under precisely similar circumstances, the legislature avoid using words conveying the idea of either renewal or extension. A patent to Samuel Browning, for separating iron ore by magnets, was renewed in 1831, almost three years after the end of the first term, without restriction and without benefit to assignees. Jethro Wood's patent for improvements in the plough was extended for 14 years, on the 19th of May, 1832. All the rights as well of assignees as of the patentee were expressly extended during the second term, and he was forbidden to charge for the use of his invention during the new term more than he received during the first term. This was an exception to the general policy of such statutes, and so notoriously has it failed in any degree to reward the inventor, that his son and heir has been imprisoned for costs incurred in a fruitless endeavor to protect his rights. Robert Eastman and Josiah Jaqueth, in March, 1835, obtained an extension by congress of their patent for a machine for sawing clapboards. The rights of assignees were not extended by that act.

Finally, the patent in question, which was granted to William Woodworth in 1828, and extended by the board of patents in 1842, by virtue of the act of 1836, was still further extended by an act of congress passed on the 26th of February, 1845, to take effect after the 27th of December, 1849, without any reservation in favor of assignees under either the first or the second term. These statutes embrace all or nearly all the instances in which the national legislature has put forth its power directly to extend patents, and they manifest a spirit of beneficence towards patentees and of neglect of assignees, entirely in harmony with the construction of the 18th section insisted upon by the plaintiff. Again, in every instance where letters patent have been extended before the expiration of the first term, which is the effect of the 18th section, the legislature have used the terms "extension" and "extended" and "prolongation" and "prolonged," and have never applied to the act of extension the word "renewal," which, on the contrary, has been invariably applied to the substitution of new letters patent on the surrender of those which were void by reason of a defective specification. It is also an extraordinary fact that in the British statutes, text books and reports, the same discrimination between "renewals" and "extensions" is maintained. (The counsel here read from the British statutes and from Webster on Patents to show that the terms "renewal" and "extension" were invariably used as he had applied them, and also referred to the orders of the privy council to show the same application of the terms in all cases.)

The public documents of the board of patents and of the congress of 1845 show the grounds on which the extensions of the patent

in question were made. They are fully exhibited in the memorial of the administrator of William Woodworth, submitted to congress. The invention of William Woodworth consisted in an entirely new organization of instruments and processes by which boards and plank, and even mineral substances, could be planed, tongued and grooved and cut into mouldings, at a single operation, with a power easily attainable, and with great dispatch. While engaged in perfecting his discovery he procured indispensable pecuniary assistance from James Strong, but not without a sacrifice of one-half of his right in the invention. After the patent was obtained, Woodworth and Strong incurred ruinous expenses in bringing their machine to public notice and favor. At this critical period, when they were greatly embarrassed, they were prevented from making sales by an advertisement published by Uri Emmons, who claimed to be the true inventor of the machine patented by Woodworth and denounced prosecution against all who should use the invention. This pretension of Emmons' was fraudulent and false. He was not the inventor. Henry Gifford of Syracuse applied to Emmons, in 1824, to devise a machine to be used in building vats required in manufacturing salt by solar evaporation. Emmons built a machine for this purpose, which was found useless and was abandoned and destroyed. Although it resembled Woodworth's in some particulars, it was essentially different as an organized machine. Emmons never built any other machine, or reduced his ideas to form, or applied for letters patent, until after letters were granted to Woodworth. Emmons found Twogood, Halstead, and Tyack negotiating with Woodworth for purchases under him, informed them that he was the inventor of Woodworth's machine, and, for the sum of one thousand dollars paid by them, proceeded to Washington, sued out letters patent for a machine like Woodworth's in many respects, and assigned it to Twogood, Halstead, and Tyack. Embarrassed by opposition of builders, especially of joiners, as well as by debts and heavy losses by incendiary fires, and threatened with litigation, Woodworth and Strong consented, from necessity, to assign to Twogood, Halstead, and Tyack exclusive rights under their patent for the Southern parts of the United States, for no other equivalent than an assignment of exclusive rights under Emmons' fraudulent patent for the Northern states. Woodworth and Strong encountered great difficulties in selling their franchise after this ruinous compromise. They received only an inconsiderable sum and the inventor died in the city of New York in the month of February, 1839, poverty bearing its usual testimony to his character as an inventor and vindicating his merits as a public benefactor. The administrator, after setting forth these facts, stated the exten-

sion of the patent under the 18th section of the act of 1836, and a failure thus far to realize the benefits of it, for causes not necessary to be specified here, and prayed an extension by congress to himself, as administrator, exclusive of assignees under the original patent. The act of 1845, further extending the patent, was passed in compliance with this memorial, and is not merely in harmony with previous legislation, but is entitled to be regarded as a legislative construction of the act of 1836.

It is also claimed that, in England, letters patent are extended on the application of assignees and to assignees, and that, since the language of the British statute and that of our own agree, the same construction ought to be given to the one as to the other. But it has been shown that the British legislature are not rigorously held to secure scientific property to the inventor, as congress are, by a constitution. Patent-rights pass in England by involuntary assignment, that is, by decree in bankruptcy and sale on execution. And the decree in bankruptcy carries all the estate of the inventor, and, of course, the possible remainder of the scientific property after the expiration of the term of fourteen years, as much as the right to the property before the granting of a patent. Therefore, Lord Brougham declared that the statute requires that the letters of extension shall issue to the person owning the possible remainder, whether he be patentee or assignee. Case of Southworth's Patent (in privy council, 1837) Webst. Pat. Cas. 487. And it was declared by the same eminent jurist that the British government seek to benefit the patentee, mediately, through his assignee. Extensions of Bate's and Macintosh's Patents, Webst. Pat. Cas. 739. So, in England, letters patent of extension are granted to the legal assignee, and he is sometimes obliged to secure an annuity to the inventor, as in Whitehouse's Case; while sometimes an extension is denied, but compensation is made in money, as in Arkwright's Case.

But even in England no person is entitled to an extension or to any benefit from an extension, as assignee or grantee, merely because he had a license or grant under the first term, but he must be an assignee of the future estate after the first term. So, licensees there take no right whatever under the new term, not even a right to use specific machines. This is clearly shown from the case of the extension of Southworth's patent. Webst. Pat. Cas. 486. In that case the assignee applied. There were twenty-two licensees, and they had all stipulated to pay during the extended term at the same rates at which they had paid under the first term. A review of the cases of extensions of letters patent adjudicated in the privy council, will clearly illustrate these two propositions: First. That the patentee only, or his assignee, for an adequate consideration, of the contingent extension, and not merely of the fran-

chise for the term of fourteen years, must apply for and obtain the extension. Secondly. That no shadow of benefit from the extension is reserved to grantees or licensees of the first term.

Thus far, the effect of the 18th section has been considered with reference to interests of assignees created by an assignment executed before the act of 1836 was passed, and expressly limited in its provisions to the original term of fourteen years, and our object has been to show that that act does not operate to enlarge or extend or alter or affect the rights of assignees in such cases, but that the renewal of a patent under the 18th section enures to the benefit of the administrator, exclusive of all such assignees.

Point III. Whether the extension specified in the foregoing second point enured to the benefit of the administrator to whom the same was granted, and to him in that capacity exclusively; or whether, as to the territory specified in the contract of assignment made by William Woodworth and James Strong to Twogood, Halstead and Tyack, on the 28th day of November, 1829, and set forth in the first special plea to the first count of the declaration, and by legal operation of the covenants contained in said contract, the said extension enured to the benefit of the said Twogood, Halstead, and Tyack, or their assigns. In the first place, the incidental retrospective operation of the 18th section on patents and assignments existing when the law was passed, (to which class the present case belongs,) must be distinguished from the prospective effect of the statute upon patents granted after its enactment. Since the act of 1836 extensions of patents are legally possible. An inventor has not only a legal property in his discovery, but a legal right to obtain letters patent for fourteen years, together with a legal contingent right to apply during that term for an extension for seven years more. This contingent right is undoubtedly as really the subject of assignment or release as the right to an original patent. Contracts concerning it would be upheld, at least in a court of equity. But in such a case the contract, to pass to the assignee the benefit of the extension for a future term, must be express, or must arise by unquestionable legal implication; that is to say, the intention of the parties to that effect must be plain and unequivocal.

Again, it is not to be denied that, before the act of 1836, an inventor, having a patent for the term of fourteen years, might have contemplated the possibility of the abolition of the whole patent system of the country and the establishment of a new one in its stead, and of a new feature in the new system, under which meritorious and unfortunate inventors might obtain extensions of their letters patent. It is also true that an inventor thus speculating on the distant and uncertain, if not improbable action of the government, might lawfully contract with an assignee, or with any other per-

son, concerning the speculative extension of his patent by a future commissioner of patents, under the contemplated law of congress, and that a court of equity might oblige the patentee to perform such an agreement. But such an agreement could not be inferred from any general or ambiguous terms. For, in all legal transactions some measure of certainty is necessarily required, and, in contracts, certainty in an absolute degree. Now what certainty is there in the present case? It can only be conjectured that the parties, when making this agreement in 1829, contemplated things so strange and extraordinary, as that the whole patent system of the United States should be changed in 1836, and provision be made for extending letters patent, and the greater contingency of William Woodworth's ability to obtain such an extension. And these conjectures are repugnant to all probability. But it is not enough that we can imagine such conjectures to have been entertained by the parties. We must have them written in the contract, in terms so plain, strong, and unequivocal, as not to mislead. This would be necessary to indicate with certainty what the contingency was and whether it has happened. The knowledge, speculations, and intentions of the parties must have been fully expressed in every such instrument, so that it may be certainly known, when the supposed contingency shall happen, whether it be the same which was the subject of the contract. The contract of assignment by Woodworth and Strong to Twogood, Halstead, and Tyack, made in 1829, expresses no such anticipation or speculation concerning the future action of congress. The contract looks to possible improvements of the invention, and to possible alterations and renewals of the letters patent. But it is totally silent concerning not merely the passage of a future law authorizing an extension of this patent, or extensions of patents generally, but concerning any possible extension of the patent in any manner whatever. Who can say, then, that the parties intended that extension which has taken place?

Again, no matter what the parties may be supposed to have stipulated for, and even though a right to an extension might have passed under the general words, yet these words are controlled by the habendum, and restricted to fourteen years. The assignee can take nothing but what must expire with the fourteen years. It is argued that the whole of the 18th section must have effect, and that the agreement between Woodworth and Strong must have effect. Granted; but the whole agreement must have effect. No part of it must fail. At least, if any part must fail, it must be that which is vague and uncertain, not that which is absolute. Now that part of the agreement which is most absolute and unequivocal is the declaration that Twogood, Halstead, and Tyack shall have and hold the rights and privileges thereby granted for and during the term of fourteen years from the date of the patent, and no longer.

Mr. Stevens: The deed does not say "and no longer."

No; the words "and no longer" are not there. But they are affixed by conclusion of law as absolutely as if they were written in capitals. The construction insisted upon by our adversaries, sacrifices this limitation which is certain, to carry out an inference from the contract as uncertain as any human speculation. Who will say, then, that when the patentee expressly limited his grant to the term of fourteen years, it nevertheless conveyed the same franchise for twenty-one years, seven years of which could only be created by the future legislation of congress? When this agreement was made, the former patent laws were in force. The act of 1836 had not yet come into being. The contract must be expounded with reference to laws and facts which then existed. There was, in 1829, a definite legal meaning of the term "improvement in machinery," and an equally definite legal significance in the words "alteration of a patent," and an equally definite legal application of the expression "renewal of a patent," and each and every one of these terms expressed a well known legal and feasible transaction, different altogether from an extension of letters patent, which was then a legal impossibility. It results, therefore, that the improvements, alterations, and renewals stipulated for, were those which were thus well known, legal, and feasible; not an extension, which was then impracticable. The difficulty in the case arises altogether from confounding the word "renewal" with the word "extension."

Again, a contract can by no possibility be extended so as to bind either party to any thing, which was not mutually understood when it was made. This contract means now just what it meant before the 18th section of the act of 1836 came into the statute book. As the effect of the 18th section is to be ascertained by reasoning a priori, so the meaning of the contract is to be obtained by abstractly examining its provisions, excluding altogether the law passed so long after the agreement was made. Had William Woodworth proposed, after it was made, to apply to congress for an extension of his patent, and had he consulted counsel as to the extent of the assignment to Twogood, Halstead, and Tyack, would not any lawyer have advised him that the assignment related merely to the term of fourteen years, and to renewals of the patent, as then recognized by law, during that term? We are told, however, that when this assignment was made, the parties knew that congress did sometimes extend patents, and may therefore be deemed to have foreseen and provided for an extension. But the difficulty is not that the parties might have foreseen and provided for an extension, but that, foreseeing such an extension, they did not provide for it. They provided only for a renewal within fourteen years, not for an extension for seven years longer. The covenant as to renewal, is satisfied by such renewals as the law then provided for, and the limitation of the whole benefit of the grant to fourteen years, shows that such renewals, and not extensions, were then contemplated. Once more, it is reasonable to sup-

pose that the parties covenanted for what was necessary. Here were two patents for the same discovery, Woodworth's and Emmons'. The parties compromised their conflicting pretensions by a mutual deed, each taking an equal interest in the other's patent. One or the other patent must be void, and must therefore be amended or renewed. None but the patentee, however, could obtain a renewal. Hence the mutual covenant that all renewals should enure to the benefit of the assignee within his district.

It remains to be observed that the 18th section leaves that contract of assignment as it found it. It does not diminish by a hair's breadth the rights of the assignees; nor does it enlarge them. The saving clause provides that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented," but only "to the extent of their respective interest therein." Twogood, Halstead, and Tyack had a right to use the thing patented, but only for fourteen years, only during the original patent, not for any portion of the extension; and of course their interest remains the same, if not enlarged by the statute. The 18th section presupposes sales of the whole, or of a great part, at least, of the patent, during the first term, calls for an account, and makes the profits and losses of the sales the basis of a right to an extension. To say, then, that the act meant to enlarge the contract of the assignees, and prolong the term assigned, and thus defeat the objects of the extension, is to impeach the wisdom of the legislature. But if we admit, for argument's sake, that the assignment by Woodworth and Strong contemplated such an extension of the patent as has been made, still it was invalid as an assignment, and constitutes no bar to the plaintiffs' suit. It was at most a mere executory agreement, concerning an impossible contingency, if such an expression may be allowed. An assignment or grant at law cannot be of a chose in action, bare right or naked possibility, much less of a legal impossibility. There was not only no such term of seven years, and no such extension of the fourteen years in being when the agreement was made, but it was not legally possible there ever should be.

But grant that the interest was a legal possibility, yet it was contingent and absolutely uncertain. It relates to a thing not in esse, and which never might be. When, however, such a thing comes in esse, chancery may seize the agreement and award a specific performance, which will convert the merely equitable possible interest into a legal right. Since, then, the interest is a merely equitable one, requiring protection in equity, because of the absence of any legal right, it follows that the assignment in question cannot, with or without aid from the 18th section, carry any legal title to the benefits of the extension; and it is only of legal titles that we have here to inquire. This question was considered by Mr. Justice Story in the case of Woodworth v. Sherman [Case No. 18,019]. He there held that the doctrine for

which I have been contending was expressly applicable to licenses and assignments under the patent act of 1836, and a fortiori applicable, because the whole design of the 18th section was, in terms, exclusively confined to the original inventor, and for his sole benefit, and not for the benefit of his licensee or assignee; and therefore that section was to receive a correspondent construction in favor of the inventor alone, unless the qualifying clause of the section, by natural or necessary implication, conferred the right upon the licensee or assignee. And in regard to the effect of the qualifying clause, the learned judge said: "The clause does not mean to enlarge the right of the assignees or grantees to use the thing patented, beyond the extent of the interest originally granted to them. If that interest was, from its nature or character, or just interpretation, limited to the original term for which the inventor held the patent, then the assignees and grantees were to have no benefit ultra in the renewed patent."

One word further. If the contract carry to Twogood, Halstead and Tyack the first extension, that made by the board in 1842, why does it not equally carry to them the second extension, that of 1845? Is there to be no end to their estate of fourteen years? May they forever remain passive and indifferent, and yet, at each successive effort by congress to reward the genius of the inventor, shall the very shadows of their names defeat the national magnanimity, and convert into mockery the magnificence of a grateful people; or, worse than this, can the assignees now wrest from the children of the inventor all they have realized from the extension?

Patented rights pass by all the forms of legal and involuntary assignment, that is by assignments in bankruptcy, as well as by voluntary grant, and may either be sold on execution, or a bill in chancery will reach them to satisfy a judgment. Phil. Pat. 354; Hesse v. Stevenson, 3 Bos. & P. 565. Now, the bankruptcy of the patentee is the consequence of his failure to obtain a remuneration by the use and sale of his invention. It was the design of congress to relieve him. Can it be supposed for an instant that when a bankrupt patentee has made a compulsory assignment of all his rights for the benefit of his creditors, those creditors may seize the new estate and swell their dividends, while he sinks into poverty and despair? The constitution provides not for payment of debts, but for the promotion of science and the arts, and directs this to be done by securing to authors and inventors the fruits of their labors, not by pampering creditors who have already eaten out the substance of public benefactors.

The argument is advanced that the word "renewal" used in the contract, is broad enough to embrace, not only renewals then authorized by law, but renewals that might afterwards be provided for; and that this

construction of the word conforms to the scope and spirit of the agreement, and carries into effect the intention and design of the parties, at the time they made it, and is the only construction which will do equal justice to both parties. The word "renewal" is, indeed, broad enough. But the question is not whether it is broad enough to include extensions, but whether it is narrow enough, precise enough, accurate enough. If the word "renewal" had, when the contract was made, a definite and well understood legal application to renewals for the original term in cases where the patent was void, and the act of extending letters patent was at that time known in law by the term "extension" as contradistinguished from "renewal," then the word "renewal" is not accurate enough to embrace an extension. The word "renewal," in this contract, cannot, by any reasoning, or on any principle of law or of logic, mean anything which did not exist, or anything which, though it might happen thereafter, was probably not contemplated by the parties when the agreement was made. For, when the contract was made, the act of 1836 had not passed, and I understand it to be conceded on the part of the defendants, that probably the parties to the contract did not contemplate the passage of such a law. Now, not only is a party forbidden by equity and good conscience from using an unforeseen advantage to defeat his contract, but by no rule of legal reasoning can an agreement be so construed, either in letter or spirit, as to make its terms embrace an object not contemplated by the parties. An executory agreement is an agreement concerning what the parties contemplate, and nothing else. It cannot hold either party concerning things not contemplated. We may infer, therefore, a concession that the extension of the patent is not provided for by the letter of the contract.

The argument for the defendants is further stated thus: "Whether the word 'renewal' did or did not look to the extension of time given by the act of 1836, it is evident upon the words of the covenant that whatever additional value either inventor (Woodworth or Emmons) might afterwards be able to obtain for his invention, it should enure to the benefit of the assignee within the district aforesaid. The parties were not only bound, forever afterwards, to offer no obstruction to one another in their particular districts, but to give to each other the full benefit of their respective exertions to increase the value of their inventions; and if they then looked only to a renewal to be procured by surrendering the existing patent, if it should be found to be defective, and by taking out a new one according to the act of July, 1832, yet it is very clear that both parties intended that every benefit of any kind, that might be obtained for the respective inventors should belong to the assignees in the respective districts. They were in that re-

spect to have a common interest in their inventions, and they have used the broadest words to accomplish that object—words which unquestionably embrace every mode by which the value of the patents could be increased. If by a subsequent act of congress advantages were given to the patentee which he did not at that time possess, and which were not, therefore, in the contemplation of the parties, yet, according to the spirit and meaning of the covenant, the assignee had a right to stand in the place of the patentee in his district, in respect to the new privileges as well as to the old, and it would be against equity and good conscience to allow him to use a privilege afterwards unexpectedly gained, in order to defeat his own contract.”

I reply to this very forcible argument: First. The effect of the extension is diminished by describing it as a mere extension of time. An extension is a resumption of the franchise, and a new grant thereof for a term of seven years. Secondly. How does it appear that any benefit of any kind, not stipulated, should pass to the assignees respectively? Thirdly. The contract here was expressly limited to fourteen years. The habendum is: “To have and to hold for fourteen years.” An extension of the patent after that time for the benefit of the patentee did not “defeat,” could not “defeat” the contract during the fourteen years stipulated. “Whatever additional value” the patent should receive, should pass to the assignee for fourteen years, but for no longer. Fourthly. If the extension were obtained unexpectedly, as is supposed, then manifestly it was not foreseen, when the contract was made. Unless the contract show such foresight, either by express words or by unerring legal implication, then the contract cannot be enlarged so as to make it transfer to the assignee the unexpected estate granted to the inventor. Fifthly. The force of the argument founded on the well understood meaning of the terms “improvements,” “alterations,” and “renewals” of the patent, employed in the assignment, is parried, by calling up a supposed “spirit of the contract.” This spirit is thus defined, viz: that “whatever additional value either inventor might afterwards be able to obtain for his invention, should enure to the benefit of the assignee.” And we are assured that the parties here used the broadest words to designate this generous spirit. If this be so, how does it happen, then, that the letter of the contract is not sufficient, without invoking its spirit? Where are any words which imply anything concerning an additional value to the invention, except an “improvement” of the machine, or anything concerning a better security for the franchise, except the words “alteration and renewal” of the patent? All those words are well and fully satisfied by transactions then legal and foreseen, without enlarging their application

to things unexpected and legally impossible. But if this reasoning be thus far sound, the spirit of the agreement must, after all, be ascertained from a general survey of its entire contents. The limitation of fourteen years is absolute and inflexible. You must kill so much of the letter before you can call the supposed spirit to life. Thus, then, while we grant that the inventor could not within the fourteen years avail himself of any advantage, foreseen or unexpected, to defeat the contract he had made for that time, he is left at entire liberty afterwards to avail himself of the magnanimity of his country, not only because it was not foreseen, and clearly, therefore, not bargained away, but because all that was bargained away ceased at the expiration of fourteen years.

But, besides these views of the operation of the 18th section in regard to the rights of assignees, I will refer the court to some authorities on the question. In the case of Van Hook v. Wood [Case No. 16,854], in the circuit court for the Southern district of New-York, in equity, on a motion for an injunction, in October, 1844, Betts, district judge, declared that he considered it settled in the construction of Woodworth’s patent, at least so far as to control that incidental motion, “that the extension of the patent to the administrator, vested a legal and valid title in him, and that this right did not enure to the benefit of assignees of the original patent, their interest being limited to the period of that patent.” Mr. Justice McKinley took the same view of the subject in the case of Wilson v. Simpson [Id. 17,834], in the circuit court for the district of Louisiana. The question was elaborately examined in the same court by McCaleb, district judge, in the case of Wilson v. Curtius [Id. 17,800]. He held that the parties to the contract contracted without reference to any right which it is pretended is secured to assignees under the act of 1836; that the object of the renewal authorized by the 18th section of that act was not to benefit assignees, but the original inventor or his heirs; that the contract contained no stipulation securing an extension of the right, upon any reasonable or legal interpretation of that instrument; that the law should be construed liberally for the inventor and strictly for the assignee; that when the assignment was made, the parties knew well their rights, and a consideration was paid by the assignees for the exclusive right for fourteen years; that the assignment might have contained a clear, positive, unambiguous stipulation for the benefit of an extension, should one be obtained at the expiration of the fourteen years; but that the want of such a stipulation could not be supplied by the court, and was fatal to the claim of the assignee. In the case before cited, of Woodworth v. Sherman [supra], Mr. Justice Story reviewed the 18th section of the act of 1836, and came to the conclusion that the assignor, before an extension of the patent, could legally grant and convey no more than the

first term; that the 18th section did not extend the rights of assignees; and that assignees could not, by virtue of that act, take any interest in the extended term, unless the assignor had, "by express words, or necessary implication, shown a broader intention," an intention to grant not merely what he then possessed, but also the possibilities which he might thereafter acquire. He declared that this construction made the whole structure of the 18th section harmonious with its professed objects, while any other would render it contradictory and subversive of the object of its enactment, would take from the inventor what he never intended to part with, and might "deprive him, in part, or in the whole, according to circumstances, of the reward, which the section seemed so studiously to hold out to encourage his genius and skill, and to reimburse his expenditures." Mr. Justice McLean also examined these questions in the case of *Brooks v. Bicknell* [Case No. 1,946], and came to the same conclusions.

Point IV. Whether the plaintiff, claiming title under the extension, from the administrator, can maintain an action for an infringement of the patent-right, within the territory specified in the contract of assignment to Twogood, Halstead and Tyack, against any person not claiming under said assignment, or whether the said assignment be of itself a perfect bar to the plaintiff's suit. If the second and third questions, or the third only, be decided in favor of the plaintiff, the decision will be conclusive in his favor on this fourth proposition.

First. It has been shown that, at most, the interest assigned by Woodworth and Strong to Twogood, Halstead, and Tyack was a mere contingent claim in equity, not assignable at common law. Now, the utmost effect of the qualifying provision at the close of the 18th section is to secure that interest just as it was; and if it were an interest in the extended term, the law must recognize it during that term. But it does not therefore convert the mere equity into a legal property, or interest, or title. Such a mere equity cannot deprive the plaintiff of his title. As long as the patentee, though he has agreed to make an assignment, has not made it, he may bring an action in his own name for an infringement of the patent, notwithstanding such agreement, since the assignee is not put in the place of the patentee, as to right and responsibility, until the assignment is executed. *Park v. Little* [Case No. 10,715].

Secondly. This is not an action for trespass on land, nor are the interests with which we are concerned real estate, or even real chattels. Nor are the legal instruments with which we are engaged deeds or grants. This is an action of trespass on the case for violating rights in personal property. Whatever may be the rights of Twogood, Halstead, and Tyack, or of their assignees if they have any, the defendants appear here without title. They neither derive nor pretend any title. The

plaintiff, by title from the administrator, who had a right to assign, is enjoying the franchise. The defendants are mere trespassers, and their defence amounts to this:—"Because you made an agreement in 1829 with Twogood, Halstead, and Tyack, that if you should obtain an extension for this term of seven years, you would assign the extension to them, therefore we are at liberty to pirate the property during that time, even though Twogood, Halstead and Tyack do not demand the performance of your agreement, or though you may be their trustee." At all events, the legal title is in the plaintiff. Only the patentee or his administrator can apply and obtain the extended patent. It is extended to him. The assignees cannot apply and cannot obtain the extension. If they be entitled to all they claim, it is only an equity in what the law has vested in the patentee or his administrator. The defendants cannot be held to account by the *cestui que trust*. It would be a good plea in bar, that they had answered in damages to the plaintiff, who is in possession, as the legal assignee of the legal title created by the extension and by force of the 18th section of the act.

No principle is plainer than that trespass for injuries concerning personal property may be brought by any person having any degree of interest in possession—even by a bailee. If the 18th section confers no rights on assignees of the first term, then the question now under consideration does not arise. If the section does confer any such benefit on assignees, it does so through a trust which it creates in their behalf, to be executed by the patentee; and this action may, for aught that is known, be for the benefit of the assignees. The declaration avers continued possession by the patentee, by the administrator, and by the plaintiff, successively. It does not appear that any possession or right ever followed the supposed assignment to Twogood, Halstead and Tyack. The new patent, by virtue of the 18th section, carried the possession, as well as the legal right, to the administrator, and it followed his assignment to the plaintiff. The defendants' plea cannot be good, unless it show that the plaintiff has no legal title or possession, general or special. Certainly this does not appear.

The principles of the common law, as well as of the statute law, have arisen out of commerce in tangible property, real and personal. Nothing is more difficult than to apply them to scientific property. But we venture another exposition. Possession and use are material circumstances in considering the validity of a transfer of a patent-right, as well as of one of other personal property. *Phil. Pat. 343*. A patentee having mortgaged the patent-right, continued in the notorious use of it, until he became bankrupt. Lord Eldon was inclined to the opinion that the patent-right passed to his assignee in bankruptcy, that is, that the mortgage was not good against the assignee, and ordered a feigned issue to try the question. *Ex parte Granger, Evans' 4 St., p. 67*, note, cit-

ed in Phil. Pat. 344. The statute of frauds, though not enacted by congress, is adopted by the federal courts, or, at least, such parts of it as are derived from the common law; and of this sort is that in relation to the sale of chattels. Applying this principle, it is submitted that the judgment of this court should sustain the plaintiff's action. When he claims by an assignment of the extended patent, ought a party to be heard who shows no title whatever, and only sets up an agreement to assign the first term, made sixteen years ago, unattended by possession? Suppose this contract of assignment to Twogood, Halstead, and Tyack to have been procured by fraud, could not that fraud be proved by the plaintiff, and would it not vitiate the contract, assignment and covenant? Unquestionably. But will the court allow a stranger, a trespasser, a wrongdoer, to set up the assignment and oblige the plaintiff to prove the fraud in this collateral action? This argument is conclusive of the question.

Point V. Whether the extension of 1842 could be applied for and obtained by William W. Woodworth, as administrator of William Woodworth, deceased, if the said William Woodworth, the original patentee, had, in his life-time, disposed of all his interest in the then existing patent, having, at the time of his death, no right or title to or interest in the said original patent—or whether such sale carried with it nothing beyond the term of said original patent; and if it did not, whether any contingent rights remained in the patentee or his representatives.

My argument on the first and second points demands an affirmative answer to the leading question in this point. Scarcely anything can be said in support of it without repetition. The question will be rendered more simple if we suppose William Woodworth, the patentee, to have survived and obtained the renewal, although he had previously assigned all his interest in the patent. Those who maintain the right of partial assignees of the first term to share the benefit of the assignment with the patentee, are obliged to claim, also, the entire benefit of the extension for an assignee of the whole of the franchise for the first term. This position is so palpably in conflict with the 18th section, (which, as we have shown, recognizes only the patentee, and requires the application to be made by him only, at his expense and cost and on his own merits,) that those who have been led into such an absurdity, seek escape by asserting that in such a case there can be no extension whatever. But the 18th section affords them no such refuge. "Whenever any patentee shall desire an extension," he may apply in all cases, at all times, within the first term of fourteen years. Certainly a patentee may desire an extension when he has sold all the franchise, as well as when he has sold a part; and the more he has sold unprofitably, the more eagerly will he desire an

extension. His application must be heard whenever it is made. And on what ground must a judgment be rendered in favor of extending the patent to the patentee? Upon the supposed ground that he has not sold all his interest in the first term? No! But on the ground that whether he has sold the whole, or only a part, he has not been adequately remunerated by the sale. Again, in certain cases, the board of patents must render judgment against the extension. And in what cases? The supposed case where the patentee has sold all his interest? No! The only cases in which the application can be denied are, first, where an extension would conflict with the public interest, and secondly, where, by sales, the inventor has been adequately remunerated. And let it be especially remarked that the judgment must pass against the inventor in such case, equally whether he has sold a part of his original invention, or the whole.

Point VI. Whether the plaintiff, if he be an assignee of an exclusive right to use two of the patented machines within the town of Watervliet, has such an exclusive right as will enable him to maintain an action for an infringement of the patent within said town; or whether, to maintain such action, the plaintiff must be possessed, as to that territory, of all the rights of the original patentee. The 11th section of the act of 1836 declares that "every patent shall be assignable in law, either as to the whole interest, or any undivided part thereof, by any instrument in writing; which assignment, as also every grant and conveyance of the exclusive right under any patent, to make and use the thing patented, within and throughout any specified part or portion of the United States, shall be recorded in the patent office within three months." The 14th section of the same act provides that damages for infringement may be recovered in an action on the case to be brought in the name or names of the person or persons interested, whether as patentees, assignees, or grantees of the exclusive right within and throughout a specified part of the United States.

It was understood in England that a party merely licensed for a particular district might maintain an action for infringement. Our patent law of 1793 was construed so as to deny to the assignee for a particular district, a right to maintain an action; as such an assignment was considered to be a mere license, and not an assignment under the 4th section of that act. Phil. Pat. 333. Confessedly the 10th and 14th sections of the act of 1836, were designed to overrule this construction. A plain man would give them, as we think, the sensible and just effect, that a patentee might assign his whole interest or any undivided part of it, great or small, defining the quantity by the measure of use, or by the number or quantity of the thing patented, to be made, used or vended, or made,

used and vended, and for any territory, great or small, and that any such grantee or assignee who should be injured by piracy might have his action in his own name, for certainly such grantee or assignee is "interested." The words "exclusive right" in the 14th section, supply one part of the description of grantees, and are not, as some suppose, words of limitation to the character of all plaintiffs. Thus, to maintain an action, the plaintiff must show either that he is a patentee or that he is an assignee, (not of an exclusive right within and throughout a specified part of the United States,) but of the whole or some undivided interest in the patent, or that he has a grant and conveyance of the exclusive right to make and use and grant to others to make and use within a specified part of the United States.

If the plaintiff be an assignee of an exclusive right to use two of the patented machines within the town of Watervliet, certainly it is true either that he is an assignee of an undivided part of the whole interest, and may maintain a suit on this ground, or he is grantee of an exclusive right to use within certain territory, and may maintain an action in that capacity. My proposition is, that the act of 1836 was, in this respect, remedial and designed to relieve the law of patents from the technical difficulties which existed in regard to the parties who might maintain actions; and that the act goes the full length of declaring that an injured assignee may maintain a suit alone, whether any other party have an interest in the same patent, in the same territory, or not. Bold as the proposition may seem, it is in harmony with other laws, which do not deprive one tenant in common of legal remedies, because his co-tenants will not join. I invite the court to consider this broad construction of the law, since, if it be adopted, it will bring our statute into harmony with the patent system of England. If the patentee do not wish to part wholly with his patent, he may grant licenses to persons to use it, and it would appear that in the event of an infringement of the patent right, all who have licenses may maintain actions for damages. 13 Petersd. Abr. 236. It has been held that if the patent has been assigned, the assignee may sue alone, or he may join with the patentee in the action. *Id.* 238. This principle is eminently just, since the patentee of scientific property may refuse to join, and the assignee ought not to be exposed to the caprice of a patentee in regard to a remedy. But if this opinion should not prevail, then I submit that the plaintiff's exclusive right to use two of the patented machines within the town of Watervliet is sufficient to enable him to maintain this action. What is an exclusive right to use two machines in the town of Watervliet? It must be admitted to be an exclusive right to use two machines "within and throughout" the town of Watervliet.

Again, it is either exclusive of the rights of all other persons to use the improvement in that town, or it is not an exclusive right to use. For, if any other party can lawfully use the same machine, then the plaintiff has not an exclusive right to use. Now, if he has such an exclusive right, he is within the letter of the law, since the patent may be divided so that one may have an undivided interest in it to make, another to sell, and another to use, and yet all these remain an undivided whole. The words of the 11th section show that there may be a valid assignment of the right to make and use, and to grant to others a right to make and use, without including the power to grant to others to vend. The question was very elaborately considered by Mr. Justice Story in the case of *Washburn v. Gould* [Case No. 17,214]. In that case the words of the assignment were, that "the party of the first part hath agreed to license and empower the parties of the second part to construct and use, and to license others to construct and use fifty of the said patented machines;" and the patentee covenanted to bring suits and pay over the damages recovered to the assignee, deducting expenses. Judge Story decided: First. That the words "license and empower," as there used, were equivalent to words of grant or assignment. Secondly. That the effect of the assignment was to give the exclusive right, for the purpose of profit, to construct and use the patented machines, and with them the exclusive right to the patent itself, as an appropriate incident, within the prescribed territorial limits. Thirdly. That if it were necessary to maintain the plaintiff's action in that case, he should decide that the patent might be construed distributively, so as to permit a grant of the exclusive right to construct to one person, to use to another, and to vend to another. Fourthly. That the words conveyed an exclusive right to the patent within and throughout the territory, although the number to be used was limited to fifty, that is to say, that the limitation of the number did not qualify the exclusiveness of the grant. The reasoning of the learned judge in that case seems to lead so clearly to the conclusion at which he arrived, that I very cheerfully leave the question to rest upon his authority.

Point VII. Whether the letters patent of renewal, issued to William W. Woodworth, as administrator, on the 8th day of July, 1845, upon the amended specification and explanatory drawings then filed, be good and valid in law; or whether the same be void for uncertainty, ambiguity, or multiplicity of claim, or any other cause. The question is general. The affirmative can be maintained only by controverting the objections against the validity of the patent, which may be raised by the counsel for the defendants. The question, however, supposes an objection that the specification is uncertain or ambiguous, or at

least that it is bad by reason of multiplicity of claim. I suppose this has allusion to the fact that the machine is capable of planing a plank, of tonguing it, and of grooving it, all at one operation; while, by detaching certain instruments, the same machine might be made to plane alone, to tongue alone, or to groove alone, or to perform any two of these operations together. Hence, it has often been said that the invention was divisible, and ought to have been patented as three separate machines. Words could hardly be more explicit than those used to define the claim:—"What is claimed, is the employment of rotating planes, in combination with rollers, or any analogous device, to prevent the board from being drawn up by the planes when cutting upwards; and also the combination of the rotating planes with the cutter-wheels for tonguing and grooving, for the purpose of planing, tonguing, and grooving boards at one operation; and also the combination of the tonguing and grooving cutter-wheels for tonguing and grooving boards at one operation; and finally, the combination of either the tonguing or the grooving cutter-wheel, for tonguing or grooving boards, with the pressure-rollers." It is apparent that here is described a perfect, organized, unique machine, capable of making three different impressions on different parts of the same material. The human mind might have contrived, first one, then another, and then a third of these operations, successively. But the invention is not vitiated because the whole three were invented in combination for one practical and useful purpose.

We find ourselves engaged with the most subtle of all legal questions when we examine whether the patent is multiplex. The objection of multiplicity is not likely to be received with very great favor, since every inquirer will fail to find a satisfactory reason for the objection in any case. But what is the rule? As explained in Phil. Pat. 219, the rule is, that an application which embraces more than one principal subject or invention, will be rejected; that is, whatever is accessory and auxiliary to the principal subject, may be joined in the same patent, but nothing more. Floors are essential in every structure for human habitation, and they must be smooth and impervious. The mechanic who, if it were possible, should make a machine, which, at one operation, would prepare the entire floor for an apartment, large or small, might combine many instruments, many methods of operation, but surely he would produce but one principal subject or invention. Even the nailing the floor upon the joists would only be auxiliary and accessory, and therefore the addition of a hammer to drive the nail, with power to move it, and perhaps of a forge to make the nail, might not be a violation of the rule. Whatever might be thought of so extreme a case, we have in Woodworth's patent one principal subject, which is no more than the

preparation of a board, to be adjusted with others, so as to produce a smooth and impervious face. All the operations of planing, tonguing and grooving, are performed simultaneously, by the use of one power, and upon the same piece of the same material, leaving upon that piece their varied impression. It is one purpose, accomplished upon the same subject matter, by one operation, at one instant of time. Complex as this operation is, the board is single afterwards, as it was before. It was a rough, unshapen plank; it is still no more than a plank, though fitted for a definite use.

But there is another and conclusive answer to the objection of multiplicity. Although the rotating grooving wheels and knives, or the rotating planing knives might be removed, and one or two of the other operations be nevertheless carried on effectively, yet there is one part of the improvement essential to each several operation, which is, of itself, altogether useless, but which, combined with one or more of the other powers and processes, is effective. That is, the rollers and the superior cylinder, which keep the plank or board fastened down on its bed, while it is subjected to one or more of the three operations of planing, tonguing and grooving. Here then is a complex yet unique machine. It is difficult to define its peculiar nature or character. It is a combination or aggregate, for it is made up of many parts and of several operations. But certainly, it is not, as has been supposed, a mere combination. It is an unique machine, for one great and important purpose. And its combination does not consist in uniting three several and separable perfect machines, but in employing certain powers and processes never before applied to effect either object, but now made to operate so as to produce at the same time, on the same substance, three effects, each equally necessary to one single and distinct purpose. The objection of multiplicity of claim results from misapprehension. There may be a lawful patent for a new combination of existing machines, applied to produce one principal purpose or effect. *Moody v. Fiske* [Case No. 9,745]. So, also, there may be a patent for a machine which combines several auxiliary operations to produce one purpose or effect. And such a patent is not a grant of an abstract principle, nor is it a grant of the different parts of any machine, but it is an improvement applied to a practical use, and effected by a combination of various mechanical powers to obtain one new result. *Gray v. James* [Id. 5,718]. This last definition describes Woodworth's patent. The new result is the complete preparation of the board, by giving it a smooth surface, and by the adaptation of a tongue and a groove. It is effected by combining no known machinery or machines, but by uniting various known mechanical powers in a new and practical application. The defendants' argument must be, that a compound machine cannot be pat-

ented. But a machine loses neither any of its intrinsic proportions, nor its uses, by being composed of various parts, producing various effects, all of which terminate in one chief object or purpose.

The object of the patent law was to encourage inventions which will reduce labor. In the old way, planing a board was one operation, cutting a tongue along one edge was another, and cutting a groove in the other edge was a third. So, making a nail was once three operations, the forging, the shaping and the heading. Now, since a man of genius has invented a machine for simplifying the manufacture of nails, and reducing all three operations to one, what would be thought of a legislative policy which should forbid the combination, and keep the three operations separate, as when manually performed? In regard to Woodworth's invention, as described in the first specification, one court decided that the machine was multiplex, and that three patents ought to have been issued. The administrator thereupon applied to the commissioner of patents, who decided that the machine was not multiplex, and that three patents could not issue.

In view of the argument on this seventh point, I respectfully ask the court to decide that, according to the specification, Woodworth's patent is not for a mere aggregate of separate machines, nor yet a grant of the different parts of a new machine, as several, but is an improvement applied to a practical use, effected by a combination of various mechanical powers to obtain one new result at one operation. The importance of fixing the character or legal description of this machine, will appear from considering that it will control the question whether the patentee shall be protected from every encroachment on his invention, or whether it shall be free to any person to pirate its parts severally.

Point VIII. Whether the court can determine, as matter of law, upon an inspection of the said two patents and their respective specifications, that the new patent of the 8th of July, 1845, is not for the same invention for which the said patent of 1828 was granted.

The question seems to admit of a brief answer. Certainly the old specification and the new one are unlike. If the new one describes the machine rightly, and the old one was defective in this respect, then the old one, in one sense, does not describe the invention at all. In order to decide that the specifications are for different machines the court must assume the first specification to be a good description of a machine. But it is confessedly bad, because it has been surrendered and cancelled as such. I cannot present a clearer argument on this subject than to quote the late Mr. Justice Story's opinion on the same question:—"Upon the face of it, the new patent purports to be for the same invention and none other, than is contained in the old patent. The avowed difference be-

tween the new and the old is, that the specification in the old is defective, and that the defect is intended to be remedied by the new patent. It is upon this very ground that the old patent was surrendered and the new patent was granted. The claim in the new patent is not of any new invention; but of the old invention more perfectly described and ascertained. It is manifest that, in the first instance, the commissioner was the proper judge whether the invention was the same or not, and whether there was any defect in the specification or not, by inadvertence, accident, or mistake; and consequently, he must have decided that the combination of machinery claimed in the old patent was, in substance, the same combination and invention claimed and described in the new. My impression is, that at the former trial of the old patent before me, I held the claim, substantially (although obscurely worded) to be a claim for the invention of a particular combination of machinery for planing, tonguing, and grooving, and dressing boards, &c.; or, in other words, that it was the claim of an invention of a planing machine or planing apparatus such as he had described in his specification. It appears to me, therefore, that prima facie, and, at all events, in this stage of the cause, it must be taken to be true, that the new patent is for the same invention as the old patent; and that the only difference is not in the invention itself, but in the specification of it. In the old, it was defectively described and claimed. In the new, the defects are intended to be remedied. Whether they are effectually remedied is a point not now properly before the court. But as the commissioner of patents has granted the new patent as for the same invention as the old, it does not appear to me, that this court is now at liberty to revise his judgment, or to say that he has been guilty of an excess of authority, at least, (as has been already suggested,) not in this stage of the cause; for that would be for the court, of itself, to assume to decide many matters of fact, as to the specification and the combination of machinery in both patents, without any adequate means of knowledge or of guarding itself from gross error." *Woodworth v. Stone* [Case No. 18,021]. I add only, that the argument that the entertaining the question by the court would involve an assumption of facts without proof seems incontrovertible, and that this consideration is as conclusive upon this court, in this cause, at this stage, as it was upon the court in Massachusetts in that cause, on a motion for an injunction. A similar question arose incidentally in the case of *Carver v. Braintree Manuf'g Co.* [Id. 2,485]. It was held, in that case, that the 13th section of the act of 1836, and the 8th section of the act of 1837, authorizing the re-issue of a patent, because of a defective or redundant specification or description without fraud, or for the purpose of adding thereto an improvement, did not require a patentee

to claim, in his renewed patent, all things which were claimed in his original patent, but gave him the privilege of retaining what he deemed proper; and that the question whether the original and the renewed patent were not for the same invention, involved matters of fact, and therefore was for the jury to decide upon evidence.

Point IX. Whether, the decision of the board of commissioners who are to determine upon the application for the extension of a patent under the 18th section of the act of 1836, is conclusive upon the question of their jurisdiction to act in a given case. My argument on the various points relating to the extension under the 18th section, has proceeded on the ground that the decision of the board of commissioners, even on a question of jurisdiction, was subject to review by the courts of the United States. Yet the law has created a board with discretionary and judicial power. Great public interests are involved in their decision, and, in this respect, the board act as a board of executive administration. It may well be supposed, that if congress designed that their decision on any question should be reviewed judicially, the law would have directed the time, manner and circumstances of an appeal, and would have designated the appellate tribunal.

Point X. Whether the commissioner of patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and pending the existence of an extended term of seven years, or whether such surrender and renewal may be made at any time during such extended term. First. The language of the law is comprehensive and unlimited. It does not limit the power to renew to the first fourteen years. But, in the same statute which provides, by the much discussed 18th section, for an extension for seven years, we find the 13th section declaring that "whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative and invalid, by reason of a defective or insufficient description or specification, it shall be lawful for the commissioner, &c." Now, here is a patent which was issued in 1828, before the act of 1836 was passed. It is thus far expressly within the letter, as well as within the spirit of the statute. But the statute was, of course, designed to apply to living franchises. Every patent granted before 1836, might, at any time within the term for which it was issued, be surrendered and cancelled. What was the condition of the patent, then, on the 8th day of July, 1845, when it was renewed? The original term of fourteen years had expired. But the new act of 1836 authorises a certain public functionary to certify an extension of it for seven years, and declares that when he shall have so certified, the certificate shall have such effect

upon the original letters patent, that they shall, to all intents and purposes, be regarded as if they had issued for twenty-one years. The commissioner has thus certified, and so these letters patent have now living force and effect, which will last until the 27th day of December, 1849. Thus they are brought within the letter and the spirit of the enactment contained in the 13th section. Secondly. The law has long been well settled, that when a patent has been extended, it is prolonged during the additional term, subject to all the legal incidents of the first term. The rights and remedies, the risks and dangers, the privileges and rules of law which appertain to the patent, are prolonged with it. Although it was contended that the special act of congress for the relief of Oliver Evans, passed in 1808, was conclusive of the originality of the invention it was held that the rights of the patentee remained unchanged in all respects, except the limited time. *Evans v. Eaton*, 1 Pet. [26 U. S.] 322. Thirdly. The power and duty of the commissioner to cancel patents void by reason of a defective specification, exist independently of the 13th section of the act—that is to say, they exist independently of any words of express enactment. As has been seen, such a proceeding was had under the law of 1793, which contained no express provision on that subject, and was affirmed by the supreme court of the United States. *Morris v. Huntington* [Case No. 9,831], and other cases, before cited, in that connection. If, then, a new patent could be issued as an act of ministerial duty, even without the authority of the 13th section, certainly it can be in all cases where the spirit of the contract between the patentee and the commonwealth requires it. The American continent, from its icy boundaries on the north, to undefined latitudes within the tropics, seems to be rapidly falling under the political sway of our confederacy. The habitations of an hundred millions of people, and of how many more I dare not conjecture, are to be erected by our artisans. The machine in question reduces in the proportion of nine-tenths, the labor and expense of a necessary part of every structure, whether it be raised for use or ornament. If my argument seem to have been too long, I hope the offence may find an apology in the importance of securing to the children of the inventor the reward allotted by his country for so distinguished a benefaction.

Samuel Stevens, for defendants.

This case presents ten questions for solution, each of which calls for the interpretation of different parts of the patent act of 1836; but none of them can by possibility involve the consideration, or require, or even justify, a discussion, as to the policy of that law. This court have nothing to do with the policy of an act of congress. The question upon the construction of any statute is, what have the legislature done, not what it ought,

or ought not to have done. I shall therefore abstain from even an attempt to answer all that part of the argument of the counsel for the plaintiff, (and which is much the greater portion of it,) in which he has attempted to demonstrate the extensive obligation resting upon the government "to foster genius or reward merit," and especially the peculiar genius and exclusive merit of authors and inventors. That argument might have been very properly addressed to the law-making power, to induce the enactment of a statute, with such provisions as the learned counsel supposes congress, from his idea of its duties, should have inserted; but how it is to aid in the humbler task of expounding the statute which has been enacted, is not so easily perceived. Nor have the merits or demerits of the invention for which Woodworth obtained his patent, the most remote bearing upon any of the questions to be discussed or decided in this case. Whether the invention is of the utmost public, as well as private utility, or whether the least possible degree of usefulness that will sustain a patent, is all that can be attributed to it, can make no possible difference in the construction of this statute. The statute must receive the same construction in the one case as in the other. Nor has the history of William Woodworth the least possible connection, directly or remotely, with any of the topics or questions which can legitimately occupy the attention of the court in this cause—whether he died in poverty or in affluence—whether he was a benefactor or a beneficiary of the public, the court have no means of knowing; and if it had, whether he was one or the other, most certainly could not alter or affect the rules by which this statute is to be expounded. The consideration of those topics, therefore, will constitute no part of the argument which I propose to submit.

I. The first question presented is: Whether the 18th section of the patent act of 1836 authorized the extension of a patent on the application of the executor or administrator of a deceased patentee.

To maintain the negative of this question, I shall endeavor to establish the following propositions or points:

1. No property in, or right to, the renewed or extended term, is, by the act, vested in the patentee until such renewal or extension is actually obtained. Therefore upon the death of the patentee, before obtaining such extension or renewal of his patent, no property in, or right to, such renewal or extension, can vest in his heirs or personal representatives.

2. The 18th section of this statute does not, in terms, authorize the renewal or extension of a patent on the application of the executor or administrator of the patentee.

3. It cannot be legitimately inferred from the language of the statute, that the law-makers intended to authorize the renewal or extension of a patent in favor, or upon the application, of the executor or administrator

of a deceased patentee; or to give any latitude of discretion, whatever, to the commissioner of patents, or to the board which is to determine upon the application, as to the person upon whose application such renewal or extension might be granted.

1st. The executors or administrators of the patentee seem to have been intentionally excluded from the 18th section. This is manifest from the fact, that in other parts of the statute, where any right, or privilege, is intended to be given to executors and administrators, it is given to them in express terms. Vide sections 5, 6, 10 and 13.

2d. An administrator or executor of a deceased patentee, cannot perform, or comply with, the terms and conditions required of the patentee by the 18th section, to entitle him to a renewal of his patent; nor could any executor or administrator comply with the conditions required by the 6th section, to authorize the issuing of a patent originally, and therefore, those terms were varied by the 10th section, so as to enable an executor or administrator to comply with them. But there is no such provision in regard to the 18th section.

3d. The power granted to the commissioner of patents and to the board, by the 18th section, is a special and limited power, and must be strictly pursued.

4th. The provision for the renewal of a patent, contained in the 18th section, if it applies to patents issued before the passage of the act, is, as to those patents, a gratuity to the patentee, in derogation of the rights to which every other citizen would be entitled upon the expiration of the first patent. The law bestowing this gratuity, will not be extended, by construction, to persons not named in it, and who cannot comply with the conditions upon which it is to be granted.

1. As to the first position: The question is not whether the inventor has any or what right to, or property in, his invention, independent of any legislative provision; but whether the 18th section of the act vests in the patentee such a right to a renewed or extended term of his patent, which may or may not thereafter be granted to him under the provisions of that section, as can be regarded as property. After the extension of a patent is duly obtained under that section, I concede that the prolongation of the exclusive right thus secured is property, as much so as the exclusive right granted by the original patent; but I deny that the patentee, before obtaining such renewal or extension of his patent, has any such right to demand or have such renewal granted to him, as will, either in law or equity, constitute property, which will descend to heirs, or vest in personal representatives. Of what description of property is it? Clearly, it is not a chattel, real or personal, in possession. Is it a chose in action? This species of property is defined to be "a personal right not reduced to possession, but recoverable by an action at law." 2 Kent, Comm. (2d

Ed.) 351; 2 Bl. Comm. 396. It depends entirely upon contract. Mr. Justice Blackstone says (2 Bl. Comm. 397) that all property in action depends entirely upon contract, express or implied. Has a patentee such a claim upon the government for a renewal or extension of his patent under the 18th section, as would entitle him to enforce it by an action at law, or suit in equity, if the government were liable to be sued? If a similar right or claim existed against an individual, could it be enforced by any proceeding in law or equity? No obligation is imposed upon the government, by this act, to grant an extension of a patent. It simply authorizes it to be done, provided it shall be deemed by the proper department consistent with the interests of the public. If an individual were placed precisely in the position of the government, it would be entirely at his own option whether such renewal or extension should be granted or not.

The duty and the power of deciding upon an application for the renewal of a patent under this section, is vested in certain designated officers of the government. If those, or any other officers of the government, refuse to perform a duty imposed upon them by statute, and which an individual has a right to require them to perform, to the injury of such individual, this court can, by mandamus, compel the performance of such duty. *Kendall v. U. S.*, 12 Pet. [37 U. S.] 524. Now, suppose the board designated to decide upon these applications, should refuse to renew a patent, in a case where the patentee had complied, on his part, with all the requisitions of that section, could this court compel the board, by mandamus, to renew the patent? Most clearly not. The decision of the board that, in its opinion, a renewal of such patent could not be granted, with a due regard to the public interest, would be conclusive upon the subject. A right of any description in one person to claim the performance of any act by another, necessarily implies an obligation on that other person to perform such act, and an obligation too, which can be enforced at law or in equity; and where no such obligation exists, no such right exists. A patentee has no more right to demand, or require, the renewal of his patent under the 18th section, than he has to demand such renewal of congress. Before the act of 1836 was passed, congress renewed patents upon the application of the patentee, requiring, however, of the patentee, proof of the same facts required to be proved by him, under the 18th section of that act. Act July 3, 1832, § 2 (4 Stat. 559). Notwithstanding the act of 1836, congress have still the right and power to renew a patent if they should deem proper to do so. But neither congress, nor the board of commissioners are bound, or under any obligation, to grant such renewal. There is, therefore, no more right, in the patentee, to demand, or have, an extension of his patent, under the 18th section, than he would have, if that statute had never been enacted.

It was contended by the counsel for the

plaintiff, that the property in this assumed right of renewal, was similar to the property in a franchise; and he illustrated this argument by this simile: "If," said he, "the state grant the use of a bridge, for a term of years, on condition that the grantee shall erect the bridge, and at the expiration of his term, devote it to the public, is not this a contract which, if performed by the grantee, will descend to his representatives, and carry the franchise to them? Now," (continued the learned counsel) "is there any thing in the intangibility of the right to an extension of a patent, or in the uncertainty of its future establishment which exempts it from the principle of this law?" No one will be disposed to deny or doubt the correctness of the simile or case put by the learned counsel, but no one can fail to see the inappositeness of the case supposed, to the one at bar. Nor, does it require any legal or logical acumen, to perceive that the conclusion which the learned gentleman drew from his hypothesis, by no means follows from it. A patent or grant of any exclusive right after it has been duly obtained, is a franchise (*Webst. Pat. p. 1*), a privilege of royalty, or of the supreme power, in the hands of a subject or citizen. 2 Bl. Comm. 37; 4 Kent, Comm. (2d Ed.) 45S. Such a grant or franchise, no one doubts, is property. In the description of the various kinds of property given in the books, such a property is designated an incorporeal hereditament. 2 Bl. Comm. 21; 3 Kent, Comm. (2d Ed.) 403. And it is called an hereditament, because it is heritable property, that is, it is property which descends to the heir, and does not go to the personal representatives of the decedent.

But a franchise of any description has no existence before it is granted. The possibility that a franchise may be granted to a person if he apply for it, is not property of any description. If the relation between the decedent and the sovereign power were such, that the sovereign power were under such an obligation to grant the franchise to the decedent and his heirs, as would, in the case of a private person, constitute a legal obligation, which might be enforced at law or in equity, there might be some propriety in classing it with that species of property known as choses or things in action. But where no such obligation exists, to hold the mere capacity to apply for such a grant, and the possibility or even probability that the application would be successful, when it is entirely in the discretion of the power to which the application is made to grant it or not, to be a right, amounting to property, to a chose in action, would most certainly be entirely new. It would be creating a species of things in action hitherto unknown to the law. It might just as well be said, that the right, or rather the privilege, of asking alms, was a chose in action, which would vest in the executor or administrator of a decedent. I will not say that the law-making authority could not, in the plenitude of its creative powers, exalt such a mere possibility, to a right

which should be regarded as property; but I do say, that it has not done it, and it is not within the constitutional powers of this court to do it.

Another argument has been urged by the counsel for the plaintiff, which certainly is entitled to attention for its boldness in setting at defiance well established principles, if for no other cause. It was contended by the learned gentleman, that, independent of any statutory provision, an inventor has a perpetual, absolute and exclusive right to his discovery; that the disclosure of his invention upon obtaining a patent for it from the government, raises an equitable claim upon the government to renew the patent, provided the patentee has not, during the original term for which the patent was granted, been reasonably compensated for the invention; that this equity is a property, vested in the patentee, which, upon his death, vests in his personal representatives; and that the 18th section of the act should be so construed, as to extend to and embrace this equity. To maintain this proposition it was asserted, (I say asserted, because it certainly was not proved,) that the state, in its organic law, (the constitution,) admits that the inventor has a perpetual, absolute and exclusive right to his discovery; that the state admits also, that so strong is the conflict between this private right and the public interest, that the private right is unsafe, and that in view of these facts, the state compromises with inventors, and encourages them, by securing to them an exclusive enjoyment of their rights for a limited term. To me, it is not only a strange, but a startling doctrine, and I think it must be so to this court, and to every other person living under a government of laws, relying upon those laws for the security of life, liberty and property, that there is any kind or species of property, to which a citizen has a just and legal title, that cannot be protected by those laws, and would be unsafe under the guardianship and protecting power of those laws. If an inventor has a perpetual, absolute, and exclusive right to his discovery, independent of any statutory provision, is the law, indeed, so feeble that that right is unsafe? And is a right granted by government, any more sacred or secure, or more easily protected by the laws of this land, than any natural or inherent right? Is property of any description, acquired by any lawful means, less secure or more difficult to protect, than the property in a monopoly granted by government?

But the whole and every part of this position of the learned counsel, is in direct hostility to the decision of the supreme court in the case of *Wheaton v. Peters*, 8 Pet. [33 U. S.] 591. In that case the court held that an author or inventor has no exclusive right of property in his works or discoveries, after he has published them to the world, and that such right never existed at common law; and, as it regards inventors, the court said that it

never had been pretended that they could hold, by the common law, any property in their inventions after they shall have sold them publicly, and that, in the United States, authors and inventors have no exclusive right or property in their works and inventions, except such as is secured to them by the acts of congress. And in regard to the eighth section of the first article of the constitution, the court held that it does not provide for the protection of acknowledged existing rights, and that the acts of congress, under that clause of the constitution, instead of sanctioning an existing right, created the right which is secured by those acts for a limited period; that a man is entitled to the fruits of his own labors, but can enjoy them only by statutory provisions, and under the rules of property which regulate society, and which define the rights of things in general.

Were it necessary to sustain this judgment by the most clear and undoubted common law authority, the task would be by no means difficult; but I forbear fortifying, by authority, a decision which is of itself the best authority. Starting, then, with the proposition that an inventor has no exclusive right whatever to his invention, except what is created and protected by the acts of congress, an inventor has no claim of any description upon the government, equitable or otherwise, beyond the express provisions of the acts of congress; and, therefore, no equity exists in favor of a patentee against the government, to which the 18th section of the patent act can be extended by construction, even should the court be of opinion that it could, under the name of expounding a statute, extend it to cases and persons clearly not embraced in its language.

Will any one pretend that the claim of a patentee to have a patent extended under the 18th section of the act, is any greater, or approaches any nearer to a right, or to a property, than the claim of an inventor to a patent, before it is issued? By the 5th section of the act, the patent, when issued, secures the exclusive right to the patentee, his heirs, executors, administrators and assigns. By the 6th section, the first and original inventor of any new and useful improvement, &c., is entitled to a patent, upon complying with the conditions and making the oath thereby required. No person pretends to deny, indeed it is conceded, that if the inventor should die before obtaining his patent, his personal representatives would not be entitled to, and could not obtain a patent by virtue of the 5th and 6th sections. Now, is there not at least as much right to an original patent, vested in the inventor at the time of his death, when he has matured and completed his invention, but died before obtaining his patent, as there is to an extension of a patent already obtained, when a patentee dies before such extension is granted? Has not the right to a patent in such case, a much greater resemblance to property, which would

vest in executors or administrators, than this mere possibility of an extension of a patent under the 18th section? And is there not just as much authority, under the 5th and 6th sections, for the issuing of an original patent to the personal representatives of an inventor, as there is under the 18th section to extend a patent in favor of the personal representatives of a deceased patentee?

If an inventor complies with the 6th section of the act, he is entitled to a patent; no discretion is vested in the commissioner of patents to issue or withhold a patent; and should he refuse, in such case, to issue a patent, this court would compel him, by mandamus, to issue it. But if a patentee does all that is required of him by the 18th section, it is still discretionary with the board, to extend the patent or not, as it may be deemed compatible, or incompatible, with the public interest. Can any one deny that while the former has some resemblance to a chose in action, the latter has none whatever? And yet, while it is conceded that, in the former case, the personal representatives could not obtain a patent, were it not for the 10th section, which expressly authorizes it, it is contended that in the latter case, such personal representatives are entitled to an extension by virtue of the 18th section, when the patentee has died without making any application for a prolongation of his patent, or complying with any other requisite of that section.

2. My second proposition requires no illustration. Its truth is demonstrated by reading the 18th section. It cannot be affirmed, that that section, in terms, authorizes the renewal of a patent on the application of the executor or administrator of a patentee.

3. It cannot be legitimately inferred from the language of that section, that the lawmakers intended to authorize the renewal or extension of a patent, provided for in that section, in favor of, or upon the application of, the executor or administrator of a deceased patentee, or to give any latitude of discretion whatever to the commissioner of patents, or to the board, as to the person in favor of whom, or upon whose application, such renewal or extension might be granted. The question presented by this proposition, relates solely to the interpretation of the 18th section of the act. In the discussion of this question, I shall assume, as an undisputed and indisputable position, that, in the exposition of the act, the court will be governed by the same rules and principles which control the interpretation and construction of any other statute, upon any other subject.

The most important and most universal of those rules and principles, and the one which I most desire to impress upon the mind of the court at this stage of the argument, is, that the intention of the legislature can only be ascertained by the language it has used in the act to express that intention. As expounders of the law, we are not at liberty to presume

that the legislature intended what it has not expressed, or expressed what it did not intend. Should courts indulge in any speculation of that kind, there would be, indeed there could be, no certain rule for the construction of any statute. In *Pennington v. Cox*, 2 Cranch [6 U. S.] 33, the court say: "That a law is the best expositor of itself, is one of those plain rules, which has been uniformly acknowledged." In *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. [26 U. S.] 46, the court assert the principle, that a legislative act is to be interpreted according to the intention of the legislature, apparent upon its face. The rule is laid down, explicitly and emphatically, in *Dwar. St. 703*, and the writer sustains his position by reference to many well considered cases.

Assuming then, that the court is not at liberty, according to the well established principles of law governing the construction of statutes, to intend or suppose, that the legislature meant what it has not plainly expressed or declared, I humbly, but most confidently, submit, that the statute in question does not authorize the renewal or extension of a patent upon the application of, and in favor of, the personal representatives of a deceased patentee.

First. It is manifest from the provisions in other sections of this act, that the administrators and executors of the patentee were intentionally excluded from the provisions of the 18th section, and that congress did not intend to authorize the renewal or extension of a patent, provided for in that section, after the decease of the patentee. Wherever and whenever congress have intended to extend this exclusive right to the heirs or personal representatives of a patentee, they have provided for it in express terms. The 6th section of the act authorizes the issuing of a patent to the inventor, upon his making the oath required, and complying with the other requisites of the statute. The 10th section provides expressly that, in case of the death of the inventor, his executors or administrators may obtain the patent, and shall hold it in trust for the heirs or devisees of the inventor, and prescribes the oath to be made by such personal representatives as a substitute for the oath required of the inventor by the 6th section. The 13th section provides for the surrender of a patent by the patentee, and the obtaining of a new patent for the same invention, when the original patent is void by reason of a defective specification, without fraud or fault on the part of the patentee; the same section provides, that this privilege shall extend to the executors, administrators, and assignees of the patentee. But the 18th section, in its terms, authorizes an extension of a patent only upon the application of the patentee. Now I submit, if congress had intended that the benefit and privilege provided for by the 18th section, should extend to the heirs or personal representatives of a deceased patentee, they would have said so, as they did in the other

sections referred to. Can any legal reason be given why, in this particular solitary instance, congress should have omitted to express its intentions, as in the 10th and 13th sections, if it did intend that the provisions of the 18th section should extend to the heirs or personal representatives of the patentee? The omission, (manifestly *ex industria*), of any words extending the provisions of the 18th section to the heirs or personal representatives of the patentee, is a clear indication of the intention of the law-giver, that those provisions should not be thus extended. "Where in several statutes in *pari materia*," (and the principle is equally applicable to several sections in the same act,) "the legislature is found sometimes inserting and sometimes omitting a clause of relation, it is to be presumed that their attention had been drawn to the point, and that the omission is designed." *Moser v. Newman*, 6 Bing. 536. "If," says Mr. Dwarries, "there is a material alteration in the language used in the different clauses of a statute, it is to be inferred that the legislature knew how to use terms applicable to the subject matter." "The several inditing and pruning of the different branches," said the judges in *Edrich's Case*, "doth argue that the maker did intend a difference of the purview and remedies, or otherwise they would have followed the same words." *Dwar. St. 707; Edrich's Case*, 5 Coke, 118a.

To overturn or escape all the rules which have been established by the wisdom and experience of the most learned jurists for the construction of statutes, the counsel for the plaintiff reposed, apparently with confidence, upon the position assumed by him, that no reason could be divined for denying to the heirs and personal representatives of a patentee, the benefit of obtaining an extension of a patent under the 18th section, which would not apply with equal force against the policy of the 10th and 13th sections. I call this an assumed position of the learned counsel, because, although he most confidently asserted it, he failed to prove it; indeed, he did not attempt to demonstrate its truth. And the learned counsel concluded that part of his argument, with a defiance to the most accomplished casuist, to find a reason for a difference of policy in the cases provided for in those three sections. Suppose there were so much of danger and peril in this defiance, that no wrangler could be found of sufficient intrepidity to attempt a trial of conclusions with the learned gentleman, as to the truth of his hypothesis, do the deductions which he has attempted to draw from it by any means follow? The argument of the learned counsel is simply and plainly this: The same reason and policy which induced congress to authorize the executors or administrators of an inventor to take out an original patent, where the inventor died before obtaining it, and also to surrender a patent void by reason of a defective specification, and take out a new patent upon a corrected specification, for the residue of the term

of fourteen years then unexpired, required congress to authorize the extension of a patent under the 18th section, in favor of the executors or administrators of a deceased patentee, and, therefore, it is to be presumed congress so intended. Is this so? Does it advance one step towards proving that congress has done a thing, to show it ought to have done it? Besides, the rule of law and good sense applicable to the construction of a statute is, that when the law-giver, in one section of the act, uses words which, in their terms, apply to particular persons or things, and, in another section, omits those words, the presumption is, that he did so intentionally, understanding the force and effect of the use of the words in one section, and the omission of them in another; and that he intended "a difference of the purview and remedy" by the different phraseology of the sections, otherwise he would have used the same words in the several sections. This inference is directly the opposite of that which the learned counsel supposed necessarily followed from those facts. A statute introductory of a new law, (as is the case of the 18th section of this act,) in its terms applicable to particular persons or things, cannot be extended or applied by construction to other persons or things, although standing on the same reason. *Jacob v. U. S.* [Case No. 7,157]; *Foster's Case*, 11 Coke, 64a.

But suppose congress unintentionally, and through mere inadvertence, omitted, in the 18th section, the provision in favor of executors and administrators contained in the 10th and 13th sections, would it help the plaintiff's case? Can this court, by construction, insert those provisions in the 18th section? Lord Ellenborough, in the case of *Rex v. Skone*, 6 East, 514, 518, has answered this question. "It is no question for us," says that learned judge, "whether it would be expedient that there should be an appeal to the sessions in the case of a conviction before two justices of the peace, for a penalty in respect of the malt duty. If there be no words of reference to any act giving such an appeal, we cannot supply the want of them. Now the clauses in the statutes of Car. II. and Geo. II. have not the word 'penalties' in those parts giving the appeal;" (the words of those statutes describing the convictions for which an appeal was given, being "forfeitures and offences,") "and when that word occurs in other clauses, in other respects facsimiles, it seems as if the omission were intentional; but if it were not intended, we can only say of the legislature, *quod voluit non dixit.*" In *Dwar. St. 790*, a like rule is laid down as the result of adjudged cases on the subject. But the hypothesis of the learned counsel, of which he so confidently challenged a refutation, and from which he has attempted to draw his conclusions, has no foundation in truth. If I am not wholly in error in regard to the policy and the main object of the provision of the constitution on this subject, and of the laws framed in pursuance of that provision, they furnish a sufficient and

most satisfactory reason for the provisions of the 10th and 13th sections, which can have no application to the provisions of the 18th section. The late Mr. Chief Justice Marshall, in delivering the judgment of the court in the case of *Grant v. Raymond*, 6 Pet. [31 U. S.] 218, 243, says: "The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals, and the means it employs are the compensation made to those individuals, for the time and labor devoted to those discoveries, by the exclusive right to make and sell the things discovered for a limited time." The same doctrine is laid down by Mr. Justice Ashurst, in *Turner v. Winter*, 1 Term R. 602, 605. Many other authorities might be adduced, were it necessary, to show that such is the true exposition of the principles, policy and object of the laws authorizing these monopolies. It is upon the same principle that the law declares a patent void, if it turns out that the patentee was not the first and original inventor, or if he has suffered his invention to get into public use before obtaining his patent, or if he does not describe his invention truly, and with sufficient intelligence to be understood by others. In either case the patent is void, because the consideration upon which it was granted fails.

The great object of these laws, then, being to give the public the benefit of the discoveries of individuals, and the exclusive right granted to those individuals to use the invention for a limited period, as a compensation for the time and labor devoted to those discoveries, and the disclosure of them to the public, being the means employed to obtain this public benefit, it follows that the same policy which would induce the grant of a patent to the inventor, would dictate a similar grant to the legal representatives of an inventor, who has died before disclosing his invention. The public would derive the same benefit from the disclosure of an invention by the executors and administrators of an inventor after his death, and the government should grant the same compensation to the heirs or devisees of an inventor for such disclosure, as it would to the inventor himself. No such reason, however, can apply to the case of the extension of a patent provided for by the 13th section. In that case, the disclosure has already been made; the patent for fourteen years, (the stipulated compensation for the invention and disclosure,) has already been granted to the patentee; a further grant of seven years is entirely at the option of the government, based upon no new consideration of a new invention, or new disclosure, from which the public would or could derive a benefit; but, on the contrary, such extension takes from the public that which they are fairly in possession of, and to the benefit of which they are justly entitled. In *Shaw v. Cooper*, 7 Pet. [32 U. S.] 292, 320, the court say: "The patent law was designed for the public benefit as well as for the

benefit of inventors. For a valuable invention, the public, on the inventor's complying with certain conditions, give him, for a limited period, the profits arising from the sale of the thing invented. This holds out an inducement for the exercise of genius and skill, in making discoveries which may be useful to society, and profitable to the discoverer. But it was not the intention of this law to take from the public that of which they were fairly in possession." This principle applies equally to the case of a possession acquired by the public, by the disclosure upon obtaining a patent, as to a possession of a discovery acquired before a patent for it is issued, by a promulgation of it to the public by the inventor.

The conditions upon which a renewal or extension of a patent is authorized by the 13th section, furnish another reason why congress would intentionally exclude executors and administrators from the purview of that section. None but a patentee himself could have any accurate knowledge of the facts required to be shown to authorize an extension of a patent for an additional term. The patentee is required to furnish to the board a statement in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention. And the patent is only to be extended in case it shall be just and proper, by reason of the patentee, without neglect or fault on his part, having failed to obtain from the use and sale of his invention a reasonable remuneration for the time, ingenuity and expense bestowed upon the same, and the introduction thereof into use. How is it possible, in the nature of things, that his executor or administrator could know anything of this? Is it within the range of possibilities, that any person but the inventor himself, could have any accurate or certain knowledge of the time spent, of the study and reflection bestowed, of the mental powers exerted, in projecting and maturing the invention, or of the amount of time and money expended in experimenting upon his discovery, and the introduction of it into use, or how much he has received for or on account of the invention, or how much he might have received therefor, with proper attention, or without neglect or fault on his part? Congress undoubtedly appreciated the uncertainty that must necessarily exist in relation to the best information that could be given by an executor or administrator upon this subject, and for that reason deemed it discreet to confine the provisions of that section to the patentee alone. The 13th section proceeds upon the principle that the inventor, having in good faith complied with the policy and provisions of the law on his part, has a just right to expect that the government will secure to him and his heirs the exclusive use of his invention for fourteen years, as a re-

ward for his ingenuity, skill and science, and as a remuneration for the disclosure of his invention to the public, and that, if from any defect in the patent issued, such exclusive right is not secured to him, and no blame or fault is imputable to him, the government will, by a new and valid patent, secure to him such exclusive right. Such is the view taken of the act of 1793, in the case of *Grant v. Raymond*, 6 Pet. [31 U. S.] 218, 243. The same principle which would require the issuing of a new patent in such case to the patentee, would require it to be issued to his heirs or personal representatives for the unexpired portion of the fourteen years. The compensation agreed to be given by the government, is a valid patent for fourteen years, to the patentee, his heirs or assigns; and when the patent issued turns out to be void, a new and valid patent could, with no more propriety, be refused to the heirs or assigns of the patentee, than to the patentee himself. The government has received the consideration for which a valid patent should be granted, and which the government admits it is bound to grant; and the death of the person entitled to this grant does not exonerate the government from the obligation. Upon this principle, and for this reason, the 13th-section of the act of 1836 was framed. But no such principle or reason exists in regard to the 18th section of the act.

Second. The 18th section of this act cannot be so construed as to authorize the renewal or extension of a patent, in favor of the personal representatives of a deceased patentee, because such representatives cannot comply with the terms and conditions required by that section to authorize the renewal of a patent. The 18th section requires the oath of the patentee to the statement in writing which is required to be made to the board. Such, I submit, is the plain import and meaning of the words used. After providing that the application for an extension of a patent shall be made by the patentee, in writing, to the commissioner of patents, prescribing the notice to be published by the commissioner, and designating the persons who shall constitute the board to hear and decide upon the application, the section proceeds in these words: "The patentee shall furnish to said board a statement in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficiently in detail to exhibit a true and faithful account of loss and profit in any manner accruing to him from and by reason of said invention." Under whose oath is this statement to be furnished? From the nature of the facts required to be verified by this oath, facts the knowledge of which must, from their character, rest almost, if not entirely, exclusively with the patentee, can there be any doubt that the verification of these facts, required by this section, is the oath of the patentee? Besides, the terms of this section are so explicit, that nothing is left for con-

struction or criticism. The patentee shall furnish a statement under oath. Does not this language as clearly and unequivocally require the oath of the patentee, as if the word "his" had been inserted between the words "under" and "oath?" Can any one suppose that congress had the most remote idea, that this statement should or could be verified by the oath of any other person than the patentee? An executor or administrator cannot comply with this requirement of the section any more than he could with the requirement, in this respect, of the 6th section. By the 10th section, congress made a special provision, varying the oath to be made when executors or administrators apply for an original patent, but no such provision has been made in relation to the 18th section.

My learned adversary has urged with much earnestness, that the object of congress in enacting the section in question, was exclusively to reward and encourage inventors, "to foster genius and reward merit"—that this object could not (as he conceives) be sufficiently accomplished, without a provision in favor of the children of the inventor who may be and often are left destitute at his death—and that therefore it is the duty of the court to give a construction to this section, which will extend its provisions to personal representatives of the deceased patentee. If such were the object of congress, it is certainly to be regretted that it has not in some way expressed it, or given some hint of it in some of the laws which have been passed upon this subject. It was certainly a very plain and easy matter for congress to have made such a provision as the learned gentleman supposes it intended to make and ought to have made, had it deemed it expedient to do so. But I have heard no argument which tends to prove that this law owes its origin to the object supposed by the learned counsel. Certainly the argument would furnish no reason for extending a patent in favor of the personal representatives of a patentee who had no family, no children, or (as might be the case) no heirs. And suppose the patentee should die deeply in debt and leave a destitute family. This family could not be benefited by an extension of his patent, unless its value should be more than sufficient to pay his debts. The patent, when extended in favor of his executors or administrators, would be assets in their hands to be administered as a part of his estate.

Again, the patentee may not be the inventor, he may not be the man of genius and of merit, which the government ought to foster and reward. An inventor may assign his invention before obtaining a patent, and the patent be taken out in the name of the assignee. Act March 3, 1837, § 6 [5 Stat. 193]. What benefit would the renewal of a patent in favor of the personal representatives of such a patentee, be to the family of the inventor? How would the extension of such a patent "foster genius or reward merit?"

If the object of congress had been to benefit the children of inventors, it is inconceivable how or why they would enact a law in the words of the 18th section of this act, which, according to the construction attempted to be given to it, would in most cases benefit only the creditors of the inventor, and in many cases benefit neither the inventor, nor his children, nor his creditors, and which, in its terms, applies to all patentees whether they are inventors or not, or do or do not leave any children or heirs to be benefitted. No principle in aid of the plaintiff's construction of this section, can be extracted from the proceedings of the privy council under the statute of 5 & 6 Wm. IV. In England the crown is the fountain from which all monopolies flow. Previous to the reign of James I., monopolies of every description and for unlimited periods, were created by letters patent from the crown. Such grants were simply the exercise of the royal prerogative, the original source of power, from which all such and the like privileges and franchises emanated. This portion of the royal prerogative was frequently exercised in a manner greatly to prejudice the business, commerce, and prosperity of the kingdom. To remedy such abuses the statute of 21 Jac. I. c. 3, commonly called the "Monopoly Act," was passed. The 1st section of that act declared all monopolies to be against public policy and void. The 6th section contained a proviso excluding from the operation of the first section, letters patent for a period not exceeding 14 years, for the sale, making and working of any manner of new manufacture in the kingdom. The act of 5 & 6 Wm. IV. c. 83, amended the 6th section of the monopoly act, so as to authorize the crown, if in its wisdom and discretion it should deem it proper and expedient, by and with the advice of the privy council, to enlarge or prolong the time for which such letters patent were authorized by the 6th section of the monopoly act, for a period not exceeding seven years. Although by these acts the power of the crown as to granting patents is thus limited, yet in granting or prolonging patents which are not prohibited by these acts, the crown still acts as the original source of power—possessing in that respect the same power that the congress of the United States does, and, therefore, in the exercise of that power, it prolongs patents in favor of the heirs or assignees or executors or administrators of a particular patentee. Congress may do the same by special act, or it might if it deemed proper, pass a general act, authorizing the extension of a patent by any officer or officers it might designate, in favor of the personal representatives or heirs of a deceased patentee.

But the question here is not what congress has the power to do, but what it has done. Has it, by this 18th section, granted the power to the board therein mentioned, to extend a patent, in favor of the executors or administrators of a deceased patentee? This board,

acting under this section, is not the original source of power, but a mere servant or agent of the original source of power, acting under and by virtue of a delegated limited authority; and the question is not what authority or powers the principal might have bestowed upon this agent, but with what power or authority, it has clothed this agent. Demonstrating that congress might have granted to this board the power claimed for it, is not advancing one step towards proving that it has done so.

Third. This brings me to the consideration of the third proposition under my third point, which is that the power granted to the commissioner of patents and to the board, by the 18th section of this act, is a special and limited power, and must be strictly pursued. Is the power given by this section limited and special? Of this there can be no doubt. It certainly is not a general power to extend all patents, in favor of any person, in the discretion of the board. Where a jurisdiction is limited by custom or by statute, either, 1st, as to place, as a leet or corporation, or, 2d, as to persons, or, 3d, with respect to the subject matter, it is deemed a special and limited jurisdiction; and its proceedings in a case arising out of the place, or in favor of persons not named in the statute giving the power, or upon a subject matter not mentioned in the statute, or in a mode or manner not specified in the statute, are *coram non iudice* and void. *Perkin v. Proctor*, 2 Wils. 382; *Case of The Marshalsea*, 10 Coke, 74-76.

The power conferred on the secretary of state by the patent act of 1793, was a special and limited power; and hence it was held in *Pennock v. Dialogue*, 2 Pet. [27 U. S.] 1, that the patentee acquired no title to his patent, without a strict compliance with all the preliminary steps required by that statute. Clearly, under that act, the secretary of state had no power to issue a patent in favor of any other persons than those named in the act. Could he dispense with a strict compliance with any one of the provisions of that act? His whole power to act in the premises, depended upon a strict compliance by the patentee with every requirement of the act. It is contended that the board organized by the 18th section of the present act, is a judicial court, whose judgments or decisions upon the subject matter before it are conclusive. If this board were to be deemed a judicial court, the conclusions drawn from that supposition by the plaintiff's counsel would not follow. If a court at all, it is indisputably a court of limited and special jurisdiction, and all its proceedings in favor of persons not specified in the act, or upon a different application from that mentioned in the act, or without a strict compliance, by the applicant, with all the requirements of the statute conferring the power, would be *coram non iudice*, and void. But, I insist, the board act as commissioners by virtue of the power or commission given them by this act, and not

as a court. It is not a judicial court recognized or authorized by the constitution of the United States. Article 3, § 1, of the constitution of the United States declares, that "the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office." By article 1, § 8, subd. 9, power is given to congress "to constitute tribunals inferior to the supreme court." It cannot be contended with the semblance of plausibility, either, that the persons composing the board constituted by the 18th section of this act, are judges within the provision of the constitution, or that the board is a tribunal inferior to the supreme court. Its decisions cannot be reviewed by the supreme court, nor can that court, by mandamus, or otherwise, interfere with its action; nor are the powers and duties of the board, within the judicial powers of the government. By article 3, § 2, of the constitution, "the judicial power shall extend to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This is all of the section which is applicable to the question now under consideration.

The late Mr. Justice Story, in his *Commentaries on the Constitution* (volume 3, § 1639), says, that the terms "law and equity," as used in this section of the constitution, mean "law and equity," according to the known legal definition of those terms, in the jurisprudence of England, at the time of the adoption of the constitution, and that by this section the constitution appeals to and adopts the common law to the extent of making it a rule in the pursuit of remedial justice in the courts of the Union. In the same volume (section 1640), this learned jurist defines the words "cases in law and equity," as used in this section of the constitution, to be cases which arise under the constitution, laws and treaties of the United States, and which can be litigated in the ordinary mode of proceeding in a court of common law, or in a court of equity. He says: "A case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the constitution, laws or treaties, of the United States, it is within the judicial power confided to the Union." By an act of congress "to provide for the settlement of the claims of widows and orphans, and to regulate the claims to invalid pensions," approved March 23, 1792 (1 Stat. 243), it was provided that certain disabled persons therein mentioned, should be entitled to be placed on the pension list of the United States for such time, and to be entitled to such allowance, not exceeding

a certain rate, for arrears of pensions, as the circuit court of the district in which they respectively resided, might think just. The act, then, prescribes certain preliminary proofs to be presented by the applicant to the court, and then the section (section 1), concludes in these words: "The circuit court, upon receipt of the proofs aforesaid, shall forthwith proceed to examine into the nature of the wound, or other cause of disability of such applicant, and having ascertained the degree thereof, shall certify the same, and transmit the result of their inquiry, in case, in their opinion, the applicant should be put on the pension list, to the secretary at war, together with their opinion in writing, what proportion of the monthly pay of such applicant will be equivalent to the degree of disability ascertained in manner aforesaid." The third section of the act required the several circuit courts to continue in session five days at the least, from the time of opening the sessions thereof, that such disabled persons might have full opportunity to make application for relief under that act.

Immediately after the passage of this act, applications for relief under it, were made to the circuit court for the district of New York. That court, then consisting of Chief Justice Jay and Mr. Justice Cushing of the supreme court, and Judge Duane, the district judge of that district, were unanimously of opinion: "That by the constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either; that neither the legislative nor the executive branches can constitutionally assign to the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner; that the duties assigned to the circuit courts by this act are not of that description. As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by official instead of personal description; that the judges of this court regard themselves as being the commissioners designated by the act, and therefore as being at liberty to accept or decline that office; that as the objects of this act are exceedingly benevolent, they will execute it in the capacity of commissioners." The circuit court for the district of Pennsylvania, consisting of Mr. Justice Wilson and Mr. Justice Blair of the supreme court, and Judge Peters, district judge for the district of Pennsylvania, certified their unanimous opinion to the president, that the court could not proceed under that act; and one reason assigned was, that the business directed by it was not of a judicial nature, and formed no part of the power vested by the constitution in the courts of the United States; and consequently, had the court attempted to perform the duties assign-

ed by the act, it would have proceeded without constitutional authority. The circuit court for the district of North Carolina, consisting of Mr. Justice Iredell of the supreme court, and Judge Sitgreaves, the district judge, came to a similar conclusion, which they maintained in a very elaborate argument. *Hayburn's Case*, 2 Dall. [2 U. S.] 410 to 414, note. The board, therefore, created by the 18th section of this act, is not a court. It is no part of, nor in any manner connected with, the judiciary. It constitutes no portion of the judicial branch or department of the government; its powers and duties are not within the judicial powers of the government.

Mr. Seward—What do you say of courts martial? Are not they courts authorized by the constitution?

Mr. Stevens—I say courts martial are part and portion of the war and navy departments, having no connection whatever with the judiciary; they are not mentioned in the constitution, and are only authorized by implication, as being necessary incidents to the power given to congress by article one, section eight, to raise and support armies, and to provide and maintain a navy. This board is a board of commissioners, with special and limited jurisdiction and powers. It is an inferior jurisdiction, not proceeding according to the common law. Such a tribunal acquires no jurisdiction, unless every preliminary step is taken in the manner, and by the person, prescribed by the statute. *Jones v. Reed*, 1 Johns. Cas. 20; *Smith v. Bouchier*, cited in 2 Wils. 385. The preliminary jurisdictional facts, required by the 18th section of this act, to authorize the board to act at all upon the application are: 1st. The patentee must make application to the commissioner of patents, for the renewal. 2d. The application must be in writing. 3rd. The sum required must be paid. 4th. The commissioner must publish notice, as required. 5th. The patentee must furnish to the board a statement in writing under oath of the ascertained value of the invention, &c. If any of these steps are omitted, the board acquires no jurisdiction to act upon the application. The power must be strictly pursued; nothing is to be taken by implication. Now, is there any more authority given by this section to the board to entertain and act upon the application of an executor or administrator of the patentee, than upon the application of the heir, or assignee, or devisee of the patentee? Can the application be made by a different person than the one designated by the statute? Can any application, except one in writing, give jurisdiction? Can the publication of notice, or the statement of the patentee in writing, under oath, of the ascertained value of the invention, as required by the statute, be dispensed with? Has the board any such dispensing power? If the board can dispense with any one of these requisites, it may dispense with the whole.

The statute securing to authors an exclusive right in their works, is authorized by the same clause of the constitution, and is very analogous in principle to the act now under consideration. In regard to that act, the supreme court held, in the case of *Wheaton v. Peters*, 8 Pet. [33 U. S.] 591, 664, that no requirement of the statute, whether important or unimportant, could be dispensed with; and that if any one of the provisions of the statute, however unimportant the court might deem it, were not strictly complied with, the author acquired no title to an exclusive right in his book. The same doctrine was held by Mr. Justice Washington, in the case of *Ewer v. Coxe* [Case No. 4,584]. The case of *Grant v. Raymond*, 6 Pet. [31 U. S.] 218, is relied upon as authority for the latitude of construction contended for by the plaintiff. I confess I am unable to see the least analogy between the principle decided in that case, and that contended for in this. The main question presented in that case was whether the law of 1793 authorized the secretary of state to issue a valid patent to an inventor, after he had issued a void one, in a case where no fault or blame was imputable to the inventor. The court, after much hesitation, and not without doubt, came to the conclusion that the issuing of a void patent did not exhaust the power of the secretary of state under that act, and that he could issue a valid patent for that portion of the fourteen years then unexpired. This was, doubtless, correct; all the requirements of the statute were complied with; a void patent was issued; that was no patent; so that the case, in legal effect, stood as though no patent had before been issued, although the application in due form had been made by the inventor several years before.

Fourth. The fourth proposition under my third point is, that the provision in the 18th section for the renewal of a patent is, as to patents issued before the passage of that act, a gratuity to the patentee, in derogation of the rights to which every other citizen would be entitled upon the expiration of the first patent. Such an act ought not to be extended by construction beyond its express terms. All grants from the government are construed strictly against the grantee. In this respect the rule of construction is different, from that which is applied to grants between individuals. But between individuals, a grant which is a gratuity—a deed of gift—is always construed strictly against the donee. The donor is never presumed to have given, or to have intended to give anything that is not expressly mentioned, or to a person not expressly named in the deed. In relation to public grants, by act of the legislature, Mr. Chief Justice Taney, in the case of *Charles River Bridge v. Warren Bridge*, says—the rule is well settled, that, in grants by the public, the grantee can claim nothing that is not clearly given; nothing passes by implication. 11 Pet. [36 U. S.] 420, 544–546. This

rule should be applied with the utmost strictness to a grant that is a mere gratuity. It cannot be denied that so far as the 18th section of the act in question authorizes the extension of a patent issued before the passage of that act, it is a mere gratuity to the patentee. The patentee had, in such case, received all that the government had agreed to give, and all he had a right to expect as a reward for his invention; an act authorizing such a patent to be extended for seven years longer, is a grant of a monopoly in derogation of the rights of the public, without consideration. It is, therefore, submitted that such a gift ought not to be construed to extend beyond the party expressly named, nor should it take effect at all, but upon a strict and literal compliance with the conditions required by the act.

II. The second question presented is, whether by force and operation of the 18th section of the act of July 4th, 1836 [5 Stat. 124], entitled "An act to promote the progress of the useful arts, &c.," the extension granted to William W. Woodworth as administrator on the 16th day of November, 1842, enured to the benefit of assignees under the original patent granted to William Woodworth on the 27th day of December, 1828; or whether said extension enured to the benefit of the administrator only in his said capacity. So far as it regards the particular case now under argument, this question will be wholly out of the case if the defendants prevail on the first question; because if the court shall be of opinion, that the act does not authorize an extension of a patent in favor of the personal representatives of a patentee, then the extension of this patent is wholly void and can enure to the benefit of no person. It will be necessary, therefore, to discuss this question on the supposition that the extension of this patent in favor of the administrator of the patentee is valid; or, (which will render it still more simple,) to assume, for the purpose of the argument, that the renewal or extension of this patent was obtained upon the application of the patentee himself. If the 18th section of this act does authorize the extension of a patent in favor of the administrator of a deceased patentee, such administrator can have no greater interest in, or more extensive right to the benefits of such extension, than the patentee himself would have had, had he lived and obtained the extension or renewal himself. The simple abstract question then, (to pursue the words of the statute,) is, does "the benefit of such renewal extend to assignees and grantees" of the original patentee? It is respectfully submitted that it does. (1) Such is the plain sense and import of the last clause of the 18th section. (2) Any other construction of that section would render it unjust and invalid, as to those assignees and grantees of the original patentee, who had purchased their rights and obtained their grants or assignments prior to the passage of the act.

1. The clause of the 18th section, upon the

interpretation of which this question depends, is in these words: "and the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest therein." The alleged obscurity of this clause does not arise from the language used by the framers of the act, but from an attempt by construction and interpretation, to give that language a meaning different from the plain import of the words used. Our adversaries contend that the word "therein," refers to the extended term, and gives the same meaning to the clause as if it read "to the extent of their respective interest" in such renewed or extended term of the patent. Therefore, if the assignment does not extend to and embrace the renewed term, or, in other words, if it is not an assignment in terms for the new term for which the patent may be extended, the assignee has not only no benefit of the renewal, but will be precluded by the renewal from using the thing patented during the renewed term. If I may be permitted to borrow a phrase from my learned adversary, I would say that "the most accomplished casuist would fail" to furnish anything like a plausible argument in favor of this construction. It is diametrically opposed to the intention of the legislature as clearly manifested by the language used to express that intention. Besides, such an interpretation would violate one of the best established rules of construction, by rendering the whole clause entirely nugatory and utterly useless. Every statute should, if possible, be so construed that every clause, sentence and word shall have full effect. Dwar. St. 763. An assignee or grantee of a renewed term, would, by virtue of his grant, be entitled to all the benefit of such renewed or extended term, without this clause in the statute.

It is, indeed, contended, that even a specific, absolute grant of the extended term, before the extension was obtained, would not vest in the grantee the legal title to such extended term, after it should be obtained, without this clause in the statute; and that without that clause, such a grantee would be obliged to resort to a court of equity to compel the patentee to convey the title to the extended term after he had obtained the extension of his patent. This position is attempted to be sustained upon an alleged principle of law, that it was not in the power of a patentee before the passage of this act, by any form of grant, assurance or covenant, to convey the legal title to an extended term of his patent which he might thereafter obtain; and that before the extension, it was not a right or property capable of being so transferred, as that the legal title to it would vest in, or enure by force of the conveyance to the benefit of the vendee. The court, I think, cannot fail to be struck with the harmony and consistency of this argument, with that urged by the learned gentleman upon the first question presented by this record, to prove that this possibility of an extension

or renewal of a patent, was such a right or property as would vest in the personal representatives of a patentee at his death. But is this argument sound, or even plausible, upon the ground assumed by the counsel? Why would not the legal title of the renewed term vest in the grantee by virtue of the grant, if it contained the necessary words to effect that object? The only reason that has been or can be urged is that from the nature of such contemplated future interest or right, any grant, or conveyance of it, must, notwithstanding any possible covenants of warranty or further assurance, necessarily be deemed an executory, and not an executed contract. Now, can it be contended that the intent, object and purpose of this clause, in the 18th section of this act, was simply to convert an executory into an executed contract? Could any object or purpose, more foreign from the sense conveyed by the words used in the clause, be imagined? This effect is attempted to be given to the statute under the name of construction. Nothing of the kind is to be found in its language. The court is asked to intend, independently, I may say with truth, in defiance of the language, that such was the subtle, metaphysical intent of congress, and that the words used express such intent.

But the proposition of the learned counsel, that no form of conveyance of such extended term, before it was obtained, could operate so as to vest the legal title thereto in the grantee after it is obtained, is wholly unsound. Suppose a patentee had, prior to 1836, granted by deed his entire right and title to his patent, and all the benefit secured thereby, and all that he might thereafter acquire in a certain specified territory, and had covenanted in the conveyance, that in case the patent should in any manner be renewed, extended or prolonged, all the right and title to such renewed, extended or prolonged term of such patent, and all the benefits thereof, should enure to, and vest in, the grantee, to the extent of his territory; after which an act should be passed similar to what the 18th section of the patent act would be, excluding the clause in question, under which the patentee should obtain an extension of his patent for seven years. Could the patentee, in direct opposition to the covenants in his grant, maintain a suit at law against his grantee, for using or vending the thing patented within his territory, after the commencement of the renewed term? Would the grantee be driven to a court of equity for relief in such a case? Could the patentee in any manner, by the judgment of any court governed by the rules of law or equity, deprive his grantee of the benefit of the renewed term? Certainly a court of equity would not sanction any such attempt. Then suppose he brings his action at law against his grantee, for a violation of the patent during the extended term, would not that covenant of the patentee be a conclusive defence to such an action? How could it be otherwise? Would such subsequent law of congress cancel or annul such a contract, or so far affect it, as to

make a resort to equity by the grantee necessary for his relief? Congress has no power to pass a law that would so affect existing contracts.

At the time the act of 1836 was passed, there was no statute or law authorizing an extension, renewal or prolongation of a patent, beyond the original term of fourteen years. When, therefore, congress made the provision that the benefit of such renewal should extend to assignees and grantees, could they have meant assignees and grantees of the renewed term? Is it at all consistent with sound reasoning, to suppose that congress, by the terms "assignees" and "grantees," meant assignees and grantees of a future possible interest in the patent, after the expiration of the original term; assignees and grantees who, as the counsel claiming this construction insists, could not, from the nature of things, have any existence; and when, in fact, such an assignment or attempt at such an assignment, was extremely rare; while on the other hand, assignments and grants, and assignees and grantees of the original patent, or of some interest therein, were as common as the patents themselves? These, I submit, are insuperable objections to the construction of the clause in question, contended for on the part of the plaintiff, while the construction claimed by us, follows from the grammatical construction and meaning of the words in which the clause is expressed.

The term "therein" obviously refers to the phrase, "the thing patented," so that if all that is grammatically understood, were expressed, the clause would read thus: "and the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented, to the extent of their respective interest" in the thing patented. The word "therein," as used in the clause, is a relative term, and is used to obviate the repetition of the phrase, "in the thing patented." This, I submit, is the plain grammatical construction of the sentence. What, then, is the thing patented? Clearly the exclusive right to make, vend and use the thing invented or discovered. If, as in this case, the invention consists in the discovery of a machine, the thing secured by the patent, and consequently the thing patented, is not the machine itself, but the exclusive right to make, vend and use that machine. An assignment or grant by the patentee of the whole of such exclusive right, for a specified territory, vests in such assignee or grantee all the right and property of the patentee, in and to such exclusive right, to the extent of such territory. The extent of the interest of such assignee or grantee is limited by the territory to which the grant or assignment is confined. Therefore, the extent of the interest of such assignee or grantee in the thing patented, to which the benefit of such renewal extends, is the extent of the territory, in and over which he has, by the terms of his assignment or grant, such exclusive right.

It is insisted, that the word "extent," used

in the clause, applies to duration of interest as well as to extent of territory. Metaphorically or poetically, the word "extent" is sometimes used to express duration; but it is never so used in a professional sense or in common parlance. The term used by property lawyers and conveyancers, to express the duration of interest in an estate, is "quantity." "The term for which the right of enjoyment is to continue, forms the quantity of the estate." 1 Prest. Est. 21. No writer on property has ever used the word "extent," or "extent of interest," to designate the time of enjoyment. In common parlance, the word "extent" is rarely, if ever, used to denote duration. Extent of one's interest or property in a town—extent of one's plantation or farm—extent of dominion—extent of a road or river—designate space and not time. If any person were to enquire as to the extent of the interest of a grantee or assignee in a patent, every one would understand the inquiry to be, whether the grant or assignment was of the whole patent, or of a part, and of what part. No one would understand such an inquiry to relate to the duration of the interest. No definition signifying duration, is given to the word "extent," by the best lexicographers. Walker defines it to mean—"space or degree to which a thing is stretched." Johnson—"space or degree to which a thing is extended." Webster, (first octavo edition,) defines it thus: "1st, space or degree to which a thing is extended; hence compass, bulk, size; as, a great extent of country, or of body; 2d, length; as, an extent of line; 3d, communication, distribution; 4th, in law; a writ of execution, or *extendi facias*." It is not to be presumed, at least it is not a legal presumption, that congress, in penning or framing this clause of the act, used any of the words employed for that purpose, in any other than their ordinary sense. The 18th section also declares, that upon the patent being so renewed, "the said patent shall have the same effect in law, as though it had been originally granted for the term of twenty-one years." Is there anything in this language which authorizes, or in the least degree countenances the construction given it by the counsel for the plaintiff, that the renewed patent shall only have this effect quoad the patentee? Can a sentence expressed in such clear and unequivocal terms, be thus curtailed and restricted by any known rule of interpretation? I insist, not. The patent, when renewed, is to have the same effect in law, in all respects, and to every intent and purpose, as though it had, in the first instance, been issued for twenty-one years. By the express terms of the act, the renewal, by relation, makes it a patent for twenty-one years ab origine. One of the necessary effects in law of this is, that an assignment of all the patentee's interest in the patent, in any specified territory, would vest in the assignee the whole right to the patent for that territory, for the twenty-one years.

2. The construction contended for by the counsel for the plaintiff, would, if adopted, render the law unjust and invalid as to those assignees and grantees who had purchased their rights and obtained their grants or assignments, prior to the passage of the act of 1836. Such assignees and grantees, by virtue of their grants, acquired the right, as the law then stood, to use the thing patented in the manner specified in their grants or assignments, not only during the continuance of the original patent, but for all time to come; an exclusive right, during the existence of the patent, and a right in common with other persons after the expiration of the monopoly. Such, we have a right to assume, was their just expectation, which entered into the inducement to purchase, and which constituted a portion of the consideration for the price paid for the grant. No man would give so much for a business of any kind, which he might by law be compelled to relinquish in fourteen years, as he would if it could be continued at his pleasure. True, he would have no exclusive right after the expiration of the monopoly, but he nevertheless knew that after the expiration of the patent, he would have a common right, and would have the benefit of being in the market, with every necessary material and structure, to carry on the business. This to start with, at the expiration of the monopoly, would be no inconsiderable advantage; an advantage valuable in itself, to which he would be legally entitled, from having purchased and paid a valuable consideration for the right of placing himself in that position. The bare making of the thing patented, during the existence of the patent, ready to be used, would be a violation of the patent. No person but the patentee, or those deriving the right from him, could do so, with impunity. This advantage, independent of the large sum that must necessarily be invested in the business at the expiration of the patent, is a property—a right—vested in the assignee or grantee, by virtue of his grant, which congress has no power to impair, much less to take from him and bestow upon his grantor. A law which would impair, or take from a grantee rights, thus lawfully acquired, for the benefit of the grantor, would be unjust and invalid. *Wilkinson v. Leland*, 2 Pet. [27 U. S.] 627, 657, 658.

The grantor, or his heirs or representatives, have no right to do, or omit to do any act, which would impair or injuriously affect any part or portion of the rights thus granted by him, and no such right could be vested in him, or his heirs or personal representatives, by any subsequent law. The fourth section of the act of 1793, under and by virtue of which the assignees and grantees of the patent in question acquired their rights, declares: "that it shall be lawful for any inventor, his executor or administrator to assign the title and interest in the said invention, at any time, and the assignee having recorded the said assignment, in the office of

the secretary of state, shall thereafter stand in the place of the original inventor, both as to right and responsibility, and so the assignees of assigns, to any degree." By what rule of construction, can the word "thereafter" be held to mean any limited period? By the plain meaning of the language used, the assignee, to the extent of the right acquired by his assignment, is to all intents and purposes, and for all time, put in the place of the inventor, both as to right and responsibility. And yet the construction contended for by our adversaries, would require the word "thereafter" to be expunged from the section, and the words "during the existence of the patent" substituted in its place.

In the case of *Herbert v. Adams* [Case No. 6,394], it was held that an inventor who had assigned his invention, and afterwards took out a patent for it, could not maintain an action for an infringement of the patent. Mr. Justice Story said, that the patentee was estopped from claiming any right adverse to the assignee; that, although the assignment was made before the patent was obtained, yet the assignee, by force of the 4th section of the act of 1793, stood in the place of the inventor, both as to right and responsibility; and that the patent obtained by the inventor subsequent to his assignment, enured to the benefit of his assignee. Now, I ask, could congress pass any law which could, or would, at any period of time, re-invest in the inventor any right to such invention, without the consent of, and hostile to his assignee? And more especially, if congress should pass any law on the subject which did not, in the most explicit terms, declare such to be its object, would this court, by construction, give it that effect? By the 7th section of the act of 1839, it is enacted that every person who has or shall have purchased or constructed any newly invented machine, &c., prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use and vend to others to be used, the machine, &c., so made or purchased, without liability therefor, &c., but that the patent for such invention, if obtained within two years, shall not be held to be void by reason of such prior sale or use, &c. The only alteration of the law, made by this section, is, that the prior use or sale of an invention shall not render a patent subsequently obtained void, unless such prior use, purchase or sale has continued for more than two years prior to the application for the patent. In the case of *McClurg v. Kingsland*, 1 How. [42 U. S.] 202, the defendant had used the invention four months before the inventor applied for his patent; and the question was, whether the use of the invention by the defendant after the patent was obtained, rendered him liable to an action for infringing the patent. The court held that the defendants had a right to continue to use the invention, notwithstanding the patent, without liability to the patentee or his assignee. Now, suppose

this patentee should get his patent renewed or extended under the 18th section of the act of 1836, would such renewal give him any better or greater or other right, than he had by his original patent? Would persons who were not liable to him for an infringement of the patent before it was extended, be liable for the same or similar acts of infringement, after it was extended? By the 2d section of the act of the 3d of February, 1831, to amend the several acts respecting copyrights, an author may renew and continue his copy-right for fourteen years after the first term of twenty-eight years. Could an author, who had sold the original copy-right of his book to a publisher, acquire by a renewal of such copy-right, any right to prohibit such publisher from publishing or selling such book after the expiration of the first term? Suppose the work were so extensive, and the publication so expensive, that the publisher should deem it advisable to publish a very large edition in the first instance, a large portion of which (of the value of many thousands of dollars) should remain on hand at the expiration of the first term of the copy-right. Would a renewal of such copy-right by the author, entitle him to prohibit the sale of the books thus published? Clearly, such an interpretation of the second section of that act, would render it most manifestly unjust, and such a construction would be still more indefensible, if we suppose (to make the case more analogous) that this second section had been enacted after the publisher had purchased and paid for the original copy-right. A retroactive effect, injurious to existing rights, is never given to a statute by construction.

The very able and conclusive opinion of Chief Justice Taney upon this very question, in the case of *Wilson v. Turner* [Case No. 17,845], at the Maryland circuit, in December last, divests it of all doubt. After stating the construction contended for by the plaintiff in that case, which was the same as that now insisted upon, the learned chief justice remarks: "Now, if this be the construction of the act of congress, the provision in favor of assignees and grantees would seem to the court to be useless and nugatory. No one, we think, would suppose that the grant of this new right annulled all contracts made under the old one; and that giving to the patentee an additional term of seven years, would deprive purchasers of the right which they had acquired in the original term, before the renewal was granted. If the patentee had assigned all his right in a particular district or state, for and during the whole fourteen years, or even for a shorter period, surely that contract would continue binding upon him, notwithstanding he afterwards procured an extension of his patent, and congress could hardly have deemed it necessary to make a special provision for its protection. Certainly, according to this construction, the assignees or grantees would derive no ad-

vantage from the renewal. Yet the law clearly intended that they should share in the benefit conferred on the patentee, and have some advantage from the extension of the patent for seven years. For it provides, in express terms, that the benefit of the renewal shall extend to them; thus using a word which shows that it was not the intention of the legislature merely to protect interests which previously existed in assignees and grantees, but to give them a share in the benefit conferred on the patentee by the renewal of the patent. Moreover, assignees who had purchased the title of the patentee in particular states and territories, and individuals who had paid for the right to use the invention during the original period of the monopoly, might have suffered serious injustice by the grant of a new and further term to the patentee, unless they also were embraced in it, and they would, therefore, very naturally and properly be the objects of protection. For, in cases like the present, where the patent was issued and the purchaser obtained his assignment before the passage of the act of 1836, both parties must have understood that the exclusive right of the patentee for its whole period was transferred, and that at the expiration of the fourteen years the assignee would have the right to use the invention without interruption, and without paying the inventor any further compensation. The object of the clause in question in the act of congress, is to preserve the contract in the sense in which both parties understood and intended it at the time it was made, and to secure to the purchaser the right which he intended to buy, and supposed he had bought, and which the patentee must have intended to sell, and, at the time of the contract, must have supposed he had sold. Indeed, the power of extension given by the act of 1836, would have operated most unjustly upon those who had purchased the right to use a patented machine, if it had not been accompanied by a provision for their protection. For, relying on the assurance given by the law, as it stood when the contract was made, that they had purchased for the whole period of the monopoly, and that they might lawfully continue the use of the invention after the expiration of the fourteen years, many grantees, after having obtained the assignment or grant from the patentee, had undoubtedly erected costly machinery, and encountered expenses which they would not have incurred, if they had supposed it would be in the power of the patentee to forbid the use of his invention after the term limited by his original patent; and if, with these expenses incurred and arrangements made for the continued use of the improvement, congress had passed the law of 1836 without this provision in favor of assignees and grantees, it would have enabled the patentee to deal with them most severely and oppressively, and to exact from them a far heavier sum for the extended term

of seven years, than they would have been willing, under other circumstances, to have given for the original term of fourteen." After further illustrating and demonstrating the correctness of this construction, and answering the arguments urged against it, the learned chief justice concludes: "Besides, the words of the law appear to us to admit of no other interpretation than the one we have given. It declares that the benefit of the renewal shall extend to assignees and grantees of the thing patented, to the extent of their respective interest therein. Now, what benefit have they in the renewal, if they are excluded from the use of the thing patented during the whole of the renewed term. According to that construction of the law, so far from receiving a benefit, they would be subject to loss; they would not even enjoy the right which they supposed they had bought, but would be compelled, at the expiration of the fourteen years, to stop the works they had constructed, at whatever loss it might occasion, unless the patentee gave them leave to proceed. Yet the law, in plain terms, declares that they are to derive an advantage from the extension, and that the benefit of the renewal shall extend to them according to their respective interests. In other words, it means to provide that assignees and grantees shall share with the patentee the benefit of the renewal, according to the interest which they respectively acquired in the thing patented within particular districts of country, or for their own individual use."

The learned counsel for the plaintiff has urged, as an answer to this argument, that there are many inventions which do not require the erection of costly machinery, or an encounter with great expense; and he instanced an invention for combining colors, in which case the loss of capital invested in machinery, must at most be very trifling. I will not say that such an argument is absurd, but, surely, it must derive its whole force, it must be exclusively indebted for whatever consideration it may command or receive, wholly and entirely to the source whence it emanated. What is it? The gentleman contends for a construction of this act, which will exclude from its provisions persons expressly included in its language. We resist this construction, and, as one reason against it, show to the court the gross injustice it must inevitably work in the case pointed out. To this the learned counsel answers: There may be other cases where the injustice would not be so great or so apparent. If the construction contended for by the plaintiff would inevitably work injustice in a single case, it demonstrates such construction to be wrong, notwithstanding there may be other cases and other persons that would not be injuriously affected by such a construction.

It has also been urged that any citizen, when a patent is about to expire, may erect costly structures and machinery to use the invention

after the monopoly shall have expired; and the question is asked: Why should not congress consider his case as favorably as that of the assignee? I suppose the difference between the case of an assignee who has purchased and paid the patentee for the right to make, use and vend the invention, and who has invested his capital in that business under a just and lawful expectation, which entered into the inducement to purchase, that he would have a right to continue in the business after the monopoly expired, and a person who, without such right, should invest his capital in the same business, is too obvious to require illustration.

If the interpretation of the plaintiff's counsel is adopted, it must inevitably deprive purchasers of the patented article for sale or for use, as well as assignees or grantees of the patent, of the right to vend or use the article purchased. Take the article of a stove for instance, an article of prime necessity, and for which hundreds of different patents have been obtained. Suppose a patentee, shortly before the expiration of his patent, should sell to a stove-dealer, a quantity of the patented stoves, or should sell a single stove to a person for his own use. The renewal of the patent would authorize the patentee to prohibit the sale in the one case, or the use of the stove in the other, after the expiration of the original patent. Any person who may have purchased the patented article from the patentee, his assignee or agent, the day before the expiration of the original patent, be it ever so expensive, may the next day be prohibited from using it. A mere purchaser of the patented article for any purpose, cannot, perhaps, be deemed to be an assignee or grantee of the patent, or of any interest in it, or of any right secured by it, and is, therefore, not within the words of the clause extending the benefit of the renewal to grantees and assignees. But can it be supposed that congress ever dreamed, much less intended, to give a patentee, under any circumstances, the right to prohibit the use of the patented article which had been sold by him, or by his authority? Can it be maintained for a moment, that such would be the effect of the 18th section, even if the clause in question had not been inserted in it? The term "to use" is employed in the clause in question, in its most extensive sense, as it is in common parlance. "The right to use the thing patented" means the right to make any use of the thing patented, of which it is susceptible, and which is authorized by the grant or assignment. If the grant be only to make and sell the thing patented, the only use the grantee can make of the invention, is to make and sell the article invented. If the grant be of all the patentee's right to the invention within a specified territory, then the grantee can make any use of it which the patentee himself could. The verb "to use," in its general signification, means any employment or disposition of a thing. Loaning money, or purchasing property with it, is

using it. Retailing goods is the use to which the shop-keeper or merchant applies that kind of property, while the consumption of it is the use to which the purchaser applies it. It has before been shown that the thing patented—the thing secured by the patent, is the exclusive right to the use of the discovery. Making and selling the article discovered, is as much an use of such exclusive right, as any employment or disposition of the article by the purchaser can be.

Another argument has been urged by the plaintiff's counsel which should not be passed unnoticed. It is contended that the constitution does not authorize any legislation on this subject, directly or indirectly, in favor of assignees, and, therefore, if the 18th section does, by its terms or effect, extend the benefit of such renewal to assignees, such provision is not authorized by the constitution, and is therefore void. To sustain this position, the counsel has cited 3 Story, Comm. § 1148. Upon this hypothesis, it is asserted that if the construction of this section is as is insisted by us, congress has undertaken to give the property of William Woodworth to his assignees, which it had no power to do. Now, it appears to me that this argument admits of a very plain answer. In the first place, although it is true that the constitution only authorizes congress to grant such exclusive right to authors and inventors, yet it is equally true that congress has power to annex any terms or conditions to the grant of such exclusive right, that it may deem proper. *Wheaton v. Peters*, 8 Pet. [33 U. S.] 591. 663. It was entirely competent for congress to annex any terms or conditions to the renewal of a patent that it might deem proper. The patentee can accept of the renewal on those terms or not, as he may choose, but he can only have such renewal subject to those terms and conditions whatever they may be. In the case of *Wilson v. Turner* before referred to, the court say: "The legislature, obviously, we think, intended to guard the party who had purchased from the patentee the right to use his invention until the expiration of his exclusive privilege, from the necessity of buying it again; and when they were giving to the patentee a new privilege, and one which he had no legal right to demand, they had undoubtedly a right to annex to it such conditions and limitations, as in their judgment, justice required."

In the next place, it is an utter misconception, if not a perversion of the facts, and of the rights of the parties, to say that if the construction contended for by us be correct, it would be giving the property of the patentee to his assignee. The patentee had no legal or equitable claim to an extension of his patent, at least before this law was passed. The law created a new right, if it be a right, which had no existence before. In creating this right, congress was bound to protect the interests of the grantees and assignees of the patentee; and the clause in question simply and only protects the assignees against any

future exaction of the patentee under the new right gratuitously bestowed upon him. Instead of giving the property of the patentee to his assignees, it only protects assignees and grantees in the enjoyment of the rights which they have purchased of the patentee. Without such a provision expressed or implied, the law would be justly obnoxious to the objection, that it deprived assignees and grantees of rights acquired by grant from the patentee, for the benefit of their grantor.

The Commentaries of the late Mr. Justice Story, in no manner favor the views of the learned counsel. The monopoly act of 21 James I. c. 3, authorizes patents to be issued to persons who shall introduce into the kingdom any new manufacture, &c., as well as to inventors. Our constitution authorizes congress to secure the exclusive right to authors and inventors only, to their respective writings and discoveries. In the commentaries referred to, Mr. Justice Story is discussing the policy of the provision in our constitution, excluding introducers of new works and discoveries. The language of the learned commentator, referred to as authority against us, is this (section 1148): "The power, in its terms, is confined to authors and inventors; and cannot be extended to the introducers of any new works or inventions;" clearly having no reference whatever, as to whether the constitution did or did not authorize congress to enact any provision for the protection or benefit of the grantees or assignees of inventors or authors. Besides, congress, upon the literal construction of the constitution insisted upon by the counsel for the plaintiff, would have no more power to authorize the issuing or renewal of a patent in favor of the executor, administrator or heirs of a patentee, than in favor of his assignees, grantees or creditors.

V. The fifth question is so intimately connected with the second, that I beg leave now to present such considerations as have occurred to me in relation to it. I assume that the discussion of the second question has demonstrated, that a renewal or extension of the patent under the 18th section, enures to the benefit of the assignees and grantees of the patentee. That section does not contemplate or authorize the renewal of a patent, unless the patentee can, to some extent, be benefitted by it, without injury to his assignees or grantees. If this be true, it necessarily follows that a patentee who has parted with his entire interest in the invention, is not within the spirit and intent of the 18th section. I have already shown that where a patentee assigns his discovery before obtaining his patent originally, he is not entitled to a patent for his own benefit, and if he do afterwards obtain a patent, it will enure to the benefit of the assignee. Suppose the case of a patentee who has, in clear and unequivocal terms, and for a valuable consideration, granted his entire interest in his invention and patent, future as well as present, so that the benefit of any extension or renewal must,

by force of the grant, enure to the grantee. Would the patentee, in such case, be within the provisions of the 18th section? Clearly not; unless that section authorizes a renewal from which the patentee can derive no benefit whatever. Clearly, such renewal could not reinvest the patentee with any right or title to the discovery, in direct violation of his grant.

III. The third question is: Whether by legal operation and effect of the assignment from Woodworth (the patentee) and Strong, to Twogood, Halstead and Tyack, on the 28th of November, 1829, and the covenants therein contained, the benefit of the renewal of said patent enures to said assignees, to the extent of the territory specified in said assignment. This question is presented on the hypothesis that the assignee is not entitled to any benefit of the renewal, or to any interest in the extended term, unless it is secured to him by the terms or legal effect of his assignment. Such, we insist, is the legal effect of the assignment in question. Upon this point I hope to establish, to the satisfaction of the court, the following propositions: (1) That all the interest which William Woodworth had in and to said invention in November, 1829, and all the right, property, and interest therein, which he contemplated thereafter acquiring, or might thereafter acquire, could be legally passed or transferred by grant or assignment, with proper granting terms therein used for that purpose. (2) By the assignment or grant in question, all the interest, right, and property, which the patentee then had, or which he might thereafter acquire, to the exclusive right to said invention, was transferred to the said assignees or grantees, to the extent of territory embraced in said grant or assignment. (3) But if the property thereafter to be acquired by the patentee in the exclusive right to said invention, by a renewal of his patent therefor, were not such a property as could legally be passed, or transferred by grant, then we submit that the covenants contained in said assignment, operate by way of estoppel, to transfer such future interest to said assignees, the moment it is acquired by the patentee or those representing him.

1. As to the first proposition, it is contended on the part of the plaintiff, that at the time of the assignment (1829) the patentee had not such a property in or right to the renewed term, as could pass by assignment; that there was nothing in esse upon which an assignment or grant could operate. Were it necessary for me to controvert this doctrine, I would refer the court to the argument of the same learned gentleman, upon the first question presented; where, it will be recollected, he labored with equal zeal to establish a diametrically opposite doctrine. It was necessary for his purpose then, and he attempted to prove that the interest of the patentee in this future contingent right of renewal, was a chose in action; such a right to property as would, by operation of law,

vest in the administrator, and might be enforced by him. I admit I could not see anything like plausibility in that argument. The possibility of obtaining a patent by a patentee, was as mere a possibility in 1839 when the patentee died, as it was in 1829 when he made the assignment. The act of 1836 did not invest the possibility of obtaining a renewal of a patent under it, with any more of the characteristics or attributes of property or right to property, than it had before. A possibility is not changed to a right, nor does it approach nearer to a right, by a change of probabilities in its favor. Nevertheless, unsound as I deem that argument to be, unless the court adopt it, there can be no pretence of authority for the renewal of the patent in favor of the administrator. It is, therefore, only upon the supposition that the court may, by possibility, hold the right of the patentee to apply for a renewal of his patent, and the possibility of such application being successful, to be a right of property, which, upon the death of the patentee before making the application, will vest in his administrator, and constitute assets in his hands, that the present question becomes at all material. Should such be the decision of the court, it would establish the proposition for which I am now contending. Surely, it cannot be denied, that every species of property which would constitute assets in the hands of an administrator, may be sold and transferred by the decedent in his life-time. Whatever the law might once have been, it is now perfectly settled, that a chose in action, or any property of whatever description, may be assigned, and the rights of the assignee will be protected at law as well as in equity. A claim of any description upon the government, which would constitute assets in the hands of the administrator, is capable of being assigned by his intestate in his life-time.

But I do not controvert the present doctrine of the learned counsel. I admit now, what I attempted, (and I hope not without success,) to prove, in my argument upon the first question, that the liberty or power of the patentee to make the proper application for a renewal of his patent, and the possibility of such application being granted, is not property or a right to property, which would go to personal representatives. It is only a possibility; and although an assignment, purporting to convey only the present interest of the assignor, would not pass any after acquired right, into which such possibility might ripen, that by no means disproves the proposition now under discussion. Every future contingent right, even a bare possibility, may be barred by estoppel, or may be transferred by deed, with proper and apt words for that purpose, although it would not descend to heirs, or pass to personal representatives. An heir, during the life of his ancestor, has only a possibility in the estate of the ancestor; yet an assignment by deed or grant, from him to a third person, of all the

interest he then had, or might thereafter acquire in such estate, with covenants for further assurance, would pass to the grantee whatever estate the grantor should thereafter acquire in the premises, at the moment he acquired it.

In this case, the patentee, at the time of the assignment, had a present tangible property in his patent. The patent, securing to him the exclusive right to his invention for fourteen years, was that species of property denominated in law an incorporeal hereditament. It is classed by the writers upon property, as a species of real estate. The patentee, at that time, also had the possibility of an extension or renewal of his patent for a further period. Congress had before renewed patents, and they might do so again, by special or general law. This was a possibility coupled with, attached to, and dependent upon, his present right and interest, and was grantable over. "A bare possibility, coupled with some present interest, is grantable over." Shepp. Prec. 252. If the grant or assignment contain either proper and apt words to transfer such possibility, as well as the present interest, or a present grant of the entire interest of the patentee in the invention, with covenants of warranty, or covenants to convey such future interest as the patentee might thereafter acquire, the patentee might thereafter acquire, the grantee or assignee would, by force of the deed, become vested with such future interest as the patentee might thereafter acquire, the moment he acquired it. An heir, entitled to an estate for years, the remainder in fee in his ancestor—the interest of the heir in the remainder is a mere possibility, not a right. Yet, if the heir should convey the whole estate with covenants of warranty, and for further assurance, or should convey his estate for years, together with his possibility in the remainder, or with covenants that his vendee should have the remainder, or so much thereof as he should thereafter acquire, his grantee, by force of the grant and the covenants, would be vested with the remainder the moment it became vested in the grantor. An inventor has no exclusive right to his invention before he obtains a patent for it. Yet if he assign his discovery, and afterwards acquires such exclusive right by obtaining a patent, such exclusive right immediately vests in his assignee, by force of the previous assignment. The same principle would vest any extension of such exclusive right in the assignee. In short, the simple question is: Has a patentee the power of transferring to another any possible future extension of his exclusive right? That he has such power, there is no ground for a reasonable doubt.

2. The assignment is by deed. It contains apt and appropriate words to convey and transfer all the interest which the patentee then had in his invention, or which he might thereafter acquire by a renewal of his patent. The assignment is of all the right and interest of the patentee in the patent, in the territory

therein specified, (the county of Albany being a part of such territory,) to have and to hold the rights and privileges granted for and during the term of fourteen years from the date of the patent. The assignors then covenant that any improvement in the machinery, or alteration or renewal of the patent, shall enure to the benefit of the assignees, and may be applied and used by the assignees, within their territory thereinbefore designated. It is clear, from the words used, that the patentee intended to grant, and supposed he was granting, and the assignees supposed they were receiving, a conveyance, not only of the right of the patentee to the original term, but also to any renewed term of the patent, should such renewed term be obtained. The intention of the parties must govern in this as well as in any other case of contract, unless, indeed, the whole law of contracts, as well as every rule for the construction of statutes, is to be overturned for the benefit of the plaintiff in this cause. Woodworth's interest in the patent, in the territory embraced in the assignment, was his entire interest, to the extent of that territory, in the invention patented. The term "patent," as used in this assignment, includes the invention, or thing patented. *Webst. Pat. 1.* The patent was his title to the exclusive right to his invention; the whole of that right is conveyed to the assignees, with an express covenant, that if the patent, securing that exclusive right, should be renewed, such renewal should enure to the benefit of the assignees, and that they might apply and use such renewed patent within the territory specified in their assignment.

3. If the court should be of opinion that the right to the renewed term could not, from its nature, pass with the then present right of the patentee, still there can be no doubt that the covenants in the assignment operate by way of estoppel to transfer the after acquired interest, by such renewal, to the assignee, the moment such renewal was obtained by the assignor or his representatives, without any other or further conveyance. Mr. Sheppard, in the *Touchstone* (volume 1, p. 182), says that the effect of such covenants is to transfer all the present and future rights of the covenantor at once to the covenantee. Mr. Preston, in his edition of the same work, says, that such covenants operate, by way of estoppel, to transfer any after acquired right, to the grantee. The grantor and his heirs being estopped, by his covenants, to assert any after acquired right, such right necessarily enures to the benefit of the grantee. No subsequent conveyance is necessary; the covenants operate as a conveyance. The doctrine must be familiar to the court. Where a grantor, without title, or with a title for years or for life, conveys in fee, with covenants of warranty and further assurance, and afterwards acquires the fee, the after acquired right enures, by force of the covenants, to the grantee, without any further or other assurance. This doctrine is not peculiar to real estate. Where the

mere bailee of a chattel, without title, sells it absolutely, and afterwards acquires the title to it from the owner, he cannot assert this after acquired title against his vendee. Mr. Sheppard, in the *Touchstone* (volume 1, p. 161), says: "A covenant doth sometimes, also, make a transmutation of property and possession of things, as in case of a covenant to stand seized of land to uses; and in case where one doth covenant that another shall have a piece of land for five years, this is a good lease for five years. And in law, where one doth covenant with another, that if he pay him ten pounds such a day, he shall have all his cattle in Dale, or his lease for years he hath of of the manor of Dale; in this case, if he pay the money at the time, he shall have the property of the goods, and of the lease for years."

It is urged that the covenants in this assignment are executory, and therefore a subsequent conveyance is necessary to transfer the title to the assignee. In all the cases I have referred to, the covenants were executory. A covenant of warranty, a covenant for further assurance, and the covenants in the several cases just referred to in *Sheppard's Touchstone*, are all executory covenants, and yet they all operate either as a conveyance or by way of estoppel, to transfer the title to the property, without any other or further assurance. The doctrine contended for by the plaintiff would work the greatest injustice, and be productive of the greatest mischief, in the most common affairs of life. Suppose a person entitled to a chattel for fourteen years, sells his interest in it, with a covenant that all the right he should thereafter acquire to it, should enure to the vendee, and the vendor should afterwards acquire a further right for fourteen years; could he, after the expiration of the first fourteen years, reclaim the chattel from his vendee, or maintain any action at law against him for it? Would not the covenant be a complete defence to any such claim? Would it be any answer to such defence, that no further conveyance had been made by the vendor? In the case of *Cartwright v. Amatt*, 2 Bos. & P. 43, this doctrine was applied to a covenant contained in an assignment of a patent. In that case, A., by indenture, (reciting that a suit was pending between him and B. respecting certain patents, and that the same could not be assigned without hazard of defeating the suit,) granted absolutely the said patents, with others, to C., excepting, however, from the grant, until the determination of said suit, such patents as should be necessary to support his, (A.'s), title. Then followed a covenant that A., upon the determination of the suit, should assign the excepted patents to C., and that, until such assignment, A. should stand legally possessed of such excepted patents. It was held that the legal interest in the excepted patents, vested in C., upon the determination of the suit, without any other or further assignment.

A grantor in fee with covenants of warranty, or for further assurance, who at the time

of the grant has no title, but afterwards acquires one, is deemed in law, quoad his grantee, to have had the title at the time of his grant or conveyance. Hence, no other or future conveyance is necessary to vest his after acquired interest in his grantee. This is precisely the position in which the 18th section of this act places the patentee, upon obtaining a renewal of his patent. "And, thereupon," (upon the renewal,) "the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years." Does it not necessarily follow, from the terms of this section, as well as from the principles of law applicable to such covenants, that the assignment in this case has the same effect, as though the patent had originally been issued for twenty-one years instead of fourteen years?

It has, however, been urged with great earnestness, that the habendum clause in this assignment restricts the grant and the covenants, to the period of fourteen years. "No matter," says the learned counsel, "what the parties may be supposed to have stipulated for, and even though a right to an extension might have passed under the general words, yet those words are controlled by the habendum, and restricted to fourteen years." It seems that the legal effect of the habendum clause in grants must be directly reversed for the benefit of this meritorious plaintiff. The habendum may sometimes enlarge, but it never restricts a grant. Mr. Preston says, the habendum is a formal and not an essential part of a deed. Where the habendum is inconsistent with the grant, the grant and not the habendum will operate. As a grant to A. and his heirs, habendum to A. for life, or for years, the grant will operate, and the habendum be rejected as repugnant to it. So, if a man grant rent, or common, &c., out of his land, by the premises of the deed to one and his heirs, habendum to the grantee for years, or for life, the habendum is repugnant, for a fee passeth by the premises, by the delivery of the deed; and, therefore, the habendum for years or life is void. 3 Prest. Abst. 43, 45; Baldwin's Case, 2 Coke, 22b. Whatever interest, therefore, the patentee had in his invention and patent, beyond the term thus secured by the patent, whether contingent or merely possible, being coupled with and incident to his then present interest as patentee, passed by the assignment, notwithstanding the habendum. Besides, the covenants expressly assure to the assignees any future interest that the patentee may acquire by a renewal of his patent. Whatever effect the habendum may have on the granting clause, it can have none whatever upon those covenants.

But it is contended, that inasmuch as there was no general law for the renewal of patents at the time of this assignment, the parties cannot be supposed to have provided, or intended to provide, for an extension of the patent; that the term "renewal" does not mean an extension of the patent, and is, therefore,

inappropriately used in the 18th section; and that it must be deemed in law to have reference to a new patent being issued in consequence of the original patent being void for some cause which would, as the law was then understood to be, authorize the issuing of a new patent for the same invention, for the residue of the term then unexpired, for which the original patent was issued. Such a construction of the covenants in this assignment, would not only render the covenant giving to the assignees the benefit of any renewal of the patent, wholly nugatory and inoperative, but would pervert and change the known and well established effect and signification of the word "renew." At the time this assignment was made there was no statute authorizing a new patent to issue, in case the first should turn out to be void from mistake, nor any general statute authorizing the renewal of a patent. But in the case of *Morris v. Huntington* [Case No. 9,831], tried at New York, in April, 1824, where the patentee had taken out two patents for the same invention, the specification in the first patent not having sufficiently described the improvement, but still the first not having been vacated, it was objected that the second patent was void for that reason, and Mr. Justice Thompson held the second patent, (for the violation of which the suit was brought,) to be void for that reason. But he remarked, in making that decision, that he saw no insuperable objection to entering a vacatur of the first patent, of record in the department of state, if taken out inadvertently, and that upon such surrender or vacatur of the first patent, the secretary of state might issue a new one (not renew the old one) for the residue of the term of fourteen years from the date of the first patent; but expressed some doubts, whether this could be done solely at the instance of the patentee. In January term, 1832, (nearly three years after this assignment,) the case of *Grant v. Raymond*, came before the supreme court, on a certificate of division upon this very point, and the court held (6 Pet. [31 U. S.] 218, 240-244) that the secretary of state might receive a surrender of the first patent, and cancel the record thereof, and issue a new patent with a corrected specification, for the same invention, for the residue of the term of fourteen years, where the first patent was void in consequence of a defective specification arising from inadvertence or mistake, and without any fraud or misconduct on the part of the patentee; that such issuing of a new and valid patent, was only a due execution of the power conferred by the first section of the act of 1793; and that an abortive attempt to execute that power by inadvertently issuing a void patent, whether such inadvertence was imputable to the patentee or to the secretary, was no impediment to a due and valid execution of it subsequently. At the time, therefore, that the assignment in question was made, it was very doubtful whether a new

patent could be issued, where the first patent was void for a defective specification.

But suppose that principle of law had been well settled, it would require no covenant in an assignment, to give the assignee the benefit of such new patent. If a patentee should assign his exclusive right to use the invention in a specified territory, without any covenants, or should sell one of his patented machines, and his patent should afterwards turn out to be void, in consequence of his own mistake or inadvertence in framing the specification, and he should, for that reason, obtain a new and valid patent for the same invention; will any one contend, that he could deprive his assignee of the right to use the invention according to the assignment, or prevent the individual to whom he had sold one of the patented machines from using it? Certainly, no such doctrine can find a place in the law or equity of this or any other civilized country. The patentee sells his exclusive right to his invention, as a valid exclusive right. If it be invalid for a defect, arising from his own inadvertence, which he can supply and does supply, and he obtains a new patent, effectually securing the same exclusive right to the same invention, and for the same term for which the invalid patent was issued; can it be pretended that that exonerates him from his assignment of the exclusive right to use the same invention for the same term? Could he maintain an action against his assignee, for using such exclusive right, after the valid patent had issued? Surely, such a principle could not be gravely insisted upon. It cannot, therefore, be determined as matter of law, upon the face of this assignment, that the covenant in question was not intended to secure to the assignee the benefit of a new patent issued under such circumstances, unless the court determine as matter of law that the parties intended to make a covenant entirely useless, nugatory and inoperative; and that, the law never does presume or intend.

The proper philological signification as well as legal meaning of the term "renewal of the patent," as used in this assignment is, to "continue"—to "prolong"—to "extend." Renewal of a lease, of a contract, of a policy of insurance, of a note, of a bond, &c., means to prolong—to extend. The term "renew" is not applicable to the making of a new thing, as a substitute for a void thing. The renewal of a thing *ex vi termini* presupposes the prior existence of the thing renewed. It is renovating a thing which has expired, or is about to expire; while a new thing is a thing which did not exist before. Making a new thing is making a thing which did not exist before. Issuing a new patent in the place of a prior void patent, is in no sense a renewal of the void patent. It would be absurd to call the giving of a new lease, as a substitute for a prior void lease, a renewal of the prior lease. The terms "renew" and "renewal" are, therefore, appropriately used in the 18th section,

to designate the extending and extension of a patent. In section two of the act of July 3d, 1832 [4 Stat. 559], concerning patents for useful inventions, the word "renew" is used as synonymous with "prolong." The 3d section of the act of 1832, and the 13th section of the act of 1836 [5 Stat. 122], provide for the issuing of a new patent in the place of an invalid patent. The word "renew" is not used; nor is the word "renew," or the terms "renewal of the patent," used in a single instance by the supreme court in [Grant v. Raymond], 6 Pet. [31 U. S.], or by the circuit court in *Morris v. Huntington* [Case No. 9, 831], when discussing the legality of issuing a patent in the place of a prior invalid patent. It is called, as it is, a new patent for the same invention and for the same term, as a substitute for and not a renewal of the former invalid patent.

It is useless to pursue this philological discussion further. It must be obvious, that the definition and meaning now attempted to be given to the word "renew," are forced and arbitrary, and contrary to the intention of the parties, and to the import of the word as understood by them, when this contract of assignment was entered into. If it can be supposed that there is anything ambiguous or equivocal, as to the sense in which the parties to this assignment used the term "renewal," the covenantor, or those who represent him, cannot be benefitted by it." "A covenant is always taken most strong against the covenantor, and most in advantage of the covenantee." Shepp. Touch. (1st Am. Ed., 1808) 166.

IV. The fourth question is, whether the plaintiff, claiming under the extension from the administrator, can maintain an action for an infringement of the patent-right within the territory specified in the contract of assignment to Twogood, Halstead and Tyack, against any person not claiming under said assignment; or whether said assignment be, of itself, a perfect bar to the plaintiff's suit. If I have been successful in the attempt to maintain my proposition in regard to the second and third questions, or either of them, nothing further need be said upon this question. If I have been unsuccessful in that attempt, nothing further can be said. If my construction of the 18th section of the patent act, or of the assignment to Twogood, Halstead and Tyack, be correct, it necessarily follows: 1st. That the plaintiff has no right or title to the exclusive use of the invention in question, in the county of Albany. That right is vested in others. 2d. Without such title, the plaintiff cannot maintain an action for an infringement of that right. The defendants are in the possession and enjoyment of the patented machine, in the county of Albany. This action is brought against them because they are in such possession and enjoyment. If the plaintiff has no title to the exclusive use of the patented machines in that county, it is idle to contend that he can

maintain the action, because the defendants have no title. The defendants have a right to say, we are answerable to no one but him who has the title to the exclusive right.

VI. The sixth question is, whether the plaintiff, if he be an assignee of an exclusive right to use two of the patented machines within the town of Watervliet, has such an exclusive right as will enable him to maintain an action for an infringement of the patent within said town, or whether, to maintain such action, the plaintiff must be possessed, as to that territory, of all the rights of the original patentee?

Prior to the act of 1836, an action at law could not be maintained by and in the name of such an assignee. *Whittemore v. Cutter* [Case No. 17,600]; *Tyler v. Tuel*, 6 Cranch [10 U. S.] 329. The only provision of the law of 1836, which authorizes an assignee to maintain an action, is contained in the 14th section, and is in these words: "and such damages" (damages for the infringement of the patent) "may be recovered by action on the case, in any court of competent jurisdiction, to be brought in the name or names of the person or persons interested, whether as patentee, assignees, or as grantees of the exclusive right within and throughout a specified part of the United States." To entitle an assignee or grantee to maintain an action in his own name, for an infringement of the patent, he must, by the express terms of this section, be the assignee or grantee "of the exclusive right within and throughout a specified part of the United States." Is an assignee or grantee of a part only of the exclusive right within a specified territory, an assignee or grantee of the exclusive right? What exclusive right must the assignee have, to enable him to sue in his own name? Clearly the exclusive right secured by the patent, to the extent of the specified territory. The exclusive right cannot mean a part of the exclusive right.

The patentee, in this case, has an equal interest with the assignee or licensee, that no more than the two machines should be used in the town of Watervliet. For, although the patentee, after he had granted to another the exclusive right of using two machines in the town of Watervliet, could not lawfully use or authorize the use of any other machines in that town; yet the unauthorized use of more than two machines in that town, would prejudice the sale and lessen the value of the exclusive right to use the machine in other places. If such an assignee can be deemed to have any interest in the patent, it is a joint interest with the patentee; in which case, a suit might perhaps be maintained in the name of both, but clearly it could not be in the name of such assignee alone. He is not an assignee of the exclusive right; that is, of the whole of the exclusive right for that town, or any other specified part of the United States.

But I submit that a grant of the exclusive right to use two machines in a specified town

or territory, is only an exclusive license to use such machines, and gives the licensee no right in the patent itself. In such case, the suit must always be brought in the name of the patentee, as the title to the whole patent is in him. A grant of the exclusive right to use two or more machines, in whatever form it may be made, is in legal effect only an exclusive license, and gives no title whatever to the patent, even if such exclusive license should be co-extensive with the patent. *Protheroe v. May*, 5 Mees. & W. 675. It necessarily follows, that a suit for an infringement of the patent under such circumstances, must be brought in the name of the patentee.

VII. The seventh question is: Whether the letters patent issued to William Woodworth, as administrator, on the 8th of July, 1845, upon the amended specification and explanatory drawings then filed, be good and valid in law; or whether the same be void for uncertainty, ambiguity or multiplicity of claim, or for any other cause. As to this question, it is submitted that the new patent issued to William W. Woodworth, as administrator, on the 8th of July, 1845, is void on the following grounds: (1) The said letters patent are not countersigned by the commissioner of the patent office, and there was no vacancy in the office of the commissioner, when said patent was issued. Vide sections 2, 4, 5, 13, of the patent act of 1836. (2) The said patent of July 8th, 1845, is for an improvement in machines for planing boards, and the specification² does not describe the machine upon which the invention patented is claimed to be an improvement, nor in any other manner specify in what the alleged improvement consists. *Turner v. Winter*, 1 Term R. 602, 605; *Campion v. Benyon*, 3 Brod. & B. 5; *MacFarlane v. Price*, 1 Starkie, 199; *Evans v. Eaton*, 3 Wheat. [16 U. S.] 454, and 7 Wheat. [20 U. S.] 356; *Lowell v. Lewis* [Case No. 8,568]; *Barrett v. Hall* [Id. 1,047]; *Sullivan v. Redfield* [Id. 13,597]; *Dixon v. Moyer* [Id. 3,931]. (3) The specification claims the invention to be of the machine or machines therein described, and not of an improvement upon any existing machine, while the patent is for an improvement in machines, which presupposes the existence of a machine upon which an improvement has been invented. The specification is, therefore, broader than the patent, does not support it, and the patent is therefore void. *Sullivan v. Redfield* [supra]; section 5 of patent act of 1836; *Webst. Pat.* 65, note b. (4) The specification describes and claims several distinct and separate combinations of tools or implements, each of which combinations is claimed as a separate machine, that may be operated separately; and also a combination of those several combinations into one machine. This multiplicity of claim renders the patent void. (5) The said new patent of July 8th, 1845 [6 Stat. 936],

² See the letters patent and specification set forth at length in 4 How. [45 U. S.] 662-663.

is not for the same invention for which the original patent was granted. (6) The patent is issued for a longer time than is authorized by law, and is also issued in trust for third persons, which is not authorized by law.

1. In regard to the first point, I submit, that unless a patent is issued, signed and countersigned by the officers designated by the statute, it is void. If it be not signed or countersigned by the proper authority, it is not a patent. The 5th section of the act of 1836, requires all patents to be signed by the secretary of state, and countersigned by the commissioner of the patent office. The 2nd execution of that act authorizes the chief clerk of the patent office to perform the duties of the commissioner during a vacancy in the office of commissioner. The same section also gives the chief clerk the custody of the seal, books, records and models of the office during the necessary absence of the commissioner, but only authorizes him to discharge the duties of commissioner, when that office is vacant. This patent is countersigned by the chief clerk, acting as commissioner, when the office of commissioner was not vacant. This, I submit, was wholly unauthorized, and the patent, not having been countersigned as required by the act, has no validity.

2. The objection to the validity of the patent, raised by the second point, it seems to me, is a matter of settled and positive law, if any question, which has been settled by repeated adjudications, can be deemed so. The patent shows upon its face, that it was granted for a "new and useful improvement in machines for planing, tonguing, and grooving, and dressing boards." It appears, also, upon the face of the patent, that that was the invention for which the patent was claimed. It will be seen, by reading the specification, that the improvement is in no manner whatever described. It describes how the machines are constructed and the manner in which they are to operate, but it does not describe the machine upon which the invention patented is claimed to be an improvement, nor in any other manner specify in what the alleged improvement consists. *Sullivan v. Redfield*; *Dixon v. Moyer*; *Lowell v. Lewis*; *Barrett v. Hall*.

The doctrine which I maintain, was, to its full extent, confirmed by the supreme court in the cases of *Evans v. Eaton*, 3 Wheat. [16 U. S.] 454, and 7 Wheat. [20 U. S.] 356. In the last case, at page 366, Mr. Justice Washington says: "The patent is for an improved hopper-boy, as described in the specification, which is referred to and made part of the patent." In the case at bar, the patent is for "a new and useful improvement in machines for planing, tonguing and grooving, and dressing boards, &c.,"—"a description whereof," (that is, of the improvement in the machines,) "is given in the words of the said William W. Woodworth in the schedule" (specification) "hereunto annexed, and is made part of these presents." Thus far the

patent in this case is the same as in the case cited, a patent for an improved thing and for an improvement in a thing being the same; and, by pursuing the opinion of Mr. Justice Washington, and comparing the specification in this case, with that in the case cited, it will be seen, so far as it regards the question now under consideration, that the specifications in the two cases are identical, and that the same principle of law must govern both. After stating that the patent was for an improved hopper-boy, Mr. Justice Washington proceeds: "Now, does the specification express in what his improvement consists? It states all and each of the parts of the entire machine, its use, and mode of operation, and claims, as his invention, the machine, the peculiar properties or principles of it, viz: the spreading, turning, and gathering the meal, and the rising and lowering of its arm, by its motion, to accommodate itself to the meal under it. But does this description designate the improvement, or in what it consists? Where shall we find the original hopper-boy described, either as to its construction, operation, or use; or by reference to anything, by which a knowledge of it may be obtained? Where are the improvements on such original stated?" In the case at bar the specification states all and each of the parts of the several machines, and the mode of their operation separately, and jointly when combined as one machine. The summary or claim is then stated in the specification as follows: "Having thus fully described the parts and combination of parts, and operation of the machine for planing, tonguing, and grooving boards or plank, and shown various modes in which the same may be constructed and made to operate, without changing the principle or mode of operation of the machine, what is claimed therein as the invention of William Woodworth, deceased, is the employment of rotating planes, substantially as herein described, in combination with rollers, or any analogous device, to prevent the boards from being drawn up by the planes when cutting upwards, or from the reduced or planed to the unplanned surface, as described. And also the combination of the rotating planes with the cutter-wheels for tonguing and grooving, for the purpose of planing, tonguing and grooving boards, &c., at one operation, as described. And also the combination of the tonguing and grooving cutter-wheels, for tonguing and grooving boards, and at one operation, as described. And finally, the combination of either the tonguing or the grooving cutter-wheel, for tonguing or grooving boards, &c., with the pressure rollers, as described, the effect of the pressure rollers in these operations being such as keep the boards, &c., steady, and prevent the cutters from drawing the board towards the centre of the cutter-wheels, whilst it is moved through by machinery. In the planing operation, the tendency of the plane is to lift the board directly up against the

rollers; but in the tonguing and grooving, the tendency is to overcome the friction occasioned by the pressure of the rollers."

Now I invite the learned counsel for the plaintiff to point out, and the court to ascertain and designate if it can, in what the improvement of the patentee in the machines for planing, tonguing and grooving and dressing boards, consists. What was the machine before it was improved? How did it operate? Of what cutter-wheels, or other tools or implements, was it composed? What has been added by the improvement? Where does the old stop, and the new begin? What was the previous combination, and how does the improved machine differ from it? To all these enquiries the same answer must be given, which was given by Mr. Justice Washington to similar questions put by himself, in the case of *Evans v. Eaton*. "The undoubted truth is, that the specification communicates no information whatever upon any of these facts." At pages 434, 435, of the case of *Evans v. Eaton*, in 7 Wheat. [20 U. S.], the supreme court fully agree with and confirm the doctrine of Mr. Justice Washington. Unless these and the other authorities cited in support of this point are overruled, this patent cannot be sustained. I need not, I trust, remind the court, that if the invention consists of a machine constituted by the combination of known implements, or by the combination of known machinery, the patent must be for the machine itself so constituted, and if taken out for an improvement upon or in machines, it cannot be sustained.

3. The third objection to the validity of this patent, rests upon a different, though somewhat analogous principle. It is a well established principle of law, in regard to patents, that the specification must not be broader than the patent; it must support the patent; if it fail to do so, the patent is void. If the patent be for an improvement in a machine, and the schedule or specification claims the machine which it describes, as the invention, or if the patent be for a machine, and the specification claim an improvement as the invention, in neither case does the specification support the patent, and it is, therefore, void. This principle is clearly deducible from the patent act, as well as from the adjudications on that subject. The 5th section of the patent act of 1836 provides, that "every patent shall contain a short description or title of the invention or discovery, correctly indicating its matter and design." In *Webst. Pat. p. 65, note b*, it is stated, that great accuracy is necessary in stating the description or title of the invention for which the patent is issued, in the letters patent; because if the invention, which is particularly described in the specification, varies from the description or title in the patent, the patent cannot be considered as having issued for the invention described in the specification, and will, therefore, be void. In *Cochrane v. Smethurst*, 1 Starkie, 205, the patent was for

an improved mode of lighting cities; the specification described the invention to consist of an improved street lamp. It was held that the specification did not support the patent; that the invention described in the specification was not truly indicated by the description or title in the patent; and that the patent was therefore void. The description or title of the invention, as contained in the patent in this case, and for which the patent is issued, is, "a new and useful improvement in machines for planing," &c. This description necessarily presupposes the existence of a machine upon which an improvement has been invented, and that the invention for which the patent was issued, consists of such improvement. But the specification claims the invention to be of the machines therein described, and not of an improvement upon any existing machine. In the case of *Sullivan v. Redfield*, before referred to, Mr. Justice Thompson says: "This specification is obviously broader than the patent. The latter is for an improvement of the steam tow-boat, and the former contains a description of the steam tow-boat itself, of which the patentee claims to be the inventor, according to his specification. The patent and specification are connected together, and dependent on each other for support. The specification should maintain the title of the patent. The latter should not indicate one thing and the former another, as the subject of the grant."

But it is said by the learned counsel for the plaintiff, that the liberality of construction for which he contends, would authorize the court to hold, that this patent is for the machines described in the specification, and not for an improvement in machines. That is most undoubtedly true. His construction of statutes and of language, would not only authorize but require the court to hold, that this patent, although it is declared in express terms to be for an improvement in machines, is, nevertheless, not for an improvement, but for the machines themselves. There is, however, a slight objection to this liberality, or, to use a more appropriate phrase, to this liberty of construction. It is entirely at variance with all principle and every adjudged case on the subject.

4. The fourth objection to the validity of the patent is founded upon the multiplicity of claim. It has already been shown, by reading the specification, that it claims a separate and distinct combination of tools and implements, constituting a machine for planing; another combination of implements constituting a machine for grooving boards and plank; another combination for tonguing boards and plank; a combination of the two last machines, constituting another and a different machine, for both tonguing and grooving plank at one operation; and a combination of all these machines, constituting another and different machine, for planing, tonguing and grooving boards at one operation. These five separate

and distinct machines, it is claimed, and, as appears by the specification, may be operated separately, producing separate and distinct results; not different parts of one complete manufacture at which the work must arrive before it can be used, but producing separate and distinct manufactures, each of which not only may be, but very frequently is used without the other. Many boards and plank are required to be planed only, the use to which they are to be applied not requiring them to be tongued and grooved; and many are required to be tongued and grooved which are not required, for the uses to which they are to be put, to be planed.

In the case of *Evans v. Eaton*, 3 Wheat. [16 U. S.] 454, 506, the supreme court manifested a very serious doubt—Mr. Justice Story said, a very significant doubt, which he was persuaded could not be removed—that several distinct inventions could not be embraced and secured in one and the same patent. When the question afterwards came before him in the case of *Barrett v. Hall*, he held, that if the patentee embraced several distinct improvements or inventions in the same patent, it would be void. In that case the patent was for “a new and useful improvement, being a mode of dyeing and finishing all kinds of silk goods.” The invention, as described in the specification, consisted of an improved reel and an improved silk-frame. The reel was used to wind and secure the silk and put it in the dye. The frame was for the purpose of extending and finishing the silk after it was dyed. The learned judge held, that if the specification claimed the reel and also the frame as the invention, the patent was void for multiplicity of claim, as containing two distinct machines, each of which might be operated separately and independent of the other. “A patent,” said he, “cannot embrace various distinct improvements or inventions; but in such case, the party must take out separate patents. If the patentee has invented certain improved machines, which are capable of a distinct operation, and has also invented a combination of those machines to produce a connected result, the same patent cannot at once be for the combination and for each of the improved machines; for the inventions are as distinct as if the subject were entirely different.” Unless the doctrine promulgated in this opinion of the circuit court is held to be unsound, the patent in the case at bar is void. Most certainly, planing boards, and tonguing and grooving boards, are much more separate and distinct operations, than those of dyeing and finishing silk. The latter are, to some extent, connected, and necessary to be performed upon the article before it can be used. Silk must at least be dried after it is dyed, before it can be used, and, in most instances, it is required to be finished before it is used, though it is sometimes used in its raw state, without receiving its gloss by being dressed. But a much greater portion of boards and plank are required to be planed without

being tongued and grooved, and to be tongued and grooved without being planed, than are required to be planed, tongued and grooved. The operations of planing, tonguing and grooving boards and plank, are no more necessarily connected, or different parts of one and the same general operation, than the operations of making a garment, and of coloring and dressing the cloth of which it is made.

But it is said that this is but one invention, and that it was necessary for the patentee to claim the several machines as well as the combination of the whole, to prevent piracies of any part of the combination of the whole, because if the patentee had only taken out his patent for the combination constituting the machine to plane, tongue and groove at one operation, any person might, with impunity, use the planing, or tonguing, or grooving machine separately. If the objection to the patent, presented by this point, be correct in principle, this argument sustains, instead of disproving it. It shows that the operations of the several machines are separate and distinct, and are not the performance of parts of one and the same general connected operation. The patentee might have obtained a patent for each of the machines, and also a patent for a combination of the whole. In the case of *Treadwell v. Bladen* [Case No. 14,154], the patentee took out a patent for a combination of five parts, and afterwards took out a patent for a combination of two of them, which produced a part of the result obtained by the combination of the whole. It was objected that the first patent embraced the whole and all its parts, and therefore the last patent was void, because a patentee could not have two patents for the same invention. But the court held the two patents were not for the same invention—that a combination of the whole did not embrace each part, or a combination of two or any number of parts less than the whole, unless such combination would produce the same result, in the same manner, accomplished by the combination of the whole.

5. In discussing the fifth objection to the validity of the patent, I shall assume that the new patent, of July 8th, 1845, issued upon the surrender of the original patent, is not for the same invention for which the original patent was issued, as that proposition is embraced in and will be debated under the eighth question. If I am right in the assumption that the new patent is not for the same invention for which the original patent was issued, it is clearly unauthorized and void. The only authority for issuing the new patent is contained in the thirteenth section of the patent act of 1836. That section only authorizes a new patent to issue for the same invention for which the original patent was issued, in case the original patent is invalid by reason of a defective or insufficient description or specification, and shall be for that reason surrendered and cancelled. If, therefore, an original patent is invalid for the reason mentioned in the act, and is for that cause surrendered and cancelled, a

new patent can only issue for the same invention. If the new patent is not upon its face for the same invention, or if the corrected specification describes an invention different from that for which the original patent was issued, the patent would be unauthorized by the act and consequently void.

6. As to the sixth point: The new patent appears upon its face to have been issued to the administrator of the patentee, in trust for his heirs at law, for the term of twenty-eight years from the date of the original patent. This is wholly without authority. The thirteenth section of the act only authorizes the new patent to issue for the unexpired term for which the original patent was issued. If the patentee be dead at the time such new patent is issued, it may be issued to his executors or administrators; but it contains no authority for the issuing of such patent in trust for the heirs at law of the original patentee. The tenth section authorizes an original patent to be issued to the executors or administrators of an inventor in trust for his heirs at law or devisees, in case the inventor dies after having made the discovery and before obtaining a patent. But in no other case is a patent authorized to be issued in trust for the heirs at law of the inventor. Nor is there any authority for issuing a patent in any case for twenty-eight years. It is said the original patent was extended under the eighteenth section for seven years, and by the act of 1845 for seven years longer, making a period of twenty-eight years from the date of the original patent. But this is no answer to the objection. The exclusive right secured by the original patent, may, by law, continue for twenty-eight years, and still, the commissioner of patents has no authority to issue a patent for that period. That depends entirely upon the fact, whether any such authority is given by the statute. The act of 1845, although it extends the original patent of 1828 for seven years from December, 1849, yet gives no authority whatever to the commissioner of patents or to any other person to issue a new patent for any period. Nor, is the extension granted by that act, in trust for, or for the benefit of, the heirs of the patentee. In both these respects, therefore, the commissioner of patents has exceeded his power, and the patent is for that reason void.

VIII. The eighth question is: Whether the court can determine, as matter of law, upon an inspection of the said two patents, and their respective specifications, that the said new patent of the 8th of July, 1845, is not for the same invention for which the said patent of 1828 was granted. Whether the specifications of the two patents describe two distinct inventions materially different from each other, cannot perhaps be decided as a matter of law upon an inspection of those specifications. The testimony of experts might prove them to be different or the same. I do not, therefore, propose in this stage of the cause to raise any question as to the dissimilarity of

the two inventions as described in the two specifications. But I insist, it appears upon the face of the two patents, that the new patent is not for the same invention for which the original patent was issued. The original patent states the invention for which it is issued, to be, "a new and useful improvement in the method of planing, tonguing and grooving plank and boards." The new patent states the invention for which it is issued, to be, "a new and useful improvement in machines for planing, tonguing and grooving boards, &c." These are manifestly different things. A method of planing, is not a machine for planing. The method of doing a thing is the manner, the modus operandi of doing it, and not the instrument by which it is done. It is the mode of operating with the machine, and not the instrument itself. There may be an improvement in the method of planing boards, without any improvement in the implements or machine with which that work is performed. So there may be an improvement in a machine for planing, without any improvement in the mode of its operation. They are not the same improvement or invention. A patent for the one will not embrace the other.

In the case of *Cochrane v. Smethurst*, 1 Starkie, 205, it was held that a patent for an improved method of lighting cities, was not supported by a specification describing an improved street lamp. The patent should have been for an improved street lamp; yet if an invention of an improved mode or method of lighting cities, and an invention of an improved street lamp, were the same thing, clearly the specification would have supported the patent. Two patents, one for an improved method of lighting streets, and the other for an improved street lamp, would not be for the same invention. A specification which would support the one, would not support the other. So in this case, a patent for an improved method of planing, and a patent for an improvement in a machine for planing, are entirely different. A specification which would support the one would not support the other. In the case of *Barrett v. Hall*, Mr. Justice Story says: "If the invention consist in a new combination of machinery, or in improvements upon an old machine to produce an old effect; the patent should be for the combined machinery, or improvements on the old machine, and not for a mere mode or device for producing such effects, detached from machinery." In *Boulton v. Bull*, 2 H. Bl. 463, Chief Justice Eyre, said that method was not a machine, but was the mode of operating, either with a machine or the hand of man; that it was a principle detached from all physical existence whatever; and that if it were new and useful and reduced to practice, it was patentable. In *Barrett v. Hall*, before cited, Mr. Justice Story concurs in this doctrine of Chief Justice Eyre. The authority and reasoning of these cases are decisive of the question.

IX. The ninth question is: Whether the decision of the board of commissioners, who are to determine upon the application for the extension of a patent under the eighteenth section of the act of 1836, is conclusive upon the question of their jurisdiction to act in the given case. It has already been shown, first, that this board is a tribunal of special and limited jurisdiction; and, secondly, that all acts and proceedings of such a tribunal, beyond the power specially given it, or in a manner different from that specially prescribed, are coram non iudice and void. It necessarily follows, that the decision of such a board, that it has jurisdiction, cannot give it jurisdiction. An adjudication, whether upon the question of jurisdiction, or any other question, which is void for the want of jurisdiction, is a mere nullity. There is no judge, and, therefore, no judgment; and so far from being conclusive upon the question of jurisdiction, it can have no effect whatever upon any question.

X. The tenth and last question is: Whether the commissioner of patents can lawfully receive a surrender of letters patent for a defective specification, and issue new letters patent upon an amended specification, after the expiration of the term for which the original patent was granted, and pending the existence of an extended term of seven years; or whether such surrender and renewal may be made at any time during such extended term. The only authority for issuing the new patent of 8th July, 1845, is given by the 13th section of the patent act of 1836. Whatever may have been the power of the secretary of state, prior to the law of 1836, by that law the authority to issue a new patent for the same invention, in a case where the original patent is void, is limited to, and can be exercised only in strict accordance with the power given by the 13th section of that act. The part of that section applicable to the present question, is in these words: "Whenever any patent which has heretofore been granted, or which shall hereafter be granted, shall be inoperative, or invalid, by reason of a defective or insufficient description or specification, or by reason of the patentee claiming in his specification as his own invention, more than he had or shall have a right to claim as new; if the error has, or shall have arisen by inadvertency, accident, or mistake, and without any fraudulent or deceptive intention, it shall be lawful for the commissioner, upon the surrender to him of such patent, and the payment of the further duty of fifteen dollars, to cause a new patent to be issued to the said inventor, for the same invention, for the residue of the period then unexpired for which the original patent was granted, in accordance with the patentee's corrected description and specification." This is a limited special authority, and must be strictly pursued. In exercising the authority conferred by this act, the commissioner is confined strictly to the power given him. "He can take nothing by implication, but must show the power to be expressly given in every instance." *Jones v. Reed*, 1 Johns. Cas. 20. The very

authority to the commissioner to issue such new patent declares, in express terms, that such new patent shall be issued only "for the residue of the period then unexpired, for which the original patent was granted." This phraseology is an unequivocal exclusion of the period unexpired, for which the original patent may have been extended; or the unexpired period or term of a renewed patent.

Congress undoubtedly intended, that it ought to be and necessarily would be ascertained within the fourteen years for which the original patent was granted, whether it was or was not void, for any of the reasons specified in that section. This part of the section is an exact transcript of the third section of the act of 1832. It can mean no more or less now, than it meant then. Prior to 1836, a renewal or extension of the term for which the original patent was issued, was only granted by a special act of congress. The 3d section of the act of 1832 confines the power of the secretary of state to the issuing of a new patent for the unexpired term for which the original patent was issued, in case such original patent were void for any of the reasons specified in that section. Should congress, by act, renew a patent, without making any provision in the act for remedying defects in the specification, the secretary of state would have no authority, by virtue of the 3d section of the act of 1832, to supply such omission. In short, if congress, by the 13th section of the act of 1836, intended to provide for the issuing of a new patent for the unexpired term for which any original patent might have been or might be extended, it is clearly a *casus omissus*, and cannot be supplied by interpretation or construction. *Dwar. St. 711.*

I have now submitted to the court all the observations which have occurred to me as pertinent to the various questions presented; and although I am perfectly aware that the law has no respect to persons, yet so much has been said in the course of the argument, of a disparaging and somewhat vituperative character against assignees of patents, and laudatory of patentees, that I hope I may be pardoned, if, before I take leave of the subject, I remind the court that the plaintiff in this cause, as well as the defendants, is an assignee of the invention in question. The only difference in their characters or positions, as litigants, is, that the plaintiff is a subsequent assignee, with a full knowledge of the prior assignment, and the right claimed under it—certainly, therefore, in no sense, a *bona fide* assignee without notice—an assignee, too, who, we are at liberty to assume, has purchased the rights which he now claims, at a reduced price, in consequence of the claims of others under the prior assignment. It is in favor of rights thus acquired that this court is invoked to disregard the plain words, as well as the established rules for the interpretation of statutes—to put a limited, forced, and unnatural construction, against the covenantee, upon the words of the covenant contained in the prior assignment, under the specious,

though, I insist, unfounded and illegal pretence, that this extraordinary departure from all law and all principle, is invoked "to foster genius and reward merit." Is inventive genius, however meritorious, to be fostered and rewarded at such an expense—at such a sacrifice?

The answers of the supreme court to the several questions certified will be found in 4 How. [45 U. S.] 687, 688.

[For other cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,389.]

Case No. 17,832a.

WILSON v. SELIGMAN.

[10 Reporter, 651.]¹

Circuit Court, S. D. New York. Oct. 25, 1880.

EQUITY PRACTICE—BILL OF REVIVOR—REPRESENTATIVE OF DECEASED PARTNER.

In a suit in equity against the members of a firm a demurrer will not lie to a bill of revivor to bring in the representative of a deceased partner.

George B. Newell, for plaintiff.
Evaris, Southmayd & Choate, for defendants.

BLATCHFORD, Circuit Judge. The demurrer to the bill of revivor must be overruled. It is said in 1 Daniell, Ch. Prac. (4th Ed.) p. 269, that if there be a demand against a partnership firm all the persons constituting that firm must be before the court, and if any of them are dead the representatives of the deceased partners must be likewise made parties. Judge Story seems to be of the same opinion. Story, Eq. Pl. § 167, note 2, and Id. § 169. This rule certainly applies to equitable demands, such as that in this suit, and to cases of purely equitable relief, such as that prayed for in this bill. The cases of *Van Reimsdyk v. Kane* [Case No. 16,871], and *Voorhis v. Child's Ex'r*, 17 N. Y. 384, cited by the defendants, are not in point. In the first case the suit was to recover the amount of a bill of exchange suable at law. What the court says is that where the claim is suable at law against the surviving solvent partners equity will not lend its aid against the representative of a deceased partner unless the bill alleges the insolvency of the surviving partners. In the second case no different rule is laid down as being the law of New York. It was a suit at law on a promissory note to recover its amount against the survivors of the firm which made it and the executor of a deceased member of the firm, and the complaint was held bad on the demurrer of the executor because it did not allege any proceedings against the survivors, or that they were insolvent. Demurrer overruled.

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WILSON (SEMMES v.). See Case No. 12,658.

Case No. 17,833.

WILSON v. SHERMAN et al.

[1 Blatchf. 536; 1 Fish. Pat. Rep. 361.]

Circuit Court, N. D. New York. June Term, 1850.

PATENT FOR INVENTION—LICENSE TO USE—BREACH OF CONDITION—INJUNCTION—JURISDICTION OF PERSON.

1. A license to run a planing machine contained a restriction, that the licensee should not dress plank or other material for other persons, to be carried out of a specified territory and resold as an article of merchandise. The restriction was both a covenant by the licensee and a condition of the grant. *Held*, that under no circumstances could the planed article, with the privity or consent of the licensee, be sold out of the territory as an article of merchandise, or, with his privity or consent, be sold within the territory, to be carried out and resold as such article.

2. A provisional injunction would be granted against such licensee to restrain his use of the machine, if applied for during his violation of such restriction.

[Cited in *Goodyear v. Congress Rubber Co.*, Case No. 5,565; *McKay v. Smith*, 29 Fed. 296; *Hat Sweat Manuf'g Co. v. Porter*, 34 Fed. 747; *Boomer v. United Power Press Co.*, Case No. 1,638.]

3. But such injunction was refused, where it appeared that the licensee had violated the restriction under a misapprehension of his rights, and had discontinued the violation.

4. Where the alleged unlawful use of the machine was in Vermont, and the suit was brought in New-York, *held*, that for the purpose of restraining the use of the machine it was only necessary for the court to have jurisdiction of the person of the defendant.

5. This question was involved in the cases of *Simpson v. Wilson*, 4 How. [45 U. S.] 709, and of *Wilson v. Simpson*, 9 How. [50 U. S.] 109.

6. But, where it may be necessary to proceed directly against the machine itself, as in extreme cases of contumacy, or of fraudulent contrivance to evade an injunction, the proceedings must be instituted in the district in which the machine is located.

This was an application for a provisional injunction for an infringement of the Woodworth patent [for an "improvement in the method of planing, tonguing, and grooving, and cutting into moldings, or either, plank, boards, or other material, and reducing the same to an equal length and thickness," &c., granted to William Woodworth December 27, 1828, extending for seven years, from December 27, 1842, and reissued July 8, 1845].² The defendant Jehaziel Sherman resided at Ferrisburgh, Addison Co., Vt., and the defendant Cook at Whitehall, Washington Co., N. Y. The facts were these: On the 29th of September, 1846, the plaintiff, being assignee of the re-issued patent for the state of Vermont, for the congressional extension of seven

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

² [From Fish. Pat. Rep. 361.]

years commencing December 27th, 1849 (see *Wilson v. Rousseau*, 4 How. [45 U. S.] 661, 662), executed a license to Chauncey & Akin, to construct, use and vend during said term four Woodworth planing machines in the state of Vermont, within ten miles of Lake Champlain, excepting therefrom the county of Chittenden. The license was given upon the express conditions: (1) That the licensees should not plane plank or other material under the regular prices established by the mill-owners at Albany, Troy and New-York, as set forth in a tariff annexed to the license; (2) that they should not keep a depot for the sale of the manufactured products of the machines, beyond the limits of the territory assigned; or sell to others the products, to be carried out of said territory or sold as an article of merchandize; or dress plank or other material for other persons, to be carried out of said territory and resold as an article of merchandize.

On the 13th of November, 1846, Chauncey & Akin assigned all their interest and rights under the above license to the defendant Sherman. It appeared that he had been, since the beginning of May, 1850, and was now engaged in running two Woodworth machines in Vermont, within the assigned territory, at a place called Bascom's Mill, at the Elbow, adjacent to the town of Whitehall, N. Y. The mill was situated about half a mile from the head of the Champlain canal; and, since it had been in charge of Sherman, some 80,000 pieces of lumber had been planed there, and shipped through the canal to some of the principal markets in the state of New-York. The lumber thus planed and shipped belonged to the defendant William W. Cook, and was planed by Sherman under a contract, for a given price per foot. Cook had no interest in the mill or the machines, or in the running of them, and no connection with Sherman in the business of planing plank or other material, except as above set forth. The contract was completed about the 1st of July, 1850, and since then Cook had had no planing done at the mill, and no connection with it. The bill was filed June 27th, 1850.

George G. Sickles, for plaintiff.
Samuel Stevens, for defendants.

NELSON, Circuit Justice. There is very little if any doubt, as the case stands upon the proofs before us, that one of the conditions annexed to the grant of the license to run the four machines, and under which the defendant Sherman is engaged in operating the two, has been violated; and that, according to its terms and spirit, all right and title to run the same have become forfeited. One of the conditions is, that the licensees shall not dress plank or other material for other persons, to be carried out of said territory and sold as an article of merchandize. The restriction is twice mentioned in the agreement; once, by way of covenant on the part of the licensees,

and again, as a condition of the grant; and the above is the substance and effect of the limitation.

It was suggested on the argument, that if it should be made to appear that the lumber planed had been sold in the territory embraced within the license, then the purchaser could rightfully carry the same out of said territory, and put it into the market for sale, and resell it as an article of merchandize. We think not. The true meaning, in our judgment, of the restriction and condition is this, that under no circumstances shall the planed article, with the privity or consent of the licensees, be sold out of the territory as an article of merchandize, or, with their privity or consent, be sold within the territory, to be carried out and resold as such article. It may be sold for any purpose or use within the territory, except for the purpose of being carried out of it for sale as an article of commerce. In other words, the licensees have the market unconditionally of the territory covered by the grant, and also beyond it, for all purposes except that of sale as an article of commerce. The object of this restriction is obvious, when we take into consideration the fact that the territory within which the licensees are authorized to run the machines is situated in the neighborhood of an extensive lumber region, and at the head of navigation leading directly to the great marts for the sale of the article, namely, the cities of Troy, Albany and New-York. An unconditional grant to operate the four machines at the given locality, would have seriously interfered with those already licensed and in operation at these several cities.

It has been supposed that the sub-contract made by Chauncey & Akin with Sherman is more liberal than the principal one between them and Wilson. We think not. On the contrary, the legal effect of it is the same. But, were it otherwise, the result would not be changed, as the defendant could acquire no greater rights from Chauncey & Akin, than they possessed under the grant from the plaintiff. "Ille non habet, non dat."

There is nothing in the suggestion that Wilson has made himself a party to the sub-contract in a way to bind him, without regard to the principal one with Chauncey & Akin. Had this motion been made while the defendant Sherman was engaged in planing the lumber for Cook, we should have felt bound, as the case is presented before us, under our view of the grant to Chauncey & Akin, to have interfered and enjoined him, on the grounds that the license set up, not only did not authorize the use made of the machines, but that such use was in direct violation of it. It appears, however, that this use terminated on the 1st of July, 1850, the contract with Cook having then been fully completed, and has not since been renewed. This particular ground, therefore, for a preliminary injunction has failed, as no beneficial object would be attained in granting one.

It has been urged on the part of the plaintiff, that an injunction should be granted on the ground of the forfeiture of the license, the defendant Sherman having violated one of the express conditions upon which it was granted. We think that this would be too rigorous an exercise of the power of the court, under all the circumstances that appear in the case. Sherman seems to have labored under a misapprehension of his rights as derived from his agreement with Chauncey & Akin, and to have unwittingly entered into the agreement with Cook to plane the lumber in question. Under these circumstances, a compensation for the damages sustained, if it should turn out on the final hearing that he has been in the wrong, will afford the appropriate and fit remedy.

The grant has now been expounded, and the extent of his rights under the license, explained; and it is but just and reasonable to assume, that he will hereafter conform to the decision. If not, the plaintiff will be at liberty to file a supplemental bill, and move again, in case of a renewal of the violation of the condition in question, or of any condition annexed to the grant.

An objection has been taken by the counsel for the defendants to the jurisdiction of the court, on the ground that the use of the machines complained of was in another judicial district, namely, in the district of Vermont. It is supposed that proceedings grounded upon any such use should have been instituted within that district. The objection, we think, is not well founded. Proceedings for the purpose of restraining the unlawful use of a machine are instituted against the owner or party concerned in the infringement, who is personally responsible for the violation. The offending machine is reached through the party legally accountable for the wrong, and without whose agency, directly or indirectly, there would have been no ground of complaint.

The eleventh section of the judiciary act of 1789 (1 Stat. 78) gives jurisdiction over the party, in the district whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. The defendants come directly within this provision.

We agree, that in a case where it might become necessary to proceed directly against the machine itself, as it may be in extreme cases of contumacy, or fraudulent contrivance to evade an injunction, the proceedings must be instituted in the district in which the machine is located. Act May 20, 1826 (4 Stat. 184); Conk. Prac. 288. But it is otherwise where the court act simply upon the guilty party. This question was involved in the case of *Simpson v. Wilson*, 4 How. [45 U. S.] 709, and which was again before the supreme court at its last term. *Wilson v. Simpson*, 9 How. [50 U. S.] 109.

Motion denied.

[For other cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,389.]

Case No. 17,834.

WILSON v. SIMPSON.

[Cited in *Wilson v. Rousseau*, Case No. 17,832. Nowhere reported; opinion not now accessible.]

Case No. 17,835.

WILSON v. SINGER.

[3 App. Com'r Pat. 334.]

Circuit Court, District of Columbia. June 30, 1860.

PATENTS — JOINT INVENTIONS — SURRENDER AND REISSUE—RES JUDICATA.

[1. When a reissue is asked, under the act of 1837, the old patent is surrendered by the free will of the owner, and the reissue operates de novo for the unexpired term. And in the case of a joint patent, therefore, the question of joint patentability is not res judicata, but is open to question, upon an application for a reissue.]

[2. A joint patent may be issued to two persons, where each has invented a distinct improvement on the same machine, the object sought to be attained being a unit, and the legal effect thereof is to vest in each of them a joint interest in both improvements.]

[3. Upon a surrender for reissue, the patentee or his assignee may make the reissue what he would have made the original, if he had known how, or if the office had permitted him to have it.]

On appeal from the decision of the commissioner of patents of the 20th of December, 1859.

DUNLOP, Chief Judge. This is an appeal by James G. Wilson from the decision of the commissioner, refusing to Wilson, as assignee, a reissue of the patent of Aikins & Felthousen of date the 5th August, 1851, with amended specifications and claims. An interference was declared by the office on the 15th April, 1859, between the application of Wilson, assignee of Aikins & Felthousen's patent of the 5th August, 1851, and the patent of I. M. Singer, dated the 12th August, 1851, reissued October 3, 1854, all relating to improvements in sewing machines. Wilson, as assignee, surrendered the patent of Aikins & Felthousen, under the 13th section of the act of July 4, 1836 [5 Stat. 122] for reissue with amended description and claims. The invention at issue, in this interference, is one of the approved devices in the sewing machine, and the commissioner in his decision says: "The main feature in controversy is a feeding device, consisting of a wheel, with a roughened surface projecting a little above the surface of the table, and a spring pressure pad, between which the cloth to be sewed is placed, and moved automatically forward, to receive the stitches, so that seams of any desired length may be sewed either in straight lines or curves, at the will of the operator." The original specification, on which the original patent to Aikins & Felthousen was granted, relating to the feeding device, is in these words: "To the front end of the shaft, K,

and within the circular shaped rest, W, is arranged a toothed feeding wheel, the teeth of which project sufficiently far through a slot in the top of said rest, W, to catch the cloth, and feed it under the needle, as said toothed feeding wheel is turned, by the operation of the pawl and rag wheel, before described; said feeding wheel running right or left, as the pawl may be set working, carrying the cloth in either direction."

The original fourth claim (struck out by the office) in the original patent of Aikins & Felthousen is in these words: "We claim feeding the cloth, under the needle, from right to left, or vice versa without stopping the machine, as fully set forth."

The claims of Wilson, on the reissue, as finally modified (they were at first fourteen), are ten in number. Of these the office allowed the 2d, 3d, 5th, 6th, and 7th, about which there is no dispute. The 1st, 4th, 8th, 9th, and 10th relate to the feed apparatus of the sewing machine, and are as follows:

1st. I claim the employment, in combination with a reciprocating needle, and a flat surface which supports the material to be sewed, of a rotating toothed feeding wheel, or other equivalent feeding device, to which the cloth is not attached, and a holder, which holds the material against the said feeding device, with a yielding pressure, substantially as and for the purposes herein specified."

"4th. I claim the employment in a sewing machine, of a table, which presents a surface for the support of the material to be sewed, on every side of, or all around, the needle, in combination with a feeding device, substantially as herein described."

"8th. I claim a sewing machine feeding the cloth or other substance, to determine the space between the stitches, by the friction of the surface of the periphery of the feed wheel, or any equivalent feeding device, substantially as specified, in combination with a spring pressure plate or pad, which gripes, or other substance against such feeding surface, substantially as specified, and for the purpose set forth.

"9th. I claim projecting the operating part of the surface of the feeding apparatus through the surface of the table, substantially as described, so that such feeding surface may act on a portion of the under surface of the material, to give the required motion to space the stitches, while the other portions of said material slide on the table, which answers the purpose of freeing the said material from the feeding surface, and to cover and protect the parts of the feeding device which are below the table.

"10th. I also claim the combination of mechanism substantially such as is herein described, so that the cloth or other material to be sewed, being placed upon the machine under the pressure pad, will be automatically carried forward, to receive the stitches, substantially as herein described, and so that seams of any desired length may be conven-

iently sewed into curves or figures at the will of the operator."

At the fourth page of the examiner's report of the 8th December, 1859, he says: "The invention involved in the patent of I. M. Singer, reissued Oct. 3rd, 1854, covers the combination in question, so far, at least, as the moving feeding mechanism is concerned. One clause of his claim is: 'In a sewing machine, feeding the cloth or other substance, to determine the space between the stitches, by the friction of the surface of the periphery of the feed wheel, or any equivalent feeding surface, substantially as specified, in combination with the spring pressure plate or pad, which gripes the cloth or other substance against such feeding surface, substantially as specified, and for the purpose set forth.' This reissue is based on a patent to I. M. Singer of the 12th August, 1851, and the specifications, drawings, and models in that patent clearly developed a complete anticipation of the invention now claimed by the applicant for this reissue, and this, too, in a perfectly operative machine."

That Wilson's amended claims, on his application for reissue, as assignee of Aikins & Felthousen, were covered by the original patent, specification, model, and drawings of Aikins & Felthousen of 5th August, 1851, I now proceed to show, by the official action of the office, at page 6 of the examiner's report of the 8th December, 1859. He says: "A reissue, therefore, can only properly be granted for the same invention as the one originally patented. Aikins & Felthousen have sworn that they are the original and first inventors of the sewing machine described in their patent, and, as the reissue now asked for purports but to correct the inadvertences, accidents, or mistakes in the original patent, the necessity or propriety of making the requirement of a new oath, on the part of the inventors, cannot be perceived." A new oath, would have been necessary if Wilson, in his amended claims, had been seeking anything new, and not embraced in "the same invention." This is a judgment of the office that the amended claims of Wilson covered only "the same invention" patented, or rather patentable, by right to Aikins & Felthousen on the 5th August, 1851, but then struck out by the office wrongfully. Again, at page 7 of the same report, the examiner says: "In this case there would be a liability to serious inconvenience to the applicant, in such a requirement (meaning a new oath), as his assignors seem, from the testimony, now to occupy an antagonistic position, and, besides, the machine, to some extent, seems to give sanction to the scope of the amended claim the assignee now seeks to have granted. I am, therefore, of opinion that, while cases may arise, where such a requirement might be just, and even necessary, it is not called for in this case." Again, at page 9 of the same report, the examiner says: "The facts here recited show, that Aikins & Felthousen

and Singer took out letters patent at the same time for improvement in sewing machines, and that the improvements claimed in both machines so nearly resembled each other as to justify the declaration of an interference between them." Again, at page 12 of the same report, the examiner says: "The invention of Aikins & Felthousen, relative to the feed motion, consists in the employment of the table to support the cloth, through which projected the teeth cut in a thin disk of metal, that was driven by a pawl both ways, so as to feed the cloth forward and back, whilst the cloth was lightly pressed by a spring pressure on the toothed wheel. Here the examiner, properly, I think, interprets Aikins & Felthousen's fourth claim (struck out by the office) in the original patent as embracing the feed wheel, and the forward, as well as the reverse, motion.

The official letter of April 12, 1859, by Mr. Shugert, as acting commissioner, the office says: "These claims are the 1st, 3d, 5th, 6th, 7th, 9th, 12th, 13th, and 14th. As to these claims, the office admits that they are sustained by the model and drawings." The 1st, 5th, 12th, 13th, and 14th are identical with Wilson's finally amended 1st, 8th, 9th, and 10th claims, and relate entirely to the feed apparatus; and, at the close of the same official letter of the 12th April, 1859, it is said: "Claims 12, 13, and 14, involve the principle of the invention secured to Singer by the reissue of patents of August 12th, 1851, and are rejected thereon accordingly." These claims 12, 13, and 14 are identical with 8, 9, and 10 of Wilson's final amended claims, and relate exclusively to the feed apparatus; 8, 9, and 10 are for the feed claimed by Singer, and are said by the office, as above, to be the same in principle with the Singer claim, and to be sustained by the model and drawings in Aikins & Felthousen's original claim.

The commissioner in his decision (page 3) says: "The construction given by the courts and by my predecessors to that portion of the patent law relating to reissues is to the effect that a patentee, on an application for a reissue, may claim all those devices, which were clearly exhibited in his original specification, drawing, or model, and which he might have legally claimed at the time of taking out his original patent." As it appears by the official letter of the 12th April, 1859, and the passages of the examiners' report hereinbefore recited, that Wilson's amended claims are sustained by the model and drawings in Aikins & Felthousen's original patent, there can be no dispute that, other objections out of the way, they are proper subjects of a reissue.

The commissioner holds the main point in controversy in this interference to be "whether Aikins & Felthousen were the joint inventors of the feed device now claimed, by the assignee, James G. Wilson. The evidence on this point is very conflicting, but, from all the testimony submitted, I can come to no other conclusion than that the feed device ex-

hibited in the model and drawings of Aikins & Felthousen's patent of August 5, 1851, was the sole and independent invention of Aikins. The testimony of S. G. Parker, Stephen B. Cushing, and others, seem clearly to establish the fact that Aikins showed them a machine containing this device as early as the latter part of the year 1848, which machine was then in working order. Aikins at that time in conversation referred to it as his invention." The commissioner, at page 5 of his decision says: "It is doubtless true that two independent inventors, engaged in producing a particular new and useful improvement, may embody their separate inventions in one machine, and obtain a patent for said machine as joint inventors. But, in such a case, each must have contributed something to the machine, and the claims must be so drawn as to cover the joint invention only. I am not aware that this precise question has been ever determined by the courts, but it appears to me plain that the intention of the laws is to allow to joint inventors, in an application for a patent, to claim only such distinct features as are in fact the joint invention of both, or a combination of features, to which combination each person has contributed something."

These extracts of proceedings in the office show two things: (1) That the amended claims of Wilson, on this his application for reissue of the patent, obtained by Aikins & Felthousen on the 5th August, 1851, are shown in, and sustained by, the model and drawings presented to the office on their original application for a patent in April, 1851; and (2) that, under the decision of the supreme court, in *Battin v. Taggart*, 17 How. [58 U. S.] 74, the 44th general rule of the office, the 13th section of the act of 1836, and the 8th section of the act of 1837, these amended claims are the proper objects of a reissue, as a matter of right, in the original patentees, or their assignee, unless other good cause to the contrary is shown.

Although the office has declared an interference in this case between the claims of Wilson and Singer for the feeding device in the sewing machine, which imports identity of invention, there is a continued effort made by the examiner in the original report, by the commissioner in the answer to the reasons of appeal, and by Singer's counsel in argument, to distinguish them, on account of the roughened or serrated surface, of the feed wheel in Singer's model, and the pointed teeth on the periphery of the feed wheel in Aikins & Felthousen's model. This could not have been thought other than a difference in mechanical detail and finish. The principles in both models being declared by the office to be the same in the official letter of the 12th April, 1859, to which I have referred. Commissioner Bishop, in his decision, so treats the claims of the parties in controversy, as did the board of appeals in the office, and being myself of the same opinion, I shall dismiss all that is said by Singer's

counsel on the subject without further comment.

The foregoing official extracts also show that the main point in controversy in this interference is whether the invention of the feed device in dispute,—that is to say, the forward feed,—was the sole invention of Aikins, or the joint invention of Aikins & Felthousen, or was properly the subject of a joint patent, to Aikins & Felthousen, as several inventors of it, and another patentable improvement on the same sewing machine. Before I proceed to discuss the main point, let me consider the objection raised by the appellant's counsel, that the matter of joint invention and joint patentability is *res adjudicata*. Mr. Stanton insists for Wilson that this question cannot be reopened upon an application for reissue; but the reissue is to be dealt with by the 8th section of the act of 1837, as on the original application, and on it the question of joint or sole invention is open, as is also priority of invention, laches, or any other legal cause which on an original application would lead the commissioner to refuse a patent. Whenever a reissue is asked, the old patent is surrendered by the requirement of the statute, and the free will of the owner and the reissue operates *de novo*, a new patent is granted for the unexpired term. The question of joint patentability on a reissue, it seems to me, is no more *res adjudicata* than the question of original and first invention, also at the same time decided, and, if this was conclusive, no interference could be declared, but I think that on a reissue it is not only competent for, but the duty of, the commissioner to declare an interference, if there is an existing claimant asserting right, as original first inventor, and so the office has properly decided in this very case. On the question of interference declared, the appellant's counsel contends, that priority is the only issue. This is certainly so as to the parties to the interference, but when one of the parties in the interference claims, not only priority of invention, but a patent, the commissioner must deny the claim to the patent, if the applicant has lost his right to a patent, even though original and first inventor, by laches, fraud, or any other legal cause.

The duty of the commissioner to the public calls him to decide these questions when they arise, and appear in the evidence before him, before he issues the patent applied for. Mr. Wilson, the applicant for the reissue, must meet the questions, not only of priority as to Singer, but the right to a joint patent of Aikins & Felthousen, his assignors, in the original patent granted to them 5th August, 1851. Has he established this joint right? As this is the leading point in the controversy, both as to the law and the fact relating to it, and has been most ably and closely argued by the learned counsel. I propose first to show what is the law in relation to joint inventions, and then to apply the facts in

this case to the law so ascertained. If I am right in the legal principles I shall announce, there will be no difficulty in sustaining the reissue in favor of Wilson, even assuming the facts to be as his adversary, Mr. Singer, asserts. First, as to the law in *Curt. Pat. § 3*: "It has also been held that a patent may be taken for several improvements on one and the same machine, or for two machines which are invented by the patentee, and conduce to the same common purpose and object, although they are capable of a distinct use and application, without being united together. But a patent cannot be taken for two distinct machines, not conducing to the same common purpose or object, but designed for totally distinct and independent objects." Also, section 109: "The object which the inventor proposes to accomplish will always be the main guide by which to determine whether the subject matter is a unit or not." In *Moody v. Fiske* [Case No. 9,745], Judge Story says: "I wish it to be understood, in this opinion, that though several distinct improvements in one machine may be united in one patent, it does not follow that several improvements in two different machines, having distinct and independent operations, can be so included, in less that the same patent may be for a combination of different machines, and for distinct improvements in each."

The law seems clear, therefore, that one patent may be taken by a single inventor for different and distinct improvements, in a single machine, because the object sought to be attained is a unit, and that no fraud is practised thereby on the revenue of the patent office. If one person can thus unite two or more different and distinct improvements on a single machine, in the same patent, it would seem in reason, and upon principle, impossible to deny the same right to two persons, who each invented one of the distinct and different improvements in the same machine. The object being a unit, they have each contributed to its attainment, and the patent must be joint, as the genius of the two has accomplished a result, which, as before said, is a unit, and therefore the subject matter of a single patent.

The commissioner in his decision admits the principle, although he fails to apply it to the case in hand, as I think he ought to have done. I refer to the passage in his decision heretofore cited by me. Unless this is a true interpretation of the law relating to joint inventions, which are mentioned and provided for in the patent acts, no joint invention could exist, unless each of two persons contributed an unpatentable element of invention, which unpatentable elements, when united, produced a patentable result; a thing which, to be sure, might happen (and which I will hereafter endeavor to show did happen, in this case of Aikins & Felthousen), but which I think is too refined and metaphysical for the practical business of life.

It would restrict, indeed almost obliterate, the theatre for joint invention, and it seems to one could never have been in the contemplation of the legislature in enacting the patent laws.

Let me apply this law to the case now before me on appeal. The feed apparatus of the sewing machine now in controversy embraces, among other things, the rotary feed wheel, and the mechanism to give it its forward motion, so as to feed the cloth to the needle, and space the stitches. This feed apparatus, it is insisted by Singer's counsel, invented in the early part of 1849, as the commissioner decides, before the date of Singer's invention of the same thing, was the sole invention of Aikins, and not the subject of a joint patent to Aikins & Felthousen, under whom Wilson claims title, as assignee.

Mr. Keller insists upon Felthousen's testimony that Felthousen only invented, or contributed to invent, the reverse or backward motion of the feed apparatus. Now, assuming Felthousen to be a competent witness, and that Mr. Keller has properly interpreted his testimony, then Felthousen had nothing to do with the feed proper, or "forward feed," as it is called, which was the sole invention of Aikins, but in the year 1850, as Mr. Keller alleges, after the date of Singer's invention of the feed proper, or forward feed, in the same year, Felthousen invented, or contributed with Aikins to invent, the reverse feed.

This reverse feed has been described by the office to be an improvement on the sewing machine, and, as such, patentable, and Wilson's claim No. 2 in his amended claims has been acquiesced in and granted by the office. See official letter of the 12th April, 1859. Now here are two distinct improvements on one and the same machine (the sewing machine); Aikins the sole inventor of one, and Felthousen the sole or joint inventor with Aikins of the other, with which other Singer has no connection, and to which he sets up no claim as inventor.

Upon the principles of law herein set forth, if sound and maintainable, Aikins & Felthousen were entitled, August 15, 1851, to the joint patent then granted to them, and Wilson, their assignee, to all the rights acquired by them under that grant. Aikins alone invented the feed wheel and feed apparatus for the forward feed, which was one patentable improvement of the sewing machine, and Felthousen, either solely, or jointly with Aikins, the reverse feed, which was another patentable improvement of the same sewing machine.

The fourth original claim, struck out by the office, is in these words: "We claim feeding the cloth under the needle, from right to left, or vice versa, without stopping the machine, as fully set forth. These two improvements were the subject of one joint patent to Aikins & Felthousen, which properly issued to them jointly, the legal effect of which joint grant was to vest each of them with a joint interest in both improvements, or, in the technical language of the law, to cause them to be seized "per my and per tout," and to be competent

by a joint grant or deed to convey the whole to Wilson, their assignee. The model and drawings of Aikins & Felthousen in the patent office in August, 1851, if they were the original first inventors of the above-named improvements, as now appears in proof, entitled them to have had these improvements embraced in their patent, as that was not done by the fault of the office in disallowing and erasing their claim, and without any fraud or deceptive intention on their part, under the decision in *Battin v. Taggart*, 17 How. [58 U. S.] 74. They and their assignee, Wilson, who stands in their shoes, have a just claim to have them inserted in a reissue. Where there is a defective or insufficient description or specification, on surrender, the patentee, or his assignee, can make the reissue patent what he would have made the original if he had known how, or if the office had permitted him to have it.

There is another view of Felthousen's testimony, supposing him a competent witness, not presented on the part of Singer's counsel, which proves the invention of the feed apparatus to be, in the strictest sense, the joint invention of himself and Aikins. In answer to the 9th cross interrogatory, Felthousen says: "I suggested and invented the application of the set screw, above the needle rod, to regulate the length of the stroke, and made the same. I also suggested the arrangement for feeding the cloth both ways, backwards and forwards, and helped make the machinery." A very ingenious and earnest argument has been made to show that Felthousen meant that he had suggested only the backward or reverse feed, as it is called, but, when the witness says backwards and forwards, I must take him to mean what he says. I do not feel at liberty to mutilate or erase any portion of his testimony. I must give to the language of the witness its plain and natural import, and this is the more incumbent on the judge when the natural import harmonizes with Felthousen's original oath in March, 1850, when the joint patent was applied for, and with the testimony of Parker, Cushing, and others, who testify that both forward and reverse feed appeared in the machine which they saw late in 1848, or early in 1849, and with the testimony of Hamner, Hollister, Hardy, and Bishop, who saw Felthousen at work with Aikins in 1848, and heard him say he was with Aikins, getting up a sewing machine, which would be a woman killer, &c. It is more reasonable and charitable, and, it seems to me, more judicial, to reconcile Felthousen's whole testimony with itself, and with the proof of the other witnesses, by supposing that Felthousen has been mistaken in the time when he and Aikins made their joint improvements on the sewing machine, and that they were made and completed not later than the early part of the year 1849.

But, if clear in this view of the case, is Felthousen a competent witness against Wilson? No rule of evidence is better settled on authority than that an assignor cannot, after assignment, impeach the title of his own assignee. Mr. Kel-

ler does not deny this law. He admits the rule of evidence, but says it has no application to this case. At page 8 of his additional argument, he says: "It is true that in the original application for the original patent he (Felthousen) joined in the oath of joint invention, but he nowhere has sworn that he was joint inventor with Aikins of the things now claimed by Wilson, as assignee." Is this so? The office has declared in the official letter of the 12th April, 1859, and the examiner in the passages of his report, to which I have referred, that all Wilson's present claims are sustained by the model and drawings of Aikins & Felthousen. Now Felthousen swore in his application to what was new in his model and drawings. The office has so decided, in not requiring Wilson, the assignee, to get a new oath from Aikins & Felthousen on the reissue, which would not have been left undone (as no patent can lawfully issue without the oath of the inventors), unless the office had thought the old oath applied to Wilson's present claims. Moreover, in the original application, Aikins & Felthousen (4th claim, struck out by the office) claimed as follows: "Fourth, we claim feeding the cloth under the needle, from right to left, or vice versa, without stopping the machine, as fully set forth." His claim was appended to the original application, when the oath was taken, though it was afterwards struck out by the office, and is covered by the oath.

It is true both the examiner and the commissioner construe this 4th original claim, so struck out, to be a claim only for the reverse feed motion, and not for the forward motion, nor for the feed wheel. However it may be as to the feed wheel, of which I shall presently speak, I cannot understand how the office confines this 4th original claim to the reverse motion only. The words are: "Feeding the cloth under the needle, from right to left, or vice versa, without stopping the machine, as fully set forth." "Right to left, or vice versa," certainly mean both feed motions, backwards and forwards, and you cannot get rid of either without expunging half the claim. Though this original claim is general and broad in its terms, and not prepared with technical accuracy, and certainly I think it ought to be construed to embrace the feed wheel, as well as both feed motions. The present construction of the office is most literal and rigid. It sticks in the bark, and does not agree with the passages in the examiner's report, hereinbefore cited by me. The feed wheel was in the original model, and is admitted to be new in the combination. The feed motion, backwards and forwards, to feed the cloth under the needle, could be effected only, as I suppose, by the revolutions of the feed wheel. This feed wheel is set out and described in the original specification of the original patent of Aikins & Felthousen in these words: "To the front end of the shaft, K, within the circular shaped rest, W, is arranged a tooth-

ed feeding wheel, the teeth of which project sufficiently far through a slot in the top of said rest, W, to catch the cloth, and feed it under the needle, as said toothed feeding-wheel is turned by the operation of the pawl and rag wheel, before described; said feeding wheel running to the right or left, as the pawl may be set working, and carrying the cloth in either direction."

When the original 4th claim, in general terms, asserted the right to feed the cloth under the needle "from right to left, or vice versa, without stopping the machine, as fully set forth," it ought, as I have before said, in fairness, to be construed to embrace the feed wheel, the revolutions of which could alone feed the cloth to the needle from right to left, or vice versa, and which feed wheel is set forth in the original specification, as above detailed.

It seems to me, therefore, if Felthousen's late testimony on his examination by Singer is to be construed as the office and Mr. Keller contend, that he only invented, or helped to invent, the reverse motion of the feed apparatus, and not the forward motion and the feed wheel, his late testimony is in conflict with his original oath, and the credit of it thereby impaired. But Felthousen in his original 4th claim and in his original oath, as well as in his answer to the 9th cross-interrogatory on his examination as Singer's witness, is consistent in averring that he was a joint inventor with Aikin of the forward or feed motion proper, as well as the reverse feed. It is not denied. At all events, both the commissioner and the examiner assume it as clearly proved that the feed proper, or the forward feed, was invented and on the machine not later than the spring of 1849, long before Singer's alleged invention. Felthousen must therefore be foresworn or mistaken as to the time when he fixes his invention after his partnership with Aikins in the year 1850.

Assuming, however, against the clear proof in the cause, and against Felthousen's uniform and consistent averments, that he did invent, or contribute to invent with Aikins, the forward feed, and that he only invented the reverse feed in the fall of 1850, still, as this reverse feed, was a substantive patentable invention, he had a right, on the law, admitted by the commissioner, and sustained herein on authority and principle, to unite his invention with the invention of Aikins, and to take out with him, as they did, a joint patent for their several improvements on the same sewing machine; and the case, in this aspect of it, is strong against Singer as in any other view of it.

Lastly, if Aikins & Felthousen are to be rejected, as incompetent witnesses to impair Wilson's title, after assignment, the joint invention is prima facie proved by their original oath, and confirmed by the testimony of Hamner, Hollister, Hardy, Bishop, and others. Upon the whole, therefore, I am of

the opinion the original joint patent of the 5th August, 1851, properly issued to Aikins & Felthousen, as joint inventors; and, as James G. Wilson is their assignee, and his amended claims, on his application for reissue, cover only what was shown in the original model and drawings of Aikins & Felthousen, and of which they were the first and original inventors, a reissue patent ought to be granted to said Wilson, as prayed.

The fourth and fifth reasons of appeal are sustained. The commissioner's decision of the 20th December, 1859, is reversed, this 30th June, 1860, and I do this same 30th June, 1860, adjudge and order, that a reissue patent be granted by the commissioner to the said James G. Wilson, assignee of Aikins & Felthousen, for the amended claims claimed by him. I return to the honorable, the commissioner of patents, all the papers, model, and drawings with this my opinion and judgment this 30th June, 1860.

[The patent was accordingly reissued January 27, 1863, but was held void in *Potter v. Dixon*, Case No. 11,325.]

Case No. 17,836.

WILSON v. SINGER MANUF'G CO.

[9 Biss. 173; 4 Ban. & A. 637; 16 O. G. 1091; 12 Chi. Leg. News, 65; 9 N. Y. Wkly. Dig. 338.]¹

District Court, N. D. Illinois. Nov., 1879.²

MARKING ARTICLE AS PATENTED—EXPIRATION OF PATENT.

1. The manufacturer of an article, which has been patented, can affix upon such article the word "Patented" or any other word of similar import, together with the date of the patent, after the patent has expired.

2. Such an article does not come within the meaning of the statute which prohibits the affixing of the word "Patented" upon any "unpatented article."

[Cited in *Rosenbach v. Dreyfuss*, 2 Fed. 224.]

Walter B. Scates, for plaintiff.
William H. King, for defendant.

BLODGETT, District Judge. This is a quiet action brought by plaintiff under the last clause of Rev. St. § 4901, tit. "Patents and Copyrights," which reads substantially as follows: "Every person who in any manner marks upon or affixes to any unpatented article the word 'Patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable for every such offense to a penalty of not less than one hundred dollars, with costs, one-half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by

¹ [Reported by Josiah H. Bissell, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. 9 N. Y. Wkly. Dig. 338, contains only a partial report.]

² [Affirmed in 12 Fed. 57.]

suit in any district court of the United States, within whose jurisdiction such offense may have been committed."

The declaration contains three counts, to which defendant demurs generally and specially. The first count charges that "on the first day of Nov., 1876, and from time to time from that date hitherto, to-wit: In this district defendant did knowingly, willfully and negligently, and contrary to the statute of the United States in such case made and provided, and for the purpose of deceiving the public, print, mold, cast, stamp, engrave, make or affix upon sliding plates the words or inscription: 'Patented Sept. 10, 1846, May 8, 1849, Nov. 13, 1850, Aug. 4, 1851, Aug. 12, 1851, Apr. 11, 1854, May 30, 1854, Nov. 2, 1854, Dec. 19, 1854, May 29, 1855, Oct. 9, 1855'; and did fix and attach one such plate so marked, engraved or stamped to and upon each of one hundred thousand Singer sewing machines; that the words and figures so as aforesaid placed upon said machines imported that the same were patented; and the plaintiff avers that said machines, on the first day of November, 1876, were not, nor were any of them patented; and plaintiff avers that it was at said last mentioned time well known to said defendant that said articles and each of them were unpatented. Whereby an action hath accrued," etc.

The second count charges that defendant, at the same time and place, did knowingly, etc., and for the purpose of deceiving the public, affix upon each of one hundred thousand other Singer sewing machines the same words and figures mentioned in the first count. "Which words and figures imported that said machines were patented." "And plaintiff avers that said machines, on the first day of November, 1876, were not patented, which defendant well knew," etc.

The third count charges that defendant, at the same time and place, did knowingly, etc., and for the purpose of deceiving the public, affix upon each of one hundred thousand other Singer sewing machines the same words and figures mentioned in the first count, which said words and figures imported that said machines were patented. "And the plaintiff avers that said machines, on said first day of November, 1876, were not patented," which defendant well knew, etc.

It is contended on the part of the defendant that the declaration is defective in not alleging that the machine or some part of it was not patented at the times imported in the words affixed to it.

The question raised by the demurrer is, whether the manufacturer of an article which has been patented can affix upon such article the word "Patented" or any other word of similar import, and the date of the patent after the patent has expired. Is such an article an "unpatented article" within the meaning of this clause of the statute?

Section 4900, makes it the duty of all patentees, their assigns, etc., and of all persons

making or vending a patented article, "to give sufficient notice to the public that the same is patented; either by affixing thereon the word 'Patented' together with the day and year the patent was granted; or when from the character of the article this cannot be done, by fixing to it or to the package wherein one or more of them is enclosed, a label containing a like notice."

It was conceded by plaintiff's counsel on the argument that defendant had held patents upon sewing machines, issued by the United States at the several dates mentioned in the declaration; but the point made was that because these patents had expired, the defendant had no longer the right to affix to the machine the word "Patented" or any other word or sign importing that it or any part of it was patented or had been patented. This is a highly penal statute, and its scope will not be extended by implication. It must be strictly construed. *U. S. v. Wiltberger*, 5 Wheat. [18 U. S.] 76; *Andrews v. U. S.* [Case No. 381].

The law of the United States in force at the several dates inscribed on these machines, limited the life of a patent to 21 years,—that is, 14 years for the original term, and 7 years extension, if an extension is granted. It is clear then that at the time when defendant is charged to have committed this offense, the patents mentioned in the inscription had expired by limitation of law, even if all had been extended so as to remain in force the full 21 years.

The mischief which this statute was intended to punish, can hardly be stated more concisely than in the words of the law itself: "The purpose of deceiving the public," that is, stating falsely that an article is then the subject-matter of a patent. And can it be said that the public is deceived by the notice inscribed upon, or affixed to, a manufactured article, that has been patented, and that the patent has expired? The "public" is presumed to know the law as well as the patentee—to know that a patent issued on the 9th day of October, 1855, had expired on the 1st day of November, 1876. If, therefore, the inscription be true in fact, as it is conceded to have been in this case, I am of opinion that it does not subject the defendant to the penalty of this statute.

It may be valuable information to the public to be told that a machine offered for sale is made in accordance with a patent which has been granted, but which has expired. So that purchasers instead of being deceived, have only desirable or important facts imparted to them, and are able to act more intelligently in dealing with the manufacturer or vendor.

The law makes it the duty of the manufacturer of a patented article, during the time the patent is in force, "to give notice to the public that the same is patented, by fixing thereon the word 'Patented,' with the day and year the patent was granted," and I do

not see anything in the spirit of this clause of the law which prevents the manufacturer from continuing to affix such word and date after the expiration of the patent.

This being a highly penal statute, it was the duty of the pleader in making a case under it to negative all presumptions in favor of the innocence of the defendant. 1 Chit. Pl. 221. The allegation is, that "on the first day of November, 1876, said machines were not nor was any part of them patented." The act charged, when construed in the light of the law, in regard to the duration of patents, does not import that they were then patented, or that they are made under any patent in force on the 1st day of November, 1876, but directly the contrary. The legal meaning of the words said in this case to have been affixed to defendant's machines is: "This machine was patented at such a date, but the patent has expired." This is the fair import of the words which defendant is charged with using, and I do not think they make a case within the intent of the law.

I do not deem it necessary to discuss the special causes of demurrer assigned, and which go only to the form of the declaration—those could readily be cured by amendment. The wish expressed by counsel upon the argument was that I should pass upon the merits of the case as stated. Demurrer sustained.

[Final judgment having been entered, plaintiff appealed to the circuit court, where the judgment of this court was affirmed. 12 Fed. 57.]

WILSON (SMITH v.). See Case No. 13,128.

Case No. 17,837.

WILSON v. STEWART et al.

[1 Cranch, C. C. 128.]¹

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

CHANCERY ATTACHMENT—BRITISH BANKRUPT ASSIGNEES.

In a chancery attachment against a British bankrupt, the court will permit the assignees of such bankrupt, on giving security and producing a copy of the proceedings of the commissioners certified by a notary-public, at Liverpool, in England, who is certified to be such by the American consul at Liverpool, to be made parties to defend the suit, and to release the attached effects.

[Cited in *Addison v. Duckett*, Case No. 77.]

Attachment in chancery. Security given, attachment dissolved.

Mr. C. Lee moved that the assignees of Stewart, under a commission of bankruptcy taken out in England, might be admitted as defendants. And to show that they were the assignees, he offered a copy of the proceedings of the commissioners, certified by a notary-public at Liverpool, and a certificate of

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

the American consul at Liverpool, that the notary was a notary-public duly commissioned, &c. Act of Assembly, Rev. Code, 168.

Mr. Taylor objected that this copy is not within the act of assembly, and there is no law authorizing such copy to be admitted as evidence.

Objection overruled, and the assignees made defendants.

Mr. C. Lee moved that Stewart might be admitted to answer by his attorney in fact.

THE COURT did not refuse to suffer the answer by attorney to be filed.

Case No. 17,838.

WILSON v. STODDARD.

[4 N. B. R. 254 (Quarto, 76); 12 Chi. Leg. News, 161.]

District Court, D. Michigan. Nov., 1870.

SALE BY BANKRUPT—VALIDITY—BURDEN OF PROOF.

1. The 35th section of the bankrupt act [of 1867 (14 Stat. 534)], which declares a sale, transfer, etc., not made in the usual and ordinary course of business of the debtor, shall be prima facie evidence of fraud, throws the burden of proof on the purchaser to sustain the validity of his purchase.

2. In such a case the proofs may be taken ore tenus at the hearing.

3. Under the evidence in this case the sale was void.

D. M. Dickinson and George Gray, for plaintiff.

John T. Holmes, for defendant.

WITHEY, District Judge. The petition upon which this hearing is had, was filed by plaintiff, and alleges that about the 10th of August, 1868, the bankrupt made to defendant a sale and transfer of a stock of goods of the value of six thousand dollars, and within six months from the filing of the petition upon which Cummings was declared a bankrupt; that Cummings was then insolvent, that defendant had reasonable cause to believe him insolvent, and to be acting in contemplation of insolvency, and that the transfer was made with a view to impair, hinder, impede, and delay the operation and effect of the provisions of the bankrupt act. Defendant was ordered to show cause; and having denied the allegations of the petition, the case has been heard upon proofs. Defendant's counsel has taken exceptions to the petition and to the proofs being taken ore tenus at the hearing, which are overruled. The facts disclose that Cummings was at the date of the sale insolvent, and that defendant knew of his embarrassed condition. Defendant's counsel conceded this upon the argument. Cummings was a trader at Plainwell, Allegan county, in this district, and had been for several years doing a general country trade. At the time of

the sale of his goods to defendant, there was a mortgage lien thereon of two thousand two hundred dollars to one Sissen, of Plainwell, for money loaned; and also a mortgage to one Brigham, on that part of the stock composed of boots and shoes, on which was unpaid two thousand eight hundred dollars. Cummings owed among other indebtedness in addition to those mortgage debts, one thousand dollars to one Cory, being the amount of two notes of five hundred dollars each, on one of which defendant was liable as indorser. He also owed defendant one thousand one hundred and four dollars not secured, and four hundred dollars to parties not named. Of all this indebtedness defendant admits to have had knowledge when he bought the property of Cummings. His purchase amounted to six thousand one hundred and ninety-seven dollars and twenty-seven cents for goods, and about fifty dollars for accounts bought from Cummings—say six thousand two hundred and forty-seven dollars, total purchase price of goods and accounts. He was to pay by canceling Cummings' debt to defendant of one thousand one hundred and four dollars and fifty-one cents; paying the notes of Cummings to Cory, five hundred dollars and five hundred and four dollars respectively, and by paying Sissen's mortgage of two thousand two hundred dollars. He also gave Cummings his two notes—one for one thousand dollars, the other for eight hundred and eighty-eight dollars. Other creditors have proved debts of more than four thousand dollars against the bankrupt, of which defendant swears he had no knowledge. The sale by Cummings to defendant covered all the bankrupt's property except the boots and shoes, part of his stock mortgaged to one Brigham, and by him taken, at or about the time of sale to defendant, to satisfy two thousand eight hundred dollars.

The provision of section 35 of the bankrupt act, which declares a sale, transfer, etc., not made in the usual and ordinary course of business of the debtor, shall be prima facie evidence of fraud, throws the burden of proof on defendant to sustain the validity of his purchase. Defendant swears that he did not know Cummings owed more than four hundred dollars over the two mortgage debts, the debt due to himself and the other indebtedness, which by the terms of purchase he assumed to pay; and urges that, such being the fact, the prima facie case of fraud is conclusively met, and shows the sale to have been in all respects bona fide, and in no wise a fraud on the provisions of the bankrupt act. Standing alone, this testimony might be sufficient explanation; but when viewed in connection with other testimony, I cannot regard the sale as one entitled to the sanction of the court. When the mortgage to Sissen was made, June 25th, 1868, defendant was placed in the store as agent of the mortgagee, to see that the terms

¹ [Reprinted from 4 N. B. R. 254 (Quarto, 76) by permission.]

of the mortgage were complied with in regard to keeping up the stock, and applying sales to its payments. Defendant from that time acted more or less as clerk in Cummings' store, up to the time of his purchase—was familiar with Cummings' business affairs, had access to his books of accounts, and to his invoices of purchases. He knew of the two mortgages on the stock, was a creditor for over one thousand one hundred dollars, indorser on one of Cummings' notes to Cory of five hundred dollars, and knew of the other note of five hundred dollars to Cory. He knew, too, that Cummings was unable to pay this indebtedness, much of it due, and from his relations to Cummings as a creditor, as agent of one mortgage, and as clerk in the store, must be supposed to have been watchful of Cummings' affairs, and have known pretty fully as to his pecuniary standing.

Cummings was upon the point of going away as some sort of an itinerant lecturer, breaking up his business, and without any property left from which other debts could be satisfied. A question arose, while taking the inventory of stock, as to the safety of defendant purchasing, when he was advised by an attorney present, that if Cummings was indebted beyond what it was proposed to arrange, it would not be safe to purchase. Cummings denied that there were any other debts except four hundred dollars. Defendant was thus warned, and prudence required that he should act with reference to the existing state of things. Again, Cummings' indebtedness, according to defendant's testimony, was all to parties residing at Plainwell, where the debtor resided, except the four hundred dollars to parties in Chicago. And yet Cummings had been a trader at Plainwell for many years, purchasing his goods in New York, Chicago, Cleveland, and other places, as defendant well knew. Now, is it reasonable to say or believe that defendant did not know, or, at least, have reasonable cause to believe, that this trader owed debts on his purchases, as it is shown he did, to an amount exceeding four hundred dollars, and when it was known that he was largely indebted at home, and purchased his goods abroad? Defendant, while taking account of stock, consulted the invoices of purchase, and one witness testifies that defendant said to him, after the purchase, he bought the goods to protect himself.

I cannot doubt for a moment but defendant knew of Cummings' insolvency and indebtedness to some extent outside of home debts, and that he purchased the goods to protect his own interests, in utter disregard of the rights of a large number of other creditors. Defendant assumed the payment of no part of Cummings' debts, outside of one note of five hundred dollars to Cory, who was his brother-in-law, except what it was to his interest to pay. Sissen's two

thousand two hundred dollar mortgage was a lien on the goods. Defendant could get no title except subject to this mortgage. He was liable to Cory on one of the five hundred dollar notes held by his brother-in-law; the other he assumed to pay.

I hold the sale void, under the evidence, by the terms of the bankrupt act. The plaintiff is satisfied to take judgment for three thousand five hundred and forty-three dollars, and, although I think he is entitled to recover more, I will take that sum as the amount of defendant's liability in this case, with costs of the proceedings.

Case No. 17,839.

WILSON v. STOLLEY.

[4 McLean, 272; 4 West. Law J. 371; 10 Law Rep. 81; 1 Fish. Pat. Rep. 146.]¹

Circuit Court, D. Ohio. April, 1847.

EQUITY PRACTICE—INJUNCTION—NOTICE—INTERROGATORIES.

1. Reasonable notice is required to be given to the defendant, of the time and place where a motion for an injunction will be made.

2. The defendant will be heard in opposition to the motion, and he is permitted to file his answer.

3. Affidavits will be received in behalf of both parties, especially in patent cases.

4. Under the rules of a court, a bill which requires an answer, must contain interrogatories.

[Cited in *Steam Cutter Co. v. Sheldon*, Case No. 13,331.]

[This was a motion by James G. Wilson for a provisional injunction to restrain the defendant John H. Stolley from infringing the letters patent for an "improved method of planing, tonguing, and grooving, and cutting into moldings, or either, plank, boards, or any other material, and for reducing the same to an equal width and thickness," etc., granted December 27, 1828, to William Woodworth, extended for seven years, from December 27, 1842, and reissued July 8, 1845. The questions of law and practice raised by the defendant are sufficiently set forth in the opinion of the court.]²

Telford & Norton, for complainant.
Walker & Fox, for defendant.

McLEAN, Circuit Justice. As this is an application to enjoin the defendants from an infringement of a patent, by the practice in such cases the defendant will be permitted to file his answer; and affidavits in behalf of both parties will be examined on the motion for injunction. The bill prays for an injunction, and that the defendant may answer, but it contains no interrogatories; and on this ground it is objected that the bill is de-

¹ [Reported by Hon. John McLean, Circuit Justice. 10 Law Rep. 81, contains only a partial report.]

² [From 1 Fish. Pat. Rep. 146.]

fective. The 5th section of the act of March 2, 1793 [1 Stat. 334], provides that "a writ of injunction shall not be granted in any case, without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving for the same." This notice was designed to enable the defendant to resist the application for an injunction; and this resistance can be more effectually made by permitting the defendant to file his answer. Affidavits are heard in behalf of both parties, especially in patent cases. This course seems to come within the spirit of the above section, and it enables the judge to act on the motion with a better knowledge of the equitable rights of the parties. As no precise rules have been adopted in regard to this procedure, except that a reasonable notice shall be given of the time and place of the motion, it has been usual to give a reasonable time for the preparation of the answer and the taking of affidavits. The delay of the defendant in preparing his answer in this case, seems not to be unreasonable; and no very strong reason is perceived why the defendant should not be permitted to show, as preliminary to a motion for an injunction, that the bill, upon its face, is materially defective.

The question now made is, whether an original bill for relief, which calls upon the defendant to answer, must not contain interrogatories, under the rules of practice adopted by the supreme court. The 41st, 42d, and 43d rules make the interrogatories a part of the bill, and prescribe its form; and the 40th rule declares that "a defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and a defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such defendant is required to answer"—which must be specified in a note at the foot of the bill, in the form stated. From this it appears the defendant is not bound to answer the bill, unless special interrogatories, of the form required, are contained in it. The 18th rule declares, that "it shall be the duty of the defendant, unless the time shall be otherwise enlarged, for cause shown, by a judge of the court, upon motion for that purpose, to file his plea, demurrer, or answer to the bill in the clerk's office, on the rule day next succeeding that of entering his appearance; in default thereof, the plaintiff may, at his election, enter, an order (as of course) in the order book, that the bill may be taken pro confesso," etc. This rule applies to all bills where an answer is required. Now, if the bill contain no interrogatories, and the defendant is not bound to answer it, can he be in default for not answering? He can never be in default except for neglecting to do that which he was legally bound to do; and if he be not in default, no decree pro confesso can be entered against him. This seems to be a reasonable construction of the above rules,

and it gives to each one of them a proper effect.

The bill being defective for want of interrogatories, it is unnecessary now to consider the other objection, that the bill does not require an answer under oath.

[For other cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,339.]

Case No. 17,840.

WILSON v. STOLLEY.

[5 McLean, 1; 1 Fish. Pat. Rep. 261.]

Circuit Court, D. Ohio. Oct. Term, 1849.

PATENTED INVENTION—LICENSE TO USE—ASSIGNMENT.

1. A license to run a planing machine may be assigned, it not being a mere personal privilege.
2. In such case the assignee is bound to perform the conditions of the license.
3. The same rule applies to the assignment of his right by the licensor.
4. And a forfeiture of the license may be enforced according to its terms, by reason of the abandonment or neglect of the licensee.

² [Action on the case. Suit brought on letters patent for an improved method of planing, tonguing, and grooving and cutting into moldings, or either, plank, boards, or other material, and for reducing the same to an equal width and thickness, etc., granted William Woodworth, December 27, 1828, extended for seven years from and after December 27, 1842, in the name of William W. Woodworth, administrator of William Woodworth, deceased, limited by a disclaimer filed by said William W. Woodworth, administrator, January 2, 1843; reissued to the latter July 4, 1845, and again extended for seven years from December 27, 1849, by act of congress, passed February 26, 1849.

[On August 9, 1843, William W. Woodworth assigned all his right and interest in and to the said letters patent, and renewal in and for the county of Hamilton, in the state of Ohio, and in certain other territory, to James G. Wilson, the plaintiff, his executors, administrators, and assigns, for and during the residue of said first extension; and afterward, on August 29, 1843, Wilson granted, by an instrument in writing, to Moses Brooks and Joseph L. Morris the exclusive right, under said extended patent, in said county of Hamilton, as well as other territory, in said instrument described, and thereby authorized said Brooks & Morris to construct and use during the said first extension the said planing machine, in the said letters patent described, in said county of Hamilton. Afterward, on November 4, 1845, said Brooks & Morris granted to Jacob P. Wilson the exclusive right, under said pat-

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

² [From 1 Fish. Pat. Rep. 261.]

ent for the first extended term aforesaid, in the county of Hamilton, and in certain other territory, and authorized the said Jacob P. Wilson to construct and use during the first extension, as aforesaid, the said planing machine, in the said letters patent mentioned, in said county of Hamilton.

[On July 9, 1845, by a certain instrument in writing of that date, William W. Woodworth, administrator, assigned and confirmed unto said James G. Wilson all the right and title of him, the said Woodworth, administrator, within the said county of Hamilton, and certain other territory, for and during the extensions of the said letters patent, to the exclusive right of making and using said improvement or machine.

[Afterward, on April 15, 1846, and before the defendant committed the grievances for which this action was brought, said Jacob P. Wilson assigned to said James G. Wilson, plaintiff, the exclusive right, under said patent extended as aforesaid, in the county of Hamilton, as well as other territory, to the extent of the interest of him, the said Jacob P. Wilson, as conveyed by the aforesaid deed of said Brooks & Morris.

[While said Brooks & Morris held, as aforesaid, the exclusive right under said extended patent, and had authority to use and construct the planing machine, as described in the patent, they granted, on September 11, 1843, to John H. Stolley, the defendant, a license. That portion of this license material to the present case is as follows:

["Whereas, John H. Stolley has two machines constructed according to the specifications in said letters patent, having fully viewed and considered said improvement, and of his own motion has requested and desired said Brooks & Morris to give him a license for using one of his two machines on the said improved plan, in the county of Hamilton aforesaid, and in no other place, on conditions hereinafter mentioned, and has offered to pay said Brooks & Morris the sum of one dollar and twenty-five cents for each and every thousand feet he may plane, payable on every Monday, during the unexpired term of said extended patent, and to plane boards for others than himself for cash only; and to require payment for the same before the boards go out of his possession; and to require such price for planing as shall be agreed on by a majority of the owners of machines running under this patent in said county, said Stolley being one of them, as they shall from time to time determine on; and, whereas, by competition heretofore, the price has been reduced to seventy-five cents per hundred feet, it is agreed not to reduce below that price until agreed on by a majority of the owners as aforesaid, to which request and desire the said Brooks & Morris have agreed to comply: Now, in consideration of the propositions aforesaid, to wit, that the said John H. Stolley shall pay said Brooks & Morris one dollar and twenty-five

cents for each and every thousand feet of boards he may plane, payable on Monday of every week during the extended term of said patent, and shall render an account, if required, under oath, and shall keep books in which entries of all boards planed shall be made, and shall give said Brooks & Morris access to said books at all times, and shall plane no boards for any other person than himself for anything but cash, and shall require payment thereof before the boards go out of his possession, the said Brooks & Morris license said Stolley the right of running either of his two machines, provided he does not run more than one of them at a time; and, provided, also, he shall keep and perform, on his part, all the stipulations aforesaid. And the said Brooks & Morris having also two machines, and Hughes & Foster having also two other machines, which they wished to run under said letters patent, it is further agreed by the said Brooks & Morris, that they will not run more than their two machines at any one time; nor will they license Hughes & Foster to run more than one of their said machines at any one time; nor will said Brooks & Morris license any additional number of said machines, in the county of Hamilton aforesaid during said extended term of said letters patent, nor will they plane boards for other persons than themselves without requiring cash for the same, nor will they plane boards other than their own at less price than shall be fixed by a majority of the owners of said right as aforesaid. It is further agreed that, in case said Brooks & Morris may think proper to bring suits against any persons for infringing the aforesaid patent right, they shall do it at their own cost; and nothing herein shall be so construed as to prevent said Brooks & Morris from receiving from persons infringing said patent, for their own use, such sums as they may think proper to receive, either after suit brought or before, and, in case of such compromise, said Brooks & Morris may grant to such persons license to run, notwithstanding anything herein contained. And it is further agreed, that if said Stolley elect to abandon the running of his machine as aforesaid, or cease for two weeks to run the same, then such neglect to run shall be considered an abandonment on his part, and said Brooks & Morris may consider this contract at an end. Witness our hands and seals, this 11th day of September, 1843, at which day this contract commences—parties each hold a copy hereof. John H. Stolley. (Seal.) Jos. L. Morris. (Seal.) M. Brooks. (Seal.)"

[After said James G. Wilson, plaintiff, had become possessed of the rights of the administrator and of Brooks & Morris, in and under the patent for the said county of Hamilton and elsewhere, the defendant committed in said county certain grievances, which are sufficiently set forth in the opinion of the court, whereupon this action was

brought, the declaration of which charged infringement and actual damages to the amount of five thousand dollars, and asked for exemplary damages, and charged that the defendant had refused to pay the plaintiffs damages incurred by reason of infringement.

[The defendant pleaded not guilty, and set up, among other matters, by way of defense, the license granted him by Brooks and Stolley, of September 11, 1843, and averred he had always performed all the stipulations in said contract of license on his part to be performed, with the exception of paying the said license money, which money he had always been and was then ready to pay, and had repeatedly offered to pay as well to Brooks & Morris as to plaintiff, who had uniformly refused to receive the same, and presented with the plea an exhibit of the account of said license moneys due and unpaid.]²

E. P. Norton, Groësbeck & Telford, and Henry Stanbery, for plaintiff.

T. Walker, Storer & Gwynne, and Thomas Corwin, for defendants.

McLEAN, Circuit Justice (charging jury). This is an action at law, to recover damages for the infringement of Woodworth's patent for planing boards, which has been assigned to the plaintiff. The defendant sets up a license in his defense. Plaintiff alleges that the license was forfeited by the defendant. The license was given by Brooks & Morris, in whom the right to the patent was vested, but they have since assigned to the plaintiff. In that assignment the license to Stolley and others is referred to, and Wilson, the plaintiff, bound himself to do what Brooks & Morris were bound to do. In the license it is stated that Stolley has two planing machines, and he was authorized to run either. Stolley agreed to pay one dollar and twenty-five cents to the lessor, or his assigns, for every thousand feet of boards by him planed, to be paid every Monday morning, during the term of the lease; and that he will work for cash only. He bound himself to keep regular books, to be inspected when required by the licensor, and that he would make his return under oath, when required. Among other provisions of the contract, it was agreed, if said Stolley elect to abandon the running of his machines as aforesaid, or cease for two weeks to run the same, then such neglect to run shall be considered an abandonment on his part, and said Brooks & Morris may consider this contract at an end.

Under the contract, Stolley had a right to abandon it without cause. The neglect, for two weeks, to run the machine, might be considered an abandonment by the plaintiff. A formal notice was not necessary by the plaintiff, that he considered the failure to run the

machine two weeks as an abandonment. Any unequivocal act, showing a waiver of the right to put an end to the contract, such as an expressed determination to enforce it, would be sufficient; or an acceptance of rent subsequently. A refusal to receive the rent would show, that he considered the contract terminated.

It seems, from the testimony, that Stolley sold his license to Garrard. The license, we suppose, was assignable, as it could not be considered a personal privilege. Garrard purchased the machine of Stolley, and commenced running it the 1st of June, 1846. Inquiry was made of Garrard, by Wilson, jun., by what right he was running the machine; and he was informed that he was running under Stolley's license, which had been assigned to him, and that his father, the plaintiff, had promised to give him a license if Stolley would abandon his license. Young Wilson then gave Garrard notice to cease running the machine. Stolley was then in the shop, and told Garrard to go on,—that he would stand between him and Wilson. Witness ran the machine from 1st June to October, 1846. In September, Garrard informed Stolley, that he had made an agreement with Wilson, to run the machine. Stolley proposed to Garrard to rescind the sale of the machine, and refund the money, and give him the use of the property up to that time, but Garrard refused to cancel the contract. On the 30th of September, 1846, Stolley commenced an action of replevin for the machine, until which time Garrard continued to run it. About two weeks before this, Stolley commenced running a new machine. Garrard was induced to purchase in the first, by the representations of Stolley, that he would give his custom in that business, as far as he could by sending his customers to him. When the sale was made to Garrard, Stolley stated as a reason for selling, that his saw mill and the planing machine afforded more business than he could attend to.

From these facts, gentlemen of the jury, it will be for you to say, whether there was not an abandonment of his license by Stolley. He sold his machine, agreed to transfer his license, and ceased to run a machine from some time in May till some time in September. To cease two weeks was an abandonment under the contract. But here was an abandonment of more than three months, under a declaration that he intended to quit the business, as he had more to do than he could attend to. Under these facts, it will not be difficult for you to render a verdict in the case, and you will find such damages in favor of the plaintiff as you shall think the circumstances require.

Verdict for the plaintiff.

[This case was twice tried before a jury. Upon the first trial the jury brought in a verdict of five hundred dollars damages for the plaintiff. This verdict being set aside, upon the second trial, before a new jury, the latter brought in a verdict

² [From 1 Fish. Pat. Rep. 261.]

of five dollars damages for the plaintiff. A motion to set aside this latter verdict was overruled, and the verdict confirmed.]²
 [For other cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,389.]

WILSON v. STOLLEY. See Cases Nos. 1,962 and 1,963.

Case No. 17,840a.

WILSON v. TAYLOR.

[2 Hayw. & H. 334.]¹

Orphans' Court, District of Columbia. Dec. 20, 1859.

ADMINISTRATORS—DECEDENT'S ESTATE.

An administrator cannot acquire the title to the property of the deceased by paying his debts. The property must be sold and accounted for by him.

[This was an action by Mary A. and Michael P. Wilson against Marion M. Taylor.] A summons was served on the administrator to show cause why he does not distribute the balance in his hands as administrator *de bonis non* of Geo. B. Scott, deceased.

PURCELL, J. M. M. Taylor qualified as administrator of George B. Scott, deceased, and returned an inventory of the personal estate, being slaves and other perishable property, and he is duly charged with the same. Subsequently he credits himself before the register, who is also regarded as auditor of this court, and stated his account in the usual mode, with sundry debts paid by him against the estate, and then charges himself, in his own account as guardian, with the balance, being the difference between said inventory and debts by him paid, no previous order of publication for a final settlement asked or obtained from the court by Taylor, the administrator. At the time said settlement was made the distributees were minors and females who have since married the petitioners. It is a strange idea that an administrator, except by consent of parties, becomes the owner of perishable property because he charges himself with an inventory which the law of 1798 imperatively requires him to do, for the information of the court, heirs and creditors, because he has paid debts to that amount. There are but two modes of disposing of the property of intestates: One by a proper sale previously ordered and directed by the court, when the property is incapable of division or for the payment of debts. An executor or administrator cannot buy at his own sale. See *Conway v. Green*, 1 Har. & J. 151; *Davis v. Simpson*, 5 Har. & J. 147; *Seaglach v. Harris*, 4 Har. & J. 67. The account in this case must be reformed in the following manner:

² [From 1 Fish. Pat. Rep. 261.]

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

A public sale of the perishable property must be made by the administrator after giving at least three insertions in some newspaper of the time and place of sale, published in the city daily on a credit of sixty days for bonds with approved security for sums over \$5, and all sums of \$5 and under cash. When the amount of sale is collected, returned approved and stated by the register a publication to creditors and heirs for a final settlement must be made. The administrator is to be charged with hire at \$150 per annum; that being the amount he charged himself with the first year, for the two slaves embraced in the inventory. See *Hall v. Griffith*, 2 Har. & J. 483; *Haslett v. Glenn*, 7 Har. & J. 17. When the above orders are completed the court will order the amount, after the payment of debts and proper expenses, to be paid to the distributees; as the relation of guardian and ward ceased on the marriage of the minors with the petitioners. See *Wilson v. Boyer*, 1 Har. & J. 297.

Case No. 17,841.

WILSON v. The TRUXILLO.

[N. Y. Times, Sept. 18, 1852.]

District Court, S. D. New York. 1852.

SALE OF CHATTELS—PASSING OF TITLE—FAILURE TO DELIVER.

[The seller of merchandise agreed with the vendee to deliver it on board a brig lying at pier No. 9, North river, but by mistake of the carman it was delivered to another brig lying at pier No. 9, East river, and a receipt for the merchandise was signed by the master of the latter brig, which sailed before the mistake was discovered. The seller then delivered similar merchandise on the other brig in fulfillment of his contract. *Held*, that the title to the merchandise shipped on the wrong brig remained in the vendor, so that he could sue such brig for the value thereof.]

The libellant, Joseph Wilson, sold twenty-five cases of friction matches to John P. Beauville, and agreed with Beauville to deliver them on board of the brig Hector, at pier No. 9, North river, for \$187.50; and to carry out his agreement Wilson employed Vernon McGoun, a carman, to make the delivery of the matches according to contract, and gave orders accordingly. The carman took the matches for that purpose, and at the same time he was furnished by Wilson with a blank receipt for the mate of the Hector to sign, and return when executed. On the face of this receipt it was specified that the twenty-five cases of matches were received of John P. Beauville, to be carried or shipped to Matanzas; and with this blank receipt and the twenty-five cases, the carman Vernon McGoun, left the store of Joseph Wilson—as Wilson supposed—for pier No. 9, North river; but, misunderstanding the order of Wilson, the carman made his way in an opposite direction, and brought up at pier No. 9, East river, instead of No. 9, North river, where lay the brig Truxillo, ready for sea; and the

man in the care of this brig supposed to be the mate, and acting as such, received from McGoun these twenty-five cases of matches on board the brig Truxillo, destined to St. Domingo, and not to Matanzas. And having received the twenty-five cases of matches on board the Truxillo, this supposed mate thinking that the cases were for his ship, signed the receipt; and the carman, supposing all to be right, took the receipt back to Wilson, and he, again, believing that all was right, did not examine the receipt. It was a singular fact, that the two brigs should be sailing about the same day, to the West Indies—one from pier 9, North river, and the other from pier No. 9, East river; and it was equally singular, that the carman should have misunderstood his orders, and yet found at No. 9, East river, a brig ready to receive his load for the West Indies, and ready to receipt for them, as the brig Héctor would have done had the delivery been there.

These admitted facts present a case founded in mistake—a case, each step of its progress, a mistake also, and all parties remain in ignorance of the real condition of things, until the brig Truxillo sailed from the port of New York. Then it was that the purchaser of the matches discovered that there had been no delivery of matches for him on board the Hector, and giving notice of that failure to Wilson, the seller, Wilson immediately, in compliance with his contract with John Beauville, sent twenty-five other cases of matches on board the Hector, still remaining at pier No. 9, North river. This last act of Wilson was received as an entire fulfillment of his contract of sale, and J. P. Beauville had the twenty-five cases shipped to Matanzas, in the Hector, as was originally agreed, and in due time. Wilson did not claim that the delivery of the first matches, at No. 9, East river, was a fulfillment of his contract, nor could he claim that such a delivery was available to him. It follows, from these facts, that the property in the first twenty-five cases never passed to John P. Beauville, but remained in Wilson as if they had never passed out of his hands. The delivery of property by the mistake of all concerned can never be construed into a delivery in fact or in law, and the right of property remains in the original owner. In this case Wilson is that owner, and he now brings this suit to recover its value. The defence rests upon the idea that the libellant holds the receipt of the mate of the Truxillo in the name of John P. Beauville, and, therefore, this action should have been in the name of John P. Beauville instead of Joseph Wilson. And secondly, that this receipt being written evidence of the contract, cannot be contradicted or explained by parole. In short, that it is conclusive, and the respondents are alone

answerable to John P. Beauville on that receipt. In reply to this defence the libellant proceeds to show that as soon as these mistakes were made known to him, he called on Mr. Chamberlain, one of the owners of the brig Truxillo, she then having proceeded to sea, and explained to him the circumstances which had placed on board the Truxillo these twenty-five cases of matches. And thereupon the owner, Mr. Chamberlain admitted that the goods were on board his brig, that he did not until that time know the owner, and further said to Wilson, that on the return of the brig, he would settle for the goods; and McGoun testified that he was present at the same interview, and remembers that Chamberlain said to Wilson that the goods would be sold at the market price, and that he would pay to Wilson what the goods brought there. It was in evidence that one case was sold at Jeremie, and the residue left for sale at different ports in the West Indies, and that before suit commenced libellant has made demand of the owners of the Truxillo. The respondents urge in their defence, that they are liable to the person named in the receipt and when he shall call for the money they are ready to respond to that claim. To sustain the defence, counsel for the defendants quote 3 Phil. Ev. 1,466, 1,469, 1,440, and Hill's Notes.

THE COURT (JUDSON, District Judge) is of the opinion that the right of property in these goods never passed from Wilson to John P. Beauville; there was never any delivery to him of these twenty-five cases; that when on board the Truxillo, by mistake of the carman, the right of property still remained in Wilson; and that as a necessary consequence, this action is maintainable against the owners of the brig Truxillo, and constitute a lien on the brig. The facts of the case bear a strong resemblance to that class of cases where, at the common law, an action of trover might be maintained. The goods went out of the hands of Wilson by mistake,—tantamount to losing them; they came into the possession of the respondents by another mistake,—tantamount to finding; they have been demanded and payment refused. This would be evidence of conversion to an act of trover. By the admiralty law, the same equity prevails and compels payment for the goods thus received and disposed of by the respondents. The receipt, upon which the defence rests, having been executed in the manner above stated, imposes no obligation upon any one, and is laid out of the case. The value of the goods thus in the possession of the defendant having been ascertained, there will be no necessity of a reference. The decree will be for \$197.42, including interest.

Case No. 17,842.

WILSON v. TURBERVILLE.

[1 Cranch, C. C. 492.]¹

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

PLEA OF LIMITATIONS—WHEN FILED.

In actions against executors and administrators, the statute of limitations may be pleaded after office judgment.

This cause having been referred, but no issue made up, and the award having been set aside at the last term, and the cause standing on an office judgment and writ of inquiry,—

Mr. Swann, for defendant, moved to plead the statute of limitations, which

E. J. Lee, for plaintiff, opposed, and produced the will of Turberville, by which he orders all his just debts to be paid, and contended that that would be a good bar to the plea of the statute, and that the court would not suffer a nugatory plea to be pleaded.

But THE COURT (DUCKETT, Circuit Judge, absent) admitted the plea, it being in a case of executors, and referred to the case of Dean v. Flannery [Case No. 3,707], at November term, 1807, where the plea was admitted after office judgment.

[See Cases Nos. 17,843 and 17,844.]

Case No. 17,843.

WILSON v. TURBERVILLE.

[1 Cranch, C. C. 512.]¹

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

LIMITATIONS—CLAIM AGAINST DECEDENT'S ESTATE.

A clause in a will directing all the testator's debts to be paid, and appropriating the rents of his real estate, does not take the case at law out of the statute of limitations, when the plaintiff does not seek his remedy under the will.

Special assumpsit by defendant's testator to sell all his crops for several years at a certain price; breach, that he did not sell and deliver, &c. Pleas, non assumpsit and limitations.

To rebut the plea of limitations, E. J. Lee, for plaintiff, produced a copy of the will of the defendant's testator, in which he directs all his just debts to be paid, and directs that the rents of his real estate shall be applied, in case certain parts of his personal estate should not be sufficient; and contended that this clause of the will took the case out of the statute. Jones v. Strafford, 3 P. Wms.

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

89; Goffton v. Mill, 2 Vern. 141; Andrews v. Brown, Finch, Prec. 385; Anon., 1 Salk. 155; Catling v. Skoulding, 6 Term R. 193; Truman v. Fenton, Cowp. 548.

Mr. Swann, contra. If the plaintiff claimed under the will, the cases might apply; but if he will avail himself of that clause of the will he must confine himself to the provision made by the will. All the cases are in chancery. No case where at law such a will takes it out of the statute. If the plaintiff in a suit at law could avail himself of this equitable evidence, he might perhaps gain a priority which would exclude other creditors who have as good a right in equity as himself.

THE COURT (nem. con.) directed the jury that that clause of the will was not an acknowledgment of the cause of action.

CRANCH, Chief Judge, suggested that there was a difference between a debt liquidated and a claim for uncertain damages upon a breach of such a contract as this.

Upon this ground, as well as upon those urged by Mr. Swann, the court founded its opinion; but told the plaintiff's counsel that they would hear any cases which he might cite upon a motion for a new trial if the verdict should be against his client upon the plea of limitations.

[See Cases Nos. 17,842 and 17,844.]

Case No. 17,844.

WILSON v. TURBERVILLE.

[2 Cranch, C. C. 27.]¹

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

PLEA OF LIMITATIONS—WHEN FILED.

After interlocutory decree, and an issue ordered, the court will not permit the defendant to plead the statute of limitations, and to file an answer.

An issue from chancery being called up for trial, in this cause, Mr. Swann, for plaintiff, moved for leave to plead the statute of limitations, and to file an answer.

E. J. Lee, for plaintiff, objected that it was now too late, after interlocutory decree; that the answer offered was not a full and fair answer; and that by his will the testator had ordered all his just debts to be paid; which took the case out of the statute.

THE COURT (THRUSTON, Circuit Judge, absent), after consideration, overruled the motion.

[See Cases Nos. 17,842 and 17,843.]

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

Case No. 17,845.

WILSON v. TURNER et al.

[Taney, 278; 7 Law Rep. 527; 1 Fish. Pat. Rep. 28.]¹Circuit Court, D. Maryland. April Term, 1845.²

PATENT FOR INVENTION—RENEWAL AND EXTENSION—RIGHTS OF ASSIGNEE—CONSTRUCTION OF ASSIGNMENT.

1. On the 27th of December, 1828, W. of the state of New York, obtained a patent for a machine of which he was the inventor, giving him the exclusive right to use the invention for fourteen years from the date of the patent, and no longer; on the 28th of November, 1829, in consideration of the assignment to him of a rival patent, W. assigned to T. H. & T., and their assigns, all his right in said patent, for certain places, amongst others, for all the state of Maryland except the part west of the Blue Ridge, "for the term of fourteen years from the date of the patent;" and by the deed of assignment, it was agreed, "that any improvement in either of the patents mutually assigned, in the machinery, or any alteration or renewal of the same, shall accrue to the benefit of the respective parties in interest, and may be applied and used within their respective districts as therein designated." W., the patentee, afterwards died, and on the 16th of November, 1842, his administrator obtained a renewal and extension of the patent, under the act of July 4, 1836 [5 Stat. 117], for the term of seven years from the expiration of the original patent, and on the 9th of August, 1843, assigned to J. G. W. his interest in the patent so renewed, for all the state of Maryland east of the Blue Ridge. On a bill filed by J. G. W. against the assignee of T. H. & T., claiming the exclusive right to use said machine, within said limits, during the term for which the patent was renewed: *held*, that the act of July 4, 1836, applied to patents granted before its passage, as well as to those afterwards issued, and consequently, embraced the patent in question.

2. This law clearly intended that the assignees or grantees of the patentee should share in the benefit conferred on the patentee, and have some advantage from the extension of the patent for seven years; for it provides, in express terms, that the benefit of the renewal shall extend to them.

[Cited in *Wilson v. Rousseau*, 4 How. (45 U. S.) 694.]

3. The object of this clause in the act is, to preserve the contract, in the sense in which both parties understood and intended it, at the time it was made, and to secure to the purchaser the right which he intended to buy, and which the patentee must have intended to sell.

4. The legislature intended to guard the party who had purchased from the patentee, the right to use his invention until the expiration of his exclusive privilege, from the necessity of purchasing it again; and when they were giving the patentee a new privilege, and one which he had no legal right to demand, they had a right to annex to it such conditions and limitations as, in their judgment, justice required.

5. The law meant to provide that assignees and grantees should share with the patentee the benefit of the renewal, according to the interests which they respectively acquired in the thing patented, within particular districts of the country, for their own individual use.

6. Under the covenant contained in the deed of the 28th November, 1829, each assignee, in his respective district, was to have precisely the same rights and benefits as the patentee himself had, or might afterwards obtain, so far as concerned these inventions; and if by a subsequent act of congress, advantages were given to the patentee which he did not at that time possess, and which were not, therefore, in the contemplation of the parties, yet, according to the spirit and meaning of the covenant, the assignee had a right to stand in the place of the patentee, in his district, in respect to the new privilege as well as the old; and it would be against equity and conscience, to allow him to use a privilege afterwards unexpectedly gained, in order to defeat his own contract, in a manner obviously inconsistent with the intention of the parties.

[Disapproved in *Wetherill v. Passaic Zinc Co.*, Case No. 17,465.]

7. A case of this description is not one in which a court of equity is bound to lend its aid, even if the party had a right at law upon the technical construction of the covenant; but the word "renewal" is broad enough to embrace not only renewals then authorized by law, but renewals that might afterwards be provided for, and this construction of the word conforms in every respect to the scope and spirit of the agreement, and carries into effect the evident intention and design of the parties, at the time they made it, and is the only construction which will do equal justice to both.

In equity.

On the 31st of August, 1844, James G. Wilson, a citizen of the state of New York, filed his bill in this court, stating that on the 27th of December, 1828, William Woodworth, of the state of New York, obtained a patent for a new and useful improvement in the method of planing, tonguing, grooving and cutting into mouldings, either plank, boards or any other materials, and for reducing the same to an equal width and thickness; and also, for facing and dressing brick, and cutting, moulding or facing metallic, mineral or other substances. That said Woodworth was the true inventor and discoverer of said machine, and that it had not been in use, or described in any public work, anterior to the invention and discovery thereof by said patentee. That afterwards, Woodworth died, and on the petition of his administrator, William W. Woodworth, there was granted, on the 16th of November, 1842, an extension of said patent, for the term of seven years from the 27th of December, 1842, the date of the expiration of the first term. That afterwards, on the 2d day of January, 1843, the said William W. Woodworth executed an instrument of disclaimer to a part of the said patented improvement, according to the act of congress in such case made and provided. That on the 9th day of August, 1843, the complainant purchased from the said William W. Woodworth, administrator, all his interest in said letters patent, so renewed and extended, with the benefit of said disclaimer, for the state of Maryland east of the Blue Ridge. That being thus the assignee of all the rights existing under the said letters patent, and the extension there-

¹ [Reported by James Mason Campbell, Esq., and here reprinted by permission. 7 Law Rep. 527, contains only a partial report.]

² [Affirmed in 4 How. (45 U. S.) 712.]

of, in and for the state of Maryland, he had reason to believe that he would be permitted to enjoy the same, and the profits thereof, without let or hindrance; but that a certain Joseph Turner, Jr., and John C. Turner had had in operation, without any right or title thereto, ever since the date of said purchase, a machine substantially the same, in principle and mode of operation, with the machine for which letters patent were granted as aforesaid. That he had given notice to the said Turners, more than once, that such conduct was in violation of his, the complainant's, rights, and if persisted in, application would have to be made to this court for redress; of all which the said Turners had been utterly regardless. That from the time of the original patent, the machine had been known and recognized as the invention of William Woodworth aforesaid, and the right thereto, if ever questioned at all, had in the end always been admitted and yielded to. That at the term of the circuit court of the United States for the First district, commencing on the 16th of May last past, the case of Washburn & Brown v. Gould was tried, which was an action brought to recover damages on account of an alleged infringement of said extended letters patent, and after an able and protracted defence, a verdict was rendered for the plaintiffs. Whereupon the complainant alleged that said patent had not only been sustained by long public concession, but also by the verdict of a jury and the judgment of a court, upon an ample trial upon the merits, and he, therefore, respectfully suggested that he had brought himself within the scope of the action of this court, by way of injunction, to protect his rights. The bill concluded with a prayer for an account and an injunction.

On the 19th of November, 1844, John C. Turner filed his separate answer, stating that a patent subsequent in date to Woodworth's was granted to Uri Emmons, for a new and useful improvement in the mode of planing floor-plank, and grooving, tongueing and straightening the edges of the same, planing boards, planing and straightening square timber, &c., by machinery, at one operation, called the cylindrical planing-machine; and that, by sundry assignments, the interest in the two patents of Woodworth and Emmons, for all the state of Maryland, except that part lying west of the Blue Ridge, became vested in the respondent and his co-defendant, with the right to receive the benefit, within said limits, of any improvement in the machinery, or alteration or renewal of the patent. That by virtue thereof, at the time of the supposed renewal of the patent granted to William Woodworth, the interest therein for the state of Maryland, except that part of said state lying west of the Blue Ridge, was vested in the respondent and his co-defendant, jointly with John Walsh and Samuel House, to

whom, to that extent, said renewal, if valid at all, accrued by force of an agreement in one of the deeds of assignment, through which the defendants trace their title, dated the 28th November, 1829; and at the time of the expiration of the said patent, on the 27th of December, 1842, the said right, by assignment to them of the interest of said Walsh and House, was vested wholly in the respondent and his co-defendant. That he knew nothing of the supposed purchase alleged in the bill to have been made by the complainant of the said William W. Woodworth, but he denied that the said William W. Woodworth had any right to convey to the complainant the rights and privileges which he claimed to derive from that purchase. That the respondent and his co-defendant were the proprietors of a machine which they employed in the business of planing, and that it was erected at a very great expense, and a very large capital was employed in carrying on the business connected therewith. That the said machine was erected before the expiration of the original patents granted to Woodworth and Emmons, by those who were possessed of the privileges conferred by both those patents for all the state of Maryland except that part lying west of the Blue Ridge. That this respondent and his co-defendant had invested their capital in the said machine and in the said business, upon the faith of the several assignments aforesaid, and believing that they would be entitled to carry on the said business and use the said machine, either, in case the said patents expired, with the public at large, or, if either or both of them were renewed, by virtue of the agreement contained in one of the said deeds, that all renewals of either of them should accrue to the benefit of the parties in interest; and he asserted that they were entitled to do so, even if the machine which they employed were substantially the same, in principle and mode of operation, with the machine for which letters patent were granted to the said Woodworth as aforesaid, which he denied. That he knew nothing about the disclaimer of a part of the invention of William Woodworth made by William W. Woodworth, or of the trial in the district court of Massachusetts. That he believed the patent-right above recited as granted to Uri Emmons, was identical in principle and in mode of operation with the machine now used by the respondent and his co-defendant. And further, that the patent granted to said Woodworth was in part for facing and dressing brick, and cutting mouldings on or facing metallic, mineral or other substances; and he believed that said method was not capable of being applied to metallic or mineral substances, or to any other substance than wood, and that he was advised that said patent is therefore void.

Subsequently to the filing of this answer,

the parties filed in the cause the following agreement:³ It is agreed that this cause be set down for final hearing, and submitted upon bill and answer, and the following statement of facts, which it is agreed shall be taken and received as though the same had been regularly proved under a commission issued and returned in the cause, either party to have the right to appeal to the supreme court, from such decision as the circuit court may see fit to make.

Statement of facts: It is admitted that, on the 27th December, 1828, William Woodworth obtained letters patent of the United States, for a new and useful improvement in the method of planing, tongueing, grooving and cutting into mouldings, either plank, boards or any other materials, and for reducing the same to an equal width or thickness; and also for facing and dressing brick, and cutting mouldings on, or facing metallic, mineral or other substances. That subsequently, the said William Woodworth died in the city of New York, when letters of administration upon his estate were granted by the surrogate of the county of New York, unto William W. Woodworth, a son of the deceased. That subsequently, the said administrator applied to the commissioner of patents for an extension of the said letters patent, when, on the 16th November, 1842, the board to whom, under the statute in such case made and provided, the said application was referred, did adjudge and certify in writing that the letters patent aforesaid should be extended; whereupon the commissioner of patents did renew and extend the said patent for the term of seven years, from and after the expiration of the term of fourteen years, for which the said patent was originally granted. That subsequently, on the 2d January, 1843, the said William W. Woodworth, administrator, did make disclaimer of all that part of the claim which is mentioned in said letters patent, which relates to the use of the circular saws, for reducing floor-plank and other materials to a width. That subsequently, the said William W. Woodworth, administrator as aforesaid, on the 9th August, 1843, did convey to the plaintiff, James G. Wilson, all his right, title and interest in and to the said patent-right and renewal, in and for the state of Maryland (except the western part thereof, which lies west of the Blue Ridge), and no other place whatever.

It is admitted further, for the purpose of the present suit, that at the time of the filing of the bill of this cause, the defendants were using, in their planing mill, in the city of Baltimore, a machine or machines which were substantially the same, in principle and mode of operation, with that described in the specification attached to the letters

patent aforesaid, without the license of the said plaintiff, or the said administrator, or any grantee or grantees under them, or either of them.

It is admitted that, on the 4th December, 1828, William Woodworth, the inventor, sold and conveyed half of his interest in the said invention to James Strong. That on the 25th April, 1829, one Uri Emmons obtained a patent for a new and useful improvement in the mode of planing floor-plank, and grooving and tongueing and straightening the edge of the same, planing boards, straightening and planing square timber, &c., by machinery, at one operation, called the cylindrical planing-machine. That afterwards, on the 16th May, 1829, the said Emmons sold his entire interest, in the last mentioned patent, to Daniel H. Toogood, Daniel Halstead and William Tyack. That afterwards, on the 28th November, 1829, the following mutual deed of assignment was executed between Woodworth and Strong, on the one part, and Toogood, Halstead, Tyack and Emmons on the other part, by which Woodworth and Strong conveyed to Toogood, Halstead and Tyack, all their interest in the patent of December 27th, 1828, in the following places, namely, in the city and county of Albany, in the state of New York; in the state of Maryland (except the western part, which lies west of the Blue Ridge); in Tennessee, Alabama, South Carolina, Georgia, the Floridas, Louisiana, Missouri and the territory west of the Mississippi; and Toogood, Halstead, Tyack and Emmons conveyed to Strong and Woodworth all their interest in Emmons' patent of 25th April, 1829, for the rest and residue of the United States; by which mutual deed of assignment the parties agreed that any improvement in the machinery, or alteration or renewal of either patent, such improvement, alteration or renewal should enure to the benefit of the respective parties in interest, and might be applied and used within their respective districts. That subsequently, on the 28th December, 1829, Tyack conveyed all his interest in the two patents to William Henry Culver. That subsequently, Toogood disposed of his entire interest in the two patents to Halstead. That subsequently, on the 15th October, 1830, Halstead assigned all his interest to William H. Culver, in whom all the interest conveyed by Woodworth & Strong under the joint deed became centred. That subsequently, on the 4th May, 1831, Culver assigned all his interest within the state of Maryland, except that part thereof lying west of the Blue Ridge, to Samuel T. Bladford. That subsequently, on the 6th September, 1831, Bladford sold his interest to Richard G. Howland. That subsequently, Howland, by deeds dated on the 7th September and 3d October, respectively, conveyed to Zachariah Woollen an equal interest with himself in the two patents within the limits last aforesaid. That subsequently, on the 1st April, 1836, Howland &

³ The papers referred to as part of this agreement are omitted, as they are too lengthy to be inserted, and their substance sufficiently appears.

Woollen assigned all their interest to Joseph Turner, Jr., one of the defendants, John Walsh and Samuel House. That subsequently, on the said 1st April, 1836, Turner, Walsh and House conveyed two-fifths of their interest to Richard S. Howland. That subsequently, on the 1st August, 1836, Howland conveyed one-half of the two-fifths held by him to Edwin P. Starr. That subsequently, Starr and Howland, on the 7th April, 1838, assigned their interest to the said Turner, Walsh and House. That subsequently, by two assignments, dated on the 31st December, 1839, and 10th December, 1842, respectively, Walsh and House conveyed their interest to the two defendants, Joseph Turner, Jr., and John C. Turner.

It is further admitted, for the purposes of this suit, that at a trial which took place at May term, 1846, in the circuit court of the United States for the district of Massachusetts, in the case of Washburn and others v. Gould, the originality of the invention by Woodworth, the patentee, became a question, and was decided in favor of the patentee.

Reverdy Johnson and John W. B. Latrobe, for plaintiff.

Wm. Schley and Hugh Davey Evans, for defendants.

Before TANEY, Circuit Justice, and HEATH, District Judge.

TANEY, Circuit Justice. This case comes before the court upon a bill filed by James G. Wilson, against Joseph C. Turner, Jr., and John C. Turner, to restrain them from using a certain machine for planing planks and boards and other materials, which the said Turners have erected and are using in the city of Baltimore. John C. Turner, one of the defendants, has answered, and the material facts of the case as they appear upon the bill, answer and exhibits, so far as they affect this controversy, are as follows:

On the 27th of December, 1828, William Woodworth, of the state of New York, obtained a patent for the machine in question, of which, as the case now stands, he appears to have been the inventor, and according to the laws of congress then in force, this patent gave him and his assignees and grantees the exclusive right to use this invention for fourteen years from the date of his patent, and no longer; consequently, his monopoly would expire on the 27th day of December, 1842.

On the 28th of November, 1829, Woodworth, the patentee, and James Strong (who had, by purchase from the patentee, become entitled to one-half of the interest in the patent), in consideration of the assignment to him of a rival patent, assigned to Toogood, Halstead and Tyack, and their assigns, all their right and interest in the patent, to be sold and used in the following places: "namely, in the county of Albany, in the state of New York; in the state of Mary-

land (except the western part thereof, which lies west of the Blue Ridge); in Tennessee, Mississippi, Alabama, South Carolina, Georgia, the Floridas, Louisiana, Missouri and the territories west of the Mississippi, and not in any other state or place within the limits of the United States, or the territories thereof; to have and to hold the rights and privileges thereby granted, to them and their assigns for and during the term of fourteen years from the date of the patent:" as more fully appears by reference to the deed of assignment filed in the case. The respondents claim the right to construct and use the machine in question, by title derived from these assignees.

Woodworth, the patentee, died some time before the 9th of February, 1839; on which day, letters of administration on his estate were granted to William W. Woodworth; and on the 16th of November, 1842, the administrator obtained from the board of commissioners established by the act of congress of 4th July, 1836, the renewal and extension of the patent, for the term of seven years from and after the expiration of the first term of fourteen years; and on the 9th of August, 1843, Woodworth the administrator assigned to James G. Wilson the complainant, all his right, title and interest, in and to the said letters patent renewed and extended as aforesaid, for the state of Maryland, east of the Blue Ridge; and under this assignment, he claims the exclusive right to the use of this machine, in the part of this state above mentioned, from the date of the assignment, until the expiration of the extended term of seven years; and he insists that Toogood, Halstead and Tyack, and those claiming under them, have no right in the patent, by virtue of the assignment of 28th November, 1829, at the expiration of the original term of fourteen years; and that the continued use of it by the respondents is an infringement of his right. It is upon this ground that he asks for the injunction.

At the time this patent was originally granted to Woodworth, and at the time of the assignment to Toogood, Halstead and Tyack, and the subsequent assignments, until one of the defendants became interested in the patent as assignee, there was no law authorizing, under any circumstances, the extension of a patent beyond fourteen years. At the expiration of that period of time, the exclusive rights of the patentee, and his assignees and grantees, terminated, and every person had the right to use the invention without any consent or license from the inventor. But by the act of July 4, 1836 (section 18), the patentee of an invention or discovery was authorized to obtain a renewal and extension of the patent for seven years, after the expiration of the term of fourteen years, upon proving, to the satisfaction of the board of commissioners, established by that act, that he had failed to obtain from the use and sale of his invention, a reasonable

remuneration for the time, ingenuity and expense bestowed upon it, and the introduction thereof into use; and that thereupon the said patent should have the same effect in law, as though it had been originally granted for the term of twenty-one years; and the same act provides, that the benefit of such renewal shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their respective interests therein. This power of extension applied to patents granted before the passage of the act, as well as to those which should be afterwards issued, and consequently, embraced the patent in question.

The dispute now before us arises upon the construction of the provision in favor of assignees and grantees. It is contended, on the part of the complainant, that this provision embraces only the rights which had been acquired in the original term of fourteen years, and that assignees and grantees of the original patent can claim no benefit, from their contracts, in the extended term of seven years; that the latter enures altogether to the benefit of the patentee; gives him the exclusive right to vend, assign and use the invention during that period; and authorizes him to prevent the use of it by those who had purchased the privilege for themselves immediately, or for particular districts of country, for the original time. If this be the construction of the act of congress, the provision in favor of assignees and grantees would seem to the court to be useless and nugatory. No one would suppose that the grant of this new right annulled all contracts made under the old one, and that giving to the patentee an additional term of seven years, would deprive purchasers of the rights which they had acquired in the original term, before the renewal was granted. If the patentee had assigned all his right, in a particular district or state, for and during the whole fourteen years, or even for a shorter period, surely that contract would continue binding upon him, notwithstanding he afterwards procured an extension of his patent, and congress could hardly have deemed it necessary to make a special provision for its protection. Certainly, according to this construction, assignees or grantees would derive no advantage from the renewal; yet the law clearly intended that they should share in the benefit conferred on the patentee, and have some advantage from the extension of the patent for seven years; for it provides, in express terms, that the benefit of the renewal shall extend to them, thus using a word which shows that it was not the intent of the legislature merely to protect interests which previously existed in assignees and grantees, but to give them a share in the benefit conferred on the patentee by the renewal of the patent.

Moreover, assignees who had purchased the title of the patentee, in particular states and territories, and individuals who had paid

for the right to use the invention during the original period of the monopoly, might have suffered serious injustice by the grant of a new and further term to the patentee, unless they were embraced in it; and they would, therefore, very naturally and properly be the objects of protection. For in cases like the present, where the patent was issued, and the purchaser obtained his assignment, before the passage of the act of 1836, both parties must have understood that the exclusive right of the patentee for its whole period was transferred; and that at the expiration of the fourteen years, the assignee would have the right to use the invention without interruption, and without paying the inventor any further compensation.

The object of the clause in question is to preserve the contract, in the sense in which both parties understood and intended it, at the time it was made, and to secure to the purchaser the right which he intended to buy, and supposed he had bought, and which the patentee must have intended to sell, and at the time of the contract, must have supposed he had sold. Indeed, the power of extension given by the act of 1836 would have operated most unjustly upon those who had purchased the right to use a patented machine, if it had not been accompanied by a provision for their protection; for, relying on the assurance given by the law, as it stood when the contract was made, that they had purchased for the whole period of the monopoly, and that they might lawfully continue the use of the invention after the expiration of the fourteen years, many grantees, after having obtained the assignment or grant from the patentee, had undoubtedly erected costly machinery, and encountered expenses, which they would not have incurred, if they had supposed it would be in the power of the patentee to forbid the use of his invention, after the time limited by his original patent; and, if with these expenses incurred and arrangements made for the continued use of the improvement, congress had passed the law of 1836, without this provision in favor of assignees and grantees, it would have enabled the patentee to deal with them most severely and oppressively, and to exact from them a far heavier sum for the extended term of seven years, than they would have been willing, under other circumstances, to have given for the original term of fourteen.

The legislature obviously, we think, intended to guard the party who had purchased from the patentee the right to use his invention until the expiration of his exclusive privilege, from the necessity of buying it again. And when they were giving the patentee a new privilege, and one which he had no legal right to demand, they had undoubtedly a right to annex to it such conditions and limitation as, in their judgment, justice required.

The construction which we put upon the law is conformable also to the previous legislation of congress upon a similar subject; for

in the act passed the 21st January, 1808, entitled "An act for the relief of Oliver Evans" (6 Stat. 70), whereby, in consideration of the particular circumstances of the case, a new patent was granted to him, after the expiration of the original one, there is an express provision, that no person who had before paid him for a license to use his improvements, should be obliged to renew it, or be subject to damages for not renewing it; thus granting the new patent upon the same principles, with reference to purchasers, that has been adopted and followed in the act of 1836, in cases of the extension of the term.

It is true, as was urged in the argument, that the right of extension is obviously given by the law, chiefly with a view to the advantage of the inventor, and not of his assignees or grantees; and that the patent, if extended at all, must be extended on the application of the inventor, and not his assignees; and the reason of this distinction is evident. The assignee purchases because he supposes the improvement is worth the money he pays for it, and that he can make a profit by his bargain; and if it afterwards turns out that he was mistaken, and his speculation in the patent-right proves to be a losing one, there would be no more justice in giving him a new privilege, whereby the public would be compelled to make good his losses, than there would be in the case of any other speculation, which proved to be unfortunate. But the same reason which would operate to prevent an extension to the assignee, would apply with equal force between the patentee and assignee, where the right to extend was conferred on the former. For he assigns his right to the exclusive privilege in a particular district of country, or grants it to a particular individual for his own use, for a price which he deems adequate, and is willing to take; and it would hardly be just, if the invention afterwards proved to be more valuable than he himself supposed it to be, to re-invest him on that account with the exclusive privilege for a new term, in such a manner as would enable him to compel those who had already bought, to buy again; the more especially, when the enhanced value is often produced by the industry and expenditures of the assignee or grantee, in bringing it into more public use and more general notice.

There is one evident distinction, however, between the patentee and assignee, so far as the public is concerned. If the invention is a valuable one, the inventor confers a benefit upon the public, and yet, without any fault of his, he may fail to obtain a reasonable remuneration within the fourteen years, for the time, ingenuity and expense which he bestowed upon it; his title may be controverted, and a large portion of the time spent in expensive litigation; he may be unable to erect the improvements necessary to show its value and bring it into notice; he

may have been unable to make sale of his privilege to others, upon terms which he was willing to take; and as between him and the public, therefore, which is to be ultimately benefited by the improvement, there is justice in the extension. It is to cases of this description that the act of congress applies. It proposes to do justice between the inventor and the public, while it protects assignees and grantees in the rights which they had previously acquired by contract with the patentee.

Besides, the words of the law appear to us to admit of no other interpretation than the one we have given. It declares that the benefit of the renewal shall extend to assignees and grantees of the thing patented, to the extent of their respective interests therein. Now, what benefit have they in the renewal, if they are excluded from the use of the thing patented during the whole of the renewed time? According to that construction of the law, so far from receiving a benefit, they would be subjected to loss. They would not even enjoy the right which they supposed they had bought, but would be compelled, at the expiration of the fourteen years, to stop the works they had constructed, at whatever loss it might occasion, unless the patentee gave them leave to proceed; yet the law, in plain terms, declares that they are to derive an advantage from the extension, and that the benefit of the renewal shall extend to them according to their respective interests. In other words, it means to provide, that assignees and grantees shall share with the patentee the benefit of the renewal, according to the interests which they had respectively acquired in the thing patented, within particular districts of country, or for their own individual use.

The construction we have given to this law, is not only called for by its language, but conforms to the principles established by congress, in a similar case, in the act of 1839. The seventh section of that act enables the inventor to obtain a patent, although he may have previously sold the right to use or vend it to different persons, provided the sale was not more than two years before his application for a patent, and provided further, that such invention had not been abandoned to the public. But the same section also provides, that the party who purchased prior to the application for a patent, may, notwithstanding the patent, continue to use the invention and vend it to others to be used, without incurring any liability to the inventor, or any other person interested in the invention. This privilege of the purchaser is without limitation as to time, and evidently would extend to a renewed or extended patent, as well as to the original term of fourteen years.

It was decided by the supreme court, in the case of McClurg v. Kingsland, 1 How. [42 U. S.] 202, that this right is not confined

to the particular machine actually constructed or manufactured before the application for the patent, but that the purchaser may continue to construct, manufacture and vend the machine or composition of matter, after the patent has been obtained. Now there can be no reason for denying to a purchaser, who makes his purchase after the patent, the privileges which the law obviously intended to secure to the party who made his purchase or obtained the license of the inventor before. If the rule is just in one case, it is just in the other; and if it be said that, in the last-mentioned case, the purchaser might not know that the inventor would ever apply for a patent, and had no reason to suppose that any obstacle would afterwards be interposed to the free and undisturbed use of the right he had purchased, the same must be said of the case now before the court: for the purchaser could not know that the inventor would ever apply for a renewed term; and when he purchased the right for the whole time of the existing monopoly, he had no reason to suppose that any new obstacle would afterwards be interposed, to prevent the free, undisturbed and continued use of that right. It would make the legislation of congress in these two laws inconsistent and contradictory in its principles, and, as we think, inconsistent with justice, in cases like the one before us, if we gave to the act of 1836 the construction contended for by the complainant.

But if the law admitted of a different construction, yet the covenant of the inventor and his partner, contained in the deed of assignment hereinbefore mentioned, of 28th November, 1829, would, in the judgment of the court be an insuperable bar to the relief asked for by the bill; for it is expressly agreed between the parties to that instrument, that any improvement in either of the patents mutually assigned, in the machinery, or any alteration or renewal of the same, shall accrue to the benefit of the respective parties in interest, and may be applied and used within their respective districts, as therein designated. It is very true that, at the time this contract was made, the law authorizing the renewal in question had not passed, and the parties probably did not contemplate the passage of such a law. But whether the word "renewal" did or did not look to the extension of time given by the act of 1836, it is evident, upon the words of the covenant, that whatever additional value either inventor might afterwards be able to obtain for his invention, it should enure to the benefit of the assignee within the district assigned. The parties were not only bound forever afterwards to offer no obstruction to one another in their particular districts, but to give to each other the full benefit of their respective exertions to increase the value of these inventions; and if they then only looked to a renewal to be procured by surrendering the existing patent, if

it should be found to be defective, and taking out a new one, according to the act of July 3, 1832; yet it is very clear, that both parties intended that every benefit of every kind that might be obtained for the respective inventions, should belong to the assignees in their respective districts. They were, in that respect, to have a common interest in their inventions, and they have used the broadest words to accomplish that object; words which unquestionably embrace every mode by which the value of the patents could be increased.

Each assignee, in his respective district, was to have precisely the same rights and benefits as the patentee himself had, or might afterwards obtain, so far as concerns these inventions; and if, by a subsequent act of congress, advantages were given to the patentee, which he did not at that time possess, and which were not therefore in the contemplation of the parties, yet, according to the spirit and meaning of the covenant, the assignee had a right to stand in the place of the patentee, in his district, in respect to the new privilege as well as to the old; and it would be against equity and conscience to allow him to use a privilege, afterwards unexpectedly gained, in order to defeat his own contract, in a manner obviously inconsistent with the intention of the parties.

A case of this description is not one in which a court of equity is bound to lend its aid, even if the party had a right at law upon the technical construction of the covenant. But we think that the word "renewal" is broad enough to embrace not only renewals then authorized by law, but renewals that might afterwards be provided for; and that this construction of the word conforms in every respect to the scope and spirit of the agreement, and carries into effect the evident intention and design of the parties at the time they made it, and is the only construction which will do equal justice to both parties. Upon the whole, therefore, the court are of opinion that the complainant is not entitled to relief, and that his bill must be dismissed. Bill dismissed with costs.

Affirmed by the supreme court, in 4 How. [45 U. S.] 712.

[For other cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,389.]

Case No. 17,846.

The WILSON v. UNITED STATES.

[1 Brock. 423.]¹

Circuit Court, D. Virginia. May Term, 1820.
CUSTOMS DUTIES—SCOPE OF ACT—FOREIGN PRIVATEER—NECESSITY OF REPORT AND ENTRY—IMPORTATION OF COLOURED SEAMEN.

1. The 31 section of the act of congress passed on the 2d of March, 1799 [1 Stat. 651], "to

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

regulate the collection of duties on imports and tonnage," which exempts "ships or vessels of war" from the necessity of making a report and entry, on arriving at any of the ports of the United States, from any foreign port or place, extends as well to privateers as to national ships.

2. The power of controlling navigation, is incidental to the power to regulate commerce, which the constitution confers upon congress; and, consequently, the power of congress over the vessel, is co-extensive with that over the cargo.

[Cited in U. S. v. Jackson, Case No. 15,458.]

3. The act of congress of the 28th of February, 1803 [2 Stat. 205], forbidding any master or captain of a ship or vessel, to import or bring, into any port of the United States, any negro, mulatto, or other person of colour, under certain penalties, where the admission or importation of such persons is prohibited by the laws of such state, does not apply to coloured seamen, employed in navigating such ship or vessel.

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

The brig Wilson, Ivory Huntress, commander, was libelled in the court below, and the vessel, with her tackle, apparel, and furniture, thirty-one demi-johns of brandy, thirteen cases of gin, and several other articles, claimed as forfeited to the United States, for violating the act of congress "to regulate the collection of duties on imports and tonnage;" and also for bringing into the state of Virginia, several persons of colour, from a foreign port, contrary to the laws of the said state, and in contravention of the act of congress, entitled, "An act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited." The four first counts of the libel, charged, that the said spirits, &c., were imported, and brought into the United States, on the — day of October, 1819, by sea, in vessels of less capacity than ninety gallons, wine measure, from some foreign port, unknown, into the port of Norfolk, in Virginia, on board the brig Wilson, which were not mentioned in the manifest and report made by the commander of the vessel, but were carefully concealed, for the purpose of evading the payment of the duty thereon, and were discovered by an agent, specially appointed by the collector of the port of Norfolk, after diligent search, &c. The fifth count in the libel, charged, that the said brig Wilson, so arriving in the port of Norfolk, in Virginia, had on board three persons of colour, not being native citizens or registered seamen of the United States, or seamen, natives of countries beyond the Cape of Good Hope, the admission or importation of such persons being prohibited by the laws of Virginia; and that the said three persons of colour were landed from on board the said brig, contrary to the form of the act of congress, whereby the said vessel, her tackle, &c., had become forfeited to the United States.

The claimant and respondent, Huntress, in his answer to the above libel, admitted that

the brig Wilson did come into the port of Norfolk, on or about the 27th day of October, 1819, having on board the brandy and gin, &c. mentioned in the libel, but affirmed that the Wilson was a private vessel of war, duly commissioned by the United Provinces of Venezuela, and New Grenada, and belonged to a citizen thereof, and that she sailed from Marguerita, on a cruise, about the 18th of August preceding, with a crew of nearly ninety persons: that in addition to the stores and other supplies, taken on board at Marguerita for the use of the crew, sundry articles of merchandise were captured on the high seas, as prize of war, and among them, the brandy and gin now libelled, which were intended to be used as sea stores of the ship, and not as merchandise. That the vessel put into the port of Norfolk, with intent to refit, and obtain supplies in the United States, without any intention, that the spirits should be unladen, or sold in the United States, and with intent that the same should be carried out again on the departure of the vessel. That on board of such armed vessels, it is not within the province of the captain, personally to inspect, or take an account of such articles, when on board; but the practice is, that such inspection and account are made and taken by some inferior officer, on whose official report of the quantity he relies. That on the arrival of the vessel at Norfolk, the first and second officer having departed, he gave orders to the clerk to examine, and report the articles on board, to enable this respondent to make his report to the collector of the port of Norfolk. That the failure of the clerk to enumerate the demi-johns of brandy, and cases of gin, in the manifest, was purely accidental, resulting from the haste in which it was prepared, and the confusion on board. That these articles were not concealed, but were deposited in the usual and proper place on board the vessel, and with the other articles reported in the manifest, and delivered to the collector. In responding to the fifth count in the libel, he denied that the three persons of colour were landed from on board the Wilson, and affirmed that they were persons engaged in the navigation of a foreign armed vessel, and constituted part of her crew. He, therefore, prays restitution, &c.

The evidence on behalf of the United States, consisted in the depositions of William Bush, supernumerary inspector of the customs for the port of Norfolk; of W. P. Davis, captain of a pilot boat; of Francis Benson, commander of a revenue cutter; and of Alexander Tunstall, deputy collector for the port of Norfolk. Bush said, that he was ordered on board of the brig Wilson on the 28th of October, 1819, to see the powder discharged. After the powder was discharged, under his inspection, the vessel, which had been lying between the forts, got under weigh and went up into the harbour. On the 29th of October, Captain Huntress made

out prize tickets for his crew, a number of whom were persons of colour. The deponent examined their baggage, but found no merchandise among it. He visited the ward room, birth deck, cabin, and fore-castle, and in the ward room discovered a great variety of articles, and among the rest, several demijohns of Spanish brandy, and cases of gin, which he was told were ship stores, and which were not comprised in the manifest given in on the 31st of October, by the captain. On the 1st of November, deponent went on board again, by request of the captain, and found a great part of the crew discharged that morning, of different colours and nations, whose baggage he inspected, and found no merchandise in it. While on board, Captain Benson, in the revenue boat, came along side, and assisted him in examining the vessel, and they found the same articles previously spoken of. The deposition of Benson was to the same effect. Davis stated, that about half way between Old Point Comfort and Cape Henry, he, being the commander of the pilot boat Anne of Hampton, on the 26th of October, 1819, about 10 or 11 o'clock p. m. was hailed, by some person on board of a vessel, then at anchor on the Horse Shoe, who inquired if there were any men of war in Hampton Roads, and then requested him to come on board, and take some goods, which he refused to do. The person conversing with him, said the vessel was called the brig Wilson. She was the same vessel detained by the officers of the customs, and then in dispute. Tunstall said, that on the day, or the day following that on which the search was directed of the brig Wilson, Captain Huntress made an application at the office of the customs, to make a post entry of a number of articles, stating that he had depended on his officers, and in consequence of an improper report from them, the goods were not included in the manifest. He was informed that if the proper entry was not made, from accident or mistake, it might be corrected. The captain then stated that some of the articles not entered, were taken at sea. This conversation took place after the discovery of the articles, spoken of by Bush and Benson, and about four days after the entry had been made, all of which articles were omitted in the manifest. On being interrogated what was the usual allowance per man in merchant ships, of spirits as stores, the deponent stated, that about four gallons per man were usually allowed, but that this depended somewhat on the length of the voyage, and in the case of armed cruisers, they had generally come in short of stores, and no instance of excess had occurred in practice to settle the rule in the office.

On the part of the claimant, the depositions of several of the officers of the brig Wilson, were read, all substantially proving the same facts, viz.: That about the 12th of August preceding, the privateer brig, Wil-

son, Ivory Huntress, commander, sailed from Marguerita, under a commission from the government of Venezuela, and proceeded to St. Thomas: that while at St. Thomas, the crew of the vessel was reinforced, by the addition of some eighteen seamen, principally people of colour, and all free. The vessel then sailed from St. Thomas, on an intended cruise of six months. At this time, the crew consisted of about eighty or ninety, inclusive, and among them were many free people of colour. During the cruise, two Spanish schooners, and one English ship, having Spanish property on board, were captured. The ship, and one of the schooners, were sent under prize masters to Marguerita, and the other schooner was abandoned, after some mutineers from the Wilson were put on board. From this schooner, they took on board of the Wilson, as prize, various articles, among them, demijohns of brandy, cases of gin, &c. The brandy and gin, and other small articles, were added to the stock of stores for the crew, and some of the gin was repeatedly afterwards served out to the crew. Several days before they reached the United States, when the Wilson was on the outer edge of the Gulf Stream, she fell in with an American schooner, called the Wasp, bound for Baltimore, and put on board of her several articles of merchandise, which were captured from the Spanish schooner, and Thomas B. Grey, of the Wilson, was sent in with the goods to Baltimore. The Wilson arrived at Norfolk, on the 27th of October, 1819, having put in to refit, with intent to depart and resume her cruise in a short time.

The district court, on the hearing of the cause, decreed, that the 31 demijohns of brandy, the 13 cases of gin, and merchandise, according to schedule, were forfeited to the United States, under the 29th and 68th sections of the act of congress, entitled, "An act to regulate the collection of duties on imports and tonnage." "And it appearing to the court, that three persons of colour, as charged in the libel, were brought in, and landed from the said brig Wilson, not being native citizens, or registered seamen of the United States, or seamen, natives of countries beyond the Cape of Good Hope, in violation of the act of congress of the United States, entitled, 'An act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited;' whereby the said brig Wilson, together with her guns, stores, tackle, apparel, and furniture, have become forfeited to the United States, and they are decreed to be forfeited accordingly." [Case unreported.] From this decree, the claimant appealed to this court.

MARSHALL, Circuit Justice. The four first counts of this case, present for the consideration of the court, a general question of considerable importance. It is this: Does

the act "to regulate the collection of duties on imports and tonnage"² apply to privateers, not engaged in the importation of goods? The 31st section enacts "that it shall not be necessary for the master, or person having the command of any ship or vessel of war, &c., to make such report and entry as aforesaid." If the words "ship or vessel of war," be construed to comprehend a privateer, there is an end of this part of the case, because, if no report or entry is required, it cannot be pretended, that any of the provisions of the act extend to a privateer, demeaning herself in her military character, and not performing the office of a merchant vessel.

The counsel for the appellant has certainly urged many reasons, which have great weight in favour of the construction for which he contends. The term, "ship or vessel of war," has been considered, and, I think, properly considered, as a generic term, including both national ships, and private armed ships. When it is used generally, it comprehends both, unless the context, or the subject matter, should exclude the one or the other. The authorities cited at bar, show, that courts and writers on public law, have used the term in this general sense. If either the language, or the objects of this law, be consulted, I think they strengthen this natural and comprehensive construction of these words. The object of the law, is professedly and obviously to raise a revenue from commerce and consumption, not to regulate the conduct of the ships of war, whether public or private, of foreign nations. All the regulations are obviously calculated for merchant vessels, and not one calculated for privateers, who might come into our ports, although a totally distinct provision for them, would certainly be necessary. The language of the law, applies it to vessels destined for the United States, not to vessels destined for a cruise on the high seas. The form of the manifest requires, that the importer should state, to what port the vessel is bound, and to whom the goods are consigned; regulations not adapted to goods captured at sea, by a cruiser. If this act applies to privateers, the tonnage duty would be demandable. But it cannot be supposed, that this duty is imposed on privateers, employed in cruising, and not in the conveyance of merchandise.

It is also an argument, which deserves consideration, that the policy of the United States has been unfriendly to the sale, in our

ports, of prizes made by foreign privateers, on nations with whom we are at peace. Some of our treaties contain express stipulations against it; and the course of the government has been, to prohibit the practice, even where no specific engagements bind us to do so. Were the revenue laws, applicable to privateers, and to their prizes and prize goods, they would give a right to introduce those goods in opposition to the avowed and uniform policy of the government. The doctrine, that the validity of prizes could not be adjudged in our ports, would be of little importance, if they could be brought in and sold.

I think, then, that our revenue laws do not apply to privateers, unless they take up the character of merchant-men, by attempting to import goods. When they do so, they attempt, under the garb of their military character, to conceal real commercial transactions. This would be fraud on the revenue laws, which no nation will or ought to tolerate. The privateer, which acts as a merchant vessel, must be treated and considered as a merchant vessel. In this case, there is no evidence, that any goods were landed, or that more were brought in, than were intended to be carried out. The only evidence, which I think at all important, is that of the pilot. His testimony, certainly, excited suspicion. Opposed to it, however, is the testimony of the witnesses belonging to the vessel, who say, that the spirits were designed for the crew, to be used as stores.

I proceed, now, to the fifth count in the libel. The first question which will be considered in this part of the case, will be the constitutionality of the act of congress, under which this condemnation has been made. It will readily be admitted, that the power of the legislature of the Union, on this subject, is derived entirely from the 3d clause of the 8th section of the 1st article of the constitution. That clause enables congress, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." What is the extent of this power to regulate commerce? Does it not comprehend the navigation of the country? May not the vessels, as well as the articles they bring, be regulated? Upon what principle is it, that the ships of any foreign nation have been forbidden, under pain of forfeiture, to enter our ports? The authority to make such laws has never been questioned; and yet, it can be sustained by no other clause in the constitution, than that which enables congress to regulate commerce. If this power over vessels is not in congress, where does it reside? Certainly it is not annihilated; and if not, it must reside somewhere. Does it reside in the states? No American politician has ever been so extravagant as to contend for this. No man has been wild enough to maintain, that, although the power to regulate commerce, gives congress an unlimited power over the

² "And be it further enacted, that it shall not be necessary for the master, or the person having the charge, or command, of any ship or vessel of war, or of any ship or vessel, employed by any prince, or state, as a public packet, for the conveyance of letters and despatches, and not permitted, by the laws of such prince, or state, to be employed in the transportation of goods, wares, or merchandise, in the way of trade, to make such report and entry, as aforesaid." Act March 2, 1799, c. 128, § 31; 1 Story's Laws, 600.

cargoes, it does not enable that body to control the vehicle in which they are imported; that, while the whole power of commerce is vested in congress, the state legislatures may confiscate every vessel which enters their ports, and congress is unable to prevent their entry. Let it be admitted, for the sake of argument, that a law, forbidding a free man of any colour, to come into the United States, would be void, and that no penalty, imposed on him by congress, could be enforced; still, the vessel, which should bring him into the United States, might be forfeited, and that forfeiture enforced; since even an empty vessel, or a packet, employed solely in the conveyance of passengers and letters, may be regulated and forfeited. There is not, in the constitution, one syllable on the subject of navigation. And yet, every power that pertains to navigation has been uniformly exercised, and, in the opinion of all, been rightfully exercised, by congress. From the adoption of the constitution, till this time, the universal sense of America has been, that the word "commerce," as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce. I could feel no difficulty in saying, that the power to regulate commerce clearly comprehended the case, were there no other clauses in the constitution, showing the sense of the convention on that subject. But there is a clause which would remove the doubt, if any could exist.

The first clause of the ninth section, declares, that "the migration or importation of such persons as any of the states, now existing, shall think proper to admit, shall not be prohibited by the congress, prior to the year 1808." This has been truly said to be a limitation of the power of congress to regulate commerce, and it will not be pretended, that a limitation of a power is to be construed into a grant of power. But, though such a limitation be not a grant, it is certainly evidence of the extent which those who made both the grant and limitation, attributed to the grant. The framers of our constitution could never have declared, that a given power should not, for a limited time, be exercised on a particular object, if, in their opinion, it could never be exercised on that object. Suppose the grant and the limitation be brought together, the clause would read thus: "Congress shall have power to regulate commerce, &c., but this power shall not be so exercised, as to prohibit the migration, or importation of such persons, as any of the states now existing, may think proper to admit, prior to the year 1808." Would it be possible to doubt, that the power to regulate commerce, in the sense in which those words were used in the constitution, included the power to prohibit the migration, or importation, of any persons whatever, into the states, except so far as

this power might be restrained by other clauses of the constitution? I think it would be impossible. It appears to me, then, that the power of congress over vessels, which might bring in persons of any description, whatever, was complete before the year 1808, except that it could not be so exercised, as to prohibit the importation or migration of any persons, whom any state, in existence at the formation of the constitution, might think proper to admit. The act of congress, then, is to be construed with a view to this restriction, on the power of the legislature; and the only question will be, whether it comprehends this case? The case is that the brig Wilson, a private armed cruiser, commissioned by the government of Buenos Ayres, came into Norfolk, navigated by a crew some of whom were people of colour. They were however, all free men, and all of them sailors, composing a part of the crew. While in port, some of them were discharged, and came on shore. The libel charges that three persons of colour were landed from the vessel, whose admission or importation was prohibited by the laws of Virginia, contrary to the act of congress, by which the vessel was forfeited. Is this case within the act of congress, passed the 28th of February 1803?³

³ An act to prevent the importation of certain persons into certain states, where, by the laws thereof, their admission is prohibited.

Section 1. Be it enacted, that from and after the first of April next, no master or captain of any ship or vessel, or any other person, shall import or bring, or cause to be imported or brought, any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman, of the United States, or seamen, natives of countries beyond the Cape of Good Hope, into any port or place of the United States, which port or place shall be situated in any state, which, by law, has prohibited, or shall prohibit, the admission, or importation of such negro, mulatto, or other person of colour. And if any captain, or master aforesaid, or any other person, shall import or bring, or cause to be imported or brought, into any of the ports or places aforesaid, any of the persons whose admission or importation, is prohibited, as aforesaid, he shall forfeit and pay the sum of one thousand dollars for each, and every negro, mulatto, or other person of colour aforesaid, brought or imported as aforesaid; to be sued for and recovered by action of debt, in any court of the United States; one half thereof to the use of the United States, the other half, to any person or persons prosecuting for the penalty: and in any action instituted for the recovery of the penalty aforesaid, the person or persons sued, may be held to special bail: provided always, that nothing contained in this act, shall be construed to prohibit the admission of Indians.

Sec. 2. And be it further enacted, that no ship or vessel, arriving in any of the said ports or places of the United States, and having on board any negro, mulatto or other person of colour, not being a native, a citizen, or registered seaman of the United States, or seamen, natives of countries beyond the Cape of Good Hope, as aforesaid, shall be admitted to an entry. And if any such negro, mulatto, or other person of colour, shall be landed from on board any ship, or vessel, in any of the ports or places aforesaid, or on the coast of any state prohibiting the admission or importation as aforesaid, the said ship or vessel, together with her tackle, apparel, and furniture,

The first section, which is the prohibiting part of the act, is in these words: "From and after the first day of April next, no master or captain of any ship or vessel, or any other persons, shall import or bring, or cause to be imported or brought, any negro, mulatto, or any person of colour, &c." There are nice shades or gradations in language, which are more readily perceived than described, and the mind impressed with a particular idea, readily employs those words which express it most appropriately. Words which have a direct and common meaning, may also be used in a less common sense, but we do not understand them in the less common sense, unless the context, or the clear design of the person using them, requires them to be so understood. Now the verbs, "to import," or "to bring in," seem to me to indicate, and are most commonly employed as indicating, the action of a person on any thing, animate or inanimate, which is itself passive. The agent, or those who are concerned in the agency or importation, are not, in common language, said to be imported or brought in. It is true that a vessel coming into port, is the vehicle which brings in her crew, but we do not in common language say, that the mariners are "imported," or brought in by a particular vessel; we rather say they bring in the vessel. So, too, if the legislature intended to punish the captain of a vessel, for employing seamen of a particular description, or for allowing these seamen to come on shore, we should expect that this intention would be expressed by more appropriate words, than "to import" or "bring in." These words are peculiarly applicable to persons not concerned in navigating the vessel. It is not probable, then, that in making this provision, a regulation respecting the crew of a vessel was in the mind of congress. But it is contended, on the part of the prosecution, that the succeeding words of the sentence, exempting certain descriptions of persons from the general prohibition, show that the prohibition itself was intended to comprehend the crew, as well as those who did not belong to the vessel. Those words are, "not being a native, a citizen, or registered seaman of the United States, or seamen natives

shall be forfeited to the United States, and one half of the net proceeds of the sales on such forfeiture shall inure, and be paid over, to such person or persons, on whose information the seizure on such forfeiture shall be made.

Sec. 3. And be it further enacted, that it shall be the duty of the collectors, and other officers of the customs, and all other officers of the revenue of the United States, in the several ports or places situated as aforesaid, to notice, and be governed by, the provisions of the laws now existing, in the several states, prohibiting the admission or importation of any negro, mulatto, or other person of colour, as aforesaid. And they are hereby enjoined vigilantly to carry into effect the said laws of said states, conformably to the provisions of this act; any law of the United States to the contrary notwithstanding. Act Feb. 28, 1803, c. 63.

of countries beyond the Cape of Good Hope." That this limitation, proves the prohibition to have been intended to comprehend free-men, as well as slaves, must, I think, be admitted. But it does not follow, that it was, also, intended to comprehend the crew of a vessel, actually employed in her navigation, and not put on board, in fraud of the law. A person of colour, who is a registered seaman of the United States, may be imported, or brought into the United States, in a vessel in which he is not employed as a mariner. The construction, therefore, which would extend the prohibitory part of the sentence, to the crew of the vessel, in consequence of the language of the exception, is not a necessary construction, though I must admit, that it derives much strength from that language. The forfeiture of the vessel is not, in this section of the act, but I have noticed its construction, because it is not reasonable to suppose, that it was intended to forfeit a vessel for an act, which was not prohibited. The second section enacts, "that no ship or vessel, arriving in any of the said ports or places of the United States, and having on board any negro, mulatto, or other person of colour, not being a native, a citizen, or registered seaman of the United States; or seamen, natives of countries beyond the Cape of Good Hope, as aforesaid, shall be admitted to an entry." It is obvious, that this clause was intended to refuse an entry to every vessel, which had violated the prohibition contained in the first section; and that the words, "having on board" were used, as co-extensive with the words "import," or "bring." We had, at that time, a treaty with the emperor of Morocco, and with several other Barbary powers. Their subjects are all people of colour. It is true, they are not so engaged in commerce, as to send ships abroad. But the arrival of a Moorish vessel in our ports, is not an impossibility; and can it be believed, that this law was intended to refuse an entry to such a vessel? It may be said, that an occurrence which has never taken place, and which, in all probability, never will take place, was not in the mind of congress; and, consequently, the omission to provide for it, ought not to influence the construction of their acts. But there are many nations, with whom we have regular commerce, who employ coloured seamen. Could it be intended by congress, to refuse an entry to a French, a Spanish, an English, or a Portuguese merchant vessel, in whose crew there was a man of colour? I think this construction could never be given to the act. The words, "having on board a negro, mulatto, or other person of colour," would not, I think, be applied to a vessel, one of whose crew, was a person of colour.

The section then proceeds: "And if any such negro, &c., shall be landed from on board any ship or vessel, &c., the said ship or vessel, &c., shall be forfeited." The words, "shall be landed," seem peculiarly applicable

to a person, or thing, which is imported, or brought in, and which is landed, not by its own act, but by the authority of the importer, not to a mariner, going on shore voluntarily, or on the business of the ship. The words, "such negro," &c., refer to the preceding passages, describing those whom a captain of a vessel is forbidden to import, and whose being on board a vessel exclude such vessel from an entry, and no others. If, then, the commentary, which has been made on those passages, is correct, the forfeiture is not incurred by a person of colour, coming in as part of a ship's crew, and going on shore.

Although the powers of Barbary, do not send merchant ships across the Atlantic, yet their treaties with us, contemplate the possibility of their cruizers entering our ports. Would the cruizer be forfeited, should one of the crew come on shore?

I have contended, that the power of congress to regulate commerce, comprehends, necessarily, a power over navigation, and warrants every act of national sovereignty, which any other sovereign nation may exercise over vessels, foreign or domestic, which enter our ports. But there is a portion of this power, so far as respects foreign vessels, which it is unusual for any nation to exercise, and the exercise of which would be deemed an unfriendly interference with the just rights of foreign powers. An example of this would be, an attempt to regulate the manner in which a foreign vessel should be navigated in order to be admitted into our ports; and to subject such vessel to forfeiture, if not so navigated. I will not say, that this is beyond the power of a government, but I will say, that no act ought to have this effect given to it, unless the words be such as to admit of no other rational construction.

I will now take some notice of that part of the act which has a reference to the state law. The language, both of the constitution and of the act of congress, shows, that the forfeiture was not intended to be inflicted in any case but where the state law was violated. In addition to the words, in the first and second sections of the act, which confine its operation to importations, into "a state which, by law, has prohibited, or shall prohibit, the importation of such negro," &c.; the third section enjoins it on the officers of the United States, in the states having laws containing such prohibition, "to notice and be governed by the provisions of the laws, now existing, of the several states, prohibiting the admission or importation of any negro, mulatto, or any person of colour, as aforesaid." This is not inflicting a penalty for the violation of a state law, but is limiting the operation of the penal law of the United States, by a temporary demarcation given in the constitution. The power of congress to prevent migration or importation, was not to be exercised prior to the year 1808, on any person whom any of the states might think proper to admit. All

were admissible who were not prohibited. It was proper, therefore, that the act of congress should make the prohibitory act of the state, the limit of its own operation. The act of congress does not, necessarily, extend to every object comprehended in the state law, but neither its terms, nor the constitution, will permit it to be extended farther than the state law.

The first section of the act "to prevent the migration of free negroes and mulattoes" (see 1 Rev. Code Va. 1819, pp. 437, 438, c. 91, §§ 64-66) into this commonwealth, prohibits their coming voluntarily or being imported. The second section imposes a penalty on any master of a vessel, who shall bring any free negro or mulatto. The third section provides, that "the act shall not extend to any masters of vessels, who shall bring into this state any free negro or mulatto, employed on board, and belonging to such vessel, and who shall therewith depart." The act, then, does not prohibit the master of a vessel, navigated by free negroes or mulattoes, from coming into port, and setting only part of his crew on shore, provided they depart with the vessel. The state prohibition, then, does not commence, until the vessel departs without the negro or mulatto seaman. No probability, however strong, that the vessel will depart without the seaman, can extend the act to such a case, until the vessel has actually departed. If this be true, neither does the act of congress extend to such a case. But this is not all. The act of assembly prohibits the admission of free negroes and mulattos only, not of other persons of colour. Other persons of colour were admissible into Virginia. The act of congress makes a clear distinction between free negroes, and mulattos, and other persons of colour. But so much of the act of congress, as respects other persons of colour, does not apply to Virginia, because such persons were admissible into this state. The libel charges the sailors landed, to have been persons of colour, not negroes or mulattos. If, under this libel it were allowable to prove, that the sailors landed, were, in fact, negroes or mulattos, it is not proved. Mr. Bush does not prove, that any were landed, but says, that those discharged were "of different colours and nations." Andrew Johnson says "that on the 29th of October, the people of colour received their prize tickets, went on shore, and, of course, took their own discharge." There is, then, no evidence, that these people were negroes or mulattos. Upon these grounds, I am of opinion, that no forfeiture of the vessel has been incurred, and that so much of the sentence as condemns the brig Wilson, ought to be reversed, and restitution awarded.

WILSON (UNITED STATES v.). See Cases Nos. 16,729-16,737.

WILSON (WASHINGTON v.). See Case No. 17,240.

Case No. 17,847.

WILSON v. WATSON.

[Pet. C. C. 269.]¹

Circuit Court, D. Pennsylvania. April Term, 1816.

SCIRE FACIAS AGAINST EXECUTOR — REVIVOR OF JUDGMENT—AUDITA QUERELA—SALE OF LANDS FOR DEBTS.

1. To a scire facias against an executor, to revive a judgment obtained against his testator, the defendant cannot plead that there are terre tenants whose lands are also bound by the judgment, so as to oblige the plaintiff to sue out a scire facias against them.

2. The proper remedy, for persons aggrieved by proceedings under such a judgment, is an audita querela, or by obtaining a rule of court, to stay proceedings.

3. The court in such a case will, if necessary, direct an issue to ascertain the facts.

4. Lands in Pennsylvania are liable to debts, in the same manner as chattels.

5. Practice and proceedings, under the laws of Pennsylvania, to sell the lands of a deceased person for the payment of debts.

6. Practice and proceedings, under the laws of England, where lands are taken in execution for the payment of debts.

This was scire facias against the defendant, one of the executors of Susannah Rodney, who was executrix of Charles Hurst; to revive a judgment, recovered by the plaintiff against said Hurst, in his life time. See [Case No. 17,808]. The defendant, who was alone warned, appeared and filed a plea, in substance as follows: That the said Hurst, in his life time, and at the time the said judgment was rendered, was seized in his demesne as of fee, of divers lands, &c. within this state, and that he continued so seized, until after the rendering of the said judgment; but that, at different times afterwards, he, for a valuable consideration, conveyed the same to divers persons in fee; and the said lands, by force of said conveyances, and of divers mesne assignments thereof, or by descent or other operation of law, have come to the possession of divers persons; who, or whose heirs or assigns, are now seized in fee respectively, viz.: to the possession of Miers Fisher; and so enumerating other persons; and perhaps to divers other persons, purchasers as aforesaid, to the defendant unknown; and the defendant, protesting that goods, &c. which were of the said Hurst at the time of his death, came to the hands of the said Susannah Rodney, whereby the said judgment might be satisfied; and that no goods which were of the said Susannah Rodney, at the time of her death came to the hands of the defendant; and that the only assets or funds, whereby the said judgment can be satisfied, are the said lands, &c., whereof the said Hurst, at the time of the said judgment, was seized, and which, by the said conveyances, became vested as aforesaid, in the said persons, before named; who,

or some, or one of whom now being seized of the said lands, may have some good and sufficient cause to assign, why the said debt should not be levied of the said lands, &c.; and because the said terre tenants are not commanded to be warned, or summoned to show cause, &c.; the defendant prays judgment of the writ, and that it may be quashed. To this plea the plaintiff put in a general demurrer.

In support of the demurrer, it was contended: First, that the plea is bad in substance, there being no necessity for a scire facias against terre tenants, by the law or practice of Pennsylvania. Second, that this plea is bad in form, as it does not even profess to name the terre tenants but states, that perhaps there are others. Third, it does not state, that no goods of Charles Hurst, came to the defendant's hands; and for aught that appears, the defendant may have received sufficient personal assets to pay this judgment. Upon the first point was cited 2 Bin. 218. Upon the form of the plea, Chit. Pl. 454, 441, 445, 443; 1 Saund. 291; 2 Ld. Raym. 1015; 1 Ld. Raym. 337; 2 Salk. 194; 3 Term R. 186; 2 Saund. 210, notes.

On the other side, on the first point were cited, 3 Coke, 12; Herbert's Case, 2 Fitzh. Nat. Brev. (Ed. 1794) 265, 266; 2 Saund. 6 et seq. A scire facias may go against the terre tenants generally, or they may be named; and the first form is best; note 10. 1 Smith, Laws Pa. 8. As to the objections to the plea they were said to be merely formal, and not to be taken advantage of on a general demurrer. 1 Chit. Pl. 647.

In answer to the argument, that there was not a special demurrer, the plaintiff's counsel contended, that a special demurrer is not necessary to a plea in abatement. 1 Chit. Pl. 454, 443.

WASHINGTON, Circuit Justice. The principal objection made to this plea, is, that the lands of Hurst, being subject to execution for payment of debts, equally with the chattels; the plaintiff is not bound to join the terre tenants with the executor, in the scire facias to revive the judgment obtained against the testator; and therefore he cannot be compelled by plea to do so. The defendant's counsel have endeavoured to support the plea, by reference to English authorities. But the laws of England upon this subject, differ so widely from those of this state, that it is impossible for one to throw much light upon the other; there is no analogy between them. In England, lands are not liable to be sold in execution, except leasehold interests. If the debtor die after judgment, and the plaintiff means to proceed against the land, in order to extend it, he must take out a scire facias against the heir, or against him and the terre tenants, either generally, or name them in the writ. If all the terre tenants are not warned, those who are, may appear and plead this fact, in delay of execution; naming in the

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

plea, the persons so omitted; and the plaintiff must, if the plea be true in fact, take out another scire facias against the persons so named; and until they are warned, the proceedings will be stayed. The reason of this is, that the terre tenants who are warned, have a right to the aid of the others, to have contribution by an extent equally, of all the lands of the debtor, which are bound by the judgment.

In Pennsylvania, lands may be seized under a fieri facias, as chattels, and sold under the writ of venditioni exponas. If the defendant in the judgment die, the judgment may be revived by scire facias against the executor, and the lands of the testator may be taken in execution, and sold, if there be a deficiency of personal assets; and even without such execution, the executor may obtain an order of the orphans' court, to sell as much of the testator's lands, as may be necessary for the payment of his debts. Since then lands may be seized and sold in this state, under a judgment originally obtained or revived, against an executor; it is in vain to look into English cases for precedents, when according to the English law, the land cannot be touched, unless a judgment be first obtained against the terre tenants. Nevertheless, we may derive much information from an attentive examination of the English practice, and a correct understanding of the principles on which it is founded.

According to the law of England, in cases of judgment and recognizances, the lands of the defendant or conusor, such as he may have aliened subsequent to the recognizance or judgment, may be extended under the eligit, without the necessity of a scire facias against the alienees. I take the reason to be, that the judgment or recognizance charges the defendant or conusor, personally, and there being no change of the person against whom the execution is to issue, no scire facias is necessary. And even if a scire facias should be rendered necessary, in consequence of a year and a day having passed, still the law would be the same as to the alienees; for the writ in this case, is not to charge new parties, but merely to enable the defendant or conusor to show, that the debt has been paid or otherwise satisfied or discharged. But, although the plaintiff or conusee, need not sue out a scire facias against the alienees in this case, they are not without remedy. For, since it would be unreasonable, that the judgment or recognizance which charged all the lands equally, in the possession of the debtor, should be borne by a part of the purchasers only; they may compel the plaintiff or conusee, to sue out execution of all the lands; and as they had no day in court, they may relieve themselves by audita querela. But upon the death of the debtor or conusor, a scire facias must issue; not merely to revive, but to charge persons not parties to the judgment; and who of course have a legal right, by the rules of the common law, and upon

the immutable principles of justice, to be heard in court before they can be charged. If the plaintiff or conusee means to charge the land, he must sue out a scire facias against the heir, or the heir and terre tenants, if there be any; and thus, having a day in court, and opportunity to be heard, if they fail to avail themselves of it, by a proper plea, to bring in those who are bound to contribute, they cannot be afterwards relieved by audita querela.

Thus stands the practice in the English courts. Let the principles upon which it is founded, be now applied to the laws of this state, in relation to executions. Here the lands of the debtor, as well as his personal estate, may be taken in execution and sold, under a judgment against his executor. Lands are chattels for the payment of debts, and although they do not pass into the hands of the executor, in the same way that chattels do, they are nevertheless liable to be seized and sold, in like manner as if they had. In relation to creditors, the executor stands in the same situation as the testator. He alone is to be charged, and consequently, he is the only person against whom the judgment is to be revived. Because the real estate in the possession of the terre tenants may, under the judgment, be taken in execution; it no more follows, that a scire facias must issue against the terre tenants, than if the execution had gone against the testator; in which case, it has been shown, that no scire facias is necessary, although their lands may be extended; and if in that case, the terre tenants can relieve themselves in no other way than by audita querela, it follows, that the remedy should be the same in this, the reason being precisely the same.

That this is considered by the courts of Pennsylvania, as the correct mode of proceeding, is strongly to be inferred, from the two cases which were cited, of Young v. Taylor, 2 Bin. 218, and Graff v. Smith, 1 Dall. [1 U. S.] 481. In the former, one of the questions was, whether upon a judgment against Taylor, he being then in life, a scire facias ought not to have issued against the terre tenants? The court decided, that such process was unnecessary, and such would have been the decision according to the English law. In the other case, where the judgment was obtained against the administrator of the debtor; the question came before the court, upon a rule obtained by the purchaser from one of the heirs of the debtor, to show cause, why the sheriff should not be directed to postpone the sale of his lands, which had been taken under the execution, until all the lands remaining unsold in the hands of the other children, should be sold by virtue of the execution. The court suggested no objection to this mode of proceeding, which it would have been proper to do, if a scire facias was the proper remedy; on the contrary, the doctrine of contribution among the heirs and terre tenants, was fully gone into and decid-

ed, upon this rule, and the law and practice of this state, in relation to executions against land, was laid down as I have before stated it.

Upon the whole I am of opinion, that under the laws relative, to executions, in this state, the plaintiff is under no necessity to sue out a scire facias against the heirs and terre tenants of the debtor, in order to charge the lands of which they are seized; and that the proper remedy for those persons, where they may be aggrieved, by an execution levied upon their lands, is by audita querela; or more properly, by obtaining a rule of court to show cause. In this way, every relief to which the parties are entitled may be afforded; should an issue be necessary, the court may direct it. It is unnecessary to give any opinion, in relation to the various objections to the plea; it is sufficient, that it is no answer to the writ; and if it were, still I should feel no hesitation in saying, that it is no part of the executor's business to take care of the terre tenants' interest, and to delay the plaintiff, because it is possible they may be injured. Let those persons take care of themselves, and pursue such remedy as the law may allow, if it is their wish to do so. As for the executor, he wants not the co-operation of the terre tenants to assist him in making his defence, nor does he require, from them, contribution: let him look to his administration of the personal estate, and the proceeds of the real estate, so far as he has been authorized to sell it; and plead, so as to discharge himself from personal responsibility. The demurrer is adjudged good, and the defendant is ordered to answer over.

In answer to the argument, that this was not a special demurrer, the plaintiff's counsel contended, that a special demurrer is not necessary to a plea in abatement. 1 Chit. 454, 443.

WILSON (WILBUR v.). See Case No. 17,637.

Case No. 17,848.

WILSON v. WILSON.

[1 Cranch, C. C. 255.]¹

Circuit Court, District of Columbia. Nov. Term, 1805.

POWERS OF EXECUTOR—CONFESSION OF JUDGMENT.

An administrator has a right at law to give a preference to a creditor by confessing a judgment, and a court of equity will not interfere by injunction.

[Cited in brief in *Relfe v. Columbia Life Ins. Co.*, 76 Mo. 595.]

Bill for injunction to prevent the administrators from confessing judgment at law in favor of other creditors in equal degree; and to distribute the assets *pari passu*.

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

C. Lee, for complainant.

An administrator is a trustee, and subject to equitable jurisdiction. At law an administrator may prefer a creditor in equal degree; but a court of equity may interfere; especially before any payments are made. The equity of him who claims *pro rata* is superior to that of him who contends for all. *Kelly v. Collins*, 1 Fowl. Exch. Prac. 298; *Max. Eq.* 15, 17; 2 Ch. Cas. 228; *Gibson v. Kinven*, 1 Vern. 66; *Solley v. Gower*, 2 Vern. 62; *Waring v. Danvers*, 1 P. Wms. 296; *Joseph v. Mott*, Finch, Prec. 79; *Smith v. Haytwell*, Amb. 66; *Brooks v. Reynolds*, 1 Brown, Ch. 183; *Hardcastle v. Chettle*, 4 Brown, Ch. 163; *Lowthian v. Hassel*, Id. 167.

Mr. Simms, for defendants.

This attempt is novel. There is no precedent for it as to legal assets. It goes to prevent the creditors from proceeding at law to recover judgment. The administrators cannot defend themselves. If they are trustees, they are created by law and must proceed according to law. Why not extend the principle to the dignity of the debt? A court of chancery has as good a right to interfere in that case as in this. A creditor ought not to be prevented from gaining a priority at law by his diligence. Preference is not *fraud per se*. If it was, all preferences would be void at law as well as in equity. In equal equity the law must prevail. *Max. Eq.* 62. There is a difference between the court's power over trusts created by the parties and those created by law. Equity will not interfere, unless there is some circumstance which brings the legal assets under its jurisdiction. The mere deficiency is not a ground of equity. Equity will not prevent the creditor from the legal remedy which he had at the death of the intestate. *Went. Off. Ex'r*, 145. Preference is not *covin*. *Goodfellow v. Burchett*, 2 Vern. 299; *Waring v. Danvers*, 1 P. Wms. 295; *Earl of Orford's Case*, Finch, Prec. 183; *Morrice v. Bank of England*, Cas. t. Talb. 220; *Martin v. Martin*, 1 Ves. Sr. 211.

E. J. Lee, for complainant, cited *Brown v. Allen*, 1 Vern. 31; *Brathwaite v. Brathwaite*, Id. 335; *Wall v. Thurbane*, Id. 414; *Buccele v. Allee*, 2 Vern. 37; *Surrey v. Smalley*, 1 Vern. 457; *Silk v. Prime*, 1 Brown, Ch. 138, note; *Girling v. Lee*, 1 Vern. 63; *Greaves v. Powell*, 2 Vern. 248; *Cutterback v. Smith*, Finch, Prec. 127; *Bickham v. Freeman*, Id. 136; *Harding v. Edge*, 1 Vern. 143; *Coop. Bank. Law*, 29, Addenda; *Vin. Abr. tit. "Executors, D."*; 3 P. Wms. 222.

KILLY, Chief Judge. The injunction in this case, is applied for on the ground that equity requires that the creditors of an insolvent should equally share his effects. It is an application to dispense with a rule of law, because that rule is inequitable in itself, and not because this particular case has any peculiar circumstances which take it out of

the general rule. That a law is in itself inequitable in every possible case, or in its general application, will not justify the court in dispensing with it. This would be to usurp legislative power. Where it is necessary for a person to apply to a court of equity to obtain a remedy which he could not have at law, the court will compel him to do equity before they will grant him the relief he asks. Upon this principle, it is, that when a creditor claims equitable assets, they will allow him only an equal share with those who have equal equity. But where a creditor gains a legal advantage, the court will not restrain him, unless for the purpose of carrying into effect its own decree—its own decree already passed, not that which it may hereafter make. The same law which gives a priority to creditors of a particular class, (for instance, bond-creditors,) makes it necessary, in case of a deficiency of assets, that a priority should exist between creditors in equal degree; otherwise the administrator would not be able to protect himself against them all, by paying some, and pleading plene administravit as to the residue. Priority of payment follows priority of judgment; and even if an administrator could not confess a judgment, there would still exist a priority, because the judgments could not be rendered at the same moment. Some creditors would gain a priority by diligence, and others by the greater ease in establishing their claims. It is, therefore, clear, that there is, at law, a priority, or at least the legal means of obtaining a priority, among claims in equal degree, as well as among claims of different degrees. The principle upon which the injunction is claimed, applies as strongly to reduce to a level claims of different degrees, as claims of the same degree. The rule of law is as strong in favor of the one priority as of the other. The question then recurs, whether this court can set up the general inequitable nature of the law, as (in itself) a ground of equitable relief? We are clear that it cannot. That it would be an usurpation of legislative, and not an exercise of judicial powers. The injunction, therefore, cannot be granted.

WILSON (WOODWORTH v.). See Case No. 18,023.

WILSON (WYNN v.). See Case No. 18,116.

Case No. 17,849.

WILSON v. YOUNG.

[2 Cranch, C. C. 33.]¹

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

TRANSFER IN WRITING—PAROL EVIDENCE.

Parol evidence cannot be given of a transfer in writing, without proof of the loss of the writing, or otherwise accounting for its non-production.

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

Assumpsit, on a policy on the ship Governor Strong, from Norfolk to Liverpool. To prove interest in Wilson, parol proof was offered that a transfer was made by Henderson to Wilson, to secure Wilson against his indorsement for Henderson. This transfer was by an instrument in writing.

The defendant's counsel objected that this testimony is not competent evidence without proof of the loss of the instrument, or otherwise accounting for its non-production. And of that opinion was the court. THURSTON, Circuit Judge, absent.

WILSON, The. FREDERICK M. See Case No. 5,078.

Case No. 17,850.

WILSON PACKING CO. et al. v. CLAPP.

[8 Biss. 154; 3 Ban. & A. 243; 13 O. G. 368; Fent. Pat. 35.]¹

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

PATENT FOR INVENTION—CANNED GOODS—INJUNCTION AGAINST INFRINGEMENT—PROOF.

1. The main and principal feature of the art of canning foods of various kinds, being old and well known, a patent for any particular article of canned goods "as a new article of commerce" must be clearly sustained by proof, in order to sustain an injunction against other manufacturers of similar goods.

2. An injunction ought not to issue to restrain the infringement of a patent when it does not appear from the record that the defendant has ever made or sold any of the goods in the district.

3. The sending of circulars to parties engaged in the trade, notifying them of a preliminary injunction, is improper.

4. Whether the pyramidal form of can is patentable, quære.

In equity. On the 5th of January last, a motion was made by complainants, based on the bill and affidavits previously filed, for an injunction, restraining the defendant [William B. Clapp] from putting up, manufacturing, or selling canned corned beef, in such manner as to infringe upon certain patents belonging to complainants and particularly described in the bill. The bill and affidavits were not read, but both parties being represented by counsel, it was conceded that a case was made for an injunction and an injunction order was accordingly entered as prayed, with the understanding that defendant might move for the vacation of said order, as soon as counsel could prepare their affidavits. The affidavits were soon after filed and the motion submitted upon the allegations and proofs of the respective parties and the briefs and arguments of counsel.

Munday & Everts, West & Bond, John N. Jewett, and T. A. Goodwin, for complainants.

Eldridge & Tourtelotte, Noble & Orrick, and Coburn & Thacher, for defendant.

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

BLODGETT, District Judge. The bill charges that complainants own three patents relating to the subject matter of packing and preserving meats in hermetically sealed cans or packages. The first of said patents was issued [July 12] 1864 to W. C. Marshall [No. 43,516; reissued May 25, 1875, Nos. 6,451 and 6,452]; the second was issued in 1874 to W. J. Wilson [No. 149,276; reissued April 6, 1875, No. 6,370]; and the third was issued in 1875 to J. A. Wilson [No. 161,848; reissued October 23, 1877, No. 7,923]. All these patents have been re-issued, and two of them, (the Marshall and one of the Wilson) within the past year. The claims are, briefly, for canned meats put up in the manner described "as a new article of commerce"; and for some special improvements in the cans or packages—the principal of which is the shape of the can—the Wilson can being made in the form of a section of a pyramid with rounded corners; whereby the solidly packed contents of the can are turned out in a firm mass or cake by cutting off the bottom or lower end of the can, so that the beef can be readily cut in slices for the table.

The process of preserving fruits, vegetables and meats in hermetically sealed cans or packages, is not new or original to these patentees. In 1810, M. Appert published in France the details of the process then lately discovered by him for preserving fruits, vegetables and meats by parboiling or cooking them so as to expel the fixed air, and then sealing them up in airtight cans, bottles or jars. This discovery was considered of so much importance to the world that the French government paid M. Appert 10,000 francs for making it public. And the art has since then been extensively practiced both in this country and Europe. The Appert process was afterwards improved by Durand, Danksin, Gamble and others in England, and by Winslow and others in this country, so that canned foods of various kinds had become an article of commerce long before the date of either of complainants' patents. 9 Enc. Brit. 767, tit. "Food" (published in 1855); 13 New Am. Cyc. (published in 1863) tit. "Preservation of Food," p. 569. The main and principal features of the art being so old, it will be, at least, a nice question to determine how far a patent for each particular article of canned foods "as a new article of commerce" can be sustained, as a new invention. I do not intend to be understood as now saying that such patents are invalid for want of novelty. I only intend to say that I think courts should not be hasty or inconsiderate in granting injunctions at the instance of the holders of such patents against other manufacturers of similar goods. And had the whole facts been brought to my notice, as they are now, at the time the original motion was made, I feel sure I should not have granted the injunction.

So far as the complainants' patents cover the cans they use, no special proof is put into the

record. To the eye the cans used by complainants and those said to have been sold by defendant, appear to be, externally, substantially alike. But I doubt whether the pyramidal shape which is the distinctive feature of complainants' can, is a patentable device. It would seem to be a shape so often adopted in other packages and molds when it is desirable to turn the contents out whole or solid, as to be no longer novel. Still, it may be patentable. I only intimate a doubt, and say that I think a court should be cautious in regard to such a patent.

Aside from the objections that apply directly to the patents it does not appear from the record that this defendant has ever made or sold any goods in the similitude of complainants' goods in this district. He is the agent of a St. Louis packing company for the sale of their goods in New York City, and does no business and has no place of business in this district. A preliminary injunction ought not, therefore, to issue against him in this district; because such a process cannot run beyond the territorial limits of the district; certainly not in an ordinary case such as is made in this record. A case possibly might be made upon extraordinary facts which would justify such an issue, but such case is not made here.

It also appears that immediately on the entry of the order in this case, circulars and notices were sent outside this district to parties engaged in the trade, dealing with the complainants' competitors, intended to alarm such persons and injure the trade of competing manufacturers. This strikes me as hardly justifiable under the circumstances. I think complainants, if they have faith in their patents, should make their attack directly on such competitors as they claim are infringing their patents, and contest the question squarely with them. This class of goods has now, according to the proofs, gone into very general use as an article of food, and can be found for sale in most family groceries; and it seems to me not the right course to attack these dealers, and annoy and intimidate them by threats of patent suits. The course taken by complainants suggests the charge that they intended to obtain many of the advantages of an injunction by harassing and interfering with the business of a rival without taking the risk of a direct suit with that rival, when they would be responsible for the consequences of their act. Such may not have been their purpose but it is liable to such construction.

The injunction is dissolved.

This case was subsequently brought to final hearing before DRUMMOND and BLODGETT, District Judges, and the patents held void for want of novelty, and the bill dismissed on a certificate of division. See *Wilson Packing Co. v. Clapp* [Case No. 17,851].

[For other cases involving these patents, see *Wilson Packing Co. v. Clapp*, Case No. 17,851, and *Wilson Packing Co. v. Hunter*, 9 Fed. 547.]

Case No. 17,851.

WILSON PACKING CO. et al. v. CLAPP.

[8 Biss. 545; 8 Reporter, 262; 4 Ban. & A. 355; 11 Chi. Leg. News, 353.]¹Circuit Court, N. D. Illinois. June 19, 1879.²

PATENTS—CANNED BEEF—NOVELTY—FORM OF CAN.

1. The method of cutting up meat, preparing it with antiseptics, pressing, putting into cans, pressing afterwards, and then hermetically sealing the cans, is not patentable, for want of novelty.

2. A patent for cooked meat put up in a solid form, in its natural state, without disintegration or desiccation, in hermetically sealed packages, can not be sustained as a new article of commerce.

3. The pyramidal form of can, for packing food, is not patentable.

4. The Marshall and Wilson patents for canning beef not sustained.

[Cited in *Wilson Packing Co. v. Chicago Packing & Provision Co.*, 9 Fed. 548.]

In equity.

Munday & Everts, J. N. Jewett, and W. H. Clifford, for complainants.

Eldridge & Tourtellotte, for defendant.

Before DRUMMOND, Circuit Judge, and BLODGETT, District Judge.

DRUMMOND, Circuit Judge. The only question in this case necessary to be considered is, whether the two things which are the subject-matter of the patents are in themselves patentable, namely, the mode described in which meat is compressed, and put into cans, and the mode described of making the cans or vessels in which the meat is placed.

The first patent is that of W. C. Marshall, originally issued July 12, 1864, and re-issued May 25, 1875. It relates to the putting up and preserving of meats. Mr. Marshall's mode, as I understand, is this: He prepares the meat, it being cut in proper form, and in its raw state, by what are called antiseptics; that is, by the various methods of preserving meat with salt, salt-peter, etc., and when the meat is in this condition he subjects it to a strong pressure. It is then put, in the proper quantity, into a package, box or can, of the required size, and is there also subjected to pressure. Then, in the usual way, the air is expelled from the package by heat, and it is hermetically sealed.

This seems to be the whole process as described by Mr. Marshall, and in his claim he declares that it is for packing and preserving meat, in subjecting it, after it has been submitted to preserving processes, to a heavy pressure, and packing and hermetically sealing in packages, or boxes, compressed meat, as described.

The question is whether of itself, this was

¹ [Reported by Josiah H. Bissell, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission. 8 Reporter, 262, contains only a partial report.]

² [Affirmed in 105 U. S. 566.]

a patentable subject, viz.: cutting up meat in its raw state, putting it into antiseptics, subjecting it to pressure, as in a mold, before and after it is put in the box or package, and then hermetically sealing it. It is admitted that the manner in which the package is hermetically sealed was well known. That is not claimed, but only the particular way in which the meat is prepared, put up and placed in the box or package.

The main difference as I understand, between the patent of Marshall and that of William J. Wilson, is that in the latter, which was originally issued on the 31st of March, 1874, and re-issued on the 6th of April, 1875, Wilson describes his meat as being first cooked thoroughly, at a temperature of 212° Fahrenheit, so that all the bone and gristle can be removed and the meat retain its natural grain and integrity. In both patents, it is claimed that the meat retains all its nutritious qualities, and that it is not desiccated, or dried, and in Wilson's patent, after it is thus cooked, it is compressed, as in Marshall's, in the box or package, and then it is hermetically sealed. These two modes of preserving meat appear to be somewhat different from any of those which have been presented to the court, in this, that the meat is not put up in brine or any other liquid, neither is it dry or desiccated, but it remains in such a form that it can be reduced to a compact mass, so as to retain most of the nutritious qualities of the meat. I take it for granted that it is impracticable to cook meat as Wilson proposes it should be cooked, (although nothing is said as to the manner in which it is to be cooked,) either by steam or water, or otherwise, without losing some of its nutritious qualities, but there may be a difference in the mode in which it is cooked; in some cases it may retain most of its nutriment, and in others only a comparatively small part. It is claimed both by Wilson and by Marshall, that it retains all the juices and nutritious qualities of the meat, the compression only removing the superfluous moisture. I doubt whether that is exactly true, but I presume it does retain most of the nutritious qualities of the meat.

Wilson claims "the process described for packing cooked meats for transportation, by compressing the same into an air-tight package, so as to preserve the meat in its integrity and retain all the natural juices and nutritious qualities of the meat, substantially as set forth;" and then he claims "as a new article of merchandise, cooked meat put up in a solid form in its natural state, without disintegration or desiccation, in hermetically sealed packages as set forth." It seems that there is an advantage in putting up meat in this way, which does not exist in other cases which have been brought to the attention of the court. The difficulty I have had, and still have, in the case is, whether this can be said to be of such a character as to entitle the parties to a patent.

The next point is as to the form of the can described in the patent of John A. Wilson, issued April 6, 1875; re-issued, Oct. 23, 1877. He claims an hermetically sealed can, used in packing meat or other articles, made in the shape of a pyramid, having rounded corners, and both ends slightly flaring to form shoulders, against which the head or end pieces rest. In other words, it is the shape of a can of cooked corned beef, put up by Libby, McNeill and Libby, and it is not material of what size it is made. "A.," he says, represents the body of the can made in the form of a truncated pyramid with rounded corners, and of any desired number of sides, although he prefers to make it of four sides; both ends of the body are made slightly flaring so as to form interior shoulders or offsets against which the heads "C." and "B." (top and bottom) rest. The edges of these heads are turned outward, as shown, and the flaring edge of the end of the can is turned over the flange, and the three thicknesses of metal pressed together by machinery, with or without solder, so as to make the joints air-tight. The meat is prepared, cut up, pressed and put in cans, pressed afterwards, and then the cans hermetically sealed. As I understand, the meat is put in at the large end. And then he claims the can for packing food, hermetically sealed, and constructed of pyramidal form and rounded corners, with offset ends to support the head, said head being secured as shown and described. He also claims, as an improved article of manufacture, solid meat, compressed as described, and within a pyramidal can, so that said can forms a mold for the meat, and permits its discharge in a solid cake substantially as specified.

It is conceded that there cannot be a patent for a mere form unless the form is of the essence of the invention. It is not easy to describe what constitutes the essence of the form so as to make it the subject of a patent, and distinguish it from that which is mere form. Sometimes, as the courts say, the form may be the substance of the invention, and there may be such a change produced in a certain article as to make it, (the article manufactured or otherwise, whatever it may be,) the subject of a patent. It seems that there are some advantages about the construction of the can which have made it come into common use. I have described the manner in which the meat is put up—that it becomes a compressed, compact mass, neither dry nor liquid; that it retains most of its nutritious qualities, and if freed from the pressure which surrounds it, it will retain its compact condition. The advantage of this can is, that when it is opened, as it usually is, at the bottom, and the bottom taken out, (the can having been previously cooled, so that the ice or the cool water may leave it in its least expansive condition,) and it is struck on the top, the meat falls out in a compact mass, and then can be eaten, or is

fit for the table. Both of these are advantages, and the advantages have been such as have caused it, as the testimony shows, to come into great use, such that it has made what is claimed to be a revolution in the trade of preserved meat. And the patent office seems inclined to issue patents for such things which it calls a new article of manufacture, both as to the manner in which the meat is put up, and as to the structure of the can. And it has issued patents for both of these as a new article of manufacture. But I must confess, on principle, I am not inclined to hold that these are the proper subject matter of a patent.

If we sustain a patent of this kind, I do not exactly see how we can do so without preventing everybody else from preparing and cooking meat, cutting it up and subjecting it to a pressure as these patentees describe. There seems nothing of invention in preparing and cutting up meat, or in putting it into a can, or in pressing it before or after it is put there, and there is certainly nothing new in hermetically sealing a can in the manner in which this is said to be sealed. There is nothing new in constructing a can of this particular form. It is a matter of fancy more or less. This can might be round or octagonal or in any other form, provided it was larger at the bottom than at the top—lessening gradually as it approached the top—and if the meat was in the same condition in which this was, and the can open at the bottom, the meat would fall out in the same way as from the plaintiff's can. If we sustain this patent, we prevent every one else from putting up meat in this form; that is, from cooking it, compressing it in the manner in which this is compressed, and putting it in cans, and hermetically sealing it. I do not feel like sustaining a patent, when such consequences are to follow.

And as to the plaintiff's can: There is nothing about this can, except the exercise, as I understand it, of mechanical skill. There is, certainly, nothing inventive in making it in this shape. I was at first inclined to think that there might be something in the peculiar form in which the can was put together, as in the rounded corners with both ends slightly flaring to form the shoulders, and the manner in which the end pieces are put on and secured, but I do not know that this is more than a mere mechanical device.

In stating my views about these patents, I may admit that there are some authorities which seem to sustain patents of this kind, and that seems to some extent to be the usage of the patent office; but my own view is, that this is wrong, and that patents of this kind ought not to be sustained.

The case of the can of lard, unreported, *Tucker v. Fairbanks* [Case No. 14,218], is somewhat similar. I have always doubted whether I ought to have sustained that claim. My desire about this case is, that it

should be arranged in such a way that the opinion of the supreme court can be taken on this question, whether or not these two things are patentable, namely: the manner in which the meat is prepared, compressed and placed in the can; and secondly, the manner in which the can is constructed.

It may be true that here is an article of merchandise which, in one sense, may be said to be new in the form in which it exists, and which, in consequence of its advantages, has come into common use.

It may be true that this is something like the caustic alkali case which has been so often referred to, but I must confess, personally, my strong opposition to the maintenance of patents of this kind as being against the rights of the public. For the court now to sustain these patents in this form is really giving them a complete monopoly of putting up compressed meats in this way, and in cans like these, and as the questions involved in this case are important, and as it may simplify matters, my brother judge and myself have concluded to certify the questions to the supreme court.

[On appeal to the supreme court, the decree of this court was affirmed. 105 U. S. 566, note.]

These patents were again brought before this court, at the December term, 1881, and decided invalid in the case of *Wilson Packing Co. v. Chicago Packing & Provision Co.* [9 Fed. 547]. See, also, *Wilson Packing Co. v. Clapp* [Case No. 17,850].

Case No. 17,852.

WILSON PACKING CO. et al. v. HUNTER et al.

[8 Biss. 429; 8 Cent. Law J. 333; 25 Int. Rev. Rec. 137; 7 Reporter, 455; 4 Ban. & A. 184; 11 Chi. Leg. News, 207.]¹

Circuit Court, S. D. Illinois. March, 1879.

FOREIGN CORPORATION — SERVICE OF PROCESS — FEDERAL JURISDICTION.

1. A foreign corporation doing business in Illinois, is liable to be sued there in the federal court, though there be no express provision of statute in regard to service.

[Cited in *Hayden v. Androscoggin Mills*, 1 Fed. 95; *Ehrman v. Teutonia Ins. Co.*, Id. 478; *Uphoff v. Chicago, St. L. & N. O. R. Co.*, 5 Fed. 547; *Eaton v. St. Louis Mining & Smelting Co.*, 7 Fed. 141; *Grover v. American Exp. Co.*, 11 Fed. 338; *Boston Electric Co. v. Electric Gaslighting Co.*, 23 Fed. 839; *Maxwell v. Atchison, T. & S. F. R. Co.*, 34 Fed. 288.]

[Disapproved in *Desper v. Continental Water-Meter Co.*, 137 Mass. 254.]

*2. Such a corporation is to be "found" there, within the meaning of the United States statutes, which provide that no suit shall be brought against any person in any district other than that in which he is an inhabitant, or where he is found.

¹ [Reported by Josiah H. Bissell, Esq., and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here compiled and reprinted by permission. 7 Reporter, 455, contains only a partial report.]

[This suit was brought for an infringement of a patent as to the process of preserving and canning meats. The defendants [Robert Hunter and others] object to the jurisdiction of the court, because they are a corporation of the state of Missouri, and, therefore, can not be sued in the Southern district of Illinois. The complainants assert that they may be sued here, because of the statute of Illinois which provides (Rev. St. p. 290, § 26): "Foreign corporations and the officers and agents thereof, doing business in this state, shall be subjected to all the liabilities, restrictions and duties, that are or may be imposed upon corporations of like character, organized under the general laws of this state, and shall have no other or greater powers." The St. Louis Beef Canning Company has a slaughter-house and stock-yards at East St. Louis, and the officers and agents of the company do business in that state for it and in its name. Thus, it is argued, the corporation is doing business in the state of Illinois, within the provisions of the statute. There is no averment by the defendants, showing that the corporation is not doing business in that state. The Illinois statute provides (Rev. St., p. 775, § 5) that corporations may be served by summons on the president, and it is not denied that the president of the St. Louis Beef Canning Company was found in this state, and was duly served with summons in this case as such president.]²

Goodwin, Offield & Towle, for complainants.
Holmes, Rich & Noble, for defendants.

DRUMMOND, Circuit Judge. This case is of importance, as it involves the question whether process can be served upon a foreign corporation doing business in this state, because it is found in the state.

The acts of 1789 [1 Stat. 73] and 1875 [18 Stat. 470] declare that no suit shall be brought against any person in any other district than that in which he is an inhabitant, or where he is found, so that where suit was brought against any person in a district other than that in which he resides, or in which he is an inhabitant, he must be found there, in order to enable the courts of the United States to have jurisdiction; so there has always been a rule in relation to suits brought against any persons in the federal courts. When the supreme court declared that a corporation was a person within the meaning of the law, which authorized suit to be brought by and against persons, then, of course, the question arose at once where this person was to be found or was found. The case of *Bank of Augusta v. Earle*, 13 Pet. [38 U. S.] 517, decided the question as to where a corporation could make a contract. The question did not arise there under the clause of the law as to where a corporation was found. The court held that although a corporation could not

² [From 8 Cent. Law J. 333.]

migrate from the place where it was created, still, unless there was some law of the state which prohibited a corporation from making a contract, that is to say, where it was outside of the state by which it was created, it was a valid contract and might be enforced. In the cases which have been cited, the Schollenberger Case, 96 U. S. 369, the Case of Williams (Williams v. Empire Transp. Co. [Case No. 17,720]), and some other cases, they were cases where there was an express provision of the statute declaring that process might be served upon a foreign corporation doing business in the state or district where suit was brought. That was true of the law of Pennsylvania, the law of New Jersey, and is also true of foreign insurance companies in this state. These are obliged to answer to process upon their agent precisely the same as in the state where created. But in this case it is admitted that no express provision of law authorizes this particular corporation, created under the law of the state of Missouri, to be served within the limits of this state. But I think we may infer that, from its right to do business in this state. That foreign corporations, and their agents doing business in this state, shall be subject to all liabilities, restrictions and duties which are or may be imposed upon corporations of like character of this state, and that they shall have no other or greater power, is expressly stated in the statute. Rev. St. Ill. c. 32, § 26. This statute implies that foreign corporations may do business within this state, but when they are admitted to do business in this state, they shall be subject to this provision of the law. Now, the question is, whether foreign corporations, coming into this state and doing business in this state, are subject to this liability, namely: to be sued within the courts of this state, and so in the courts of the United States, in the district where they are doing business. It seems to me that this question was substantially decided by the case of Harris, reported in 12 Wall. (Railroad Co. v. Harris, 12 Wall. [79 U. S.] 65). If we admit that under the law of this state this corporation can do business in this state, and has been doing business in this district within the meaning of the acts of congress, then it was found within this district so that process could be served upon it.

The allegation in the bill that the St. Louis Beef Canning Company—this corporation created under the laws of Missouri—owns and possesses a slaughter house and stock yard in the city of East St. Louis, Illinois, where beef to be canned by the company is slaughtered and dressed, preparatory for, and in the name of, such company, is not denied in the plea, and it must be considered as admitted. Now, in the Case of Harris, supra, the only ground upon which the court took jurisdiction of the case was under the acts of congress. The Baltimore & Ohio Railroad was authorized to construct a railroad within the District of Columbia; the service of process

was upon the president of the company; he was found within the district; the person—the corporation—was there through its president, and it was the only way that the court could by any possibility take jurisdiction. The person—the defendant—the corporation, must be found within the district in order that the court may take jurisdiction, and it was found there in consequence of the acts of congress, which authorized it to construct a branch road within the district, and because the president was there within the district. At the time the writ was thus served there was no act of congress authorizing suits against corporations doing business in the district, and of course no act which authorized service of process upon foreign corporations, though the court took jurisdiction of the case, as I have said, on the ground that the corporation was there found. It is said that if this position be maintained, that every officer of every foreign corporation who comes within the limits of the state of Illinois is liable to service of process, and that the corporation would be found here because the officer or president was here. That does not follow. On the contrary, I think that it is to be said only of foreign corporations that should be thus found here, in the absence of any express legislation authorizing service of process. It is necessary that the foreign corporation should do business in the state in order to be found here, and in order to warrant service on the president when within the limits of the state. The mere fact of its president or other officer passing through the state, and process being served upon him, would not bring the case within the meaning of the act of congress. A foreign corporation would not in that way be found within the limits of the state, and it seems to me that independent of the authority of the case of Harris, sound reasoning leads us to the same result. As soon as it was determined that a corporation was a person liable to sue and be sued, it must of necessity be brought within the jurisdiction of the federal courts. As the law is now understood and has been decided by the supreme court of the United States, a foreign corporation cannot do business outside of the territory where created, except by the consent of the state where it desires to do business. Of course, that being so, the state has a right to prescribe upon what condition it may do business. As to foreign insurance companies, Illinois has legislated upon that subject because the agents are so numerous; their names are legion. The statute, therefore, declares that before a corporation of that kind can do business here, it must consent to service of process upon its agent.

There is no such legislation as to this particular kind of corporation; but does it follow that the state must legislate upon the Beef Canning Association of Missouri, or that otherwise it cannot be served with process? I do not think that because it has legislated in relation to foreign insurance companies, it

must legislate upon all corporations as to service of process. When they attempt to do business within the state, they come within the limits of the state; they are protected by our laws when they transact business within our territory, and are they then not to be subject to suits against them? Ought they to be permitted to come here, to make contracts, to do, maybe, all their business here by virtue of the law of another state, and then say they cannot be sued in our state because their corporation is within another—a sister state? I do not think that it is reasonable or right. They transact business under the protection of the laws, and they ought to be liable to the burdens as well as the benefits of the laws. One of the burdens, I think, is liability to be sued. I do not very well see how they cannot be, under the statute I have cited already, which provides that they shall be subject to all liabilities, restrictions and duties of home corporations. Undoubtedly, the state can legislate in relation to all foreign corporations, and can declare under what terms they shall do business within our state, as in relation to foreign insurance companies, and perhaps other kinds of corporations. It has not chosen to do so as to this particular class, but I do not think on that account a foreign corporation doing business within our state can escape the consequences which follow from that business, one of which is liability to be sued. Inasmuch as this plea does not meet the allegation of the bill in all respects, and especially in the view taken of this case, it must be held to be insufficient, and is overruled.

NOTE. A national bank cannot be sued in the federal court outside of the district where it is located, and service on the cashier, when found within another district, does not give jurisdiction. *Main v. Second Nat. Bank* [Case No. 8,976]. The acts of congress confer no jurisdiction over a defendant who is served with process, while temporarily in a district in which he does not reside. *Smith v. Tuttle* [Id. 13,120]. In a suit against a corporation, in the United States circuit court in one state; by a citizen of another state, service of process within the state upon a joint defendant, a citizen of a third state, gives the federal court jurisdiction over him. *Mowrey v. Indiana & C. R. Co.* [Id. 9,891]. Under the act of congress of March 3, 1875, a corporation cannot be served with process outside of the state where it was created, and the presence of an agent of a foreign corporation is not the presence of the corporation within the meaning of the act. *Hume v. Pittsburgh, C. & St. L. R. Co.* [Id. 6,865.]

Case No. 17,853.

WILSON SEWING MACHINE CO. v. JACKSON.

[1 Hughes, 295; 1 4 Cent. Law J. 225.]
Circuit Court, D. Maryland. Feb. Term, 1877.
DEPOSITIONS DE BENE ESSE—ADMINISTRATION OF OATH.

1. Section 864, Rev. St. U. S., is in derogation of the common law, and therefore its provi-

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

sions must be strictly complied with in taking depositions de bene esse under it; the witness must be "carefully examined," and must be sworn to testify the "whole truth" on the entire subject-matter of the depositions, and not merely the whole truth in response to each of several interrogatories propounded to him.

2. As to the mode of administering the oath, it is sufficient in that respect to follow the directions of the statute law of the state of the United States where the depositions were taken.

[This was an action by the Wilson Sewing-Machine Company against Isabella Jackson, executrix of Samuel Jackson. Heard on motion for a new trial.]

William Daniel and A. Stirling, Jr., for plaintiff.

O. F. Bump and T. M. Lanahan, for defendant.

BOND, Circuit Judge. At the trial of this cause the plaintiff, in support of its claim, offered to read to the jury the deposition of the president, one Wilson, taken de bene esse. The defendant objected on the ground that the statute (Rev. St. U. S. § 864) had not been complied with, the deponent not having been properly cautioned and sworn, and the court sustained the objection, and refused to allow the deposition to be read. The verdict being for the defendant, the plaintiff makes this its motion for a new trial. It appears from the certificate of the notary who took the deposition, that in pursuance of the notice given he attended at the time and place appointed, and that William G. Wilson, a witness of lawful age, produced on the part of plaintiff, "being by me first duly sworn on interrogatories propounded to him, testified" as is set forth. Originally there followed after the word sworn the words, "on the Holy Evangelists of Almighty God," but on cross-examination the witness stated he had not been so sworn, and the notary struck those words out of his certificate. At the close of the deposition the notary certifies that William G. Wilson "was by me first sworn to tell the truth, the whole truth, and nothing but the truth" touching the interrogatories propounded to him, and at the close of his certificate he certifies that the said Wilson "was by me sworn on the Holy Evangelists of Almighty God." The statute of Illinois, the place where this deposition was taken, provides (Rev. St. 1874, c. 101): "It shall be lawful for any person empowered to administer an oath to administer it in the following form. The person swearing shall with his hand uplifted swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the Gospels." The supreme court of the United States has determined that the act of congress now expressed in section 864 of the United States Revised Statutes is in derogation of the common law, and must be strictly construed and complied with. It requires that the party about to testify shall be cautioned and sworn

to tell the whole truth, and be carefully examined. The first certificate of the notary is that he was duly sworn, and it is to be supposed from that statement that the witness was legally sworn; that is, that he took the oath prescribed by the statute of Illinois. But that is not sufficient. It must be certified in the form prescribed by the statute that witness was sworn to tell the whole truth; not merely that he should true answers make to the interrogatories propounded to him. But the second certificate of the notary is that the witness was first sworn to tell the truth, the whole truth, and nothing but the truth touching the interrogatories propounded to him. What the witness should have been sworn to do in this ex parte proceeding was to tell the whole truth as far as he knew it respecting the matter in controversy between the plaintiff and defendant. He might well have told the truth in answer to all questions propounded to him, and then have suppressed facts within his knowledge about which he was not interrogated, and yet those facts might have been of infinite importance to the defendant. But laying this aside, how was the witness sworn on this occasion? The notary further certifies that he was sworn on the Holy Evangelists of Almighty God; the witness says he was not. If there be a statutory form of oath in the place where the witness is examined, that is the form to be used upon an examination under section 864 of Revised Statutes of the United States, unless the deponent expresses conscientious scruples respecting that form. If he expresses such conscientious scruples the oath which he regards as binding upon his conscience must be administered to him, and the commissioner or other examining officers must certify the reason which caused him to vary from the customary or statutory form of oath. But in this instance the notary certifies first, that he duly swore the witness; that is, according to the customary or statutory form; and then he certifies that he swore him according to another form, without alleging any conscientious objection to the statutory form on the part of the witness, and the witness states in his examination that he was not sworn on the Holy Evangelists of Almighty God, as the notary certifies he was sworn. The notary had no authority to vary the customary form of oath unless the witness had conscientious scruples respecting that form, and we suppose he did so vary it because of the witness's scruples. If he did so do, the witness declares he was not sworn at all, and even if he were, the notary does not certify that under the form the witness was sworn to tell the whole truth.

There are other reasons filed for a new trial, but they all depend upon the disposition of this question respecting the admissibility of this deposition; except perhaps one, and that the verdict must stand. This motion is denied.

NOTE [from 4 Cent. Law J. 225]. This case shows the necessity of exercising great care on taking and certifying depositions de bene esse, to be used in the federal courts. The first case bearing on the leading proposition involved in it is that of *Garrett v. Woodward* [Case No. 5,253]. There the witness was affirmed to testify the truth concerning all the matters touching which he should be questioned. The deposition was rejected. The next case was that of *Rainer v. Haines*, Hemp. 689. There the witness was duly sworn to testify the truth in regard to the matters in controversy. The deposition was suppressed. The next case was that of *Shutte v. Thompson*, 15 Wall. [82 U. S.] 151. There it did not appear that the witness was sworn to testify the whole truth. The court held that this defect was sufficient to require the rejection of the deposition, but also decided that the objection had been waived. From this review of the authorities, it will be seen, that the principal proposition involved in this case is fully supported. The forms contained in reliable works on practice in the federal courts are in conformity with this doctrine.

Case No. 17,853a

WILSON SEWING MACH. CO. v. MORENO et al.

[See 7 Fed. 806.]

Case No. 17,854.

WILT v. STICKNEY.

[15 N. B. R. 23; 1 5 Am. Law Rec. 630.]

District Court, N. D. Ohio. Dec. 9, 1876.

BANKRUPTCY—LIMITATIONS.

The limitation of two years in section 2057 does not apply to a proceeding to review a decree in equity.

[This was a bill of review filed by George F. Wilt, administrator of Harrison Wilt, against Edson Stickney, assignee in bankruptcy of Peter I. Vanderveer, to review a decree of this court declaring invalid a mortgage held by the said Harrison Wilt on certain of the bankrupt's property, and directing a sale thereof.]

Sherlock J. Andrews, for demurrer.
J. E. Ingersoll, contra.

WELKER, District Judge. On the 8th day of September, 1870, the defendant as assignee filed his bill in equity in this court, stating that the bankrupt Vanderveer owned certain real estate at the time of the filing of the petition in bankruptcy, and on which Harrison Wilt claimed a mortgage lien; that there were several other mortgages thereon; alleging that the mortgage of Wilt was void, and asking the court to so declare it, and order the sale of the real estate clear and free of the mortgage lien so claimed by Wilt. Answer thereto was filed by Wilt, claiming the mortgage to be a valid lien on the real estate, and asking its sale and proceeds applied to its payment. On the 11th of March, 1871, the cause was heard in this court, and on

¹ [Reprinted from 15 N. B. R. 23, by permission.]

such hearing a decree was entered setting aside the mortgage of Wilt as invalid, and ordering the assignee to sell the real estate and apply the proceeds to the debts of the estate. On the 13th of May, 1875, this bill of review was filed by the complainant, praying that said decree be reviewed and set aside for reasons therein stated, and a rehearing of the case be had. On the 9th of July, 1875, the defendant, assignee, filed a plea to said bill, setting up the statute of limitation, alleging that the cause of action did not accrue to the complainant within two years before the filing of the bill of review. To this plea the complainant files a general demurrer.

The question made by the demurrer is, whether the limitation provided in Rev. St. § 2057 of the bankrupt law [of 1867 (14 Stat. 517)] applies to this proceeding, it being conceded that the bill of review was not filed within two years from the rendition of the original decree. That section provides that "no suit at law or in equity shall be maintained in any court between an assignee in bankruptcy and a person claiming an adverse interest touching any property or right of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

It is claimed by the respondent that this proceeding is in effect a suit, and comes within the provisions of the section. In construing this statute it is important to understand what is meant by the term suit as used in the section. Does it mean all proceedings of any character, in which is involved the property or rights of the bankrupt arising between the assignee and claimant? Technical words used in statutes are to be given their legal signification. What then is a suit? It is defined to be the prosecution or presentation of some claim, demand, or request. In law language it is the prosecution of some demand in a court of justice. Story, Comm. Const. § 1719. The word "suit" is used in its modern sense as synonymous with action. 1 Barb. 15. An action is defined to be a legal demand of one's right; or it is the form of a suit given by law for the recovery of that which is due. 1 Barb. 15. Till judgment the "suit" is called an action. Bouv. Law Dict. Proceedings in error coram nobis in law, and bills of review in equity cases are in the nature of applications for new trials in cases already once tried or heard, and are but continuations of the original cases. In 1 Barb. 16, it is said that "a writ of error is not a suit or action as those words are understood and used." In 4 Ohio St. 690, it was decided that "a bill of review is not an original bill or suit."

It is, however, claimed by the respondent that, in *Bailey v. Glover*, 21 Wall. [88 U. S.] 342, the supreme court of the United States has given a construction to this section of

the statute which substantially determines this question. The court held in that case that the section was a statute of limitation, and precisely like other statutes of limitation, and "applies to all judicial contests between the assignee and other persons touching the property or right of property of the bankrupt transferable to, or vested in the assignee, where the interests are adverse, and have so existed for more than two years from the time when the cause of action accrued for or against the assignee." The use by the court of the terms "all judicial contests" certainly was not intended to change the definitions of a suit or action, as well understood in the law, but should be regarded as simply another form of the general definition of those terms already given. Two things are required of this statute: First. Must be a suit. This we have considered, and in the light of authority find this proceeding not a suit. Second. Must be a cause of action upon which the limitation can operate. Cause of action means simply a right of action. The remedy sought by this review is not to assert a right of action, but to review and reverse an action already heard and determined, to obtain a rehearing of an action already commenced, and cannot be considered a cause of action in the sense in which it is used in the statute.

It seems to me, therefore, that the true and correct construction of the statute sustained by principle and authority is, that it does not apply to proceedings for reviews in cases in equity, and that the limitation to this class of proceedings is that provided for writs of error and bills of review. The demurrer is sustained.

Case No. 17,855.

In re WILTBANK.

[22 Int. Rev. Rec. 282.]

District Court, E. D. Pennsylvania. Sept. 4, 1876.

CRIMINAL LAW — DISAGREEMENT AND DISCHARGE OF JURY—AUTHORITY OF COURT.

In the case of *James H. Wiltbank*, charged with mutiny, the jury came into court, and stated that they were still unable to agree upon a verdict. Judge CADWALADER said that in his opinion, if the jury gave due effect to the evidence, their verdict should be one of guilty. The foreman stated, and several jurors sustained him, that they were divided in opinion as to the facts in the cause, some of them believing the witnesses for the prosecution, and others accepting as true the testimony of the second mate for the defence. There was an absolute division upon the facts, the differing jurors having formed their judgment conscientiously, and therefore being unwilling to yield.

The judge said that even if the statement of the second mate was believed, the verdict should still be one of guilty. He then express-

ed his views of the duties and powers of a jury, the importance of this case affecting the safety of life and property at sea, and the necessity for a verdict. He therefore refused to discharge them, and sent them back to their room.

The case was given to the jury on Wednesday. After being locked up all night, they came into court at noon on Thursday, and announced that they were unable to agree upon a verdict. CADWALADER, District Judge, after listening to their agreement to disagree, sent them back to their room, where they remained until the scene in court this morning narrated above.

One of the jurors is quite ill. He was sick all night, and is reported to be no better to-day. This afternoon, between 1 and 2 o'clock, the jury came into court, and stated that after an honest and laborious effort, they found themselves still unable to agree upon a verdict. There were conscientious differences upon questions of fact, which the members could not relinquish unless compelled to. A verdict from their own voluntary conviction was impossible; therefore, as they understood the powers and duties of a jury, they could not agree except under a binding instruction from the court, to which they would be bound to yield.

CADWALADER, District Judge, said that, under the evidence, he thought it the duty of the jury to convict the defendant. They could not do otherwise, unless they found that at the time of the occurrence charged as mutiny, the captain of the brig was incapable of navigating the vessel, because he was so intoxicated as to be irrational, and of this he saw no evidence in the case. In criminal cases the jury had the power to decide questions of law and fact, but always in conformity with the law and legal evidence, and they had no right to give an arbitrary decision of any question. To find that on this occasion the captain was incapable from drunkenness from navigating the vessel would be extremely arbitrary. He was willing to assume as much responsibility in this case as the law would permit, and therefore would accept the verdict of guilty, accompanied by a declaration that but for the further instruction of the court the jury would not have agreed upon a verdict. Such a verdict was accordingly rendered, coupled with a recommendation to mercy.

The defendant was permitted to depart on his own bail, the judge saying that the importance of the case had led him to the course he had pursued, and he was not only willing, but anxious, to hear an argument for a new trial, and correct whatever error he may have committed.

The jury, which consisted of eleven members, stood on Wednesday and Thursday six for conviction to five for acquittal; yesterday seven for conviction to four for acquittal; this morning nine for conviction to two for acquittal; and from noon until they finally came into court ten for conviction to one for acquittal.

WILTBERGER (UNITED STATES v.).
See Case No. 16,738.

Case No. 17,856.

WILTON v. RAILROAD CO.

[2 Whart. Dig. 408-410.]

Circuit Court, E. D. Pennsylvania. Dec.,
1848.

PATENTS—ELEMENTS OF INVENTION—SPECIFICATIONS—DRAWINGS—FAILURE TO APPLY FOR PATENT FOR 18 MONTHS.

[1. The principle or essential character of an invention involves two elements: (1) The object attained; (2) the means by which it is obtained, and that, if either of these be new, it may be the subject of a patent.]

[2. Drawings annexed to a patent issued under the act of 1837 (5 Stat. 191) form no part of the specification, where no drawings were annexed to the original patent.]

[3. An inventor who does not reduce his invention to practice, or apply for a patent till after 18 months, others in the meantime having invented the same thing, and reduced it to practice, cannot recover for a breach of his patent.]

[Cited in 2 Whart. Dig. 408-410, to the points above stated. Nowhere reported; opinion not now accessible.]

Case No. 17,857.

WILTON v. RAILROADS.

[1 Wall. Jr. 192.]¹

Circuit Court, E. D. Pennsylvania. Oct. 21,
1847.

EVIDENCE UNDER PATENT ACT—PRACTICE.

The 15th section of the act of congress of July 4, 1836 [5 Stat. 123], commonly called the "Patent Act," does not require notice of the names and places of residence of the witnesses, by whom it is intended to prove a prior knowledge and use of the thing patented.

[Cited in Woodbury Patent Planing Mach. Co. v. Keith, Case No. 17,970; Agawam Woolen Co. v. Jordan, 7 Wall. (74 U. S.) 596.]

In this suit, which was one for an infringement of a patent right, the defendants pleaded the general issue; and, relying in their defence upon a previous use and knowledge of the thing patented, gave notice to the plaintiffs under the act of congress,² that they would offer proof upon the trial that it had been publicly used at certain places which they named, and that a prior knowledge of it was possessed by certain persons, whom, together with their places of residence, they also named. But the notice did not specify the names nor residences of the witnesses by whom it was intended to prove what was thus notified. The act of congress of July 4, 1836 (section 15), which allows this defence and notice, says: "Whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, he shall state in his notice of special matter the names and places

¹ [Reported by John William Wallace, Esq.]

² Of July 4, 1836, § 15 (5 Stat. 123), that the defendant shall be permitted to plead the general issue, and to give any special matter in evidence of which notice in writing may have been given thirty days before the trial, tending to prove that the thing patented had been in public use, &c.

of residence of those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used."

Mr. Mallery, now calling upon a witness to prove where and by whom the thing had been used, Mr. Hazlehurst objected to the testimony, because the name and residence of the witness had not been given. He cited 2 Greenl. Ev. § 501, where it is said: "The facility with which this defence" (of prior use) "may be made, affords a strong temptation to the crime of subornation of perjury; to prevent which the defendant is required to state, in his notice, the names and residence of the witnesses by whom the alleged previous invention is to be proved." He cited, also, Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448, 459, in the supreme court of the United States. The court below had rejected the testimony of one White, for want, says, the reporter, "of the notice required by the act of congress, of the use of the machine at Mauch Chunk, at which place it was said his testimony would shew it had been used." This report, Mr. Hazlehurst thought, did not shew precisely what notice was or was not given, but Judge Story, in giving the opinion of the court, clearly did. "There is no proof on the record," says that judge, "that notice had been given according to the requirements of the statute, that White was to be a witness," &c. "Unless such notice was given, it is plain that the examination could not rightfully be had." What notice does the court here mean, as being within "the requirements of the statute?" Clearly "that White was to be a witness." Dr. Greenleaf, without quoting this case, yet seems to have the same notion of the requirements of the act. Indeed, if a witness knows, i. e. legally knows, of another man's discovery, he himself knows of the discovery, and the notice ought to be given.

Mr. Meredith, contra. There has been a misconception of the act by Judge Story and by Dr. Greenleaf, who follows him. The case cited of Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448, 459, shews that the ground of the rejection of White's testimony was because notice was not given of a use of the machine at Mauch Chunk. White was, himself, the person who had used it there, and his name ought to have been given, not as witness, but as that of a person who "possessed a prior knowledge of the thing." The point adjudged was as to the "place." The language of the court, or rather the judge who delivered the opinion of the court, is loose, and goes for what it is worth.

GRIER, Circuit Justice. The language of the act, I think, requires nothing more than the names and residences of the persons who possessed the prior knowledge of the thing patented, and the name of the place at

which it had been used. It would be unreasonable to extend it, unless it clearly required us to do so, to the names and residences of all the witnesses whom the defendant meant to summon. The other requisition is reasonable enough, and was intended to guard against surprise from such evidence as was given in Whitney's Case (Whitney v. Fort [Case No. 17,588]). Though Mr. Whitney's cotton gin was an invention of perfect originality, two persons were yet brought forward, one of whom testified that he had seen a similar machine in England seventeen years before, and the other that he had seen one in Ireland.

It would have been quite enough, in order to disprove it, that the other side had had notice of the place at which, and name of the party by whom, the alleged prior machine was used.

WILTSIE, The JOHN J. See Case No. 7, 353.

Case No. 17,858.

WINANS v. BOSTON & P. R. CO.

[2 Story, 412; 2 Robb. Pat. Cas. 136; Merw. Pat. Inv. 313; 37 Jour. Fr. Inst. 63.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1843.

PATENTS FOR INVENTIONS—SPECIFICATIONS—AXLES FOR RAILWAY CARRIAGES.

Where the plaintiff, in the specification of his patent, claimed as his invention "an improvement in the construction of the axles or bearings of railway, or other wheeled carriages," and it appeared, that the improvement, though it had never before been applied to railway carriages, was well known as applied to other carriages, it was *held*, that the patent was not good.

Case for infringement of a patent dated the 30th of July, 1831, for "a new and useful improvement of railway and other wheeled carriages." Plea, the general issue with special matters of defence: (1) That the invention was not new. (2) That the invention was in public use before the patent, with the consent of the patentee. The specification annexed to the patent was in substance as follows: "To all whom it may concern, be it known, that I, Ross Winans, have invented an improvement in the construction of the axles, or bearings, of railway, or other wheeled carriages, and that the following is a full and exact description thereof: The axle, with my improved journals, or bearings, may be made straight, and the wheels placed thereon in the usual way; but instead of forming the bearing under the body of the carriage, and within the naves or hubs, of the wheels, there to sustain the weight of the load, I extend the axles out at each end, projecting beyond the naves to such a length

¹ [Reported by William W. Story, Esq. Merw. Pat. Inv. 313, and 37 Jour. Fr. Inst. 63, contain only partial reports.]

as shall enable me to form them into gudgeons. The lengths and diameters of these gudgeons, I regulate according to the load they are intended to sustain, and to other circumstances. In all cases, however, the value of my invention depends upon the gudgeons having their diameters as small as a due attention to the strength required will allow. The causing the axles to run in boxes, or upon bearings, without the naves, admits of their being made much smaller than usual, the degree of diminution which I have found to answer well in practice, will hereafter be stated. They should be formed of good wrought iron, and case-hardened: or overlaid, or cased with the best steel, and hardened, which materially diminishes the extent of bearing surface necessary to enable them to receive and resist the pressure of the load, and their tendency to wear; they may therefore be short, and are consequently strong, when of comparatively very small diameter. The tendency to lateral movement is checked, or limited by forming the end, or point of the axle, or gudgeon, so as to be met occasionally by the external cap or cover of the gudgeon box, when lateral pressure occurs. By placing the bearing outside (as aforesaid), the diameter of the wheels may be enlarged with more advantage than formerly, as the axles between the wheels may be made of any required strength (to resist the increased stress thrown on to that part of them by an enlargement of the wheels,) without affecting the size or strength, of the bearing journals. By the foregoing means, the leverage of the wheels (or the mechanical advantage with which the moving power acts, to overcome the resistance to motion), is increased, and consequently the friction or resistance to motion in rail-road carriages, diminished to a greater extent than heretofore. This improvement in the axles or journals of rail-way carriages, was devised and carried into operation on my experimental rail-way, and exhibited to various persons in the early part of the year 1827; and it was put into practical operation, under my direction, on the Baltimore and Ohio, and on the Liverpool and Manchester rail-roads, in the early part of 1829, in connection with another improvement for the further diminution of friction, by means of a revolving bearing, or friction wheel, for which other improvement a patent was granted to me on the 11th of October, 1828." "The object of the invention, and a practical demonstration of its utility having been shown, its application and adaptation to the different railroad carriages, burden wagons, locomotive engines, &c., and to the different bearing boxes that may be preferred for different purposes, (either revolving or common,) will be evident and easy, to any person acquainted with the building of railway carriages. But to render it still more so, the following general directions and proportions are given," &c. "I,

therefore, declare that the improvement, or improvements, above explained and described, in diminishing the resistance to motion in wheeled carriages to be used on railways, which I claim as my own invention, is the extending the axles each way outside of a pair, or pairs, of wheels, far enough to form external gudgeons to receive the bearing box of the load body, and diminished as aforesaid with a view to lessen the resistance of friction, as small as its situation, with the use of the most favorable metal for wear, will permit. Thus conveniently increasing the leverage of the wheels, without impairing their effective strength or durability."

At the trial, it appeared that Winans had obtained a patent for the invention in England, in Oct., 1828, and afterwards on the 30th of July, 1831, he took the present patent.

It was argued by B. R. Curtis, for the defendants, that this was too late; and Shaw v. Cooper, 7 Pet. [32 U. S.] 292, 320, 322, Act 1839, c. 88, § 7 [5 Stat. 354], and McClurg v. Kingsland, 1 How. [42 U. S.] 202, were cited. But the main ground was, that the invention was not new, but had been before applied to other carriages, although not to railway carriages, before the patentee applied it to railways. The patent was not for the application of the improvement to railway carriages alone, but it was "to rail-way and other wheeled carriages." Edgew. Roads & Carriages, printed in 1817, Append. 2, pp. 71, 73, 76; and Dr. Hook's Essay upon Carriages, printed in 1684, pp. 145, 146, were cited in support of the objection.

C. G. Loring, for plaintiff, argued, that it was the intention of the plaintiff to claim as his invention the application of extended axles of wheels to carriages with flanges on railroads; that the plaintiff claimed this particular combination as new, and it was so. But he did not mean to claim the invention as applicable to all other wheel carriages.

STORY, Circuit Justice. I fear that it is impossible to give this limited interpretation to the plaintiff's patent. The patent itself is for "a new and useful improvement of rail-way, and other wheeled carriages;" and the specification expressly states, that the patentee has invented "an improvement in the construction of the axles, or bearings, of rail-way, or other wheeled carriages," and then he proceeds to give a description thereof. It is plain from this language that he does not limit his invention to rail-way carriages; but he insists, that it is new as to other carriages. It is true, that in summing up his claim, in the close of the specification, he seems to use language somewhat more restrictive; but even there he says, that what he claims as his invention is, "the extending the axles each way outside of a pair or pairs of wheels, far enough to form external gudgeons to receive the bearing box of the load body, and diminished as afore-

said with a view to lessen the resistance of friction, as small as its situation, with the use of the most favorable metal for wear, will permit; thus conveniently increasing the leverage of the wheels without impairing their effective strength or durability." Now the invention, as stated in this general form, is precisely what the defendants insist is not new, but was well known before, as applied, not to railway, but to other carriages. If this be true, it seems difficult to perceive how the present patent can be maintained.

A verdict was thereupon taken pro forma for the defendants, with liberty to move a new trial upon the question of law. No such motion was made.

Case No. 17,859.

WINANS v. DANFORTH et al.

[New York Times, Nov. 17, 1860.]

Circuit Court, S. D. New York. Nov., 1860.

PATENTS — INFRINGEMENT — ANTICIPATION — ABANDONED EXPERIMENTS.

[1. A patent for increasing or decreasing the draft of a locomotive boiler by carrying the exhaust pipes of the engines to the bottom of the smoke pipe, and there controlling the discharge of the steam by plugs, is infringed by a locomotive in which a like result is accomplished by carrying the exhaust pipes to the bottom of the smoke box, instead of the smoke pipe.]

[2. The previous construction of a machine resembling that of a patent, but which proved unsatisfactory in operation, and was therefore abandoned, does not operate as an anticipation of the patent.]

This was an action by Ross Winans against Charles Danforth and others for damages for an alleged infringement of a patent granted in November, 1846, to the plaintiff, for an improvement in the machinery of locomotive engines, by which the exhaust steam which was made to discharge itself into the smoke pipe, was so regulated as to increase or decrease the draught of the smoke-stack, according as the engineer desired to increase or decrease the working power of the engine. This object the plaintiff effected by carrying his exhaust-pipes, to the bottom of the smoke-pipe, and fitting them there with conical plugs, by the motion of which in the pipes, the discharge of the steam into the smoke-pipe was increased or diminished. The defendants, who are engine-builders at Paterson, N. J., have built engines in which the two exhaust-pipes are brought into one, in which a conical plug was fitted, by means of which the exhaust steam was discharged, not into the smoke-pipe, but into the bottom of the smoke-box. They claimed that this was no infringement upon the plaintiff's patent. They also claimed that the machinery built according to the plaintiff's patent would not be available, and they denied the novelty of the plaintiff's invention.

Mr. Blatchford and Mr. Keller, for plaintiff.
Mr. Cozzens and Mr. Stoughton, for defendants.

NELSON, Circuit Justice, charged the jury that the idea of the plaintiff was the regulation of exhaust steam for the purpose of increasing the draught according to the necessities of the engine, which idea was not denied to be a useful one; and if this idea was to be found in the arrangement which was placed at the bottom of the smoke box, it was just as much an infringement of the plaintiff's right as if it was placed any where else. That as to the denial of novelty, several points were relied on. One was an engine called the McNeil, but as it appeared that this was only an experiment which proved unsatisfactory and was abandoned, that might be laid aside, as it was necessary not only that a man should have an idea, but should embody it in a working machine, to secure him the benefit of the patent laws. Another reference was based on machinery described in the Mechanic's Magazine, but in that there was no idea of regulating the exhaust steam for the purpose of affecting the draught, but only for the purpose of checking the progress of the piston in the cylinder. Another matter relied upon to impeach the novelty of the plaintiff's invention was some experiments which were made to find out what was the proper amount of steam to discharge into the smoke-pipe of any locomotive by a fixed aperture, but which when ascertained would leave the pipes just the same as the pipes previously used, and had no idea of regulation of the exhaust steam in them. That another defence relied upon was a patent granted to Mann & Tyng. But this was simply a plan of diverting a portion of the steam into the boiler, when there was more made than was needed for the draught and not a regulation of the body of the steam discharged, and could not therefore be relied on. That if on all the evidence, the jury should find in the defendant's machine the ideas of the plaintiff embodied into a machine corresponding with the machine of the plaintiff they must find a verdict in his favor.

The case has been on trial for several days. The jury, after a short absence, found a verdict in favor of the plaintiff for the sum of \$3,000.

Case No. 17,860.

WINANS v. DENMEAD.

[9 Leg. Int. 74; 1 4 Am. Law J. (N. S.) 498.]

Circuit Court, D. Maryland. 1852.²

This was an action on a patent for a coal car. The plaintiff by his patent declared the principle of his invention to be the making

¹ [Reprinted from 9 Leg. Int. 74, by permission.]

² [Reversed in 15 How. (56 U. S.) 330.]

of the car body in the lower part in the form of a frustrum of a cone, that form securing an equal pressure of the load in all parts, and by its diminishing proportions allowing it to pass through the track frame, so as to lower the centre of gravity.

The defendants had made car bodies in the form of a frustrum of an octagonal pyramid, and they were alleged to have thereby infringed the patent of the plaintiff, as the pyramid acted on the same principle with, though not altogether as well, as the cone.

J. H. B. Latrobe, for plaintiff.

J. Mason Campbell, for defendants.

THE COURT [GLENN, District Judge] decided, after a full argument, that the plaintiff had by his patent restricted himself to the particular form of car body there described, and was consequently not entitled to recover.

[On appeal to the supreme court, this decision was reversed. 15 How. (56 U. S.) 330.]

Case No. 17,861.

WINANS v. EATON et al.

[1 Fish. Pat. Cas. 181; Merw. Pat. Inv. 419.]¹
Circuit Court, N. D. New York. Sept., 1854.

INFRINGEMENT OF PATENT—PRELIMINARY INJUNCTION.

1. If there exist any reasonable doubt about the originality or novelty of the improvement as arranged and constructed by the patentee, or about the substantial identity of that manufactured by the defendant with the plaintiff's, the court is not at liberty, upon a motion for a preliminary injunction, to interfere and arrest the manufacture.

2. The determination of such questions must be postponed until the case is matured and disposed of at the final hearing.

[Cited in Sargent Manuf'g Co. v. Woodruff, Case No. 12,368.]

This was a motion for a provisional injunction to restrain [Orsamus Eaton from] the infringement of letters patent for "a new and useful improvement in the construction of cars or carriages intended to travel upon railroads," granted to Ross Winans, October 1, 1834, and extended for seven years from October 1, 1848.

The portion of the specification which is material to a correct understanding of the opinion, is as follows: "The object of my invention is, among other things, to make such an adjustment or arrangement of the wheels and axles as shall cause the body of the car or carriage to pursue a more smooth, even, direct, and safe course than it does as cars are ordinarily constructed, both over the curved and straight parts of the road, by the before-mentioned desideratum of combining the advantages of the near and distant coupling of the axles, and other means

to be hereinafter described. For this purpose, I construct two bearing-carriages, each with four wheels, which are to sustain the body of the passenger or other car, by placing one of them at or near each end of it, in a way to be presently described. The two wheels on either side of these carriages are to be placed very near to each other, the spaces between their flanges need be no greater than is necessary to prevent their contact with each other. These wheels I connect together by means of a very strong spring—say double the usual strength employed for ordinary cars—the ends of which spring are bolted, or otherwise secured, to the upper sides of the boxes, which rest on the journals of the axles, the longer leaves of the springs being placed downward, and surmounted by the shorter leaves. Having thus connected two pairs of wheels together, I unite them into a four-wheel bearing-carriage, by means of their axles, and a bolster of the proper length, extending across, between the two pairs of wheels, from the center of one spring to that of the other, and securely fastened to the tops of them. This bolster must be of sufficient strength to bear a load upon its center of four or five tons. Upon this first bolster I place another of equal strength, and connect the two together by a center-pin, or bolt, passing down through them, and thus allowing them to swivel or turn upon each other in the manner of the front bolster of a common road-wagon. I prefer making these bolsters of wrought or cast iron; wood, however, may be used. I prepare each of the bearing-carriages in precisely the same way. The body of the passenger or other car I make of double the ordinary length of those which run on four wheels, and capable of carrying double their load. This body I place so as to rest its whole weight upon the two upper bolsters of the two before-mentioned bearing-carriages, or running gear. I sometimes place these bolsters so far within the ends of the body of the car as to bring all the wheels under it, and in this case less strength is necessary in the car body than when the bolster is situated at its extreme ends. In some cases, however, I place the bolster so far without the body of the car, at either end, as to allow the latter to hang down between the two sets of wheels or bearing-carriages, and to run, if desired, within a foot of the rails. When this is done, a strong frame-work projects out from either end of the car or carriage-body, and rests upon the upper bolsters of the two bearing-carriages. This last arrangement, by which the body of the car is hung so low down, manifestly affords a great security to the passengers, exempting them, in a great degree, from those accidents to which they are liable when the load is raised. * * * I do not claim as my invention, the running of carriages upon eight wheels, this having been previously done; not, however, in the manner, or for

¹ [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 419, contains only a partial report.]

the purposes herein described, but merely with a view of distributing the weight, carried more evenly upon a rail or other road, and for objects distinct in character from those which I have had in view, as hereinbefore set forth. Nor have the wheels, when thus increased in number, been so arranged and connected with each other, either by design or accident, as to accomplish this purpose. What I claim, therefore, as my invention, and for which I ask a patent, is, the before-described manner of arranging and connecting the eight wheels which constitute the two bearing-carriages, with a railroad car, so as to accomplish the end proposed by the means set forth, or by any others, which are analogous and dependent upon the same principles. Ross Winans."

Much testimony was offered to impeach the novelty of the patent, and the attention of the court was mainly directed to this point.

G. M. Keller and S. Blatchford, for complainant.

W. A. Beach and D. B. Eaton, for defendants.

NELSON, Circuit Justice. This case should have been decided at an earlier day, but such has been the pressure of business in court since the argument, that I have been unable to devote that time to its consideration which its difficulty and magnitude required. The papers are very voluminous, and some of the questions involved depend upon complicated and contradictory evidence.

As this is a motion for a preliminary injunction, I shall not deem it necessary to go into the case at large, or as fully as if it stood for a final hearing; but shall content myself by stating briefly the ground upon which I have arrived at the conclusion that the motion must be denied. This patent has been before me heretofore in the case of Winans v. Schenectady & T. R. Co. [Case No. 17,865], on a motion on the part of the defendants for a new trial. The case had been tried at law before his honor, Judge Conkling, and the questions involved were, the correctness of the rulings at the circuit.

In deciding upon these questions, it became necessary to give a construction of the patent, which will be found in the opinion then delivered, and which I do not understand is a matter of dispute on this motion.

The patent is for a new and useful improvement in the construction of cars or carriages intended to travel on railroads, which is particularly adapted to passenger cars; and after stating the difficulties to be encountered in running these cars on the road at great speed, from curvatures and consequent friction between the flanges of the wheels and rail, and from other obstructions and impediments specified, and after describing the parts and manner of the construction of a car, with a view to overcome these difficulties and impediments, the patentee closes by saying: "I do

not claim as my invention, the running of cars or carriages upon eight wheels, this having been previously done; not, however, in the manner and for the purpose herein described, but merely with a view of distributing the weight carried, more evenly upon a rail or other road, and for objects distinct in character from those which I have had in view as hereinbefore set forth; nor have the wheels, when thus increased in number, been so arranged and connected with each other, either by design or accident, as to accomplish this purpose. What I claim, therefore, as my invention, and for which I ask a patent, is the before-described manner of arranging and connecting the eight wheels which constitute the two bearing-carriages, with a railroad car, so as to accomplish the end proposed by the means set forth, or by others which are analogous and dependent upon the same principles."

In the arrangement of this passenger car, the patentee constructs the bearing-carriages each with four wheels, which sustain the body of the car, by placing one of them at or near each end of it; the two wheels on either side of the truck are to be placed very near each other. The spaces apart between the flanges need be no greater than are necessary to prevent contact. The car body rests upon bolsters supported on each of the two bearing-carriages or four-wheeled trucks, the bolsters so constructed as to swivel or turn on each other like the two front bolsters of a common wagon; the trucks may be so placed within and under the end of the car, as to bring all the wheels under it or without the end, so as to allow the body to be suspended within the two bearing-carriages. The closeness of the fore and hind wheels of the trucks, taken in connection with the use of them—the trucks arranged as distant from each other as can be done consistently with the proper support of the car-body—is considered by the patentee as an important feature of the invention, as, by the contiguity of the fore and hind wheels of each truck, while the two trucks may be at a considerable distance apart, the lateral friction from the rubbing of the flanges against the rails is most effectually avoided, while, at the same time, all the advantages attendant upon placing axles of a four-wheeled car far apart are obtained; for the two wheels on either side of the trucks, may, from their proximity, be considered as acting like a single wheel, and as the two trucks may be placed at any distance from each other, consistent with the required strength of the body of the car, all the advantages are obtained that result from having two axles of a four-wheeled car at a distance from each other, while its inconveniences are avoided.

The two wheels on either side of the trucks are connected together by means of a very strong spring, the ends of which are bolted or otherwise secured to the upper sides of the boxes which rest on the journals of the axles, the

longer leaves of the spring placed downward. The bolsters extend across, between the two pairs of wheels, from the center of one spring to that of the other, and are securely fastened to the top of them. This is the car substantially as arranged and constructed by the patentee without going into all the details of the specifications.

As we held when the patent was formerly before us—the improvement claimed is the car itself, arranged and constructed as described in the patent, and which we have above in substance set forth; and the question now before us, is the same as before the jury on the former case, viz: whether or not cars or carriages for running on railroads as a whole, like the one described in the patent, had been before known or in public use? And whether or not the cars manufactured by the defendants are, in arrangement and construction, substantially like it?

The case, in its present posture, does not call for a definite determination of these questions, as that must be postponed till the final hearing. These questions are only important to be considered now, so far as they may aid us in deciding upon the right of the complainant to have the defendants enjoined pending the litigation. For if there exist any reasonable doubt about the originality or novelty of the car, as arranged and constructed by the patentee, or about the substantial identity of the cars manufactured by the defendants with the plaintiff's, then I am not at liberty to interfere and arrest the manufacture at this stage of the proceedings. The determination of that must be postponed till the case is matured and disposed of at the final hearing.

A good deal of proof has been furnished by the defendants in this case, bearing directly upon the question above stated, not before the court and jury in the case against the Schenectady and Troy Railroad Company. The most material is that relating to what is called in the proceedings the "Quincy Car." We have a description of this car from Gridley Bryant, the inventor and constructor of it. He is an engineer, and in 1826 superintended the building of a railroad leading from the Quincy quarries, in Massachusetts, to the landing at Milton, a distance of between three and four miles. This is said to be the first railroad built in the United States. Bryant states that the eight-wheeled car on this road was constructed in the summer of 1829, and has been used on it from that time to the present; that the objects of the construction were to carry a large load on the eight wheels without injury to the road; to turn the curves freely, descend the inclined plane, and run on the road carrying the stone as smoothly and safely as possible. It consisted of two four-wheel trucks, securely held by center pivots or king bolts about ten feet apart, which passed through the bolsters of a rigid body or platform framing, and the centers of the trucks. The body, with its bolsters thus secured by the vertical king bolts, had side bearings on curved plates on the trucks, and

the truck swivelled under them to conform to the curves and switches or turnouts of the road, while the body connecting the trucks sustained and carried the load smoothly and safely. That the trucks consisted of rigid rectangular wheel frames with the double cross bolsters, and held the bearing points of the wheels on the rail, the same distance apart as the gauge of the track, which was five feet. He further observes that this car contained a combination of the two four-wheel trucks; rigid wheel frames, with a permanent body to carry the load by means of vertical king bolts, allowing the two trucks to swivel to conform to the curves of the road, the same in principle of construction and operation as the eight-wheeled cars now in general use on railroads in the United States.

Bryant continued in the service as superintendent and engineer of the road till 1836, at which time, two of these eight-wheeled cars were in use, including the one originally constructed. This witness is fully confirmed by three others, each of whom were engaged upon the road at the time spoken of by him, and since. The railroad has a steep inclined plane, on which the cars are raised and lowered by means of an endless chain, and has several sharp curves and turnouts. One of the heavy curves that encircle the hill of the quarry, is said to be about two hundred feet radius.

Several experts have been examined in relation to the arrangement and construction of this "Quincy car," and a decided preponderance in numbers, and among them persons of the highest skill and of the greatest experience in their professions, concur in saying that it embodies the principles, arrangement and construction of the cars in general use upon railroads, which it is admitted are the kind manufactured by the defendants. The evidence furnished on behalf of the defendants, in resisting the motion upon this branch of the defense, is very full and strong; and as the case stands, overcomes the contrary proofs given in support of the bill.

In addition to this "Quincy car," the defendants have furnished a model and drawing of the eight-wheeled steam carriage, devised and constructed by Horatio Allen, and put in operation in February, 1832, on the South Carolina Railroad. The drawings were made in the winter of 1830 and 1831. A few of the carriages were running on the road before the close of the year 1833. This car was therefore devised and completed in working order, by Allen, prior to the patent of Winans, and indeed prior to the perfection of his improvement preparatory to obtaining the patent.

As in the case of the "Quincy car," the decided preponderance of the evidence is, that this steam carriage embraces all the elements, arrangements and organization to be found in the cars manufactured by the defendants.

I do not find that this evidence was before the court and jury in the former trial upon this patent. Although it may not be regarded (looking at the particular construction and purpose of this steam carriage) as bearing so directly upon the novelty of the Winans car, or speaking

perhaps more accurately, as showing the principles and arrangements of the defendants' cars to have been discovered and applied before the date of the Winans improvement, it is undoubtedly entitled to a good deal of consideration; and as the case now stands, sufficient at least, in connection with the "Quincy car," to forbid the granting of the injunction.

The defendants have also given in evidence a model of a carriage for railways and roads, described by W. and E. W. Chapman, in their patent granted in England, in 1812. The specification is published in the 24th volume of the Repertory of Arts, etc., under the date of February, 1814, with drawings. Fig. 3, says the patentee, shows a carriage of six wheels for the engine, which may rest equally, or nearly so, on each of its wheels, and move freely round the curves, or past the angles of a railway; 1, 1, the fore pair of wheels are, as usual, on railways, fixed to the body of the carriage; 2, 2, and 3, 3, the other two pair, are fixed on axles (parallel to each other) to a separate frame, over which the body of the carriage should be so poised as that two-thirds of its weight should lie over the central point of the fore wheels where the (pivot?) 4, is placed, and the remaining third over the axis (axle) 1, 1. The two-thirds weight of the carriage should rest on conical wheels, or rollers, bearing upon the curved plates 1, 1, so as to admit the ledges of the wheels, or those of the way to guide them on its curves, or past its angles, by forcing the transom, or frame, to turn on the pivot, and thus arrange the wheels to the course of the way, similar to the carriage of a coal wagon; and the patentees add, if the weight of the locomotive engine should require eight wheels, it is only requisite to substitute, in place of the axis (axle) 1, 1, a transom, such as described, laying the weight equally upon both, and then, similarly to two coal wagons attached together, the whole four pair of wheels will arrange themselves to the curves of the railway.

The weight of the evidence of the experts who have been examined in respect to the Chapman car, is, that the elements and arrangement, as described in the specification, and delineated in the drawing, comprise all the substantial elements and arrangements to be found in the cars of the defendants, and a critical examination of the description and of the drawing, certainly tends to confirm rather than weaken the inference of these witnesses. This Chapman car is probably the origin of the "Quincy car," the Horatio Allen car, and of all that class now in use upon the railroads of this country, and was devised by the Chapmans not simply to equalize the greater burden, attained by the multiplication of the wheels, and to relieve the stress upon the rail; but also by the arrangement of the four pairs of wheels, so that each of the pairs should be fixed to separate frames (the axles parallel to each other), and the burden resting upon the central points of the four wheels, and turning upon a pivot, or swiveling, to permit the trucks to accommodate themselves to the curves and angles of the road,

and cause them to move more freely and smoothly round these.

This description and drawing of the Chapman car, as given in the volume of the Repertory of Arts, were before the court and jury in the former trial; but as the novelty and improvement of the plaintiff's patent were left, as questions of fact, to the jury, the subject was not a matter of particular examination on the motion for a new trial.

There are many other parts of this case which, were this a final hearing, it would be necessary to notice, but in the present stage of it are not important; as, for the reasons given, we think, upon the well-settled principles governing applications for a preliminary injunction, this motion must be denied.

[For other cases involving this patent, see note to *Winans v. Schenectady & T. R. Co.*, Case No. 17,865.]

Case No. 17,862.

WINANS v. McKEAN R. & N. CO.

[6 Blatchf. 215.]¹

Circuit Court, N. D. New York. Oct. 9, 1868.

CREDITORS' BILL AGAINST CORPORATION—UNPAID STOCK SUBSCRIPTIONS—JURISDICTION OF DEFENDANT—REMOVAL FROM STATE COURT—FOLLOWING STATE DECISIONS.

1. Where a suit is brought in a state court, and is duly removed into this court, by the defendant, under the 12th section of the act of September 24, 1789 (1 Stat. 79), the question of the jurisdiction of this court is not dependent upon any of the provisions of the 11th section of that act.

[Cited in *Hobby v. Allison*, 13 Fed. 402.]

2. A defendant who voluntarily appears in a suit in this court, waives his right to urge, as an objection to the jurisdiction of this court, that he was not found, or served with process, in this district.

[Cited in *Romaine v. Union Ins. Co.*, 28 Fed. 636.]

3. Where a bill is filed, in this court, against a corporation created by the state of Pennsylvania, by a judgment creditor thereof, for a sequestration of its property, rights, and franchises, and for the appointment of a receiver thereof, with power to collect from its stockholders the amount of their unpaid subscriptions, or sufficient thereof to satisfy such judgment, and for the payment therewith of such judgment, it is a sufficient statement, in such bill, of the amount and value of such unpaid subscriptions, to state that it has unpaid subscriptions to its stock much more than sufficient to pay such judgment.

4. The fact that such corporation has no property in this district, and no property any where, but the demands for such unpaid subscriptions, is no objection to the jurisdiction of this court, and no defence to such suit.

5. The cases of *Mann v. Pentz*, 3 Comst. [3 N. Y.] 415, and *Dayton v. Borst*, 31 N. Y. 435, considered.

6. The case of *Dayton v. Borst* maintains the right of a receiver of a corporation appointed under a judgment creditor's bill, to recover the balance unpaid upon subscriptions to the capital stock of such corporation, without any previous call for the payment of such sub-

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

scriptions having been made by such corporation, and, as the latest exposition of the law of the state of New York on the subject, by its highest court, is adopted by this court.

[This was a bill in equity by Theodore B. Winans against the McKean Railroad & Navigation Company.]

The case came before the court, on a demurrer to the plaintiff's bill of complaint.

HALL, District Judge. The bill sets forth, in substance, that the plaintiff is a citizen of the state of New York, and the defendant a corporation created under and by virtue of the laws of the state of Pennsylvania; that, heretofore, the plaintiff, being a citizen of New York, commenced an action in the supreme court of that state, against the defendant, for the same cause of action afterward stated in the bill; that, thereupon, the defendant, by the means, and in the mode, prescribed by law, and duly set forth in the bill, removed the case to this court for trial, in pursuance of the act of congress; that afterward, and at the next term of this court, the defendant filed, in this court, a copy of the process served upon it in this action, in said supreme court, and entered its appearance in the said action, so removed to this court for trial; that the defendant was, on the 10th of August, 1858, and still is, a corporation created under and by virtue of the laws of Pennsylvania, and is a citizen of that state; and that the defendant has its principal office and place of business in the city of New York. The bill then proceeds to state the regular recovery of a judgment in favor of the plaintiff, against the defendant, in the supreme court of the state of New York, for more than nine thousand nine hundred dollars, for money lent; that such judgment was recovered in September, 1865, and duly docketed; that executions were issued thereon, and duly returned wholly uncollected; and that the judgment remains wholly unpaid. The allegations in respect to such judgment and executions, and the return of such executions, are, in fact, those which are ordinarily required in a judgment creditor's suit, prosecuted for the purpose of reaching the equitable assets of the debtor. The bill then further states, that, since the recovery of such judgment, the plaintiff has made diligent efforts to have such judgment prosecuted, and to commence an action for the recovery thereof, in Pennsylvania; that he has not been able to find any of the officers of the defendant upon whom to serve process in that state, or any property belonging to the defendant, in that state, to attach, so as to commence an action therein; that all of the directors of the company reside in the city of New York, and all, or nearly all, of the stockholders thereof reside in that city; that the defendant has no office or officer any where in the state of Pennsylvania, and is not engaged in any business in that state, and has no property of any kind therein, and has no property in the state

of New York, or elsewhere, subject to levy and sale on execution; that the only property or means which the defendant has, is the demand of the defendant against its stockholders, for the portion of their subscriptions remaining unpaid; and that the defendant has subscriptions to its stock remaining unpaid, and which have never been called for or required to be paid by the defendant, or its directors, much more than sufficient to pay the judgment of the plaintiff. The bill, then, without setting out any of the provisions of the defendant's charter, or of the laws under which it was incorporated, or any thing in regard to the terms, or legal effect, of the alleged subscriptions which have not been paid in full, or whether the parties who made such subscriptions are still stockholders in the corporation, and, in short, without setting out any thing beyond the fact of there being such unpaid subscriptions, to show that the corporation has a present, or any future, right of action to recover the unpaid balance of such subscriptions, and without making any of the persons whose subscriptions are unpaid, parties to the bill, proceeds to pray for a sequestration of the property, rights, and franchises of the defendant, and for the appointment of a receiver, with the usual powers to receive the property, rights, and franchises of the defendant, and to collect and receive from the stockholders of the defendant the amount of their subscriptions unpaid, or sufficient thereof to satisfy the plaintiff's judgment, with interest and costs; and that such receiver may be directed, by the judgment of this court, to pay over to the plaintiff the amount of such judgment, interest, and costs. It also contains the prayer for general relief.

To this bill the defendant demurs, and assigns as causes of demurrer: (1) That it appears, by the bill, that the defendant is a citizen of the state of Pennsylvania, and that all of its property and effects are within that state, and that the property and effects sought to be reached by, and through, this action, are in that state, and that none of the same are in the state of New York; (2) that it does not appear that the defendant has any property or effects whatever, to be used, or applied, in or towards the satisfaction of the judgment mentioned and described in the bill; (3) that it does not appear that the defendant holds against its stockholders, or any of them, any demand for any portion of their subscriptions, or that any portion thereof is unpaid, or that any portion thereof is collectable; (4) that the plaintiff has not, in and by his bill, made and stated such a case as does, or ought to, entitle him to any such discovery, or relief, as is sought, and prayed for, from and against the defendant. There is also a fifth formal cause of demurrer assigned, but it is only a reiteration, in a different form, of the substance of the cause of demurrer fourthly assigned.

As it was conceded on the argument, and is substantially stated in the bill, that this suit

was first instituted in a state court and removed to this court for trial, according to the provisions of the 12th section of the judiciary act, it is unnecessary to discuss the questions presented by the cause of demurrer firstly assigned, or to examine the numerous cases cited on the argument to show that this court has no jurisdiction of this case by reason of the character and citizenship, or legal domicile or locality, of the defendant. If this question of jurisdiction depended upon the provisions of the 11th section of the judiciary act, most of the cases cited would be pertinent; but, as it depends wholly upon the provisions of the 12th section, a sufficient authority for holding that the demurrer cannot be sustained upon the grounds stated, is furnished by the cases of *Bliven v. New England Screw Co.* [Case No. 1,550]; *Barney v. Globe Bank* [Id. 1,031]; *Sayles v. Northwestern Ins. Co.* [Id. 12,421]; *Clarke v. New Jersey Steam Nav. Co.* [Id. 2,859]. But, even in a case within the 11th section of the judiciary act, a defendant who is not found, or served with process, in the district in which the suit is brought, waives his right to object to the jurisdiction upon that ground, by voluntarily appearing in the suit, as the defendant did in this case, by entering his appearance in this court, as alleged in the bill. The immunity which, under the 11th section of the judiciary act, is, in certain cases, secured to a defendant not so found or served with process, is a personal privilege which he may always waive; and he does waive it by entering his appearance. *Toland v. Sprague*, 12 Pet. [37 U. S.] 300; *Clarke v. New Jersey Steam Nav. Co.* [supra]; *Flanders v. Etna Ins. Co.* [Case No. 4,852]; *Harrison v. Rowan* [Id. 6,140]; *Gracie v. Palmer*, 8 Wheat. [21 U. S.] 699; *Logan v. Patrick*, 5 Cranch [9 U. S.] 288; *Irvine v. Lowry*, 14 Pet. [39 U. S.] 293.

The objection that the property and effects of the defendant which it is the object of the bill to reach, are in the state of Pennsylvania, and all the objections stated in the second, third, and fourth causes of demurrer assigned, may, perhaps, be properly considered together; or else, as having such direct and close connection as to justify the omission to consider each separately and in its order.

The bill alleges, in substance, that the defendant has no property of any kind in Pennsylvania, and that the only property or means which it has is its demand against its stockholders for the proportion of their subscriptions remaining unpaid; but it alleges that the defendant has subscriptions to its stock remaining unpaid much more than sufficient to pay the plaintiff's debt. Taken together, these allegations can hardly be said to show that the defendant is without means to pay the plaintiff's debt. The alleged sufficiency of these unpaid subscriptions would seem to require that their value as well as their amount should be more than equal to

the plaintiff's debt; and it must be admitted that the allegation of value would have been more clearly appropriate and sufficient, if the value of these subscriptions, or their amount, and the pecuniary responsibility of such subscribers, had been directly alleged, and not been left to be inferred from the somewhat indefinite statement just referred to. The question is not free from doubt, but I am inclined to think that the bill is sufficient in so far as this statement of amount and value is concerned, and shall therefore proceed to consider the more serious questions still remaining for discussion.

The right to require payment of these amounts of unpaid stock, if it can be considered as the property or effects of the defendant, must belong to the defendant as a Pennsylvania corporation, and, as a chose in action, must be considered as property of the defendant in Pennsylvania, where and where only the body corporate exists. If it is, as yet, a mere right of the corporation, by a resolution of its board of directors or managers, to call for the payment of the balance unpaid, by installments or otherwise, it is a right which can be made the basis of an action at law against the stockholders only, upon and by means of the proper action of a Pennsylvania corporation; and, probably, this action cannot be enforced by this court, for want of power to compel the directors or managers of this foreign corporation to make the necessary calls for such payment. If the proper calls have been made, or if a suit at law could now be sustained by the corporation, without any such call having been made, to enforce payment, such a right of action follows the locality of the corporation or creditor, and, so far as locality is concerned, must be considered as assets of the defendant in Pennsylvania, and not within the jurisdiction of this court—and this whether the written subscription, or other evidence of such subscription, be within this district or in Pennsylvania.

But I am inclined to the opinion that the fact that the defendant has no real or personal property, choses in action or equitable interests, in this district, is not, of itself, an objection to the jurisdiction of this court or a sufficient defence to the present bill. The actual appearance of a foreign corporation as a defendant, gives to this court the same right to grant a proper decree upon the case made, that it would have the right to make under like circumstances against a natural person proceeded against for the same cause of action; and the case of *Mitchell v. Bunch*, 2 Paige, 606, cited and relied upon by the defendant, as well as several English cases there cited by Chancellor Walworth, would seem to authorize this court to make a decree in a judgment creditor's suit, requiring the defendant to transfer to a receiver real and personal estate, situated in a foreign country, and choses in action belonging to him, though he might be a resident of a for-

ign country, in order to secure their application to the satisfaction of the judgment of the plaintiff in such suit. It is not, ordinarily, a sufficient defence to an action at law or a suit in equity, that the plaintiff will not be able to enforce the judgment or decree to which he would otherwise be entitled; but, in a judgment creditor's suit brought to enforce the payment of such creditor's demand out of the equitable interests and assets of the defendant which are not subject to execution at law, the precise ground of relief is, that the court of equity can enforce the remedy sought, while it cannot be obtained in a common law court; and, in such suits, a court of equity ought not to allow the parties to go through a long course of expensive and, perhaps, vexatious litigation, when it is apparent that it must be fruitless in its result. This makes it necessary to consider the more important questions which relate to the actual merits of this case, and the extent of the relief which can be afforded to the plaintiff under his bill as now framed, through the action of a receiver or otherwise.

It is very clear, that the capital stock of the corporation defendant, and any unpaid portions of such capital stock, must be considered, in equity, as a trust fund, specifically charged with the payment of the debts of the corporation. *Mann v. Pentz*, 3 Comst. [3 N. Y.] 415, 422; *Spear v. Grant*, 16 Mass. 9; *Wood v. Dummer* [Case No. 17,944]; *Briggs v. Penniman*, 8 Cow. 387; *Slee v. Bloom*, 19 Johns. 456, 474; *Hume v. Winyaw Co.*, 4 Am. Law Mag. 92; *Ward v. Griswoldville Manufacturing Co.*, 16 Conn. 593; *Nathan v. Whitlock*, 9 Paige, 152; *Dayton v. Borst*, 31 N. Y. 435. This being so, it must necessarily follow, that a court of equity, upon a bill properly framed, in a suit brought by and against all proper parties, would grant the equitable relief to which the plaintiff might be entitled. (See cases just cited.) This brings us to the questions whether, in this case, the proper parties are before the court, and whether the bill states a case which entitles the plaintiff to the relief, or any portion of the relief, prayed for in the bill.

The case of *Mann v. Pentz*, *ubi supra*, apparently decides, that the allegations of the bill in this case would be insufficient to authorize a decree against any single stockholder of a railroad corporation created by the legislature of this state, who might have been made a party to such a bill; and that any receiver who might be appointed in such a suit would have no right, in any event, to prosecute, either at law or in equity, an individual stockholder, for the recovery of the sum unpaid upon his stock. If that case stood alone, it would create very serious doubts, whether a receiver appointed in this case could maintain any action at law or suit in equity, for the purpose of enforcing payment of the amount still unpaid upon subscriptions to the capital stock of the defend-

ant; and it might well be doubted, whether the liability of a stockholder upon his unpaid subscriptions could be enforced in the courts of this state, except by a suit in equity, in behalf, or for the benefit, of all the creditors of the corporation, and against all the stockholders in default. The stockholders' liability to creditors of the corporation was apparently considered, in that case, as a statutory liability only, and it was said that the stockholder could only be made liable to the corporation by regular calls, in pursuance of its charter; but the subsequent case of *Dayton v. Borst*, 31 N. Y. 435, seems to be opposed to the case of *Mann v. Pentz*, on these points, (unless there is a difference between the two cases by reason of the fact that one was a New York corporation and the other a corporation of New Jersey,) and to maintain the right of a receiver, with the ordinary powers of a receiver appointed under the bill of a judgment creditor, to recover the balance unpaid upon subscriptions to the capital stock of the corporation of which he has been made receiver, without any previous call being made by the corporation. The 13th section of the act creating the corporation in which the defendant in *Mann v. Pentz* was a stockholder, provided for calls upon the stockholders, and notice thereof, and for the forfeiture of stock in case the calls thereon were not paid; and it may have been properly considered by the judges who decided the two cases referred to, that this 13th section, in effect, required calls to be made before any action could be brought for the recovery of the amount unpaid upon the subscriptions of its stockholders, although I confess that my own first impression was, that the provision referred to required such calls, and notice thereof, only in cases where a forfeiture of the stock was contemplated. The rights of the parties were also considered to depend upon the New York statutes in reference to insolvent corporations, and these facts may, perhaps, distinguish the case from that of *Dayton v. Borst*. The cases of *Mann v. Pentz* and *Wood v. Dummer* were cited by Judge Davies, in delivering the opinion of the court in *Dayton v. Borst*, and there is nothing in his opinion, showing that the court intended expressly to overrule the decision in *Mann v. Pentz*. Nevertheless, the two cases appear to me to be irreconcilably in conflict, unless the case of *Mann v. Pentz* proceeded upon the ground that, under such 13th section, there could be no liability against the stockholder, unless a call had been made in pursuance of that section, or upon the ground that the statute of New York had provided a different remedy against delinquent stockholders; and the latter case, in which the plaintiff was the receiver of a foreign corporation, "with power" (as is stated) "to sue for, collect, receive, and take into possession, all the goods, rights, and credits" of such corporation, shows that a receiver with these powers, (such as are or

dinarly conferred upon receivers under judgment creditors' bills), had a right to sue for the unpaid balance of subscriptions, and that, when there was nothing to the contrary appearing in the case, the receiver might recover the amount, without showing anything more than the fact that the defendant had become a stockholder and had failed to pay the full amount of his stock.

The case of *Dayton v. Borst* seems to be full authority for the position, that a receiver appointed in this suit would, under the case made by the bill, be entitled to recover the unpaid balances due from the stockholders of the defendant, to such extent as would enable him to pay the plaintiff's demand; and, as the question is one of state law, and the decision in *Dayton v. Borst* was made by the highest court of the state, without the express dissent of any of its judges, I shall rule the demurrer in this case on the authority of that decision, as the latest exposition of the law of this state upon the questions involved in its determination.

I confess, that a bill framed according to the views expressed in the cases of *Wood v. Dummer* and *Mann v. Pentz*, and making the corporation, and its delinquent stockholders, parties defendants, seems to me a more appropriate form of proceeding in the case of a domestic corporation; and no insuperable objection to adopting that form of proceeding in the case of a foreign corporation, at least so far as to make stockholders in default parties defendants in a state court, now occurs to me, or has been suggested by the counsel. The equitable attachment of the demand of the corporation against such defaulting stockholders, thus made defendants, would be an important consideration in favor of such a form of proceeding; but, as it has not been adopted in this case, it is not necessary now to decide whether such a bill could be maintained upon the case stated by the plaintiff.

The demurrer is overruled, but with leave to the defendant to answer, within thirty days after notice of the order overruling the demurrer, on the payment of costs.

Case No. 17,863.

WINANS v. NEW YORK & E. R. CO.

[Fish. Pat. Cas. 213; Merw. Pat. Inv. 422.]¹
Circuit Court, N. D. New York. June, 1856.²

PATENTS FOR INVENTIONS—SUFFICIENCY OF SPECIFICATIONS—ACTION FOR INFRINGEMENT
—RAILROAD CARS.

1. The patent and the certified copy of the record thereof, in December, 1854, and the certified copy of the drawings deposited by the patentee in the patent office, on the 19th November, 1833, with the references thereon, are under the provisions of the act of congress of

¹ [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 422, contains only a partial report.]

² [Affirmed in 21 How. (62 U. S.) 88.]

March 3, 1837 [5 Stat. 191], prima facie evidence of the particulars of the invention patented.

2. If the jury finds the plaintiff's patent to be valid, and that the defendants have infringed, they will have no difficulty in reaching the conclusion that the invention claimed by the plaintiff was put in use by the defendants, because such use was known to be advantageous.

3. If the specification of the plaintiff's claim is too broad, and he thereby claims to be the first inventor of that which was old and in public use before his alleged discovery and invention, and which is absolutely necessary to an organization constituting the arrangement and connection claimed by the plaintiff as his invention, and having the capacity to operate upon the principles of his invention, he is not entitled to recover in action, although some substantial part of the invention claimed, or some new combination of mechanical powers or devices, described in the patent, may have been first invented and discovered by him.

4. When a patentee specifies what he claims as new, every mechanical part, principle, or combination which he mentions in his specification, but which are not included in his invention, as claimed and limited, must, by necessary implication be considered as admitted to be old, or in use before; and the patent is not invalid, because the patent has not in express words particularly stated them to be old, nor described the particular manner of their construction.

This was an action on the case tried before Judge Hall and a jury, to recover damages for the infringement of the letters patent for "a new and useful improvement in the construction of cars or carriages intended to travel upon railroads," granted to Ross Winans, October 31, 1834. A portion of the specification and the claims will be found in the report of the case of *Winans v. Eaton* [Case No. 17,861]. The charge of the court related mainly to the construction of the patent, for, from the evidence offered, it sufficiently appeared, that, if the claims of the patentee were construed as insisted upon by the defendants, the patent was void for want of novelty, and the plaintiff could not recover.

J. A. Spencer, D. L. Seymour, C. M. Keller, and S. Blatchford, for plaintiff.

D. B. Eaton, S. Hubbell, and S. Stevens, for defendant.

HALL, District Judge (charging jury). I am very happy to inform you that there is a prospect of this case being very speedily disposed of. These are the rulings, gentlemen, which the court has determined to make, in delivering to you the charge which is to guide you in determining your verdict.

1st. The patent itself is prima facie evidence of the novelty and utility of the invention patented. The issuing of the patent is also prima facie evidence that the specification, when delivered, was accompanied with drawings and written references thereto, as then required by statute. So also the patent; and the certified copy of the record thereof, in December, 1854, and the certified copy of the drawings deposited by the patentee in the patent office on the 19th Novem-

ber, 1838, with the references thereon, are, under the provisions of the act of congress, of July 4, 1836 [5 Stat. 117], prima facie evidence of the particulars of the invention patented.

2d. It can hardly be necessary to occupy the time of the jury upon the question of utility, for the reason that, if the jury find the plaintiff's patent to be valid, and that the defendants have infringed, they will, it is believed, have no difficulty in reaching the conclusion that the invention claimed by the plaintiff was put in use by the defendants, because such use was known to be advantageous. On the question of novelty, I shall presently give other instructions.

3. It is necessary that you should understand what the plaintiff claims as his invention; that is, what is covered by the terms of the claim contained in his specification. The plaintiff, by his specification, does not claim to be the first inventor of the first railroad car or carriage, run upon eight wheels; nor does he claim to be the discoverer of the different effects produced by the near and by the remote position of the wheels of an ordinary four-wheeled car. He admits by his specification that the different effects produced by these different positions of the wheels in a four-wheeled car were known, and he also admits that the knowledge that placing the axles of such wheels comparatively near together, enabled the car to pass curves of short radius with the least friction, but at the same time rendered it less suited to the attainment of the steadiness of motion desired; together with the knowledge that the remote position of such wheels gave greater steadiness of motion to the car, and greater relief from the lateral and vertical vibrations, and the frequent shocks and concussions caused by minute obstructions and irregularities on the track, had caused the adoption, in the modes of construction then in use, of a compromise in regard to the distance between the fore and hind wheels of the four-wheeled car; which compromise, he says, was then most commonly made, between the evils resulting from a considerable separation and a near approach of the wheels of the four-wheeled car. He then says that by the modes of construction then in use, one of these advantages of positions of wheels must be sacrificed to the other, by which, and by the statement in regard to the usual compromise, he is understood to mean that no mode of construction then in public use would allow the full advantages of both these positions of the wheels (the near and the remote) to be attained at the same time; and that in practice, a part of the advantages resulting from each position was (by the compromise in regard to the distance between the wheels, adopted in the modes of construction then in use) necessarily sacrificed, in order to obtain part of the advantages of the other position. He afterward, in stating

the object of his invention, informs us that he seeks to attain that object by the before-mentioned desideratum of combining the advantages of the near and distant coupling of the axles, and other means, to be therein-after described. He then describes the means by which this desideratum is to be obtained; the construction of two bearing-carriages, each with four wheels; the two wheels upon each side of these carriages to be placed very near each other, there being no necessity that the space between the flanges should be greater than is necessary to prevent their contact; the placing upon these bearing-carriages of a bolster of proper length, extending across between the two pairs of wheels; the placing on the top of this lower bolster of another of equal strength, and connecting the two together by a center-pin or bolt, passing down through them, and thus allowing them to swivel and turn upon each other, in the manner of the front bolster of a common road-wagon; the placing of the body of a passenger or other car, of double the ordinary length of those used upon four wheels, so as to rest its whole weight upon the two upper bolsters of the two bearing-carriages, at, near, or beyond the ends of the car body, so that such weight shall be borne substantially upon the central portion of the bolsters, being also the central portion of the bearing-carriages. His disclaimer, which follows, is in this language:

"I do not claim as my invention the running of cars or carriages upon eight wheels, this having been previously done; not, however, in the manner or for the purposes herein described, but merely with a view of distributing the weight carried, more evenly upon a rail, or other road, and for objects distinct in character from those which I have had in view, as hereinbefore set forth; nor have the wheels, when thus increased in number, been so arranged and connected with each other, either by design or accident, as to accomplish this purpose."

This disclaimer excludes from his subsequent claim no mode of arranging and connecting the eight wheels, which constitute the two bearing-carriages, with an eight-wheeled railroad car, except those modes where the use of eight wheels was adopted merely with the view of distributing the weight carried more evenly upon a rail, or other road, and for objects distinct in character from those of enabling a car with a comparatively long body to turn curves with facility and safety, and with less friction. His subsequent claim furnishes a further limit of the invention claimed, and this claim embraces, by its specific language and express terms, the manner of arranging and connecting the eight wheels, which constitute the two bearing-carriages, with a railroad car before described in the plaintiff's specification, by the means set forth, or any others which are analogous and dependent

on the same principles; and it embraces nothing more. Therefore, according to the import and true construction of the plaintiff's patent and specification, he claims to be the first inventor of "a new and useful improvement in the construction of cars and carriages intended to travel upon railroads"—which improvement consists in the manner of arranging and connecting the eight wheels, which constitute the two bearing-carriages, with a railroad car, the object of which is to make such an adjustment of the wheels, axles, and bearings of the car, as shall enable a car with a comparatively long body to pass curves with greater facility and safety, and less friction; and as shall at the same time cause the body of the car to pursue a more smooth, even, direct, and safe course over the curvatures and irregularities, and over the straight parts of the road.

4. The manner of such arrangement and connection is to place upon the upper bolsters of two bearing-carriages, each having four wheels, with the flanges of each pair of wheels very near together, the body of a car, so as to rest its weight and have the bearing of the load upon the center, or central portion of the bearing-carriages; the bolsters of the bearing-carriages and car-body respectively being connected by center-pins or bolts, so as to allow them to swivel and turn upon each other, in the manner of the front bolster of a common road-wagon, and the bolsters being placed at, near, or beyond the ends of the body, and the closeness of the fore and hind wheels of each of the two bearing-carriages, coupled as remotely from each other as may be desired, or can conveniently be done, for the support of one body, is a most important feature of the invention, with a view to the objects, and on the principles set forth in the specification.

5. The patentee does not claim to be the inventor of a car-body (either for freight or for passengers), of a new or peculiar construction, in size or form, nor of any single and wholly separate part of the entire car; but he claims as his invention, the manner of arranging and connecting the eight wheels which constitute the two bearing-carriages, with a railroad car, in the manner and by the means described in his specification, for the ends before described, whether such railroad car is adapted to the transportation of freight or of passengers. The leading principle set forth in the specification, upon which the arrangement and connection act, to effect the objects aimed at, is, that by the contiguity of the fore and hind wheels of each bearing-carriage, and the swiveling motion of the trucks or bearing-carriages, the planes of the flanges of the wheels conform more nearly to the line of the rails, and the lateral friction of the flanges on the rails while entering, passing through, and leaving curves, is thereby diminished; while at the same time, in consequence of the two bearing-carriages being arranged and con-

nected with the body of a passenger or burthen car by means of the king-bolts or center-pins and bolsters, placed as remotely from each other as may be desired, or can be conveniently done, and with the weight bearing upon the central portion of the bolsters and bearing-carriages, the injurious effect of the shocks and concussion received from the slight irregularities and imperfections of the track, and other minute disturbing causes, are greatly lessened.

6th. The plaintiff has then clearly and distinctly claimed the manner of arranging and connecting the eight wheels, which constitute the two bearing-carriages, with a railroad car, in the manner described in his specification, so as to accomplish the end proposed by the means set forth, or by any others which are analogous and dependent upon the same principles. And he has not by the disclaimer, in his specification or otherwise, circumscribed or limited this claim by admitting the previous use or disclaiming the invention of the mode of connecting and arranging the eight wheels in two bearing-carriages or trucks of four wheels each, with a car-body or platform, by means of bolsters and center-pins or bolts, allowing these trucks to swivel upon their center, so as to suit the lateral curves of the railroad, and also to run upon the straight track, and also allowing a railroad car-body of any convenient length, consistent with the required strength of such body, to be run upon such bearing-carriages upon curves of short radius—thus rendering unnecessary the compromise which the patentee represents in his specification it was, prior to his invention, necessary to make. If the patentee intended to claim only the exclusive center-bearing, and an unusual or previously unknown proximity of the wheels on either side of the separate bearing-carriages, or either of these features separately, he should have limited his claim to the particular features or feature intended to be claimed; or, if he intended to take a patent for a combination only, he should have expressly claimed the invention of such combination, and should have pointed out clearly and exactly the elementary parts of such combination. He has done neither. Nor has he by the terms of his disclaimer and claim, when considered in connection with those parts of the specification which necessarily exclude the conclusion that the patentee knew or intended to admit that railroad cars, running upon two four-wheeled swiveling trucks, were generally known to the public, or known to those interested in their adoption and use, or even when these are considered in connection with the evidence, showing the use, to some extent of such railroad cars, limited his claim to the form, substance, mechanical properties, functions or action of any number less than the whole of the separate parts or devices which, by the united mechanical action in the arrangement and connection claimed as his in-

vention, give effect and utility, as well as the peculiar character and distinguishing principle, to such arrangement and connection. He, therefore, embraces in this claim of his improvement the use of the two four-wheeled swiveling-trucks, so arranged and so connected to the body of the car as to allow the trucks, when used under, or at, or near the ends of a car-body at any convenient distance from each other, to adapt themselves to the lateral curves of the road.

And, therefore, if you find as a fact, that which I understand is conceded in this case, that the use of two four-wheeled swiveling-trucks, so arranged and so connected to the body of a car as to allow the trucks, when under, or at, or near the ends of a car-body, at any convenient distance from each other, to adapt themselves to the lateral curves of the road, is absolutely necessary to an organization constituting the arrangement and connection claimed by the plaintiff, and having the capacity to operate upon the principles of the invention claimed (as such claims are construed by this court) in order to attain to any useful extent the objects stated in the plaintiff's specification; and if you shall also find, as a fact, that cars constructed with the body of such length as to rest upon the bolsters, remotely placed at or near the ends of the car-body, and the lower bolster resting upon two four-wheeled trucks, swiveling upon their centers, so as to adapt themselves to the lateral curvatures of a railroad, by means of the use of such bolsters, connected by and swiveling upon center-pins or king-bolts, were known and in public use in the United States prior to the time of the alleged invention, then the jury must find a verdict for the defendant, whether such trucks were constructed with or without a spring to each wheel, or whether the wheels thereof were coned or cylindrical upon their threads, or revolved with, or were loose upon their axles; because the plaintiff having suffered both the original and extended terms of his patent to expire, without having filed in the patent office, according to the provisions of the seventh section of the act of March 3, 1837, a disclaimer of part of the thing claimed and patented as new, and still claiming in this suit to be the first inventor of everything which he claims as new in his patent, is precluded from claiming the benefits conferred, under certain circumstances, by the provisions of said seventh section, and because, if the specification of the plaintiff's claim is too broad, and he thereby claims to be the first inventor of what was old and in public use before his alleged discovery or invention, and which is absolutely necessary to an organization, constituting the

arrangement and connection claimed by the plaintiff as his invention, and having the capacity to operate upon the principles of the invention claimed by the plaintiff; he is not entitled to recover in this action, although some substantial part of the invention claimed, or some new combination of mechanical powers or devices, described in the patent, may have been first invented and discovered by the plaintiff.

7th. I do not deem it necessary to do so, but at the suggestion of the counsel, I will add, that bearing-carriages constructed in any of the modes usually practiced at the date of the patent, (being, except in regard to the required close proximity of the two wheels on either side of the bearing-carriages, which constitute or embody what have been called the alternative modes of construction), having been in common use at the date of such patent, and that fact appearing on the face of the specification, it was unnecessary to describe particularly the mode of constructing such bearing-carriages, or the other elements which form portions of the car, containing the arrangement and connection which the plaintiff claims to have invented, if such other elements were well known and in common use; and as the patentee specifies, that he claims as new the before described manner of arranging and connecting the eight wheels, which constitute the two bearing-carriages, with a railroad car, every mechanical part, principle, or combination which he mentions in his specification, but which are not included in his invention, as claimed and limited, as before stated, must by necessary implication be considered as admitted to be old, or in use before; and the patent is not invalid, because the patent has not in express words particularly stated them to be old, nor described the particular manner of their construction.

8. It being conceded, in this case, that the defendant has not used the long, single spring described in the plaintiff's specification as part of the means, in one mode of construction, of connecting the two wheels on either side of the bearing-carriages, it is not now material or necessary to determine that said long spring is or is not claimed as a part of the plaintiff's invention; but at the request of the plaintiff's counsel I shall express my opinion upon that question, and my opinion is, that it is not so claimed.

The jury found a verdict for the defendants.

[This charge was approved, and judgment for defendants affirmed, in 21 How. (62 U. S.) 88.]

[For other cases involving this patent, see note to *Winans v. Schenectady & T. R. Co.*, Case No. 17,865.]

Case No. 17,864.

WINANS v. NEW YORK & H. R. CO.

[4 Fish. Pat. Cas. 1; Merw. Pat. Inv. 421; 61 Jour. Fr. Inst. (3d S.) 316.]¹Circuit Court, S. D. New York. Nov., 1855.
PATENTS FOR INVENTIONS—RAILROAD CARS—ORIGINAL INVENTION—PUBLIC USE.

1. The invention of Winans was an improvement in the four-wheeled car previously in existence, and consisted in the arrangement and construction and adjustment of the eight-wheeled car, as a whole, as described in his specification.

2. The circumstance that a person has had an idea of an improvement in his head, or has sketched it upon paper, or has drawn it, and then gives it up, or neglects it, does not in judgment of law constitute or have the effect to constitute him a first and original inventor.

[Approved in *Reeves v. Keystone Bridge Co.*, Case No. 11,660.]

3. It is not the person who has only produced the idea that is entitled to protection as an inventor, but he who has embodied the idea into a practical machine, and reduced it to practical use.

4. Where one is engaged in producing some new and useful instrument, and who has embodied it into a machine and endeavored to reduce it to practice by experiments, if he fail of success and abandon it, that consideration affords no impediment to another, who has taken up the same idea and has gone on perseveringly until he has perfected it and brought it into practical and useful operation.

5. Upon the trial of an action brought after the act of 1837 [5 Stat. 191], upon a patent granted prior to that act, it is a defense, that the invention was in public use prior to the application.

6. Public use means the use of the perfected invention. If it be experimental, to ascertain the utility, value, or success of the thing invented, by practice, it will not be fatal to the patent.

[Cited in *Harmon v. Struthers*, 57 Fed. 641.]

7. A patent for an improvement does not absorb the thing improved, or give the right to the patentee to use it.

8. The court, having given all instructions and stated all principles of law deemed necessary, declines to give special instructions prayed for by the parties.

This was an action on the case tried before NELSON, Circuit Justice, and a jury, to recover damages for the infringement of letters patent for "improvement in the construction of cars or carriages intended to travel upon railroads," granted to Ross Winans, October 1, 1834, and extended for seven years from October 1, 1848. The material portion of the specification is quoted in the report of the case of *Winans v. Eaton* [Case No. 17,861].

C. M. Keller and J. H. B. Latrobe, for plaintiff.

C. W. Sandford and W. Whiting, for defendants.

NELSON, Circuit Justice (charging jury).
The first question in this case is, what is the

¹ [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 421, contains only a partial report.]

thing, the machine or instrument, which the plaintiff claims to have invented? It is essential to comprehend this, in order to ascertain whether it is new, never before known, or in public use; and is also essential to enable you to determine whether the cars used by the defendants are a violation of the patent. It will be necessary, therefore, in the first instance, to turn your minds to the patent and the description of the improvement claimed, which is there to be found. The description, I think I may say, is one of unusual clearness and precision for instruments of this character. We have had no difficulty in ascertaining from it the improvement as claimed by the patentee, as it defines not only the arrangement and construction of the car—the running gear and the body—but also the principles governing the same, and upon which the improvement is founded. The patentee refers in the beginning to the numerous curvatures in the railroads of this country, the radius of which, in many instances, is but a few hundred feet, and to the friction arising between the flanges of the wheels and the rails, causing a loss of power, and destruction of both wheels and rails. He then refers to the high velocities on railroads by the modern improvements in locomotive engines, and the demand of public opinion—of the business interests of the country—for this description of speed, and also to the consideration, that certain things in the construction of both roads and cars become important which were not, and would not have been, at the old rates of speed. He observes that the great momentum of the load and intensity of the shocks and concussions are among the things to be noted and provided for.

The patentee then refers to the fact that passenger and other cars, in general use upon railroads, have but four wheels, the axles of which are placed from three and a half to five feet apart, the distance being governed by the nature of the road upon which they are run, and other considerations. He then observes that when the cars (meaning the four-wheeled cars) are constructed so that the axles retain their parallelism, and are at a considerable distance apart, there is, of necessity, a tendency in the flanges of the wheels to come in contact with the rails, especially on a curvature of a short radius, as the axles then vary more from the direction of the radii; and that, from this consideration, when taken alone, it would appear to be best to place the axles as near each other as possible, thus causing them to approach more nearly to the direction of the radii of the curves, and the planes of the wheels to be more in the line of the rails. But there are other considerations, he says, that must not be overlooked in the construction of the car, namely, the increased force of the shocks from obstructions at high velocities; and he observes that the greater the distance between the axles, while the length of the body

remains the same, the less is the influence of these shocks and concussions. In consequence of this, he says a compromise is most commonly made between the evils resulting from a considerable separation and a near approach, as by the modes of construction now (meaning then) in use in respect to the four-wheeled cars, one of the advantages which he has referred to must be sacrificed to the other. The patentee then refers to the fact that the lateral curvatures of the roads, together with their irregularities, create these difficulties—are at the foundation of these difficulties. It becomes very important, therefore, he observes, both as regards comfort, safety and economy, to devise a mode of combining the advantages derived from placing the axles a considerable distance apart, with those of allowing them to be situated near to each other.

Now, gentlemen, this is a result to which the patentee arrives after his discussion of the various difficulties to be encountered in the construction of the car, and it may be said to be the leading idea—the general principle—the fundamental principle, if you please—embodied in the eight-wheel car, and which he has subsequently described. I will call your attention to it again, because it brings out the principle upon which the eight-wheel car has been constructed by the patentee. It tends, therefore, very much to develop the leading features, the controlling features of that construction. He says: It becomes very important, both as regards comfort, safety, and economy, to devise a mode of combining the advantages derived from placing the axles at a considerable distance apart, with those of allowing them to be situated near to each other. He then refers to the attempt to overcome these difficulties by the use of coned wheels, and to the partial remedy thereby, but points out the failure of the use of those alone, under high velocity, to get rid of the embarrassment.

The patentee then explains the object of his invention, which, among other things, is to make such an adjustment or arrangement of the wheels and axles as shall cause the body of the car or carriage to pursue a more even, direct, and safe course than it does as cars are ordinarily constructed, both over the curved and straight parts of the road, by the desideratum of combining the advantages of the near and distant couplings of the axles, and other means which he has described.

He then describes the arrangement and construction of his cars, which I will not take up your time in reading. It has been read so often and so frequently illustrated and exemplified in the progress of this trial, that I have no doubt you are familiar with it. It will be found upon the copy of the patent which I have between folios twenty-one and twenty-eight. And then comes the claim. The patentee says, after describing the construction of his car:

"I do not claim as my invention the running of cars or carriages upon eight wheels, this having been previously done; not, however, in the manner or for the purposes herein described, but merely with a view of distributing the weight carried more evenly upon a rail or other road, and for objects distinct in character from those which I have had in view, as hereinbefore set forth. Nor have the wheels, when thus increased in number, been so arranged or connected with each other, either by design or accident, as to accomplish this purpose. What I claim, therefore, as my invention, and for which I ask a patent, is, the before-described manner of arranging and connecting the eight wheels, which constitute the two bearing carriages, with a railroad car, so as to accomplish the end proposed by the means set forth, or by any others, which are analogous and dependent upon the same principles."

The claim itself explains the improvement set up by the patentee. It is the arrangement and construction and adjustment of the eight-wheeled car, as described in his specification, the car as a whole. The patentee claims no right as inventor to any of the constituent parts of the car, the wheels, the axles, and peculiar construction or framing of the running gear of the bearing carriages, the contrivances by which they are connected together, the springs, the bolsters, the turning of them upon the center, or the swiveling of the trucks—nothing of this is claimed as new on the part of the patentee. This is plain from the terms of the claim, which is the construction and arrangement and adjustment of these various parts into a car as a whole, combining the advantages which he has set forth as he claims.

Now, it is proper to observe, that this improvement, as claimed by the patentee, is made upon the existing four-wheel car then in general use, and which, as has appeared in the progress of this trial, is still in use in England, and probably upon the Continent, unless they have adopted our eight-wheel cars, some specimens of which I have understood have been sent to the Continent. It will, therefore, be proper and useful for you to examine this four-wheel car as then in general use, and the evidence in respect to it. Models have been introduced and exemplified, and no doubt you understand it. But you should inquire into this fact, in order to ascertain whether or not the difficulties described by the patentee existed upon curved roads at great velocity, I mean as respected this four-wheel car then in use upon roads with high velocity and with short curves—and whether or not the eight-wheel car, as arranged and constructed by the patentee, is an improvement upon it. This is one of the questions in the case for your consideration, and, as to this, you will probably not have much difficulty. From the time they were first brought out in Baltimore—I mean the eight-wheeled cars—it is admitted on all

sides, that they have generally taken the place of the previous four-wheel car, and their use soon spread throughout the railroads of the United States, and, for aught that appears before us in this trial, the first construction and arrangement, and adaptation of those eight-wheel cars to the railroads of this country was in Baltimore, and they were constructed and arranged for the Baltimore and Ohio Railroad Company, and the Washington branch of it. It was offered, it is true, to be shown, on the part of the defendants, that one—that is, an eight-wheel car—was brought out in Massachusetts in 1838, but that fact, at that late day, affords no exception to the truth of the remark I have made; for the eight-wheel car, what is claimed by the patentee to be the perfected car, the car completed, and upon which the patent was founded, was made as early as the beginning of the winter, some time in December, 1834—the Washington cars, four years before the eight-wheel car in Massachusetts.

Now, gentlemen, if I have succeeded in explaining to you the improvement described in the plaintiff's patent, and claimed by him, upon these four-wheel cars, by the construction of an eight-wheel car, as I hope I have, the next question to which your attention must be called is this—whether or not this improvement as thus described in the patent, and as first brought out in Baltimore—whether this was the improvement of the plaintiff. This is one of the material questions in the case, which, as you have already discovered, has been most seriously contested between the parties. After calling to your minds the construction given by the court to the patent, and to what constitutes the improvement which is claimed to have been reduced to practical use—after you have ascertained and comprehended this improvement claimed by the plaintiff, and described in his patent—after this, which is a question of law (I mean so far as the construction of the patent is concerned), after you have ascertained what is claimed by the plaintiff as his improvement, the question whether or not he was the first inventor of it is a question of fact, which belongs to you to determine. The burden of the evidence—for the greater portion of the time, the long time which has been consumed in this trial—has been directed on both sides to the solution of this question. The patent of the plaintiff, given in evidence, and the extension of it for seven years, which has been given in evidence, together with the testimony of the experts introduced on the part of the plaintiff in the opening of the case, furnish prima facie evidence that the plaintiff was the first and original inventor of the improvement claimed, and of its utility; and therefore, the burden of showing that he was not the first and original inventor, and of the inutility of the patent, rests upon the defendants. They are obliged to assume this position in that

stage of the trial. Accordingly, they have gone into evidence at large for the purpose of satisfying you upon these points, and you have before you, first, the evidence from Baltimore, for the purpose of showing this—that, assuming the car described in the plaintiff's patent to be the improvement upon the four-wheel car, and that it was new and useful, yet the defendants insist upon this evidence, that the plaintiff was not the first inventor, but that somebody else was. They refer to the timber, the wood, and the trestle cars, and much evidence has been given in respect to these cars. The plaintiff, on the contrary, insists that neither of them embodied his improvement, or that if any of them did, it was constructed after his invention, which it is claimed is carried back upon the evidence to the fall or beginning of the winter of 1830. Now, gentlemen, I am not going over this evidence on either side. It has been so amply and ably discussed by the learned counsel upon both sides, that I can not doubt that you are familiar with every material portion of it. It will be for you to say, upon the evidence, whether or not the defendants have furnished evidence to satisfy you that the plaintiff was not the first and original inventor, but that somebody else was. They have that burden upon them. It will be for you to determine, upon the whole of the evidence, whether they have overcome the patent, and the evidence furnished in support of it.

Then another ground is taken, viz: that there is nothing new in the arrangement or construction of the car, as described in the patent, but that it was old, and before in public use; and they say that it is to be found in Chapman's patent and drawings, and also in Tredgold and Fairlamb's—although as to the two latter, they are not much relied upon—in the Quincy car, in the Allen locomotive, and in the Jervis locomotive. All these have been brought out in the progress of the trial, and amply examined and discussed, and I am persuaded that you are entirely familiar with all the evidence bearing upon this branch of the case. The question upon it will be, whether or not you find the improvement of the plaintiff—the improvement existing in the arrangement and construction of his eight-wheel car upon the four-wheel car—whether you find that improvement in any one or all of these patents or machines—not whether they have eight wheels and two trucks, free to swivel or rock; but the question is, whether the peculiar arrangement, adjustment, and construction of the car—the wheels and trucks in relation to the road—claimed in the patent, and which I have endeavored to explain to you, on the principles which the patentee has developed—whether that embodiment thus found in the eight-wheel car is to be found in either of these structures to which you have been referred. That is the question.

Another ground of defense set up on the

part of the defendants is, that Mr. Imlay is the inventor. You recollect his testimony, I have no doubt. It is claimed that he carries back the construction, or the idea, if not the construction, of the eight-wheel car, to 1829. It is, however, proper to say, in respect to this witness, that he spoke doubtfully as to time. He would not speak positively. It was a matter of memory with him. I noted his evidence particularly. He was uncertain as to time. But, whatever that time was (and I refer to his interview with the committee of the French Town Railroad), he says he made a rough sketch of his idea of an eight-wheel car at this time, whatever time that may be, and that he made a contract with the road to build a car, as he thinks, but which fell through in consequence of his partners not concurring with him; and then we hear no more of his connection with an eight-wheel car until he removes from Baltimore to Philadelphia, in 1833, and brings out, I think, the "Victory," in 1834 or 1835, I am not certain which. I refer more particularly to the evidence of this witness, for the purpose of stating to you a principle of law. Now, the circumstance that a person has had an idea of an improvement in his head, or has sketched it upon paper—has drawn it, and then gives it up—neglects it—does not, in judgment of law, constitute or have the effect to constitute him a first and original inventor. It is not the person who has only produced the idea, that is entitled to protection as an inventor, but the person who has embodied the idea into a practical machine, and reduced it to practical use. He who has first done that is the inventor who is entitled to protection.

A kindred principle, also, it may be proper to state here, which is, that where a person engaged in producing some new and useful instrument or contrivance, and who has embodied it into a machine, and endeavored to reduce it to practice by experiments—if those trials fail—if he fail in success and abandon it, or give it up, that consideration affords no impediment to another person, who has taken up the same idea or class of ideas, and who has gone on perseveringly in his studies, trials, and experiments, until he has perfected the new idea, and brought it into practical and useful operation. He is the person—the meritorious inventor—who is entitled to the protection of the law.

Another ground of defense set up is, that the patentee allowed the public use of his improvement, of his eight-wheel car, upon the Baltimore and Ohio Railroad, before he made his application for a patent. Now, it is undoubtedly true, as the law stood at the time of this patent, in October, 1834, that the public use of the invention, with the consent of the patentee, or sale of it, prior to the time of his application for a patent, operated as a forfeiture—as a dedication to the public. This, however, means the use of the perfected invention—the invention complete.

If the use be experimental, to ascertain the value, or the utility or the success of the thing invented, by putting it into practice by trial, such use will not deprive the patentee of his right to the product of his genius. The plaintiff, therefore, in this case, had a right to use his cars on the Baltimore and Ohio Railroad, by way of trial and experiment, and to enter into stipulations with the directors of the road for this purpose, without any forfeiture of his rights. He could not probably obtain the opportunity of trial which was essential to the perfection of his improvement without obtaining their consent, and, as I have already said, it is the use of the improvement after it has been completed and reduced to practical success, which operates as a forfeiture—as a dedication to the public—as a giving it up to the public.

Now, gentlemen, if, upon consideration of these questions which I have submitted to you, you should come to the conclusion that this improvement is a useful one, and that the plaintiff is the first and original inventor of it, the next question for your consideration is, the question of infringement. If you are against the plaintiff upon either of the two first questions of utility and originality, then, of course, this other question will not be reached.

Then, as to the infringement by the defendants' cars, the question is: Do they embody the arrangement and construction of the plaintiff's car—in other words, the improvement in the plaintiff's specification? Improvements, as you have seen during the progress of this trial, have been made upon the eight-wheel car, since it was brought out and put in operation. The swinging bolster is an instance, and there are also others that have been mentioned in the course of the trial. Now, the improvements thus made upon the eight-wheel car do not give any right to the thing improved. The plaintiff in this case would have had no right to use a four-wheel car, if there had been a patent for it, because he had improved it by the eight-wheel car. So an improvement upon the eight-wheel car does not absorb, or give a right to the inventor of that improvement to use the thing improved. Therefore, the question still is, whether or not you find in the defendants' organization and arrangement the organization and arrangement of the plaintiff's improved car. If you do, the additional improvements since made upon it do not disprove the infringement. It is a question of fact for you to determine. Having ascertained and comprehended what the improvement of the plaintiff is, as claimed in his patent, and which I have endeavored to explain to you in the beginning of this charge, you will apply that to the defendants' cars, and see whether it is embodied there. If it is not, then there is no infringement. If it is, there is an infringement.

Then, as to the question of damages. It is admitted by the counsel for the plaintiff

that the amount stated in the declaration is ten thousand dollars. This suit was brought January 16, 1849, as stated. They claim damages for the years 1847 and 1848. It is in evidence that twenty-four eight-wheel passenger cars, thirty-two freight cars, and eight baggage cars were used in 1847 by the defendants, upon their road; and in 1848, twenty-five eight-wheel passenger cars, thirty-five freight cars, and eleven baggage cars. It is also in evidence, and it does not seem to be contradicted, that the patent fee for the right to use an eight-wheel passenger car is worth two hundred dollars a car per annum for license, and that the freight cars and baggage cars would be worth twenty dollars per annum. Taking this evidence, and there seems to be no contradiction about it, the damages claimed, upon the principle which I have stated, would exceed considerably ten thousand dollars. There is no doubt about that. But you are limited, and you can not go beyond that sum. These, gentlemen, are all the observations I think it is necessary to make to you.

I have prayers for instructions here, by the defendants' counsel, numbering, I believe, eighty, but the counsel must excuse me from going over them. I have given all the instructions, and all the principles of law that I deem necessary or useful in the submission of this case to you, and whatever else may be found in these numerous prayers is beyond what I deem proper to trouble you with, for I regard them as not pertinent, nor relevant, and not material to comment upon.

The jury, not being able to agree upon a verdict, were discharged.

[For other cases involving this patent, see note to *Winans v. Schenectady & T. R. Co.*, Case No. 17,865.]

Case No. 17,865.

WINANS v. SCHENECTADY & T. R. CO.

[2 Blatchf. 279; Merw. Pat. Inv. 416; 53 Jour. Fr. Inst. 256.]¹

Circuit Court, N. D. New York. Sept. 1, 1851.

PATENTS FOR INVENTIONS—CONSTRUCTION OF RAILROAD CARS—LOCATION OF TRUCK—SUFFICIENCY OF SPECIFICATION.

1. The claim of Winans' patent, granted October 1st, 1834, for an "improvement in the construction of cars or carriages intended to run on railroads," which claim is "the before-described manner of arranging and connecting the eight wheels, which constitute the two bearing-carriages, with a railroad car, so as to accomplish the end proposed by the means set forth or by any others which are analogous and dependent upon the same principles," is a claim for the car itself constructed and arranged as described in the patent, and evidence that parts of the arrangement and construction were be-

¹ [Reported by Samuel Blatchford, Esq., and here reprinted by permission. Merw. Pat. Inv. 416, and 53 Jour. Fr. Inst. 256, contain only partial reports.]

fore known does not affect the novelty of the invention.

[Cited in brief in *Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co.*, Case No. 8,453.]

2. The location of the trucks relatively to each other under the body of the car, as well as the near proximity of the two axles of each truck to each other, form an essential part of the arrangement of the patentee, who states, in his specification, that the closeness of the fore and hind wheels of each truck, taken in connection with the use of two trucks arranged as remotely from each other as can conveniently be done for the support of the car-body, with a view to the objects and on the principles set forth by him, is considered by him as an important feature of his invention. But the improvement does not consist in placing the axles of the two trucks at any precise distance apart, or at any precise distance from each end of the body; and the specification is sufficient, although it does not state in feet or inches the exact distance from the ends of the car-body at which it would be best to arrange the trucks, or what should be the exact distance between the axles.

3. The patent, which was issued in 1834, had no drawings originally annexed to it, and the specification contained no reference to any drawings. The patent was recorded anew in June, 1837, under section 1 of the act of March 3d, 1837 (5 Stat. 191), and a drawing of the invention, verified by the oath of the patentee under said section 1, was filed in November, 1838: *Held*, in an action for the infringement of the patent, that a certified copy of such drawing was admissible in evidence under section 2 of said act, in connection with certified copies of the patent and specification, and that the whole together were prima facie evidence of the particulars of the invention and of the patent granted therefor.

4. As a general rule, such a drawing cannot be used to correct any material defect in the specification, unless it corresponds with a drawing filed with the original specification for the patent; otherwise, in case of discrepancy, the specification must prevail.

5. Nor can such a drawing have the same force and effect as if it had been referred to in the specification, nor is to be deemed and taken as part of the specification.

6. The specification of Winans' patent said nothing about the mode of attaching the car to the motive-power or to the next car in a train, nor anything about the use of side-bearings to prevent the rocking of the car from side to side, but the drawing filed in November, 1838, showed that the car was to be attached to the motive-power and to the next car in a train by its body, and not by a perch from the truck, and also showed a provision for side-bearings: *Held*, that the specification afforded a sufficient description of the invention independently of the drawing, and that the mode of attaching the car and the use of side-bearings did not enter into the essence of the invention or constitute any substantial part of the improvement.

7. The law allows an inventor a reasonable time to perfect his invention by experiment and ascertain its utility, before it obliges him to take out his patent; and, in the case of Winans' invention, experiments could be made only by putting the car into the service of those controlling lines of railroads. In applying the rule, a jury must take into consideration the nature of the invention, and all the circumstances of the case. But an inventor is bound to act in good faith, and must not suffer his invention to be used except for the purposes of experiment.

This was an action on the case, tried before CONKLING, District Judge, in June, 1850, for the infringement of letters patent² granted to the plaintiff on the 1st of October, 1834, for an "improvement in the construction of cars or carriages intended to run on rail-roads."

At the trial, the plaintiff gave in evidence the original patent. It had been recorded

² The specification was as follows:

"To all whom it may concern—Be it known, that I, Ross Winans, civil engineer, of the city of Baltimore, in the state of Maryland, have invented a new and useful improvement in the construction of cars or carriages intended to travel upon railroads; which improvement is particularly adapted to passenger-cars, as will more fully appear by an exposition of the difficulties heretofore experienced in the running of such cars at high velocities, which exposition I think it best to give in this specification, for the purpose of exemplifying the more clearly the object of my said improvement. In the construction of all railroads in this country, which extend to any considerable distance, it has been found necessary to admit of lateral curvatures, the radius of which is sometimes but a few hundred feet; and it becomes important, therefore, so to construct the cars as to enable them to overcome the difficulties presented by such curvatures, and to adapt them for running with the least friction practicable upon all parts of the road. The friction to which I now allude is that which arises from the contact between the flanches of the wheels and the rails, which, when it occurs, causes a great loss of power and a rapid destruction of or injury to both the wheel and the rail, and is otherwise injurious. The high velocities attained by the improvements made in locomotive engines, and which are not only sanctioned, but demanded, by public opinion, render it necessary that certain points of construction and arrangement, both in the roads and wheels, which were not viewed as important at former rates of travelling, should now receive special attention. The greater momentum of the load, and the intensity of the shocks and concussions, which are unavoidable, even under the best constructions, are among those circumstances which must not be neglected, as the liability to accident is thereby not only greatly increased, but the consequences to be apprehended much more serious. The passenger and other cars in general use upon railroads have four wheels, the axles of which are placed from three and a half to five feet apart; this distance being governed by the nature of the road upon which they run, and other considerations. When the cars are so constructed that the axles retain their parallelism, and are at a considerable distance apart, there is a necessary tendency in the flanches of the wheels to come into contact with the rails, especially on the curvatures of least radius, as the axles then vary more from the direction of the radii. From this consideration, when taken alone, it would appear to be best to place the axles as near to each other as possible, thus causing them to approach more nearly to the direction of the radii of the curves, and the planes of the wheels to conform to the line of the rails. There are, however, other circumstances which must not be overlooked in their constructions. I have already alluded to the increased force of the shocks from obstructions at high velocities; and, whatever care may be taken, there will be inequalities in the rails and wheels, which, though small, are numerous, and the perpetual operation of which produces effects which cannot be disregarded. The greater the distance between the axles, while the length

anew on the 7th of June, 1837, under section 1 of the act of March 3d, 1837 (5 Stat. 191), as appeared by a memorandum to that effect endorsed upon it. No drawings were annexed to the original patent, nor was there any reference in the specification to any drawings. On the 25th of September, 1848, the patent was extended for seven years from the 1st of October, 1848, as appeared by a certificate of extension endorsed on the

of the body remains the same, the less is the influence of these shocks or concussions; and this has led, in many instances, to the placing them in passenger-cars at or near their extreme ends. Now, however, a compromise is most commonly made, between the evils resulting from a considerable separation and a near approach, as, by the modes of construction now in use, one of the advantages must be sacrificed to the other. But it is not to the lateral curvatures and inequalities of the road alone that the foregoing remarks apply. The incessant vibration felt in travelling over railroads is mainly dependent upon the vertical motion of the cars, in surmounting those numerous though minute obstructions which unavoidably exist. The nearer the axles are placed to each other, the greater is the effect of this motion upon the passengers, and the greater its power to derange the machinery and the road. It becomes very important, therefore, both as regards comfort, safety and economy, to devise a mode of combining the advantages derived from placing the axles at a considerable distance apart, with those of allowing them to be situated near to each other. It has been attempted, and with some success, to correct the tendency of the flanches to come into contact with the rails, on the curved and other parts of the road, by making the tread of the wheel conical; and, if the travelling upon rail-roads was not required to be very rapid, this would so far prove an effectual corrective, as the two rails would find diameters upon the wheels which would correspond with the difference in length, the constant tendency to deviation being as constantly counteracted by this construction; but, at high velocities, the momentum of the body in motion tends so powerfully to carry it in a right line, as to cause the wheel on the longer rail to ascend considerably above that part of the cone which corresponds therewith; the consequence of this is, a continued serpentine motion, principally, but not entirely, in a lateral direction; nor is this confined to the curved parts of the road, but it exists to an equal, or greater extent, upon those which are straight, especially when the axles are near to each other, the irregularities, before spoken of, constantly changing the direct course of the wheels, whilst there is no general curvature of the rails to counteract it. To avoid this effect, and the unpleasant motion and tendency to derangement consequent upon it, an additional motive is furnished for placing the axles at a considerable distance apart.

"The object of my invention is, among other things, to make such an adjustment or arrangement of the wheels and axles, as shall cause the body of the car or carriage to pursue a more smooth, even, direct and safe course than it does, as cars are ordinarily constructed, both over the curved and straight parts of the road, by the before-mentioned desideratum of combining the advantages of the near and distant coupling of the axles, and other means to be hereinafter described. For this purpose, I construct two bearing-carriages, each with four wheels, which are to sustain the body of the passenger or other car, by placing one of them at or near each end of it, in a way to be presently described. The two wheels on either side

original patent. The plaintiff then offered in evidence a certified copy from the patent-office of the patent; of the specification; of the certificate of extension; of a drawing accompanied by written references thereto, which drawing was not filed at the time the patent was recorded anew, but was filed on the 19th of November, 1838; and of an affidavit made by the plaintiff on the 19th of November, 1838, and filed in the patent-office. The written references accompanying

of these carriages are to be placed very near to each other; the spaces between their flanches need be no greater than is necessary to prevent their contact with each other. These wheels I connect together by means of a very strong spring—say double the usual strength employed for ordinary cars—the ends of which springs are bolted, or otherwise secured, to the upper side of the boxes which rest on the journals of the axles; the longer leaves of the springs being placed downwards, and surmounted by the shorter leaves. Having thus connected two pairs of wheels together, I unite them into a four-wheel bearing-carriage, by means of their axles and a bolster of the proper length, extending across, between the two pairs of wheels, from the centre of one spring to that of the other, and securely fastened to the tops of them. This bolster must be of sufficient strength to bear a load upon its centre of four or five tons. Upon this first bolster I place another of equal strength, and connect the two together by a centre-pin or bolt passing down through them, and thus allow them to swivel or turn upon each other in the manner of the front bolster of a common road wagon. I prefer making these bolsters of wrought or cast iron; wood, however, may be used. I prepare each of the bearing-carriages in precisely the same way. The body of the passenger or other car I make of double the ordinary length of those which run on four wheels, and capable of carrying double their load. This body I place so as to rest its whole weight upon the two upper bolsters of the two beforementioned bearing-carriages or running gear. I sometimes place these bolsters so far within the ends of the body of the car as to bring all the wheels under it, and, in this case, less strength is necessary in the car-body, than when the bolster is situated at its extreme ends. In some cases, however, I place the bolster so far without the body of the car at either end as to allow the latter to hang down between the two sets of wheels or bearing-carriages, and to run, if desired, within a foot of the rails. When this is done, a strong frame-work projects out from either end of the car or carriage-body, and rests upon the upper bolsters of the two bearing-carriages. This last arrangement, by which the body of the car is hung so low down, manifestly affords a great security to the passengers, exempting them, in a great degree, from those accidents to which they are liable when the load is raised. Several bodies may be connected or rest on a common frame, and be supported, on the bearing-carriage, in a manner similar to that of a single body. When the bolsters of the bearing-carriages are placed under the extreme ends of the body, the relief from shocks and concussions, and from lateral vibrations, is greater than it is when the bolsters are placed between the middle and the ends of the body, and this relief is not materially varied by increasing or diminishing the length of the body, while the extreme ends of it continue to rest on the bolsters of the bearing-cars, the load being supposed to be equally distributed over the entire length of the body.

"Although I prefer the use of a single spring to a pair of wheels, as above described, instead of the ordinary spring to each wheel, and con-

the drawing were in these words: "References to the annexed drawings of Ross Winans' improvement in the construction of cars or carriages intended to run on rail-roads, for which letters patent were issued, dated October 1st, 1834. Fig. 1. Side view of an eight-wheel car. Fig. 2. End view of the same. Fig. 3. Upper and lower bolsters, detached from the body and bearing-carriages. AA represents the body of the car resting on the bearing-carriages B and C, as exhib-

sider it as more simple, cheap and convenient than any other arrangement, the end which I have in view may, nevertheless, be obtained by constructing the bearing-carriages in any of the modes usually practised, provided that the fore and hind wheels of each of them be placed very near together; because, the closeness of the fore and hind wheels of each bearing-carriage, taken in connection with the use of two bearing-carriages coupled remotely from each other as can conveniently be done for the support of one body, with a view to the objects and on the principles herein set forth, is considered by me as a most important feature of my invention; for, by the contiguity of the fore and hind wheels of each bearing-carriage, while the two bearing-carriages may be at any desirable distance apart, the lateral friction from the rubbing of the flanches against the rails is most effectually avoided, whilst, at the same time, all the advantages attendant upon placing the axles of a four-wheeled car far apart are thus obtained. The bearing of the load on the centre of the bolster, which also is the centre of each bearing-carriage, likewise affords great relief from the shocks occasioned by the percussion of the wheels or protuberant parts of the rails or other objects, and from the vibrations consequent to the use of coned wheels; as the lateral and vertical movements of the body of the car, resulting from the above causes, are much diminished. The two wheels on either side of one of the bearing-carriages may, from their proximity, be considered as acting like a single wheel; and, as these two bearing-carriages may be placed at any distance from each other, consistent with the required strength of the body of the car, it is evident that all the advantage is obtained which results from having the two axles of a four-wheeled car at a distance from each other, whilst its inconveniences are avoided. Another advantage of this car, compared with those in common use, and which is viewed by me as very important, is the increased safety afforded by it to passengers, not only from the diminished liability to breakage or derangement in the frame-work, but also from the less disastrous consequences to be apprehended from the breaking of a wheel, axle, or other part of the running gear, as the car-body depends, for its support and safety, upon a greater number of wheels and bearing points on the road. I do not claim as my invention the running of cars or carriages upon eight wheels, this having been previously done; not, however, in the manner or for the purposes herein described, but merely with a view of distributing the weight carried more evenly upon a rail or other road, and for objects distinct in character from those which I have had in view, as hereinbefore set forth. Nor have the wheels, when thus increased in number, been so arranged and connected with each other, either by design or accident, as to accomplish this purpose. What I claim, therefore, as my invention, and for which I ask a patent, is the before-described manner of arranging and connecting the eight wheels, which constitute the two bearing-carriages, with a rail-road car, so as to accomplish the end proposed by the means set forth, or by any others which are analogous and dependent upon the same principles."

ited at DD, on pivots equidistant from the wheels of each bearing-carriage. H represents an upper bolster of cast iron, separate from the body of the car, with its pivot X corresponding with the socket Y in the lower bolster E, also shown as separated from the bearing-carriage." The said affidavit was in these words: "State of Maryland, Baltimore, Sect.: On this 19th day of November, in the year eighteen hundred and thirty-eight, before me, the subscriber, a justice of the peace of the said state, in and for the said city, personally appeared Ross Winans, and made solemn oath that he is the inventor of an improvement in the construction of cars or carriages intended to run on railroads, for which letters patent of the United States were granted him, dated the first day of October, 1834, and that the annexed drawing is, as he verily believes, a true delineation of the invention, as described in the said letters patent. Sworn before James Blair, justice of the peace." The defendant objected to the evidence offered, on the grounds, first, that it appeared no drawing was annexed to the original patent; second, that the act of congress did not make such a drawing as this evidence. The court overruled the objection and admitted the evidence. It was claimed by the plaintiff that the drawing showed that his car was to be attached to the motive-power, and to the next car in a train, by its body, and not by a perch from the bearing-carriage or truck, it being conceded that this connection by the body was indispensable to the free action of the plaintiff's trucks; and that the drawing also showed a provision in the arrangement of the trucks for side-bearings, to prevent excessive rocking of the car from side to side. It was insisted by the defendants that the specification was defective in saying nothing about the mode of attachment of the car or about the side-bearings; and that the plaintiff could not give any evidence to show in what manner his car, as perfected and used, and the various arrangements of trucks which he tried while experimenting, were connected in a train for the purpose of draught, or use the drawing to show anything which was not set forth in the specification. The court decided that the drawing might be referred to to illustrate the specification, but not to enlarge the claim of the patent, and allowed the plaintiff to give evidence as to what was represented in the drawing in regard to a mode of attachment and to side-bearings, and as to the mode of attachment actually used in the car as perfected and the various modes tried while the plaintiff was experimenting. The evidence was, that the plaintiff was experimenting at Baltimore, Md., to produce an eight-wheeled rail-road car, for about four years prior to October, 1834; that the first car made by him, the Columbus, was made in July, 1831; that three others were made, all of them unsatisfactory, prior to the car described in the patent, which

was completed and found to be successful but a short time before the date of the patent; that one of the chief defects in the various arrangements of trucks tried during the course of the experiments was, in the cars being coupled together by the trucks and not by the bodies; and that the car, as finally successful, and as shown in the drawing, was drawn by the body. The car Columbus, made in July, 1831, had two trucks, with four wheels in each, but was drawn by a perch from one of the trucks, and the axles of each truck were too far apart from each other, which defects caused the car to run off the track in turning curves.

The defendants set up that one Conduce Gatch, of Baltimore, was the actual inventor of the successful car made in 1834; and that the claim of the plaintiff's patent was void for want of novelty. The various points raised by the defendants in connection with this latter defence, and the nature of the evidence adduced in its support, will sufficiently appear from the instructions prayed for by the defendants, as hereafter set forth.

After the close of the evidence, the defendants requested the court to charge the jury: (1.) That the mode of attaching the car to the motive power, or to other cars to be drawn in trains, formed no part of the improvement claimed by the plaintiff, and, therefore, could not be taken into consideration in determining whether all or any part of the improvement claimed by the plaintiff was new. The court refused so to charge, but instructed the jury, that although the mode of attachment formed no part of the improvement claimed by the plaintiff, yet it might be taken into consideration for the purpose of ascertaining whether the plaintiff had complied with the law by describing his invention and showing how it was to be used; that the specification was sufficient if the patentee had described a carriage susceptible of an attachment of the power to the body, if the drawing showed such mode of attachment; that the plaintiff could suffer no disadvantage from not having stated it in his written specification; and that, although the drawing was not to be taken into consideration for the purpose of measuring the extent of the patentee's claim, yet it might be considered in ascertaining whether what he claimed was new, if the jury could discover that it had any bearing on that point. The court also charged, that the drawing, of which a certified copy had been given in evidence, was to have the same force and effect as if it had been referred to in the specification, and was to be deemed and taken as a part of the specification.

The defendants also requested the court to charge: (2.) That the remoteness of the two bearing-carriages from each other when attached to the car, was not so expressed or described in the specification as to constitute any part of the improvement claimed by the plaintiff. The court charged to the contrary of this instruction.

The court further charged that the improvement claimed by the plaintiff consisted: 1st. Of the manner of arranging the eight wheels into the two trucks which constituted the two bearing-carriages, which arrangement included the bolsters placed on the centre of each bearing-carriage, and the placing the axles of each truck as near together as could be done without the flanges of the wheels interfering with each other. 2d. Of the manner of connecting the two bearing-carriages to the body of the car by a centre-pin or king-bolt passing through the centre of the upper bolster, which was attached to the body of the car, into the lower bolster on the bearing-carriage. The court also charged that the position of the trucks at or near the ends of the car, was to be considered as constituting a part of the arrangement claimed by the plaintiff as his invention.

The defendants also requested the court to charge: (3.) That if the jury should find that any part of the arrangement of the eight wheels into the two trucks, or the manner of connecting these trucks to the body of the car, was known and used before the alleged improvement by the plaintiff, the patent was void, but the court refused so to charge.

The defendants also requested the court to charge: (4.) That if the jury should find that, prior to the alleged invention of the plaintiff, there was published, in any public work, a description of a car to run on rail-roads, resting on two bearing-carriages composed of four wheels, each having a bolster extending across in the centre between the two wheels, fastened to and forming a part of the carriage, and attached to these bolsters by a centre-pin or bolt passing through the substantial frame of the car in the centre of the bolsters, so as to allow the frame of the carriage to turn and swivel upon the bolsters of the bearing-carriages, the plaintiff's patent was void. (5.) That if the jury should find that any part of the arrangement of the eight wheels into bearing-carriages, or the manner of their connection with the frame or body of the car, was described or delineated in Chapman's patent, or the plates accompanying it, as set forth in the 24th volume of the Repertory of Arts, &c., second series, published in London in 1814, or in Wood's Treatise on Railroads, published in London in 1825, at pages 154 to 157, or in the plate between pages 294 and 295 of the latter book, the plaintiff's patent was void. The court declined to give the instructions specified in the fourth and fifth prayers, in the form therein requested, but left it to the jury to say whether, in their opinion, it had been shown that the alleged invention of the plaintiff was substantially described in either of the books mentioned in the fifth prayer, and instructed the jury that, if it was so, the patent was void.

The defendants also requested the court to charge: (6.) That if the jury should find that it was known to persons acquainted with the science of mechanics and mechanical motion,

that a four-wheeled carriage, with its axles in close proximity, would traverse a curve more easily than if they were further apart, then that part of the arrangement described and claimed in the specification was not new, and the patent was void. But the court refused so to charge.

The defendants also requested the court to charge: (7.) That if the jury should find that the timber-car found to have been used on the Baltimore and Ohio Railroad before the car Columbus was built, embraced any part of the manner of arranging or connecting the eight wheels to the body of the car, as claimed in the plaintiff's specification, his patent was void, and that it made no difference that said timber-car was only used temporarily or for a temporary purpose. (8.) That if the jury should find that the car Columbus did not substantially embody the whole improvement claimed by the plaintiff, and should also find that the truck of four wheels constructed by Mr. Jervis in the winter of 1832 for the locomotive Experiment, and put in use on the Mohawk and Hudson Railroad in April, 1832, or that the timber-car proved by Mr. Williams and Mr. Whitney to have been constructed and put in use on said road in April or May, 1832, contained any part of the arrangement or connection of the eight wheels to the body of the car claimed in the plaintiff's specification, his patent was void. The court refused to give the instructions mentioned in the seventh and eighth prayers, in the form therein requested; but, after informing the jury that unless the plaintiff appeared by the evidence to be the first inventor of all that by his patent he claimed as his invention, his patent was void, and after submitting to them the evidence relative to the timber-carriage mentioned in the seventh prayer, and also that respecting the four-wheeled truck devised by Mr. Jervis for the locomotive Experiment, and the timber-carriage mentioned in the eighth prayer, the court left it to the jury to decide whether or not it was shown by this evidence that the plaintiff was not such inventor, and declined to give any other or further instructions in answer to these prayers.

The defendants also requested the court to charge: (9.) That if the court should be of opinion that the remoteness of the two bearing-carriages, as described in the plaintiff's specification, constituted a part of the arrangement of the eight wheels into bearing-carriages and the connection to the body of the car, as claimed in the plaintiff's specification, then the patent was void, unless the jury should find that the specification described, with sufficient precision, the proper and necessary location of those bearing-carriages under the body of the car, to enable a mechanic of sufficient skill to construct rail-road cars, to locate the bearing carriages under the car the necessary distance apart, without any experiment, invention or addition of his own. The court gave the instructions contained in this

prayer, and left it to the jury to say whether the plaintiff had not sufficiently indicated the position of the trucks with respect to the ends of the carriage; and remarked that their distance apart must depend on the length of the carriage.

The defendants also requested the court to charge: (10.) That if the jury should find that a car constructed as described in the plaintiff's specification, without side-bearings at the ends of the bolsters, would not be entirely safe to passengers, the patent was void. In answer to this prayer, the court instructed the jury that, in order to find for the plaintiff, the jury must be convinced that what the plaintiff had patented was useful, but that any degree of utility was sufficient to support a patent, the word "useful" in the patent law being used in opposition to "frivolous" or "noxious"; and that, with regard to the question of side-bearings, although the jury should think it better to have longer bearings than the plaintiff contemplated, that would not warrant them in finding the patent void, if the invention was useful, within the instructions given, as it was not necessary that the thing patented should be the best possible thing of the kind that could be made; and the court refused to charge the jury otherwise in relation to this prayer.

The defendants also requested the court to charge: (11.) That if the jury should find that the car Columbus embraced in substance the improvements claimed in the plaintiff's specification, and that said car was put into use by the Baltimore and Ohio Railroad Co., on the 4th of July, 1831, and that it was occasionally used by said company from that time, by the consent of the plaintiff, then the patent was void. In relation to this prayer, the court instructed the jury that the law allowed to an inventor a reasonable time to perfect his invention and ascertain its utility, before, in order to secure to himself its exclusive use, it obliged him to take out his patent; that, in applying this rule, it was the duty of the jury to take into consideration, the nature of the invention and all the circumstances of the case; but that an inventor was bound to act with sincerity and good faith towards the public, and in accordance with the policy of the patent laws; that if he unnecessarily deferred his application for a patent, and suffered his invention to be used, except for the purposes already mentioned, and beyond what he had reason to believe necessary for those purposes, his patent would be void; and that this instruction was intended to embrace the evidence relating as well to the Winchester, Dromedary and Comet, as to the Columbus mentioned in this prayer. And, in relation to this prayer, the court refused to give any further or other instruction.

The defendants also requested the court to charge: (12.) That if the proximity of the axles of the bearing-carriages, and any par-

ticular remoteness of those bearing-carriages from each other, formed any valid part of the improvement claimed by the plaintiff, then, unless the jury found that both the proximity of said axles and the remoteness of said bearing-carriages from each other in the defendants' cars, were the same as that claimed by the plaintiff to be his improvement, there had been no infringement and the defendants were entitled to a verdict. The court instructed the jury, that in order to warrant them in finding the fact of infringement, they must be satisfied, from the evidence, that the defendants had used either the same thing, or substantially the same thing, as the plaintiff's invention; and the court refused to charge otherwise in relation to this prayer.

The defendants also requested the court to charge: (13.) That the patent was void on its face, because, 1st. There was not in the specification any sufficiently precise or certain rule for the arrangement and connection of the bearing-carriages with the car, to accomplish the objects of the pretended invention. 2d. The end proposed by the patentee was stated in the specification, but no means of accomplishing it were described, other than the application of known mechanical principles in such manner as would best accomplish that end or object. 3d. The claim was for an improvement to accomplish the "end proposed," by such arrangement and adjustment of things in use as would accomplish that end, but the specification left the rule or particular manner of arrangement and adjustment to be discovered and applied. 4th. The specification left the manner of arrangement and connection of the bearing-carriages or wheels, for the accomplishment of the purpose or end the patentee had in view, as much a matter of accident or experiment as they were before the specification was written. 5th. The patent was for a car to be constructed upon such known mechanical principles and with such mechanical arrangement as might be found necessary to attain the "end," or accomplish the purpose stated in the specification and claimed, without describing what that mechanical arrangement or combination must be. But the court refused so to charge.

The court also instructed the jury, that the drawing—a certified copy of which had been given in evidence by the plaintiff—was to have the same force and effect as if it had been referred to in the specification, and was to be deemed and taken as a part of the specification. The court further instructed the jury, that the application of a thing already known to a new and useful purpose, might be the subject of a patent, provided the new use was not analogous to the old, and required the exercise of the inventive faculties.

The jury found a verdict for the plaintiff, and the defendants, upon a case made, now moved for a new trial.

Joshua A. Spencer and Samuel Blatchford,
for plaintiff.

Samuel Stevens, for defendant.

Before NELSON, Circuit Justice, and
CONKLING, District Judge.

NELSON, Circuit Justice. I. We have examined the various grounds presented by the counsel for the defendants on the motion for a new trial, and, after the fullest consideration, are of opinion that the motion must be denied.

Most of the exceptions taken at the trial, and relied on in the argument here, are founded on what we regard as an entire misapprehension of the thing claimed to have been discovered by the plaintiff and for which the patent has been issued. This will be seen on a reference to the instructions prayed for by the defendants, upon which most of the questions in the case arise. They assume that if any material part of the arrangement and combination in the construction of the cars or carriages described in the patent was before known or in public use, it is invalid; and hence, various parts were pointed out by the counsel at the trial, and the court was requested to charge, that if either of them was not new, the jury should find a verdict for the defendants.

Now, the answer to all this class of exceptions is, that the patentee sets up no claim to the discovery of the separate parts which enter into his arrangement in the construction of his cars. These may be old and well-known, when taken separately and detached, for aught that concerns his invention. His claim is for the car itself constructed and arranged as described in his patent. This, we think, is the clear meaning of the specification, and of the claim as pointed out in it. Proving, therefore, that parts of the arrangement and construction were before known, amounted to nothing. The question was, whether or not cars or carriages for running on rail-roads, as a whole, substantially like the one described in the patent, had been before known or in public use; not whether certain parts were or were not substantially similar. The argument presupposes that the claim is for the discovery of a new combination and arrangement of certain instruments and materials, by means of which a car is constructed of a given utility; and that, if any one or more of the supposed combinations turns out to be old, the patent is invalid. This is the principle upon which much of the defence has been placed; but no such claim is found in the patent. No particular combination or arrangement is pointed out as new or claimed as such. The novelty of the discovery is placed upon no such ground. On the contrary, the result of the entire arrangement and adjustment of the several parts described, namely, the rail-road car complete and fit for use, is the thing pointed out and claimed as new. This is the view taken of the patent by the chief justice, in the case of the present plaintiff against the Newcastle and Frenchtown Turnpike and Rail-road Company, tried before him in the Maryland

circuit, and which was adopted by the judge on the trial of this case.

II. It was further insisted, on the part of the defendants, that if the relative position of the two bearing-carriages to each other constituted a material part of the arrangement in the construction of the car, the patent was void, unless the jury should find that the specification described with sufficient precision the location of these bearing-carriages under the body of the car, so as to enable a mechanic of skill in the construction of cars, to place them at the proper distance apart without experiment or invention. It was also contended, that the remoteness of the bearing-carriages from each other was not so described in the specification as to constitute any part of the improvement. In respect to this branch of the case, the court charged that the relative position of the bearing-carriages to each other, in the construction of the car, was a material part of the arrangement of the patentee, and left the question to the jury whether or not he had sufficiently described the position of the trucks, having in view their distance apart and also their distance from the ends of the car-body, suggesting, at the same time, that their location must always depend, in a measure, on the length of the body.

It will be seen, on looking into the specification, that the location of the trucks relatively to each other under the body of the car, as well as the near proximity of the two axles of each truck to each other, form a most essential part of the arrangement of the patentee in the construction of his cars. Great pains are taken to point out the defects in the existing four-wheel cars, and the impediments to be encountered and overcome in the running of cars upon railroads, as the latter are usually constructed. The patentee states that, in the construction of them, especially when of considerable length, it has been found necessary to admit of lateral curvatures, the radius of which is sometimes but a few hundred feet, and that it becomes important, therefore, to so construct the cars as to enable them to overcome the difficulties presented by these curvatures, and to adapt them for running, with the least friction practicable, on all parts of the road. The friction referred to is that which arises between the flanges of the wheels and the rails, causing great loss of power and destruction of the wheels and rails, besides other injuries. For this purpose, he constructs two bearing-carriages, each with four wheels, which are to sustain the body of the passenger or other car, by placing one of them at or near each end of it, as particularly described. The two wheels on either side of the truck are to be placed very near each other—the spaces between the flanges need be no greater than is necessary to prevent their contact with each other. The car-body rests upon bolsters supported on each of the two bearing-carriages or four-wheeled trucks, the bolsters so constructed as to swivel or turn on each other like the two front bolsters of a common wagon. The body of the car may be made of double the length of the

four-wheeled car, and is capable of carrying double its load. The truck may be so placed within the ends of the car as to bring all the wheels under it; or, without the end, so as to allow the body to be suspended between the two bearing-carriages. The patentee further states, that the closeness of the fore and hind wheels of each bearing-carriage, taken in connection with the use of the two bearing-carriages arranged as remotely from each other as can conveniently be done for the support of the car-body, with a view to the objects and on the principles before set forth, is considered by him as an important feature of the invention; for, by the contiguity of the fore and hind wheels of each bearing-carriage, while the two bearing-carriages may be at any desirable distance apart, the lateral friction from the rubbing of the flanges against the rails is most effectually avoided, while at the same time all the advantages attendant upon placing the axles of a four-wheeled car far apart are obtained. The two wheels on either side of the bearing-carriages may, from their proximity, be considered as acting like a single wheel; and, as these two bearing-carriages may be placed at any distance from each other, consistent with the required strength of the body of the car, it is apparent that all the advantages are obtained which result from having the two axles of a four-wheeled car at a distance from each other, while its inconveniences are avoided. Among the principles stated by the patentee to be taken into consideration in the construction of the car is, that the greater the distance between the axles, while the length of the body remains the same, the less the influence of shocks and concussions occurring on the road; and hence the relief from them, when the trucks are placed under the extreme ends of the body, is greater than when they are placed midway between the centre and the ends.

It is apparent, from what we have already referred to in the specification, and still more manifest on a perusal of the whole of it, that the improvement in this part of the arrangement does not consist in placing the axles of the two trucks at any precise distance apart, in the construction of the car, or at any precise distance from each end of the body. The distance used must necessarily depend somewhat upon the length of the car and the strength of the materials of which it is built, and hence it was impracticable to specify in feet or inches the exact distance from the ends of the car-body at which it would be best to arrange the trucks. Neither do the advantages of a car constructed and arranged as described, depend upon the trucks being placed at a specified distance from the ends, or so that there may be a specified distance between the axles. Having in view the defects in the existing cars, and other difficulties to be encountered, some considerable latitude may be allowed in this respect, consistent with the object sought to be attained, to remedy the defects in the existing cars. All the

principles for the construction of a car for the purpose of overcoming these difficulties and remedying these defects, are particularly set forth in the description given by the patentee. We think the specification sufficient, and that the court was right in the opinion expressed on this branch of the case. Any mechanic of skill could readily arrange the bearing-carriages in connection with the body of the car, so as to secure the advantages so minutely and clearly pointed out, and which are shown to attend the practical working of cars constructed in the manner described.

III. The questions of originality and of infringement were questions of fact, depending upon the evidence, and were properly submitted to the jury. We think the weight of it decidedly with the verdict.

IV. The patent in this case was originally issued on the 1st of October, 1834, and was recorded anew on the 7th of June, 1837, according to the act of congress of the 3d of March, 1837 (5 Stat. 191). No drawings were attached to the original patent, nor was there any reference therein to drawings. On the 25th of September, 1848, the patent was extended for the term of seven years from the 1st of October, 1848. The plaintiff gave in evidence, at the commencement of the trial, a certified copy of the patent and specification, of the certificate of extension, of a drawing with references to the same, and of an affidavit of the plaintiff, made November 19th, 1838. The drawing was not filed at the time the patent was recorded anew, but was filed on the 19th of November, 1838. The counsel for the defendants objected to the evidence, on the grounds: 1st, that it appeared that no drawing was annexed to the original patent; and, 2d, that the act of congress did not make such a drawing evidence. The court also instructed the jury, in summing up the case, that the drawing, a certified copy of which had been given in evidence, was to have the same force and effect as if it had been referred to in the specification, and was to be deemed and taken as part of the specification.

The 1st section of the act of 1837 provides that any person interested in a patent issued prior to the 15th of December, 1836, may, without charge, have the same recorded anew, together with the descriptions, specifications of claim and drawings annexed or belonging to the same, and it is made the duty of the commissioner to cause the same, or any authenticated copy of the original record, specification or drawing which he may obtain, to be transcribed and copied into books of record kept for that purpose; and that, whenever a drawing was not originally annexed to the patent and referred to in the specification, any drawing produced as a delineation of the invention, being verified by oath in such manner as the commissioner shall require, may be transmitted and placed on file, or copied as afore-

said, together with the certificate of the oath, or such drawings may be made in the office, under the direction of the commissioner, in conformity with the specification. The 2d section provides, that copies of such record and drawings, certified by the commissioner, or, in his absence, by his chief clerk, shall be prima-facie evidence of the particulars of the invention and of the patent granted therefor in any judicial court of the United States, in all cases where copies of the original record or specification and drawings would be evidence, without proof of the loss of such originals. This section also provides, that no patent issued prior to the aforesaid 15th day of December, 1836, shall, after the 1st day of June then next, be received in evidence in any court on behalf of the patentee, unless it shall have been so recorded anew, and a drawing of the invention, if separate from the patent, verified as aforesaid, shall have been deposited in the patent office. See, also, section 3 of the same act.

It is quite clear, from the above provisions of the act, that the court was right in admitting the drawing in evidence, in connection with the patent and specification. The whole together are made prima-facie evidence of the particulars of the invention and of the patent granted therefor. The weight to be given to the drawings furnished under the act, by way of enlarging or explaining the description as given in the specification, is another question. That will depend upon the circumstances of each particular case. As a general rule, they will not be effectual to correct any material defect in the specification, unless it should appear that they correspond with drawings which accompanied the original application for the patent; otherwise, in case of discrepancy between the drawings and specification, the latter should prevail. Care must be taken to avoid imposition by the use of the newly-furnished drawings, and, for this purpose, the specification will afford the proper correction, unless the plaintiff goes further and shows that the drawings conform to those originally filed.

The charge that the drawing in this case was to have the same force and effect as if it had been referred to in the specification, and was to be deemed and taken as part of it, was, perhaps, too strong, as it respects the drawings furnished under the act of 1837. The principle is true as it respects those accompanying the original application for the patent, but can hardly be said to be applicable, to the full extent stated, in the case of these newly-furnished drawings. The principle might open the way to imposition and fraud. Assuming that there is nothing but the oath of the party attesting that the drawing affords a true delineation of the invention, the specification should prevail, in case of a material discrepancy. But, admitting the instruction in this re-

spect not to be strictly correct, and that too much weight was given to the drawing, we do not see that it would have altered the result. The specification afforded a sufficient description of the invention, independently of the drawing. It was open to some question whether some slight additions that improved the working of the car, were embraced in the specification, but they did not enter into the essence of the invention or constitute any substantial part of the improvement. Time and experience usually indicate these slight additions and alterations, and they should be regarded as consequential results, belonging to the inventor. It requires time and experience usually to perfect the machine, and improvements derived therefrom are justly due to him.

V. We think that the court was correct in its instructions as to the prior use of the car Columbus and of others constructed by the patentee before he made application for his patent. The law allows the inventor a reasonable time to perfect his invention by experiments; and these could be made, in this instance, only by putting the car into the service of those controlling lines of railroads. There were repeated failures in the experiments tried and in the cars which were abandoned before the perfection of the car described in the patent. These experiments and trials sufficiently account for the previous use set up by way of forfeiture of the invention.

Upon the whole, after a careful examination of the case, and of all the points made by the defendants on the argument, many of which have been noticed above, we are satisfied that the verdict is right, and that a new trial should be denied.

[For other cases involving this patent, see *Winans v. Eaton*, Case No. 17,861; *Winans v. New York & E. R. Co.*, Id. 17,863; *Winans v. New York & H. R. Co.*, Id. 17,864; *New York & M. L. R. Co. v. Winans*, 17 How. (58 U. S.) 30.]

WINCH, The M. F. See Case No. 4,485.

Case No. 17,866.

WINCHELL et al. v. JOHN HANCOCK
MUT. LIFE INS. CO.

[8 Ins. Law J. 651; 8 Reporter, 549.]¹

Circuit Court, D. Massachusetts. May Term, 1879.

LIFE INSURANCE—CONSTRUCTION OF POLICY—FORFEITURE—RIGHT TO PAID-UP INSURANCE.

[1. An endowment life policy provided that, after the payment of one annual premium, the insured might surrender the policy, and receive a paid-up policy for an amount proportioned to the premiums paid, and the policy should be void if any premium was not paid when due, subject to Acts Mass. 1861, c. 186, which continued policies in force in spite of a failure to pay any premium, provided notice of the claim

¹ [8 Reporter, 549, contains only a partial report.]

and proof of death of the assured were given within 90 days. *Held*, that a paid-up policy proportioned to the premiums paid could be obtained, though the original policy had been forfeited by failure to pay a premium.]

[2. Equity could not relieve against the failure to submit notice of the claim and proof of death within 90 days, as provided by the statute, so as to keep the original policy in force, though this failure resulted from ignorance of the existence of the policy.]

[3. The right of insured to a paid-up policy was a property right, which survived to his representatives.]

Bill in equity by Isabella H. Winchell, wife and administratrix of the estate of George I. Winchell, deceased, and Harry Winchell, only child of said George, against John Hancock Mutual Life Insurance Company. The complainants alleged that said George I. Winchell obtained from the defendants a policy for \$3,000 upon his life, for the benefit of his wife and children, a copy of which is annexed to the bill. It was dated June 17, 1866, and was what is known as a "ten-year endowment policy," that is to say, premiums were to be paid for ten successive years, after which nothing more was to be paid by the assured. The policy contained this clause: "At any time after one annual premium has been paid, as stipulated in this policy, it may be surrendered at the option of the assured; and he is entitled to receive, in lieu thereof, a paid-up or nonforfeiture policy for an amount pro rata of the annual premiums paid, to wit, for one-tenth of the amount insured by this policy, for each and every premium paid therein: provided expressly, and this policy is made, and it is accepted by the assured upon, the following express conditions, to wit: (2) That if the premium, or any premium note given therefor, or any part of either, shall not be paid to said company on or before the time specified for the payment of the same, this policy shall thereupon be forfeited and be null and void; this condition, however, being subject to the provisions of the 186th chapter of the acts of the legislature of Massachusetts, in the year 1861, entitled 'An act to regulate the forfeiture of policies of life insurance.'"

That statute continues in force all life policies for a time, reckoned according to their net value, notwithstanding a failure to pay the premium, provided that notice of the claim and proof of the death shall be submitted to the company within ninety days after the decease of the assured. The assured paid eight annual premiums, including that due June 17, 1873, after which time he paid nothing. He died December 17, 1877.

The bill alleged that the payments made upon the policy were sufficient, under the statute of Massachusetts referred to in the policy, to continue it in force until after the death of the assured. That Winchell was a man of little or no business knowledge or experience, and left his affairs in great confusion, and the plaintiffs were in ignorance of

the existence of the policy, and the same was lost until on or about March 30, 1878, when they individually gave due notice and proof of the death of said Winchell to the defendant corporation, and demanded payment, which was refused; that the delay was due to unavoidable accident, from which a court of equity will relieve the plaintiffs. After reciting the clause concerning the option to take a paid-up policy in proportion to the number of premiums which had been paid, the bill alleged that the plaintiffs had offered to deliver up the policy to the defendants, and had demanded of them a paid-up policy for \$2,400, but the defendants had refused to give said policy, or to pay the amount thereof. It prayed, in the alternative, payment of the full amount of \$3,000, or a delivery of a paid-up policy of \$2,400, and payment of that amount. The defendants demurred to the bill.

S. Wells and F. L. Hayes, for defendant.

(1) The plaintiffs have a complete and adequate remedy at law. Rev. St. § 723; *Thompson v. Railroad Cos.*, 6 Wall. [73 U. S.] 134; *Mossop v. Eadon*, 16 Ves. 431.

(2) Equity will not relieve against a neglect to comply with the requisitions of a statute, and the ignorance of the plaintiffs is not an accident or mistake. *Story, Eq. Jur.* §§ 101, 105, and cases, and sections 1325, 1326.

(3) The paid-up policy could be demanded only while the assured had an "option;" that is, while his policy was in force without default on his part. *Bussing's Ex'rs v. Union Mut. Life Ins. Co.* (March, 1879) 8 Ins. Law J. 218. The cases cited by the plaintiffs are distinguished in this: that they were on policies which were nonforfeitable, and which had an acknowledged value after a failure to pay a premium.

(4) The right of surrender was a personal right, which could not be exercised after the death of the assured.

D. Foster and A. D. Foster, for the plaintiffs.

(1) A bill for the specific performance of a contract to write a policy will lie after a loss, as well as before. *Brooklyn L. Ins. Co. v. Dutcher*, 95 U. S. 269; *Eames v. Home Ins. Co.*, 94 U. S. 621; *Tayloe v. Merchants' Fire Ins. Co. of Baltimore*, 9 How. [50 U. S.] 405.

(2) The option may be exercised "at any time," after one annual premium has been paid. If it ceased as soon as there was a neglect of payment, it would be void at the only time when it was for the benefit of the assured to demand it. A policy should be construed most strongly against the company. *Dorr v. Phoenix Mut. L. Ins. Co.*, 67 Me. 438; *Nat. Bank v. Insurance Co.*, 95 U. S. 678; *Chase v. Phoenix Mut. Life Ins. Co.*, 67 Me. 85; *New York Life Ins. Co. v. Statham*, 93 U. S. 30; *Montgomery v. Phoenix Ins. Co.*, 6 Reporter, 362.

LOWELL, Circuit Judge. Equity will not relieve against a penalty or forfeiture imposed

by statute, because it is presumed that the legislature would have inserted in an act any exceptions or mitigations which it intended to admit. A fortiori, when a new right is conferred by statute, and certain acts to be done within a certain time are made conditions precedent to the recovery, equity might perhaps even then relieve against a delay caused by the positive fraud of the defendant; but nothing short of that would avail. The plaintiffs admit this general rule, and distinguish this case by the fact that the statute is incorporated into the contract, and so becomes a right by stipulation. I do not think the policy intends any more in this respect than to remind the assured that he has the rights given him by the statute, and, indeed, I understand one of the statutes to require such a reference to be inserted in the policy. The plaintiffs, therefore, having failed to notify the loss until about one hundred days after it occurred, cannot be relieved on the ground of their ignorance of the existence of the policy.

The construction of the clause of the contract which gives the assured an option to take a paid-up policy at any time after one annual premium has been paid, coupled with the other clause that the policy shall be void if any premium is not paid when due, saving as the forfeiture is restricted by the Massachusetts statute, is a nice and difficult one. The defendants, in support of their demurrer, maintain that the two clauses, taken together, mean that the option must be exercised before there has been a forfeiture; that is to say, during some current year for which payment has been made, and before or on the day the annual premium is payable. The option, they argue, means a choice between the original and the paid-up policy, and there can be no choice between a forfeited policy and some other. The case of *Bussing's Ex'rs v. Union Mut. Life Ins. Co.* [supra], is an authority for this construction, which seems to reconcile the apparent discrepancies in the two clauses, and to be consistent with all the words used. On the other hand, the plaintiffs insist that the policy is nonforfeitable after one annual premium has been paid, and that the assured may choose between the temporary extension of the policy under the Massachusetts law, or a paid-up policy for a less amount. They further say that the word "option" may be disregarded, or be read as meaning "right"; that is, the assured has the right, at any time after paying one or more annual premiums, to take a paid-up policy for an amount proportioned to the premiums paid.

After much doubt, I have concluded that the plaintiffs' construction is the more obvious and natural one. I think the assured, in reading his policy, would suppose that he need give himself no uneasiness about the premiums, for that he could always be sure of a policy as large as those he had paid would warrant. That was my impression on first reading the policy, and I think, when that

is the case, the other construction should be clear and decisive on a more careful consideration, before a court should venture to adopt it. The policy itself, as a policy for \$3,000, was forfeited by neglect to pay the premium, except as it was kept in force until the death of the assured by virtue of the statute of Massachusetts; and that policy could not be revived or reinstated except by the consent of both parties. But it is not wholly inconsistent with that condition to hold that the right to a paid-up policy of less amount remained good. Such was the decision upon those words in two cases cited by the plaintiffs, which I agree are not otherwise specially like the present.

The defendants would import into the contract the words often found in such policies, that the paid-up policy must be applied for while the original policy is in force. The plaintiffs say that the very omission of those words is evidence that such is not the intent. I do not consider that form of expression to have become so universal that the court can supply it by implication, nor, on the other hand, that the omission has much bearing on the case. Nor do I consider that the words "at any time after" one premium has been paid refer to the present question at all. The meaning is the same as if "after" or "when" had been used, and points to a terminus a quo, to the beginning of the right, and not to its termination. But I do consider that one fair and reasonable, and, on the whole, the fairest, construction of the contract is that the forfeiture by nonpayment is of all rights not otherwise provided for. Even if we supplied the words, "while the policy is in force," this policy was in full force for the whole amount when the assured died. It was in force, in all respects, and to all intents and purposes, and subject to be forfeited, if the assured did any act prohibited by the conditions, such as traveling in certain countries, or engaging in certain occupations. In other words, up to this time it was not forfeited at all, except as to the right of extending it beyond the time to which the statute extended it. Why, then, should not the assured have the option to exchange it for a paid-up policy? If the assured had this right at the time of his death, the plaintiffs have it, because there was nothing of a personal character to die with the person. It was a right of property, which they would take, or, at least, which the administratrix would take, like other rights of that character.

I am inclined to think an action at law might at the present day be maintained on this claim; but, as the paid-up policy never was issued, and the defendants refused to issue it on demand, it seems to come directly within the cases cited by the plaintiffs, in which courts of equity have been held to have jurisdiction also; they having acquired it when courts of law were less liberal than now. Demurrer overruled.

WINCHESTER (UNITED STATES v.). See Case No. 16,739.

WINCHESTER REPEATING ARMS CO. (OSCANYAN v.). See Case No. 10,600.

WINDL (POLK v.). See Case No. 11,251.

Case No. 17,867.

In re WINDER.

[2 Cliff. 89.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1862.

HABEAS CORPUS—WHEN WRIT OF RIGHT SERVICE—PREVENTION BY FORCE.

1. Courts of justice may refuse to grant the writ of habeas corpus where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment.

2. But where probable ground is shown that the party is in custody under or by color of the authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ of habeas corpus then becomes a writ of right, which may not be denied.

3. The service of the writ in this case was prevented by force. The writ was ordered to be placed on the files of the court, to be served when and where its service might become practicable.

This was a petition for a writ of habeas corpus. The circumstances of the case are fully set forth in the petition and the opinion of the court.

To the Honorable Nathan Clifford, an Associate Justice of the Supreme Court of the United States, sitting in the District of Massachusetts:—

The petition of William H. Winder respectfully represents, that he is and always has been a loyal citizen of the United States, and was a resident of the commonwealth of Pennsylvania until the time of the arrest and restraint hereinafter mentioned, and has been for a long time past confined in Fort Warren, a military fort of the United States within the district of Massachusetts, under the command of Colonel Justin Dimmick, where and by whom he is illegally restrained of his liberty. That your petitioner whilst so resident in the commonwealth of Pennsylvania was arrested at his residence in the city of Philadelphia upon the 11th day of September, A. D. 1861, under a warrant purporting to be issued by a United States commissioner, upon a charge of conspiracy to overthrow the government of the United States, under the act of congress of the 13th July, 1861. Your petitioner avers that he was entirely innocent of this charge, or of any other offence against the United States, and at once urged an immediate hearing of the case, which was refused, upon the alleged ground of other engagements of the United States attorney, and the hearing was postponed to the afternoon of the 13th Septem-

ber, 1861, your petitioner remaining in custody. Your petitioner was again present at the day to which the hearing of his case was adjourned, ready and anxious to meet the charge against him, when, after a considerable delay, the United States attorney stated that he had no charge to prefer against your petitioner. He then said that an order had been received for your petitioner's delivery to the United States marshal, and your petitioner was discharged by the commissioner; and a telegraphic message, of which the following is a copy, was produced and handed to the counsel of your petitioner, who was present with him:—

"Dated Wash'g. Sept. 11, 1861. To Geo. A. Coffey, U. S. District Attorney: Have telegraphed Marshal Millward to arrest Wm. H. Winder and transfer him to Fort Lafayette. S. Cameron, Secretary of War."

Your petitioner was then at about 5 o'clock of the afternoon of September 13, 1861, without any warrant or cause of commitment being exhibited or stated either to him or to his counsel, immediately seized and taken into custody by William Millward, United States marshal for the Eastern district of Pennsylvania, and was on the same afternoon removed to the city of New York by a person believed to be a deputy or officer of said marshal, and upon reaching the city of New York was carried to Fort Lafayette, a military fort of the United States, under an order, a copy of which he has since obtained, and which is as follows:—

"Philadelphia, Sept. 13, 1861. Lieut.-Col. Martin Burke, Commanding Fort Hamilton: Dear Sir,—Permit me to introduce to you my deputy, Mr. Sharkey, who carries with him Mr. Winder, to be delivered to your custody, per order of secretary of war. Very respectfully, your ob't servant, Wm. Millward, U. S. Marshal."

Your petitioner avers that neither at the time of his said arrest, nor at any time since, has he ever seen the said order or pretended order of the secretary of war, which, for reasons hereinafter stated, he believes never existed. Your petitioner remained so unlawfully restrained of his liberty in Fort Lafayette, under color of some order or pretended order of the secretary of war or some other person, until some time towards the end of October or beginning of November, 1861, when he was transferred, under some order or direction to him unknown, to Fort Warren, near Boston, a military fort of the United States under command of Colonel Justin Dimmick, in which place he has ever since been detained in custody, and now is unlawfully restrained of his liberty. Ignorant of the cause of his unlawful arrest and detention, and conscious of entire innocence, your petitioner addressed a letter to the secretary of state upon the subject of his imprisonment, of which the following is a copy:—

"Fort Warren, 5th Dec. 1861. To the Hon. W. H. Seward, Secretary of State: Sir,—In

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

accordance with your letter of instructions, read to the parties confined in this fort, to address you directly in relation to their release, I proceed to do so, relying upon the implied assurance of your letter, that these communications will receive your personal attention and reply. I have been confined now nearly thirteen weeks, and during all that time I have been unable to learn of any charge whatever; consequently, I can only state that I am unconscious of word or act inconsistent with the character of a true American citizen; and hence I infer that my arrest did not emanate from the head of a department, and that the names of such, when employed in this matter, were merely pro forma, without attention to, and probably without knowledge of, the document to which they were attached. In this state of affairs, I will respectfully submit to your consideration the propriety of allowing me, on parole, to visit Washington for the examination of my case, and I will add my conviction that a short interview will satisfy you of some error in my arrest and confinement, which have proved seriously detrimental. Should the granting the parole prove to be inconsistent with your purposes, I trust I shall not be disappointed in my expectation of receiving a statement of any charges against me, fully, specifically, and with all the evidence in possession of the department, together with the names of all parties making charges. Respectfully, your obedient servant, W. H. Winder."

No answer was ever received by your petitioner to this letter, and time rolling on, and remaining in his original ignorance of the cause of his unlawful imprisonment, your petitioner addressed a letter, of which the following is a copy, to the secretary of war:—

"I have been held in confinement in Forts Lafayette, N. Y., and Warren, Mass., without process or form of law, now more than five months, having been arrested in Philadelphia, my residence, from whence, by order of Simon Cameron, secretary of war, by telegraphic despatch, I was transferred to those distant points. Immediately upon my arrest, in my absence, my office, desks, and chests, &c., were all broken open, and all my papers, a collection of thirty years, ransacked, on pretence of hunting treasonable matter during the few months previous; the sanctity of private correspondence was violated and malignantly calumniated by the publication of pretended contents of letters thus seized; other parties were also thus grievously slandered by statement of falsely alleged contents, and I debarred of all opportunity to contradict such infamous publications. My letter-books, writings, and letters are still in possession of public officials. Even pictures twenty years old found in my possession were misrepresented to slander me. My correspondence at Philadelphia since my arrest has been intercepted and detained. I am to this hour in ignorance of

the causes of my arrest and detention. Governor Seward, secretary of state, caused an order of his to be read to the prisoners, in which he stated that the employment of paid counsel would only have the effect of prejudicing the case of such parties, would be deemed an offence, and would occasion procrastination of imprisonment; his order required all applications to be addressed directly to him, or through unpaid parties. In accordance with this order, never having employed counsel, on the 5th December last, I addressed a letter to the secretary of state, in which, referring to his order as giving assurance that he would read and reply to our communications, I proceeded to state my long confinement, my ignorance of the causes therefor, and requesting permission to go to Washington for an investigation of my case, or for a statement of the charges against me, if any, the full testimony, and the names of my accusers, or else an unconditional discharge. To this hour no reply has been received. My release was tendered to me on condition of taking the oath of allegiance, &c., &c. I declined to accept release upon conditions. A second time release was offered upon condition of taking the oath, which offer was accompanied by a letter of explanation from Governor Seward, intended to remove supposed objections, in stating that support of the constitution did not include support of the individual members of the executive. My objection, being radical, applied to all tests or conditions, which might be supposed to admit that I had done anything inconsistent with the character of a true American, and I of course declined this second offer of release. In common with my fellow-members of the company to which I am attached, I took an oath to support the constitution, and I am still under its full responsibility. I am ready in common with all others, on every proper and lawful occasion, to take it a thousand times. But as a discriminating test, imputing past and future intended wrong, it is not possible for me thus voluntarily to calumniate myself. The interior of Fort Warren, with the mens sibi conscia recti, is preferable to release purchased at the expense of character. So far from being willing thus to calumniate myself, I have challenged and I do now challenge a comparison of record of fidelity to the constitution and the Union with all concerned in my arrest and detention, confident that the result will furnish none of them with cause for self-gratulation. In this state of the case, the secretary of war announces that the president will grant 'amnesty' for past offences and take 'parole' against future ones, of all persons 'except spies in the service of the insurgents, or others whose release at the present moment may be deemed incompatible with the public safety.' Thus I should be turned loose, stained with an unnamed guilt of the past, supposed to be covered by the 'amnesty,' and

the equally nameless guilt of the future, averted by the 'parole,' allowing a censorious world to impute any wrong it may please, as being concealed beneath the cloaks of 'amnesty' and 'parole,' and to which, by my acceptance, I would give at least a quasi admission, and certainly would leave upon myself the color of guilt, and without power of vindication against such imputation. The 'spies' and those whose liberation may be 'deemed incompatible with the public safety' will have probably the opportunity of perfect vindication, while those favored with 'amnesty' and 'parole' will stand forever shaded beneath those clouds. It would seem to be an exquisite aggravation of the original wrong which the order admits and purports to remedy or correct. The wrong done was illegal incarceration without charge; the remedy now proposed is to confess that wrong has been done, and to receive 'amnesty' therefor; to acknowledge intention to do future wrong, and then to give 'parole' to forego such intention. The condition, in a Northern state, of a man accepting 'amnesty' and giving 'parole,' would be a confession of guilt bearing in its train intolerable consequences. For these reasons, and many others which naturally present themselves, and would be stated if necessary, the undersigned trusts the secretary of war will find it consistent with his duty to reinstate him at home to his original position before arrest. If there be any charge of crime against me, I am ready to meet it. If there be none, I trust the secretary will see that to impose conditions on me as the price of my liberation, is to aggravate the wrong which will then stand confessed. It might be simple justice, alike to the administration as to the prisoners, to have the informers who misled the defendant exposed to view and to just punishment. I have the honor to be your obedient servant, W. H. Winder. Fort Warren, 22d Feb'y, 1862. Hon. E. D. Stanton, Secretary of War, Washington City."

Your petitioner's books and papers had all been seized and taken by the marshal, at the time of his arrest; but having been, previously to his arrest, in correspondence with Gen. Simon Cameron, and believing it to be impossible that that officer would, of his own motion, have authorized his arrest, he wrote to him upon the 15th March, 1862, as follows:—

"Fort Warren, 15th March, 1862. Hon. Simon Cameron: Sir,—It was by order from you, through a telegraphic despatch, that I was taken from Philadelphia to Fort Lafayette and placed in confinement there, from whence I was transferred to this fort, in which I am confined, still ignorant of the cause which induced you to issue that order. The object of my writing this letter is to obtain from you information at whose instance and upon what representations you were influenced to the issue of the order for my

confinement in Fort Lafayette. I believe I do not err in supposing the order could not have been of your own motion, but was upon the statement of party or parties who ought not, and who you supposed would not, willingly mislead you, and I trust that my reliance on your readiness to afford me the information will not prove delusive. I feel myself entitled to this consideration at your hands; and am unwilling to doubt your inclination to accord it to me. I am, respectfully, your obedient servant, &c., W. H. Winder."

To this letter an answer was received, as follows:—

"Lochiel, March 24, 1862. W. H. Winder, Esq.: Sir,—You surprise me by saying in your letter of the 15th inst., received to-day, that it was by my order you were taken from Philadelphia to Fort Lafayette and placed in confinement. I knew nothing of your arrest until I saw the fact stated in the newspapers, and, being at the time closely engaged in the discharge of my official duties, neglected to inquire into the cause, presuming, however, that it was done by order of the state department, which had charge of such cases as I supposed yours to be. Very resp't'y, Simon Cameron."

And the following further correspondence took place between your petitioner and Gen. Cameron:—

"Fort Warren, 31 March, '62. Hon. Simon Cameron, Lochiel, near Harrisburg: Sir,—I have to thank you for your prompt reply to my request for information as to the causes which induced you to issue an order for my transfer to Fort Lafayette. Your reply of the 24th, stating your surprise at learning that I had been sent there by your order, and that you knew nothing of my arrest until you saw it in the papers, and presumed it had been done by order of the state department, confirms me in my supposition that your name had been used either without your knowledge or inadvertently signed to a paper without heeding its contents. It was obtained somehow through the district attorney. I give you a copy of the document on which Col. Burke took charge of me and placed me in Fort Lafayette:—'Philadelphia, Sept. 13, 1861. Lt.-Col. Martin Burke, commanding Fort Hamilton. Dear Sir,—Permit me to introduce to you my deputy, Mr. Sharkey, who carries with him Mr. Winder, to be delivered to your custody, per orders of secretary of war. Very respectfully, your obt't servant, Wm. Millward, U. S. Marshal.' I am respectfully, your obedient servant, W. H. Winder."

"Fort Warren, 31 March, 1862. Hon. Simon Cameron, Lochiel, near Harrisburg. Dear Sir,—Since writing you to-day I have received the following copy of despatch from Philadelphia:—'Washington, Sept. 11, 1861. To Geo. A. Coffey, U. S. Dist. Att'y.: Have telegraphed Marshal Millward to arrest Wm. H. Winder and transfer him to Fort Lafa-

vette. S. Cameron, Sec'y War.' I have supposed this might call to your mind the communication of Mr. Coffey to which apparently it is a reply. I am respectfully, your obedient servant, &c. W. H. Winder."

"Lochiel, 2 April, 1862. W. H. Winder, Esq.: Sir,—I have enclosed your letter of the 31st, received to-day, to the secretary of state, and disavowed all knowledge of your arrest, with a request for your release, if you have been held by my direction. Very respectfully, Simon Cameron."

"Fort Warren, 5th April, 1862. Hon. S. Cameron, Lochiel, near Harrisburg: Dear Sir,—I have been much gratified by the receipt of your letter of 2d April, in which you advise me of your having sent my first letter of 31st March to the secretary of state, with a request for my release, if I have been held by your direction. This is satisfactory, and is all the action the case requires at your hands, unless, indeed, a disregard of your request should render it proper for your own vindication against an act which you repudiate, but the responsibility of which is placed by the record on your name. I am, respectfully, your ob't serv't, &c., W. H. Winder."

It thus appears that no order was ever given by the secretary of war for the arrest of your petitioner, and he was left in absolute darkness as to the authority, or supposed authority, by which he was originally imprisoned and was then detained. In the month of May last, commissioners to visit and report upon the cases of those who had been arrested and were detained in the military prisons of the United States, came to Fort Warren, and your petitioner was summoned to appear before them. Then for the first time, and nearly eight months after his arrest, upon the 7th May, 1862, your petitioner was informed that his offence was his correspondence and his writings for the newspapers. Your petitioner at once demanded the production of any writings of his upon which any charge of violating the laws of the United States could be based. None such were produced, and your petitioner now asserts what he has before stated, that none such can be produced. Your petitioner was then told by the commissioners that his case would be taken into consideration, but he has never heard further from them upon the subject, nor has any offence been since ever imputed or stated to him, or the reason of his arrest and detention, nor has, so far as he is aware, any further or other action ever been taken in regard to him or his case. Your petitioner avers that he has now been nearly fourteen months unlawfully restrained of his liberty, and detained in custody under color of some pretended authority of the United States, without any specific crime or offence under or violation of its laws being imputed to him, in disregard of the plain provisions of the laws and constitution of the United States, to the benefit of which the humblest citizen is entitled. Your petitioner now solemnly reasserts what he has heretofore more than once stated, that he is innocent of any crime or offence

against his country or its government and laws, and he respectfully prays your honor to grant a writ of habeas corpus to be directed to Col. Justin Dimmick, commandant of Fort Warren, and to his officers having charge of your petitioner, commanding him and them to bring your petitioner before your honor, to do, submit to, and receive what the laws may require. And he will ever pray, &c. W. H. Winder.

By his agent and attorney,

George W. Biddle.

Boston, October 25th, 1862.

Wm. B. Reed, Geo. W. Biddle, Peter McCall, and Geo. S. Hillard, for petitioner.

CLIFFORD, Circuit Justice. This is a petition for a writ of habeas corpus, wherein the petitioner represents that for a long time past he has been confined in Fort Warren, a military fort of the United States, in this district, under the command of Colonel Justin Dimmick, where and by whom he is illegally restrained of his liberty.

As a foundation of the application, and to show that the prayer of the petitioner ought to be granted, he alleges that he is and always has been a loyal citizen of the United States, and that until the time of his arrest, as therein set forth, he had been a resident of the commonwealth of Pennsylvania, and the complaint is, that while he was so resident there he was, on the 11th of September, 1861, arrested at his residence in the city of Philadelphia, under a warrant purporting to have been issued by a commissioner of the United States, upon a charge of conspiracy to overthrow the government of the United States.

According to the petition that warrant was founded upon the act of congress of the 13th of July, 1861 [12 Stat. 255]; but the petitioner avers that he was entirely innocent of that charge or of any other offence against the United States; that he urged an immediate hearing of the case on the day of his arrest, which was refused on the ground that the district attorney had other engagements, and the same was postponed to the 13th of the same month, when he was again present, and ready and anxious to meet the charge, but that the district attorney, after stating that he had no charge to prefer against him, informed him that an order had been received that he should be delivered to the marshal of the United States for that district; that he was accordingly discharged by the commissioner, and was then and there, without any warrant or cause of commitment being exhibited to him or to his counsel, immediately seized and taken into custody by William Millward, marshal of that district. When the district attorney, however, informed the petitioner that an order had been received that he, the petitioner, should be delivered to the marshal, he at the same time, as the petitioner states, handed to his counsel, who was present with him, a telegraphic despatch, addressed to the district attorney, of the following purport:—

"Have telegraphed Marshal Millward to ar-

rest Wm. H. Winder, and transfer him to Fort Lafayette. S. Cameron, Sec'y of War."

Recurring to the copy of the telegram as given in the petition, it will be seen that it was dated at Washington on the 11th of September, 1861, two days before the petitioner was taken into custody by the marshal; and the petitioner states that on the same afternoon that he was so seized, he was removed to the city of New York, by a person believed to be a deputy or officer of the marshal, and upon reaching that city was carried to Fort Lafayette, a military fort of the United States, under an order of which the following is a copy:—

"Permit me to introduce to you my deputy, Mr. Sharkey, who carries with him Mr. Winder, to be delivered to your custody per order of the secretary of war."

Said order or letter was dated at Philadelphia on the 13th of September, 1861, and was addressed to the commandant of Fort Hamilton, and was signed by the marshal.

Having stated these proceedings, the petitioner avers that he has never seen the order or pretended order of the secretary of war, and, for reasons set forth in the petition, he does not believe that any such order ever existed, but that he remained in Fort Lafayette, so unlawfully restrained of his liberty, under color of some order or pretended order of the secretary of war or of some other person, until some time towards the last of October or the first of November, 1861, when he was transferred, under some order or direction to him unknown, to the military fort before mentioned in this district, under the command of Colonel Justin Dimmick, in which place he has ever since been detained in custody, and now is unlawfully restrained of his liberty.

On the 5th of December, 1861, he addressed a letter to the secretary of state, soliciting leave to visit Washington, on parole, for the examination of his case, or that he might be furnished with a statement of the charges against him; but as no reply was received to the communication, it will not be reproduced at the present time. Failing to get any reply to that letter, on the 22d of February, 1862, he addressed another letter to the present secretary of war, but, so far as appears, the communication was never answered. Believing it to be impossible that the former secretary of war, General Simon Cameron, would of his own motion have authorized his arrest, the petitioner states that he, on the 15th of March, 1862, wrote to General Cameron upon the subject, informing him that it was by his order that he, the petitioner, was seized and taken from Philadelphia to Fort Lafayette, and there placed in confinement, and afterwards transferred to Fort Warren, and inquired at whose instance and upon what representations he had been induced to issue the order.

To that letter, as the petitioner states, a

reply was received under date of the 24th of March, 1862; and he gives what purports to be a copy of the answer. Suffice it to say, without attempting to give the precise language, the writer expresses his surprise at the remark of the petitioner that it was by his order that he had been taken from Philadelphia to Fort Lafayette and placed in confinement. On the contrary, he expressly states that he knew nothing of the petitioner's arrest until he saw the fact stated in the newspapers, and adds several circumstances confirmatory of that statement. Confirmed by that letter in the opinion that the name of the former secretary of war had been used without his knowledge, or inadvertently, the petitioner states that on the 31st of the same month, he wrote General Cameron another letter, thanking him for his prompt reply, and furnished him with a copy of the document under which the commandant of Fort Hamilton took charge of him and placed him in Fort Lafayette, and also a copy of his telegraphic despatch to the district attorney, which was handed to his counsel at the time he was discharged by the commissioner. Considering that the reply of General Cameron is a brief one, it will be given in the language of the copy set forth in the petition.

"Lochiel, April 2, 1862. W. H. Winder, Esq. Sir,—I have enclosed your letter (of the 31st) received to-day, to the secretary of state, and disavowed all knowledge of your arrest, with a request for your release, if you have been held by my direction. Very respectfully, Simon Cameron."

Various other matters are stated in the petition, which need not be particularly noticed at this stage of the case, except to say that the petitioner, in conclusion, avers that he has been nearly fourteen months unlawfully restrained of his liberty, and detained in custody, under color of some pretended authority of the United States, without any specific crime or offence being imputed to him, in disregard of the plain provisions of the constitution of the United States and the laws of congress, to the benefit of which every citizen is entitled; he accordingly prays the court to grant this writ of habeas corpus.

By the fourteenth section of the act of the 24th of September, 1789 [1 Stat. 81], it is provided, among other things, that either of the justices of the supreme court of the United States, as well as the judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of inquiring into the cause of commitment; provided, that writs of habeas corpus shall in no case extend to prisoners in jail, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify. Additional authority upon the subject is also conferred by subsequent

acts of congress, but it is unnecessary to refer to any other act, as the petition in this case is obviously founded upon the before-mentioned provision of the judiciary act.

Courts of justice may refuse to grant the writ of habeas corpus where no probable ground for relief is shown in the petition, or where it appears that the petitioner is duly committed for felony or treason plainly expressed in the warrant of commitment; but where probable ground is shown that the party is in custody under or by color of the authority of the United States, and is imprisoned without just cause, and therefore has a right to be delivered, the writ of habeas corpus then becomes a writ of right, which may not be denied, but ought to be granted to every man who is committed or detained in prison or otherwise restrained of his liberty. Authorities in support of these positions are unnecessary, as wherever the principles of the common law are adopted or recognized they are universally acknowledged.

Although the petitioner was arrested, in the first place, by virtue of a warrant issued by a commissioner of the United States, still the case, as stated in the petition, shows that he was discharged from that arrest, and that no warrant of any kind has since been issued against him. Assuming the case to be as stated in the petition, he was not only arrested and imprisoned under an order having no other sanction than that of a telegraphic despatch, but it now appears from the petition that the secretary of war who was supposed to have sent or authorized the telegram containing the order, denies all knowledge of the arrest of the petitioner, except as he learned the fact from the newspapers, and entirely disavows all responsibility for the proceedings.

Nothing need be added to the narrative of the facts as set forth in the petition, to demonstrate that the petition shows probable ground to conclude that he is imprisoned and restrained of his liberty without just cause. Undoubtedly he is in custody under or by color of authority of the United States, and such being the fact, all the requisites known to the law are shown to entitle the petitioner to the writ for which he prays; and on that state of the case, it becomes the duty of the court to grant it. When these pre-requisites appear, it is not competent for the court to deny the application, because the court has in such case no discretion upon the subject, but the writ must issue as a matter of right.

All these remarks must be understood as based entirely upon the facts as stated in the petition, and, of course, can have no application to any different state of facts which may be shown upon the return.

The United States marshal having declined to serve the writ, it was placed in the hands of B. F. Bayley, a deputy sheriff, who made the following return thereupon:—

"I, Benjamin F. Bayley, being duly sworn, do depose and say that I am one of the deputies of the sheriff of the county of Suffolk, in the commonwealth of Massachusetts; that on Tuesday, the 28th day of October, A. D. 1862, there was placed in my hands for service a writ of habeas corpus, a copy of which is hereto annexed, directed to Colonel Justin Dimmick, commandant of Fort Warren, or to any officer under him having the charge of William H. Winder, commanding him to bring the body of said Winder, then confined in said Fort Warren, to be dealt with as to law and justice should appertain; that upon receiving said writ, I immediately proceeded to Commercial Wharf, in the port of Boston, where the steamboat plying between the said port and said Fort Warren was lying, and stated to the captain in charge of said boat, that I desired to proceed therein to Fort Warren as a messenger from the United States court, with papers for said Colonel Justin Dimmick. The said captain told me that his orders were positive not to allow any one to go in said boat without a pass from Colonel Dimmick, said orders having been received on Friday last, the 24th instant; that being prevented from proceeding in said boat, I did on the morning of Wednesday, the 29th day of October, 1862, receive from the counsel of said Winder, certain instructions in regard to the service of the said writ of the following tenor:—"You are entrusted with the service of a writ of habeas corpus, issued by order of the Honorable Nathan Clifford, a justice of the supreme court of the United States, to be served upon Colonel Justin Dimmick, at Fort Warren. You will have with you the original writ, with an attested copy thereof. You will procure a proper conveyance to take you to Fort Warren, and land there in order to serve the writ as directed. Upon landing or meeting the sentry, or other person at the fort whom you may first meet, you will respectfully inquire for Colonel Dimmick, stating you have a paper to deliver to him from Judge Clifford, a judge of the supreme court of the United States. Should you be allowed to see Colonel Dimmick, you will respectfully deliver to him the original writ, saying at the same time, This is a writ from Judge Clifford, and at once return to Boston, when you will draw up a statement of the time and mode of service. Should the sentry or party with whom you first communicate refuse you permission to see Colonel Dimmick, you will ask by what authority you are refused; if none is stated, and the refusal be persisted in, you will hand a copy of the writ to the sentry or other party, asking him to deliver it to Colonel Dimmick, saying you will wait for an answer, and bring it if received. If this be refused, you will return at once. Should you be refused permission to land, and the refusal be persisted in upon your stating that you have a paper for Colonel Dimmick, you will at once return and make a report of

what you have done. Should Colonel Dimmick be absent from the fort, you will communicate or endeavor to communicate with the officer in command, in the manner hereinabove set forth.' That upon receiving said instructions I hired a sail-boat in the port of Boston aforesaid, manned with two men, and was accompanied by John H. Clark, a reputable citizen of the county of Middlesex, in this commonwealth, and proceeded therein to Fort Warren, to serve the said writ according to my instructions; that I arrived near to said Fort Warren, at about three o'clock of the afternoon of said 29th day of October, when I perceived a body of about fifty armed men drawn up in military array near the place of landing; that upon nearing the landing I was hailed by a sentinel and told by him to keep off; that I then told said sentinel that I had a communication to make to Colonel Dimmick, and approached a little nearer to said landing; that the said force was then marched down to the landing, when I was again peremptorily ordered by a person in command of said force, to keep off, and was prevented from landing; that finding it impossible to land or approach nearer to the said fort, I directed the boat, in which I was, to be put about, and returned to the port of Boston, where I arrived at about five o'clock of the afternoon of the same day, having been forcibly prevented from serving the said writ; that I verily believe that had I attempted to effect a landing at said Fort Warren, after having been warned away, as hereinbefore stated, I should have been prevented from so doing by the force of armed men drawn up at the landing, and that to the best of my belief it was impossible for me to land and serve the said writ. And that further I say not. Benj. F. Bayley.

"Sworn and subscribed this 30th day of October, A. D. 1862. G. S. Hillard, Justice of the Peace."

Mr. Reed then addressed the court as follows:—"May it please your honor. Having presented to the court this affidavit, the counsel for the relator beg leave to say that we came to this jurisdiction to solicit the process of the law in order to release from a long and, as we believe, unlawful imprisonment (for nearly fourteen months), a fellow-citizen of Pennsylvania. We deferred any action until the district attorney should have full opportunity of communicating with the authorities at Washington. We came prepared, and anxious to meet and discuss any grave questions of law which the officers of the government might raise in opposition to this discharge. The court granted the writ of relief which was asked for, but its execution has been evaded and resisted, so as to prevent the consideration and decision of these questions. In the case decided by the chief justice of the United States, that of Merriman, the military officer to whom the process was directed, made a return in form respectful; and this, too, at a time of local disturbance

and on the edge of actual war. But here in Massachusetts, many hundred miles away from any scene of war, where perfect peace reigns, and every peaceful relation of life is maintained, and the court is regularly transacting the ordinary and profitable business of the government, here in Massachusetts, the writ which your honor granted is both evaded and resisted, and an imprisoned American citizen is denied the common right of knowing who are his accusers and of what he is accused. Your honor's writ is that of the United States, and that peaceful writ the military force of the government prevents us from executing. At this moment we can do no more. We submit the facts this affidavit discloses. We beg to express to your honor our high sense of the kindness and consideration we have received at your hands, in this effort to assert the supremacy of the law and the rights of the citizen."

CLIFFORD, Circuit Justice. The court does not perceive that anything more can now be done to effect service of this writ. The service appears to have been prevented by force. The court deeply regrets that officers of the United States should obstruct process out of a court of the United States, especially this process. But those officers are at present beyond the control of the law, and the court has not the command of the physical force needful to effect a service of this writ at the present time. Let the writ be placed on file, to be served when and where service may become practicable.

WINDHAM PROVIDENT INSTITUTION,
Ex parte. See Case No. 6,588.

Case No. 17,868.

WINDSOR v. WHITING.

[10 Hunt, Mer. Mag. 175.]

District Court, D. Massachusetts. Dec., 1843.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY—SUBSEQUENT BANKRUPTCY OF ASSIGNOR.

[A debtor made, in 1838, an assignment for the equal benefit of all his creditors, to which assignment five creditors became parties before the debtor was decreed a bankrupt under the law of 1841, which prohibited preferences. *Held*, that the assignment could not be sustained in favor of the creditors generally, or in favor of those who became parties before the bankruptcy decree.]

This was a summary proceeding in equity, instituted by [Henry Winder] the assignee of Nathaniel Blake, a bankrupt, to recover of the respondent [William Whiting] a fund amounting to about \$3,000, which had been collected by him under an assignment made to him by Blake, for the benefit of his creditors, December 10, 1838, according to the provisions of the statute of April 15, 1836. Only five creditors had become parties to this assign-

ment, and no dividend had been paid, when, on the 20th of January, 1843, Blake filed his petitions in bankruptcy, but afterwards a number of other creditors signed the instrument.

Upon these facts, it was contended, for the respondent, (1) that the assignment was good at common law; (2) that, if Whiting, as assignee, held anything, he held for the trusts declared in the assignment; (3) that all creditors had a right to become parties to the assignment at any time before the final dividend; (4) that the assignee in bankruptcy had no rights beyond those of the bankrupt to defeat the assignment.

SPRAGUE, District Judge, held it clear that the assignment was not valid under the statute of 1836, which had been repealed before the instrument was made. The question, then, was, was it good at common law? Now, it was clearly settled in this state that, in case of an assignment to trustees for creditors, any creditor not a party thereto might attach the surplus, and so defeat the distribution according to the trusts. Therefore, the second and third propositions of the respondent fell to the ground. Then, as to the fourth proposition, the assignee in bankruptcy acted for the creditors, and for their benefit he had a right to follow property conveyed away by the bankrupt contrary to their legal rights. And, further, he took all their rights in that regard by operation of law, and therefore those creditors who executed the assignment after the bankruptcy could not take any part of the fund thereby. But how were those who executed the instrument before the decree of bankruptcy to be dealt with? It was contended that they should be paid in full, to the exclusion of all who subsequently became parties. This assignment, intended to derive all its efficacy from the statute of 1836, it was attempted to sustain by the common law, in order to carry into effect the intention of the parties. Now, the statute of 1836 prohibited preferences. It was the intention of the parties that there should be no preferences, and that all creditors should have a right to come in at any time before the final dividend. To cut off the subsequent signers, and give the whole fund to the five who had previously signed, would be to defeat the intention of the parties, by the means which were to be invoked for the purpose of effectuating that intention. Again, the bankrupt law prohibits preferences. Yet it was contended that it was to have such a construction and operation given to it as to create a preference for these five creditors, and exclude all others, as well those who signed subsequently as others. By this means the intention of the parties and of the bankrupt law were both to be defeated. An assignee, under the insolvent law of 1838, if it had continued in operation, would have defeated this conveyance; and the assignee, under the bankrupt law, had as extensive rights as an assignee under that statute would have had.

WINDSOR MANUF'G CO. (STEAM CUTTER CO. v.). See Case No. 13,332.

WINDSOR MANUF'G CO. (STEAM STONE-CUTTER CO. v.). See Cases Nos. 13,335 and 13,336.

WING (DWIGHT v.). See Case No. 4,219.

WING (OLCOTT v.). See Case No. 10,481.

Case No. 17,869.

WING v. RICHARDSON.

[2 Fish. Pat. Cas. 535; 1 2 Cliff. 449.]

Circuit Court, D. Massachusetts. May Term, 1865.

PATENTS FOR INVENTIONS—PRESUMPTIONS—TIME OF INVENTION—PLATE HOLDER FOR CAMERAS.

1. The presumption, arising from the letters patent, that the patentee was the original and first inventor, in the absence of the application for the patent, extends back only to the date of the letters patent, and in no case does it extend further back than to the time of the filing of the original application.

2. Whenever a party desires to show that his invention was made prior to the date of his application for the patent, he must prove the fact by other sufficient evidence, because no such presumption arises from the letters patent, or the application, or both combined.

3. Letters patent to Albert S. Southworth, dated April 10, 1855, and reissued September 25, 1860, for a plate holder for cameras, examined and sustained.

[Cited in Ormsbee v. Wood, Case No. 10,579.]

4. The reissued patent is for the same invention as that described in the original patent.

5. The date of the patentee's invention was the latter part of 1847 or the spring of 1848, when the improvement was reduced to practice as an operative machine.

6. The patent is not for a principle or a result, but for the means described for accomplishing the result.

This was a bill in equity, filed to restrain the defendant [Charles F. Richardson] from infringing letters patent for a "plate holder for cameras," granted to Albert S. Southworth, April 10, 1855, reissued September 25, 1860, and assigned to plaintiff [Simon Wing].

The plate holder, as described in substance by the patentee, consists of a stationary casing, containing a zinc plate in front of the daguerreotype plate, provided with a square opening C equal to one-fourth of the latter plate. The hollow square space within the casing is of proper dimensions, so that when the frame holding the daguerreotype plate is successively slid into the four corners of said hollow space, the parts 1, 2, 3, 4 of the plate will be successively exhibited opposite the opening, ready to receive the picture. The plate holder is brought into said four positions by moving a square knob into the four corners of an opening in the rear part of the casing. This motion can be made so quickly that the four pictures can be taken without covering the aperture of the camera from first to last. The object of this arrangement

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

is to obtain rapidly a succession of pictures, timing them differently in order to select the best, and also to take stereoscopic pictures with one camera.

The claim was as follows: "The within-described plate holder, in combination with the frame in which it moves, constructed and operating in the manner and for the purpose substantially as herein set forth."

The claim of the reissue was as follows: "I claim bringing the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera, substantially in the manner and for the purpose specified."

Chauncey Smith and B. R. Curtis, for complainant.

W. A. Herrick and J. F. Redfield, for defendant.

CLIFFORD, Circuit Justice. This is a bill in equity for the alleged infringement of certain letters patent. Complainant is the assignee of the letters patent. Invention in question was made by Albert S. Southworth, and letters patent were duly granted to him for the same April 10, 1855. Description of the invention as therein set forth was, that it was a new and useful plate holder for cameras; but it is alleged that the description was defective, and on that account the patentee was allowed to surrender the original letters patent, and new letters patent were issued to him September 25, 1860, on an amended specification for the same invention. Present suit is founded upon the reissued letters patent, and the complainant, as the assignee of the same under certain mesne conveyances, alleges that the respondent, at North Bridgewater, in this district, on December 18, 1863, infringed the same. Wherefore he prays for an account and for an injunction.

Several defenses are set up in the answer, but the one principally relied on at the argument consists in a denial that the patentee is the original and first inventor of the improvement described in the letters patent. Letters patent are granted by the government under authority of law; and when regularly issued, and in the usual form, they are, if introduced in the case, prima facie evidence that the person named as such was the original and first inventor of what he has described therein as his improvement. Such presumption, however, in the absence of the application for the patent, extends back only to the date of the letters patent, and in no case does it extend further back than to the time of the filing of the original application. Whenever a party desires to show that his invention was made prior to the date of his application for the patent, he must prove the fact by other sufficient evidence, because no such presumption arises from the letters patent, or the application, or both combined. Specification of the reissued letters patent de-

scribes the invention as certain improvements in taking photographic impressions as therein described. Separate plates, as the inventor represents, had previously been used for each impression, and, consequently, where several impressions were to be taken, as in multiplying copies, it became necessary that the plate should, at each impression, be removed and replaced by another. Effect of those changes was to cause delay and inconvenience. Object of this invention is to remedy that difficulty, and it consists, as the patentee states, in bringing successively different portions of the same plate, or several small plates in one plate holder into the field of the lens of the camera. Practical operation of the machine is that it brings different portions of the same plate or several smaller plates secured in one plate holder into the axis of the focus of the lens, so that several impressions may be made on the same plate with equal correctness. Claim of the reissued patent is the "bringing the different portions of a single plate, or several smaller plates, successively into the field of the lens of the camera," substantially in the manner and for the purpose set forth in the specification. Patentee states that in carrying out his invention he makes use, as the preferred method, of a peculiarly-arranged frame, in which the plate holder is permitted to slide, but in which its position is so definitely indicated that the operator can quickly and accurately adjust the plate or plates to effect the described result. Decided preference is given to that arrangement, but the patentee states that his improvement may be embodied by causing the lens of the camera to be made adjustable in different positions with respect to the plate, so that different portions of the plate, although it remains stationary, may be successively brought into the field of the lens. One of the experts describes the invention embodied in the patent as a mechanism so organized that a lens may be properly focused with regard to different plates, or different parts of the same plate, without removing the plate from the mechanism until as many impressions are made as may be desired, and it is not perceived that the description is too broad if the definition be limited to the particular means set forth in the specification. Doubt can not be entertained that the invention is one of merit, and it is equally clear that the patentee, whether the first inventor or not, was the actual inventor of his improvement, and that, in making it, he borrowed nothing from any of the devices set up in the defense. Nothing of that kind is pretended; but it is insisted that the evidence shows as matter of fact that an apparatus substantially the same had been constructed and reduced to practice by one or more persons at a prior date, so that the patentee is not the original and first inventor of his alleged improvement. Patentee gave the directions for making his first model, or machine, in August, 1846, and it was made and sent to him at Boston in November follow-

ing. Design of the camera then constructed was that it should slide in the frame so as to make successive pictures in the axis of the focus of the lens, but a frame was never actually adapted to that machine. Statement of the patentee is explicit that it was designed to operate in either of the modes pointed out in the specification of the reissued patent, but the frame was never made, and, consequently, was never so used. He also states that he constructed another machine for the same purpose, in the year following, which was used in taking pictures for seven or eight years. Principle was the same, but instead of moving the frame, the apparatus was so constructed that it moved the lens over the plate, being, in fact, the same arrangement suggested in the patent on which the suit was founded. The reasons given by the patentee, why he reduced the second form of his invention to practice, before he adapted a frame to the first machine, was that the first would be expensive, and that the second required fewer changes in the old apparatus, and could be perfected and put in operation at much less expense, as he could use his old camera and old frame. Belief of the witness is that he completed that machine in 1847, but he states positively that he used it early in the spring of 1848, and that it was a completed machine. His recollection is distinct that he completed it here, in this city, before he went to California, and that he commenced preparations to go there in the winter of that year.

Suffice it to say, without reproducing more of the testimony, that the invention held by the complainant is shown not only to have been made as early as the latter part of 1848, or the first part of the year 1849, but that the same was reduced to practice, as an operative machine. Respondent does not controvert the position that the patent, if it be valid, covers the two methods described in the specification. Both undoubtedly were invented by the patentee, and they are clearly embraced in his claim. Such are the views of the experts, and such is the legal construction of the patent.

2. Infringement is clearly proved, and the allegation in that behalf is scarcely denied. Regarding the evidence as plenary upon that point, it does not seem to be necessary to say more upon the subject.

3. Reissued patent in this case is for the same invention as that described in the original patent, and therefore is not affected by the cases cited in that behalf by the respondent.

4. Abandonment is not proved. On the contrary, the reasons assigned for the delay which ensued before the application for the patent was presented are satisfactory, and they show that there is no unexplained want of diligence in perfecting the invention.

5. Patent of the complainant is not for a principle or result but for the means described for accomplishing the result, and, conse-

quently, is valid notwithstanding that objection.

6. Evidence offered by respondent to show that others had made similar machines prior to the date of the invention in question is not satisfactory. Recollections of Marcus A. Root, after the lapse of sixteen years, are quite too indistinct and uncertain to set up a lost machine to defeat a valuable improvement and deprive a meritorious inventor of the fruits of his toil and labor. Care should be observed in investigations of this nature to guard the public against a growing propensity on the part of patentees to expand their patents beyond what they ever invented, and at the same time to protect them against the equally unjust claims of pretentious persons who always stand ready to prove that they are the real inventors of what has been patented to another. Neither have any merit, and both should be discouraged. Dates stagger a good memory, even when the inquiry has respect to recent events; but, after the lapse of sixteen years, under the circumstances of this case, I do not think it safe to rely upon the unsupported statements of this witness. They are too uncertain, inconsistent, and contradictory. Statements of Philip Haas are no better, but in fact are less reliable. He contradicts himself, is contradicted by the circumstances, and by the testimony of the other witnesses in the case. Attempt is made to support his statements by the testimony of Enos B. Foster, but it can hardly be said to have that effect. When he went into the employment of the other witness he was but fifteen years of age, and they both admit that the alleged machine is lost. They do not attempt to testify to but one picture now in existence taken with that machine. Their statement is that it was lost in 1850, and they afford no reason to infer that any of its parts are in existence. Theory is that it was made by one Saxton, in 1840, under the directions of Philip Haas, and that it was stolen from the owner's place of business. But the proofs show that he never made another, and ever after used a machine constructed according to the old method. He gave a second deposition, and in that he states that he was mistaken; that it could not have been made as early as 1840, but thinks it was four years later. Complainant called a witness who worked for Philip Haas the latter part of 1846 and for the most part of 1847, and he states that he never saw any such machine in his shop, although he was an assistant operator, and had the fullest opportunity to see all the models or machines in the apartments. He had for eleven months, as he states, the general charge of all apparatus and material, and everything that pertained to the business of his employer, and it is sufficient to state that his statements are utterly inconsistent with the testimony of the principal witnesses for the respondent. In view of the whole evidence, I am of opinion that the respondent has not proved that the

patentee in this case was not the original and first inventor of the improvement described in his reissued letters patent. Having come to this conclusion upon the evidence, I do not find it necessary to determine the other questions of law discussed at the bar.

Decree for an account and injunction. Cause referred to a master to ascertain the amount of damages.

[For other cases involving this patent, see note to Ormsbee v. Wood, Case No. 10,579.]

Case No. 17,870.

WING v. SCHOONMAKER.

[3 Fish. Pat. Cas. 607.]¹

Circuit Court, N. D. New York. July, 1869.

PATENTS FOR INVENTIONS—PLATEHOLDER FOR CAMERAS—INVENTION.

The plate holder for cameras patented by Albert L. Southworth, April 10, 1855, existed, and was carried into practical operation by working machines, and was in use by practical photographers seven or eight years before the date of his patent, and before he had perfected his machine. The patent is therefore void.

This was a bill in equity filed to restrain the defendant [Christopher C. Schoonmaker] from infringing letters patent for a "plate holder for cameras," granted to Albert S. Southworth, April 10, 1855, reissued September 25, 1860, and assigned to complainant [Simon Wing]. The nature of the invention and the claims are stated in the report of the case of Wing v. Richardson [Case No. 17,869].

E. Cowen, for complainant.

Townsend & Browne and Henry Baldwin, Jr., for defendant.

NELSON, Circuit Justice. The bill is filed in this case, founded on a patent to A. S. Southworth, April 10, 1855, for a new and useful plate holder for cameras, and reissued September 25, 1860. The claim in the reissued patent is, "bringing the different portions of a single plate, or several plates, successively into the field of the lens of the camera, substantially in the manner and for the purpose specified."

The patentee states in his specification that it had been customary to use a separate plate for each impression, the plate being removed from the camera and replaced by another, when several impressions of the same object were to be taken, as in multiplying copies. This caused delay and trouble, to obviate which was the object of this invention, and which consisted in bringing successively different portions of the same plate or several smaller plates, secured by one plate holder, into the field of the lens of the camera; and in carrying out the invention, the patentee has made use of a peculiarly arranged frame, in which the plate holder is permitted to slide, and in which the position of the plate holder is definitely indicated to the operator, etc.

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

The only real question in the case is, whether or not the patentee was the first and original inventor of the above improvement. The burden of the proofs, both on the part of the complainant and defendant, bears upon this point. It is insisted on the part of the complainant, that the improvement was conceived and put into practical use as early as 1846, and, if not, as early as the winter of 1847-8. The patent was not issued till 1855. I have looked, with some care, into the proofs, which are quite voluminous, and am satisfied this position is not sustained.

On the contrary, the better opinion is, the improvement was not perfected by the patentee till the year 1854. He went, according to his own account, to California, in the winter of 1848-9, and remained there two years; and on his return, he took up the subject of the stereoscope, and was engaged in considering new plans and new ideas on this subject, and taking out patents thereon, until he was taken sick and shut up in his room, when he applied himself to finish the idea of taking pictures rapidly in the center of the lens, by adapting the movement in a frame which would fit any ordinary camera. Again, he says on his cross-examination, that it was three years after his return from California that he was sick, and which was in November, in the fall of 1854. He says, also, on his examination-in-chief, that he had not perfected the mechanical parts of his machine, so as to carry out his idea readily, when the California excitement led him to go there.

He further says, that the instrument made by Coburn in the fall of 1846 was abandoned, and that he then contemplated a different improvement. This was by moving the lens over the plate. This idea was not in the first patent at all, and is only alluded to in the reissue. Now the proofs are full that this idea of making the same impression on different parts of the same plate, by the use of a sliding plate holder, existed and was carried into practical operation by working machines as early as 1847-48, and was in use by several practical photographers some seven or eight years before the date of the patent of Southworth, and before he had perfected his machine.

Entertaining these views, it follows that a decree must be entered for the defendant.

[For other cases involving this patent, see note to Ormsbee v. Wood, Case No. 10,579.]

Case No. 17,871.

WING et al. v. WARREN.

[5 Fish. Pat. Cas. 548; 1 2 O. G. 342.]

Circuit Court, D. Massachusetts. June, 1872.

ASSIGNMENT OF PATENT—SURRENDER AND REISSUE.

Where a patentee had sold all his right, title, and interest in his patent, except as to a single-

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

town, and subsequently, at the request of the assignees, had applied for and obtained a re-issue of the patent in his own name, which re-issued patent he had assigned as before, *held*, that the surrender of the original patent at the request of the true owners was valid; and that, if the reissue to the patentee was a clerical error, he had corrected it by the subsequent assignment.

Demurrer to bill in equity [brought by Simon Wing, Marcus Ormsbee, and A. S. Southworth, against W. S. Warren]. Suit brought upon letters patent for an "improvement in plate-holders for cameras," granted A. S. Southworth in 1855.

The bill alleged the issue of the patent to Southworth, and his subsequent assignment of all his right, title, and interest in it, except the right to make, use, and sell the thing patented in Salem, Massachusetts; that Southworth afterward, at the request of the assignees, surrendered the patent, and the commissioner of patents, at the request of all the parties, reissued it to Southworth, who assigned the reissued patent as before; that, on its expiration, in 1869, it was renewed for seven years to Southworth, and that it was then vested in the complainants.

The defendant demurred to the bill on the following grounds: (1) By the assignment of the original patent, Southworth's whole interest passed, and all that was left him was a license for Salem. *Potter v. Holland* [Case No. 11,329]; *Smith v. Mercer* [Id. 13,078]. (2) Therefore, Southworth could not surrender the patent, and his act assuming to do this was void. The bill says that this was done by request of the assignees, but there is no pretense that this was in writing, as in *Dental Vulcanite Co. v. Wetherbee* [Id. 3,810]. (3) Even if the surrender was good, the reissue was void, because not made to the true owners. In the case of the Cummings patent, involved in the above-named suit, a similar mistake was made, but it was immediately corrected in the office as a clerical error, and this was held to cure the difficulty.

W. W. Swan, for complainants.
J. E. Maynadier, for defendant.

CLIFFORD, Circuit Justice. If we grant (which we are not at present prepared to do) that all title had gone out of the patentee by his assignment to Wing and Ormsbee, yet his surrender at the request of the true owners would be valid; and, if the reissue to him was a clerical error, he corrected it at once by an assignment. We are both of opinion that an infringer can not take advantage of such a mistake, if there was one, after it had been corrected either by the office or the parties. Demurrer overruled.

[For other cases involving this patent; see note to *Ormsbee v. Wood*, Case No. 10,579.]

WINGARD (BROWN v.). See Case No. 2,034.

WINGED RACER, The (GILLIGAN v.). See Case No. 5,439.

WINGED RACER, The (TORICES v.). See Case No. 14,102.

Case No. 17,872.

The WINGS OF THE MORNING.

[5 Blatchf. 15.]¹

Circuit Court, S. D. New York. Nov. 6, 1861.

COLLISION—MUTUAL FAULT—ABSENCE OF LOOKOUT—EXCESSIVE SPEED—COSTS ON APPEAL.

1. Where a sailing vessel, coming into the Hudson river, at New York, off the Battery, in the night time, put her head to the wind and her sails aback, with a view to anchoring, before the hands on board of her discovered a steam vessel in motion coming towards her, but it appeared that she had no competent lookout, and that, if she had had one, the steam vessel might have been seen in time to prevent the plating of the sailing vessel on her track: *Held*, a collision having taken place between the two vessels, that the sailing vessel was in fault: *Held*, also, that the steam vessel was in fault for descending the river in the night too near to the shore, and at too great a rate of speed, at a locality where her lights were mistaken for the lights of vessels at anchor, and where she was liable to meet vessels coming in to anchor.

2. As both vessels were in fault, the damages were divided; and, as both parties had appealed, and the decree below was affirmed, no costs were given to either party, on appeal.

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

This was a libel in rem, filed in the district court, against the ship *Wings of the Morning*, to recover for damage caused to the barge *Stephen Warren*, by a collision which occurred between the two vessels, in the Hudson river, at New York, off pier number 4, on the night of November 22, 1852. The barge was lashed to the steam tug *General Wool*, on her starboard side. The tug was descending the river with her tow, a quarter or a third of the way from the New York side, intending to pass around the Battery into the East river, for the purpose of discharging her cargo. The *Wings of the Morning* was coming up the river, having taken in all her sails except the spanker, preparatory to dropping anchor in the stream. The wind was southeast or south-southeast, and the tide was ebb. The *Wings of the Morning* had come up the river near the middle of it, and had ported her helm to luff into the wind and check her headway, to enable her to drop anchor, and was in the act of dropping it, or about to drop it, as the mate discovered the tug and tow coming down upon him. The district court held, that both vessels were in fault, and divided the damages. [Case unreported.] Both parties appealed to this court.

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

Edward H. Owen and Cornelius Van Santvoord, for libellants.

Charles Donohue and Washington Q. Mor-ton, for claimants.

NELSON, Circuit Justice. The main point of dispute is, whether or not the order to port was given, and the change of the direction of the ship had taken place in pursuance thereof, after the tug and tow were seen by the hands on board of the ship. If the order was given afterwards, or even after the tug and tow might have been seen with a proper lookout, then the ship was in fault in giving the order. On this point there is much conflict in the proofs. The result of my examination is, that the order to port was given, and the change of the direction of the ship, which placed her on the track of the tug and tow, took place, before her hands had discovered them in motion; and that, with her sails aback and her head to the wind, she was disabled from avoiding the collision. But, at the same time, I agree with the court below, that, with a competent lookout properly attending to his duty, the descending vessels might have been seen in time to prevent the manœuvre and the heading of the vessel in shore across their track. The night was not very dark, and the chief difficulty in discovering the tug and tow arose from the great number of vessels at anchor, with lights, in that locality. The hands on the ship saw the lights of the descending vessels in time to have avoided them, but mistook them for the lights of vessels at anchor.

I also agree with the court below, that the tug was in fault for descending the river in the night so near the shore in that locality, and at a rate of speed of five miles an hour, with the tide; and, according to the testimony of the captain of the barge, probably at a greater rate of speed. These vessels were on their way around the Battery to the East river, and should have kept further out into the river, outside of vessels at anchor with lights, and clear of vessels coming in to anchor in the night on the New York side.

The decree must be affirmed, but without costs to either party, as both parties have appealed.

Case No. 17,873.

The WINIFRED.

[Blatchf. Pr. Cas. 33.]¹

District Court, S. D. New York. Aug., 1861.²

ENEMY VESSEL—CONDEMNATION—NEUTRAL OWNERS OF CARGO—LIENS.

1. Vessel condemned as enemy property.
2. A part of her cargo condemned as enemy property, although under hypothecation to a

¹ [Reported by Samuel Blatchford, Esq.]

² [Modified by the circuit court; case unreported.]

neutral merchant for advances on the invoice and bill of lading.

3. The title of the absolute owner prevails, in a prize court, over the interest of a lien holder, whatever the equities between those parties may be.

In admiralty.

BETTS, District Judge. The bark Winifred was seized on the 25th of May, 1861, by the United States steamship Quaker City, under command of Acting Master F. W. Mathews, on the high seas, off Cape Henry, and libelled for attempting to violate the blockade of Hampton Roads, in Virginia, and enter that place, it being then blockaded; also, because the vessel and cargo were at the time owned by enemies of the United States. The charge of violating the blockade was abandoned by the district attorney on the trial, and the confiscation of the vessel and cargo was demanded as being enemy's property. The firm of Crenshaw & Co. intervene for the vessel and five-eighths of her cargo, "as sole owners thereof," and claim that they are all citizens of the United States of America, trading in Richmond, Virginia, under the style of Crenshaw & Co., and that the bark "belongs to Richmond, aforesaid." The exemption of the vessel from liability to capture as enemy's property is put upon the denial in the claim that the claimants were insurgents, traitors, &c., or enemies of the United States. John Lewis and Charles Paul Phipps, having their principal house at Liverpool, England, under the style of Phipps & Company, and John Lewis, Phipps, and others, trading in the city of New York, through their branch house here, under the style of J. L. Phipps & Co., and in Rio, Brazil, under the style of Phipps Brothers & Company, intervened, and claimed to be owners of three-eighths of the cargo of the bark, and to have a lien on, and claim to, and right to the possession of the balance of the cargo, under large advances by them to the other claimants, Crenshaw & Co., and that the claimants are all British subjects; that on the 26th of April, 1861, before any seizure of the vessel and cargo, the claimants bona fide, in the usual course of business, and having no other security, made a special advance to Crenshaw & Co., owners of the residue (five-eighths) of the cargo, of the sum of \$20,622.26, on possession of the original invoice and bill of lading thereof, and that such assignment of five-eighths of the cargo to these claimants by Crenshaw & Co. was without any fraudulent purpose or understanding to secure it from confiscation as the property of Crenshaw & Co. The test oath of part of the claimants verifies the bona fides and just consideration of such assignment to them.

The general positions of law and fact adopted by the court in regard to the preceding suits apply to the corresponding points raised in this one: (1) There was, at the time of

the capture of the vessel and cargo a state of civil war subsisting between the citizens of that portion of the state of Virginia in which Richmond is situated and the United States. (2) The owners and claimants of the vessel were public enemies of the United States and its government at the time of her being taken and seized, and she thereby became subject to condemnation. (3) The owners of the vessel in their claim and answer assert they were sole owners of five-eighths of the cargo of coffee shipped on her at Rio Janeiro and bound to Hampton Roads, and it was consigned to them in the bill of lading found on board the ship. But a title to that portion upon bona fide hypothecation or lien is set up in the claim of Phipps & Co., to the amount of \$20,622.26. No evidence is produced verifying the justness and validity of such lien.

The case, as it stands on the allegations and proofs, fixes the right of property in the five-eighths portion of the cargo to be in the owners of the vessel at the time it was shipped. That title must prevail in a prize court, in priority to the subsidiary interest of the lien holders (*The Marianna*, 6 C. Rob. Adm. 24), whatever the equities between the particular parties may be (*The Frances*, 8 Crauch [12 U. S.] 418), unless it be proved aliunde by the claimants, and that their title to this part of the cargo was absolute in them previous to its exportation.

The judgment of the court upon the whole case, therefore, is that three-eighths parts of the coffee be restored to the claimants, Phipps & Co., as neutral owners, without costs, and that the remaining five-eighths thereof be condemned as forfeited, being the property of Crenshaw & Co., enemy owners, and also that the vessel be condemned as enemy's property, with full costs. Further proofs will, however, if prayed for, be granted the claimants, on the claim of Phipps & Co. to the possession and right of property in themselves, as against the libellants, in that portion of coffee alleged by those claimants to be vested in them, by way of transfer or lien from Crenshaw & Co. The question of costs on such further proofs is to be reserved until a final hearing on that point.

The judgment now rendered is to be final, unless application to give further proofs is made by the claimants on notice to the libellants, and allowed by the court, within ten days after the entry of this decree.

The decree in this case was affirmed by the circuit court on appeal July 17, 1863, except as to five-eighths of the cargo condemned below. As to that the circuit court allowed further proofs. On those that court, December 3, 1863, allowed Phipps & Co. the amount of their advance on the five-eighths, with interest, to be paid out of its proceeds. [Case unreported.]

WINIFRED. The. See Case No. 6,451.

WINIFRED, The. See Case No. 12,261.

Case No. 17,874.

WININDGER et al. v. GLOBE MUT. LIFE
INS. CO.

[3 Hughes, 257.]¹

Circuit Court, E. D. Virginia. Nov. 14, 1878.
INSURANCE—NONPAYMENT OF PREMIUM—LAPSE OF
POLICY.

The failure to pay an installment of premium of insurance in advance when due, causes a lapse of the policy, unless the agent of the company by indulgence creates the belief in the insurer that he is treating the installment as if it had been actually paid.

The case was brought first in the corporation court of Norfolk, and was removed thence into the United States circuit court.

The facts as given in evidence were, substantially, that although the policy called for the prepayment each year of annual premiums, yet that these were changed subsequently into quarterly instalments, payable at the beginning of each quarter-year, on what are called renewal receipts, the effect of which was to extend the policy for each three months on payment of the quarterly payment in advance. The payment by Winindger of these quarterly instalments of the premiums had been very irregularly made, rarely before near the end of each quarter instead of the beginning. These payments had been made partly in butcher's meat and partly in small amounts of cash to Mr. E. J. Griffith, the insurance agent of the defendant in this city. Mr. Griffith had been exceedingly indulgent to Winindger in respect to the forfeiture of the policy, keeping it alive by dealings, by accepting small sums at a time, and by taking due-bills for balances. The instalment due the 10th October was probably never paid, but Winindger relied upon Mr. Griffith's keeping his policy alive as usual, probably thinking his butcher's account had partly paid the quarter's premium, and that a sum of eight dollars in money sent by his clerk would be credited to the premium. At all events, Winindger was confident throughout his last illness that his policy was alive, and this as late as the first day of January, which was two or three days before his death. Nevertheless, on or about that day he sent out his brother with the money to pay the October instalment. His brother called on Mr. Griffith at once and offered to pay the instalment, but Mr. Griffith stated that he had returned to the insurance company in New York the renewal receipts for the October instalment, and could not now receive the money, especially inasmuch as Winindger was now seriously ill, and that the policy was forfeited. On this state of facts, given in evidence to the jury, counsel on each side asked the court for instructions to the jury covering their respective views of the law, and submitted learned arguments in support of them.

White & Garnett, for plaintiff.
Baker & Walke, for defendant.

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

HUGHES, District Judge, declined to give any of these instructions in the form in which they were asked for. He said:

A policy of insurance could only be kept alive in general by the payment in advance, at the beginning of each year insured for, of the annual premium. That the payment in advance of the premium was an essential element of an insurance contract. That on a failure to make this payment at the beginning of any year, the policy lapsed by its very terms. That the policy now sued upon provided that it might be renewed after default, if the premium should be paid within thirty days after the beginning of each year. But it must be borne in mind that the policy lapsed at the beginning of the new year, after default, and that payment within thirty days but renewed what had expired. The agreement in this case to accept quarterly instalments only changed the times and amounts of the payments, not the nature of the transaction. If the annual payment was not made by the beginning of each new year the policy lapsed. The payment in advance of a quarterly instalment of this premium only operated to revive and renew for the ensuing three months what had lapsed and expired. If, therefore, any quarterly payment was shown not to have been made, then the policy had not been revived, had not been renewed, and there could be no recovery.

The judge then instructed the jury as follows: "There are two questions upon which the jury are to pass in this trial, namely: First, whether the premium due the 10th October, 1877, was paid; and, if it was not paid, second, whether Winindger's neglect and failure to pay it before his mortal illness was caused by the defendant, or its agent, Mr. Griffith, inducing him to believe that he might neglect to do so to the extent that he actually did neglect it, without losing the benefit of his policy. The court accordingly gives the following instructions: 1st. If the jury believe, from the evidence, that Winindger did not pay the October quarterly instalment of the premium, then they must find for the defendant; unless, 2nd. They believe, from the evidence, that Winindger's neglect to pay it was induced by the conduct of the defendant or Mr. Griffith; and if they believe that his failure to pay was so induced, they must find for the plaintiff. 3rd. The court also instructs the jury that a tender of a past-due premium for or by the insured during his mortal illness, does not of itself save a policy otherwise forfeited."

The jury then retired to their room, and after a deliberation of about twenty minutes brought in the following verdict: "We the jury find for the plaintiffs, and assess their damages at \$2,000, with interest thereupon at six per cent. from April 13th, 1878."

Mr. Walke entered a motion to set aside the verdict as contrary to the law and the evidence, and both counsel agreed to submit the motion to the court without argument. The court accordingly took the motion under advisement.

On a later day in the term the verdict was set aside, and a new trial ordered. The case was afterwards compromised.

WINISIMMET CO. (LENOX v.). See Case No. 8,248.

Case No. 17,875.

In re WINKENS.

[2 N. B. R. 349 (Quarto, 113); 1 Chi. Leg. News, 163; 2 Am. Law T. Bankr. 53.]¹

District Court, S. D. New York. Jan. 16, 1869.
BANKRUPTCY OF PARTNER—DISCHARGE FROM FIRM LIABILITIES.

Where a member of an existing firm has filed an individual petition in bankruptcy where there are firm debts and firm assets, the firm must be declared bankrupt before a member thereof can be discharged from its liabilities. This applies only to copartnerships actually existing, or where there are assets belonging to the firm.

[Cited in Re Stevens, Case No. 13,393; Re Webb, Id. 17,317; Wilkins v. Davis, Id. 17,664.]

I, James F. Dwight, register of said court in bankruptcy, do hereby certify that in the course of the proceedings in this cause, the following question arose pertinent to said proceedings, and is submitted to the district judge for his decision under provisions of the act [of 1867; 14 Stat. 517]:

On the 31st day of December, 1868, Daniel Winkens, of New York City, filed in the court his petition to be adjudicated a bankrupt and discharged from his debts. Attached to the petition were Schedules A and B, as provided for by the bankrupt act. The petition was in form No. 1, established by the supreme court; and petition and schedule were correct in form. The matter was duly referred to me, as register, to make adjudication in bankruptcy, and to take such other proceedings as are required by the act. On the return day of the order of reference, January 6th, 1869, the bankrupt appeared by his attorney, and filed a certified copy of his petition and schedules, as directed in said order. On an examination of said Schedule A, it appears that the petitioner owes debts, both individually and as a member of the firm of Thomas & Co., and as a member of the firm of Daniel Winkens' Nephew. And that it appeared by an examination of said Schedule B, that among the assets set forth, is the individual property of the petitioner, certain claims and debts due the firm of Thomas & Co., and certain property of the firm of Daniel Winkens' Nephew; which firm of Thomas & Co. was composed of John J. Thomas and this petitioner, and became insolvent in March, 1868, and his property has been put in the hands of a receiver. And the firm of Dan-

¹ [Reprinted from 2 N. B. R. 349 (Quarto, 113), by permission. 2 Am. Law T. Bankr. 53, and 1 Chi. Leg. News, 163, contain only partial reports.]

iel Winkens' Nephew was composed of the petitioner and Charles Marquandt, and was engaged in business at the time of filing the petition. (Charles Marquandt is also petitioner for adjudication in a separate proceeding pending before me.) Upon which facts the register declines to make adjudication in bankruptcy of the petitioner, until his co-partners in the firms referred to are brought into the proceedings, under the provisions of the thirty-sixth section of the act, and rule 18 of the supreme court. To this decision the bankrupt excepts, and prays that the question may be certified to the district judge, that his opinion may be had on the question, as to whether the register erred in declining to make adjudication against the petitioner, as prayed for; which prayer is granted, and this certificate made in accordance thereto.

Opinion.

I do not think that the petitioner is entitled to be adjudged a bankrupt or discharged in these proceedings, unless his co-partners are joined with him. He shows debts jointly with co-partners in two firms, and assets, the property of the same firms, but the co-partners in neither of these firms are parties to these proceedings, or sought to be brought in under the provisions of section 36 of the law, or rule 18, which provides for the bankruptcy of co-partnerships. He seeks a discharge from his debts due as a member of firms, that he does not ask to be adjudged bankrupt, and offers to pay his individual as well as co-partnership debts, with firm property, the members of which firms are not joined. I understand the law to be that, when there are firm debts and firm assets, the firm must be declared bankrupt (by either voluntary or involuntary proceedings) before any member of the firm can be discharged from its liabilities; and that this applies only to co-partnerships actually existing, or where there are assets belonging to the firm, and not to co-partnerships terminated heretofore by bankruptcy, insolvency, assignment, or otherwise. In the case of *In re Little* [Case No. 8,390], where I certified a question to the court, February 29, 1868, a decision is given on this point; and as I am aware that some misapprehension and uncertainty exists in the profession as to the effect of the decision in *Little's Case*, I would respectfully suggest to the court that this occasion be taken advantage of to definitely settle the law and practice in cases of petitions where firms are concerned.

Which facts and opinion are respectfully submitted this 15th day of January, 1869.

BLATCHFORD, District Judge. The register has stated, in his opinion, with accuracy and conciseness, the law on the subject referred to, as held by this court, and applied by it in repeated cases. His decision in the present case is correct.

WINKLEY (ODIORNE v.). See Case No. 10,432.

Case No. 17,876.

In re WINN.

[1 N. B. R. 499 (Quarto, 131); 1 Am. Law T. Rep. Bankr. 17.]

District Court, N. D. Georgia. Dec. 24, 1867.

BANKRUPTCY PROCEEDING — CLAIM OF LIEN
CREDITOR.

1. A prior lien gives a prior claim, and the district court may ascertain and liquidate such a lien.

[Cited in *Re Erwin*, Case No. 4,524.]

2. The creditor who has a lien on property for the payment of his debt is admitted as a creditor only for the balance of the debt after deducting the value of such property.

[Cited in *Re Hambright*, Case No. 5,973; *Re Bloss*, Id. 1,562; *Re Stansell*, Id. 13,293.]

[In the matter of *Elijah E. Winn*, a bankrupt.]

In this case the following questions arose in the proceedings of the same, and upon request of James R. Hanks, a judgment creditor, were certified by the register, Lawson Black, for the opinion of the district judge. First. Does a debt secured by lien lose its lien by proof of the debtor? Second. Does a judgment in this state retain its lien in bankruptcy? Third. If a judgment is older than a mortgage, out of what fund shall it be satisfied?

My opinion is that the district court in bankruptcy is a court of equity, and that it is a court of original jurisdiction in matters of bankruptcy. The bankrupt is the complainant in equity, and each one of his creditors are defendants in the bill, and the court having original equity jurisdiction over all the parties and the subject matter of the suit, may pass any order, or decree in the case, it thinks proper for the purpose of doing equity between all the parties to the suit, either on the parties to the suit, or in relation to the subject matter of the suit, and that said orders and decrees so passed cannot be set aside nor inquired into in any other court, and that they are final and conclusive upon the parties and the subject matter of the suit, unless they are carried up in the manner prescribed in the bankrupt act. And any person disobeying the order or decree of the court, is liable to be punished for a contempt of the court. When a debtor is adjudged a bankrupt, all proceedings in a state court against him must stop, if the subject matter of the suit can be proven against his estate in bankruptcy, and no creditor, who holds a claim against the estate of the bankrupt, which might be proven in bankruptcy, whether the debt is secured by lien or not, can enforce such debt in a state court, except by the per-

¹ [Reprinted from 1 N. B. R. 499 (Quarto, 131), by permission.]

mission of the district court. The district court has no jurisdiction over a state court, but it has full and complete original jurisdiction of the bankrupt; and all the assets of the bankrupt; and over all the creditors of the bankrupt; and may fine and imprison any of the creditors of the bankrupt for interfering with the assets of the bankrupt, in a state court, without the permission of the district court, on any debt which might be proven against the estate of the bankrupt. And when the bankrupt obtains his certificate of discharge, it releases him from all debts, demands, and liabilities which might have been proven against his estate in bankruptcy. The court appoints a day and gives all the creditors of the bankrupt notice of the time and place to prove their debts against the bankrupt, and under this notice the creditor who holds no security for his debt, proves his debt as unsecured and entitled to share pro rata out of the general fund. The creditor whose debt is secured by lien, proves his debt as secured by lien on a certain piece of property of such a value, is not entitled to vote for assignee nor participate in the general fund, with the unsecured creditors, until the property on which his lien is secured, is applied towards the satisfaction of his debt. See twenty-second section of the bankrupt act [of 1867 (14 Stat. 527)], as to proof of debts with security. It is necessary for the creditor, whose debt is secured by lien, to prove or liquidate his debt as secured by lien, that the court may be fully informed how and in what manner to dispose of the assets of the bankrupt, so as to do equity between all the creditors of the bankrupt.

The only way a secured creditor can lose his lien on the property, is by a release of the lien on the property and proving the debt as an unsecured claim. When the secured debts are proven or liquidated, the court has power, by order, to authorize the assignee to redeem or remove the lien by paying the creditor the money due, if the assignee is in a condition to do so, and, if not, the court may permit the creditor to take the property, on which he holds a lien, at its value, towards the satisfaction of his debt; or the court may order the property sold, subject to the incumbrances as ascertained by the court; or the court may order the property to be sold free from all incumbrances, and that the said liens be secured and protected on the money arising from the sale of the said property, in the same manner as if the said property had been sold to satisfy the said lien in a court of law.

Second. My opinion is that a judgment in this state retains its lien in a court of bankruptcy in the same manner and to the same extent as it does in a court of law. The bankrupt act (section 20) mentions mortgages, pledges, and liens on the property of the bankrupt to secure the payment of a debt due the creditor. Here the question arises; what did congress mean by the word "lien"? They cer-

tainly did not intend that each district judge should determine for himself what is, and what is not, a lien on the property of the bankrupt, without some rule or law to guide him, by which he may determine by law what is a lien. My opinion is that congress meant by the word "lien" all the liens protected by the laws of each state, and that all the liens protected by the state law should be protected in bankruptcy. In section 21 of the act, no judgment can be taken against the bankrupt pending his adjudication, except by permission of this court, for the purpose of ascertaining the amount of the debt, upon which no execution can issue. If the judgment has no lien, and does not infringe or interfere with the rights of the unsecured creditors, why prevent the creditor from taking the judgment? By section 14 of the act, the assignee takes the property of the bankrupt with the like right, title, power, and authority to sell said property as the bankrupt could have done. He acquires no other or better title to the property than the bankrupt had, and if there was a lien on the property in the hands of the bankrupt, the same lien follows the property into the hands of the assignee.

Third. The judgment of Hanks is older than the Gate City mortgage, and has a general lien on all the property of the bankrupt. The mortgage has a special lien on a certain piece of the bankrupt's property, and if the mortgage creditor cannot get his money out of this piece of property he may lose his lien and his debt also. Therefore the lien of the judgment on the mortgage property is held in abeyance until all the other property or general fund of the bankrupt is exhausted by the judgment. It is therefore the judgment of the register that a debt secured by lien does not lose its lien by proof of the debt as secured by lien. And that a judgment in this state retains its lien in a court of bankruptcy in the same manner and to the same extent it does in the state court. And that an older judgment cannot take mortgaged property until all other property of the general fund of the bankrupt is exhausted by the judgment.

[All of which is respectfully submitted to the honorable district judge, at the request of James R. Hanks, Fears & Arnold and Luther J. Glenn, attorneys in said case.]²

ERSKINE, District Judge. A prior lien gives a prior claim, and the district court may ascertain and liquidate a lien. Bankrupt Law, § 1. By section 11 the debtor must, in his schedule, make a statement of any existing lien, pledge, mortgage, judgment, collateral, or other security, &c., and he must show what incumbrances are on the estate. By section 14 the assignee takes "all the estate" of the bankrupt, with the like right, title, power, and authority to sell, &c., that the bankrupt had, and the assignee may discharge any mortgage or conditional contract,

² [From 1 Am. Law T. Rep. Bankr. 17.]

or pledge, or deposit, or lien upon any property, at any time. Section 20. The creditor who has a lien on property for the payment of his debt, is admitted as a creditor only for the balance of the debt after deducting the value of such property. Section 27 declares that all creditors, whose debts are duly proved and allowed, shall share in the distribution. Thus we have the system: the court has jurisdiction to ascertain and liquidate the lien, and the debtor must state (disclose) the lien to the court. The assignee takes the estate, coupled with the right and power of the debtor to sell, &c. The debtor could only sell subject to the lien. The quantity of his interest was the right to the property as subject to the lien. The creditor is allowed to prove the balance of his debt to the extent of the balance; it must be "duly" proved, and if allowed, he would share in the distribution.

The clerk will certify this opinion to Mr. Register Black.

NOTE BY THE JUDGE. It is proper that I advert to my approval, on the 23d November last, of the opinion of Mr. Register Garnett Andrews in the matter of Fellner, Novell & Co., bankrupts. The approval was too general in its terms, and apparently affirms all the views expressed by the register. The affirmance ought to have been confined to what I consider the only pertinent question certified for my decision, namely, the protection of the property temporarily under the peculiar circumstances of the case, and should not have extended, even by implication, to the subject of liens, or whether judgments share the estate of the bankrupt, pro rata or otherwise, under the statute. The clerk will transmit a copy of this correction to Mr. Garnett Andrews, register in the Sixth district.

WINN (UNITED STATES v.). See Case No. 16,740.

Case No. 17,876a.

WINNE v. The CARROLL.

[14 Betts, D. C. MS. 57.]

District Court, S. D. New York. Dec. 20, 1848.

COLLISION — SAILING VESSELS IN EAST RIVER — COSTS IN ADMIRALTY.

[1. Failure of a sloop running before the wind in the East river to foresee the point at which an approaching schooner will run out her tack, so as to keep out of her way when she goes about, is a fault barring recovery for an ensuing collision.]

[2. When the blame for a collision is found to lie with the libellant alone, the costs will be taxed against him.]

[This was a libel by Gilbert G. Winne against the schooner Carroll to recover damages for a collision.]

PER CURIAM. The sloop Hornet, owned by the libellant, and the schooner Carroll, came in collision the afternoon of the 16th of August last in the East river between Grand street and Williamsburg Ferry, and this action seeks to recover the damages sus-

tained by the sloop on this occasion. The wind was fresh, about south, with perhaps a slight inclination east, and tide ebb. The sloop was loaded with stone, and was beating down against as much wind as she could well bear. The schooner was loaded with lumber on deck, and coming up before the wind to make a berth on the New York side above Grand street. To accomplish that, she came up into the wind enough to enable her to drop her mainsail, and then, under her jib, was bringing her head towards the point she intended to make. There is some indistinctness and ambiguity in the testimony describing this manœuvre. No witness on board the sloop at the time has been examined, and the evidence of those observing the occurrence from the shore does not concur in respect to it. Prettyman was on his vessel at the foot of Delancey street; Barry and Hare were in front of a house near the Williamsburg Ferry,—all a distance of several hundred yards from the vessels. Prettyman says, when struck, the sloop was pointing towards Brooklyn on the Long Island shore, the wind about S. E., her mainsail taken in, and nothing but her jib set, and had little or no headway; she was heading to the wind. Barry says the sloop was standing right up the river, under her jib, and he did not observe she went into the wind to let her mainsail run. Mr. Barry's version is the most perplexing of all. He says the wind was S. or S. S. W.; that the sloop hove about to let down her mainsail and run off to about S., paying off by her jib till her head was S. or S. W., in which situation the schooner struck her on her larboard bow, the sloop at the time heading W. N. W., and to windward of the schooner.

It would be difficult to deduce from this evidence any reliable description which would inculpate the conduct of the sloop. But, without discussing it minutely, I think the testimony on the part of the claimants exonerates the schooner from all fault, and fixes the blame on the sloop. It is consistent, in its various particulars, with the libel, and the testimony of Barry and Prettyman, adding some facts which would more probably be noticed by those on the schooner, and the other witness near them in another vessel sailing in the same direction. The schooner made her starboard tack, from the New York shore, over as near to the Long Island side as was customary and proper to run, on account of a shore eddy at that point; the sloop at that time being before the wind, running directly up the river. As the sloop came about on her larboard tack towards New York, and was getting full, but with imperfect headway, the schooner was observed within a few yards of them in the act of veering round on the wind, having dropped her mainsail, and at that time and within that space there was no means by which the schooner could avoid a collision.

Want of precaution on the part of the sloop in two important particulars is established by the proof: (1) She should have foreseen at about what point the schooner's starboard tack would run out, and so placed herself as not to impede that movement, or be in the way of the schooner when she came about. The sloop was before the wind, and could take such direction or position as she desired. (2) She was loaded on deck with lumber, and had no lookout forward, and the circumstances raise strong presumption that her helmsman did not see the schooner, and brought his vessel into the wind without regard to the position and right of way of the other. It is manifest the two vessels struck when each had acquired but slight headway under their respective manœuvres, of tacking and coming round before the wind, and the decided import of the evidence is that the sloop was to the windward, and brought herself round either against the schooner, or into her track, so as to render it unavoidable that the schooner must come upon her.

In this view of the case I must declare that the libelant has established no cause of action in his own favor, and that a decree must accordingly be rendered discharging the schooner from the suit. The matter of costs is undoubtedly very much under the discretion of the court. *Canter v. American & Ocean Ins. Co.*, 3 Pet. [28 U. S.] 319; [U. S. v. *The Malek Adhel*] 2 How. [43 U. S.] 237. The general principle at law and equity is that costs in causes of damage in this court follow the decision. *The Ebenezer*, 7 Jur. 1117; *The Athol*, 1 W. Rob. Adm. 374. But in cases of collision the usage is to charge them on the party most to blame. *The Celt*, 3 Hagg. Adm. 321. If neither is to blame, each party pays his own costs. *The Washington*, 5 Jur. 1067. And in the English admiralty, when both are to blame, it would seem that the costs are imposed on both in common (*Id.*), although 1 W. Rob. Adm. 26, citing *Hay v. Le Neve*, leaves each party to pay his own costs. The negligence and blame leading to the damage in this case being on the part of the libelant himself, the libel must be dismissed, with costs. *The Harriett*, 1 W. Rob. Adm. 188.

WINNE (HILL v.). See Case No. 6,503.

Case No. 17,877.

WINNEBRENNER v. EDGERTON.
[This is a state case, reported in 41 Hunt, Mer. Mag. 72.]

WINNIPISOGEE LAKE C. & W. MAN-
U'FG CO. (PARKER v.). See Case No.
10,752.

WINOOSKI LUMBER CO. (GATES v.).
See Case No. 5,270.

Case No. 17,878.

In re WINSHIP.

[7 Ben. 194.]¹

District Court, S. D. New York. March, 1874.

REFUSAL OF BANKRUPT TO TESTIFY—PROTEST BY
COUNSEL—CONTEMPT—COSTS.

1. A bankrupt was summoned, at the instance of a creditor who had proved his claim, to appear before the register to be examined. He appeared, but, under the advice of counsel, refused to be sworn and examined, on the ground that he was advised that the said creditor had no valid claim, and was not a creditor within the meaning of the act. The counsel for other creditors also protested against his examination. *Held*, that no legal invalidity of the creditor's claim being proved, the bankrupt could not refuse to be sworn and examined.

2. Counsel for other creditors had no legal right to interpose.

3. As the bankrupt had acted under advice of counsel, he ought not to be punished for contempt, nor to be required to pay costs other than those of the certificate.

4. The protesting creditors ought to pay the costs occasioned by their action.

Edwin K. Winship, a bankrupt, being required to testify before the register in the matter of his bankruptcy, before the election of an assignee, at the instance of Escher, a creditor whose claim, though proved, he intended to dispute as invalid for usury, refused to testify; and the counsel for 14 other creditors also interposed an objection to the examination of the bankrupt.

The register, upon request of the bankrupt, certified to the court his conclusions upon the questions arising, viz., that, inasmuch as no legal proof existed of the invalidity of Escher's claim, and such claim had been duly proved, the bankrupt should submit to the examination; that the counsel for the other creditors had no right to interpose any objection; that, as the bankrupt had acted under the advice of counsel, he ought not to pay costs other than those of the certificate which he demanded; but that the protesting creditors ought to pay the costs occasioned by their action.

BLATCHEFORD, District Judge. I con-
cur in the views of the register.

WINSHIP (McCABE v.). See Case No.
8,668.

Case No. 17,879.

In re WINSLOW.

[1 McCa. Pat. Cas. 123.]

Circuit Court, District of Columbia. 1850.

PATENT OFFICE APPEALS—SUFFICIENCY OF "REA-
SONS OF APPEAL"—VAGUENESS.

[1. Reasons of appeal which state "that the decision is in opposition to a clear apprehension of the merits of the case"; "that the decision is

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

inconsistent as opposed in affirmation to precedents which have governed such cases"; and "that the decision is adverse to the opinion of skillful and competent men,"—held too vague and indefinite to raise any question for the judge to pass upon.]

[2. Where the commissioner's refusal to grant a patent is based upon want of novelty, the judge cannot consider a reason of appeal which is occupied mainly in a description of the object and importance of the machine, and of the comparative merits of the applicant's machine and a prior machine which the commissioner has cited as an anticipation.]

Appeal from commissioner of patents.

CRANCH, Chief Judge. Appeal from the decision of the commissioner of patents rejecting the application of Lieutenant J. A. Winslow for an alleged improvement in marine camels. The appellant in his specification, after describing his camel, which he calls a "camel steam tug," says, "claims to a patent": "First. For the peculiar model in which two camels are connected together, described as above, and intended for transporting ships, &c. Secondly. For the application, in combination, of letting water into the camels for sinking the machine and submerging the propellers when there is no ship on the ways, which, for want of such ballast, would interrupt the means of locomotion. Thirdly. For the application, in combination, of water-tight compartments, to prevent the ill effects which would arise from so large a body of water rushing backward and forward in a swell at sea, and also for controlling the water in these compartments to assist in preserving the trim of the machine, or an equal draught forward and aft. Fourthly. For the application, in combination, of balancing, by putting the heavy machinery forward to counteract the effect of want of buoyant power in the stern part of the machine."

These, I suppose, were intended to designate the particular improvements for which he desires a patent. There is no date to Mr. Winslow's specification; but as it was sworn to on the 17th of July, 1849, that may be considered as the date of his application for the patent. On the 31st of August, 1849, the commissioner of patents rejected his application and communicated his decision to Mr. Winslow in a letter of that date, marked No. 2; and as the commissioner, in stating the grounds of his decision, has referred to that letter, it seems necessary here to insert it: "Upon examination of your claims to letters-patent for alleged improvements in camels, it appears that your invention has been in all essentials anticipated, which fact prevents, under the law, the issue of letters-patent to you. In an application for letters-patent filed by Henry M. Shreve, December, 1839, to which you are referred, may be found described the two camels united by a platform upon which the ship is sustained, having their outer sides converging so as to form a bow, and also provided with compartments

or sections in the body of the same in order that they may be balanced; and likewise with the means of propulsion by steam. Mr. Shreve in his specification declares the purport of his invention to consist in floating large vessels over shoals or bars. The sole difference between your machine and his consists in the position of the machinery, and this fact is not patentable when it is considered that both docks are furnished with means amply sufficient to equalize their draught of water of either stem or stern. A certificate as to the utility of your invention has been forwarded by you, which renders it proper to observe that the rejection of this case by the office does not in any way depend upon or is influenced by considerations of the practical merit of the contrivance. All that this office has to decide upon is the novelty of the contrivance and the fact that it is not pernicious. For terms of appeal or withdrawal you are referred to the enclosed circular." On the 29th of December, 1849, Mr. Winslow, through the office, presented his petition of appeal from the decision of the commissioner, and filed his reasons of appeal, viz.: "First. That it is alleged that the decision is in opposition to a clear apprehension of the merits of the case. Secondly. That the decision is inconsistent, as opposed in affirmation to precedents which have governed such cases. Thirdly. That the decision is adverse to the opinion of skillful and competent men," &c. These reasons of appeal are followed by a long argument as to the comparative merits of the two camels, viz., Mr. Shreve's and Mr. Winslow's, and an attempt to show that Mr. Shreve's would not answer the purpose and that Mr. Winslow's would. In February, 1850, before the day appointed by the judge for the hearing of the appeal, the commissioner of patents filed in the office "the grounds of his decision fully set forth in writing," as required by the eleventh section of the act of the 3d of March, 1839, as follows, viz.: (The commissioner's decision is omitted.)

By the act of congress of the 3d of March, 1839, section 11 [5 Stat. 354], in the case of an appeal from the decision of the commissioner of patents rejecting an application for a patent, the revision of the judge is confined to "the points involved by the reasons of appeal" filed in the office. It is necessary, therefore, to ascertain the points so involved. The first reason of appeal is "that the decision is in opposition to a clear apprehension of the merits of the case." This reason is certainly vague and indefinite, and I do not perceive that it involves any point affecting the decision of the commissioner. The second reason of appeal is "that the decision is inconsistent as opposed in affirmation to precedents which have governed such cases." This reason is also vague and indefinite, and I cannot see that it involves any point applicable to the decision of the commissioner in this case. The third reason of ap-

peal is "that the decision is adverse to the opinion of skillful and competent men," &c. The residue of the paper filed, and headed "Reasons of an appeal," &c., is occupied principally in a description of the object and importance of the machine, and of the comparative merit of the camels of Shreve and that for which Mr. Winslow asks a patent.

The commissioner's decision is founded upon the want of novelty in Mr. Winslow's machine, and not upon its comparative merit. None of the reasons of appeal filed in the office involves any question of the relative merits of the two machines. The opinion of naval constructors respecting those merits cannot affect the question of novelty, and none of the reasons of appeal involve that question. It is therefore not within my cognizance, which, as before stated, is confined to the points involved in the reasons of appeal. I am therefore of opinion that the reasons of appeal filed in the office are not sufficient to justify a reversal of the decision of the commissioner of patents, that the said reasons must be overruled and the said decision be affirmed.

Case No. 17,880.

WINSLOW v. A FLOATING STEAM PUMP.

[2 N. J. Law J. 124.]

District Court, D. New Jersey. Feb. Term, 1879.

MARITIME LIEN—LOCAL LAW.

Furnishing an air pump to a water craft familiarly called a "chuncker," used for pumping the water out of a dry dock in the Hudson river, is a maritime service. The lien given by the local law for such service may be enforced by the district court in admiralty.

In admiralty.

NIXON, District Judge. This is a libel in rem, filed to recover the amount alleged to be due for the equipment of a vessel. The equipment was an air pump furnished to a water craft familiarly called a "chuncker," used for pumping the water out of a dry dock on the Hudson river, and incidentally from sunken vessels. The merits of the controversy are involved in the solution of two questions: (1) Whether such an equipment is a maritime service, and (2) the value of the articles furnished.

1. The respondents are the lessees of a dry dock at the foot of one of the streets of Jersey City. An useful if not an indispensable part of the instrumentalities with which they carry on their business of overhauling and repairing vessels is some sort of a mechanism for pumping out their dry dock. They rented with the dock a canal boat or "chuncker" for this purpose, having an engine and boiler, and the libellant sold to them an air pump and hose with necessary connections, which was placed in the boat in April last. The answer of the respondents admits "that said

vessel is used by them for the purpose of holding their machinery for pumping out their dry dock and other kind of pumping in and about the Hudson river and Harbor of New York and the waters adjacent thereto." As the 2d section of the act of the legislature of New Jersey, entitled "A further supplement to an act for the collection of demands against ships, steamboats and other vessels," approved March 20, 1878, makes all debts to the amount of twenty-five dollars and upwards, contracted by the master, owner, agent or consignee of any ship or vessel within the state for * * * fitting, furnishing or equipping such vessel a lien thereon, and has a preference to all other liens, except mariner's wages, there does not seem room for doubt that the libellant's claim is a lien upon the vessel and is enforceable in a court of admiralty. It is now the settled doctrine that such liens, created by the local law, are cognizable in the district courts of the United States.

The remainder of the opinion concerning the value of the articles, is of no general interest, and is omitted.

Case No. 17,881.

WINSLOW v. FOUR HUNDRED BARRELS OF SALT.

[1 Biss. 459.]¹

Circuit Court, N. D. Illinois. Aug., 1864.

LIEN FOR DEMURRAGE—WAIVER.

1. If a master delivers a cargo, and receives the freight, without an agreement on the part of the person receiving it that it is to be held subject to a lien for demurrage, the lien is waived, and a libel for demurrage cannot be sustained against the cargo.

2. The fact that the master stated that he should look to the cargo for the claim for demurrage, is not sufficient to sustain the lien.

Appeal from decree of district court of the United States for the Northern district of Illinois, dismissing the libel, which was filed to recover demurrage for delay in loading and unloading a cargo of salt. [Case unreported.]

Robert Rae, for libellant.

Waite & Towne, for respondent.

DAVIS, Circuit Justice. The bark Major Anderson, owned by the libellant, was employed to bring a load of salt from the port of Bay City, Michigan, to the port of Chicago. The vessel was unnecessarily detained at Bay City for three days, for which demurrage is claimed. Demurrage is also claimed because the vessel was not unloaded with dispatch at Chicago.

The question for determination is whether, if demurrage was due, the lien for it on the four hundred barrels of salt has not been waived. I think it has. The cargo of the vessel was salt, and consigned to H. Gelpcke,

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

at Chicago. The master, on his arrival here, reported to Gelpcke, the consignee, who referred him to Haskin, who had bought from Gelpcke a large quantity of salt, to be delivered. Haskin, accordingly, received the cargo in place of Gelpcke, which was discharged after an unusual delay. Ingraham, the captain, and Egan, the agent of the Anderson, told Haskin that they would look to the salt for their claim for demurrage; but Haskin never agreed that he would receive the salt subject to this claim. The salt was delivered and freight paid, and, if there was a just claim for demurrage, why was not some understanding had between Haskin and the agent of the vessel, that the lien on the salt would be retained for the demurrage? If Egan, on delivery had insisted on this, and Haskin had assented to it, then the lien would exist. A mere intention, on the part of the agent of this vessel, that he would retain the lien, and saying so, does not constitute the lien. Egan could have refused to deliver the salt, if the vessel's claim for demurrage was right; but instead of that, he does deliver, on payment of freight only, and doubtless misled Haskin by leading him to believe that the vessel would look to Gelpcke, and, in fact, negotiation is afterwards had by Egan with Gelpcke, which, proving abortive, the salt was attached, and this libel filed. The delivery of the salt was unconditional. Haskin treated it as his own, without incumbrance and with no understanding that the lien should continue, and in fact sold part of this very lot now in controversy.

In the opinion of the court, the lien on the salt was waived when it was delivered to Haskin, who received it without consenting to hold it subject to the lien for demurrage.

Judgment below is affirmed.

NOTE. Contra, see One Hundred and Fifty-One Tons of Coal [Case No. 10,520]. For an extended discussion of the doctrine of maritime liens, and numerous references to authorities, see 5 Am. Law Reg. (O. S.) 129; Ang. Carr. § 370 et seq.

WINSLOW (MARTIN v.). See Case No. 9,172.

Case No. 17,882.

WINSLOW v. MAXWELL.

[Cited in Bartels v. Redfield, 16 Fed. 339. Nowhere reported; opinion not now accessible.]

WINSLOW (MITCHELL v.). See Case No. 9,673.

WINSLOW (RAND v.). See Case No. 11,549.

WINSLOW (THATCHER v.). See Case No. 13,863.

WINSLOW (TROY IRON & NAIL FACTORY v.). See Case No. 14,199.

WINSLOW (UNITED STATES v.). See Cases Nos. 16,741 and 16,742.

WINSLOW, The R. G. See Case No. 11,736.

Case No. 17,883.

WINSO et al. v. The CORNELIUS GRINNELL.

[26 Law Reporter, 677.]

District Court, S. D. New York. June Term, 1864.

WHAT ARE SALVAGE SERVICES—COMPENSATION—DAMAGE TO SALVING VESSEL.

[1. Where a steamer found a sailing vessel anchored among the shoals off Cape May, in ignorance of her true position, and in considerable danger of being driven upon the banks in case her cables should part, and, after attempting, without success, to get a hawser from her, led the way safely out to sea, the sailing vessel proceeding, however, under her own sails, *held*, that this was a salvage service for which a liberal compensation should be awarded.]

[2. Where a steamer bound from Philadelphia to Boston was delayed several hours off Cape May by rendering a salvage service, and in consequence thereof arrived at Pollock Rip nearly at low water, and struck in going over, and received severe injuries, *held*, that the same were merely remote and consequential damages, which could not be recovered against the vessel to which the services had been rendered.]

[3. Five thousand dollars awarded to a steamer worth, with her cargo, \$500,000, for piloting out to sea without any considerable danger to herself a sailing vessel worth \$122,500, from a position of considerable peril among the shoals off Cape May.]

[This was a libel by Henry Winso and others, owners of the steamship Saxon, against the ship Cornelius Grinnell, to recover compensation for salvage services.]

SHIPMAN, District Judge. This is a libel for salvage, brought by the owners of the steamship Saxon against the sailing ship Cornelius Grinnell, for services rendered to the latter by the Saxon, near Five Fathom Bank, to the eastward of Cape May, on the 3d of April, 1863. Two questions are raised on the pleadings and proofs: (1) Whether the services rendered come within the rule of compensation applicable to salvage rewards; and (2) if so, what amount should be allowed.

The peculiar character of the case will be best presented by a somewhat detailed statement of the facts which appear proved by the evidence. The New York and London packet ship Cornelius Grinnell, of New York, valued for the purposes of this case at not less than \$22,500, having on board a cargo of the value of at least \$100,000, with a large number of passengers and a full crew, left London for New York on the 13th of March, 1863. On Saturday, the 2d of April, at about 10 o'clock a. m., she hove to in a severe gale of wind, her master supposing that he was off Fire Island, south of Long Island. The ship lay till the next morning at 4 o'clock, her head being kept east southeast, the gale continuing severe. After 4 o'clock she was run in west southwest, as it was then supposed, towards New York. Between 12 and 1 o'clock she made land, which

was then thought to be the New Jersey shore. She was then headed off east south-east, and in half or three quarters of an hour struck in shoal water. She then wore ship to the westward, and immediately anchored in five and a half fathoms of water. She lay here, with her head to the wind, which was blowing fresh from the north-east, accompanied with rain, for about an hour, her officers being ignorant of their real position, when the steamship Saxon, owned by the libellants, and running regularly between Philadelphia and Boston, was discovered passing on her trip to Boston. The captain of the Grinnell immediately set signals of distress, and the Saxon bore down for him. When within hailing distance, Captain Spencer, of the Grinnell, inquired of the master of the Saxon if he could tell him where he was. The latter replied that he was on Five Fathom Bank, off Cape May. Captain Spencer then told him that he had struck on a shoal, had a considerable number of passengers on board, and asked him if he would take him to a port of safety. Captain Matthews of the Saxon replied that he would try. Thereupon, after the proper orders, the Grinnell's cable was slipped, and the Saxon took a hawser from her for the purpose of taking her in tow. In attempting to get the ship off before the wind, under her jib and foretopsail, the hawser broke from inevitable accident, and without fault on the part of either ship. The hawser parted near the Grinnell's knight heads, and, though every effort was made to haul it in on the steamer, it got foul of her screw, though her engines were stopped as soon as they could be. Some twenty or thirty fathoms of it were found on the screw after she reached Boston. After the hawser parted, the captain of the Saxon ordered the Grinnell to make sail and follow him, which was done, the two ships steering towards the mouth of Delaware Bay. After sailing five or six miles the steamer stopped her engines to let the Grinnell come up, when Captain Matthews told the master of the Grinnell that he should have to get another hawser to him before night, as it would be ebb tide before they reached the mouth of the bay, and he could not get him to a safe anchorage without it. Captain Spencer then asked him if he could not take him to sea. The captain of the Saxon said he could, and thereupon the steamer led the way, and the Grinnell followed out to sea clear of all shoals, when the Grinnell, on notice from the captain of the Saxon that she was all clear, hauled up on her course for New York. The Saxon went on her way to Boston. The ships parted about 8 o'clock, Sunday evening, April 3, having been together about five hours. When the Grinnell arrived in New York she was found to be in good condition, no damage having been suffered in the gale. While getting the hawser fast, the sea running high, the Grinnell in pitching, as the

Saxon came across her bow, came down on her, staving the boat of the latter, carrying away her rail, and cutting a hole in her deck. This damage to the Saxon was repaired for \$260. Beyond this, and the winding of the hawser about the screw, the Saxon received no injury while engaged in rendering assistance to the Grinnell. Before her arrival at Boston, however, she suffered serious injury, to repair which, including loss for her detention during the repairs, cost her owners more than \$25,000. The weather continued stormy after she left the Grinnell, and, the evening of the day after, she encountered a heavy gale. She kept her best steam on, and arrived at Pollock Rip, in her usual route, at about 5 o'clock Tuesday morning, about an hour before dead low water. In attempting to cross the Rip, the steamer struck; and was very badly injured, and had to be towed to Boston. Had she not been detained by the services she rendered the Grinnell, she would undoubtedly have reached the Rip at about high water, and passed over it in safety. The Saxon was a valuable steamer, worth over \$100,000, and had a cargo on board valued at \$400,000. To the south and west of Five Fathom Bank, where the Grinnell lay, are shoals, some of which are said not to be laid down on the charts, and as the wind and current were moving in a southwesterly direction, if the Grinnell had parted her chains, she would have been in considerable danger of being wrecked, especially if the gale had increased to a point of great severity. In case of such increase of the gale, she would have been in some danger of parting her cable had she not been rescued. The Saxon was the only regular steam packet which was due at that point about that time, though government transports occasionally passed up and down the coast in that vicinity.

Upon these facts the two questions already referred to arise, which have been elaborately discussed by counsel, and they are, obviously, as heretofore stated: (1) Were the services rendered by the Saxon to the Grinnell salvage services, and therefore entitled to salvage compensation? (2) If they were salvage services, what compensation is the Saxon entitled to?

Upon the first point, the court is satisfied that the service rendered was in the nature of salvage. The Grinnell was saved by the timely interposition of the Saxon, from a position of considerable peril. She was at anchor in the neighborhood of dangerous shoals, upon which there was at least some danger of her drifting, in the event of the parting of her cables. One severe gale had just been encountered, which had driven her into the position of danger where she then lay; and though this storm had lulled, it was not entirely over. The sea was high and the wind fresh; and another severe gale visited the coast within a few hours after

she was taken out to sea by the Saxon. The evidence is not entirely clear as to the degree of severity of the succeeding gale at Five Fathom Bank, but, judging from the ordinary range of such storms, it is fair to conclude, from the evidence, that it was felt in considerable violence at this point. It is true the Grinnell might have rode out this gale, but the captain was ignorant of his position, and the pilots who cruise the waters in that vicinity were thirty miles away at Delaware breakwater, and not likely to reach the neighborhood of Five Fathom Bank in such weather. No one can certainly determine whether or not she would have ridden out the gale in safety; and though Captain Spencer thinks she would, as her ground tackle was strong, still it must be conceded that there was more or less danger in her lying there and trusting to the experiment. It is quite evident that Captain Spencer considered his ship in great danger, and was therefore anxious that the Saxon should take him to a port of safety. It is true that he now says his fears at that time were based upon the supposition that his ship was leaking badly, which turned out to be an error. Still, I think it is clear that the ship was in real and unusual danger, independent of the fact whether she was leaking badly or not. The services of the Saxon were, therefore, in the judgment of the court, salvage services, and come entirely within the rule laid down by Dr. Lushington in the case of *The Charlotte*, 3 W. Rob. Adm. 71, where he says: "According to the principles which are recognized in this court in questions of this description, all services rendered at sea to a vessel in danger or distress are salvage services. It is not necessary, I conceive, that the distress should be actual or immediate, or that the danger should be imminent and absolute. It will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered." This doctrine is accepted and enforced by the admiralty courts in this country. Mr. Justice Curtis, in the case of *Hennesy v. The Versailles* [Case No. 6,365], gives a brief and clear definition of salvage: "The relief of property," he remarks, "from impending peril of the sea, by voluntary exertions of those who are under no legal obligations to render assistance, and the consequent ultimate safety of the property, constitutes a technical case of salvage." Many other authorities to the same effect might be cited, and in view of the general rule, when considered with reference to the particular cases from which it has been deduced, I cannot doubt but that the present case is covered by it.

It only remains to consider the amount of compensation to be awarded. We are met on the threshold of this branch of the case with the claim that the court, in fixing the

amount to be awarded, should consider the damage suffered by the Saxon in striking on Pollock Rip. It is not claimed that the entire amount of this damage should be included in the award, but it is insisted that the Saxon, by the delay of five hours while aiding the Grinnell, arrived at Pollock Rip so much later, and at low water, by which her risk in crossing was increased, and in consequence of which she met with the accident, and suffered great damage. And it is clear that the Saxon would have arrived at the Rip at high water, and therefore, in all probability, have passed over in safety, had it not been for her delay in aiding the Grinnell. In a certain popular and remote sense, when she undertook to get the Grinnell out of danger at Five Fathom Bank, she incurred whatever risks such a delay might subject her to. She took the risk of encountering another storm, which she might escape if she avoided the delay. Whatever increased dangers might arise during the time which her detention in this salvage service at Five Fathom Bank might prolong her voyage were all in one sense hazarded by her in staying by the Grinnell. But these remote and uncertain dangers do not, in the eye of the law, enhance her merit, and thus increase her reward. Though she had been totally wrecked by another gale, which she would have wholly escaped but for her delay of five hours in this service, I apprehend that such a disaster could not be allowed to enhance the salvage compensation. All such dangers were contingent, and the damages which might result from them must be considered in the language of the law, as remote, having no logical or legal connection with the transaction upon which the libel is founded.

We come, then, to the simple question of the amount of compensation due the Saxon for the services rendered at Five Fathom Bank. The elements to be considered in solving this question are well understood. The only difficulty is as to their application. The general rule as to compensation is that it should be liberal. In determining what is liberal we are to consider "the value of the property saved, the degree of the peril from which it was delivered, the risk of the property, and especially of the persons of the salvors, the severity and duration of their labor, the promptness of their interposition, and the skill exhibited." *The Versailles* [Case No. 6,365].

So far as the value of the property saved is concerned, it was considerable; it is admitted, for the purposes of this case, to be \$22,500 for the ship, and \$100,000 for the cargo. As to the degree of peril from which the ship and cargo were delivered, it is more difficult to determine. It was sufficient to constitute a case of salvage, but was not that imminent peril which often menaces the certain destruction of vessels on a lee shore. As the wind and sea were at the time of her

rescue, she was not in a condition of great peril. To what degree the gale increased soon after her escape, that point is not clear. So far as the risk of the property or persons of the salvors is concerned, there is no unusual ground of merit. There was, comparatively, very little risk to either. The labors of the salvors were neither severe nor long, and though their services were promptly rendered, there was nothing in the exigencies of the case to call for very great skill. On the whole, I think I shall be following the spirit of the rule which calls for liberal rewards in salvage cases, by adjudging five thousand dollars as the proper sum. Had it not been for the untoward disaster at Pollock Rip, I think the salvors themselves would have regarded this as a liberal reward. To this sum, however, I will add two hundred and sixty dollars, the amount of the damage which Captain Matthews stated that the *Saxon* suffered by being struck by the *Grinnell*.

Let a decree be entered for the libellants for the sum of five thousand two hundred and sixty dollars, with costs.

Case No. 17,884.

Ex parte WINSOR.

[3 Story, 411.]¹

Circuit Court, D. Massachusetts. July Term, 1844.

CORPORATIONS—POWERS OF DIRECTORS—LEVY OF ASSESSMENTS—SET-OFF—DIVIDEND OF STOCKHOLDER.

1. Under the act of 1809, the power to lay assessments is vested exclusively in the corporation, and cannot be delegated to the directors.

[Cited in *Ruggles v. Collier*, 43 Mo. 365.]

2. Where the powers and privileges of the *Norfolk Manufacturing Company* were, by its charter, made subject to the provisions of the act of 1809, and a by-law was passed authorizing the directors "to take care of the interests, and manage the concerns of the corporation;" it was *held*, that the corporation had no power to delegate an authority to the directors to lay assessments, and that the said by-law did not, in fact, import an intention to delegate it.

[Cited in *Smith v. Duncan*, 77 Ind. 94.]

3. And the said company, having first made a dividend of 10 per cent. and, before payment thereof, laid an assessment of 10 per cent. payable on the same day; it was *held*, that the corporation were not entitled to take the dividend of any stockholder, without an order from him, in payment of any debt due from him to the corporation, or as a set-off to the assessment, or as a charge upon any shares, which might afterwards be sold.

This cause came before the circuit court, being certified from the district court, on account of the district judge being interested therein. The original petition and answer, and the amended petition and answer thereto, were as follows:

"To the Honorable the Judge of the District Court for the District of Massachusetts: Henry Winsor, of Boston, in said district,

as he is assignee of Samuel H. Babcock, a bankrupt, respectfully represents, that the said Babcock, prior to the decree of bankruptcy in his case, was the proprietor of twenty shares in the capital stock of the *Norfolk Manufacturing Company*, a corporation established by law, within and under the authority of the commonwealth of Massachusetts, which shares, under and by virtue of said decree, became vested in your petitioner. And your petitioner further shows, that on the fifteenth day of August, 1842, the said Babcock was indebted to the said corporation, in the sum of two thousand dollars (or more), for monies had and received by the said Babcock, for the use of the said company; that in the month of June, 1842, the said Babcock failed to pay his debts, and was insolvent, and ever since so continued, until the time of filing his petition for the benefit of the bankrupt act, February 7th, 1843 [5 Stat. 440]. That it was well known to the said corporation, on the said August 15th, 1842, that the said Babcock was insolvent and unable to pay his debts, and on that day the directors in the said corporation declared a dividend of ten per centum on the capital stock of the said company, being one hundred dollars on each and every share thereof, payable on November 1st, 1842; and on October 25th, 1842, the said directors laid an assessment of ten per centum, or one hundred dollars, on each and every share in the said company, payable on the same first day of November, 1842; that no money was paid by the said corporation for such dividend, but that the stockholders signed a receipt for their several portions thereof; and that as to all the shares in the said company, except the said twenty shares, the said company gave a receipt for the assessments laid thereon. That the said Babcock gave an order to the said company to receive the said dividend on the said twenty shares. That the said company claimed to apply the said dividend to the payment of the debt of the said Babcock to the said company, and to hold the said shares as security for the payment of the said assessment. That under and in pursuance of an order of the district court of the United States, for this district, the said assignee caused the said twenty shares to be sold at public auction, and James Read, of said Boston, became the purchaser thereof, and that the said Read is the treasurer of the said corporation. And it was agreed by the said Read, on behalf of the said corporation, that the said shares should be transferred to the purchaser thereof, at said sale, and that the amount of the said assessment should be placed on deposit in some bank to abide the decree of this honorable court in the premises. That the said corporation was not in a condition to, and would not have made any dividend at the said time, in the usual and ordinary course of its business; and that the same was done

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

for the purpose and object of securing the payment of the debt, due from the said Babcock to the said company, and thus to give the said company a preference or priority over the general creditors of the said bankrupt. That the said Babcock gave the said order for the said dividends to the said company in contemplation of bankruptcy, and for the purpose of giving to the said company a preference or priority over the several creditors of the said bankrupt; or if not so given, the same was given in contemplation of bankruptcy to the said corporation, which was not a purchaser for a valuable consideration, or a bona fide creditor without notice, and the same was a fraud upon the bankrupt act, and is void. That the said company had no right or authority to appropriate the said dividends, as payment of the said debt of the said Babcock; but if they had any right to declare the same, they were bound to apply the same in payment of the said assessments, as in the case of all the other stockholders in the said company. Wherefore your petitioner prays, that the said company, and the said Read, may be summoned to appear and answer the premises, the said Read under oath, and that this honorable court will decree, that the whole proceeds of the said shares be paid to your petitioner, and that the said company be restrained by an injunction of this honorable court, from claiming any lien thereon, or in any way intermeddling therewith, and for his costs most wrongfully sustained."

Amendments to the said petition were afterwards filed by the said Winsor, and were as follows:

"The said Winsor prays leave to file the following amendments to his petition, and that Theodore Dunn, the president of the said Norfolk Manufacturing Company, be required to answer the original petition, and this amended petition, under oath, according to the best of his knowledge, information, and belief. The said Winsor farther avers, that the dividend declared by the directors of the said Norfolk Manufacturing Company on the twentieth day of August, 1842, was never payable to the stockholders in the said company, and was never paid to the said stockholders, but that the vote declaring the said dividend was rescinded on the 25th day of October, 1842, before the dividend so declared became payable, by the vote laying an assessment of the same amount, on each and every share in the said corporation, as the said dividend previously declared, which assessment was made payable at the same time, at which said dividend had been declared to be payable, and that no assessment was ever payable for, or in respect of the said shares, in the capital stock of the said company, under and by virtue of the said vote of October 25th, 1842, the said vote to lay an assessment being, in effect, merely a rescission of the said

vote declaring a dividend. That it was well known to the said Dunn, president, or to some one or more of the officers of the said corporation, on the 27th day of July, 1842, and on the 15th day of August, 1842, that the said Babcock had failed to pay his debts at maturity; that he was insolvent and unable to pay the liabilities to which he was subject, individually, and as a stockholder in the Dudley W. Manufacturing Company, and otherwise. That no assessment was duly and legally made upon the said shares of the said corporation, on the 25th day of October, 1842, inasmuch as by the acts incorporating the said Norfolk Manufacturing Company, the power to lay assessments upon the shares of the said company was vested in the corporation, and to be exercised by them only, at a legal meeting duly called for that purpose, and the directors of the said corporation, could not legally make any assessment whatever upon the said shares.

"The defendants in their answer admit that Samuel H. Babcock, in the said complainant's bill mentioned, prior to the decree of bankruptcy in his case, was the proprietor of twenty shares in the capital stock of the said Norfolk Manufacturing Company in the said complainant's bill mentioned. And that under and by virtue of said decree, the interest of the said Babcock in the said shares at the time of the said decree rested in the said Winsor as assignee of the said Babcock's estate. That the said Babcock on the 15th day of August, in the year 1842, was indebted to the said Norfolk Manufacturing Company in the sum of about \$2500, for monies had and received by him in trust, as treasurer of the said corporation, for the use of the said corporation. And that, at some time, the said Babcock failed to pay his debts, but the defendants assert, that they are unable to state at what time he thus failed to pay his debts. And the defendants deny that, on the said 15th day of August, in the year 1842, and for a long period thereafter, they considered the said Babcock insolvent; but assert, that the said Babcock represented at that time, and for a long time subsequently thereto, that he fully believed, that he was solvent, and had more than sufficient property to pay all his debts, and that he was negotiating to avoid the sacrifice of his property, and to pay or to provide for the payment of all his debts in full. And that he did not intend to avail himself of the benefits or provisions of the bankrupt law. That from the efforts made by the said Babcock, and from his representations to them from time to time, they fully believe, that the said Babcock continued confident in the belief, that he should make some arrangement or arrangements by which he could pay or secure to be paid all his debts in full, until down to the time or about the time of his filing his petition to be declared a bankrupt, and that they themselves fully believed that he would be able so to do. And

they further say, that but for the great sacrifice made of his property the said Babcock would have been able to pay all his debts in full—his schedule of property at cost amounting to about \$200,000, and his indebtedness to 88,000 dollars only. The defendants also admit, that a dividend of 10 per cent. was made, and that afterwards an assessment of 10 per cent. was made, as set forth in the petition, and that no money was paid by the said corporation for such dividend. But they deny, that as to all the shares in the said corporation, except the said twenty shares, the said company gave a receipt for the assessments laid thereon. But they admit, that the said Babcock, on the 27th day of July, in the year 1842, did give an order to the said company to receive the said dividend on all his shares in the said company. And they further admit, that the said company claimed and do still claim to apply the said dividend to the payment of the debt of the said Babcock to the said company, and to hold the said shares as security for the payment of the said assessment. And that under and in pursuance of an order of the district court of the United States for this district the said complainant, as assignee as aforesaid, caused the said twenty shares to be sold at public auction—and that James Read, one of the defendants, became the purchaser thereof, and that the said Read is the treasurer of the said corporation. And they further admit, that it was agreed by the said Read, on behalf of the said corporation, that the said shares should be transferred to the purchaser thereof at the said sale, and that the amount of the said assessment should be placed on deposit in some bank, to abide the decree of this honorable court in the premises. But they absolutely deny the averment of the complainant in the said bill of complaint contained, 'that the said corporation were not in a condition to, and would not have made any dividend at the said time in the usual and ordinary course of its business, and that the same was done for the purpose and object of securing the payment of the debt due from the said Babcock to the said company, and thus to give the said company a preference or priority over the general creditors of the said bankrupt,' and each and every part and parcel thereof.

"But these defendants further answering say, that the said Norfolk Manufacturing Company, as their annual accounts made up to July 1st, 1842, verify, and which were fairly, honestly, and bona fide made up for the purpose of ascertaining the true condition of their affairs, and for no other purpose, as they always had previously done in the month of July in each and every previous year, show a balance of net profits in favor of the said company, at that time, of \$10,931.64, that might properly be divided among the stockholders therein, which would pay ten per centum, and leave in the treasurer's

hands a surplus of \$2631.64; that nothing had occurred in the condition or affairs of the company between the time of making up the account and declaring the dividend as before mentioned to alter its pecuniary standing for the worse. That it was the bona fide intention of the directors of the said company, so far as these defendants know, to declare and make the said dividend of 10 per cent. and that the only question made as to the declaring of the said dividend was in relation to a large debt due to them, which was amply secured by attachment of property. And the time of payment of the said dividend was protracted until the first day of November in the year 1842, for the purpose of realizing the money for the said debt to pay the said dividend, it then being probable, that the said money would be received on, before, or about that time. That the directors of the said company laid the assessment set forth in the petition, because they were disappointed in not realizing the debt due to the said company as above mentioned, as they had confidently expected to do, prior to the said first day of November in the year 1842, and because the treasurer of the said company, then being in cash advance for the said company upwards of \$13,000, and not having received the amount due to the company as aforesaid, declined paying the said dividend, and for no other reason or reasons whatever. That the said Norfolk Manufacturing Company have in previous years more than once declared dividends which, from some unforeseen occurrences, or disappointments in the receipts of money, they were unable to pay, and have been obliged to lay assessments to meet such dividends in the same manner as was done in the instance stated in the said plaintiff's petition, as will appear by their record. And they absolutely deny, that the said dividend was made for the purpose of securing the payment of the debt due from the said Babcock to said company, or to give the said company a preference or priority over the general creditors of the said Babcock. But they assert, that it was made for the purpose of making a dividend of profits among the stockholders;—the said corporation having earned profits amply sufficient for that purpose. That inasmuch as said Babcock was indebted to the said company, they would not, as a matter of business, pay out a dividend to a stockholder indebted to the said company, but would retain in their hands the amount of such indebtedment.

"And they absolutely deny the following charges, contained in the said bill of complaint, viz. 'that the said Babcock gave the said order for the said dividends to the said company, in contemplation of bankruptcy, and for the purpose of giving to the said company a preference or priority over the several creditors of the said bankrupt, or if not so given, the same was given in contemplation of bankruptcy, to the said corpora-

tion, which was not a purchaser for a valuable consideration, or a bona fide creditor without notice, and the same was a fraud upon the bankrupt act and is void—and each and every one of them, and each and every part of each and every one of said charges, or averments. But on the contrary, aver and state, that the said Babcock, when he gave the said order, did not contemplate bankruptcy, but did contemplate and fully intend and believe, that he had ample property and would be able to pay all his debts in full, and that he should moreover have a surplus for himself. And, therefore, that he could not suppose, that the giving of such order to the said company was giving them a preference or priority over the several, general, or any creditor, or creditors of him, the said bankrupt. And that the said corporation were bona fide creditors and purchasers for a valuable consideration, without notice. And that the same dealings and transactions by and with the said Babcock were bona fide made and entered into more than two months before he filed his petition to be declared a bankrupt as aforesaid, and that no other party, or any party whatever to any such dealings, or transactions, or any of them, so far as these defendants had knowledge, or believe, had notice of any prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of the said bankrupt act. That the said Norfolk Manufacturing Company insist, that they are entitled and have lawful authority to appropriate the said dividends as payment of the said debt of the said Babcock. And that they had a lawful right to declare the same, and were not bound to apply the same or any part thereof in payment of the said assessments, and that the case of the said Babcock was different from that of all and every of the other stockholders in the said company, inasmuch as that, as these defendants say, the said Babcock was the only one of the said stockholders, that was indebted to the said company, except one other, who owes a debt not yet payable, and inasmuch as that the said Babcock's indebtedness arose from monies of the said company. And, that the debt due from the said Babcock to the said company was strictly of a fiduciary character, for monies of the said company in his hands, and to which the said company were entitled, notwithstanding he might not be enabled to pay all, or any portion, of his just debts. That it was not money belonging to him—and that the company never supposed, that they were crediting or charging him therewith—nor consented to take his express or implied obligation therefor. But that he used it for his own private purposes, without the knowledge or consent of the said company, or any stockholder or officer therein—and in violation of good faith to them. And the defendants pray that the bill may be dismissed, and that they be decreed their costs."

The answer of Theodore Dunn set forth, that he had read the answers of James Read, and the Norfolk Manufacturing Company, by James Read, treasurer of said company, to the original bill of complaint, or the original petition of said Winsor, filed in this case, and knew the contents thereof, and that the same are true, and contain as full and correct an answer to the said original bill as he can make, and requested that the same answer might be taken as and for his answer to said original bill, and to that part of the amendments to said bill or petition as requires his answer thereunto. The answer of the said Dunn then recapitulates the statements made in the preceding answer of Read, and further states that the dividend declared by the directors of said Norfolk Manufacturing Company, on the 13th day of August, 1842, was payable to the stockholders in said company, on November 1st, 1842, and was paid to all the stockholders, on said November 1st, 1842, excepting Samuel H. Babcock, by filing it in set-off to an assessment of the same amount per share, against the same stockholders, which was receivable on the same day—and that the said Babcock would have been paid the dividend on his shares in said corporation, on the same day, in the same manner, had he not previously assigned to the said company, or corporation, his said dividend, and been indebted to the said company, as stated in the answer of James Read to the original bill of complaint. That the vote declaring the said dividend was not rescinded on the 25th day of October, 1842, before the dividend so declared became and was payable by the vote laying an assessment of the same amount on each and every share in said corporation, or on any other day, in that or in any other manner. And that the assessment mentioned in the answer of said James Read, was payable for and in respect of the said shares in the capital stock of the said company, under and by virtue of the said vote of October 25, 1842, and that the vote to lay an assessment was not, nor was it intended to be, a rescission of the said vote declaring a dividend—but the said vote to lay an assessment was intended to be, and was independent entirely of the vote declaring a dividend. And according to the best of his knowledge, information and belief, the said vote to lay an assessment is not, in effect, merely a rescission of said vote declaring a dividend in law. And asserts that it was not so considered or intended, in fact, by the said Norfolk Manufacturing Company, nor the directors thereof, one of whom was the said Samuel H. Babcock, at that time, and who was present, and acted and voted to lay said assessment, nor by the said Dunn. That he not only did not know, but did not suppose that the assessment made upon the shares in the Norfolk Manufacturing Company, on the 25th day of Octo-

ber, 1842, according to the best of his knowledge, information and belief, was duly and legally made, inasmuch as by the acts incorporating the said corporation, it is empowered to make by-laws, not repugnant to the constitution and laws of the commonwealth. And that by one of the by-laws of said corporation, the directors are empowered, and it is made their duty, to take care of the interests, and manage the concerns of the corporation, which duties they could not have faithfully discharged, otherwise than by laying the said assessment to provide for the payment of the dividend declared as aforesaid, as they had been disappointed in the collection of monies due to them, upon which they relied for the payment of said dividend—and that the power to lay assessments upon the shares of said company vested in the said directors, although it might also have vested in the corporation—and could be exercised by said directors at a meeting duly holden for that purpose, as well as by the stockholders, at a legal meeting duly called for that purpose. That whether or not said assessment was duly and legally made upon all the shares of the said corporation, the complainant or petitioner cannot make that objection, because he claims under the said Babcock, and his claim did not exist until long after said assessment was laid and made payable, and the said Babcock, while he was the sole owner of the shares in the said corporation, and solely interested therein, in which the complainant claims to have an interest as assignee in bankruptcy, and while he was a director in the said corporation, at a meeting of the said directors duly called, and legally met together, he and the other directors laid the said assessment by an unanimous vote—and then and there promised to pay the same when it was then and there made payable to wit, on the first day of November, 1842; and because the said complainant had no claim or interest in the said shares until long after the said November 1st, 1842,—and must have taken the same shares subject to the said assessment, subject to the lien of the said corporation thereon, and subject to the promise and agreement of the said Babcock, from whom he derived them, in relation to the said assessments thereon. And the said Dunn further answering saith, that to the best and utmost of his knowledge, information and belief, the said Babcock had not failed to pay his debts, at maturity, prior to the giving by him, the said Babcock, of the said order for dividends to the said corporation, on the 27th day of July, 1842, or prior to August 15th, 1842, and that it was not well known to the said Dunn prior to said 27th day of July, that he, the said Babcock, had failed to pay his debts at maturity, and that it was not known to him, that he, the said Babcock, had failed to pay his debts at maturity, until he filed his petition

to be declared a bankrupt, to wit, on, or about February, 1843.

William Gray, for assignee.
J. J. Clarke, for respondents.

STORY, Circuit Justice. The principal questions which have been argued in the cause, are: First. Whether the assessment laid by the directors on the shares of the Norfolk Manufacturing Company, on the 25th of October, 1842, was a good and valid assessment? Second. If valid, whether it did not, in contemplation of law, amount to a revocation, or rescission of the prior dividend declared by the directors, and payable on the same day with the assessment, or as a set-off against the same? Third. Whether, supposing the assessment and dividend good, and in full force, the order or agreement of Babcock with the company, for the transfer of his dividend, was not a collusive order or agreement in contemplation of bankruptcy, and therefore void as against the creditors of Babcock, under the bankrupt act of 1841, c. 9 [5 Stat. 440]. The latter question can become material only, in case of the failure of either of the other grounds to support the claim made by the assignee. I shall accordingly, in the first place, consider the question, whether the assessment was valid; for if it were not, then the assignee has a perfect title to the redress sought by him in this court.

The charter of the Norfolk Manufacturing Company was granted by the legislature on the 4th of February, 1824; and it was therein declared that they "shall have all the powers, and privileges, and shall be subject to all the duties, and requirements, prescribed in an act passed on the 3d of March, 1809, entitled, &c., and the several acts in addition thereto." The only material clause affecting the present case, is the fifth section of the act of 1809, which provides "that any such corporation may, from time to time, at any legal meeting, called for that purpose, assess upon each share, such sum or sums of money, as shall be judged by such corporation, necessary for raising a capital for the establishment and completion of the object of the incorporation, and for defraying the charges and expenses incident thereto, to be paid to their treasurer, at such time or times, and by such instalments, as shall be directed by the corporation." Now, the present assessment was not laid by the corporation at all; but by the sole authority of the directors. But it is said, that the directors have a co-ordinate power with the corporation, as to the laying of assessments under the by-laws of the corporation, one of which declares that "they (the directors) shall take care of the interests, and manage the concerns of the corporation." In the first place, it strikes me, that by the very terms of the act of 1809, the power to lay assessments is intended to be vested solely

and exclusively in the corporation, and to rest in its discretion, as to the time when, and extent to which it is to be exercised. The power is given in the affirmative, and the maxim, "Expressio unius est exclusio alterius," seems to me strictly applicable to such a case. It is a very high power, of a summary nature, and may involve a loss or forfeiture of the shares of the corporators, in case of a noncompliance with the requisition. It is, therefore, founded in a sound public policy, that the corporation, which is to bear the burthen, should be the sole judge of the times and occasions on which assessments should be laid. But it is said, that the corporation may delegate the powers to the directors. That is a proposition, which I am by no means prepared to admit. The general rule certainly is, that the powers confided to a corporation, like those confided to an agent, cannot ordinarily be delegated. "Delegatus non delegare," is the known maxim as to agents; and when the corporation itself is pointed out as the proper functionary to execute a discretionary power, it seems to me, that the true conclusion is, in the absence of all other provisions, that it must be solely exercised by the corporation, at its legal meetings held for that purpose. And any by-law, made in contravention of the enactments of the charter, is, as well upon the general principles of law, as by the express provisions of the act of 1809, § 1, to be treated as a mere nullity. But it does not appear to me, that the corporation ever has, or intended by its by-laws, to delegate any authority to lay any assessments. The language of the by-law, on which the whole of this part of the argument rests, is conceived in very general terms, and by no means requires, and in my judgment, does not admit of any interpretation, which shall include any such delegation of authority. It is "to take care of the interests, and manage the concerns of the corporation," which must, upon the principles of fair reasoning, be limited to the ordinary interests, and ordinary concerns of the corporation, as general agents of the corporation; and not extend to the extraordinary interests, or extraordinary concerns, expressly confided to the discretion of the corporation itself, by the very terms of the charter. In the most ordinary cases of agency, general language, however broad, when found in the instrument creating the agency, is constantly construed as limited to the special objects pointed out as the scope and purpose of the agency.²

But if this doctrine were at all doubtful, which it does not appear to me to be, the second point made at the bar would be equally decisive in favor of the assignee. And that is, that the assessment, if lawfully laid, was, to all intents and purposes, a com-

plete merger, or extinguishment, or set-off of the dividend; and it is immaterial in which light it is received. It was obviously and confessedly laid for the very purpose of controlling the payment of the dividend; it was payable on the same day; and was, in fact, in respect to all the other stockholders but Babcock, actually applied, as an extinguishment, or set-off, of the dividend. No other exigency existed, or was contemplated to exist, calling for the assessment, but to recoup the dividend, and indeed to supersede the necessity of paying the dividend. Babcock himself could not have claimed the dividend, without paying the assessment, and the corporation are entitled to take the dividend under the order, or agreement, only sub modo, to discharge the assessment, or subject to the assessment. The order was, in fact, given on the 27th of July, before any dividend was declared; and after it was declared, and before it became due, the assessment was made for the very purpose of preventing the payment of the dividend out of the funds of the corporation, not then properly applicable to the purpose. It seems to me, therefore, that in no respect is the corporation entitled to the dividend, in part payment of the debt due to it, or to set-off the assessment, as a charge pro tanto, upon the shares of Babcock, which have been sold, and the proceeds lodged subject to the order of the court.

This view of the subject renders it wholly unnecessary to consider the other point, viz. whether the agreement and order to transfer the dividend was a collusive transfer in the sense of the bankrupt act. That transfer was after the failure of Babcock, and, under the circumstances, is not a question wholly free from difficulty, and I desire, therefore, to express no opinion respecting it. But I am of opinion, upon the other grounds, that the whole proceeds of the shares sold of the bankrupt ought to be paid over to the assignee, for the benefit of the bankrupt's estate, without deducting any sum for the assessments thereon, and that an injunction do issue accordingly.

[For other cases involving the estate of this bankrupt, see Cases Nos. 696, 697, and 17,886.]

Case No. 17,885.

In re WINSOR.

[16 N. B. R. 152; 19 Chi. Leg. News, 402; 2 Cin. Law Bul. 212.]

District Court, W. D. Michigan. Aug. 10, 1877.

BANKRUPT'S DISCHARGE—OMISSIONS FROM SCHEDULE—KEEPING BOOKS OF ACCOUNT.

1. If a bankrupt honestly regards a judgment held by him as worthless, he is not chargeable with false swearing or fraud if he omit it from his schedule. Even if it has value as an asset, and he considers it as having value, still its

² See Story, Ag. §§ 21, 62-68, and the authorities there cited.

¹ [Reprinted from 16 N. B. R. 152, by permission.]

omission must be intentional in order to charge him with false swearing or fraud.

2. A merchant or trader who, prior to his becoming such, has kept books of account showing the state of his affairs, is not required to carry their contents or any part of them into his books opened and kept as a trader, in order to satisfy the requirement of the statute as to a bankrupt keeping proper books of account while he is a merchant or tradesman.

3. Keeping proper books of account, within the meaning of the bankrupt act [of 1867 (14 Stat. 517)], is the keeping of an intelligent record of the merchant's or tradesman's affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business, and a casual mistake therein will not prevent a discharge.

[Cited in *Re Blumenthal*, Case No. 1,575; *Re Graves*, 24 Fed. 554.]

4. It is not required that a chattel mortgage given to secure a debt shall be entered upon the merchant's or trader's books. An entry of notes upon the fly-leaf of the blotter is sufficient.

[In the matter of *Zenas G. Winsor*, a bankrupt.]

J. W. Champlin, for bankrupt.
Mr. Fletcher and Mr. Smiley, opposed.

WITHEY, District Judge. Fifteen grounds of opposition to the bankrupt's discharge are stated in the specifications of three opposing creditors, and cover all the grounds alleged by other creditors. It is necessary to notice but four in deciding the case, viz.: specifications 2, 3, 13 and 15. One and fourteen were abandoned, and three embraces in substance all that is alleged by four to twelve, inclusive.

The second specification alleges wilful and false swearing by the bankrupt in his oath to Schedule "D;" also wilful and fraudulent omission of an asset from the schedule. The evidence is, that one Butler, in 1868, obtained judgment in the state court against Jacob W. and Eugene E. Winsor, which in May, 1874, was assigned to the bankrupt. At the time of the bankruptcy, this judgment remained unsatisfied, and has not been scheduled as an asset. It also appears that Jacob W. Winsor died some time before the proceedings in bankruptcy were commenced, his estate being utterly insolvent. The other judgment debtor is irresponsible. The bankrupt testifies that the reason the judgment was not scheduled among his assets was because it never occurred to him to place it there. He seems to have considered it worthless and of no consequence before his bankruptcy. Eugene E. had entered into the obligation on which the judgment was recovered at the instance of the bankrupt, and on the understanding that he was to be saved harmless. The bankrupt did not consider that he had any just claim against Eugene, in view of that understanding.

The facts do not sustain the charge that the bankrupt took a wilful false oath, or that he fraudulently omitted the judgment from his schedule. If the bankrupt honestly regarded the judgment worthless, he might

omit it from the schedule without being chargeable with false swearing or fraud. If it had value as an asset, and was considered by the bankrupt as having value, still there was neither a wilful false swearing nor fraud unless the omission to place the judgment in the schedule was intentional.

The third specification alleges that the bankrupt, being a merchant and tradesman, failed to keep proper books of account, in not having entered a debt owing to one of his children. Four other specifications allege the same thing as to four other children. The facts disclose that in 1865, the bankrupt held in trust land for his five children, which he sold for some fourteen thousand dollars and appropriated the money to his own use. This misappropriation occurred before the bankrupt engaged in trade. At the time of the sale of the land he entered the transaction in his then books of account. Six months or more before the petition in bankruptcy was filed, those books were destroyed by an accidental fire which consumed a building in which they were kept. When he went into trade in 1870 or 1871, the bankrupt opened books of accounts appertaining to his business as a trader, but did not transfer to them any of the transactions entered in the books of account which he had kept for fifteen years previously. The bankrupt law declares that "no discharge shall be granted, or, if granted, be valid, if, being a merchant or tradesman, he has not subsequent to the passage of this act, kept proper books of account." The question is, does this provision require the books of account kept by a trader as such, to contain entries of debts owed by him at the time he went into trade, previously contracted, as well as of those debts incurred in his business as a trader. The statute relates to the bankrupt while a merchant or trader, and, as we understand, visits upon him the penalty of being refused a discharge from his debts, if while a trader he did not keep proper books of account. The statute should be so construed as to carry out the intention of congress. A trader must be held to the utmost good faith in keeping his accounts, to the end that his assignee in bankruptcy or any competent person may be able from his books to ascertain the state of the bankrupt's business while a trader. But if, prior to becoming a trader, he kept books of account which exhibited the state of his affairs, their contents, nor any part of them, need not be carried into his books opened and kept as a trader in order to satisfy the provision of the statute as to a bankrupt keeping proper books of account during the time he is a merchant or a tradesman. The law requires no books of account to be kept by any one as a condition precedent to obtaining a discharge other than those who, being merchants or tradesmen, become bankrupt. Had the books kept by Winsor prior to his entering into trade not been destroyed

and they been turned over to the assignee, it is obvious that the ground of opposition we are considering could not successfully have been urged, and the accident that destroyed those books ought not, therefore, to be made the circumstance for visiting upon him the penalty of being denied a discharge. We find that specifications three to twelve inclusive are not sustained.

The thirteenth specification involves the same clause of the statute as that last considered, but is too indefinite to constitute a ground of opposition; nevertheless we will consider it. The charge is that the bankrupt did not enter in his books of account "a large real estate transaction with one E. P. Ferry." The evidence shows that the transaction complained of was entered on page 510 of the blotter kept by the bankrupt as a trader, fully disclosing his indebtedness in relation thereto. We might, therefore, without further comment, dispose of this specification. But in the course of the trial, by reference to the schedule of debts, it appeared that subsequent to the real estate transaction the bankrupt gave to Ferry two notes of two thousand five hundred dollars each to cover the indebtedness growing out of that transaction, and these notes were not entered in the books of account. The specification charges that the bankrupt "had large real estate transactions with one E. P. Ferry, of Grand Haven, Michigan, of which he kept no record in his books of account." Now, suppose, by a liberal construction, the subsequent giving of the notes should be considered as part of the "real estate transaction," and covered by the pleading, or assuming that the court is not to grant a discharge if it appears the bankrupt has not kept proper books of account, whether such omission is pleaded or not, what conclusion should be reached? The evidence shows that the bankrupt's books purported to contain an account of his bills payable. He testified that he had supposed, until his attention was called to the omission, his books did contain entries of all his bills payable, that his practice was to enter them in his books of account. Now, the mere fact that they were not entirely accurate, or that items of his business were occasionally omitted from his books, ought not, standing alone, to be regarded as evidence that he did not keep proper books of account within the meaning of the bankrupt law, unless "proper" means "accurate" books of account; and if the latter is to be the interpretation of the statute, we venture to assert there will thereafter be few if any discharges of bankrupt traders.

It was urged that intentions and good faith are not to be considered in determining whether proper books of account have been kept. Such is the rule to be applied when no account of cash, of merchandise, or stock, or bills payable, etc., has been kept, or when no intelligent account of any such matters

has been kept. The bankrupt merchant or tradesman in such case is not entitled to a discharge, no matter what may have been his intention, as has been often held. On the other hand, when it appears that he has in some intelligent form or manner kept an account of those and other departments of his business; and yet is shown to have omitted one or more items from the accounts it then becomes a proper inquiry whether the omission was casual or intentional. Keeping proper books of account, within the meaning of the bankrupt act, may be said to be the keeping of an intelligent record of the merchant's or tradesman's business affairs, and with that reasonable degree of accuracy and care which is to be expected from an intelligent man in that business. An intentional omission, fraudulent within the scope of the bankrupt law, would be conclusive that proper books of account had not been kept; whereas, if the omission to make the proper entry was not designed but casual, it is manifest that no such conclusion would necessarily follow. If on the other hand there were repeated omissions, evincing gross carelessness or want of reasonable care, it might justly be held that the bankrupt had not kept proper books of account, for he should be held not only to the utmost good faith, but to the exercise of at least ordinary care in keeping his accounts.

We have been guided by such considerations whenever the question has been presented whether the bankrupt, merchant or tradesman, has kept proper books of account. No case has been cited by counsel, and we have not been able to find any, which considers the questions we have discussed. The primary consideration is whether the bankrupt has kept his accounts in such manner as to furnish an intelligent understanding of his affairs. If such has been the manner of keeping a record of his affairs, and yet mistakes are exhibited therein, it then becomes a proper subject of inquiry whether there is evinced reasonable care and an honest purpose to fully enter or keep proper accounts. If the court can answer these questions in the bankrupt's favor, he is, in our judgment, entitled to a discharge.

The fifteenth and last specification presents other objections to the bankrupt's book-keeping. They relate to several notes made by the bankrupt and endorsed by E. E. Winsor, discounted at the banking-house of M. V. Aldrich, in this city, the first one being for two thousand dollars, the others being renewals for such part of the original sum as from time to time remained unpaid. It is alleged that none of these notes were entered as bills payable. An examination of the books kept by the bankrupt shows that on a fly-leaf in the back part of his blotter these notes were all entered, except, possibly, the original note for two thousand dollars. The entries show the date, amount and time of payment, etc., in the form of memo-

randums; but afford all the information necessary to advise any intelligent person of the indebtedness evidenced by the notes. There can be no doubt but this answers the requirements of the law. The entry of the last note given in renewals shows the indebtedness subsisting at the time of the bankruptcy; those previously entered had been canceled as paid. The court did not personally inspect the book as to the two thousand dollar note first given, but the attention of the bankrupt having been called as a witness to the fact whether it did there appear, he examined and stated it was entered and, as we understood, pointed out the entry. We therefore find the notes to have been entered in his books of account in such manner as to satisfy the requirement of the statute. It was further objected by this specification that the bankrupt also failed to keep proper books of account, in that he gave to Eugene E. Winsor a chattel mortgage on a part of his personal property to indemnify him against any liability which Eugene should thereafter incur on account of the bankrupt in conducting as agent the bankrupt's Grand Rapids branch of business. As the mortgage was evidence of no indebtedness and created no liability, but was given as mere indemnity against a possible future liability of the mortgagee, we entertain the opinion that there was no obligation on the part of the bankrupt to make an entry in his books of account of the giving of such mortgage. When, subsequent to the giving of the mortgage, Eugene became liable as endorser or otherwise upon the bankrupt's obligations, those obligations were entered in the manner we have stated. The mortgage, if it should come to have any valid effect as against creditors, would become a matter of public record in the proper clerk's office; it belonged to no account usually kept by merchants; it occasioned no increase in the debtor or credit side of any account, and all that could be entered would have been a memorandum of its existence and the purpose for which it was given.

Our conclusion is that the bankrupt is entitled to a discharge from his debts. A decree will be entered in accordance with these views.

WINSOR (BURNHAM v.). See Case No. 2,180

WINSOR (DELANO v.). See Case No. 3,754.

WINSOR (JILLSON v.). See Case No. 7,321.

Case No. 17,886.

WINSOR v. KENDALL.

[3 Story, 507.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1844.

PREFERENCE BY BANKRUPT—"CONTEMPLATION OF BANKRUPTCY"—KNOWLEDGE OF CREDITOR.

1. Where the petition set forth that K, as agent of B, paid to A, a creditor of B, a certain

due bill, in order to induce A to become a party to a general assignment in favor of B's creditors, which never took effect; and B subsequently became a bankrupt under the act, it was *held*, that the payment of the due bill, as set forth in the petition, was not a fraudulent preference in contemplation of bankruptcy,—and that the evidence showed, that K did not act as agent of B, and that if he did, since he concealed his agency from A, that he was to be treated, as to A, as a purchaser and not an agent.

[Cited in brief in Tucker v. Daly, 7 Grat. (Va.) 331.]

2. A creditor is never held to be unduly preferred by a bankrupt, unless he understand at the time, that he is dealing with the bankrupt, or with his avowed agent, for security or payment out of the funds of the bankrupt.

3. The assignee of a bankrupt has only the right of the bankrupt, except in cases of assignment or transfers, or agreements with one creditor in fraud of the others.

[Cited in Schulze v. Bolting, Case No. 12,489; Carr v. Gale, Id. 2,435; Re Wynne, Id. 18,117.]

4. The phrase "contemplation of bankruptcy" means contemplation of insolvency and total stoppage of business.

This case was adjourned from the district court into this court on account of the district judge being interested therein. The original petition in equity was in substance as follows: "Respectfully represents Henry Winsor of Boston in the county of Suffolk in said district, merchant, that on the seventh day of February, 1843, Samuel H. Babcock of said Boston, merchant, filed his petition in bankruptcy, and was declared bankrupt on the fourteenth day of April in the year 1843, and that your petitioner was afterwards duly appointed and qualified assignee of the estate of said bankrupt, and accepted that trust. That on or about the twenty-eighth day of December, 1842, the said bankrupt made or attempted to make an assignment of his goods, credits and effects, for the benefit of his creditors, and that on or about the said twenty-eighth day of December, the said bankrupt called upon one Hugh R. Kendall, of said Boston, merchant, and asked him to execute the said attempted assignment. That the said Kendall refused to do so, unless the said Babcock would pay, or cause to be paid, a certain due bill, dated January nineteenth, A. D. 1842, signed by said bankrupt, and payable to the said Kendall on demand, with interest,—said due bill being for the sum of one thousand dollars; and that the said bankrupt on or about the same twenty-eighth day of December, and for the consideration that said Kendall should sign the said assignment, furnished the money to one I. M. Smith, and caused him to pay the said due bill, together with the interest thereon, to the said Kendall, and said Kendall shortly afterwards executed the assignment. That the said payment was made by the said bankrupt for the purpose of giving said Kendall a preference or priority over the general creditors of said bankrupt. And

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

that if the said payment was not made for such purpose, it was made by said bankrupt in contemplation of bankruptcy, and the said Kendall was not a bona fide creditor or purchaser without notice. The said payment was made within two months next before the filing of the petition, upon which said Babcock was declared bankrupt as aforesaid, and the same is a fraud upon the bankrupt act of the United States passed August 19, A. D. 1841 [5 Stat. 440]. The petition prays that Kendall may be ordered and pay over to the petitioner, as said assignee, the said sum and interest so received by him, and to pay to the petitioner his costs and counsel fees in this behalf incurred, and for such further and other relief as the nature and circumstances of this case may require."

The answer of the respondent was in substance as follows: "The respondent in his answer admits, that he did on the twenty-eighth of December, 1842, and for a long time previous thereto, hold a due bill signed by the said Babcock, dated January 19th, 1842, which, from the circumstances under which it originated, was regarded by this respondent, and as he believes by the said Babcock, as a debt, which said Babcock was not only legally, but in honor bound to pay. That he was applied to some days previous to December 28th, 1842, by the said Babcock, to become a party to an assignment, which the said Babcock represented he had made for the benefit of his creditors, and to avoid all occasion of becoming bankrupt under the laws of the United States,—which this respondent refused to do. But he denies that he made any agreement to sign the same, upon being paid the amount of the said bill, and avers that his motives and reasons for refusing to execute the said assignment were, because said Babcock had not paid said bill as this respondent conceived he ought in honor to have done, and because this respondent then had a suit pending in the court of common pleas in the county of Suffolk against the said Babcock, upon the debts due him from the said Babcock, wherein he had attached said Babcock's property; and because, also, he had another suit then pending in the said court against the Dudley Woollen Manufacturing Company, upon a draft drawn by said company and accepted by said Babcock, which constituted the principal debt due from Babcock to this respondent, in which suit this respondent then supposed he had obtained some security by an attachment on the property of said company. And the respondent denies, that the said due bill was paid to him by said Smith in consideration, that he should sign the said assignment, and avers, that some days after the application to him by the said Babcock hereinbefore mentioned, to wit, on December 28th, 1842, the said Smith applied to this respondent

to purchase the said due bill, giving as his reason, that there was a difficulty in the said Babcock's family concerning said due bill, and he, Smith, wanted to purchase it for the sake of peace, (he the said Smith being, as this respondent now believes, a son-in-law to the said Babcock.) That the said Smith purchased said due bill of this respondent, giving him therefor his, the said Smith's, note for the amount due on said bill, payable in sixty days and endorsed by a good and sufficient endorser, which note was afterwards taken up by the said Smith on or about the seventh of January, 1843, upon this respondent's discounting two per cent. from the amount of the said note. And the respondent denies, that he knew at any time or now believes, that the said Smith, in purchasing said due bill, was acting for said Babcock, but on the contrary, this respondent, at the time of his said transactions with said Smith, believed and still believes, that he, the said Smith, was acting for himself. And this respondent admits, that he did afterwards execute the said assignment provisionally, and upon certain conditions, which to the best of his belief were, that those of said Babcock's creditors, who had attachments upon his property, should become parties to the said assignment within a limited time. And this respondent doth not admit, that the said Babcock gave the said Smith the money to pay said due bill, and does not believe, that said Babcock has ever paid the amount of said due bill to the said Smith, and requires the said complainant to prove the said facts, if they are material. That said Smith, as he is informed and believes, came to this respondent's store during the absence of the said respondent, a few days after this respondent had signed said assignment, and brought with him the said due bill, and left the same with said respondent's clerk, with a request that this respondent would prove the said due bill under said assignment, and receive a dividend thereon in Smith's behalf, but in his, the respondent's name, alleging as a reason, that he the said Smith did not wish to have it known that he, the said Smith, had purchased said due bill. This respondent, however, upon being informed of the said request, refused to comply therewith, and returned said due bill to said Smith. And this respondent denies that any of the transactions had between him and Smith were had for the purpose of giving him a preference or priority over the other creditors of said Babcock, and denies, that any payment was made to him by said Babcock within two months before the filing of the petition, and prays that the said petition may be dismissed, and that he may be allowed his costs and counsel fees in this behalf sustained."

Mr. Gray, for assignee.

Edward D. Sohler, for respondent.

STORY, Circuit Justice. The whole question in this case turns upon this, whether the due bill owing to Kendall was paid by Babcock in contemplation of bankruptcy, and with an intent to give Kendall a preference over the other creditors, contrary to the intentment of the second section of the bankrupt act of 1841 (chapter 9). To establish such a case, several facts must concur. The due bill must have been paid by Babcock or his agent, acting as such, out of his, Babcock's funds; it must have been in contemplation of his bankruptcy; and it must have been with a design to give a preference to Kendall.

I shall not dwell a moment upon the consideration, of what in point of law is the meaning of the words "in contemplation of bankruptcy," in the sense of the bankrupt act of 1841 (chapter 9). It has been often adjudged by this court to mean contemplation of an insolvency and inability of the debtor to pay his debts, and also the contemplation of a total stoppage and destruction of his business consequent thereon. In the former cases, arising under this same bankruptcy, (and the evidence in this case on the same points does not materially differ in its aspect,) I have had occasion to state that the general assignment made by Babcock did not, under all the circumstances, and with reference to the stipulations contained therein, constitute an act of bankruptcy, and that, as it became a nullity from the non-compliance of all his creditors with the conditions of that assignment, it might be laid out of our consideration. The very object of the payment of the present due bill, even according to the view of the case now asserted by the assignee, was to procure the assent and signature of Kendall to that assignment. His signature and assent were obtained; but it became ineffectual, because the assignment did not ultimately become a valid or operative instrument. It might, therefore, be truly said, that the object of the negotiation for, and payment of, this due bill was not to give an undue preference to Kendall in contemplation of bankruptcy, in the sense of the bankrupt act, but it was to give validity and effect to that instrument, so as to supersede the necessity of going into bankruptcy. In this view of the matter there is much difficulty in maintaining this point as propounded on behalf of the assignee. The case bears a close analogy to that of *Wheelwright v. Jackson*, 5 Taunt. 109.

But this point is the less material in this case, because the other points of the case seem to me, upon the evidence, decisive against the assignee. In the first place, it is, in my judgment, fairly made out by the evidence, and confirmed by the answer of Kendall, that the negotiation of Smith with Kendall was not for the payment of the due bill by Smith on account of or as agent of Babcock. Smith came avowedly as a friend of the family to purchase the bill on his own

account, and not to purchase it for Babcock. The due bill was, upon the representations of Smith, sold to him as a purchaser on his own account, and he gave his personal security to Kendall, by a note, with his partner as endorser for the payment thereof. Non constat, if he had come to Kendall avowedly to pay the due bill out of Babcock's funds, and on his account, that Kendall would have taken the funds, or agreed to the arrangement; for if Babcock should subsequently become a bankrupt, the transaction might be liable to be overhauled as a fraudulent preference under the bankrupt act. If, on the contrary, Smith became a purchaser on his own account, then the transaction was susceptible of no such interpretation; for it would then amount to a mere assignment or transfer of the due bill to Smith, and make him, instead of Kendall, a creditor of Babcock. Besides, Smith does not pretend that he ever told Kendall that he came to purchase for Babcock or with his funds; and Kendall had not the slightest reason, from the attendant circumstances, to believe that he did. The professed, or at least the apparent object, was to purchase the due bill on his, Smith's, own sole account, to be used by him as he should choose; and enforced or not according to his pleasure. So Barnes expressly testifies; and Kendall solemnly asserts that he sold the bill to Smith upon the faith of this statement. Then, again, it is difficult to perceive any very satisfactory evidence in the case to establish the fact, that Smith did purchase and pay for the due bill out of the funds of Babcock. In fact, he paid the amount by his own promissory note, endorsed by his partner; and this very circumstance shows, that the funds actually appropriated by him for the payment were his own funds. It is true, that he or his firm, was owing Babcock a part of the money on a due bill, and that he obtained some other funds from Leonard, and other persons, which seem to have been handed to Smith for the purpose of paying the due bill to Kendall. But the money was not, strictly speaking, so applied; and Smith (as Barnes testifies) afterwards treated the due bill, not as an extinguished debt of Babcock, but as a subsisting debt; and he requested Kendall to take back the due bill and prove it as a debt against Babcock, as if it were his own, as he, Smith, did not wish to be known in the business at all. There is nothing in Smith's deposition which can fairly be said to shake or overcome the credibility of Barnes's testimony. Babcock's testimony has been introduced into the case; and certainly it does not exactly correspond with that which, upon his examination in bankruptcy, when he applied for his discharge, he gave as to the nature and character of the transaction. He then represented, in effect, that the funds to take up the due bill of Kendall were not his own funds; but were

furnished by friends. How far that statement coincides with or contradicts his present testimony, I do not now stop to inquire. There is certainly much looseness in his testimony; and it may arise from the infirmity of his memory, without any deliberate intention to falsify the actual facts. Perhaps the different statements might be reconciled, if Babcock had been called upon to explain the apparent discrepancies. But, as my judgment in the present case does not turn upon any investigation of this sort, I am content to leave the testimony as it is.

What I do proceed upon is this: That even if Smith did actually use the funds of Babcock and with his consent, in paying the due bill; yet if Smith concealed that fact from Kendall, and Kendall, in the whole transaction and arrangement, understood from Smith that he was dealing with him as a purchaser on his own account, and not as an agent of Babcock, it is not now important either for Smith, or for Babcock, or for Babcock's assignee, to set up that concealment as a ground to recover back the money from Kendall. Kendall dealt with Smith as a principal and not as an agent. He sought no preference under the bankrupt act, and he had no means of knowing that Babcock was negotiating with him to give him any preference. To allow Kendall's title to the money under such circumstances to be impeached by Smith or by Babcock, would be in effect to enable them to perpetrate a fraud upon an innocent creditor, who supposed, and had a right to suppose, that he was making a sale to Smith, and not receiving payment from Babcock. I know of no case, where a creditor has been held to be unduly preferred by a bankrupt, unless, at the time, the creditor clearly understood himself to be dealing directly with his agent for a conveyance, security, transfer, or payment, from or out of the funds of the debtor, thus withdrawing a part of the common funds appropriated by law for the benefit of all the creditors. Payment or security by a third person out of his own funds, and not out of those of the debtor, would not fall within the predicament contemplated by the second section of the bankrupt act of 1841 (chapter 9). In general, the assignee of a bankrupt does not stand in a better predicament than the bankrupt himself, and can claim only what the latter might claim. See *Wheelright v. Jackson*, 5 Taunt. 109. An admitted exception is, where the conveyance, security, assignment, transfer, or negotiation is made in fraud of the other creditors, or is to give an unlawful preference. There may possibly be some other exceptions; but certainly this is the most prominent and important. But where the assignee seeks to recover from a creditor a sum of money, paid to him by a third person, for the debt due to such creditor by the bankrupt, it ought to appear, that the creditor knew that the payment was made out of the bankrupt's funds, or on his

account, so as to extinguish the debt, and not that the creditor was misled by such third person into the belief, that it was a purchase of the debt on his own account, and was a mere assignment to himself for his own benefit, and to be paid for out of his own funds.

My opinion, therefore, is, that the petition of the assignee is not maintainable, and that it ought to be dismissed, with costs to the respondent.

[For other cases involving the estate of this bankrupt, see Cases Nos. 696, 697, and 17,884.]

Case No. 17,887

WINSOR v. McLELLAN.

[2 Story, 492; 16 Law Rep. 440.]

Circuit Court, D. Massachusetts. Oct. Term, 1843.

INTEREST IN VESSEL — BILL OF SALE — SECURITY FOR DEBT — DELIVERY OF POSSESSION — RECORD OF MORTGAGE — ASSIGNEE IN BANKRUPTCY — STATUS.

1. A bill of sale of one half of a vessel, as collateral security for a debt, with a provision, that the mortgagors may keep possession of the vessel, and use her for their own benefit until default of payment, is valid, as an immediate conditional sale.
 2. Delivery of possession to a purchaser, of a moiety of a vessel, when in the possession of the other part-owner, is not, in general, indispensable to pass the property.
 3. As between the mortgagor and mortgagee notice to the part-owner in possession is not necessary.
 4. By the Revised Statutes of Massachusetts, it is not necessary, as between the parties themselves, that a mortgage of personal property should be recorded.
 5. The assignee in bankruptcy, except in cases of fraud, stands in no better situation than the bankrupts themselves.
- [Cited in *Ex parte Dalby*, Case No. 3,540; *Ex parte Ames*, Id. 323; *Coggeshall v. Potter*, Id. 2,955; *Sixpenny Sav. Bank v. Estate of Stuyvesant Bank*, Id. 12,919; *Yeatman v. New Orleans Sav. Inst.*, 95 U. S. 766; *Stewart v. Platt*, 101 U. S. 738; *Hauselt v. Harrison*, 105 U. S. 406; *Putnam Sav. Bank v. Beal*, 54 Fed. 578.]
- [Cited in *Brown v. Brabb*, 67 Mich. 22, 28, 34 N. W. 405, 408. Cited in brief in *Colender Co. v. Marshall*, 57 Vt. 234. Cited in *Goss v. Coffin*, 66 Me. 435; *Martin v. Rowen*, 51 N. J. Eq. 457, 458, 26 Atl. 824, 825; *Ryder v. Ryder* (R. I.) 32 Atl. 921; *Shay v. Glen*, 37 N. J. Eq. 35. Cited in brief in *Tucker v. Daly*, 7 Grat. (Va.) 331.]
6. The fact that one of the mortgagors made oath at the custom-house, subsequent to the bill of sale, that the vessel belonged to him and his partner, cannot affect the rights of the mortgagee.
 7. The bankrupts, some months previous to their bankruptcy, conveyed, by a bill of sale, as collateral security for a debt of \$2,000, one half of a vessel, of which the other half was owned by the master, and agreed to assign all future policies of insurance thereon, as further security for the same debt, which was done, it being agreed, that the mortgagors might use the vessel for their own benefit, until default of

payment. The bill of sale was not recorded. The vessel, at the time the bill of sale was made, was at sea, in the possession of the master. Between that time, and the filing of the petition for the benefit of the bankrupt law by the mortgagors, the vessel came once to Boston, the place of business and residence of the mortgagors, and twice to Bath, the place of business and residence of the master, but the mortgagees did not take possession. Five days before the filing of the petition they sent notice to the master of the bill of sale. The said mortgaged moiety of the vessel having been sold by direction of the assignee, it was held, that the proceeds of the sale should be paid to the mortgagees.

[8. Cited in *Re Jordan*, Case No. 7,529, and in *Re Wynn*, Id. 18,117, to the point that a mortgage or other conveyance made as security for a debt, evidenced by a note or bond, will operate as security for the same continuing debt, though the evidence of it be changed by renewal, or otherwise.]

This was the case of a question adjourned into the circuit court from the district court of Massachusetts. The petition set forth, that Edward and William H. McLellan, of Boston, merchants and co-partners, of whom the petitioner, Henry Winsor, of Boston, was the assignee in bankruptcy, included in the schedule of their assets one half of the brig *Napoleon*, at sea, and in the schedule of their liabilities, \$2,000 due to the trustees of Mrs. Rebecca S. McLellan, secured by a bill of sale of one half of the brig *Napoleon*. The bill of sale was made Dec. 9, 1841, and the petition of the McLellans for the benefit of the bankrupt law was filed Nov. 22, 1842. In the intermediate time, the trustees did not take possession of the vessel, but the bankrupts employed her for their own use. And on April 28, 1842, Edward McLellan made oath at the custom-house, that he and his partner, and George W. Jordan, were the owners of the brig. Jordan was the master of the vessel, and owned one moiety. The trustees, on the 8th of April, 1843, petitioned the court for leave to sell the half of the brig, which had been conveyed to them, and the sale was authorized to be made under the direction of the assignee. The sale took place, and the trustees executed a conveyance, but the collector refused to issue a new register, unless upon a transfer by the assignee. The assignee accordingly executed a bill of sale to the purchasers, and received the purchase-money, amounting to \$1,600, which sum was subject to deductions, for payments and charges, of \$133.59. The balance was claimed by the assignee to be paid into the general fund, for the benefit of the creditors.

The answer of the trustees, in addition to the above facts, set forth, that the policies of insurance, made upon the said moiety, subsequent to the bill of sale, had been transferred and made payable to them, and that it was agreed, at the time the bill of sale was given, that the bankrupts should use the vessel until default of payment. The vessel, at that time, was at sea, but between that time and the time of filing the petition

for the benefit of the bankrupt law it had been once at Boston, and twice at Bath, where the master lived. The trustees did not take possession; but, on the 17th of November, 1842, they addressed a letter to the master, notifying him of the transfer to them, and, subsequently to the receipt of that letter, the vessel was managed for the joint use of the trustees and the master. The answer concluded with a prayer, that the assignee be ordered to pay over to them the balance of the proceeds in his hands, and for costs.

Upon these facts, the question was adjourned into the circuit court.

Wm. Gray, for petitioner.

Sidney Bartlett, for respondents.

STORY, Circuit Justice. In considering the present question, it should be constantly borne in mind, that there is no provision in our bankrupt act of 1841, c. 9 [5 Stat. 440], corresponding with the provision in the statute of 21 Jac. I. c. 19, §§ 10, 11, and the more recent statutes of England, respecting reputed ownership in cases of bankruptcy. See statute 6 Geo. IV. c. 16, § 72. There is no proof, nor even any allegation of fraud between the trustees and the bankrupts, with a view to delay or defeat or defraud their creditors, in the present transaction. So that the case stands drily and nakedly upon the mere rights of the assignee, acting for the general creditors, under a general assignment in bankruptcy. Now, the principle has been long established, that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand. 2 Story, Eq. Jur. §§ 1228, 1229, 1411; *Langton v. Horton*, 1 Hare, 549, 563; *Muir v. Schenck*, 3 Hill, 228; *Murray v. Lylburn*, 2 Johns. Ch. 441, 443; *Deac. Bankr.* (Ed. 1827) pp. 320, 321, c. 10, § 3. The assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition, that the bankrupt himself held it, and subject to all the equities, which exist against the same in the hands of the bankrupt. This was clearly laid down by Lord Hardwicke in *Brown v. Heathcote*, 1 Atk. 160, 162, and has ever since been adhered to, not only in courts of equity, but also, as the case of *Leslie v. Guthrie*, 1 Bing. (N. C.) 697, abundantly shows, at law. But I need not dwell upon this point, as it came very fully under consideration in the case of *Rand v. Winslow* [not reported] at the last October term of the circuit court in Maine.

It appears from the facts disclosed by the petition and answer, that in July, 1841, the trustees had in their possession \$2,000 of trustee money, belonging to the cestui que trust, Mrs. S. M. McLellan, the wife of one of the bankrupts, and that they lent that sum to the firm of E. & Wm. H. McLellan

(the bankrupts); and on the 9th of December, 1841, upon a settlement with the firm, they took an accountable receipt from the firm for the payment of that sum and interest, on demand; and at the same time, they took as a collateral security a bill of sale of the one half of the brig Napoleon, then at sea, the one half being owned by the firm, and the other half being owned by one Jordan, who was then master thereof. And it was at the same time agreed, that the policy, then existing on the one half of the brig on behalf of the firm, should be assigned to the trustees, and also all policies on her future voyages, as collateral security for the same purposes. Assignments were accordingly made on the respective policies. No notice was given to the master of the bill of sale by the trustees, or otherwise, until the 17th of November, 1842, when a letter was written to him by the trustees, informing him of the fact, the brig then being abroad. Up to this period the firm had the possession and use of the brig in common with the master, and received the profits and earnings thereof, the brig having returned once to Boston (the place of residence and business of the firm,) and twice to Bath, the place of residence and business of the master. The firm petitioned for the benefit of the bankrupt act on the 22d of November, 1841, (five days only after the letter was written) and were duly declared bankrupts on the 3d of January, 1843.

It is under these circumstances, that the assignee, on behalf of the general creditors, insists that the want of delivery to and possession by the trustees is fatal to their claim, and that no property passed to them under the bill of sale made by the bankrupts to the trustees, one of the trustees being one of the bankrupts. In the petition, there is no allegation, that the bill of sale was made to the trustees in contemplation of bankruptcy, and therefore, that question, as well as the question, whether the conveyance was intentionally fraudulent, might properly be laid aside, as not belonging either to the allegations or the proofs in the statements of the parties. I shall, nevertheless, take occasion to speak a few words to the point, as if it were properly presented by the proceedings before the court.

The first objection to the conveyance, taken by the petitioner, is, (as has been already suggested) that there was no delivery or possession of the brig made or taken by the trustees; nor, indeed, any notice of the transfer, given to the master, until five days before the bankruptcy; so that, in point of fact, during all the intermediate period between the conveyance and the notice, the grantors had the full possession and use of the brig and of her profits. Now, in the first place, it is clear, that there can be no delivery of possession of a ship by one part owner of his share to a purchaser, when the actual possession is in another part owner;

such, for instance, as in the present case, where the master is owner of a moiety of the vessel, and in actual possession thereof. The most, that can, under such circumstances, be required is, that the master, or other part owners, should have notice of the transfer, so as to put them in a correct position, so far as their own rights are concerned. That actual possession by a purchaser of the share of a part owner is not indispensable, at least in ordinary cases, is clearly established in *Addis v. Baker*, 1 Anstr. 222, and was affirmed in the case of a mortgage of an undivided share of a ship, in the case of *Gillespy v. Coutts*, Amb. 652. See, also, *Abb. Shipp. by Shee* (Ed. 1840) pt. 1, c. 1, § 3; 2 Kent, Comm. (4th Ed.) p. 132, § 45. In the next place, however the case may be as to a subsequent purchaser without notice, or to a creditor claiming by judgment and execution, where no possession is given by the part owner, or notice of the transfer given to the other part owners in possession, (which may require the application of a different principle,) it is clear, that as between the parties themselves to the transfer, the conveyance will pass a complete and effectual title, independent of the delivery of any possession. This is a known and old rule, applicable to the sale of all personal chattels. See 2 Bl. Comm. 448. In cases of bankruptcy, (independently of fraud,) as we have already seen, the assignee can take only what the bankrupt himself could lawfully hold; and he succeeds merely to that title, and nothing more. Nay, even in cases of reputed ownership, in bankruptcy, under the provision of the statute of 21 Jac. I. c. 19, §§ 10, 11, the omission of mortgagees to take possession of a ship for nine months after the transfer to them, and leaving the ship in the intermediate time in the possession and management of the mortgagees, has been held not to affect the title of the mortgagors, as against the assignees in bankruptcy, the mortgagees having, in fact, taken possession before the bankruptcy of the mortgagors; for the court said, that the ship could not be treated as within the order and disposition of the mortgagors at the time of their bankruptcy. Lord Chief Justice Abbott on that occasion added: "The bill of sale might be void upon the statute of Elizabeth, as against creditors; but not as against the parties, who executed it; and their assignees are in this respect in no better situation." *Robinson v. M'Donnell*, 2 Barn. & Ald. 134, 136. See, also, the remarks of Mr. Justice Bailey in the same case. The case of *Briggs v. Parkman*, 2 Metc. (Mass.) 258, is a very strong authority to show, that the omission to take possession of the mortgaged premises, being personal property, and agreeing, that until condition broken the mortgagor may retain the possession and use thereof, nay, even may sell and dispose thereof, substituting other property as security, are not to be deemed per se acts of fraud upon creditors;

but the presumption of fraud may be repelled, and the conveyance held good against the general assignees under the insolvent act of 1838 (chapter 163).

But it is further objected, that, notwithstanding the formal bill of sale to the trustees, yet, taking the other papers, the receipt given by the trustees, and the order on the policies, it was not the intention of the parties, that the title should pass to the trustees, but that the bill of sale and order were to be held as collateral security, and on repayment of the debt, the "bill of sale and order for insurance shall be returned to the owners, and be null and void." It strikes me, that this is a very forced and unnatural construction of the proceedings of the parties. Their manifest object was to give collateral security to the trustees, by way of mortgage on the vessel itself, and on the policies underwritten thereon, and not merely for them to hold the bill of sale as a formal instrument by way of pledge, without giving effect to it as a conditional transfer of the property. The permission of the owners to take the profits and earnings of the vessel in the intermediate time, and until the debt was to be paid, was not inconsistent with, but in pursuance of, the original agreement. The policies were underwritten, exactly as they should be, in the name of the mortgagors, who were the general owners, subject only to the rights of the mortgagees. The subsequent change of the papers by Edward McLellan, without the consent or knowledge of the trustees, could not change their rights, even if he intended thereby to affect them, of which there is not any evidence. In short, it appears to me, that no other sensible construction can be put upon the original transaction, than to treat it as an immediate conditional sale of the moiety of the vessel to the trustees, as collateral security for the debt due to them. But, then, it is said, that if the bill of sale is to be deemed, with the accompanying papers, to have created a mortgage, (as I think it clearly did,) then it is void, because it was not recorded, as required by Rev. St. Mass. c. 74, § 5. That section provides: "That no mortgage of personal property, hereafter made, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." It may well admit of doubt, whether the statute was intended to apply to any cases of mortgages of undivided interests in personal property, of which, of course, no exclusive possession could be given to, or retained by, the mortgagee. But, assuming it to be otherwise, still the statute expressly holds such unrecorded mortgages to be valid between the parties; and the assignees in bankruptcy, as we have already seen, except in cases of fraud, take only what the bankrupt himself is entitled to.

But then again, it is urged, that the transaction is void under the second section of the bankrupt act of 1841 (chapter 9), as a conveyance made in contemplation of bankruptcy, and for the purpose of giving the trustees an undue preference as creditors. Now, this argument is mainly, if not wholly, founded upon the ground that the conveyance is not to be treated as a sale or conveyance of the moiety of the vessel to the trustees until the 17th of November, 1842 (only five days before the bankruptcy), when they gave notice to the master of the brig of their title, which notice, however, as the brig was then abroad, did not reach the master until long afterwards. But it appears to me, that the foundation on which the argument rests, utterly fails; for in the view which I take of the matter, the bill of sale took effect, as a mortgage, at the time of the execution and delivery thereof to the trustees on the 9th of December, 1841. There is no pretence to say, that at that time, either the mortgagors or the trustees contemplated any bankruptcy of the mortgagors. The notice to the master was not necessary to found a title in the trustees; but it was at most only an assertion of their title, necessary to be made for the protection of the master, and for the protection of the trustees against any subsequent bona fide purchaser or judgment creditor. The notice took effect from the time, when it was sent to the master; and the time, when it reached him, is not material, so far, at least, as the present assignee is concerned. The only remaining consideration, under any aspect of the case, would be as to the conveyance being founded in a positive actual fraud upon the creditors of the bankrupt. But this, upon the facts stated in the case, cannot be either inferred or presumed. And, indeed, as has been already suggested, no question arises under the petition and answer in the present case, either as to the conveyance having been made in contemplation of bankruptcy, or with an intent to defraud the creditors of the bankrupt.

Upon the whole, I shall direct it to be certified to the district court, upon the question adjourned into this court, that upon the facts set forth in the said petition and answer, the said one half of the said brig Napoleon, after the said Edward and W. H. McLellan were decreed bankrupts, was the property of, and should be holden by the said trustees, for the benefit of the said Rebecca McLellan, and that it was not the property of, or to be holden by the said assignee, for the benefit of the creditors of the estate of the said bankrupts.

WINSOR (PIERCE v.). See Cases Nos. 11,150 and 11,151.

WINSOR (RICHARDSON v.). See Case No. 11,795.

WINSOR (ROGERS v.). See Case No. 12,023.

Case No. 17,888.

WINSOR v. SAMPSON et al.

[1 Spr. 548.]¹

District Court, D. Massachusetts. April Term, 1853.

TRUSTEES OF VESSEL—LIABILITY FOR MASTER'S WAGES—SET-OFFS.

1. Trustees holding the title of a vessel, and controlling and managing her, for the benefit of others, are liable for the wages of the master.

2. Charges by the owners, against the master, for passage of his minor son,—for freight of a piano forte,—for board-bill paid for him,—passage of his servant,—for regulating a chronometer,—and for use of extra state rooms, considered and decided upon.

This was a libel by the master of the ship Rockland against the owners, to enforce payment of \$1761.42 wages, on a voyage round the globe, from New York to San Francisco, and Calcutta, and back to Boston. The defence was, that the respondents, Messrs. Sampson and Tappan, were not owners of the vessel, and not liable to Captain Winsor for wages; and secondly, if liable, they claimed a set-off of \$1254.71, for various items specifically considered in the opinion of the judge.

R. H. Dana, Jr., for libellant.

William Dehon, for respondents.

SPRAGUE, District Judge. The first question is, whether the respondents are liable at all for wages. They say, in their answer, that they were not owners, and made no contract with the libellant. It appears that the register and bill of sale were in their names, as sole owners; but they say that they held merely as trustees, and an indenture of trust between them and one Horace B. Tebbets, of New York, has been produced. From this it appears that they were to hold the legal title and the possession of the vessel, to appoint the master, to collect the freight at all the ports, to determine the employment of the vessel, and at the end of the voyage, to sell the vessel, and after paying all expenses, to divide the net profits of the voyage, including the price obtained for the vessel, with said Tebbets and one Ward, giving one half to Tebbets and one quarter to Ward, and retaining the balance themselves. In pursuance of this indenture, they appointed Captain Winsor, gave him his instructions, from time to time, and it was to them he rendered his accounts at the end of the voyage. As mere trustees in possession, they would in law be liable for wages, unless the master agreed to exempt them, and looked to others. It is alleged in the answer, that he contracted with, and relied upon Tebbets, but the evidence is otherwise. Further, the respondents were not mere trustees. They had an interest

in the vessel, and were trustees for themselves as well as Tebbets. On every principle, then, they must be held liable for the wages.

The remaining question is upon the claims against the master, which they present by way of set-off. They are six in number:

1st. A charge of \$475 for the passage of the captain's son. The captain had leave to take his wife with him, and this was a boy about five years old, who went with his mother. The libellant says it was verbally agreed that the boy should go with his parents, and he has interrogated the respondents on this point, under oath. They deny all knowledge of the boy's going in the vessel, and their answer is evidence, and the only direct evidence. No knowledge of his going is traced to the respondents. In this state of the evidence, the master must pay for his son's passage, and it appears that \$300 would be a proper charge.

2d. The next charge is \$100 for freight of a piano, from New York to San Francisco. This piano belonged to Mrs. Winsor, was placed in the cabin, kept open, and used by Mrs. Winsor, and other ladies who were passengers. The evidence shows that it was taken as an article of furniture, and for use and amusement, and was not an incumbrance, but conducive to the pleasure of the passengers. This item, therefore, is disallowed.

3d. A deduction of \$118.12 is claimed on the libellant's board bill, while at Singapore. The master's answer says that he was boarded at the lowest rate, and the bill was paid by the respondent's agent there, apparently without objection, and no evidence is offered to prove that the amount paid was unreasonable. This claim, therefore, is not allowed.

4th. The respondents charge \$125 for the passage of a servant to the master, from Singapore to Boston. The evidence shows that this man was an assistant steward, signed the articles, and was paid by the owners; also that it was necessary to have such a person on a ship of this size, having three cabins, and that he did steward's duty, and did not attend more on the captain and his family, than on the other passengers. This item is disallowed.

5th. The next item is a charge of \$34 for regulating the captain's chronometer at San Francisco, Singapore and Calcutta. It seems there were two chronometers on board, one belonging to the ship, and the other to the captain, and they were both regulated together. There is no evidence of the usage in such cases, and in the absence of a settled usage to the contrary, I think it reasonable that the expense of rating and regulating the captain's chronometer, where he used it for the benefit of the ship, solely, should be borne by the ship.

6th. The last item is a charge of \$300 for the use of three extra state-rooms, on the

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

passage from Calcutta. There was but one passenger, beside the captain's family, and the state-rooms in the three cabins were nearly all of them unoccupied, except by a few articles of ship's stores. The captain put several articles of his own in these rooms, with the ship's stores, but all his articles could have been stored in one room, if necessary, and were only distributed for convenience, and were not unreasonable in quantity. If there were reason to suppose that he used these rooms so as to displace freight or stores, he should be held answerable; but the evidence of both the supercargo and the mate shows, that there was no use for these rooms. It would be extremely unreasonable to charge him for them.

I shall allow the whole amount in the libel, less \$300 for the son's passage. Decree for the libellant, for \$1461.42, and costs.

WINSTON (BANK OF UNITED STATES v.). See Case No. 944.

WINSTON (CAPE GIRARDEAU & S. L. R. R. v.). See Case No. 2,390.

WINSTON (KINZIE v.). See Case No. 7,835.

WINTER, In re. See Case No. 1,057.

WINTER (GRAVES v.). See Case No. 5,710.

Case No. 17,889.

WINTER v. The HERCULES.

[Holmes, 465.]¹

Circuit Court, D. Massachusetts. March, 1875.

COLLISION—CHANGE OF COURSE.

Mere apprehension of danger, not then imminent, is not sufficient to justify a change of course by a sailing-vessel meeting a steamer under way.

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

[This was a libel for damages resulting from a collision by Joseph Winter against the steamer Hercules (Charles H. Winnett, claimant).]

J. C. Dodge, for claimant.

F. Goodwin, for libellant.

SHEPLEY, Circuit Judge. Both parties have appealed from the decree of the district court, which awarded to the libellant one-half of his damages suffered in a collision between the steamer Hercules and the Antelope, a schooner of libellant. The collision occurred near Martha's Vineyard, three or four miles north of west from the Cross Rip light-ship. The wind was blowing heavily about east-south-east, accompanied by rain. The steamer was working to the eastward about three or four miles an hour through the water. The schooner was sailing westward before the wind eight or ten miles an

hour through the water. Before either vessel changed her course in view of the pending collision, they were heading in nearly opposite directions; the schooner west by north, the steamer east-south-east one quarter east. The steamer struck the schooner about midships on her starboard side and nearly square across her. The steamer first starboarded; then the schooner, instead of keeping her course, starboarded; then the steamer changed and ported her helm. Then followed the collision. The schooner had the right of way, and was bound to keep her course. The steamer might go either side of the schooner, to starboard or port, as might be most safe. Without going into detail of the testimony, I am satisfied, upon a careful examination of the record, that if, when the steamer starboarded, she had adhered to that course without change, and the schooner had also kept her course, there would have been no collision. When the steamer starboarded, the schooner, apparently for the purpose of widening the distance between the two, also starboarded. But the steamer then changed and ported. This brought the schooner directly across the bow of the steamer. The schooner attempts to justify her change of course on the theory that it was not made until the collision was inevitable. I do not so find from the testimony. If the schooner had kept her course the probabilities are that the collision would not have taken place; that is, the correction of the mistake on the part of the steamer would not have been too late to avoid the collision if the course of the schooner had not been changed. Mere apprehension of danger does not exonerate the schooner for changing, unless the danger was imminent. It is contended on the part of the steamer that the first change of helm was corrected before it had occasioned any change in the course of the vessel. I have reached the conclusion from the testimony that the course of the steamer was changed, and that, if the order to port had been given at the time the first order to starboard was given, it would not have been too late to have avoided the collision. It is difficult to sift the truth from conflicting testimony on questions of time and distance. There are almost certain tests by which all other evidence in collision cases can ordinarily be tried in the undisputed facts of the case. Time and distance are the vital questions in this case. But looking to the facts as proved, I have reached the conclusion, not without some hesitation, that the steamer ported too late, and not until she was too near the schooner. The doubt in the district court was as to the fault of the schooner. The additional evidence before this court tends strongly to sustain the correctness of the conclusion of the district judge, holding her also in fault.

Decree affirmed, with interest and without costs after the appeal.

¹ [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

Case No. 17,890.

WINTER v. IOWA, M. & N. P. RY. CO.

[2 Dill. 487; 7 N. B. R. 289; 6 West Jur. 562; 5 Chi. Leg. News, 74; 6 Alb. Law J. 358.]¹

Circuit Court, D. Iowa. Oct. Term, 1873.

RAILWAY COMPANY—ACTS OF BANKRUPTCY—COMMERCIAL PAPER—PREFERENCE—TRANSFER OF STOCK.

1. The provisions of the bankrupt act apply to railway corporations, and if they commit an act of bankruptcy they may be proceeded against under that act.

[Cited in *Re California Pac. R. Co.*, Case No. 2,315; *Re Southern Minn. R. Co.*, Id. 13, 188; *New Orleans. S. F. & L. R. Co. v. Delamore*, 114 U. S. 506, 5 Sup. Ct. 1011.]

2. It is not an act of bankruptcy, under section 39 of the bankrupt act, as amended July 14th, 1870 (16 Stat. 276), for a railway company to suspend and not resume payment of its commercial paper for a period of fourteen days.

3. Object and effect of the said amendment of July 14th, 1870, discussed and considered.

4. An executory agreement by a railway company to transfer certificates of its stock to a creditor is not an act for which the company can be thrown into bankruptcy.

5. Effect of transfer by the company of its stock, discussed.

This is a petition for revision under the second section of the bankrupt act. Louis C. Winter filed his petition in the district court, representing that he was a creditor of the above named railway company, and charging that the company had committed certain specified acts of bankruptcy, asked that it be declared a bankrupt. To this petition a demurrer was sustained by the district court; and it is that ruling that the petitioning creditor, Winter, now seeks to have revised.

Brown & Dudley, for petitioner for revision.

O. C. Howe and Phillips & Phillips, for railway company.

DILLON, Circuit Judge. The defendant is a railway corporation, organized under the general incorporation acts of the state of Iowa, and although not material, perhaps, to the determination of the legal questions now presented, counsel admitted that no part of its road was yet in operation.

The first ground of demurrer is that the defendant is not a "moneyed, business, or commercial corporation," within the meaning of the bankrupt act, and hence the provisions of that act do not apply to it. The provisions of this act shall apply to all moneyed, business, or commercial corporations, and joint stock companies. Section 37. Except as otherwise provided, corporations are within the bankrupt act (section 48) and in my judgment the purpose of congress in the use of the language above quoted from

section 37 was to include all corporations of a private nature, organized for pecuniary profit. Instead of undertaking to enumerate by name or description the various kinds of such corporations, language broad enough to include them, and which would exclude corporations of a public, civil, or municipal character, as well as those organized purely and strictly for religious, charitable, educational, and like purposes, was employed.

Railways fall within the designation of business or commercial corporations. Domestic or inter-state commerce, as well as foreign commerce, is contemplated by the constitution, and is habitually carried on by land as well as by water. Indeed, since the general introduction of railways, it is a fact known to all that navigation by river has relatively become of secondary importance, and the inland commerce and travel of the country are largely conducted and carried on by means of railways.

The question whether railroad companies are within the operation of the bankrupt act has several times been before the courts, and so far as the researches of counsel have extended, it has been uniformly decided that they were. *Alabama & C. R. Co. v. Jones* [Case No. 126], per Woods, Circuit Judge; *Adams v. Boston, H. & E. R. Co.* [Id. 47], per Shepley, Circuit Judge; approved and doctrine reaffirmed by Clifford, Justice, in *Sweatt v. Boston, H. & E. R. Co.* [Id. 13, 684.] Concurring in the views expressed in the opinions in these cases, it is not necessary to enter into an extended discussion of the question, or to repeat the arguments by which the conclusion reached is sustained.

It has been strongly urged that the practical consequences of holding this view are so serious, involving the stoppage or interruption of the operations of the road when thrown into bankruptcy, that such a construction should not be adopted. But where the language and intent of the legislature are plain, such arguments belong not to the judiciary. When the language is doubtful and the intent obscure, it is permissible to look at consequences and guide our decision by the aid thus supplied, but such is not, in my judgment, the case with respect to the question now under consideration.

Under the laws of the state, railroads may mortgage their property, or it may be subjected to the payment of their debts by proper judicial order, and in this manner sold and transferred, and really the only question is whether insolvent railway companies shall be made to pay their debts under the collection laws of the state, or under the mode provided by the bankrupt act.

There may be practical difficulties or embarrassments in the administration in bankruptcy of a railway company, owing to the nature of the property, and this might suggest reasons to congress for excepting such corporations from the act, or for providing a

¹ [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 6 Alb. Law J. 358, contains only a partial report.]

special mode of proceeding; but it affords no sufficient grounds for a forced construction of the present statute so as to exclude such corporations from the scope of its operation.

One of the acts of bankruptcy charged in the petition is the non-payment for more than fourteen days of the commercial paper of the company, viz., two negotiable promissory notes, executed by the railroad company to the petitioning creditor. The demurrer to this portion of the petition presents the question whether the suspension and non-payment by a railroad company for more than fourteen days of its promissory notes is an act of bankruptcy within the meaning of section 39 of the act as amended by the act of July 14th, 1870 (16 Stat. 276). As thus amended, the act reads as follows: That any person residing and owing debts as specified in the act, "who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended, and not resumed payment of his commercial paper within a period of fourteen days."

As originally framed, this portion of section 39 of the act had given rise to controversy in respect to the question whether any non-fraudulent suspension by a "banker, merchant, or trader," (the only classes named,) of commercial paper, no matter how long continued, was an act of bankruptcy. Various opinions were entertained on this important practical question, and it was a question not free from doubt upon the phraseology of the original act. It was to settle this point that the amendment of July 14th, 1870, was enacted. Under the original act it is plain and undisputed that the person or corporation to be proceeded against under the clause must have been a banker, merchant, or trader. In making the amendment, congress did two things. First, it extended the provisions to "brokers," "manufacturers," and "miners," making six classes in all; and second, it provided in terms that the fraudulent stopping of payment by any person included in any one of these six classes, or the stopping or suspension and non-resumption of payment by any person included in any one of the enumerated six classes of his commercial paper for fourteen days, though not fraudulent, should be acts of bankruptcy. In other words, both clauses of the amendment extend to, and extend only to, persons belonging to one of the enumerated clauses. Mere suspension or non-payment of negotiable or commercial paper by any one else, as, for example, a farmer, or a mechanic, other than a manufacturer or trader, is not an act for which he may be thrown into bankruptcy; and, although I have read the argument in favor of the opposite view, made by a very

able and experienced bankruptcy judge, I cannot agree to its correctness. In re Hercules Assur. Soc. [Case No. 6,402], per Blatchford, J.

As a railroad company organized under the laws of Iowa is neither a banker, broker, merchant, trader, manufacturer, or miner, within the meaning of these words, as used in the bankrupt act, it follows on the supposition that the foregoing views are sound, that it cannot be proceeded against, in bankruptcy, for the mere suspension or non-payment, however long continued, of its commercial paper.

Another act of bankruptcy is alleged in the following language: "That the said railroad company, on the 7th day of August, 1872, being bankrupt and in contemplation of insolvency, did agree to issue to J. R. Mershon, its acting president, on demand, the certificates of stock of the said company, in the amount of \$4,000, with the intent to give a preference to the said Mershon, and by such disposition of its property to defeat and delay the operation of the bankrupt act."

It is perhaps only necessary to observe that an unexecuted agreement by a company to transfer certificates of its stock is not an act for which it can be forced into bankruptcy.

Other acts of bankruptcy are charged to the effect that the company had actually transferred to creditors certificates of its stock, with intent to defeat or delay the bankrupt act by thus giving such creditors a fraudulent preference; and counsel have desired an opinion on the sufficiency of these counts of the petition.

The allegations are not sufficiently specific to warrant the expression of any very definite or final opinion upon the effect of the act charged. The rights of the stockholders are always subordinate to the rights of creditors, and it is difficult to see how the issue at par of the stock of the company not theretofore issued, in payment of the bona fide debts of the company could operate to the prejudice of creditors, or work a fraud upon them.

If, however, the stock was owned by the company as paid up stock lawfully acquired by it, it would probably be then regarded as ordinary property, and if disposed of by the authorized act of the corporation to creditors under circumstances to give them an illegal preference, no reason is perceived why it would not be an act for which the corporation could be proceeded against under the bankrupt law.

The order sustaining the demurrer to the petition of the creditor will be affirmed, and the cause remanded to the district court for further proceedings not inconsistent with this opinion. Affirmed.

Case No. 17,891.

WINTER v. LUDLOW.

[16 Leg. Int. 332, 340, 348; 1 3 Phila. 464.]

Circuit Court, E. D. Pennsylvania. Oct., 1859.

EQUITY JURISDICTION — NONJOINDER OF PARTY —
SUPPLEMENTAL BILL—SUBPENA—SERVICE
IN DIFFERENT DISTRICT.

1. The act of congress of 28th February, 1839 [5 Stat. 321], does not enable the circuit courts of the United States to make a decree in equity which may affect a resulting interest in the subject of controversy vested in a party not before the court.

2. Where an objection for the want of such a party has been sustained at a final hearing, the court, instead of dismissing the bill, usually retains the cause, in order that he may be made a party.

3. Where a person is a necessary party, in consequence of an act performed by himself after the commencement of the suit, the proper proceeding to bring him into court, is an original bill, in the nature of a supplemental bill.

4. Such a proceeding, though supplemental as to the former parties, is original as to the new party; and, though the former suit was commenced before the passing of the act of 4th May, 1838 [11 Stat. 272], may, if afterwards instituted, be within the meaning of that law, a suit brought after its enactment.

5. Under that act, and under the previous law and practice of the circuit courts in equity, a subpoena issued in such a case out of the circuit court, for either of two districts of a state, may be served in the other district of the same state.

In equity. After a final hearing, the decision of this cause was prevented by an objection that a decree could not be made until a person of the name of S. B. Ludlow should have been brought into court as a party. The question afterwards arose whether a subpoena issued by this court against this person, who was a resident of the Western district of the state, could be served upon him in that district. Upon the questions whether he was a necessary party, and whether he could thus be served with process, the opinion of the court was as follows:

CADWALADER, District Judge. S. B. Ludlow is not a person against whom, as a party, an enforcement of any decree by judicial process would be necessary. The question whether he was a necessary party, depended, therefore, upon the species of necessity which is determinable with a sole reference to the right of contestation recognized by courts of equity as belonging to every person who has an interest in the subject of controversy. The act of 28th February, 1839, provides that where, in any suit at law, or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within, the district where the suit is brought, or shall not voluntarily appear thereto, it shall be

¹ [Reprinted from 16 Leg. Int. 332, 340, 348, by permission.]

lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer; and the nonjoinder of parties who are not so inhabitants, or found within the district, shall constitute, no matter of abatement, or other objection to said suit. Under this act, a decree might have been made, without S. B. Ludlow as a party, so far as the amounts for which the original defendants were pecuniarily liable to the draftholders were concerned. But such a decree, if these defendants were still insolvent, might have been of little avail to the complainants. The question principally considered, therefore, has been whether under the act, or independently of it, the objection could be disregarded as to the fund in the hands of the receiver. Of this fund the resulting ownership is in S. B. Ludlow, who, if the complainants' case were fully sustained, has an option to redeem the fund by payment of the drafts in question from other sources. Independently of this right, he has an interest entitling him to contest every allegation of the bill on which a decree in favor of the draftholders might be founded, and to avoid, if he can, the effect of the complainants' allegations, by introducing new matter. The act of 1839 does not sanction a decree that may affect such an interest unless its proprietor is before the court as a party. *Shields v. Barrow*, 17 How. [58 U. S.] 130, *Coiron v. Millaudon*, 19 How. [60 U. S.] 115, and *Green v. Sisson* [Case No. 5,768], show that the present case, as to the fund in the receiver's hands, must, therefore, be determined independently of that act.

In the circuit courts of the United States, in consequence of "the peculiar structure of their limited jurisdiction over persons," the general rule of equity practice, that all persons interested shall be brought in as parties, has not been applied without some qualification. Its unqualified application, in cases not within the act of 1839, would often divest these courts of their jurisdiction as it is defined in the constitution and acts of congress. Therefore, if a plaintiff has done all that lies in his power to bring every person interested before the court, a decree upon the merits may be made, though an interest exists in some person whom, as the resident of another state, the process of the court cannot reach, if the case may be completely decided as between the parties in court. But this relaxation of the rule has been admitted only where "the right of the party before the court did not depend upon the right of the party not before the court; each of their rights stood upon its own independent basis; and the ground upon which it was necessary, according to the general principle, to have both before the court, was,

to avoid multiplicity of suits, and to have the whole matter settled at once." No exception from the rule has ever been allowed where the rights of the parties before the court, are not separable from, and independent of, the rights of the person who is not made a party. In such a case there can be no adjudication affecting the subject. This appears from the case of *Mallow v. Hinde*, 12 Wheat. [25 U. S.] 197-199, cited in *Shields v. Barrow* [supra], and in other decisions which might be mentioned.

According to these rules of decision, the objection of the want of S. B. Ludlow as a party prevented a decree from being entered in favor of the complainants. For any reason other than to facilitate an appeal from a decision in support of this objection, the court was not willing to dismiss the bill hastily upon the objection. As between the complainants and the original defendants, this fund had been rightly taken into the custody of the court for the purpose of preventing its malappropriation. There was no want of jurisdiction between these original parties; and at the stage of the cause at which the receiver was appointed, the objection of the want of other necessary parties would not have prevented his appointment. See [*Mallow v. Hinde*] 12 Wheat. [25 U. S.] 198; 2 Russ. 149, 152; 3 Hare, 62, 63. It might then have been expected that S. B. Ludlow, when apprised of the proceeding, would become a co-plaintiff. If, in an ulterior stage of the proceeding, the court found itself unable, without having him before it as a party, to make a decree upon the merits, the suggestion of the difficulty was by parties who did not support the objection upon any equity of their own. Whether a decree of dismissal could have been made at the instance of these defendants, without some provision for the future security of the fund in court, is a question which it was not necessary immediately to decide. The fund could not be restored to them, to be handed by them to Beebee & Company, under the wrongful acts of appropriation which have been mentioned, without permitting a palpable violation of honesty. Certainly, no decree, other than one in favor of the craft holders, would have been proper while there was any probability that, if the cause were retained, the impediment in the way of such a decree on the merits might be removed. In the above cited case of *Mallow v. Hinde*, an injunction against proceeding under judgments at law had been granted in an early stage of a suit in equity, in which the objection of want of parties finally prevailed. The necessary parties who could not be served with process were named Taylor and the Beards. The supreme court said: "We have no doubt the circuit court had jurisdiction between the complainants and the defendant Hinde, so far as to entertain the bill, and grant an injunction against the judgments

at law, until the matter could be heard in equity. And if it had been shown to the circuit court, that from the incapacity of that court to bring all the necessary parties before it, that court could not decide finally the rights in contest, the court, in the exercise of a sound discretion, might have retained the cause, and the injunction, on the application of the complainants, until they had reasonable time to litigate the matters of controversy between them and Taylor and the Beards in the courts of the state, or such other courts as had jurisdiction over them; and if then it was made to appear, by the judgment of a competent tribunal, that the complainants were equally interested with the rights of Taylor, the trustee, and the cestuis que trust, * * * the circuit court could have proceeded to decree upon the merits, * * * Such a proceeding would seem to be justified by the urgent necessity of the case, in order to prevent a failure of justice." [*Mallow v. Hinde*] 12 Wheat. [25 U. S.] 198, 199.

The court suggested its readiness to dismiss the bill without prejudice, founding the dismissal upon the want of S. B. Ludlow as a party, if such a dismissal would expedite an appeal from such a decision of the point. But the complainants' counsel intimated no desire of an immediate decision for this purpose. The cause was retained, therefore, with a suggestion, however, from the court, that perhaps it could not be thus retained indefinitely. The practice in England, as Mr. Daniel states it on the authority of 2 Atk. 14, 3 Atk. 111, and 5 Brown, Parl. Cas. 504, is, not to dismiss a bill for want of parties immediately, when the objection is sustained, but to order the case thus to stand over. In *Herndon v. Ridgway*, 17 How. [58 U. S.] 425, a cause appears to have been retained twelve months before dismissal for want of parties upon motion in an earlier stage of the proceedings.

At this period the belief was that S. B. Ludlow, as a citizen of California and resident of that state, was not amenable to the process of the court. He had, however, as the complainants allege to have been afterwards ascertained by them, become, in the meantime, a citizen of Pennsylvania, by having resumed his residence in the state, but in the western district. The complainants have since adopted measures for making him a party. An objection to the sufficiency of these measures for their intended purpose has been interposed. It is made, not on his own part, but on that of the original defendants. Nevertheless, it must be considered, so far as it involves the question whether he has been effectually made a party in the cause.

The complainants appear to have assumed that, as to S. B. Ludlow, the necessary proceeding is for the simple addition of a party by way of amendment. This is a mistake. The foundation of the right of suit in this

case is the appropriation made on the 1st September, 1851, by the original defendants. But S. B. Ludlow had, as we have seen, a right of ratifying this act so as to make it his own. His letter of 14th October, 1851, which appears to have been his first adoption of it, was not written until after the original bill in this case had been filed. If this letter had not operated as a ratification, it would have constituted in itself a sufficient independent appropriation for the security of some, if not of all of the draft-holders. Regarded as a ratification, its effect was to modify materially the character of the interest which had previously been equitably vested in the draft holders under the appropriation, as an act of the original defendants alone. Until thus ratified, it had taken effect only as the declaration of a trust attaching to these defendants' own interest in the ultimate proceeds of the remittances in their hands. It operated afterwards as an assignment of the immediate property in the remittances themselves upon a direct trust for the security of the draft holders. Even if the necessity for the proceeding against S. B. Ludlow had not, in part, arisen thus from a material occurrence happening after the filing of the original bill, he could not regularly have been brought in as a party by way of simple amendment in so late a stage of the cause. When a cause, after evidence taken or a master's report made, has been heard upon a bill, answer and replication, a new party who might, in an earlier stage, have been added by amendment, cannot regularly be brought in otherwise than by supplemental bill. But, a bill simply supplemental, or a supplemental bill in the nature of an amended bill, is a proceeding essentially different from that which must be instituted where parties have acquired, as the complainants had here acquired, a new or modified equitable or legal interest in the subject of litigation after the commencement of the original suit, or where the relation of defendants to the subject of controversy may be determinable, in part, by the effect of an occurrence happening—or as in this case, an act performed—since its commencement. Such a new proceeding may, according to the circumstances of different cases, approximate, in its character, in various degrees, to that of an original bill; and so far as a new party is concerned, may, sometimes even become a bill entirely original. In 1 Eq. Cas. Abr. 2 (B) pl. 1, reasons are given for the rule, which was recognized nearly two centuries ago, that a devisee cannot bring a bill of revivor, for want of privity, but must bring his original bill. When a new party is to be added in respect of such an interest as was in question in the present case, and the effect of the proceeding against him depends, or may depend, upon the effect of an act which, like S. B. Ludlow's ratification

of the paper in question, has occurred after the former suit was brought, the bill, though supplemental, as to the former parties, is, as to him, an entirely original bill. This is distinctly apparent in Vice Chancellor Shadwell's opinion in *Woods v. Woods*, 10 Sim. 210, 213, a case which, much less than the present, required such a decision. He founded his opinion upon texts of Lord Redesdale's treatise which he quoted. The following additional passages may be cited from the 4th edition of the treatise. On pages 72, 73, 98, and 99, Lord Redesdale specifies cases in which "the suit cannot be continued by a bill of revivor, and its defects cannot be supplied by a supplemental bill; but by an original bill in the nature of a supplemental bill the benefit of the former proceedings may be obtained." He says (page 99): "This bill, though partaking of the nature of a supplemental bill, is not an addition to the original bill, but another original bill, which, in its consequences, may draw to itself the advantage of the proceedings on the former bill." He had on pages 63 and 64 defined cases in which parties to the suit are able to proceed in it to a certain extent, though, from an event subsequent to the filing of the original bill, the proceedings are not sufficient to attain their full object, as when the subsequent event gives a new interest in the matter in dispute to any person not a party to the former bill, or a new interest to a party. He observed, in effect, that in such cases, the defect may be supplied by a bill which is usually called a supplemental bill, and is, in fact, merely so, with respect to the rest of the suit, though with respect to its immediate object, and especially against any new party, it has also, in some degree, the effect of an original bill. He says on pages 72 and 73: "There seems to be this difference between an original bill in the nature of a bill of revivor, and an original bill in the nature of a supplemental bill. Upon the first, the benefit of the former proceedings is absolutely obtained, so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause; and if any decree has been made in the first cause, the same decree shall be made in the second. But in the other case, a new defence may be made; the pleadings and depositions cannot be used in the same manner as if filed, or taken, in the same cause; and the decree, if any has been obtained, is not otherwise of advantage than as it may be an inducement to the court to make a similar decree." This passage was commented upon by Lord Eldon, 9 Ves. 54, 55, in the case of a tenant in tail, who, upon the death of a preceding tenant in tail party to a suit in equity, succeeded to the right of suit, not as heir of the former party, but as remainderman, "claiming," as Lord Eldon expressed it, "by

force of a new limitation, and not by succession." He thought the right of such a party to the benefit of the former proceedings, including the depositions, dependent upon such order as the court might make upon a view of the circumstances of the case. See, also, 13 Sim. 287, 288; 2 Hare, 95, 96. In the case in 10 Sim. from which Vice Chancellor Shadwell's opinion has been quoted, a bill was filed against a trustee with power to sell, and a purchaser from the trustee, to set aside the purchase on the ground of fraud. The purchaser, after filing his answer, died. The plaintiff then filed against his devisees the bill which Sir Lancelot Shadwell denominated original as to them, though supplemental as to the trustee. The question was, whether the insertion by the pleader, in the latter bill, of nearly the whole of the contents of the original bill, was, or was not, according to the rules of equity practice, objectionable. It would have been objectionable, if the proceeding in question had been, as to the new parties, a continuance of the original proceeding. The vice chancellor decided that it was not objectionable, because the suit, as to them, was an entirely new one. It was, he thought, not less a suit newly brought as to them because the former proceeding was continued against the original parties. In our practice, a supplemental bill which, as to a new party, is an original bill, would no doubt be sustained if references to the contents of the original bill on file were so made as to incorporate the parts referred to, without repeating them at length. In the case which has been cited, the decision was, not that they "must," but that they "might" be thus repeated.² The omission to repeat them would not render the substantial character of the proceeding less that of a suit newly brought against such a party.

The case thus decided was not one in which the point arose, as it here arises, upon an act of the new defendant himself, performed after the commencement of the original suit. The present case is, therefore, even more clearly, that of a new suit against S. B. Ludlow, in respect of his act of ratification, than the case decided by Vice Chancellor Shadwell. The proper character and form, in this respect, of a proceeding for the purpose of bringing in S. B. Ludlow as a party, having been thus determined, we may, before considering further the sufficiency of the particular measures which have been adopted for the purpose, inquire whether the process of the circuit court for this district of the state, can, in any mode, be executed for the purpose, in the other district.

The compulsory exercise of the jurisdiction of the courts of the United States, through the execution of process by the marshals of

the respective districts, may, where a state has been divided into two or more districts, depend upon the division of the state in which a party resides, or may be served with process. The marshal, where his authority has not been, for special purposes, enlarged by particular legislation, can "execute throughout the district" for which he has been appointed, all such lawful precepts issued under the authority of the United States as may be directed to him; but cannot go out of his district. The occasional consequent limitation of the exercise of the jurisdiction of the circuit courts is, however, not a limitation of the jurisdiction itself. This jurisdiction of the circuit courts never depends upon the district of a state in which one of her citizens resides or may be found. The jurisdiction, as to all persons, except aliens, depends upon citizenship alone of the respective states. In the present case, therefore, the question is not of jurisdiction, but of its exercise. See [*Gracie v. Palmer*] 8 Wheat. [21 U. S.] 699; [*Harrison v. Rowan*] [Case No. 6,140].

Under acts of congress now in force, there are states of which each constitutes a single judicial district. The other states are divided, each into two or more districts. No state is divided into districts which are in different circuits; and no district is composed of parts of any two states. Under the judicial system of the United States, the relations, within a state, of two districts into which it has been divided, are, for many purposes, different from the relations of either or both to the district of any other state. The differences depend as well upon considerations of uniformity in the exercise of jurisdiction, as upon those of the separate sovereignties of the several states, which require, for the one case, provisions not needed for the other. For some purposes, the several districts of a state are little else than divisions of a district composed of the entire state.

The general motives and purposes of the series of statutes which have organized the system, and regulated the course of procedure under it, have been consistent and uniform. The act of 13th February, 1801 [2 Stat. 89], by which the courts were temporarily re-organized, should not, however, be regarded as one of the series. If a deviation, or tendency to deviate, in some particulars, from their otherwise uniform policy may be detected in certain provisions of this act, the extreme shortness of the time during which it was permitted to remain in force, and the complete restoration of the previous system effected by its early repeal, furnish sufficient reasons to dismiss it from consideration under this head, and render any recurrence to the well known historical causes of its repeal unnecessary. The judiciary act of 1789 [1 Stat. 73], contained peculiar provisions as to Kentucky and Maine. The provisions have ceased to be in force; but their

² Since the decision the practice in England has been modified by statute and by orders in chancery.

former motives require explanation. Kentucky, though a part of Virginia, was, under the provision in the constitution for the admission of new states, on the very point of becoming a separate state. As to her, the legislation was for her prospective condition of a state. Maine, though a part of Massachusetts, was territorially detached. So far as the course of procedure might be concerned, she was to be treated as a separate jurisdiction. In order that crossing and recrossing the intervening state of New Hampshire, in the service of process, might be avoided. This act made Kentucky and Maine each a separate district. Neither of these two districts was made a part of any judicial circuit. The act conferred the jurisdiction of a circuit court upon the district court of each of them, so far as this could be done without making it a circuit court. Eleven other judicial districts, created by the act, were composed, each, of one of the eleven states which had then ratified the constitution. These eleven states, as districts, were divided into three circuits, each composed of two or more such states as districts. The two other original states having afterwards ratified the constitution, each of them was, in the year 1790, made a district, and annexed to one of the three former circuits. In 1792, under an act passed in 1791 [Id. 189] Kentucky was admitted as a state, without any immediate change in the provisions, concerning her, of the act of 1789. Vermont, having also become a state, was, in 1791, made a district, and annexed to one of the original circuits. There thus were sixteen judicial districts. Each of the fifteen states constituted an entire district, except Massachusetts, whose detached territory, constituting a separate district, was not a division like any of the divisions of states into districts which were afterwards made.

Lest a doubt should arise whether, under this organization of the courts of the United States, their process might not, in certain cases, run beyond their jurisdiction, the act of 1789, provided, or as Judge Washington says, "declared," that no civil suit should be brought before either of the said courts against an inhabitant of the United States, by any original process in any other district than that in which he is an inhabitant, or in which he shall be found at the time of serving the writ. In the reported cases, the effect of this enactment has been considered with a sole reference to the constructive, or actual service of process beyond the limits of the state, as well as district, for which the court issuing it was held. These cases recognize, as independent of the enactment, the rule that a controversy is not cognizable by a tribunal which has jurisdiction of neither the thing nor the person against whom proceedings are directed. They regard the prohibition in the act as a measure of precautionary legislation to prevent a departure

from this rule in the procedure of the courts of the United States. *Toland v. Sprague*, 12 Pet. [37 U. S.] 300; *Piquet v. Swan* [Case No. 11,134]; *Ex parte Graham* [Id. 5,657]; *Allen v. Blunt* [Id. 215]; *Day v. Newark Co.* [Id. 3,685].

A suit in equity, in which the original process is a writ of subpoena to appear and answer, was, of course, included in this prohibition. In the introduction to *Crompton's Practice*, published three years before the act was passed, this writ, as used on the equity side of the English court of exchequer, in imitation of the course of proceeding in chancery, had been denominated "an original process in a civil action." It was perhaps the original process as to which the precaution of such an enactment was, most of all, necessary. As a process directed immediately to parties defendant, it differs from the original process in suits at law, which is directed to the marshal, sheriff, or other local officer by whom it is to be executed. In consequence of this difference from process ministerially directed, it was, at one time, supposed in England that service of a subpoena upon a defendant in Scotland, or even beyond the four seas, if personally made, would be sufficient. 2 Madd. Ch. Prac. (2d Ed.) p. 199. The opinion was apparently sustained by reported cases. But upon examination of the registrar's book, it was afterwards discovered that these cases had been misreported. A service of the subpoena made beyond the jurisdiction of the court which issues it, except in modes, and under circumstances in which it has, from time to time, been authorized by statutes, is now regarded in England either as an absolute nullity, or as an insufficient foundation for any process of contempt for non-appearance. 2 Sim. 544; 4 Paige, 429; 1 Moll. 244, 245; 1 Hogan, 79, 131; 6 Bl. & Bl. 824, 825. And see the reports of the last case in 2 Jur. (N. S.) 787, and 36 Eng. Law & Eq. 179. The same rule now applies as to service of the writ in Jersey, Guernsey, and the other Norman isles which are under British dominion, but in which English laws are not in force, and the jurisdiction of English courts is not exercisable. *Fernandez v. Corbin*, 2 Sim. 544. See 4 Inst. 286; 11 Exch. 64, 67, 68. A case reported as having occurred in the year 1781, shows, however, that at the date of the act of 1789, there was in England a contrariety of opinion upon the general subject. 2 Dick. 587.

While every state, except Massachusetts with reference to Maine, constituted still a single entire district, the act of 2d March, 1793, § 6 [1 Stat. 335], enacted that subpoenas for witness required to attend a court of the United States, in any district, may run into any other district, provided that, in civil causes, the witnesses do not live out of the district at a distance greater than one hundred miles from the place of holding the court. This, it is believed, is the only law

of the United States which, for any purpose whatever, authorizes any process issued on behalf of a private party to cross the line of a state. By an act of 9th June, 1794 [1 Stat. 395], "the state of North Carolina" was "divided into three districts, in which the district court of the said state" was to "be held at such times and places as" were "already ascertained by law" for the stated sessions of the court. The act defined the territorial extension of the respective districts. It created no new or distinct court. The judge, clerk, and marshal, a single officer of each denomination, retained respectively their former positions for the whole original district, of which the so called new districts were thus divisions. An act of 1797 [Id. 517] reunited them as a single district; but an act of 29th April, 1802, again divided the state into three such districts or divisions. The same act of 29th April, 1802 [2 Stat. 156], divided Tennessee which had, in the meantime, been admitted as a state, into two districts. The court of each district was to be held by the judge of the former district in whose office no change was made; but the districts were not the less distinctly organized with a different clerk, marshal, and attorney of the United States for each. The subsequent acts as to Tennessee prior to one of the year 1822 which will be particularly mentioned under a distinct head, require no citation. An act of 9th April, 1814 [3 Stat. 120], "for the more convenient transaction of business in the courts of the United States within the state of New York," divided that state into two districts. But there was no marshal in the state other than the former one officiating under his previous commission, until the 3d March, 1815 [Id. 235], when an act authorizing the appointment of a marshal for the Northern district impliedly limited the official character of the former incumbent and his successors to that of marshal for the Southern district. By an act of 20th April, 1818 [Id. 462], Pennsylvania was divided into an Eastern and Western district each separately organized, with a judge, district attorney, and marshal of its own; and by an act of 4th February, 1819 [Id. 478], Virginia was divided into two similar districts. These respective acts conferred upon the district court of the Western district of each of the two states, in addition to the ordinary jurisdiction and powers of a district court, the jurisdiction of all causes, except appeals and writs of error, cognizable by law in a circuit court, subject to writs of error in modes respectively provided. The law dividing Pennsylvania contained an enactment in the words: "All actions, suits, process, pleadings, and other proceedings of a civil nature, except in cases of appeals and writs of error, commenced and pending in the district or circuit court of said district of Pennsylvania, in which no verdict shall have passed, or

plea to the merits shall have been decided, and which, by law, should have been or commenced in said district court of said Western district, if the same had been had or commenced before the passing hereof, and where the parties shall not otherwise agree, shall be and hereby are continued over to the district court of the Western district established by this act, and shall there be proceeded in with like effect and in the same manner as if originally had or commenced therein."

No other state had been divided into districts when the supreme court, in February term, 1822, under the authority of the act of May, 1792, § 2 [1 Stat. 276], prescribed "rules of practice for the courts of equity of the United States." A comparison of the acts which had thus divided five of the states, indicates that there had not been any uniform system of legislation on the subject. The general purpose of these acts, indeed their sole purpose, had been a convenient partition of the judicial business within the respective states. An extinction of any part of the former business of the courts was not intended. So far as it had occurred indirectly through the provisions of the acts, it was a result of defective legislation. The result, perhaps, may not have been produced at all in North Carolina, where one marshal still officiated for the whole state. However this may have been, the result in New York, Pennsylvania, and Virginia, was, that in suits at law, as the process could not be directed otherwise than to the marshal of the district in which it was issued, it could not be served in another district of the state. Where the jurisdiction existed, its exercise was thus prevented in cases in which the defendants, though citizens of the state, did not appear, and could not be served with process in the district. For such cases, a partial remedy of this evil was provided by the above mentioned act of 1839, and a complete remedy by an act of 4th May, 1858 [11 Stat. 272], which will be mentioned hereafter.

In the case of a subpoena to testify, the act of 1783 had been intended merely to sanction crossing the line of a state for the purpose of service of the writ upon a witness not living more than one hundred miles from the place of trial. After certain states had subsequently been divided into districts, the act, of course, authorized the service of it upon such a witness beyond the line of the district, but within the limits of the state in which it was issued, if a legislative authority for such a service of it was required. But in the case of a witness living within the state, more than one hundred miles from the place of holding the court, who has been served within the state, but out of the district, though service of the subpoena should be deemed regular, there cannot be an attachment if he disobeys his

mandate. Whether the service of the subpoena would be deemed regular or not is, therefore, a question of little, if any, practical importance, and one which, in practice, can scarcely arise.

But the case of a subpoena to appear and answer in an equity is, in this respect, different in the courts of the United States. The difference has existed since the adoption of the rules of 1822, if not from an earlier period. The effect of the prior legislation which has been mentioned, upon the case of defendants in a suit in equity, citizens of the same state, but not residing or found within the same district of the state, has been different from its effect in suits of law. The writ of subpoena to appear and answer in equity, as process directed, immediately to the defendants themselves, has already been distinguished from original process at law. The subpoena differs in like manner from the subsequent processes of contempt for not appearing in obedience to its mandate, or for not answering after appearance. These processes, of which the attachment is the first, are directed in England to the sheriff or other local officer. A marshal of the United States cannot execute one of these processes beyond his district. But it by no means followed that the process of subpoena, when issued by the circuit court for one of the districts of a state, could not, in any case, be served in another district of the same state. Until the promulgation by the supreme court of the rules of 1842, this process might have been served by any person. The rules of 1822 had not required that it should in any case be served by a marshal. The 8th of those rules merely required that it should be executed by a sworn officer, or that affidavit of the service of it when executed by any other person should be made. The 15th of the rules of 1842 is that "the service of all process, mesne and final, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case, the person serving the process shall make affidavit thereof." The subpoena, when there is no special order of the court, is under this rule, in substance and effect, process directed to the marshal, but it is not in form directed to the marshal. Other process is directed to him, and cannot be directed, even by the court's order, to any other person, except in the case in which he or his deputy is a party, as provided by the act of 1789. The distinction between such other process and the subpoena to appear and answer is recognized in the rule of 1842, which does not limit the court's power to direct that the subpoena shall be served by another person to this case alone in which the marshal is a party. This power, under the rule, is exercisable, therefore, whenever its exercise may, in the opinion of the court, promote the ends of justice, conformably to the rules

prescribed by congress in organizing the courts and regulating their procedure.

We have seen that in England the service of such a subpoena out of the realm is not regarded as effectual, because the writ cannot run beyond the limits of the jurisdiction. But the process of subpoena always ran, throughout the realm, into its territorial divisions, in which ministerially directed processes of the courts of chancery, including the processes of contempt, could not be executed by any local officer to whom they might have been addressed. The subpoena was the former process to bring in a party to answer a charge before the king in council (see Hale, Jur. H. L. pp. 7, 44), and was, for some remedial purposes, a usual process of the court of chancery as early as the reign of Edward III., when the jurisdiction of the court was beginning to show traces of a partial independence of that of the council. See the records in 1 Rolle, Abr. 372. The present equitable jurisdiction of the court, if not that which was thus exercised at that period, originated in it; and the process was indubitably the same. If a question could have arisen as to the propriety, there could be none as to the power of sending this original process into any part of the realm. See 2 Burrows, 856. Chief Baron Gilbert (Forum Rom.) appears to have thought that the subpoena to appear and answer had been adopted from the common-law process to bring in a witness to testify. The subpoena to testify, like the subpoena to answer, cannot be served beyond the jurisdiction of the court which issues it. But it runs into every part of the territory which is within the court's jurisdiction. Thus, in Pennsylvania, when it issues from one of the courts to the respective counties, it runs into every county of the state. 2 Serg. & R. 349.

The distinction between the process which is directed to a local officer, and the process of subpoena directed to the party, has been exemplified in England in the case of a defendant residing in one of the counties palatine. The peculiar jurisdiction of the court of equity of the palatinate is exercisable only "between parties dwelling within the same, and for lands there, and for other local matters." Hales v. Daniel, Nels. Ch. 67, 68; 1 Cas. Ch. 41; Moor v. Somerset, Nels. Ch. 51. Thus defined, it is an exclusive jurisdiction. But if the suit is not of a local nature, or if any one party resides elsewhere, or if complete justice cannot, for any other cause, be rendered in that court, the court of chancery of England, or the court of exchequer on its equity side, has the jurisdiction. The legal presumption is always in favor of the jurisdiction of the superior court until a case has been shown, upon plea, to be exclusively cognizable, and sufficiently remediable, by the local court. A subpoena to appear and answer in an equity suit in chan-

cery, or in the exchequer, may, therefore, be served in the county palatine. *Cheetham v. Crook*, McClel. & Y. 307; *Egerton v. Derby*, 4 Inst. 213, 12 Coke, 114; *Edgworth v. Davis*, Nels. Ch. 66; *Owen v. Holt*, Hob. 77; *Ld. Redes. Tr.* (4th Ed.) 224, 225, and the cases there cited. But independently of the statute (27 Hen. VIII. c. 24, § 3) and some other acts of parliament, the court of chancery, if the defendant had not appeared, could not have issued an attachment or other process of contempt to be executed within the palatinate. That act provided that, after a day named in it, all process in every county palatine should be made in the name of the king by the person having the royalty, and should be tested in the name of such person. Under this enactment, the process could not regularly be issued out of the chancery in the name of the king, directed to the sheriff of the county palatine. The practice was to issue out of the chancery of England a writ in the name of the king, directed to the chief judicial officer³ of the county palatine, requiring him, under the seal of the county, in the name of the king, to command the sheriff of the county to attach the defendant. See *Lord Cholmondeley's Case*, cited by *Lord Kenyon* in 6 Durn. & E. [6 Term. R.] 73. If the writ were addressed directly to the sheriff of the county palatine, it would, on motion, be quashed. *Bradshaw v. Davis*, 1 Chit. 374. And see *Bracebridge v. Johnson*, 1 Brod. & B. 12. The effect of British statutes of the present century has been to alter this practice as to the palatinates of Durham and Chester. But it was followed as to the duchy of Lancaster after their enactment. *Lord Kenyon* thought that so soon as the writ of attachment, properly tested, had been made out in the county palatine, and been delivered there to the sheriff, he became responsible directly to the court of chancery for his acts and omissions under it. The practice in the chancery, when obedience by the sheriff is to be enforced, is, however, to make an order upon the judicial officer of the palatinate to return the writ directed to him, and afterwards to make an order upon the sheriff of the county palatinate to return the second writ.

In England these distinctions between the process of subpoena and processes of contempt have been matters rather of form than of substance. Judgment that the bill be taken as confessed cannot there be entered until the defendant, after appearance, has been proceeded against as in contempt for not answering. Consequently, the question of the regularity of the place of service of the subpoena has usually arisen upon a

subsequent application for an attachment, when it has, for practical purposes, been resolved into a question whether the attachment could be executed there. If it could not, the regularity of the service of the subpoena had usually been a point of no practical importance. But in the courts of the United States, a different practice, which had prevailed in some of the states before the judiciary act of 1789, and had been followed under it in some of the circuits, was established on a uniform footing for all of them by the rules of 1822. According to this practice, if the defendant did not appear and file his answer within a prescribed period after the proper day for his appearance, the complainant, at his option, instead of proceeding by attachment, might "proceed to take his bill for confessed," or he might have a general commission to take depositions, and proceed to a hearing, as if there had been an answer and replication. The rules of 1842, omitting the latter alternative require that, at the bottom of the subpoena, shall be placed a memorandum that the defendant is to enter his appearance on or before the return day, "otherwise the bill be taken pro confesso"; and provide for the entry of an order that it be so taken if he do not answer within a prescribed period. The judiciary act of 1789 would thus have given cognizance of the present case to this court; and the acts which have since divided the original district have neither taken the jurisdiction away, nor prevented its exercise. According to the practice recognized or established by the rules of 1822, and continued under those of 1842, if an equity suit was properly brought in any district against certain defendants, there could be no difficulty, doctrinal or practical, in the service of a subpoena upon other defendants, citizens of the same state, residing in another district of the state. Under the rules of 1822, this writ might have been served upon them by any person. Under the rules of 1842, there could be no difficulty in obtaining, in a proper case, a special appointment by the court of a person to make the service. After waiting the prescribed time to afford an opportunity for contestation by the party served, an order might, if he did not appear, be obtained, that the bill, as to him, should be taken as confessed. As no further decree, and no enforcement of any decree, would, as to S. B. Ludlow, be necessary in this cause, it might, after such an order, proceed against other parties without further impediment under this head. This, it has been said, would have been the practice in a case like the present, properly brought in the district in which the process was issued. In the present case, the question whether this was the proper district could have been attended with no difficulty. The principal, as well as the primary, cognizance of the cause was here.

But, in cases of a different character, the

³ The writ was directed to the Bishop of Durham, who alone of the proprietors of the palatinates, had an appellate judicial cognizance of suits in equity in their courts. It was directed to the chamberlain of Chester, and to the chancellor of the duchy of Lancaster.

question which district was the proper one for the cognizance of an equity suit against defendants, within the jurisdiction, but residing in different districts of the same state, must often have been attended with embarrassing difficulties. A simple rule would have been, that the filing of the bill in either district, and primary service of process within its limits upon any one defendant, should always vest the cognizance of the cause in the circuit court of such district. In an equity suit, however, the casual primary service upon a mere formal party, having an insignificant interest, or, perhaps, no interest whatever in his own right, might, under such a rule of practice, have taken away the right of adjudication from the court of the district in which the controversy would seem, in a particular case, to be principally cognizable. But the objection thus founded upon the contingent occasional occurrence of such a case was outweighed by considerations in favor of a rule of certain uniform applicability. Therefore, a series of particular statutes, beginning in the year 1822, determined, according to this rule, the practice of the circuit courts for the several districts of the respective states of Tennessee, Alabama, Mississippi, Georgia, Iowa, Ohio, and Texas. The last of these particular enactments was in 1857. The first of them had passed on 30th March, 1822. It enacted as to suits by citizens of the United States in the circuit courts of the United States for either the district of East, or of West, Tennessee, against two or more citizens of the state of Tennessee, some of whom should reside in East, and some in West, Tennessee; that the plaintiff might cause the clerk of the circuit court in which he should elect to commence his suit, to issue duplicate writs, one directed to the marshal of East, and the other to the marshal of West, Tennessee, which writs it should be the duty of the respective marshals to execute and return, and that, when returned, they should be docketed, and proceeded in to judgment as one case only. A provision authorizing executions to run from one district of the state into the other was added. An act of 18th January, 1839 [5 Stat. 321], divided the state into three districts, and re-enacted the above provisions of the act of 1822, confining, however, its provisions to suits not of a local nature, but omitting the restriction which had confined their application to cases in which citizens of the United States were plaintiffs. The form of the acts passed before 1839, as to Alabama and Mississippi, and after 1839 as to Georgia, Iowa, Ohio, and Texas, differed from the act as to Tennessee only in the degrees in which the language used in them, respectively, approximated that of a general act passed on 4th May, 1858 [11 Stat. 272], for the apparent purpose of regulating the practice, under this head, upon a uniform footing throughout the United States.

The general act of 4th May, 1858 [11 Stat. 272], is entitled "An act to provide for the issuing, service and return of original and final process in the circuit and district courts of the United States in certain cases." The first section enacts "that all suits not of a local nature hereafter to be brought in the circuit and district courts of the United States, in a district in any state containing more than one district, against a single defendant, shall be brought in the district in which the defendant resides; but if there be two or more defendants residing in different districts in the same state, the plaintiff may sue in either district, and issue a duplicate writ against the defendants directed to the marshal of any other district within the state in which any of the defendants reside, on which duplicate writ the clerk issuing the same shall endorse that it is a true copy of a writ sued out of the court of the proper district; and such original, and duplicate writs, so issued, shall, when executed, be proceeded on accordingly; and upon any judgment rendered in a suit so brought, process of execution may be issued and directed to the marshal of any district in the same state. And in suits of a local nature, where the defendant resides in a different district in the same state than the one in which the suit is brought, the plaintiff may have original and final process against such defendant directed to the marshal of the district in which he resides." The second section enacts "that in all cases of a local nature, at law, or in equity, where the land, or other subject matter of a fixed character, lies partly in one district, and partly in another district within the same state, the plaintiff may bring his action or suit in the circuit or district court of either district; and the court in which any such action or suit shall have been commenced, as aforesaid, shall have jurisdiction to hear and decide the same, and to cause mesne or final process to be issued and executed as fully as if the land or other subject matter were wholly within the district for which such court is constituted."

In suits which are within the enactments of this law, every case which can arise, in practice, under this head, appears to have been provided for. The provisions of the second section include, certainly, suits in equity, as well as actions at law. The provisions of the first section likewise apply to suits in equity, if the phrase "writ against the defendant directed to the marshal" includes the subpoena to appear and answer. Unless the phrase is interpreted so as to include this writ, the uniformity in the practice under the act throughout the United States which it appears to have been intended to secure, cannot be attained. This will be seen upon a recurrence to the above mentioned particular statutes as to Tennessee, in the first of which, passed, as above, in 1822, the legislation in question originated. These

acts were an adaption to the courts of the United States for Tennessee of a practice which appears to have been familiar in the courts of the state in suits in equity. 6 Yerg. 85. Such suits must, therefore, have been within the intended application of the above mentioned acts of 1822 and 1839, as to the districts of Tennessee. The words of these acts were not more applicable to suits of the kind than the words of the act of 1858. While Tennessee was a part of North Carolina, "an act for giving an equity jurisdiction to the superior courts" for the respective districts of that state, passed in 1782, had conferred upon them the jurisdiction previously exercised by the court of chancery under the British government. It enacted that, upon the filing of the bill, the clerk should "issue a writ of subpoena, as is usual in cases of chancery," or, upon a special order of a judge to hold the defendant to bail, should issue, for this purpose, a writ in a prescribed form, directed to the sheriff. "Upon such writ or subpoena being duly served, and a copy of the bill delivered in proper time, proof being made to the satisfaction of the court, by return of the sheriff, or by affidavit, the defendant" was to "appear, and put in his answer, or plea, agreeably to the practice in chancery, or demur, or, on failure thereof, the plaintiff's bill" was to "be taken pro confesso." The subpoena in equity seems to have been regarded, in some of the states, from a period prior to the judiciary act of 1789, and in some of the circuit courts of the United States, from a period long anterior to the adoption of the rules of 1842, as process directed, in the state courts, to the sheriff, and in the federal courts, to the marshal. A statute of New Jersey, passed on 13th June, 1799, enacted "that it shall be the duty of the sheriff, or coroner, as the case may require, of any county in this state to whom any subpoena, order, attachment, process of sequestration, writ of execution, or other process issuing out of the court of chancery shall be directed or delivered, to serve, or execute, the same, and to make return thereof at the time and place therein mentioned, which shall be filed by the clerk"; and "that every subpoena, or process for appearance shall be served on the person to whom it is directed, or a copy thereof left at his dwelling house, or usual place of abode, at least ten entire days prior to its return." In this act, the subpoena, though in form directed to the person to be served, is classed with process ministerially directed. From the case of *Kennedy v. Brent*, 6 Cranch [10 U. S.] 191, it may be inferred that in the circuit court of the United States for the Eastern district of Virginia,⁴ the practice, adopted

from that of the state, was in the year 1810, that the subpoena in equity might be served by any person, but that its delivery to the marshal to be executed imposed upon this officer a duty to serve it not less obligatory than if it had been formally directed to him. Its delivery to a sheriff in England imposed no such obligation upon the sheriff.

If the act of 1858 had been passed before the adoption of the rules of 1842, the writ of subpoena to appear and answer in equity could not, however, in this court, have been regarded as process directed to the marshal, in any sense in which the phrase could have been understood here. But even here, the process may, under these rules, be understood as one of this description. The rules having been promulgated under the authority of an act of congress, have, in some degree, the force of statutory regulations. They provide, as above, that the service of all process in equity, including the subpoena, shall be by the marshal of the district, or his deputy, or by some other person specially appointed by the court. Independently of the act of 1858, when an order for service by another person is not applied for, the process cannot, under the rules of 1842, be served otherwise than by the marshal of the district, or his deputy. In such a case the record of the proceedings may, with great propriety, recite the filing or exhibition of the bill, and, after setting it forth, state that process of subpoena was thereupon awarded and issued, to be served by the marshal of the district, or by his deputy. The writ also might, with equal propriety, be endorsed by the clerk, at the complainant's instance, that it was to be served by the marshal, or his deputy, according to the rules. See [*Kennedy v. Brent*] 6 Cranch [10 U. S.] 189. With or without such an endorsement, the subpoena, appearing by the record to have been thus awarded, is, as has already been suggested, in substance and effect, under the rules of 1842, process directed to the marshal. In the case of *Allen v. Blunt* [Case No. 215] Judge Nelson appears to have thought that, in the absence of everything like such an entry of record or endorsement, the subpoena could not be regarded as a process directed to the marshal. In that case the question was, whether service of a subpoena, in equity, upon the defendant, appeared by the marshal's return to have been made in the district of Massachusetts. The return did not state where it had been served. Judge Nelson, remarking that the fact of the service upon the defendant in the district of Massachusetts rested wholly upon the subpoena and return, said: "The writ of subpoena is not directed to the marshal for anything that appears in the record; and the return speaks of the service of a notice upon Blunt, which might very well refer to the memorandum accompanying the subpoena, directing that the appearance of the defendants must be entered on

⁴ The case occurred in that portion of the District of Columbia, which had been ceded by Virginia. The opinion of Marshall, Chief Justice, and the decision of Chancellor Wythe, cited in the argument, sustains the inference stated.

or before the return day of the writ, or the bill would be taken pro confesso." These observations would seem to import that, though the subpoena is, in the body of it, directed to the defendant, and not to the marshal, yet the record of the proceeding under which it has been issued, and is to be served, may contain what renders it process directed to the marshal, by whom it is to be served, and whose return is to attest the service.

Under an act of 1858, a bill averring residence of the defendants in different districts of the state, might very properly pray that the process, in duplicate, should be awarded for execution by the respective marshals, according to the provisions of the act. The clerk, in making out the record, would then very properly set forth an award of process accordingly; and he might endorse the duplicates of the subpoena with a direction that service of it by each of the respective marshals be made upon the defendants residing in his district. Each duplicate would thus become process directed to the marshal of one of the districts. These formalities might, perhaps, all, or some of them, be dispensed with, leaving the act of 1858 and the rules of 1842 to define their own effect. The ascertainment of their effect is, however, facilitated by stating thus a case of the fullest compliance with such formalities. This act of 1858 may, therefore, be interpreted as applicable to a suit in equity. Had it been interpretable as a measure entirely of intended new legislation, and thus applicable to suits in equity, it would show that, in the opinion of congress, the subpoena in equity did not, in any case, run out of the district in which it was issued into another district of the same state. The circumstance that the act, in express terms, is limited in its application to suits brought after its enactment, would then have added force to this argument. In part, the purpose of the act was to remedy absolute defects in the previous legislation. Thus in certain states, including Pennsylvania, it restored, in suits at law, the exercise of the jurisdiction on a footing as extended as before any division of the respective states into districts; and rendered the practice in them the same as that already established, by particular acts, for Tennessee and certain other states. But its purpose was also to settle the practice under other heads, according to rules applicable alike in all parts of the United States. We have seen that although, before its enactment, the subpoena from a district in which a suit in equity was properly brought, might have run into another district in the same state, yet the question, in which of two districts of a state the cause was properly cognizable, might often have been involved in embarrassing uncertainty. Under the act, the residence of any one defendant in either district in which the bill may be filed suffices always to determine the question,

and sustain a service of process in the other district. The act thus furnishes, as to suits in equity, a uniform rule of proceeding, where the practice might otherwise have been uncertain and variable.

This law certainly contains enactments which are not new. Its first enactment that all suits not of a local nature, "in a district in any state containing more than one district, against a single defendant," should be brought in the district in which he resides, is clearly declaratory. It, moreover, attracts attention from the omission of any such provision, in express terms, for the case of a suit against a plural number of persons, all residing in the same district. The latter case, and the case expressly provided for, do not seem, either of them, to have required statutory regulation. Again, a general act of congress, passed on 20th May, 1826 [4 Stat. 184], had enacted that all writs of execution upon any judgment or decree obtained in any of the district or circuit courts of the United States, in any state which had been, or might thereafter be, divided into two judicial districts, might run and be executed in any part of such state, but should be issued from and made returnable to the court where the judgment was obtained. Notwithstanding this general enactment, the act of 1858 has re-enacted its provisions. They had in like manner been unnecessarily re-enacted for Tennessee in 1839. Their original enactment for Tennessee in 1822 had, however, been a useful provision for that state, at that period. This repetition in the act of 1858 of the general enactment of 1826 as to executions, the general conformity of the provisions of the act of 1858 concerning original process to those of the prior particular laws which have been mentioned, and the mode above defined, in which the act of 1858 applies to suits in equity, show that this act was not intended as an entirely new measure of legislation. Therefore the argument that the act, if applicable at all to suits in equity, manifests an opinion of congress that the subpoena could not, before the act, have been served, in any case, in another district of the same state, cannot prevail.

To recapitulate: The act of 24th September, 1789 [1 Stat. 73], divided the United States into judicial districts, with a sole reference to the jurisdiction of the respective courts, which it created. Process directed to a marshal could not be served beyond the limits of his district. He could not have crossed its line in serving the process, if nothing on the subject had been contained in the act. But the subpoena to appear and answer in equity was not in form, or in effect, process directed to the marshal. At the date of the act, opposing opinions were entertained upon the question whether in England such a writ could be served beyond the limits of the jurisdiction. That no doubt upon this or any similar question might be

entertained in the practice under this act, the 11th section provided that no civil suit shall be brought against an inhabitant of the United States, by any original process, in any other district than that of which he is an inhabitant, or in which he shall be found at the time of serving the writ. This enactment was applicable not less to the subpoena than to ministerially directed process. But its only effect, at its date, was to prevent the boundary of a state from being crossed in the service of original process of either kind. Under this act the former defendant, and S. B. Ludlow, could have been served with process, at law or in equity, in the same suit. The intended effect of the act which afterwards divided the state into two districts was a mere partition of the jurisdiction conferred by the act of 1789 between the courts of the two intraterritorial divisions. That these two acts, in their combined effect, prevented, in any case, the exercise of this jurisdiction where it had before been exercisable, was the result of an oversight in legislation since remedied. Where it occurred, it was not a direct consequence either of the prohibition in the eleventh section of the act of 1789, or of any enactment in the law dividing the state. It occurred in suits at law, when compulsory process was required against necessary parties residing in different districts of the same state, because the process in such suits could be directed to the marshal only. But when a suit in equity was brought against such parties, the subpoena, being directed immediately to themselves, could be served upon them all. The act of 1789 fulfilled its office in rendering service out of the district ineffectual, when, in order to make the service, the boundary of the state or original district was crossed. The rules of 1822, and the previous practice in some, if not in all, parts of the United States, dispensing with processes of contempt, enable the complainant, without issuing any writ ministerially directed, to obtain, as to such defendants as did not appear, an order that the bill should be taken as confessed. It was questionable whether a complainant could, under this practice, have claimed an arbitrary option to proceed in either district of the state, without reference to the question in which district his cause was the more properly cognizable. Particular acts of congress, however, gave him this option in certain states, in suits both at law and in equity. The rules of 1842 gave to the courts in Pennsylvania, and other states to which no such acts applied, a control in this respect of the proceeding, by preventing the service of process in equity otherwise than by the marshal of the district, unless a special order was made authorizing the service by another person. When there was no such order of the court, the subpoena became, under these rules, in substance and effect, process directed to the marshal of the district. But this character of the writ could,

in a case like the present, have been changed under these rules, by an order of the court appointing another person to make the service upon a defendant residing in the other district. The act of 1858, containing general provisions like those of the particular statutes already mentioned, gave to the plaintiff in every suit not local, against parties residing in different districts of the state, an election of the district in which to proceed; and thus rendered the practice on the subject uniform throughout the United States. The subpoena issued in duplicate under this act is, in effect, a writ directed to the respective marshals of the two districts, to be served by each upon such defendants named in it as reside in his district.

In suits in equity the average number of original parties is very much greater than in suits at law, and the necessity for adding other parties often develops itself as the suits proceed. This act must, therefore, have been intended to apply to suits in equity, unless the remedial purposes of its provisions had already been attainable in such suits under the former practice established by rules of the supreme court. If the act were inapplicable to such suits, the complainants might, therefore, with even more certainty as to the correctness of the practice, proceed in this case, under an appointment of a person other than the marshal of this district, to serve the process upon a new defendant in the Western district.

Had the decision been that a subpoena issued by this court, in equity, could not, independently of the enabling provisions of this act of 4th May, 1858 [11 Stat. 272], have been served in the Western district, the present case would be embraced within these provisions of the act. It is true that the act applies only to suits brought after it was passed. But the complainants can proceed properly, for the purpose in question, in one way only. This, as we have seen, is by an original bill in the nature of a supplemental bill, which would be, as to the former defendants, a supplemental, but, as to S. B. Ludlow, an entirely original, bill. The reason and spirit of the act of 1858 cannot require the complainants to go through the absurd formality of obtaining an order for the dismissal, without prejudice, of their original bill, as against the former defendants, for the mere purpose of bringing the case within the literal application of the words of the act, by recommencing the proceeding against those parties. By so doing, they could certainly bring themselves within the letter of the act. But it is to S. B. Ludlow unimportant whether he is made an additional party under such a proceeding, or in the other mode. The proceeding would not, as to him, be less original, in the one case, than in the other. So far as the proceeding is against "two or more defendants residing in different districts in the same state," the suit would, for the first time, be

brought, when the original bill in the nature of a supplemental bill, might be filed. The case is, therefore, perhaps, within the words, but certainly within the reason and meaning, of the law.

The result appears to be that, under an original bill in the nature of a supplemental bill, against the former defendants and S. B. Ludlow, service of a duplicate writ of subpoena could be made upon S. B. Ludlow, in the Western district, either under the act of 1858, or independently of its provisions.

Case No. 17,892.

WINTER et al. v. SIMONTON.

[2 Cranch, C. C. 585.]¹

Circuit Court, District of Columbia. June 4, 1825.

COVENANT ON CHARTER-PARTY—BAIL FOR DEFENDANT'S APPEARANCE—PLAINTIFF'S AFFIDAVIT—LIABILITY OF MARSHAL.

1. The authority of a justice of the peace, in one of the states, may be proved by parol.

2. An affidavit of the plaintiff's (written upon the back of a copy of the charter-party, and annexed to an account current which states the particular charge, with dates, &c., and averring that "there is now due and unpaid upon the original charter-party, of which the within is a true copy, \$2,433.06, the whole amount of said charter being \$3,212.96, of which \$779.90 have been paid, agreeably to the account current by us signed and hereunto annexed, which exhibits the true and perfect state of the demand now existing between the said Simonton and ourselves") is sufficiently certain to hold the defendant to bail, in an action of covenant on the charter-party.

3. The marshal is bound to take sufficient bail for the appearance of the defendant, in all cases, except in the actions of trespass on the case mentioned in the 3d section of the Maryland act of 1715, c. 46, and he is the judge of its sufficiency.

4. That act does not include actions of covenant.

5. The marshal, being called upon by the court to bring before them any defendant arrested by him upon any original writ or mesne process, according to the tenor of his return, and, failing so to do, will, on motion, be amerced to the amount of the debt, or damages and costs, and judgment will be entered therefor, nisi, the second day of the next term.

Covenant on a charter-party. Upon the return of the *capias ad respondendum*, Mr. Key moved that the defendant might be permitted to appear without special bail. The affidavit was made in the state of Maine, before Eben Clapp, who calls himself a justice of the peace. Another person, who calls himself a notary-public and justice of the peace for the county of Lincoln, certified that the said Eben Clapp was a justice of the peace for the same county; but his certificate is dated one month before the date of the affidavit taken before Mr. Clapp.

Mr. Key, for defendant, objected that

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

there was no evidence of the authority of the justice to administer the oath, and cited the case of *Smith v. Watson* [Case No. 13-124], in this court, at June term, 1806; 3 Whart. Dig. 50, tit. "Bail"; and *Turner v. Fendall*, 1 Cranch [5 U. S.] 117.

Before THE COURT decided upon this objection to the affidavit, the plaintiff produced a witness, (Geo. Sullivan, Esq.) who proved the handwriting of the justice, and that he was acting as a justice of the peace, at Bath, in the county of Lincoln, in the state of Maine, where the affidavit was made.

Mr. Key then objected, that the affidavit was not sufficiently certain. It was written upon the back of a copy of the charter-party, upon which the suit was brought, and which was annexed to the plaintiffs' account current with the defendant. It was made by the plaintiffs, and stated "that there is now due and unpaid upon the original charter-party, of which the within is a true copy, twenty-four hundred and thirty-three dollars and six cents; the whole amount of said charter being thirty-two hundred and twelve dollars and ninety-six cents, of which seven hundred and seventy-nine dollars and ninety cents have been paid, agreeably to the account current by us signed and hereunto annexed, which exhibits the true and perfect state of the demand now existing between the said Simonton and ourselves," "and that the foregoing account current is just and true in all particulars." The affidavit ought to be as positive and direct as that required by the statute of 12 Geo. I. c. 29. But it is not positive. It says, "agreeably to the account current hereunto annexed." The account shows that the balance is carried to a new account which is not produced. It avers that the account exhibits the true state of the "demand" between them and the defendant, not the amount due. It does not state that any thing is due from the defendant, nor from anybody else, to the plaintiffs. *Travers v. Hight* [Case No. 14,151], in this court, at June term, 1812; *Young v. Moriaty* [Id. 18,167], at the same term; *Bartleman v. Smarr* [Id. 1,074], Dec. term, 1810; *Welsh v. Hill*, 2 Johns. 100.

THE COURT (MORSELL, Circuit Judge, doubting whether the affidavit was sufficiently certain) overruled the objections to the affidavit, and ruled the defendant to give special bail.

On a subsequent day (May 26th,) Mr. Barrell, for plaintiffs, moved the court to amerce the marshal, to the amount of the damages and costs, for not bringing in the defendant when called upon by the court, at the return of the *capias*. The damages, at the time of the arrest of the defendant, were not stated in, or upon, the writ; no declaration had been sent with the writ, and no affidavit filed to hold the defendant to spe-

cial bail; but while the defendant was in custody of the marshal, upon this writ, Mr. Barrell, the plaintiff's attorney, made this indorsement upon it: "Covenant on charter-party; damages, 4,000 dollars." The charter-party was not filed, but was produced by the plaintiff's attorney while the marshal had the defendant in custody, upon this writ, before one of the judges upon habeas corpus, and was shown to the marshal, to the judge, and to the defendant, who made no objection to it. The covenant was to pay \$425 per month, to commence on the 7th of July, and to pay \$600 on the arrival of the vessel at Havana. The judge ruled the defendant to give special bail; or rather, refused to discharge the defendant without special bail.

Mr. Barrell contended that the Maryland act of 1715, c. 46, § 3, applies only to actions of trespass on the case, where the damages are uncertain; and that in all other cases the marshal is bound to take full bail; and if he does not produce the body of the defendant, at the return of the writ, the court, upon motion, is bound, by the Maryland act of 1794, c. 54, § 2, to amerce him in the whole amount of the debt or damages, and costs.

Mr. Key, contra. The marshal can be amerced only \$133⅓, or 8,000 pounds of tobacco, according to law, and the practice of this court, under the act of Maryland of 1715, c. 46. The statute of 12 Geo. I. c. 29, never was extended to Maryland, and the practice in that state, before that statute, and before the act of 1715 was settled, that the defendant might be held to bail, in all actions, without affidavit, and the sheriff was to take a bail-bond in 8,000 pounds of tobacco. The statute of 1715 speaks only of actions on the case; but the same practice previously prevailed in all actions. Actions of covenant are within the mischief of the act of 1715; which act recognizes the previous practice, and limits the amount of bail. *Gorsuch v. Holmes*, 4 Har. & McH. 54 (Judge Samuel Chase's opinion); *Anon.*, Id. 159. By the English statute of 23 Hen. VI. c. 10, the sheriff was obliged to take a bail-bond in a reasonable amount, of which the sheriff was to judge. If he took a bail-bond, he was justified; if he did not, he was liable to an action for escape. The practice in Maryland, where there was no special order, before 1715, was to take a bail-bond for 8,000 pounds of tobacco. If the damages were not mentioned in the writ, and if no declaration was sent with the writ, in what amount was the marshal to take bail? How could he be safe against both plaintiff and defendant? In this case, the marshal took a bail-bond in \$4,000, and has tendered it to the plaintiff's attorney, who refused to accept it.

Mr. Barrell, in reply, observed that the case cited from 4 Har. & McH. 159, was not

upon a question of amercement, but upon a question of ruling bail. That if the marshal required excessive bail, the remedy of the party was by habeas corpus. He relied upon the positive requisition of the act of Maryland of 1794, c. 54, § 2, which gives the plaintiffs a right to judgment against the marshal for their whole amount of damages and costs, for not producing the body of the defendant upon the return of the writ.

CRANCH, Chief Judge. This is a motion to amerce the marshal to the full amount of damages and costs, for not bringing in the body of the defendant, according to the tenor of his return upon the *capias ad respondendum*. The action is for covenant broken, brought upon a charter-party, by which the defendant covenanted to pay to the plaintiffs \$425 a month for the use of a vessel. At the time of the arrest of the defendant, no declaration was filed, nor any affidavit of debt, nor even an indorsement on the writ of the amount claimed; nor did the amount of damages claimed by the plaintiffs appear in the writ. The marshal took a bail-bond, in the penalty of \$4,000, which he offered to assign to the plaintiffs before this motion was made. By the law of Maryland, 1794, c. 54, § 2, it is enacted, "that where any sheriff or coroner, being called upon, by order of the general court, or any county court, to bring before them any defendant or defendants before arrested by such sheriff or coroner, upon any original writ or mesne process, according to the tenor of his return, the court, on motion, shall cause such sheriff or coroner to be amerced to the amount of the debt or damages, and costs due from the defendant or defendants, to be ascertained by the oath of the plaintiff or plaintiffs, his, her, or their agent, factor, or attorney, and such other proof as the court may require, and shall and may enter judgment nisi, the second day of the next term thereafter, for the amount of the amercement aforesaid, in the name of the plaintiff or plaintiffs, and for his or their use, against such sheriff or coroner, which judgment shall be as valid and effectual as any judgment rendered upon any verdict of a jury." This act is peremptory, that the court shall cause the sheriff to be amerced to the amount of damages and costs.

But it is contended, on the part of the marshal, that the act of Maryland, 1715, c. 46, § 3, ought to be extended to actions of covenant, because they are within the same mischief. By that section it is enacted, "that in all actions of trespass on the case, where damages are laid to be above 4,000 pounds of tobacco, if no declaration be sent with the writ expressing the true cause of action, the sheriff shall not require a bail-bond exceeding the sum of 8,000 pounds of tobacco, although the damages be marked

on the writ for any greater sum whatsoever." By the English statute of 23 Hen. VI. c. 10, sheriffs and all their ministers may deliver to bail or main-prize, upon sufficient surety, all persons arrested by writ, bill, or warrant in any personal action. Of the sufficiency of that surety, the sheriff was the judge. By the statute of 13 Car. II. st. 2, c. 2, the bail for appearance shall not be bound in a penalty above 40, if the cause of action be not particularly expressed. Before that statute it might be in any sum the sheriff pleased. Day's Com. Dig. "Bail," p. 30, K, 4. But it appears by the cases cited by the counsel of the marshal, from 4 Har. & McH. 5, 159, that neither the statute of 13 Car. II. st. 2, c. 2, nor that of 12 Geo. I. c. 29, nor the subsequent statutes of George, were ever considered in force, or practised upon in Maryland. The present question, therefore, depends upon the statute of 23 Hen. VI. c. 10, and the Maryland acts of 1715, c. 46, § 3, and 1794, c. 54, § 2. By the statute of 23 Hen. VI. c. 10, if the sheriff return a cepi corpus, or reddidit se, he shall have his prisoner at the return day, as before the act. And if he has not, he shall be amerced by the court, upon a rule given to bring in the body. Com. Atty. 311; Eterick v. Cowper, 1 Salk. 99; Day's Com. Dig. "Bail," K, 5. The first amercement was only 40s., but issues were from time to time subsequently increased, until they amounted to the debt or damages, and costs claimed by the plaintiff. This practice under the statute prevailed in Maryland before the year 1794, when the act was passed, making the amercement a direct remedy for the plaintiff, and authorizing the court to amerce the sheriff to the full amount of debt or damages and costs, in the first instance.

We are not informed of any case in Maryland, in which it has been decided that the statute of 1715, c. 46, § 3, comprehends actions of covenant, as well as actions of trespass on the case. The preamble of that section shows that the evil intended to be remedied, was the holding to bail in spiteful and malicious actions of trespass on the case, in which the plaintiffs laid their damages very high. The same cause of complaint was not very likely to exist in actions of covenant, because they must be brought upon the contract of the party, and it is therefore not probable that the legislature intended to extend the remedy to such actions. It is evident from that statute itself, that before that statute the sheriff was bound to take sufficient bail for the appearance of the defendant in all cases; and that he was the judge of its sufficiency. The act of 1794, c. 54, § 2, makes no exception in favor of actions of covenant, or any other action, and is peremptory upon the court. We think, therefore, that the marshal must be amerced to the amount of the

damages due from the defendant to the plaintiffs.

THRUSTON, Circuit Judge, not having heard the argument, gave no opinion.

[For further proceedings in this case, see Cases Nos. 17,893 and 17,894.]

Case No. 17,893.

WINTER et al. v. SIMONTON.

[3 Cranch, C. C. 62.]¹

Circuit Court, District of Columbia. Dec. Term, 1826.

COVENANT—ACTION BY SURVIVING PROMISEES.

In an action of covenant by two survivors, upon a charter-party made with three persons, the declaration should state the death of one, and aver that the defendant had not paid the money to the three, or to either of them.

Covenant, on a charter-party made to Samuel Winter, Samuel G. Bowman, and Joshua Bowman. The declaration was in this form:—"John W. Simonton, late of Washington county, was summoned to answer to Samuel Winter and Samuel G. Bowman, survivors of Joshua Bowman, in a plea that he keep with them the covenants made between the said Samuel Winter, and Samuel G. Bowman, and one Joshua Bowman, now deceased, and the said John W. Simonton according to the force, form, and effect of certain articles of agreement of charter-party executed between them, &c., and whereupon the said Samuel Winter and Samuel G. Bowman, by Samuel B. Barrell their attorney, say," &c. And after setting forth the terms of the charter-party, and the employment of the vessel by the defendant, until she was totally lost by the perils of the sea, and that according to the terms of the charter-party the sum of \$2,734.17 had become due by the defendant, of which he had notice, "yet though often requested the said Simonton has never paid said sum of \$2,734.17 to the plaintiffs, but hath wholly refused and neglected so to do contrary to the form and effect of the said charter-party, and of the said covenants of the said defendant, by him in that behalf made with the said plaintiffs in manner and form aforesaid," &c.

To this declaration the defendant demurred generally; and objected: (1) That the death of Joshua Bowman is not stated in the declaration, but only in the recital of the writ, which is no part of the declaration, but a mere formal part of the record to be made up by the clerk. (2) That it is not averred that the money was not paid to Joshua Bowman in his lifetime. 2 Selw. N. P. 405, 406; Hardr. 320; 1 Chit. Pl. 79, note, 304, 317, 326. (3) That it is not averred that the defendant did not give good bills on Boston, New York, or Philadelphia, which by the

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

terms of the charter-party he was allowed to do.

Mr. Jones, for plaintiffs, contended: (1) That the recital was a sufficient averment of the death of Joshua Bowman. 1 Har. Ent. 35. (2) That the averment that the defendant had never paid the money, implies that it was not paid to the three, or either of them. (3) That although there were two modes of payment allowed, yet a general averment of non-payment included both.

R. S. Coxe, in reply. (1) The death of Joshua Bowman is only suggested in the recital of the writ. There is no averment of his death upon which the defendant could take issue. The precedents all require a positive averment of the death in the declaration. 1 Har. Ent. 35, 163; 2 Chit. 45; 2 Selw. N. P. 405. (2) The averment in the declaration is that the defendant did not pay the money to the plaintiffs; but he might have paid it to Joshua in his lifetime. The covenant is to pay to the three, not to two only. The breach should be coextensive with the covenant. (3) The covenant upon oyer differs from the statement of it in the declaration, where it does not appear to be in the alternative.

THE COURT (MORSELL, Circuit Judge, absent) said that the 2d objection was fatal, and gave no opinion as to the others. The plaintiffs had leave to amend on payment of costs.

[See Cases Nos. 17,892 and 17,894.]

Case No. 17,894.

WINTER et al. v. SIMONTON.

[3 Cranch, C. C. 104.]¹

Circuit Court, District of Columbia. May Term, 1827.²

AGREEMENT TO HIRE VESSEL—ACTION FOR HIRE
—CONSTRUCTION OF PLEA—DEPOSITION—
CERTIFICATE OF COMMISSIONERS.

1. An agreement to hire a vessel, "from Bath to Havana, and from thence to Mobile or elsewhere, in any legal trade for the space of twelve months, at and after the rate of \$425 a month, —\$600 to be paid on the arrival of the brig at Havana," the owners covenanting "that the said brig shall be tight, stiff, staunch, and strong, well victualled and manned at their own expense, during that period, the dangers of the sea only excepted"—the hirer paying "all port-charges and pilotage at every place" to which she may go, is not a contract of freight.

2. With regard to the destination and loading of the vessel, the hirer is owner pro hac vice.

3. The general owner is not bound to see that the master performs the voyages indicated by the hirer; the master and mariners being, in that respect, subject to the order and control of the hirer.

4. In an action for the hire of a vessel according to the terms of a sealed agreement, the defendant, by pleading, "that he had paid to the plaintiffs all and every such sums of money as

were become due and payable from the said defendant, according to the tenor and effect of the said articles of agreement," assumes upon himself the burden of proving that he had paid the hire of the vessel, for the time and at the rate stated in the declaration; and the plaintiffs are not bound to prove any of the facts therein charged.

5. The certificate of the commissioners who have taken a deposition, that they had taken the oath prescribed in their commission, is sufficient evidence of that fact.

6. They are quasi officers of the court, and are to be believed.

Covenant upon an agreement under seal, which was in substance as follows:—That Winter and Bowmans of Bath, (in Maine,) owners of the brig James Munroe of Bath, "agree to let or hire the said brig to the said Simonton, from Bath to Havana, and from thence to Mobile or elsewhere, in any legal trade, for the space of twelve months, at and after the rate of \$425 per month, and the said Winter and Bowmans agree that the said brig shall be tight, stiff, staunch, and strong, well victualled and manned at their own expense, during that period, the dangers of the sea only excepted; and the said Simonton on his part agrees to pay or cause to be paid, to the order of the said Winter and Bowmans, on the arrival of the said brig at Havana, the sum of \$600; and the said Simonton agrees to pay, or cause to be paid all port-charges and pilotages at every place where she may go to; and the said Simonton further binds himself and agrees to pay, or cause to be paid, after the first-mentioned payment, \$600 from time to time, as the charter of the said brig amounts to that sum; that is to say, when the said brig earns \$600 at the rate of the before-mentioned charter, it is to be paid in Spanish milled dollars in the United States, or in good and approved bills of exchange at from ten to sixty days sight on Boston, New York, or Philadelphia, to the order of Winter and Bowmans. And it is further understood clearly that the said Winter and Bowmans are to be at no other expense than that of victualling, manning, and keeping the hull and rigging of the said vessel in good order. And the said Simonton agrees that this charter shall commence nine days before the brig's leaving the wharf for sea, which shall be noted at the foot of each agreement, being signed in triplicate; and it is understood, the said Simonton has liberty of lading said vessel with any articles he may think proper, contraband goods always excepted;" penalty \$2000; and dated July 15, 1820. At the foot of the agreement is the following, signed by all the parties:—"In case war between the United States and Spain takes place in the intermediate time of the within specified charter of the within named brig James Munroe, it is understood between the parties that the charter shall be null and void on the first information of that event; but that the said

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

² [Reversed in 5 Pet. (30 U. S.) 141.]

Simonton shall deliver the said brig to the within named Samuel Winter and S. G. and J. Bowman, at Bath aforesaid, he paying charter at the rate within specified, up until the time she is so delivered, the dangers of the seas and enemies excepted. And the parties within named further agree, that the charter shall commence on the 7th day of July, 1820." The declaration, after setting out the substance of the contract, and averring performance of the covenants on the part of the plaintiffs to be performed, averred that the brig, on the 7th of July, 1820, being in fit and proper condition, was, by the said Simonton, taken into his service, and on the 16th sailed from Bath, and afterwards arrived at Havana; during all which time, and afterwards, the said brig, under the direction and control and in the employment of the said Simonton, until the 20th of January following, when, during the prosecution of a voyage under the direction of the said Simonton, the brig was lost by the perils of the sea; at which time she had earned \$2,734.17, for the hire and affreightment of the said brig, in virtue of the said charter-party, viz., at the rate of \$425 per month, during the said term of twelve months, for which the said brig had been let and hired by the said charter-party, as aforesaid, and from and after the said 7th day of July, 1820, until the loss of the brig as aforesaid, &c.; which said sum of \$2,734.17 was then and there in arrear and unpaid, and due and owing by the defendant to the plaintiffs, of which he had due notice, but has never paid the same, &c.

After the opinion of the court upon the demurrer heretofore taken to the declaration, the plaintiffs had leave to amend it, which they did, and the defendant then pleaded four pleas in bar, viz:—First plea. "That he, the said defendant, hath paid to the said plaintiffs all and every such sums of money as were become due and payable from the said defendant, according to the tenor and effect, true intent and meaning of the said articles of agreement, and of this he puts himself upon his country. And the plaintiffs likewise." Second plea. "That the plaintiffs did not, on their part, perform and keep the covenants and stipulations in the said articles of agreement contained, on their part and behalf to be performed and done, according to the tenor and effect, true intent and meaning of the same, in this, to wit: that the said brig or vessel in the said articles of agreement mentioned, the James Munroe, did not pursue the voyage and voyages which the said defendant ordered and appointed for her, and carry on the legal trade in which the said defendant engaged and employed her; but did, without any sufficient lawful cause therefor, depart and deviate from the same; and did, on the 27th of November, 1820, while subject to the order and control of the said de-

fendant, under and by virtue of the said articles of agreement, omit and fail to proceed from Port au Prince to Crooked Island, as the defendant had ordered and appointed; and did unlawfully, and in violation of said articles of agreement, and of the duty and obligations imposed by the same, proceed to the port of Havana, in the island of Cuba, against the orders and directions of this defendant, whereby he sustained great loss and expense, and the voyage in which the said vessel or brig was engaged was greatly delayed and defeated; and afterwards, while the said articles of agreement continued in full force and effect, viz., on the 30th of December, 1820, the said brig or vessel did unlawfully sail from said Crooked Island to Ragged Island, instead of proceeding to the port of Mobile, to which she was destined and bound, according to the orders and instructions of this defendant, whereby and by reason of such unlawful deviation from her voyage, and violation of the orders of this defendant, the said voyage was wholly defeated; and the said brig or vessel was afterwards, viz., on the 20th of January, 1821, wholly lost by shipwreck, and a cargo on board belonging to this defendant, of the value of \$10,000, was wholly lost and destroyed to this defendant; and this he is ready to verify," &c. Third plea. This plea was, in substance, that while the brig was lawfully subject to the orders and directions of this defendant, she was dispatched and ordered by the defendant, in a lawful trade, from Port au Prince to Crooked Island, and sailed in the said voyage; "Yet the captain and crew of the vessel, in violation of the orders of the defendant, did carry the said brig to the port of Havana;" whereby, &c. Fourth plea. The fourth plea, in substance, was: That on the 30th of December, 1820, the brig being at Crooked Island, to take in a cargo of salt for the defendant, to be carried direct to Mobile, the defendant procured insurance to be made from Crooked Island to Mobile; yet the captain and crew, well knowing the premises, and without the consent of the defendant, deviated from the said voyage without lawful authority or excuse, and proceeded from Crooked Island to Ragged Island; in consequence of which deviation the brig was lost, and the insurance became void. To the three last pleas there were general demurrers, and joinders.

Mr. Barrell for the plaintiffs, to show that the matters pleaded in these pleas were not conditions, or covenants precedent, cited 5 Petersd. Abr. 313, 314, 318, 325, 326, 328, 329; Havelock v. Geddes, 10 East, 555; Ritchie v. Atkinson, Id. 295; Shields v. Davis, 6 Taunt. 65; Davidson v. Gwynne, 12 East, 381; Sheels v. Davies, 4 Camp. 119; Cole v. Shallet, 3 Lev. 41, 5 Petersd. Abr. 390; Bornmann v. Tooke, 1 Camp. 377.

Mr. Bradley and Mr. Coxe, contra, contended that obedience of orders was, in the nature of things, precedent to the right to recover for the use of the vessel; that freight is not earned until the end of the voyage, and the delivery of the goods; that the contract of freight is entire; that, in the present case, nothing was due until the end of the twelve months for which the vessel was hired; that the question whether a covenant be precedent or not depends more on the nature of the covenant than on its words. They cited *Havelock v. Geddes*, 10 East, 555; *Ritchie v. Atkinson*, Id. 295; *Shields v. Davis*, 6 Taunt. 65; *Davidson v. Gwynne*, 12 East, 381; *Sheels v. Davies*, 4 Camp. 119; 5 Petersd. Abr. 314, note, 329, 347, 368; *Hotham v. East India Co.*, Doug. 272; *Constable v. Globerie*, Palm. 397; *Bornmann v. Tooke*, 1 Camp. 377; *Osgood v. Groning*, 2 Camp. 466; *Luke v. Lyde*, 2 Burrows, 882; *Cook v. Jennings*, 7 Term. R. 381; *Olhson v. Drummond*, 2 Chit. 705; Com. Cont. 323; *Penoyer v. Hallett*, 15 Johns. 332; *Liddard v. Lopes*, 10 East, 526; *Caze v. Baltimore Ins. Co.*, 7 Cranch (11 U. S.) 362; Selw. N. P. "Covenant," 444; 4 Bac. Abr. 627, "Merchant," H.; *Byrne v. Pattison*, 2 B. & A. 17; S. C. Abb. Shipp. 270, note; 2 Bac. Abr. "Covenant," D; 2 Selw. N. P. 439; Jac. Sea Laws, 229; Abb. Shipp. 134, 163, §§ 13, 209; *Ritchie v. Atkinson*, 10 East, 306; *Magalhaens v. Busher*, 4 Camp. 54, 55, 389; Abb. Shipp. 133, 179, 265, § 19; 3 Chit. Pl. 96, 317, 319, 490, 492; 5 Petersd. Abr. 341, §§ 2, 345, 346; *Clarke v. Gurnell*, 1 Buis. 167; *Mackrell v. Simond* [2 Chit. 666], Abb. Shipp. 209, 267; *Bright v. Cowper*, 1 Brownl. & G. 21; *Smith v. Wilson*, 8 East, 445. See, also, *Cole v. Shallet*, 3 Lev. 41; *Shower v. Anderson*, T. Jones, 216; *Porter v. Shephard*, 6 Term. R. 665; *Campbell v. Jones*, 6 Term. R. 571; *Thorpe v. Thorpe*, 1 Salk. 171; *Gibbon v. Mendez*, 2 Barn. & Ald. 17; *Vallejo v. Wheeler*, Cowp. 144, 147, 154, 155; *Hutton v. Bragg*, 2 Marsh. C. P. 339; S. C. 7 Taunt. 14; *Trinity House v. Clark*, 4 Maule & S. 288; *Saville v. Campion*, 2 Barn. & Ald. 503, 5 Petersd. Abr. 299; *Paul v. Birch*, 2 Atk. 621; *Frazer v. Marsh*, 13 East, 238; S. C. 2 Camp. 517; *M'Intyre v. Bowne*, 1 Johns. 229; *Hooe v. Groverman*, 1 Cranch [5 U. S.] 215; *Fletcher v. Braddick*, 2 Bos. & P. N. R. 182; *Story*, Abb. 33 (27); *Cheriot v. Barker*, 2 Johns. 346; *Tate v. Meek*, 2 Moore, 278, cited in 2 Barn. & Ald. 509, not then reported; *Yates v. Railston*, 2 Moore, 294, also cited in 2 Barn. & Ald. 509; *Yates v. Mennell*, 2 Moore, 297.

[See Cases Nos. 17,892 and 17,893.]

CRANCH, Chief Judge. The second plea sets up, by way of defence, supposed breaches of covenant on the part of the plaintiffs, and the questions occur: 1st, whether any of the facts stated constitute such a breach

of covenant on their part; and, 2d, if so, then whether the covenants, so broken by the plaintiffs, were precedent covenants on their part. Both of which questions must be answered in the affirmative, or the plea must be adjudged bad. Do any of the facts averred in the plea constitute a breach of covenant on the part of the plaintiffs? The facts stated in that plea are, that the brig did not pursue the voyage and voyages which the defendant ordered and appointed for her, and carry on the legal trade in which the defendant engaged and employed her, but did, without any sufficient or lawful cause therefor, depart and deviate from the same; and did, on the 27th of November, 1820, while subject to the control of the defendant, omit and fail to proceed from Port au Prince to Crooked Island, as the plaintiff had ordered and appointed, and proceeded to Havana, against the orders and directions of the defendant; and on the 30th of December sailed from Crooked Island to Ragged Island, instead of proceeding to Mobile, according to the orders of the defendant; by which deviation, and violation of orders the voyage was defeated, and the vessel and cargo lost, on the 20th of January, 1821. This plea is founded upon the supposed obligation of the plaintiffs, either by express covenant, or by implied duty as owners, to see that the brig should perform such voyages as the defendant should indicate; and that the discharge of such obligation or duty was a condition precedent to the right of the plaintiffs to recover the sum stipulated to be paid for the hire of the brig. No such express covenant is found in the charter-party.

The only express covenants, on the part of the plaintiffs are: (1) To let or hire the brig to the defendant, to be used by him, from Bath to Havana, and from thence to Mobile or elsewhere, in any legal trade, for the term of twelve months; (2) that she shall be tight, stiff, stanch, and strong, well-victualled and manned, at the plaintiffs' expense, during that period; the dangers of the seas excepted. If there be any covenant that the brig should go to Havana, or any other port, it is a covenant on the part of the defendant, and for the security of the plaintiffs; for if the brig had never arrived at Havana, the plaintiffs, according to the case of *Gibbon v. Mendez*, 2 Barn. & Ald. 17, could never have recovered any thing for the hire; because no payment was to be made by the defendant until the arrival of the brig at that port. Nor was there an implied obligation upon the plaintiffs, as owners, to see that the brig should perform such voyages as the defendant should indicate. The possession of the whole vessel and crew was delivered to the defendant, to use them in such voyages, and in such lawful trade as he should think proper with the single limitation of going first to Havana. In that respect, the vessel, the mas-

ter, and mariners were, as is admitted by the plea, subject to the order and control of the defendant. He had a right to direct the lading and destination of the brig, and he was to pay all port charges and pilotages at every place to which she might go. No orders, in these respects, were to be given to the master or mariners, by the plaintiffs. That it was the intention of the parties that the possession of the brig should belong to the defendant is evident from his covenant in the memorandum at the foot of the charter-party, that in case of a war with Spain, he should deliver the brig to the plaintiffs at Bath, "he paying charter at the rate within specified until the time she is so delivered, the dangers of the seas and enemies excepted."

In regard, therefore, to the destination and loading of the vessel, the defendant himself was owner pro hac vice; and the plaintiffs were under no implied obligation to see that the specific voyages should be performed, which the defendant might project. This was not a contract of freight, but of hire. The plaintiffs did not covenant to carry goods, or to perform any specific voyage. In Story, Abb. Shipp. p. 273, it is said, that if the price of transportation of goods be paid upon their being laden on board the vessel, even "this payment, although commonly called freight, is not properly so denominated, that word denoting the price rather of actual carriage than of receiving goods in order to be carried; and therefore in the case of Blakey v. Dixon, 2 Bos. & P. 321, the court, admitting that an action might be brought for money agreed to be paid on receiving the goods on shipboard in order to be transported, decided that such money could not be recovered by the name of freight." Freight is a compensation for the carriage of goods. *Watson v. Duykinck*, 3 Johns. 335. In the present charter-party the word freight is cautiously avoided, even at the expense of some awkwardness of expression. The plaintiffs agree to "let, or hire," not "let to freight," as is usual in charter-parties of affreightment. The instrument is called "this memorandum of an agreement;" not "this charter-party of affreightment," as is usual in contracts for freight. The word voyage is not used in any part of the instrument, probably because that word, in common acceptance, includes the idea of a mercantile adventure, and not merely the act of going from one port to another; and because the price to be paid was for the time and ability to use the vessel, and not for the actual use of her. The word "freight" was probably avoided because it implied an actual transportation of goods, and it might possibly be said that no freight would be due if no goods should be transported. The usual words "for a voyage," were probably avoided because it might be said that no freight would be earned until the voyage should be

ended. The parties have substituted the word "charter" for the usual term "freight." Thus the defendant agrees "to pay \$600 from time to time as the charter of the said brig amounts to that sum: that is to say, when the said brig earns \$600, at the rate of the before-mentioned charter, it is to be paid in Spanish milled dollars," &c. And again, the defendant agrees "that the charter shall commence nine days before the brig's leaving the wharf for sea;" and in the memorandum it is provided that, in a certain event, the defendant is to deliver the brig to the plaintiffs at Bath, "he" (the defendant) "paying charter at the rate within specified." The defendant was at liberty to take in goods on freight. In that case the defendant would be entitled to the freight and the plaintiffs to the hire, or the charter, as it is called in the agreement; and each might insure his own interest. The plaintiffs might insure the hire the defendant the freight. If the defendant had taken in goods on freight, the shipper's remedy for non-delivery of those goods would have been against the defendant as owner pro hac vice, and not against the plaintiffs. The court is therefore clearly and unanimously of opinion that this is a case of hire and not of freight. The price was earned by time, not by the carrying of goods, or the ending of a voyage, except as to the payment of the first sum of \$600 at Havana. The arrival of the vessel at Havana was a condition precedent to the payment of that sum, not because it was the freight of goods, nor because the voyage was there ended; but because, until the arrival of the brig at Havana the *casus foederis* would not have occurred.

The court being of opinion that there was no obligation upon the plaintiffs, either express or implied, to see that the vessel performed the voyage, projected by the defendant, it is unnecessary to consider the other question, viz. whether the plaintiffs' discharge of such an obligation, if it had existed, would have been a condition precedent to the payment of the sum stipulated to be paid for the hire of the vessel; and all the cases may be laid aside which were cited to show that freight is not due until the goods are delivered, or the voyage ended; and to show what covenants are precedent, and what are mutual. The court has carefully examined the authorities cited, and many more, to show in what cases the owner, and in what the charterer, shall be considered as the owner pro hac vice; and they find no case in which the charterer has been held to be owner pro hac vice, so strong as the present; and none in which the possession of the vessel, for the time, has been more completely transferred to the charterer. It would occupy too much time to remark particularly upon the authorities which have been consulted upon that point.

The court has also examined the declara-

tion, and can see no substantial fault in it; and we are unanimously of opinion that the 2d plea is bad. The 3d plea avers a deviation by the master and crew, while the vessel was lawfully subject to the orders and directions of the defendants; and the 4th plea avers that the captain and crew deviated, whereby the vessel and insurance were lost. The court is of opinion that both these pleas are bad for the reasons before given in regard to the 2d plea.

After the opinion of the court was given, the cause came on for trial upon the issue joined upon the first plea, which was, in substance, that the defendant "hath paid to the said plaintiffs all and every such sums of money as were become due and payable from the defendant, according to the tenor and effect, true intent and meaning of the said articles of agreement; and of this he puts himself on the country," and the plaintiffs likewise.

Upon the trial of this issue, Mr. Barrell, for plaintiffs, offered the deposition of Mr. Weber, the master of the brig, taken under a commission from this court.

Mr. Bradley, for defendant, objected that it did not appear that William Terry, who certifies himself to be a justice of the peace, and that the commissioners took before him the oath required by the commission, was a justice of the peace.

THE COURT, however, overruled the objection, saying that the certificate of the commissioners was sufficient evidence that the oath had been properly taken. They are quoad hoc the officers of this court, and are to be believed.

In the course of the trial, which occupied several days, THE COURT (CRANCH, Chief Judge, absent) instructed the jury, at the request of the plaintiff's counsel, "that the plea is no traverse of any averment in the declaration necessary to establish the primary obligation to pay what is therein demanded, nor imposes on the plaintiffs any necessity, in supporting the issue on their part above joined, to prove any averment in their declaration; but that the whole onus probandi, under the affirmative plea of payment, is on the defendant to prove such payment as he has alleged;" the court being of opinion, and so expressing it to the jury, that upon the issue joined in this case, and which the jury had been sworn to try, the defendant had assumed upon himself the burden of proving that he had paid the hire of said vessel for the time stated in the declaration, at the rate of \$425 per month.

The defendant took a bill of exceptions and carried the cause to the supreme court, where it was reversed (5 Pet. [30 U. S.] 141), for error in that instruction; but Mr. Justice THOMPSON, who delivered the opinion, intimated that the judgment of this court upon the demurrer, was probably correct.

Case No. 17,895.

WINTER et al. v. UNITED STATES.

[Hempst. 344.]¹

District Court, D. Arkansas. Oct., 1848.

SPANISH LAND GRANT—OPEN CONCESSION—NEGOTIATION OF SURVEY—IDENTIFICATION OF MONUMENTS.

1. Hearsay and reputation are not admissible to prove particular facts in a contest as to private rights, and hence proof that a stone monument was reputed to have been put down to designate a private grant, cannot be received.

2. By the laws and ordinances of Spain, and the regulations and usages of the province of Louisiana, the survey of an open concession or grant was necessary to give it locality and to perfect the title in the grantee, and without which private was not separated from public property, nor was the grant valid as against the government which made it, and hence not valid against the United States.

[Approved in De Villemont v. U. S., Case No. 3,839; Cited in Glenn v. U. S., Id. 5,481.]

3. The regulations of Count O'Reilly, of 1770; those of Gayoso, of 1797; those of Morales, of 1797; the regulations existing in Florida as to the survey of lands, and decisions of the supreme court of the United States on that subject, referred to and commented on at large.

4. A survey of lands under the Spanish government, as with us, meant and consisted in the actual measurement of land, ascertaining the contents by running lines and angles, with compass and chain; establishing corners and boundaries, and designating the same by marking trees, fixing monuments, or referring to existing objects of notoriety on the ground, giving bearings and distances, and making descriptive field notes and plots of the work [Ellicott v. Pearl] 10 Pet. [35 U. S.] 441; [U. S. v. Hanson] 16 Pet. [41 U. S.] 198.

[Cited in Muse v. Arlington Hotel Co., 68 Fed. 641.]

5. A warrant or order of survey could be executed by the surveyor-general of the province of Louisiana or by any deputy appointed by him, or by the district surveyor, or by the commandant of a post, or by a private person specially authorized by the governor general or intendant; but Spain never permitted individuals to locate their grants by mere private survey.

6. The supreme court of the United States has decided in various cases, that an actual survey of an open concession was a necessary ingredient to its validity, and that it must also have been an authorized survey to sever any land from the royal domain. These cases cited.

7. A party is bound to abide by his own pleadings, and cannot therefore be permitted to prove any thing in opposition thereto.

8. Therefore a petition which prays for the confirmation of an indefinite grant, and shows on its face by express averment, that the same was not surveyed, presents a case in which the claim must be rejected.

9. Fixing a stone post or monument at any particular spot, with however much solemnity, was not equivalent to a survey, nor could it in the very nature of things designate any particular or specific land, and it was, therefore, an unauthorized act, not recognized by the Spanish government.

10. No usage or custom can prevail against an express law of the lawmaking power.

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

11. Under the government of Spain, as well as by the civil law, conditions in grants were required to be performed, and were not inserted as mere matters of form.

12. A grant of one million of arpens of land, at the port of Arkansas, made by the Baron de Carondelet, governor-general of Louisiana, to Elisha Winter, on the 27th of June, 1797, rejected, because the grant did not designate any particular land, and was not designated and ascertained by an authorized survey.

Petition for the confirmation of a Spanish grant, determined in the district court of the United States for the district of Arkansas, under the act of congress of the 26th of May, 1824 (4 Stat. 52), before Benjamin JOHNSON, District Judge. The facts of the case are sufficiently stated in the opinion of the court. A translation of the concession referred to in the petition and thereto attached, was as follows:

"The Baron De Carondelet, Knight of the Religious Order of St. John, Field Marshal of the Royal Armies, Governor-General and Vice Patron of the Province of Louisiana and West Florida, Inspector of the Troops of the Same, &c. Being desirous to promote the population and agriculture by all the means adapted to the political circumstances of the times, and advertng to the proposals made to the government by Elisha Winter, to the end of forming a settlement in the post of Arkansas, for the cultivation of flax, wheat, and hemp; therefore, in order to realize said object, I presently concede to said Elisha Winter one thousand arpens of land square, to William Winter five hundred arpens square, to Gabriel Winter five hundred square, and to Samuel Price, Richard Price, William Hubble, John Price, William Russell, Joseph Stetwell, and Walter Karr, fifteen arpens of land in front by forty in depth, to each of them respectively, in consideration of the good information given to me of their excellent deportment and good principles, under the express conditions, that as soon as they shall have settled themselves on their respective surveys, which the commandant of the post will cause to be executed, there shall be delivered to each one his title deed in due form; that the settlement is to be made as united and as closely connected as possible, nor are any other American families to be admitted than those above named, and such as the government may permit to settle, which permission may be given in the meal time by the commandant to the good colonists, such as Spanish, French, German, and Irish, who shall make application; but no manner of admission shall be granted to vagabonds, and for any contravention of this clause the commandant will be held responsible. Provided, that if in the term of one year the lands appropriated in this document to the families above named, respectively, are not occupied, this concession shall be void, which shall be attended to in all its parts by the commandant of the district, who is charged with

the strict execution of the whole, consistent with the beneficence and humanity of the Spanish government. The present given at New Orleans, the 27th of June, 1797.

"[L. S.] The Baron De Carondelet.
"Andrez Lopez Armisto."

Among various exceptions to testimony adduced by the petitioners, was one to the deposition of William Russell. The material parts of the deposition were as follows:—William Russell being duly sworn, says, the first time he was at the post of Arkansas, was either in 1812 or 1813; that he then heard the grants to the Winters frequently spoken of, and that it was the general understanding of the community at the post of Arkansas, that three grants, one to Elisha Winter, one to William Winter, and one to Gabriel Winter, had been made by the Spanish government; that William Winter had settled on the lands granted to him, very soon after the grant was made, and that he continued to reside on it until his death, and was buried on it. It was generally understood and reported at the post, that Elisha Winter, soon after the date of the grant, brought from Lexington, Kentucky, a hewn stone or monument, three or more feet long, and of large size, which was established under the superintendence of Don Carlos De Villemont, the then Spanish commandant of the post, in 1798, as the south-east corner of the tract granted to Elisha Winter, and as the south-west corner of the tract granted to William Winter. The place pointed out to me, as that where William Winter settled and lived and died, was north of east of the corner-stone, and one mile and a half from it. The grant to William Winter was generally understood, and reputed at the post of Arkansas, in 1812 or 1813, to lie east of that granted to Elisha Winter; that the lines of these tracts were to be run to the cardinal points, and that the line dividing them was to be run north from this corner-stone. He has heard the said Don Carlos De Villemont say, that the stone was planted with a good deal of public ceremony for the purpose of putting the grantees in possession of their lands. As to these matters he has no personal knowledge, and what he does know and states is derived from hearsay and reputation. In 1816 or 1817, he was at the said corner-stone, which had then fallen down and was lying on the ground; but it was generally said to be at the same spot where it was first set, in 1798.

To this deposition the United States, by S. H. Hempstead, district attorney, excepted on the ground that it was formed of "matters of hearsay and reputation as to particular facts, and therefore inadmissible." An exception was also taken to the statement of Don Carlos De Villemont, made before Frederick Bates in 1813, on the ground that the latter had no authority to take it.

These exceptions having been argued by Daniel Ringo, for the petitioners, and S. H.

Hempstead, Dist. Atty., for the United States, THE COURT, on the 7th of September, 1846, delivered the following opinion:—

OPINION OF THE COURT (JOHNSON, District Judge). The first exception is to the second deposition of William Russell. It is not deemed necessary to notice any other ground of exception to this deposition than the one which relates to hearsay and reputation. The court heretofore ruled in this case, that hearsay and reputation was not admissible to prove particular facts in a contest as to private rights; and it may not be improper briefly to state the reasons on which the rule is based. It is certainly a general and long established principle of the law of evidence, that hearsay and reputation is not competent to prove any fact in a court of justice. The reason is that evidence ought to be given under the sanction of an oath, and an opportunity afforded of cross-examination. It is also unquestionable, that there are some exceptions, which are probably as ancient as the rule itself, and which are allowed, either because the danger attending such evidence is not likely to occur in the excepted cases, or because greater inconvenience would result from its exclusion than its admission; and among these exceptions are questions relating to public rights. In these cases common reputation is admitted, because such rights being matters of public notoriety, and of great local importance, become a continual subject of discussion in the neighborhood, where all have the same means of information, and the same interest to ascertain the claim. 1 Phil. Ev. 248; Weeks v. Sparke, 1 Maule & S. 679; Morewood v. Wood, 14 East, 329. The boundaries of parishes or manors may be thus proved, because they are more or less of public concern; and it is not to be doubted that if a contest should arise between two states or two countries, as to boundary, general reputation would be admissible. Gris. Eq. Ev. 220. The tradition, however, of a particular fact, as that a post or stone was put down, or turf dug in a particular spot, is not competent evidence to establish a private right, because it is not a matter of public concern in which the community are interested. This rule is undoubtedly sustained by the English cases, and by the weight of authority in the American courts. 1 Phil. Ev. 250; 3 Term R. 709; 5 Term R. 123; 14 East, 330; 1 Price, 253; 1 Anstr. 298; Cherry v. Boyd, Litt. Sel. Cas. 7; Lee v. Tapscott, 2 Wash. (Va.) 276; U. S. v. Kingsley, 12 Pet. [37 U. S.] 483; Elecott v. Pearl, 10 Pet. [35 U. S.] 412. The whole object and scope of Russell's deposition is to prove matters of reputation, or the voice of common rumor, which relate to no public; but to a strictly private right. The petitioners are prosecuting a private claim in this court, in which the public are not interested in the sense contemplated by

the rule as to public matters. The deposition of Russell is, in the opinion of the court, incompetent and inadmissible as evidence, and must be rejected.

The third exception is to the testimony of Don Carlos De Villemont, purporting to have been taken before Frederick Bates, as commissioner, in 1813. The main ground relied on by the district attorney to exclude this testimony is, that "the recorder of land titles, acting as commissioner, had no jurisdiction over the case, and had therefore no authority to take the testimony." By an act of congress of the 13th of June, 1812 (2 Stat. 748), power was vested in the recorder of land titles to investigate and report on certain Spanish and French claims in the state of Missouri. His authority appears to have been confined to two classes of cases; first, to the claims of persons who were then actual settlers on the land they claimed, and whose claims had not been before that time filed with the recorder of land titles. Such persons were allowed to file a notice in writing, stating the nature and extent of their claims, and the written evidences thereof, which were directed to be recorded. Second, to claims which had been presented to the board of commissioners of Missouri, but had not been decided on by that board. The recorder has authority to take testimony in these two classes of cases. 1 Land Laws, 622. Now this case could not belong to the first class; because the claimant was not then an actual settler on the land; nor did he file any notice of claim with the recorder. Nor could it belong to the second class, because, although it had been before the board of commissioners, it had been rejected by that board. It had therefore "been decided on," and whether rightfully or wrongfully, it was not his province to determine. It was certainly not the intention of congress, either by that or any subsequent law, to give him authority to reinvestigate either confirmations or rejections of claims made by the board of commissioners. Strother v. Lucas, 12 Pet. [37 U. S.] 454. This case, then, was not regularly before him; he had no jurisdiction over it for any purpose whatever, and it must therefore follow that he had no authority to take the testimony, and that it is of no more force or validity than a mere ex parte statement. It must, therefore, be excluded. The second deposition of William Russell, and the testimony of Don Carlos De Villemont, must be rejected and suppressed.

The remaining exceptions of the district attorney to the evidence adduced by the petitioners, will be reserved for decision till the final hearing of the cause. Depositions suppressed.

Samuel C. Roane and Frederick W. Trapnall appeared as counsel for the petitioners. Daniel Ringo was also of counsel for the petitioners, who argued the law and facts of the case at great length. The following is

a synopsis of his argument, and the points and authorities referred to by him:—

The grant is indisputably proven. The lands granted are at the post of Arkansas. Is not this definite? Cannot a survey be made from it? The lands were granted for settlement and agriculture, as is particularly shown on face of the grant. They were granted June 27, 1797, to be settled in one year. In the winter or spring following, all the grantees removed to the post and settled there as agricultural farmers, embarked in a business not previously followed by them, and remained there engaged in such business until at and after the United States took possession of the country, a period of seven years at least. This is proven by Stilwell and Many. Their settlement was upon the nearest vacant land to the post; the land between their settlement and the post was occupied by and granted to others. This is proven by Stilwell and Pelham. They removed there with the avowed design of settling on lands granted them by the Spanish government, and induced Stilwell to remove with them to occupy lands granted to him by the same instrument. This is proven by Stilwell. Winter procured in Kentucky, and brought with him to Arkansas, a stone two feet long, avowedly for a corner monument to the lands granted him, which, shortly after their arrival at the post, was taken to his dwelling, and thence to a place some two miles distant, and planted in the ground upright, just outside the lands granted to and occupied by others, where it has ever since remained. This is proven by Stilwell. Winter, thenceforward, claimed there the quantity of land given by said grant; his claim was notorious, and must have been known to the commandant, and he exercised acts of ownership by occupancy, and by bartering some of it with Stilwell's father. The settlement at the post consisted then of some forty or fifty families, confined within the compass of four or five miles from the post. Proven by Stilwell. Stilwell's father was put into possession of his land by the commandant; and in the same manner was every one who settled at the post invested with the land occupied by him. The grant contained an order to the commandant to put the grantees in possession of the granted lands; establish the boundaries of their lands respectively; whereupon a title deed in form should be given to each, and provided that if the lands granted were not occupied by the families named in the grant within one year, the concession should be void. Settlement on the granted lands within one year, was the only condition prescribed to the grantees; the commandant was charged with the duty of establishing the boundary, or making the surveys, and forbid to admit other Americans, not named, as settlers. This proves, incontestably, that the commandant possessed and exercised the control of the settlements made at the post,

or within his jurisdiction, allowing only such persons to settle there as he was ordered by his superior, or himself judged proper to admit, and excluded such as he was directed, or chose, from settling. Also that he prescribed to each the place of his settlement, which was to be as united and contiguous as possible; and he is commanded expressly to attend to the strict execution thereof in all its parts.

What was it that the commandant was thus enjoined to attend to, and do or see done? (1) To survey, cause to be surveyed, or establish the boundaries of the lands granted. (2) To see that each family to whom the lands were granted was established on the same within one year from the date of the grant. (3) To see that no more or other American families than those named were admitted to settle on said lands. Did he perform these orders? The Winter families and Stilwell removed to the post, and were settled and established there as early as the spring of 1798; Stilwell was formally put into possession by the commandant; the Winters at once made extensive improvements, erected permanent buildings, cleared lands, cultivated wheat, flax, hemp, and cotton; brought to the country sheep and other stock, the first that were ever there, and slaves and hired men; brought a stone to be planted as a monument on corner to the land granted, which was planted within two weeks after their arrival at a place contiguous to, but outside of the lands then occupied by others, so that a line extended west and east from it would embrace their settlement north of such line, in the quantity of lands granted to them; continued their settlement at the same place for seven years under the Spanish government, claiming the land as their private property under said grant, and that said stone had been planted by the commandant as the south-east corner of E. Winter's tract. These facts were notorious; were much talked of; were known to the various commandants, who never molested them, or denied their right, as claimed; nor did they ever complain that the commandant had not done what was required of him, nor did the governor ever complain that his orders had not been executed. The commandant was a public officer, and the law presumes that he discharged his duty, and the presumption is therefore irresistible that he established the boundary of the lands granted to Winter and his sons; that he caused said stone to be planted as a monument of such boundary; that it indicated the south-east corner of the tract of Elisha Winter; and that he saw the Winter family established on the lands so granted to them, according to his orders and the usages and customs then observed at said post. As to presumption, *Hartwell v. Root*, 19 Johns. 345; *Ross v. Reed*, 1 Wheat. [14 U. S.] 482; *Frost v. Brown*, 2 Bay, 133.

With this conclusion every act of the parties accords; while no one fact has been or can be adduced to militate against this presumption; let us see. The grant was made June 27, 1797. By it the commandant was required to set apart to each family the lands granted; and they were to establish themselves on the lands so granted and set apart for them respectively within one year: these facts are incontestably proven. Winter procured in Kentucky and brought to Arkansas a hewn stone of large size, two feet long,—there was no other such at or near the post,—removed to and settled at the post. The stone was set up conspicuously in the prairie immediately after. Winter claimed the land to the extent of the grant northwardly, claimed the stone as his southeast corner. All these facts were notorious at the post in 1798, and thenceforward; no one then controverted his rights as claimed. But it has been said in argument that the stone may have been planted without the authority or direction of the commandant. For what purpose? Can a rational man suppose that Winter would have procured, transported, and planted it, without any object? or that he would have planted it with the design of making title to lands not granted to him? or that the commandant would have suffered him to establish himself on the land, of which he publicly claimed this was a corner monument, and quietly occupy it for seven years under such claim, and to exercise all the acts of ownership over it? Such a supposition is directly opposed to the ordinary conduct of men, to the usages of the Spanish authorities, to the express orders to the commandant, and utterly irreconcilable with the acts and conduct of the parties, and the legal presumptions based on them. Nor could any of the parties at that period have anticipated a change of government, or acted in reference to such event; nor can it be presumed that Winter, by such conduct, could have expected to make title to or hold the lands claimed by means other than those warranted by the laws, usages, and customs then prevailing in said district; so that no possible motive for planting said stone without the direction and authority of the commandant can be conceived.

But it has been also urged that this is a general grant, which could only be so located as to sever the granted lands from the domain, and make them the property of the grantees, by an actual survey thereof, made by or under the authority of the Spanish surveyor-general. To this we reply, that the governor-general, as viceroy, possessed, in regard to the disposal of the public lands, all the powers of the king. 1 White, New Recop. pp. 367-372; 2 White, New Recop. p. 31, § 23; Id. p. 38, § 45; Id. p. 41, § 50; fee-simple right acquired in four years, Id. p. 49, § 75; grants not revoked without fault of grantee, Id. p. 99; as to mode of grants, surveys, &c., Id. p. 474; Morales's letter of

Oct. 16, 1797; custom, 1 White, New Recop. p. 360, tit. 7; as to dominion, Id. p. 85, cc. 1-4, mode of acquiring, Id. 91, cc. 9-11; Id. p. 154, §§ 1-3; Id. p. 300, c. 7; Id. pp. 341-344; Smith v. U. S., 10 Pet. [35 U. S.] 326. He was neither restrained by any law or order of the king, nor could he be by any regulations of his predecessors, for his powers were equal to theirs, and he could limit or abrogate them in whole or in any particular.

In the present grant he expressly orders the commandant of the post to establish the boundaries, or cause the surveys to be made, as he had an unquestionable right to do. It is in proof that no surveyor was then in the district of Arkansas, nor any actual surveys made for years thereafter. That post was a frontier, remote from the capital and exposed to Indian depredations, and no actual survey of these lands could safely have been made; which facts were doubtless known to the governor, and fully account for the orders given by him to the commandant to establish the boundaries of the lands, or cause them to be surveyed, thus dispensing with a survey by the surveyor-general of these lands. That no survey by actual admeasurement and running and marking the lines was then made, is admitted; but that a boundary was fixed by the commandant, we insist is established: (1) By proof of the occupancy by the grantees. (2) By the planting of the stone as a monument of the boundary, and the marking of trees to indicate the boundary. (3) By the figurative plots of said tracts returned to and found in the land archives of said province and district.

The lands at the post were then in Lower Louisiana (proven by Stoddard), and the archives belonged to the office at New Orleans, the capital; and these plots were found in said archives in 1805, indorsed by Trudeau, the surveyor of said province; that they were received by him October 8, 1798, as appears by the certificate of Armesta; the same remained in the archives at New Orleans on the 1st March, 1808, as appears by the certified copies made on that day by Trudeau, the same person who had custody of the originals in 1798, and also in 1808; also in the records relating to said province taken to Florida on the surrender of Louisiana; the same evidence is found in 1808, and Trudeau, in April, 1808, again certifies that he took a copy of the original plot, and deposited the same among the archives; and the same remains in said office in 1848, as appears by the testimony and certificate of Bringier, the present depository thereof, under the authority of the state of Louisiana. In 1808, June 18, the copies of said plats, of 1st and 2d of March, were produced to the board of commissioners for Louisiana and recorded in the recorder's office established by the United States at St. Louis. At that time the whole was within the same jurisdiction; and copies from the

office at New Orleans, where the originals then were, without additional authentication, were as conclusive as the originals or protocols which by law must remain among the archives, and unless shown to be antedated or fraudulent, were conclusive. 1 White, New Recop. tit. "Proofs." Such copy, therefore, imported such verity as by law clearly entitled it to be used as evidence, and to be admitted to record by the United States recorder. Trudeau had been intrusted with the custody of these archives by the Spanish government, and they continued in his custody afterwards under the authority of the United States government; he was their lawful custodian, and he had a right, under the unaltered laws and usages in force in the province, to authenticate copies of them, as he did; nor was there then or now any authorized imputation that such survey or plot was made at a different time, or received at a different time from that stated by Trudeau, namely, October 8, 1798, or that such plots have not been in his office as public archives ever since. And can it now be presumed, without evidence, that they were not made and deposited in 1798, or that the plots of survey were not made by proper authority? If not made by such authority, would they have been received and kept on record as archives by the proper depository of the surveys as authentic evidence of title? Such presumption is contrary to reason, and not warranted by any principle or rule of law; but on the contrary, the presumption from the facts is irresistible. that it was a plot or survey authorized in such case, constituting an authentic evidence of title in the grantees to the lands therein indicated. Otherwise it would not have been so officially filed and preserved by the lawful and proper depository of such evidences of title; nor can he be presumed to have acted fraudulently in the matter.

The evidence of genuineness of these plots is, therefore, at least prima facie, established; and there is no testimony contravening this fact. The presumption that the commandant executed the order of the governor, established the boundary of said lands, or caused said plots thereof to be made, is corroborated by these facts; and the stone being mentioned thereon, as a point in the boundary, corroborates the evidence and presumption that said stone was planted by the commandant, or his authority, as a monument or evidence of the boundary of said lands. These copies of said plots, as stated above, were recorded by the board of commissioners June 18, 1808. By acts of congress claimants were required, within a limited time, to produce for record the written evidence of their right, under penalty that if not so recorded they should never be received in evidence in any court; which requirement Winters complied with June 18, 1808, and his grant and these plots were then recorded by the recorder of the United

States. But it has been said that the recording gives them no character or validity as evidence; that the recorder should record papers produced without regard to their genuineness or otherwise, and that before a copy of such record can be read, the genuineness of the original must be proven by extraneous evidence.

Can such be a fair exposition of the acts of congress requiring such documentary testimony? If so, the effect would be simply to impose burdens on the claimants, and seduce them into a fatal but delusive security as to the evidences of their titles, by requiring them, under the penalty of losing the benefit of such documents as evidences of their rights if they should fail to have them so recorded, and subjecting them to the expenses incident to such recording. Such we cannot conceive to have been the design of the government, or the effect of the law; and we insist, that by recording them they were intended to be made evidence without further proof, as without such recording they are forbidden to be received as evidence in any court. 1 Land Laws, 519, 528, 548, 620, 636, 640. If such be not the fact, no advantage whatever could result to the claimants, but only advantages to the government, and burdens and prejudice to the claimants; a result not warranted by the spirit of the acts of congress, but directly opposed to it. See *MacKay v. Dillon*, 4 How. [45 U. S.] 445. Copies admitted by court in Missouri, and admission not disapproved.

But from lapse of time, if from no other principles, the transcripts of these plots ought to be received as evidence, being from the proper office and made by the proper depository of the original papers, in which office they are in this instance shown to have been since 1798, a period of fifty years, within which time witnesses to the transaction are presumed to have died or departed the vicinity, and especially such may be presumed to be the case in the circumstances of the present case, the act having taken place under a foreign government, and seven years before the present government acquired jurisdiction; the smallness and sparseness of the settlements, and the removal of many of the inhabitants on the change of government, as well as the death of all the parties to the transaction,—the grantees, the commandant, and the surveyor-general. See *Duncan v. Beard*, 2 Nott & McC. 406; Phil. Ev. 477, 479, and notes; 3 Phil. Ev. 1310; *Jackson v. Laroway*, 3 Johns. Cas. 283; *Hewlett v. Cock*, 7 Wend. 371; *Barr v. Gratz*, 4 Wheat. [17 U. S.] 213; *Winn v. Patterson*, 9 Pet. [34 U. S.] 674; *Patterson v. Winn*, 5 Pet. [30 U. S.] 240; 1 Starkie, Ev. 343; [Thomas v. Horlocker], 1 Dall. [1 U. S.] 14; *Jackson v. Blanshan*, 3 Johns. 292; 10 Johns. 495; 3 Har. & McH. 581; Id. 196; 1 Bay, 364; 2 Nott & McC. 55; 2 Munf. 129; 2 Wash. [Va.] 276; 6 Bin. 435; 2 Day, 280.

It has been asked, also, who are the Mar-

quis. De Casa Calvo, and Andres Lopez Armesta? We prove the signature of the latter, and that he was secretary of the province, which may also be seen by the documents published by authority of congress; and by the same it is shown who the Marquis of Casa Calvo was, and his official character. 2 Land Laws, Append. 165, 166. These documents show the change of sovereignty on the 30th November, 1803; they were deposited in the provincial archives, then under the dominion of the United States, December 28, 1803, and certified by Spanish officers, and now published as well authenticated. Spanish proclamation of May 18, 1803, by Salcedo and Casa Calvo, supposes and requests the continuance in office of the existing judicial and ministerial authorities. The dominion, as before stated, was delivered November 30, 1803; October 31, 1803, congress authorized the president to vest in such person or persons as he might elect; the military, civil, and judicial powers, &c.; and on the 26th March, 1804, passed acts for establishing territorial governments, to take effect October 1, 1804, in which provision is made for continuing the existing laws, &c. By what laws and what officers was the country governed in its municipal affairs after the change of dominion, and before the existing laws and officers were reenacted or reappointed by the United States? Surely there can be no doubt as to this; the existing laws and officers remained until superseded by others appointed by the United States. The dominion only was changed, and every thing else remained as before. If this were not so, what was the situation of the province after the cession to France in 1800, and before the cession to the United States in 1803? The sovereignty or right of sovereignty was in France, but the actual government was administered by the existing authorities, and their acts of an administrative character, indeed all their acts, have been recognized by the United States and by France. The official character of Don Vincent Folch is shown by document No. 29. 2 Land Laws, Append. 227. He was governor of Florida from November, 1796, to 1809, and from May, 1809, to October, 1809, and we present his official authentication, as such, of the documents and plots of these lands, showing that they exist in the archives of Louisiana, removed to Florida by Casa Calvo; and his authentication under his seal, as viceroy of Florida, is as authoritative as the great seal of Spain, for as to the province, he stands in place of the king. *Lincoln v. Battelle*, 6 Wend. 484; *Vandervoort v. Smith*, 2 Caines, 155; *Paekard v. Hill*, 7 Cow. 434.

In addition to these evidences (which apply to all the cases), the testimony of Gabriel Winter establishes the position of the lands of Wm. Winter, the establishment of the corner of his tract by De Villemont, and his investiture of the land granted him by the commandant. He speaks from personal

knowledge, is a competent witness, and is in every particular fully corroborated by other testimony; his interest, if any, is in the question only, which does not disqualify him. 3 Starkie, 781; 1 Starkie, 84, 85. Gabriel Winter never occupied his land, nor was it occupied for him by any tenant of his. But if the proof establishes the grant, and the fact that his land was set apart to him according to the usages of the Spanish government or orders of the governor, and can be identified, it is his. Now if the survey offered be evidence, although the plot is figurative only, it is sufficient; the place of beginning is easily identified, the geography of the country shows where the lake on which it commences is situated, and this the court will judicially notice; and if there is any difficulty about the identity (if the other facts requisite are established), the court should direct a survey, as was done in Florida in sundry cases. By establishing the Winter family on any portion of the lands granted, the condition of the grant as to occupancy was fulfilled, according to the usages then in force; but occupancy was not indispensable, if the lands were set apart for him after being granted to him; they were severed from the domain and became his private property, and we prove that performance of specified conditions was not usual nor required. Customs established control the general laws on subjects to which they relate, and which they embrace. It is proved that there was no surveyor in Arkansas to 1802, which fact must have been known to the governor, and therefore his order required only the establishment of boundaries or beginning points for the surveys; and for the like reason, the custom, as proven, that lands were in that mode assigned to individuals, and they put in possession under and by such designation or establishment of boundary, is not only shown to have existed, but it existed of necessity. Where lands are occupied under a grant, a survey may be presumed. [*O'Hara v. U. S.*] 15 Pet. [40 U. S.] 283. A copy of a deed required to be enrolled is as good evidence as the original. *Dick v. Balch*, 8 Pet. [33 U. S.] 33; *Jackson v. Cole*, 4 Cow. 587; *Jackson v. King*, 5 Cow. 237; *Peck v. Farrington*, 9 Wend. 44. Entries of surveys made in his office by registers of land-office in Kentucky or Virginia are evidence of the facts, are public records, and it is not to be presumed that he would place on his records any thing not authorized; and facts proved by such records must be received as prima facie evidence. *Galt v. Galloway*, 4 Pet. [29 U. S.] 342, 343. So, we insist, the rule is as to matters recorded by the recorder of land titles, who is a sworn officer, and those received and deposited as records or archives by the Spanish surveyor-general, from both of which officers we have authenticated copies of the figurative plots of Winter's survey or grant of lands, as also a sworn copy from the present depository

and keeper of the latter. *Williams v. Sheldon*, 10 Wend. 634; *People v. Denison*, 17 Wend. 312.

A copy of an award recorded in a county, which is afterwards divided, of lands situated in the new county, is properly authenticated by the clerk of the old county. *Jackson v. Tibbits*, 2 Wend. 592. And so, we insist, is now the rule as to records made in Louisiana, before the division, respecting lands now in Arkansas. Hearsay and general reputation competent testimony as to boundaries. 1 Phil. Ev. 249, 251. The acts and declarations of Winter, from the date of the grant to the date of his settlement at the post, in regard to his removal there, its object, the transportation of the stone and its object, as well as the declaration of Winter, extracted from Stilwell by the examination of the United States, and in answer to interrogatories propounded by them, are competent proofs; the former are *res gestæ* as to the matter, and the latter being proof elicited by the United States, they can neither impeach the witnesses or object to its competency. What a deceased witness has sworn to at a former trial between the same parties, in relation to the same issue, is proper evidence. *Jackson v. Crissey*, 3 Wend. 251; *Crary v. Sprague*, 12 Wend. 41. We insist that the parties and issue were the same when these cases were before the commissioners that they are now; and what witnesses then said, who are now dead, is good evidence, which embraces all the witnesses examined by said commissioners. See, also, Act Cong. 1824, § 4.

S. H. Hempstead, Dist. Atty., argued the case fully in behalf of the United States, on all the points presented; but to defeat the claim relied mainly on the position, that as the concession was indefinite in itself, a survey was necessary to give it locality, and as no survey was ever pretended to have been made, the concession was void. As to the necessity of a survey, which was the turning point in the case, the following is a synopsis of his argument. The survey of lands was always a matter of the first importance in the province of Louisiana. It was generally expressed and always implied, in all grants not capable of complete identification by natural boundaries. They were made upon conditions that they were not to interfere with previous grants, or in the very phraseology of the grants themselves, "without prejudice to third persons," which most strongly implied the necessity of a survey as the only practicable mode of conforming to this requisition. Actual survey and the actual demarcation of boundaries, by persons properly authorized, were the only means by which authentic official evidence could be furnished of the location of grants, and the separation of private from public property. Without going further back than 1754, the royal regulations and orders, the regulations of the several governors and those of the in-

tendants from that time to the acquisition of Louisiana, affords ample evidence of the truth of the proposition, to say nothing of the uniform usage of the provincial government upon that subject. It is prescribed in the royal regulations, of October 15, 1754. The sixth clause was based on the fact that many grants, sales, and compositions of lands, made after the year 1700, were held by the grantees, without having been surveyed or valued, and directs that confirmations should be withheld until such surveys and valuations should be executed. The seventh clause also speaks of survey and valuation. 2 Land Laws, 52. Count O'Reilly, invested with unlimited civil and military powers, was sent by the king of Spain, in 1769, to the province of Louisiana, for the purpose of establishing there a permanent civil and military government. He states that the king had been pleased by his patent, issued at Arauguez, the 16th April, 1769, to delegate to him powers to establish in the military, the police, the administration of justice, and in the finances, such regulations as should be conducive to the service and the happiness of his majesty's subjects in the colony. On the 18th February, 1770, O'Reilly established general regulations with regard to granting the royal domains. The 12th is as follows: "All grants shall be made in the name of the king by the governor-general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge and of two adjoining settlers, who shall be present at the survey; the above-mentioned five persons shall sign the process verbal which shall be made thereof, and the surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government and *cabildo*; another shall be delivered to the governor-general, and the third to the proprietor to be annexed to the titles of his grant." 2 Land Laws, Append. 206.

The regulations of O'Reilly were not only expressly sanctioned by the king, on the 24th August, of the same year, but Don Louis De Unzaga, then the governor-general of Louisiana and his successors, were specially required to conform to them in all points, until they should be changed by his majesty. 2 Land Laws, Append. 530. From the 18th February, 1770, this regulation requiring a formal and particular survey of concessions, was the law of the whole province of Louisiana, and from the 24th August following, possessed the force of a royal cedula, which no representative or tribunal of the Spanish monarch was at liberty to modify or disregard. It does not appear that it was ever abrogated, or changed by the king, and indeed the uniform practice of the provincial government conforming to it, is the highest evidence of its having become firmly ingrafted upon the civil system of government

which existed in the province of Louisiana. But this is not the only evidence. Governor Gayoso, in his instructions, of the 9th September, 1797, declares that the forms established by his predecessors, in which to petition for lands, should be followed, and it is apparent that they carry out the general policy contained in those of O'Reilly. In a letter of Gayoso to Morales, the intendant-general, dated March 5, 1799, he says: "I also send you the form of the first decree which it has been the custom to issue before the survey was made. Of the registers which will soon be sent you, you will see the form in these used by all my predecessors." The intendant-general of the province of Louisiana, Morales, in a letter to Don Pedro Varela Ulloa, the king's minister, dated October 16, 1797, respecting grants of land, says: "In order to obtain lands from the exchequer (fisco) the custom is still pursued which prevailed when the French were masters of the country, except in so far as the government and the intendency acted in concert; and no other form is or has been observed than the presentation of a memorial by the petitioner praying for a certain number of arpens and designating their location. In virtue of this the surveyor or commandant of the post, with the assistance of the neighbors, makes the survey, and if no objection be offered puts the party in possession and gives him the papers necessary for having his title drawn out; this title is issued upon the strength of these papers, a minute of it being preserved in the office, in order that it may be noted in the book of grants; the sum which is to be paid to the surveyor or commandant for his trouble, is then delivered or put aside; and the duty of five per cent. for office fees being retained, the petitioner remains in full and quiet possession of the quantity of land which it may please the governor to grant. What I have said in the last paragraph must be understood as regarding inhabitants or planters who solicit grants of land; with respect to new settlers, although the commandant of the district in which they wish to fix themselves, may have surveyed and assigned to them the quantity of land which they and their families are considered capable of cultivating, there are yet but few who have obtained the titles which should have been furnished to them." 2 Land Laws, Append. 542.

The power of granting lands was exclusively vested in the intendency, in 1798, it having been previously exercised by the governor-general; this appears from the royal order of October 22d, 1798. 2 Land Laws, Append. 208, 542-545, et seq. Morales, intendant-general of Louisiana, published his general regulations, July 17, 1779, consisting of thirty-eight articles relative to granting lands. The 15th article is in almost the same language as the 12th clause of the regulations of Count O'Reilly; it is as follows:—

"Article 15th. All concessions shall be given in the name of the king, by the general intendant of the province, who shall order the surveyor-general, or one particularly named by him, to make the survey and mark the land by fixing the bounds not only in front but also in the rear; this survey ought to be done in the presence of the commandant or syndic of the district, and of two of the neighbors, and these five shall sign the process verbal which shall be drawn up by the surveyor." The 16th article requires the process verbal with a certified copy to be sent by the surveyor to the intendant; to the end that on the original process verbal, the necessary title paper, with the certified copy attached, be issued and delivered to the grantee. The original was required to be deposited in the office of the secretary and recorded, "to the end that at all times and against all accidents the documents which shall be wanted can be found." The 17th article requires the titles of concessions to be recorded in books to be kept for that purpose. The 18th article is as follows:—"Experience proves that a great number of those who have asked for land think themselves the owners of it; those who have obtained the first decree by which the surveyor is ordered to measure it and put them in possession; others, after the survey has been made, have neglected to ask for the title to the property; we declare that any one of these who have obtained the said decrees, notwithstanding in virtue of them the survey has taken place, and that they have been put in possession, cannot be regarded as owners of land until their real titles are delivered completed with all the formalities before cited." The 25th and 38th articles show that the grantees were obliged to pay the surveyor for his services, and to have the surveys executed at their own expense; and the more particularly was this the case in gratuitous concessions. "The fees of the surveyor in every case comprehended in the present regulation, shall be proportionate to the labor and that which has been customary until this time to pay," is the language of the 30th article. 2 Land Laws, Append. 208, et seq.

It is true that these regulations were promulgated after this particular concession was made; but it is obvious that they merely embodied general principles contained in antecedent royal orders, and regulations of previous governor-generals, and enunciated with greater particularity, rules, regulations, and usages then existing in the province of Louisiana, and which had existed long anterior to the year 1797. This is not left to doubtful inference, for the intendant Morales expressly informs us that he prepared his regulations "after having examined with the greatest attention the regulation made by the Count O'Reilly, of the 18th February, 1770, as well as that circulated by Governor Gayoso, of January 1st, 1798, and after he

had taken counsel of the assessor of the intendancy and of other persons skilled in those matters." The regulations of Morales, then, did not profess to establish any new system, but merely to give publicity to an old one, and point out with more precision those things which were esteemed essential to obtain a complete right of property in granted lands. No substantial alterations were made, and indeed their similitude to those of the Count O'Reilly in their main parts cannot escape observation, and, in a word, a close scrutiny will prove that. It was no idle assertion of the intendant that he had examined the regulations of the Count O'Reilly with the greatest attention. 2 Land Laws, Append. 209.

It cannot admit of doubt, that even long before O'Reilly was sent to Louisiana, there were surveyors in each of the districts of the province, who were salaried officers, and whose duty it was to survey grants of land when called on by grantees for that purpose, and to make an official report of such surveys to the governor-general or granting power, which then became an official record. It appears from the letter of the king's minister, the Marquis De Grimaldi, that O'Reilly had appointed surveyors for districts in the province at half their former salary, which appointment the king approved. 2 Land Laws, Append. 530. Indeed, it is a matter of public history, that surveyors were always "part and parcel" of the government of the province of Louisiana. If we look to the official records of the Spanish government in Florida, we shall find, that at least as early as 1791, instructions, emanating from the provincial government, were given to surveyors, as to the manner of measuring and establishing the boundary lines of granted lands. 1 Land Laws, Append. 1004. In that year, Quesada, governor of Florida, appointed Pedro Marrot to the office of surveyor-general, and prescribed several standing rules for the direction of that officer. The 9th rule is: "When lands are to be surveyed bounding those of individuals having them of their own, they will be cited to appear for the purpose of exhibiting their titles permitting them to remain in possession, running the lines without injuring them; and the government reserving the right of examining at a proper time the validity of their titles, and the defects of their petitions." Again, in the 1st rule he is directed to "take care that the measurements be made adhering to the title."

These instructions or rules were dated and issued October 24, 1791. 1 Land Laws, Append. 997, 998. On the 29th October, 1790, it had been communicated to governor Quesada as the order of the king of Spain, that foreigners who would freely present themselves and swear allegiance to his majesty, should have lands granted and measured to them, in proportion to the working hands each family might have. 1 Land

Laws, Append. 996. The 9th clause of the regulations of Governor White, of October 12th, 1803, declares that all persons who abandoned or ceased to cultivate lands, which at any period shall have been measured to them by the surveyor-general, although they had obtained the corresponding title of property, should nevertheless lose and forfeit their right thereto. 1 Land Laws, Append. 101. Governor Estrada, who succeeded Governor White, commissioned George J. F. Clarke as surveyor-general of the Province of Florida, on the 2d of May, 1811. The commission recites, that whereas, the appointment of public surveyor being vacant on account of the absence of Don John Porcel, who exercised the same, and therefore being in the want of one for the measurement by the government in the laying off of lands, &c. 1 Land Laws, Append. 1003. Certain instructions were promulgated by Estrada, on the 11th June, 1811, for the government of the surveyor-general in the discharge of his official duties; some of them will be referred to. "2d. The surveyor having been called on by any person to measure and bound lands to him, he will require his title of property or grant from government, that on sight thereof he may proceed to its measurement and demarcation." "5th. To each person whose lands have been measured, a plot will be given, constructed in running lines of ink, marking in the perimeter the corners by a small circle of a line in diameter, and on the longitude of each line note its magnetic direction and length in chains and links. . . . In the centre of plot he will place in numbers the acres of land which he has measured. The plot being made, he will deliver it with the following description: 'Plot of the number of acres of land of A. B., in such a place, measured and bounded by the public surveyor of this province. Don George Clarke, East Florida, the day of the year and month on the same tract. George Clarke.' 6th. The surveyor will keep a book of large paper, and copy therein the plots he gives out according to the foregoing article. . . . 7th. The book mentioned in the foregoing article will serve to show government what lands are vacant or not measured; he should form in legal surveys a journal of his operations, to satisfy the persons having lands adjoining. 8th. That the boundaries shall be permanent, he will cause to be drove down at the corners stakes of three feet long and three inches thick at their heads, leaving them three inches above ground. 9th. Those who employ the surveyor will pay him four dollars per day for his personal services, calculating from his departure from the mansion where he is found until he concludes the work performed for them." 1 Land Laws, Append. 1004.

The commissioners for ascertaining Spanish claims in West Florida, namely, Samuel R. Overton, Joseph M. White, and Craven P.

Luckett, in their report, in 1824, state that "the first step in obtaining a gratuitous concession, was the presentment of a petition to the sub-delegate, or authority vested with the power of disposing of lands. This petition was referred to the surveyor, who was required to report whether the tract solicited was vacant and royal domain." "The subject was next submitted to the fiscal or king's attorney, whose province it was to state whether or not there were any objections to a compliance with the petition. When these reports were found to be favorable, the sub-delegate made the concession, fixed the terms, and passed the decretal order of survey. After all which had been fulfilled and executed, it was forwarded to the office of intendency for confirmation. Where any doubts existed as to the land being vacant and royal domain, the order of survey preceded the concession." 1 Land Laws, Append. 1043.

Such a mass of evidence, running through a period of more than fifty years, and harmonizing in all its parts, must certainly be regarded as establishing the necessity of surveys. No exceptions are provided for, and if there were any, it is the duty of the claimant to prove them by the strongest testimony, inasmuch since the law and the uniform usage under it are against him. It is evident that a warrant or order of survey could be executed by the surveyor-general or any of his deputies, or the surveyor of any district, or by the commandant of a post, or by a private person specially authorized by the governor-general or intendant. It appears to have been at one period a common practice in Florida for private persons to execute warrants or orders of survey by the direction of the governor, and upon which surveys formal and perfect titles were issued. 1 Land Laws, Append. 1014, et seq.; U. S. v. Harrison, 16 Pet. [41 U. S.] 198, et seq. In Smith v. U. S., 10 Pet. [35 U. S.] 334, it is said that "Spain never permitted individuals to locate their grants by mere private survey. The grants were an authority to the public surveyor or his deputy to make the survey as a public trust to protect the royal domain from being cut up at the pleasure of the grantees. A grant might be directed to a private person, or a separate official order given to make the survey; but without either, it would not be a legal execution of the power." Again: "But neither in this, nor the record of any of the cases which have been before us, have we seen any evidence of any law of Spain, local regulation, law, or usage, which makes a private survey operate to sever any land from the royal domain; on the contrary, all the surveys which have been exhibited in the cases decided were made by the surveyor-general of the province, his deputies, the special order of the governor or intendant, or those who represented them. No government gives any validity to private surveys of its warrants or

orders of survey; and we have no reason to think that Spain was a solitary exception, even as to the general domain, by grants in the ordinary mode for a specific quantity to be located in one place."

Between a survey by the public surveyor and an authorized survey by a private person, there was a wide difference. A survey made by a public surveyor, in the discharge of his public duties, is admitted in evidence in suits between other parties, because the act is done under oath, and in the discharge of his duties to the government and the public. These duties are to measure the land by compass and chain, to establish corners, mark lines, and to preserve accurate field notes of the survey, with such explanations as may be required to give it certainty. A plot is then made, which embodies, in a condensed form, the whole survey, and shows the lines, corners, trees, rivers, creeks, and other natural and artificial objects on the ground, with such remarks as may explain them. The statement, however, of collateral facts not within the scope of his proper official functions, are not admissible as evidence. *Ellicott v. Pearl*, 10 Pet. [35 U. S.] 441; *U. S. v. Hanson*, 16 Pet. [41 U. S.] 198. It is upon this principle that it has been frequently held in the Florida cases, that because of the official character of the surveyor-general, the plots and certificates made by him, in the discharge of his official duty, have accorded to them the force and character of a deposition; but as to a survey by a private person, nothing is presumed, and every thing must be proved. *U. S. v. Hanson*, Id. 200, 201; [*Smith v. U. S.*] 10 Pet. [35 U. S.] 334; [*U. S. v. Low*] 16 Pet. [41 U. S.] 162.

The Spanish regulations attended to most clearly evince that when a concession was made, the duty was imposed on the grantee of having the order of survey executed, and the survey returned to the proper officer at his own expense, and without any cost to the royal treasury. In other words, the concession being an authority to the surveyor-general and his deputies to make the survey as a public trust, it was the duty of the grantee to call upon him for that purpose, or to procure authority for a private person to do it. The government contented itself, in the first instance, with giving the authority to survey, and then leaving it to the party to procure the execution of that authority. If he failed, he could not claim any right of private property in the grant, nor could he obtain any title without complying with this necessary condition. There was no law, order, cedula regulation, usage, or custom of the province of Louisiana or Florida which authorized this condition to be dispensed within any case, or under any circumstances. It is also evident that a survey meant in these provinces what it means with us, the actual measurement of land, ascertaining the contents by running lines and

angles, marking the same, and fixing corners and boundaries. 6 Jac. Law Dict. 157; Webst. Dict. When the phrase is applied to land, no other meaning is attached to it by lexicographers; nor is it used in a different sense in the jurisprudence of any country with which I am acquainted. This is no idle inquiry, because these kind of cases are not to be tried by common law rules, but by the laws, customs, and usages of the province of Louisiana; and hence the judges of the supreme court, in all the cases brought before them, have referred to these as guides. In doing this it would have been impossible to overlook the fact that actual surveys were a necessary ingredient to the validity of grants under the Spanish dominion, and it has consequently been directly or indirectly arrested in numerous cases decided by that tribunal to be equally necessary under the government. *Wherry v. U. S.*, 15 Pet. [40 U. S.] 327; *U. S. v. Forbes*, Id. 180; *Buyck v. U. S.*, Id. 220; *O'Hara v. U. S.*, Id. 297; *U. S. v. Delespine*, Id. 328; *U. S. v. Miranda*, 16 Pet. [41 U. S.] 155; *U. S. v. Low*, Id. 162; *U. S. v. Harrison*, Id. 198; *U. S. v. Clarke*, Id. 228; *U. S. v. King*, 3 How. [44 U. S.] 784.

The Spanish document adduced as the foundation of this claim is an open order of survey, and might have been located in any part of the then district of Arkansas. It had no locality, no definite description of any particular land. There are two substantial conditions in it: 1st, that the lands conceded should be surveyed in one year, which the commandant of the post should cause to be executed; and, 2d, that the grantees should settle upon and occupy their respective surveys within that period. These two conditions are fairly deducible from this paper, which, for the sake of convenience, will be called a grant; and it may be observed that it was undoubtedly competent for the governor-general to order the commandant to cause the survey to be executed. *Smith v. U. S.*, 10 Pet. [35 U. S.] 327. It is not pretended that the lands mentioned in the grant were ever surveyed under the Spanish government; indeed that they were not, is shown in the petition itself. But it is said that as to the lands granted to Elisha and Wm. Winter, a stone or stones were planted, and that this gave locality and identity to the tracts, and severed them from the royal domain. The bare statement of the proposition is its refutation. Fixing a stone or post is no survey, nor is it equivalent to a survey. It does not of itself indicate whether it is the corner of a north, east, south, or west line; nor does it indicate that the lines are to run from it to the cardinal points of the compass. But to go further: planting a stone to designate any particular corner, with a contemporaneous assertion that a parallel line is to be run a certain distance and direction, and thence in other directions, so as to form a square, is no identification of the land by any mode known to the Spanish

government; nor is it so in fact. There are no visible lines, no visible boundaries, nothing to apprise our neighbor how far he may go without trespassing upon our soil, and nothing to indicate the lines of separation between public and private property. The idea of giving identity to a million and a half of arpens of land without measurement, and without actually running and marking a single line, is really too absurd to merit consideration. If it were not gravely insisted on, it might well be thought to be an experiment on human credulity.

Now supposing, for the sake of argument, that all the testimony taken or adduced in this cause, as to planting a corner-stone, is competent, and that none of it ought to be excluded, what does it amount to? Certainly to nothing more than that in 1798 Elisha Winter, the father, planted a large stone, intending thereby to designate the tract granted to him; and that this was done in the presence of the commandant of the post of Arkansas, Don Carlos De Villemont. It is a singular and important fact, that the statement of this person, made more than thirty years ago, when the matter must have been fresh in his recollection, is entirely silent as to what course the stone was to designate, or to what points of the compass the lines were to run from it. This omission could not have proceeded from defect in memory, and it can only be accounted for on the supposition that the act of planting the stone was esteemed to be of so little consequence, that nothing was said on the subject. As if to admonish us of the intrinsic infirmity of hearsay evidence, and the propriety of excluding it, it is stated by persons examined since the pending of this suit that they understood, principally however from the family of Winter, that this stone was actually intended to designate the south-east corner of this tract, and that the lines were to run to the cardinal points of the compass; a statement condemned by the silence of Don Carlos De Villemont, the very person who would have known it if such had been the fact. Could the stone, in the very nature of things, designate or identify any land? Could it not be the corner of four separate tracts? Could not lines from it be run north as well as south, and east as well as west, or north-east, north-west, south-west, or south-east? It was, therefore, an idle and nugatory act, and could not, in the very nature of things, separate any land from the royal domain.

It cannot be doubted that a survey was contemplated and required by the grant itself, a requisition indeed enforced by a general law sanctioned by the monarch himself. The petitioners, satisfied as they must be that nothing was done equivalent to a survey, or to identify the land, are driven to the flimsy excuse that there was no public surveyor within the district of Arkan-

sas, and thus indirectly admitting a survey to be essential. The commandant alluded to says:—"There was no public surveyor in the district of Arkansas at that time (1798), nor afterwards, during my command, down to the year 1802; on which account these tracts were not surveyed nor platted in the ordinary manner." This is insufficient to excuse the non-performance of the conditions, because the fact must have been as well known in 1797 as it was the year after. *U. S. v. Kingsley*, 12 Pet [37 U. S.] 484. The condition was not impossible, but on the contrary was reasonable and proper, and one of two things must be established by the claimants, either that it was complied with, or that the performance of it was excused by the governor-general, and also that he was competent to excuse its performance, because, as plenary as his authority might have been, he was a subordinate officer, bound to execute the will of the king, whether expressed in royal orders, regulations, or in other modes which might have been adopted. The Baron Carondelet had no dispensing power; he could not say that a survey need not be made, or that a right of private property should vest without identity to the land. But it is fruitless to inquire what he might or might not have done, since it is not pretended that the performance of the conditions was ever excused. To say that there was no public surveyor in the district of Arkansas in 1798, amounts to nothing. There was a surveyor-general at New Orleans, who could constitute deputies and send them to any part of the province to execute surveys at the request of a grantee, and upon the payment of the usual compensation. If Elisha Winter did not choose to invoke his aid, the governor-general could have authorized a private person to make and return the survey, which it is reasonable to infer would have been done upon application, especially as we are informed that Winter was on terms of intimacy with that functionary, and was, according to the proof, in New Orleans a greater portion of the time between 1797 and 1800. The commandant of Arkansas post could doubtless have authorized a competent person to make and return the survey, by virtue of the direction in the grant to cause the surveys to be executed. The means to enable Winter to comply with this part of the grant were ample, sufficiently convenient, and at his command. Surely judicial tribunals will not undertake to relieve him from the consequences of his own neglect. The time allowed, one year, was abundant; and certainly it was not too much to expect, that as he had obtained from the bounty of the government a grant of enormous size, larger than many of the German principalities, he would not only willingly bear the inconvenience and expense of its separation from the royal domain, but would hasten the consummation of that event with all the forms and solemnities known to the law.

Under the Spanish government, the mode of designating grants, and investing individuals with the right of property therein, was attended with solemnity and publicity. The practice in such cases was in many respects analogous to livery of seizin, as used under the feudal system at an early period of English jurisprudence. A grant delivered out for survey meant, not as in our country, a perfect title, but an incipient right, which, when surveyed, required confirmation by the governor. [*U. S. v. Hanson*] 16 Pet. [41 U. S.] 200. And hence in this concession a survey is enjoined, to the end that each grantee may receive a title in due form. In the province of Louisiana, not only were actual boundary lines to be marked and established, and corners planted by an authorized surveyor, but the party was then formally put into possession, either by the surveyor or commandant, in the presence of his neighbors, provided there was no objection, and it did not interfere with the rights of third persons. The grant required a survey of the land, not planting a stone, which without survey could be nothing but an idle ceremony. But it is insisted that no lands were surveyed at the post of Arkansas, and that it was a custom there for the commandant to put persons in possession without it. To that I reply that the assertion is not proved, but if it was, such a custom,—if a thing rarely practised and confined to a few interested persons can be so called,—was in positive violation of the law existing in the province on that subject. No usage or custom can ever prevail against an act of parliament,—a principle which must utterly destroy the usage of the post of Arkansas.

But it is said that it was the policy of the Baron De Carondelet to encourage settlements, and to dispense with surveys, if necessary to attain that end; and we are entertained with a sort of review of the acts of himself as governor-general. But will it advance us a single step in the cause to inquire into the policy of the baron during the five years he was governor-general, or to contrast his administration with that of Estevan Miro, his predecessor, or Gayoso, his successor? It would be quite as pertinent to investigate the Spanish intrigue set on foot as early as 1790 to separate the territory west of the Alleghany mountains from the Union, and its total failure; or to show that the Baron De Carondelet commenced his administration in 1792 with a scheme to sever Kentucky from the confederacy and bring her under Spanish dominion, and failed in it; or that he set it on foot a second time in 1795, sent an emissary into Kentucky in the person of Gayoso, then lieutenant-governor of Natchez, and again failed; or that the baron made a third attempt in 1796, and again signally failed. It would be a waste of time to wade through the rubbish of Spanish rule, to find out the policy of Spanish officials. We should discover enough at every step to demonstrate hostility to American citizens and American interests; corruption in office, and

breaches of public and private faith. Whether the policy of the Baron De Carondelet was good or bad, is of no importance to the present question. He had not the right, and did not, in point of fact, dispense with a survey.

But it is said that figurative plots of the Winter grants were found in the offices in New Orleans. And of what avail is it to produce figurative plots or plans—mere creatures of the brain—office sketches, that can be made at any time? These sketches only present the supposed outlines of a tract of land, which could be made at a distance from the land, and without ever seeing it, by one having a general knowledge of the face of the country. They show no bearings and distances, no field marks or boundaries, no latitude or longitude, and no natural or artificial objects on the ground. Constructive journeys, constructive corners, constructive lines, make up these constructive surveys. They are destitute of reality, and carry deception on their face. Two conditions arise from a fair construction of the concession: First, that each grantee would cause his grant to be surveyed; second, that he would establish himself on it within one year; and it was upon the performance of these conditions that each grantee could receive his "title deed in form." Non-performance within the time limited amounted to a forfeiture, or, to use the express language of the concession, the grant "became void." To speak with legal exactness, the lands granted could not vest in the grantees until a compliance with those conditions. No specific lands were appropriated in the document itself, and as none were severed from the royal domain by authentic survey, it was impossible for the grantees to occupy the lands granted. Occupancy is equivalent to seizin or possession, and it is certainly too clear to be controverted, that identity of the premises is essential to a seizin in law, as it is necessarily implied in a seizin in fact. *U. S. v. Miranda*, 16 Pet. [41 U. S.] 159; *Arredondo's Case*, 6 Pet. [31 U. S.] 741.

JOHNSON, District Judge. This is a petition filed by the heirs of Elisha Winter, under the act of congress of the 26th May, 1824, entitled "An act enabling the claimants of lands within the limits of the state of Missouri and territory of Arkansas to institute proceeding to try the validity of their claims," revived for five years by the act of 17th July, 1844; and the claim mentioned in the petition is for one million of arpens of land, in the state of Arkansas, based upon a Spanish concession, made by the Baron De Carondelet, governor-general of the province of Louisiana, the 27th day of June, 1797, to Elisha Winter, the ancestor of the petitioners. 4 Stat. 52; 5 Stat. 676. The answer of the district attorney denies all the statements and allegations in the petition, and full proof is demanded thereof. From the commencement of the case, every reasonable indulgence has been extended to the claimants, to enable them to procure all

the proof within their reach, and doubtless we now have all that could be found, material to their rights.

The case has been thoroughly investigated by the counsel on both sides, and it gives me pleasure to add, that it has been argued by them with great zeal and uncommon ability, and which will the better enable me to form a correct opinion upon the questions which it is now my duty to decide. Most of the testimony offered by the claimants has been excepted to by the district attorney; and these exceptions are on file in the case, as a part of the record. Some of them were decided by the court before the hearing; but finding that course of proceeding calculated to produce inconvenience and delay, and in a collateral manner bring about a decision upon the merits of the cause, the rule requiring exceptions to be filed was rescinded. But I will add, that as far as decisions have been made on exceptions, they are entirely satisfactory to my mind, and will be adhered to, and the principles therein contained, applied upon the present occasion.

As to the exceptions filed by the district attorney, not yet expressly decided, I will merely remark, that it is not deemed necessary to the rights of either party that this court should decide specifically upon each exception, because it would be useless as far as it could have any effect here; and in case of appeal to the supreme court, all the testimony and the exceptions to it will appear of record, and thus each party there will derive the same advantage and benefit, as if there was a specific decision upon each exception; for the inquiry then will be, not how this court has decided, but whether the decision is sustained by the principles of law, and warranted by legal and competent evidence. Without taking upon myself, therefore, the unnecessary labor of deciding collateral questions, I will now proceed to the main and prominent points in the case.

The paper in the Spanish language, which is produced as the foundation of this claim, is really nothing more than an order or warrant of survey, and strictly speaking is not a concession; but for the sake of convenience I shall call it the latter. Several translations of it have been brought to the notice of the court, but I shall not undertake to determine how nearly these translations assimilate to each other, because, should this case be taken to the supreme court, that tribunal will have no difficulty in ascertaining the true meaning of the paper. Without descending to particulars on this point, I will only observe that I regard this concession as authorizing Elisha Winter to select, within the then district of Arkansas, one million of arpens of land, which was to be severed from the royal domain, and occupied within one year from the date of the concession, or else the concession to be void; in other words, that he was to establish himself upon it in one year. The genuineness of the signature of the Baron De Carondelet to the

concession, has been, in my opinion, sufficiently proved by competent witnesses,—those who are acquainted with his handwriting,—so as to entitle it to be used as evidence in any court of justice.

The district attorney in his argument, insists that the Baron De Carondelet had no authority to make so extensive a grant, and that if he could rightfully do so, he might with the same propriety have conceded to any private individual, as a mere gratuity, a whole parish or district of the royal domain. Certainly no one can doubt that a concession so immense ought to be closely scrutinized; but at the same time I do not feel it incumbent upon me to inquire into the precise extent and nature of the powers vested in the governor-generals of Louisiana as it respects the quantity of land which could be granted. The supreme court of the United States has frequently decided in this kind of cases, that a grant or concession made by an officer who has by law authority to make it, carries with it *prima facie* evidence that it is within his power, unless the contrary is shown; and it is, therefore, no longer a debatable question. *U. S. v. Arredondo*, 6 Pet. [31 U. S.] 691; [*U. S. v. Percheman*] 7 Pet. [32 U. S.] 51; [*U. S. v. Clarke*] 8 Pet. [33 U. S.] 436; [*Delassus v. U. S.*] 9 Pet. [34 U. S.] 134.

Without further inquiry, therefore, I shall assume that the Baron De Carondelet possessed the power to make this concession; that the extraordinary extent of it is no objection to its validity and then comes the main question in the case, namely, whether the land mentioned in the concession, was separated from the royal domain, so as to vest a right of property in the grantee, and thus bring it within the purview of the treaty of Paris of the 30th April, 1803. It is almost superfluous to add, that the whole case must turn upon this solitary point, for however meritorious the claim may be, and however strong the considerations which may favorably recommend it to the political departments of the government, it is not competent for the judiciary, either to grant land, give an equivalent, or confirm a claim that is destitute of identity. Indeed, the act of the 26th May, 1824, confers the special and limited authority under which this court must act in these cases; and by reference to that law it will be seen that the locality of a claim must be ascertained to give the court jurisdiction. 4 Stat. 52. Now this concession on the face of it is utterly indefinite, and does not appropriate any specific lands to the grantees; and hence it is material to inquire whether an actual survey of such a concession as this was necessary to vest a right to the property in the grantee? The district attorney maintains the affirmative; and in my opinion he has successfully sustained that position, by referring to royal orders; to regulations of different governor-generals of the

province of Louisiana, running through a period of nearly fifty years; to regulations in Florida, on the same subject; and lastly, to various adjudications of the supreme court of the United States.

It is perfectly obvious, that among civilized nations, where individual ownership of the soil is recognized as a right, some mode of designating every man's land must necessarily be adopted. Indeed, without any regulations at all upon that subject in Louisiana and Florida, the survey of lands would have followed as a natural consequence upon making grants; for without surveys, the confusion in land titles, and the disputes and litigation that must have ensued, would have been intolerable evils which no government would allow. In point of fact the survey of grants of land was common in the province of Louisiana as early as 1754, because the sixth and seventh clauses of the royal order of that year, of date the 15th October, expressly require surveys to be made. 2 Land Laws, 52.

The most solemn and imposing regulations, however, upon the subject of surveying lands, are found in the twelfth clause of the general regulations of Count O'Reilly, civil and military governor of the province of Louisiana, promulgated on the 18th of February, 1770. That clause is as follows: "(12) All grants shall be made in the name of the king, by the governor-general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in presence of the judge ordinary of the district, and of the adjoining settlers who shall be present at the survey; the above-named four persons shall sign the process verbal which shall be made thereof, and the surveyor shall make three copies of the same; one of which shall be deposited in the office of the scrivener of the government and *cabeldo*, another shall be delivered to the governor-general, and the third to the proprietor to be annexed to the title of his grant." 2 Land Laws, Append. 206.

The regulations of O'Reilly probably stand upon higher ground than those of any of his successors, because they were expressly sanctioned by the king himself, on the 24th August, 1770, the same year they were promulgated; and the governor-generals of Louisiana were specially required by the monarch to conform thereto, until it was his royal pleasure to change them. 2 Land Laws, Append. 530. There is no evidence that they were changed or modified at any subsequent period as far as surveys of grants were concerned. On the contrary, the instructions of Gayoso, dated the 9th September, 1797, and the regulations of Morales, intendant general of Louisiana, published 17th July, 1799, very clearly indicate that surveys were essential. In fact the fifteenth article of the regulations of Morales, is almost literally copied from the

twelfth clause of O'Reilly's regulations already referred to. The general practice of the government conformed to these regulations; and it is known that there was a surveyor-general in upper, and another in lower Louisiana, each of whom had authority to constitute as many deputies as they pleased, with a view to execute surveys. Undoubtedly the Spanish regulations show, that when a concession was made, the duty was imposed on the grantee of having the order of survey executed at his own expense; and a return of the survey was to be made to the proper officer; and all this without cost to the royal treasury. In other words the concession was an authority to the surveyor-general and his deputies, to make the survey as a public trust; and it was the duty of the grantee to call upon him for that purpose, or procure authority for a private person to do it.

The government contented itself in the first instance with giving the authority to survey, and then leaving it to the party interested to procure the execution of that authority. No law or regulation existing in the province of Louisiana, has been brought to the notice of the court, which dispensed with a survey in the case of an open floating concession, and it is presumed there was none. It is also quite evident that a survey under the Spanish government meant, as with us, the actual measurement of land, ascertaining the contents by running lines and angles, marking the same, and fixing corners and boundaries. 1 Land Laws, Append. 996-998, 1001, 1003, 1004, 1014, 1043; U. S. v. Hanson, 16 Pet. [41 U. S.] 198; 6 Jac. Law Dict. 157. "The survey," say the supreme court, in *Ellicott v. Pearl*, 10 Pet. [35 U. S.] 441, "made by a surveyor being under oath, is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plot the lines, corners, trees, and other objects on the ground; and to subjoin such remarks as may explain them; but in all other respects, and as to all other facts he stands like any other witness, to be examined on oath, in the presence of the parties, and subject to cross-examination." This case is cited, because in pointing out the duty of a surveyor of land, it clearly shows the nature of a survey, and what must be understood by it; namely, running lines with compass and chain, establishing corners, marking trees and other objects on the ground, giving bearings and distances, and making descriptive field notes and plots of the works. These are the ingredients of an actual survey, as well as the evidences of it; for it is not the mere assertion of the surveyor that he had surveyed land that makes it so. U. S. v. Hanson, 16 Pet. [41 U. S.] 200.

A return by the surveyor-general, embracing a description of a survey of land

in legal form, was *prima facie* competent evidence without further proof on which the granting power could act. Plots and certificates, on account of the official character of the surveyor-general, had accorded to them the force and character of a deposition. [U. S. v. Hanson] 16 Pet. [41 U. S.] 200, 201; [U. S. v. Wiggins] 14 Pet. [39 U. S.] 346.

It is evident also, that a warrant or order of survey could be executed by the surveyor-general, or any deputy appointed by him; or the surveyor of the district, or by the commandant of a post, or by a private person specially authorized by the governor-general or intendant. It appears to have been at one period a common practice in Florida, for private persons to execute warrants or orders of survey by the direction of the governor, and upon these surveys formal and perfect titles were issued to the interested parties. 1 Land Laws, Append. 1014 et seq.; [U. S. v. Hanson] 16 Pet. [41 U. S.] 198. In *Smith v. U. S.*, 10 Pet. [35 U. S.] 334, it is said that "Spain never permitted individuals to locate their grants by mere private survey. The grants were an authority to the public surveyor, or his deputy, to make the survey as a public trust, to protect the royal domain from being cut up at the pleasure of grantees. A grant might be directed to a private person, or a separate official order given to make the survey; but without either, it could not be a legal execution of the power." And in the same case it is further said, that, "neither in this nor the record of any of the cases which have been before us, have we seen any evidence of any law of Spain, local regulation, or usage, which makes a private survey operate to sever any land from the royal domain. On the contrary, all surveys which have been exhibited in the cases decided were made by the surveyor-general of the province, or his deputies, or under the special order of the governor or intendant, or those who represent them. No government gives any validity to private surveys of its warrants or orders of surveys, and we have no reason to think that Spain was a solitary exception even as to the general domain, by grants in the ordinary mode, for a specific quantity to be located in one place."

The supreme court of the United States, in various cases, has either directly or indirectly decided, that an actual survey of an open floating concession is a necessary ingredient to its validity; and that it must also be an authorized survey to sever any land from the royal domain. I shall make no comment on these cases, but merely refer to them. *Wherry v. U. S.*, 10 Pet. [35 U. S.] 338; *Smith v. U. S.*, Id. 327; *U. S. v. Forbes*, 15 Pet. [40 U. S.] 180; *Buyck v. U. S.*, Id. 230; *O'Hara v. U. S.*, Id. 297; *U. S. v. Desepine*, Id. 328; *U. S. v. Miranda*, 16 Pet. [41 U. S.] 155, 162; *U. S. v. Hanson*, Id. 198; *U. S. v. Clarke*, Id. 228; *U. S. v. King*, 3 How.

[44 U. S.] 784; U. S. v. Lawton, 5 How. [46 U. S.] 26. But upon this point I need not multiply authorities. Ordinances and regulations expressly sanctioned by the king, practice conforming to these regulations, the decisions of our courts of justice, all combine to establish it as a proposition beyond dispute, that a concession indefinite in itself, is void, without the aid of an official survey. In most grants, even those of a descriptive character, which designated the place where the lands were to be located, a survey was required to be made and returned before a party could obtain a formal and perfect title. Non-interference with the rights of others was a condition which attached to all grants, and was generally expressed; but if not expressed, always implied. This, of itself, demanded an actual survey on the ground, as the only certain mode of observing that condition. The actual demarcation of boundary lines by authorized persons, and the formal return of the proceeding were the only means of affording authentic official evidence of the location of grants and the separation of public from private property.

It is not pretended that the lands mentioned in this concession were surveyed within one year, nor before the 10th day of March, 1804. On the contrary, the fact is distinctly alleged in the petition, that there was no actual survey; and an excuse is offered for the omission, which, when scrutinized, will be found to be insufficient. According to a well-established rule, this averment cannot be controverted by proof on the part of the petitioners; they being bound to abide by their own pleadings. To obviate the want of a survey, it is said that a corner-stone was planted, under the direction of Don Carlos De Villemont, to designate the grant made to Elisha Winter, and that it was a proceeding of great solemnity. There is, in my judgment, no competent evidence adduced to show the planting of this stone by the authority, or under the direction and superintendence of Don Carlos De Villemont, as commandant of the post of Arkansas. But if there was, it has been shown to be a clear departure from the Spanish regulations respecting the location of grants; and hence a nugatory and idle act. Fixing a stone post or monument at any particular spot is no survey, nor equivalent to it; nor is it the slightest indication whether it is a northern, eastern, southern, or western corner; nor does it indicate how the boundary lines are to run. But to go further still,—planting or erecting a stone to designate any particular corner with a contemporaneous assertion, as to how the lines are to run from it, is no identification of land, nor can these acts, in the very nature of things, give it any known or certain locality. I repeat, that if there was full proof of the act of planting a stone, or erecting a monument, it was an illegal act, and severed no land from the royal domain. The concession required a survey, a

process verbal of it and its return, not the planting of a stone; and therefore the proceedings of the commandant, said to have been adopted to designate the lands granted, were not only in violation of the plain requisitions of the concession itself, but were not sanctioned by any of the ordinances, orders, or regulations of the Spanish government. If a survey could have been dispensed with, it is reasonable to infer that it would have been done in the concession itself, and that planting a stone, or some such act, would have been substituted in its place. But this is not the case, and indeed so far from it, a survey and the return of it are clearly contemplated, and upon that the proper title was to be furnished to the grantees in form.

The Baron De Carondelet, plenary as his powers may have been, was subordinate to the king, and was obliged to observe his royal ordinances and orders. As governor-general, he had no dispensing power; and to say nothing of the insuperable difficulty of locating a tract of land of a million of arpens by the mere erection of a monument as a corner, it is sufficient to observe that he had not authority to dispense with a survey of the land in a case like this, and that it would have been illegal to do so; and there is perhaps no better proof of it than the fact that this proceeding, said to have been officially reported to the Baron De Carondelet, must, if so reported, have been regarded by him as illegal, and as a departure from the concession; for otherwise the presumption is almost irresistible, that the title in form promised in the concession would have been furnished to the grantees, and more especially as Elisha Winter was said to have been on terms of intimacy with the baron, and to have been in New Orleans much of his time between 1798 and 1800. In my judgment, it was a condition that the grant should be surveyed, and without it the grantee could not be said to be established on any specific land; he could not be said to have the legal seizin or possession of any specific land (U. S. v. Lawson, 5 How. [46 U. S.] 29); and therefore I disregard all the proof respecting the occupation by the Winters of a tract of land near the post of Arkansas, which they claimed as a grant from the Spanish government, as being entirely irrelevant.

But it is urged upon me that conditions were inserted in Spanish grants as a mere matter of form; that a compliance with them was not required; that there are no instances where grants have been declared forfeited for a non-compliance with conditions; that the hostility of the Indians would have prevented an actual survey, and that there was no surveyor at the post of Arkansas. As to danger from Indians, it may be replied, in the spirit of the decision of the supreme court in the case of U. S. v. Kingsley, 12 Pet. [37 U. S.] 484, on a similar occasion, that a grantee cannot be permitted to urge as an excuse in fact or in law, for

not complying with his undertaking, a danger which applies as forcibly to repudiate the sincerity of his intention in asking for the grant, as it does to his inability from such danger to execute it afterwards. And as to there being no surveyor at the post in the district of Arkansas at the time, it was a fact which he must be presumed to have known at the date of the concession, and cannot therefore be permitted to derive any advantage from that circumstance; nor was he confined to the district of Arkansas in obtaining a surveyor. It was imposing no extraordinary hardship, and was indeed asking but little at his hands, to require a survey of this enormous gratuity.

Now as to conditions being inserted in Spanish concessions as matters of form only, it seems to me to be a singular position to assume before a judicial tribunal, and not less singular that proof of it should be adduced. If I am at liberty to disregard certain parts of this concession as being formal and not requiring observance, may I not with the same propriety reject the whole? And is this to be a rule in this kind of cases, and to form a landmark in their adjudication? Judicial decisions would then depend upon the integrity and intelligence of witnesses, not on the written law, and would vary as often as the opinions of men. Such proof can have no weight with me, because of its uncertainty, and because it contravenes known regulations and laws which existed in the province of Louisiana, and which I prefer as guides to the loose declarations of witnesses of whom we know nothing.

While upon this point, I will also add, that if it was the usage at the post of Arkansas to designate lands by merely fixing some corner thereto, it was a usage repugnant and contrary to express written law, and therefore void. 1 Bl. Comm. 77; 3 Term R. 271. No usage or custom can prevail against an express act of the lawmaking power. If the performance of conditions was not required, they would hardly have been inserted; and the fact that surveys and occupation were required by the terms of almost every concession, are conclusive proof that so far from being matters of form, they were really matters of the first consequence, and indicated the permanent establishment of the only certain system of separating private grants from the public domain. According to my recollection, the civil law used in Spain, and introduced into the province of Louisiana, was equally as strict as the common law with regard to exacting a compliance with conditions, and as rigidly excluded parol proof, either to change, vary, modify, or annul, or in any manner affect such conditions. Code Nap. b. 3, c. 4, § 1. But what perhaps is more to the purpose, the supreme court has held that conditions could not be dispensed with, but must be performed. U. S. v. Kingsley, 12 Pet. [37 U. S.] 486.

There are other points that might be no-

ticed, but it is not necessary; and in closing this opinion, I will adopt the language of the supreme court in Lawton's Case, 5 How. [46 U. S.] 28, as applicable on the present occasion. This concession, in its leading features, cannot be distinguished from various others, where no specific land was granted, or intended to be granted; but it was left to the grantee to have a survey made of the land in the district referred to by the concession by some person properly authorized, by which additional act the land granted would have been severed from the king's domain, and have become private property. Let the claim be rejected, and the petition be dismissed, at the costs of the petitioners. Ordered accordingly.

NOTE. The cases of Heirs of William Winter, Deceased, v. United States, and Gabriel Winter v. United States, for 250,000 arpens each, depending upon the same facts and principles, were severally argued by Daniel Ringo, for the petitioners, and S. H. Hempstead, Dist. Atty., for the United States, in conjunction with the preceding case; and, under the foregoing opinion, the claims were severally rejected, and the petitions dismissed. In each of the three cases appeals to the supreme court were prayed and granted, but never prosecuted any further, and were abandoned. The case of Putnam v. U. S. [Case No. 11,484], claiming under Elisha Winter by conveyances, was dismissed.

WINTER (UNITED STATES v.). See Cases Nos. 16,743 and 16,744.

WINTER (WAYNE v.). See Case No. 17,304.

Case No. 17,896.

WINTERMUTE v. REDINGTON.

[1 Fish. Pat. Cas. 239.]¹

Circuit Court, N. D. Ohio. Dec., 1856.

PATENT FOR INVENTION—IMPROVEMENT IN APPLICATION FOR HYDRAULIC POWER—SPECIFICATIONS—INFRINGEMENT.

1. The principle so embodied and applied, and the principle of such embodiment and application are essentially different; the former being a truth of exact science, or a law of natural science, or a rule of practice; the latter, a practice founded upon such truth, law, or rule. A new and improved method of producing a useful result or effect is as much the subject of a patent as an entire new machine.

[Cited in Johnson v. McCabe, 37 Ind. 538.]

2. The word "machine" in the statute includes new combinations as well as new organizations of mechanism, and hence there may be a patent for new combinations of machinery to produce certain effects, whether the machines constituting the combination be new or old. In such a case, the patent is not for an abstract principle, but for the particular application of the principle which the patentee professes to have made.

3. Parker's patent is not for the vertical or horizontal arrangement of the wheels upon the shaft, or the putting them in pairs; neither does it embrace, as a distinct discovery, the concentric cylinder inclosing the shaft, nor the spout,

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

the gate, the outer cylinder, or the buckets on the wheel.

4. The purpose or aim was to obtain an increase of power with a given quantity of water; and the secret of the invention of the wheel is the vortical motion of the water on the wheel, which operates as a coefficient to the reactive power of the water in the buckets.

5. The identity that is to be looked to, in an action of infringement, respects that which constitutes the essence of the invention, namely, the application of the principle. If the mode adopted by the defendant shows that the principle admits of the same application in a variety of forms, or by a variety of apparatus, such mode is a piracy of the invention.

6. But if the defendant has adopted variations which show that some other law, or rule of practice or science, is made to take the place of that which the patentee claims as the essence of his invention, then there is no infringement.

7. In estimating the actual damages the rule is to give the value of the use of the patented thing during the illegal user, or in other words, the amount of profits.

8. An assignment of a patent by one of two or more administrators is good, and passes the entire interest.

9. The patentee may be regarded as a purchaser from the public, being bound to so communicate his secret, by specification, drawings, and models, that it shall be successfully available to the whole community at the expiration of his patent.

10. The right to an invention dates from the time of discovery, and the patentee is secure in his patent if his machine or manufacture was not in public use when he made his application.

11. The word "useful," in section six of the act of 1836 [5 Stat. 119], and in section one of the act of 1793, does not prescribe general utility as the test of the sufficiency of an invention to support a patent. It is used merely in contradistinction to what is frivolous, or mischievous to the public. It is sufficient if the invention has any utility.

[Cited in *Cook v. Ernest*, Case No. 3,155.]

12. When the exact nature and extent, or essence of the claim can be perceived, the court is bound to adopt that interpretation of the patent, and give it full effect.

13. In describing an improvement in a machine, it may be necessary, and when so, it is proper to describe the whole machine, as it operates with the improvement, in order to make the description understood by a person of the trade to which it belongs; and if this is not done, the patent fails for obscurity.

14. Where a patent is for an improvement on an old machine, if the whole of it, the old and the new, is described in the specification, the patentee must distinguish what part he claims, or the patent will be void for ambiguity.

15. A patent can not be sustained for a mere principle; but a principle may be embodied and applied, so as to afford some result of practical utility in the arts and manufactures, and under such circumstances a principle may be the subject of a patent.

16. It is, however, the embodiment and application of the principle which constitutes the grant of the patent.

This was an action on the case [by John Wintermute against Alexander H. Redington], tried before Judge Willson and a jury, for the infringement of letters patent granted to Zebulon and Austin Parker, October 9, 1829, and

assigned to plaintiff. The nature of the patent is sufficiently stated in the report of the case of *Parker v. Hulme* [Case No. 10,740].

G. M. Lee and S. S. Fisher, for plaintiff.
Herrick & Barlow, S. F. Andrews, and R. Hitchcock, for defendant.

WILLSON, District Judge (charging jury). The plaintiff has brought his action on the case to recover for an alleged infringement of a patent, for which letters patent were granted in October, 1829. The patent issued originally to Zebulon Parker and Austin Parker, and on the 19th day of October, 1843, was renewed by Zebulon Parker, for seven years, extending its duration thereby to October, 1850. Austin Parker before that time having deceased, the renewal was for the joint benefit of Zebulon Parker and the estate of Austin Parker.

A transcript of the record of the court of common pleas of Trumbull county, Ohio, is in evidence showing, that at the November term, 1834, Robert McKelvy and Eliza Parker were appointed administrators upon the estate of Austin Parker; also an assignment, dated July 31, 1841, from McKelvy, administrator, etc., to Z. Parker, of all the interest of said estate in the patent. There is also in evidence, an assignment of the entire interest in the patent from Z. Parker to the plaintiff, dated May 17, 1847.

To this paper evidence of title, no exceptions have been taken by the defendant, except to the assignment of McKelvy (the administrator) to Zebulon Parker. It is claimed that inasmuch as both administrators did not join in the assignment, a part only of the interest in the patent passed to the assignee.

This exception is not well taken. Administrators of an estate are not, properly speaking, trustees in whom is vested the legal title. The law clothes them with certain powers, by which they are enabled to transmit the legal title of property. They are mere instruments of the law, and the effect is given to their acts upon the same principle that title to property is transferred by the official act of a sheriff or marshal; and it is well settled, that if a man appoint several executors, they are esteemed in law but as one person representing the testator. Acts done by one of them, which relate to the delivery, gift, sale, or release of the testator's goods or personal property, are deemed the acts of all. The same rule obtains with reference to the acts of administrators. *Wheeler v. Wheeler*, 9 Cow. 35. I am unable to see any force in the objection made to the assignment of McKelvy.

Such is the position of the plaintiff upon the record, as to title. The defendant has pleaded the general issue, and given notice of the want of novelty in the invention. As the validity of this patent has been drawn in question, it becomes the duty of the court to examine it, and determine its character. The general character of the patentee's invention, as de-

clared in the patent itself, is, "a new and useful improvement in the application of hydraulic power." To obtain a right understanding of the invention, however, we must resort to the specifications, which by law are required to accompany the patent.

In the introductory part of the specifications, the invention of the patentees is claimed to consist of "a new and useful improvement in the application of hydraulic power, by a method of combining percussion and reaction, applied and exemplified in: 1st. A compound vertical percussion and reaction waterwheel, for saw mills and other purposes, with the method of applying the water on the same. 2d. An improved horizontal reaction waterwheel, with the method of combining percussion with reaction on it. 3d. A method of combining percussion with reaction on common reaction wheels, or those already in use." Then follows the statement that "the principle upon which this improvement is founded, is that of producing a vortex within reaction wheels, which, by its centrifugal force, powerfully accelerates the velocity of the wheel, and adds proportionately to its momentum."

Taking the definition of percussion, as given by Mr. Morton, an expert, it is safe to say, its legitimate meaning, as used by the patentees here, is a power over and above reaction, derived from the impingement of the water, with a momentum due to its velocity, upon the buckets placed obliquely in its line of motion. The term being thus understood, we have clearly and satisfactorily exhibited in this part of the specifications, the purpose of the invention; which is the application of hydraulic power to the propulsion of water-wheels by a new and improved method.

In pursuing the specifications further, we find the minute details, the *modus operandi*, of producing a wheel or machine for this new and improved method. Before construing the patent and specifications, in order to ascertain what the patentees claim to be their invention, it is proper for us to recur to some well-settled principles of law which will govern the court and direct the jury in applying the testimony in the case.

As the patent law of the United States grants the patentee a monopoly, and not only awards damages, but inflicts a penalty for a violation of the exclusive privilege, it requires that the invention shall be so described, in the specifications, that one acquainted with the art or manufacture to which it relates, may not only understand the invention, but be able by following the specifications, with the aid of the drawings, to construct the machine, or make the combination, which is the subject of the patent. And this rule of law is founded on the equitable principle, that a monopoly or exclusive privilege should not be given to an individual without a just equivalent to the public. While the statute holds out encouragements to stimulate invention and improvement in the arts and manufactures by securing to the inventor a remuneration for his out-

lay and a reward for his ingenuity, nevertheless, the consideration for which the patent issues to him, is the benefit he confers on the community, by his discovery eventually becoming public property. The patentee may be regarded as a purchaser from the public, being bound to so communicate his secret by specification, drawings, and models, that it shall be successfully available to the whole community at the expiration of the patent. I state this principle of law thus fully, for the reason that in the experiments made before you by Paul C. Parker, a millwright, on his machine, the scroll seemed to be a detriment to the wheel. That scroll, the plaintiff's counsel say, was too large, and not constructed in accordance with the specifications of the plaintiff's patent. If so, the experiment goes for nothing. Then, any witnesses, who have condemned the use of the scroll, should prompt you to a careful examination of the specifications, models, and drawings, that you may determine whether they furnish the instructions and data sufficient to enable a good and skillful millwright to construct the scroll, and all other parts of the machinery, so as to produce the effect claimed by the patentees, and in doing this you will recur to all the testimony given in the case, as to the sufficiency of the patentee's specifications, models, and drawings in that regard.

In the second place, is this alleged invention new and useful? By section 1 of the act of 1793 [1 Stat. 318], re-enacted by section 6 of the act of congress of July, 1836, it is provided that any person or persons having discovered or invented any new or useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not at the time of his application for a patent, in public use or on sale with his consent or allowance as the inventor or discoverer, and shall desire to obtain an exclusive property therein, may make application in writing, etc.

It is an essential requisite of this law, that the invention be new; and in relation to the time in reference to which the invention must be new, our statute differs materially from the English statute, enacted in 1623. By that act of the British parliament, the invention was required to be new at the time of the issuing of the letters patent; a long time thus intervened after application made and before the grant of the patent, in which the discovery was made public, and the patentee suffered by piracy upon his discovery. The consequence was, that for more than two hundred years it was almost impossible for a patentee to sustain his patent in the English courts, in a suit for infringement, for the reason that his invention was in use, and, therefore, not new at the date of issuing the patent.

Our statute is more just and liberal to the

patentee. The right to the invention dates from the time of discovery, and he is secure in his patent if his machine or manufacture was not in public use at the time he made his application. The question of novelty in this invention, therefore, must be considered with reference to the time of discovery in 1828. Again: The patent itself is prima facie evidence of novelty, and this prima facie evidence is strengthened by the fact of the renewal of the patent. It can only be overcome by proof made under the defendant's notice, and your inquiries in that particular are restrained by the notice.

The questions of the sufficiency of that notice, and the admissibility of proof under it, have been fully argued by counsel and decided by the court. They are questions with which you had nothing to do. Such proof as was permitted to go to you under the ruling of the court, you are to receive as evidence of previous invention, knowledge, or use, and none other. You will refer to your minutes of the testimony to refresh your recollection of what was sworn to by Urbane Kelsey, Jesse Stow, Jabez W. Phillips, Wm. H. Thurston, Perley Blakeslee, Elisha Garrett, and Henry Wetmore. The testimony of these witnesses, coupled with the exhibition of models of the "Kelsey wheel," "Humiston wheel," "Foster's Crossing wheel," and the "McComb wheel," is all, and I believe the only, evidence proper for you to consider in ascertaining the want of novelty in the Parker patent. It is for you to determine its effect under the rules of law that will be given to you by the court.

There are certain legal rules which will govern you in testing the novelty and utility of this invention. And I may here remark, that the word "useful," in the section of the statute which I have quoted, is not used for the purpose of establishing general utility at the test of a sufficiency of invention to support the patent. It is used merely in contradistinction to what is frivolous or mischievous to the public. Mr. Justice Story has illustrated this rule by saying that "a new invention to poison people, or to promote debauchery, or to facilitate private assassination, are not patentable inventions. But if the invention steers wide of these objections, whether it be more or less useful, is a circumstance very material to the patentee, but of no importance to the community." It is quite sufficient if it has any utility. The plaintiff, then, has answered the requirements of the law, if his invention in usefulness is but a slight improvement on former wheels, even though it be for an improvement upon what is old.

In testing the novelty of the invention, the task is more difficult. Where the patent is for an improvement on an old machine, if the whole of it, as well the old as the new part, is described in the specifications, it is essential that the patentee distinguish what part he claims, since, if this does not satis-

factorily appear, the patent will be void for ambiguity. Or, if the clear construction of the patent and specification taken together, is, that he claims the whole machine in its improved state, the patent will be void by his claiming too much. And if the specifications contain a description of what is old and known, as well as what is new, what is claimed as new must be distinguished. In specifying an improvement in a machine, however, it may be necessary, and when so, it is proper to describe the whole machine as it operates with the improvement, in order to make the description understood by a person of the trade to which it belongs; and if the patentee fails to do this, his patent fails for obscurity. The simple purpose of the law, in requiring the patentee to distinguish new from old, is, that it may distinctly appear what his invention is. It is sufficient if what is claimed as new appears with reasonable certainty on the face of the patent and specifications, or by necessary implication. These are governing rules of law, where the claim of the patent is for parts of a machine, those parts being essentially what is claimed as the improvement on the whole machine.

There is, however, a class of cases to which these stringent rules do not apply, although the discovery is in the nature of an improvement on what is old. Where any new contrivances, combinations, or arrangements are made use of in machinery, although the chief agents are well known, those contrivances, combinations, or arrangements may constitute a new principle, and then the application or practice will necessarily be new also. And in such a case, the new and improved method of producing a useful result or effect, is as much the subject of a patent as an entire new machine.

The word "machine" in the statute includes new combinations as well as new organizations of mechanism, and hence there may be a patent for new combinations of machinery to produce certain effects, whether the machines constituting the combination be new or old. In such a case, the patent is not for an abstract principle, but for the particular application of the principle which the patentee professes to have made. And I have no hesitation in saying, that the invention or discovery claimed by the plaintiff's patent is substantially of this class. With this view of the case, I know it is objected that the patentees here claim the discovery of abstract principles, and it is urged, that in contemplation of law, principles of science are never new, or the subject-matter of a patent.

It is true that a patent can not be sustained for a mere principle. For instance, Sir Isaac Newton's discovery of the principle of gravitation could not be the subject of a patent. But it is equally true, that a principle may be embodied and applied, so as to afford some result of practical utility in the arts and manufacturers, and that under such

circumstances a principle may be the subject of a patent. It is, however, the embodiment and the application of the principle which constitute the grant of the patent. And it has been justly said "that the principle so embodied and applied, and the principle of such embodiment and application, are essentially distinct; the former being a truth of exact science, or a law of natural science, or a rule of practice; the latter a practice founded upon such truth, law, or rule."

Now, percussion, reaction, and centrifugal force are, in the abstract, neither new principles nor subjects of a patent. But their embodiment and application to machinery may be both new and useful, and entitle the discoverer to the exclusive use of his invention. The patentees in this case claim the discovery of embodying these principles in a water-wheel, and their application in a new and improved method of propulsion. And this it is competent for them to do.

Having stated these rules of law for your government, let us examine more minutely the patentee's claim. It is the business and duty of the court to construe the patent and specification for the purpose of determining what the claim of the discovery or invention is; whether it is for the invention of a new water-wheel, or for the discovery of an improved water-wheel merely, or whether it is for an improved method of applying hydraulic power for the propulsion of water-wheels. And it is the province of the jury, under the instruction of the court, as to what the invention is, to determine whether such invention is new and useful.

In construing this patent and specifications, we recognize the force of the rule laid down in *Curtis on Patents* (section 391): "That the patentee is to be presumed not to intend to claim things which he must know to be in use; and that the specifications should be so read as will make the claim coextensive with the actual discovery or invention."

What, then, is embraced in the claim of this patent? It is not the vertical or horizontal arrangement of the wheels upon the shaft, or the putting them in pairs. It is absurd, said my brother Leavitt, to suppose that a man of ordinary intelligence would claim as his invention the self-evident truth in mechanics, that a wheel on a horizontal shaft should be vertical. Neither does it embrace, as a distinct discovery, the concentric cylinder inclosing the shaft; nor the spout, the gate, the outer cylinder, nor the buckets on the wheel. These and many other things are mentioned in the specifications as necessary fixtures and adjustments in the patentee's combination and arrangement. This combination and arrangement is for the application of hydraulic power to the propulsion of water-wheels by a new and improved method.

The purpose or aim of the patentees evidently was to obtain an increase of power

with a given quantity of water. They claim that by the arrangement of the concentric cylinder and the spout of spiral termination, a greater leverage is obtained by applying the water on the wheel in the line of motion, and at as great a distance as possible from the center. The outer cylinder gives it a vortical motion and the inner cylinder gives it greater force by directing it from the center. By the adjustment of the scroll (when properly made), the water passes around and between the cylinders, so that it is directed to the wheel in such proportion that as the volume of water diminishes by passing through the issues, the remainder is kept up to the work and is thus caused to press equally upon the entire circumference of the buckets.

In these arrangements of machinery, the patentees claim a combination of pressure or percussion, reaction, and centrifugal force that produces a combined power of propulsion. And here lies the secret of the invention of this "Parker Wheel." It is the vortical motion of the water on the wheel, which operates as a coefficient to the reactive power of the water on the buckets. It is what the patentees claim it to be, to wit: "An improvement in the application of hydraulic power, by a method of combining percussion with reaction." This is evidently what is claimed by the inventors; and when the exact nature and extent, or essence of the claim of the inventors can be perceived, the court is bound to adopt that interpretation of the patent, and to give it full effect.

This conclusion is drawn from the hypothesis that the terms "reaction wheels" and "common reaction wheels," as used in the specifications, were understood and employed by the patentees in the technical sense of those words, and as understood and defined in books of accredited authors. Since the invention of the "Parker Wheel" one hundred years ago, the term "reaction," as applied to water wheels, has been well understood as contradistinguished from "impact" or "percussion."

That the patentees use the term "reaction" in its technical sense, is evident from the language employed in the specifications in relation to the size of the issues and the quantity of water admitted upon the wheel, as compared with that leaving it at the issues.

That they understood what a common reaction wheel was, is further evident from their description of it in the specifications, in which they say, "It runs under the penstock. Through the floor; a circular hole is made, nearly equal in diameter to the internal diameter or the rim, and concentric with the wheel. The hole through the floor is lined with staves in cylindrical shape," etc., and then the buckets and issues are described. This description answers to that of the "McComb Wheel" which has been testified to by witnesses, and illustrated by

an exhibited model of reaction wheel in common use at the date of issuing the Parker patent. Now, it is claimed that this old reaction wheel was propelled by the water (when full in the forebay) pressing or acting first on the disc of the wheel, and then in the lines if its radii upon the buckets, and spouting out at the issues, thus preventing by its course the possibility of a vortical motion on the wheel.

From a careful examination of the specifications, I am fully satisfied that the essence of the invention is, the producing a vortical motion on a reaction wheel in the line of its motion, and that the invention of producing a vortical motion upon a percussion or impact water-wheel is not within the claim of the patent.

This construction of the patent and specifications by the court, will be regarded by you in your inquiries upon the questions of novelty and utility. In declaring what the patentee's claim is, I have sufficiently indicated the opinion that the invention is not frivolous, and that it is the proper subject of a patent.

Thus far in the case, there are presented to you three inquiries: 1st. Do the specifications and drawings furnish such full directions that a skillful millwright can construct a waterwheel containing the combination claimed by the patent. 2d. Is the invention useful? 3d. Is it new?

If you find affirmatively on these three propositions, you will then recur to the testimony, and inquire whether the defendant has infringed upon the plaintiff's right. In this branch of the case, the duty and labor of examining and weighing the testimony, the law, for wise and sound reasons, has imposed upon you. It is made the duty of the court, however, to declare the rules of law by which you are to be governed in applying the evidence.

We have already stated that when a person has invented some mode of carrying into effect a law of natural science, or a rule of practice, which constitutes the peculiar feature of his invention, such discovery may be secured to him by a patent. Hence it follows that he is entitled to protect himself from all other modes of making the same application. The substantial identity, therefore, that is to be looked to, respects that which constitutes the essence of the invention, namely, the application of the principle. If the mode of carrying the same principle into effect, adopted by the defendant, still shows that the principle admits of the same application in a variety of forms, or by a variety of apparatus, the jury will be authorized to treat such mode as a piracy of the invention. But if the defendant has adopted variations which show that the application of the principle is varied, that some other law, or rule of practice or science, is made

to take the place of that which the patentee claims as the essence of his invention, then there is no infringement. Curt. Pat. 338.

If the defendant, in the use of a reaction water-wheel, whether on a vertical or horizontal shaft, whether single or in pairs, has run it, or caused it to be run, by the aid of the vortical motion of the water upon the wheel in its line of motion, he has violated this patent; provided he has used, in so doing, any or all of the patentee's mechanical contrivances for producing that vortical motion or mechanical equivalents for any or all of them to produce it. This contains, in a nut-shell, the whole law of the case upon the question of infringement. A different rule of law would obtain, if the shute, cylinders, scroll, and other contrivances were embraced in the claim of the patent. This view of the case renders it unnecessary for me to notice in detail the great number and variety of points made by counsel, upon which they have desired the court to instruct you.

If you find, from the testimony, explained and illustrated as it has been by the models which are in evidence, that the defendant has infringed upon the plaintiff's right, then the only question remaining for your consideration, is that of damages.

If you find for the plaintiff, you will assess and return as your verdict, the actual damages he has sustained by the infringement, whether such infringement was an intentional violation of the patent or not: and in estimating the actual damages, the rule is, to give the value of such use during the term of the illegal user, or in other words, the amount of profits actually received by the defendant between the 17th of May, 1847, and the 19th of October, 1850. This rule is fully stated in the case of Parker v. Banker [Case No. 10,725].

The case, gentlemen, is now committed to your hands. I have cautiously abstained from all comments upon the testimony. It has been so thoroughly examined and canvassed by counsel on both sides, that even an allusion to it by the court would be a work of supererogation. The patient and careful attention which, for more than two weeks, you have given to the evidence and arguments of counsel, is a sufficient guarantee that your verdict will accord with the law and the testimony. Although the long time occupied in the trial has challenged your patience, you have, nevertheless, been amply compensated in the elucidation of important principles of philosophy and law, and by the exhibition of profound erudition of scientific witnesses, which has been surpassed only by the ability and learned disquisition of counsel in the trial and argument of the cause.

The jury found a verdict for the defendant.

[For other cases involving this patent, see note to Parker v. Hatfield, Case No. 10,736.]

Case No. 17,897.

WINTERMUTE v. SMITH.

[1 Bond, 210.]¹

Circuit Court, S. D. Ohio. Oct. Term, 1858.

DEPUTY MARSHAL—FAILURE TO RETURN APPOINTMENT—RIGHT TO FEES—SUIT AGAINST MARSHAL.

1. Where a deputy marshal was regularly appointed by a marshal, and duly sworn as deputy, but no return of such appointment was made by the marshal to the district judge, such omission did not affect the legality of the service of subpenas made by such deputy, nor deprive him of the right to his fees.

2. A deputy marshal is not entitled to charge for service or mileage for himself as a witness.

3. Though the service is rendered by the deputy marshal, the fees legally belong to the marshal, and his receipt for them operates as a discharge from liability for such service.

4. A deputy marshal's remedy for compensation is against the marshal for whom he performed the services.

[Action by Alfred Wintermute, assignee, against Daniel Smith.]

G. M. Lee, for plaintiff.

Thomas Ewing, Jr., for defendant.

LEAVITT, District Judge. The writs in this case were returned as served by Samuel Dolph, deputy marshal, and the fees for mileage and service by the deputy indorsed on the writs. The clerk has taxed these costs thus charged by the deputy marshal for mileage and service. In this case, judgment has been entered against the plaintiff for costs. The plaintiff now moves to have the taxation corrected by striking out the fees charged by Dolph, as deputy marshal, including traveling fees for services. It appears that, prior to last October term, there had been an agreement between Wintermute, as counsel for the plaintiff, and Ewing, as counsel for the defendants, that the subpenas should be served without the intervention of an officer, the service to be acknowledged by the witnesses. This arrangement was made to save costs to the parties.

Prior to the service of the writs, Wintermute wrote to one Anderson, at Newark, inclosing the subpenas, and referring to the arrangement with Ewing, but saying he would not trust to that, and directing that they should be served by Dolph, who he says was a regular deputy marshal. Dolph served the subpenas, and made return as before stated. Several of the persons served say they acknowledged service of the subpenas, but no such acknowledgment appears on the writs. Dolph swears in his affidavit that he served the writs. The question is, whether, under these circumstances, Dolph is entitled to his fees. It is alleged that he was not a deputy. It is proved that he was regularly appointed by

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

the late marshal, and duly sworn as a deputy; but no return was made by the marshal to the district judge of the appointment of Dolph as a deputy. This omission, if he was duly appointed and sworn, would not affect the legality of the service of the subpenas so as to deprive the deputy of the right to fees. He is not, however, entitled to charge for service or mileage for himself as a witness, and the fees so charged must be stricken out. It seems there has been a full settlement of the marshal's fees by the plaintiff in all these cases, who holds receipts for the payment of them, embracing a release from all further liability to the marshal for his fees. There can be no doubt the fees belong legally to the marshal, and he controls them, though the service is rendered by a deputy. All writs are directed to the marshal, and he is supposed to serve them, and the writs are returned by the marshal as served by deputy.

The marshal's receipt must operate as a discharge of the plaintiff, so far as the marshal's fees are concerned, and I do not see how they can be collected by the plaintiff. But still there is no ground for an order to retax the costs, as they do not appear to have been illegally taxed. I suppose, however, the clerk would be justified in making an entry in such case, that the marshal's fees for the service in question had been satisfied. The marshal's receipt would be sufficient authority for this. Dolph's remedy for compensation for his services is against the marshal for whom he performed the services. The court can not, therefore, make a formal order for the retaxation of these costs. This seems not to be necessary, according to the views of the court, as before intimated.

Motion overruled.

Case No. 17,898.

WINTERPORT GRANITE & BRICK CO. v. The JASPER.

[Holmes, 99.]¹

Circuit Court, D. Massachusetts. Feb., 1872.

CONTRACT OF SALE—OFFER AND ACCEPTANCE—CARGO OF VESSEL—SALE AT INTERMEDIATE PORT.

1. The agent of the owners of a cargo of wood, described in the bill of lading as consisting of ninety-five cords, more or less, while the vessel was lying in a port to which she had been taken in an unseaworthy condition, offered by letter to sell the wood to the master of the vessel, at a certain price "per cord, for the quantity shipped." The master seasonably mailed to the agent an acceptance of the offer, and on the next day wrote that he would have the wood surveyed, and would remit as soon as he could make it convenient. On receipt of these communications, the agent replied, claiming that the term "quantity shipped" in his offer meant the quantity "as per bill of lading," and requiring the master at once to remit the

¹ [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

proceeds, with the bill of lading to verify the account, and notifying him that the wood was not his "property to move away or dispose of until he complied with these conditions." Before this reply was received the master sold the wood, which on survey proved to contain seventy-eight cords and one foot. *Held*, that the sale was complete, and the title to the wood vested in the master, when his acceptance of the offer to sell was mailed.

2. A voyage from Maine to Boston was abandoned on account of unseaworthiness of the vessel, caused by perils of the seas, and the vessel taken to an intermediate port, where the agent of the owners of the cargo sold the cargo to the master. *Held*, that the owners of the cargo had no lien upon the vessel for non-delivery of the cargo at the port of destination.

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

[This was a libel by the Winterport Granite & Brick Company against the schooner Jasper (F. W. Nickerson and others, claimants). From a decree of the district court dismissing the libel (case unreported), libellants appealed.]

George W. Esterbrook, for appellants.

D. A. Gleason and C. W. Phillips, for claimants.

SHEPLEY, Circuit Judge. Libellant shipped, in November, 1867, a quantity of pine-wood on the schooner Jasper, then lying in the port of Winterport, Me., to be transported to Boston and delivered to Phinley W. Reed, the agent of the libellants. The master of the schooner gave libellants a bill of lading for ninety-five cords, more or less, with the usual exception of the perils of the seas. The vessel sailed on her voyage, and proceeded down the Penobscot river as far as Bucksport Narrows, when a heavy squall from the north-west drove the vessel ashore, where she lay two tides, causing her to leak badly. After getting her off, the master proceeded with her down the river to the port of Stockton, where the master came to anchor, and called a survey, which pronounced the vessel unseaworthy.

The crew then left the vessel on account of her unseaworthy condition. The master remained on board, and with some assistance took the vessel to Rockland, where the wood was landed and subsequently sold. In October, 1868, this libel was filed, alleging the shipment of ninety-five cords of wood, according to the bill of lading; that the master converted to his own use seventy-eight cords thereof, and carelessly and negligently lost the balance; and praying for process against the schooner, her tackle, apparel, and furniture.

The answer admits the shipment of the cargo, but denies that the amount shipped exceeded seventy-eight cords and one foot; alleges that the schooner sailed from Winterport with that quantity on board; that without fault of the master or crew she was driven ashore, and became unseaworthy and unable to complete the voyage; that she was got off in a reasonable time thereafter, and as soon as it could be done, and proceeded to the port of Stockton, where the master immediately notified the agent of the libellants of the facts;

and that thereupon the libellants, through their agent, bargained and sold all the wood to Josiah G. Staples, the master of said schooner. The answer alleges that the voyage was terminated at Stockton by the perils of the seas, without default for which the schooner would be liable; and that the liability of the schooner then ceased, any further detention of said wood having been solely in pursuance of the contract of sale between the libellants and Staples.

At the time of the shipment of the cargo, Olesser Gray and William R. Ginn were part-owners in the Jasper. In January, 1868, they sold their interest to Henry S. Staples, who owned the remaining shares in the schooner. In June, 1868, Staples sold the schooner to George W. Reed and William B. Reed, of Bangor, Me. From the time of the disaster to the time of filing the libel the schooner was either in the district of Maine or the district of Massachusetts, or on voyages between ports in said districts, being frequently in the ports of both districts. Libellants are a corporation established by the laws of Massachusetts, and having also a place of business and agents at or near Winterport, in Maine.

On the 22d of November, the master advised the agent of the libellants that the vessel had been ashore, and was not seaworthy to perform the voyage; that he would be obliged to discharge the cargo, and pile the wood on the wharf; that the vessel would require to have the sheathing taken off, and to be recaulked and sheathed, which, on account of the ice, could not be done until spring. He then inquires of the agent, "What is the least you will take for the wood here?" On the 25th of November, Reed acknowledges the receipt of the master's letter of the 22d, and writes: "Should you prefer to buy rather than ship the wood, you can have it for four dollars per cord, for the quantity shipped." On the 29th of November, the master writes to Reed, acknowledging the receipt of Reed's letter of the 25th, and accepting his offer of the wood.

On the 30th of November, Staples again writes to Reed: "I have concluded to take up with your offer. I think of going to Rockland, and do the best thing I can with the wood, and I will remit the money as soon as I can make it convenient. I will get a sworn surveyor on the wood, and good measure as I can."

On the 3d of December, Reed writes to Staples acknowledging the receipt of Staples's letter of the 30th, but claiming that Reed's offer to sell for "four dollars per cord for the quantity shipped" "means per bill of lading," and requiring the master at once to remit the proceeds, with bill of lading to verify the account, and notifying Staples that the wood was "not his property to move away or dispose of until he complied with these conditions." Before this letter was received, Staples had sold the wood for four dollars and thirty-seven cents per cord in Rockland, accounting to the owners for the advance of thirty-seven cents

per cord, as freight from Winterport to Rockland.

The offer to sell the wood to Staples, and his acceptance, were both unconditional. When a proposition is made in writing, and sent by post, the person making the offer can retract or modify by a subsequent letter reaching the other party at any time before an answer of acceptance is written and put in the mail. But as soon as such answer is placed in the mail, the contract is closed as to both parties. Although a letter of retraction be actually on the way at the time when the letter of assent is mailed, yet the contract is closed, unless such letter of retraction be received prior to the mailing of the letter of assent. The acceptance by written communication takes effect from the time when the letter of acceptance is sent, and not from the time when it is received by the other party. *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Taylor v. Merchants' Fire Ins. Co.*, 9 How. [50 U. S.] 390; *The Palo Alto* [Case No. 10,700]; *Mactier v. Frith*, 6 Wend. 103.

The property was in the possession of Staples, and no formal delivery was necessary to change the title. His letter of acceptance reached Reed before Reed's letter of Dec. 3 was written. And even if the modification of the contract by the letter of Dec. 3 took effect, and the wood was not to become the property of Staples "to move away and dispose of until he had complied with the conditions" of that letter, it is clear that, after that time, he would hold the cargo, not as agent of the owners of the schooner, but subject to the arrangement between Staples and the owners of the cargo. The owners of the schooner, after that time, were under no obligation to forward, in fact they had no right to forward, the cargo to Boston, the place of its original destination. If the libellants had any lien on the cargo until the price was paid, they clearly had no lien against the vessel, having waived any right to have the cargo delivered in Boston, and consented to accept it at an intermediate port.

And if any claim existed against the vessel, libellants should have enforced it within a reasonable time. What is a reasonable time is a question dependent upon the circumstances of each case; and the court, in the exercise of its discretion in determining this question, will be guided by the evidence of opportunities to enforce the lien, of the lapse of time, of the change, if any, of ownership. In this case, ten months had elapsed; the vessel had been in Massachusetts four times, and she was in Boston eighteen days before being libelled, consigned to the same person who, as agent of the libellants, had been the consignee of the cargo in controversy, and had been publicly advertised and sold before the service of the libel. If the libellants had any lien, they would have lost it by their neglect to enforce it under such circumstances. Decree affirmed, with costs.

Case No. 17,899.

WINTER'S BANK v. ARMSTRONG.

[Cited in *First Nat. Bank v. Armstrong*, 36 Fed. 61. No opinion filed; nowhere reported.]

Case No. 17,900.

In re WINTHROP.

[5 Law Rep. 24.]

District Court, D. Massachusetts. March 26, 1842.

IMPRISONMENT OF BANKRUPT.

A judgment creditor enjoined from committing a bankrupt to prison.

[Cited in brief in *Ex parte Hoskins*, Case No. 6,712; *Ex parte Waddell*, Id. 17,027.]

In this case the bankrupt [Grenville T. Winthrop] presented his petition, setting forth that the petitioner, upon the 8th day of March, was, upon his petition to this court, declared to be a bankrupt; that an assignee had been appointed, according to the late act of congress [5 Stat. 440], in his behalf, and that it was necessary for him to be ready, at all times, for examination in regard to his affairs; that he had filed his petition for a discharge; that Ebenezer Trescott, of Boston, recovered a judgment against the petitioner, in the court of common pleas, at the last January term, and had sued out an execution thereon, and placed the same in the hands of a deputy sheriff of Middlesex, on March 22d, with written directions to collect the amount of the same, or commit the petitioner forthwith to prison, and in consequence of such directions, said deputy sheriff was about to commit the petitioner to jail. Wherefore he prayed, that said Trescott, and said deputy sheriff, and all other persons, might be enjoined from arresting or committing the petitioner to jail, until a hearing could be heard upon his petition for a discharge.

William C. Aylin, for petitioner.
Ebenezer Trescott, pro se.

SPRAGUE, District Judge, sustained the application, and granted the injunction. He observed, that it appeared, by the affidavits of the petitioner and the assignee, that the presence of the petitioner was necessary, to give information to the assignee, and to assist him in relation to the estate; that the petitioner ought to be in a situation at all times to obey the orders of the court, and that his being in close confinement would conflict with the proper exercise of the jurisdiction of the court under the bankrupt law. But, besides this, the object and purpose of the creditor here were inconsistent with the object and purpose of the bankrupt law. He sought to coerce his debtor to give him a preference. The law forbade that preference. The object of enforcing the execution was to compel the debtor to turn out property, or to disclose

secret funds, wherewith to pay the debt. But the bankrupt law had divested him of all his property. He could have no funds; and if he should, from any property, open or secret, pay this execution, the creditor could derive no benefit therefrom, as he would be immediately compelled to pay over the same to the assignee, upon a proper application for that purpose. It is the purpose of the bankrupt law to distribute all the property of the bankrupt among his creditors, and, if he has conducted fairly, to discharge him from his debts. This process has been commenced in the present case. The petitioner has been divested of all his property, for the benefit of all his creditors. The time for hearing his application for a discharge has not yet arrived. Shall the creditor, in this interval, after the bankrupt has been by law absolutely disabled from paying this debt, be permitted to use an instrument to coerce payment, when there is no reason to doubt that the bankrupt has acted in good faith, and will be entitled to his discharge from this very debt?

The judge decreed an injunction until the further order of court, observing that it would be open to the creditors, at any time, to move to have it dissolved.

WINTHROP (SULLIVAN v.). See Case No. 13,600.

Case No. 17,901.

WINTHROP v. UNION INS. CO.

[2 Wash. C. C. 7.]¹

Circuit Court, D. Pennsylvania. April Term, 1807.

MARINE INSURANCE — DEVIATION FROM COURSE —
CONSTRUCTION OF POLICY — USAGE — DEPOSITION
TAKEN UNDER COMMISSION.

1. Action on a policy of insurance on goods on board the ship Maryland, at and from New-York to the Cape of Good Hope, with liberty to proceed to, and trade at the Isle of France, and any other port or ports in the Indian seas, and at and from the ports she might go to, back to New-York; with liberty to touch and trade, as usual, on the outward and homeward voyages, for refreshments. The vessel touched at the Isle of France, thence to Trincomala, proceeded to Madras and sold part of her cargo, and went from thence to Tranquebar, where she took in goods and proceeded to Batavia; there she sold the remains of her original cargo, as well as the goods taken in at Tranquebar, and sailed from Batavia with a cargo purchased with the proceeds of her outward cargo, and of the goods taken on board at Tranquebar. After leaving Batavia, all the officers died; and before his death, the captain directed one of the seamen, who was ignorant of navigation, to take the ship to the Isle of France, and deliver her to the consul. She arrived there, and was despatched for New-York, under the command

of a British subject, but was lost on the voyage. *Held*, that the trading was within the terms of the policy. That the proceeding to the Isle of France, was not a deviation. That the acts of the consul, if irregular, could not prejudice the rights of the insured.

[Cited in *Coles v. Marine Ins. Co.*, Case No. 2,988.]

[Cited in brief in *Winter v. Delaware M. S. Ins. Co.*, 30 Pa. St. 337. Cited in *Schroeder v. Schweizer Lloyd Transport, etc., Co.*, 60 Cal. 477.]

2. Evidence of a usage to explain some clause in the contract of insurance, is regular; but it can only be resorted to when the law is unsettled, and then the construction must be determined by the usage, and not by the opinions of witnesses.

[Cited in *Folsom v. Merchants' M. & M. Ins. Co.*, 38 Me. 421. Cited in brief in *Keener v. Bank of U. S.*, 2 Pa. St. 239; *Walsh v. Homer*, 10 Mo. 8.]

3. Depositions taken under a commission, issued to a place where the commissioners are prohibited executing the commission, taken according to the law of the place, in the presence of the commissioners, by the judge, may be read in evidence,

4. If all the interrogatories, either in form or substance, are not put to the witnesses, the evidence cannot be read.

[Cited in brief in *Louden v. Blythe*, 16 Pa. St. 538.]

5. It is no objection to reading a deposition taken abroad, that the witnesses had previously been examined and cross-examined under a commission in the United States.

6. The protest of some of the crew, taken at the Isle of France, was permitted to be read, to invalidate their evidence under a commission.

Action on a policy, of the 4th of January, 1804, entered into by the Union Insurance Company, on goods on board the Maryland, lost or not lost, at and from New-York to the Cape of Good Hope, with liberty to proceed to, and trade at the Isle of France, and any other port or ports in the Indian seas, and at and from the ports she might go to, back to New-York; with liberty to touch and trade, as usual, for refreshments, on the outward and homeward voyage. The policy was open, and 20,000 dollars were insured. The ship sailed from New York, on the voyage, about the latter end of December, 1803, and touched at the Cape of Good Hope; whence she departed, and touched at the Isle of France, and went thence to Trincomala, in the island of Ceylon. It did not appear that she traded at any of the above ports. From Trincomala, she went to Madras, where she sold a part of her cargo, and received in return an order on Tranquebar, a Danish port on the Coromandel coast, where she took in goods purchased with the above order, and then proceeded to Batavia; there she sold the residue of her American cargo, as well as that part taken in at Tranquebar, and invested the proceeds in a return cargo, and about 10,000 dollars in specie, on account of the plaintiff, and 4000 dollars belonging to the captain. The crew were generally sick at Batavia, and the first officer died there, or shortly after she sailed

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

on her return voyage. Before the ship had left the Straits of Sunda, the second officer, in a state of delirium, shot the master, Captain Wickham; and shortly after died. The master appointed an officer in his room, and being himself seized with a lock-jaw, and sensible of his danger, he called to him one of the seamen, Beardsley, a young man on board, and asked him if he could lay the ship's course for the Isle of France; and being answered in the affirmative, he directed him to conduct her to that island, and deliver her to the American consul at that place. The master shortly after died, before the ship had cleared the Straits, and before any course had been laid. A council of the crew being called; they determined, in their situation, that it was best to go to the Isle of France; and, accordingly, Beardsley conducted her there in safety, and delivered her to Mr. Buchanan, the American consul. Mr. Sauliera, (the correspondent of the plaintiff, and to whom the captain, who was also the sole consignee, was recommended by his owner, in case he should want his assistance on the outward voyage,) claimed the right of taking the vessel and cargo; which, being resisted by Buchanan, the American consul, the question was brought before the court of admiralty of the island, where the possession and management of the vessel was decreed in favour of Buchanan. Buchanan obtained an order of the court for a survey of the vessel, and either upon the report made by the surveyors, or for some other reason, he thought the vessel was overloaded; and in order to lighten her, he sold a part of her cargo of sugar, and invested the proceeds, as well as the 14,000 dollars, and about 1600 dollars received from passengers, in a lighter load, consisting of indigo, &c. He employed a Mr. Adamson, a British subject, then in the island, to command and navigate the ship to New-York; and permitted some Englishmen, who had been prisoners in the island, to take their passage in the ship to New-York. The ship sailed from the Isle of France, and was lost on the American coast, within a day's sail of New-York. On notice of loss, a regular abandonment was made. The property of the plaintiff was admitted. One of the objections made by the defendants to paying the loss when the abandonment was made, was, that the ship when she left Batavia, was overloaded. But this was so clearly disproved by the evidence in the cause, that it was abandoned on the trial.

A number of depositions were taken and read, proving the facts above stated, which are noticed in the charge. The protest of Beardsley, and of most of the witnesses who have deposed in the cause, was read to discredit their testimony, as to the intention of Captain Wickham when he left Batavia, to call at the Isle of France. The

defendants offered to prove by witnesses, a usage, in voyages like the present which prevented the selling on board of any part of the cargo at any intermediate port, at which the vessel was permitted to call. To prove that such evidence was proper, were cited Park. Ins. 30, 42, 45, 49; Johns. 333. The admission of the evidence was opposed by the plaintiff's counsel.

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

BY THE COURT. An usage to explain some clause in a policy, is proper. If the construction be doubtful, it is the safest guide, because most likely to accord with the intention of the parties; who, it is to be presumed, had a view to the usage when they contracted. But usage can only be resorted to where the law is doubtful and unsettled; and even then the construction must be determined by the usage, and not by the opinions of the witnesses, however respectable they may be. In this case, the usage which the defendant expects to prove, will not contradict, though it may qualify and explain the permission which is granted by trading at the ports in the Indian seas; and it will contradict no settled principle of law on that subject. The evidence, therefore is proper.

Witnesses were then examined who stated, that where the termination of the voyage was fixed, the permission to trade, was, according to usage, confined to ports in the line of the voyage; but where this was not the case, as in the present instance, the trading might be backwards and forwards, out of the line. They mentioned two cases, where the policies resembled the present, except that the insurances were upon time, and a trading, similar to that which took place in this case, was carried on, and not objected to; and concluded, generally, by saying, that such a trading, in such a voyage, and under such a policy, is considered lawful, within the general usage of trade.

The defendant's counsel then offered to read depositions taken under a commission to the Isle of France, which was opposed upon two grounds: first, that it was executed not by the commissioners named, but by the judge of the admiralty, or some tribunal of that nature in the island: second, that many of the interrogatories were not put to the witnesses, neither were they answered. As to the first objection, it appeared that the execution of a foreign commission at that place by individuals, was considered by the government as an assumption of sovereign power, which was not permitted to be exercised. The American consul, to whose management this business was entrusted, in pursuance of the advice of counsel, petitioned the judge of the court to execute the commission, which he did with great solemnity, in the presence of persons named in the commission; but the interrogatories were not all put in the form they were propound-

ed by the counsel in this country, and some of them were not put at all.

In support of the commission, it was argued that this was the best evidence, which, from the nature of the case, could be produced; and if it be rejected, it will be impossible, in this or any other case, to obtain testimony where the witnesses reside in any part of the French dominions. In the case of *Church v. Hubbard*, 2 Cranch [6 U. S.] 236, it was decided, that foreign laws must be proved like other matters of fact; but that, if such proof was unattainable, inferior evidence, even the certificates of a consul, might be admitted. As to the second objection, the interrogatories are informally put; yet, if they are substantially answered, it ought to be deemed sufficient; particularly in a case where the execution of the commission was taken from the persons named in it, by the imperious interference of a foreign power.

WASHINGTON, Circuit Justice, was of opinion that the first objection ought not to prevail. The object of courts is, that the administration of justice should not be impeded by difficulties of form. The substantial purpose for which a commission to examine witnesses is given, is to obtain the evidence of those witnesses fairly, fully, and impartially. The commission, the interrogatories, &c., constitute the form by which this purpose is to be effected. If the substance be obtained, but from imperious circumstances not controllable by the court, the form cannot be observed; a correspondent relaxation is proper, in order to prevent the courts of justice from being impeded. Upon this ground, which is rendered tenable by the general principles of law, the first objection ought to be overruled. A contrary decision might be productive of extensive mischief in commercial questions. But, whilst the form in which the commission is executed, may, in a case like the present, be disregarded; it is, nevertheless, the duty of the court to see that the evidence has been fully and fairly taken. If the interrogatories be substantially put, though not in the precise form in which they are propounded by the parties; and if it appear that they are answered by the witnesses, it will be sufficient. But they ought all to be put, and should be all answered; as well those of the one side, as those of the other. This is not the case, as to any of the depositions under this commission. To mention one instance, among many others, which might be selected from the commission. The witness, by a cross-interrogatory, is asked, if the Maryland came into the Isle of France from necessity. In answer to some other question, he states, incidentally, that she came in, having lost all her officers; and this is said to be an answer to the above question. But that question was calculated to draw from him every circumstance of necessity within his knowledge, such as stress of

weather, leakages, being overloaded, &c. Each party has a right to have full benefit of his interrogatories, and to have them fully answered. This objection, therefore, is conclusive against the depositions.

PETERS, District Judge, fully concurred in the opinion upon the last objection, but he was not perfectly satisfied as to the first; although he concurred, rather than divide the court.

A third objection was made to the reading of Beardsley's deposition, taken under this commission, that he had been previously examined and cross-examined, under a commission in the United States. But the court thought this no reason why his second deposition should be rejected. The protest of Beardsley and some others of the crew, stated, that the Maryland sailed from Batavia for the Isle of France, and that they believed this was the intention of Captain Wickham, that he might there dispose of part of the cargo. But in the depositions of the same witnesses, they declared that they did not swear to this protest, and that if it was interpreted to them they did not understand it, and would not have signed it if they had. But the judge who received the protest, certifies that it was interpreted to the appearers, and sworn to by them.

The counsel for the defendant, Dallas and Rawle, objected to the plaintiff's right of recovery, upon the ground of a deviation committed in three instances; 1st, in selling at Madras, buying at Tranquebar, and reselling at Batavia; 2d, in going to the Isle of France; 3d, in breaking bulk, and changing her cargo there. Second; that the policy was vacated by taking on board an English captain at the Isle of France. They cited, in support of the first act of deviation, *Lafabre and Wilson*, Park. Ins. 294; on the third, Park. Ins. 309, 310, 313; 2 *Marshall Ins.* 413; Park, Ins. 295; Esp. 610; 3 *Esp.* 257; 5 *Esp.* 56. Upon the second point, they relied upon the evidence to prove that she did not touch at the Isle of France from stress of weather, from being overloaded, or from the incapacity of the ship to proceed. The loss of officers was a mere pretence. The captain intended, when he left Batavia, to stop there. On the third point, they insisted that the American consul was to be considered as the agent of the insured, legally substituted as such by the captain, who united in himself the characters of master and consignee. If so, then the changing of the cargo, and taking in an additional cargo purchased with the 14,000 dollars, was clearly a deviation, and was committed by the plaintiff's agent. On the last point, they insisted that the putting on board an English commander increased the risk, inasmuch as it would, by an ordinance of Louis XV., have made her good prize had she been taken by a French cruiser.

For the plaintiff, these positions were controverted by Tilghman and Ingersoll, par-

ticularly as to the facts respecting the second ground of deviation. They denied that the captain had meditated a deviation, and insisted that the American consul was the agent of all parties concerned.

WASHINGTON, Circuit Justice (charging jury). The plaintiff has proved every thing necessary to his right of recovery; and the question is, whether by any act, inconsistent with his contract, he has discharged the underwriters from the obligation to indemnify him for the loss which has happened. The claim is resisted on account of three distinct acts of deviation; first, on the outward voyage, in buying and selling a cargo in the ports at which she was permitted to touch; second, in calling at the Isle of France on her return voyage; and, thirdly, in changing her cargo there, and the taking in a new cargo purchased with the specie brought from Batavia. Another objection is made to the recovery, upon the ground of the risk having been increased by taking on board, at the Isle of France, an English captain to command the ship home.

To understand the first objection under the head of deviation, we must attend to the nature of the voyage insured. What was it? From New-York to the Cape, with liberty to proceed to, and trade at the Isle of France, and thence to any port or ports in the Indian seas; and at and from the ports she might go to, back to New-York, &c. It is contended by the counsel for the defendants, that the permission to trade beyond the Isle of France, is merely constructive, and cannot be more extensive than the express permission to trade at the Isle of France; that though the plaintiff might have touched at as many ports as he pleased, in order to dispose of his outward cargo, yet he could only take in a return cargo at those ports, and had no right to dispose of any part of it at any port on the voyage: that a more extensive construction would be highly unreasonable, by prolonging and increasing the risk beyond the time and measure which could properly have been contemplated by the underwriters.

It may be well doubted, whether this increase of risk to the extent supposed, is not in a great degree imaginary. The buying and selling would be nothing more than a change of cargo, and it must always be the interest of the insured to terminate the voyage as soon as possible. But be this as it may, it is always in the power of the insurers to prevent the consequences of a protracted voyage beyond the period they may be willing to insure, by limiting the duration of the risk. Insurances upon time, seem to be peculiarly fitted to trading voyages, and in most cases accompany them. The only two instances mentioned by the witness called to prove an usage, as to voyages like the present, were insurances upon time. It is impossible for the underwriter to calculate the

period when a trading voyage will terminate; and it may, therefore, be prudent for him to say, that he will not take the risk longer than a fixed number of months, &c. But it is unnecessary to consider the extreme case mentioned by the defendant's counsel. It will be more prudent to confine our inquiries to the very case before us. Does the policy protect the selling at Madras? the investment of the proceeds of that sale in a cargo at Tranquebar, and the resale of it at Batavia? The first consideration is, do the words of the policy, properly construed by the rules of law, protect such a trading? If they do, then, secondly, is there any usage of trade which restrains the construction? First, the permission to trade at the Isle of France, ought, upon every principle of construction, to be carried forward so as to apply to the ports in the Indian seas; for, otherwise, the permission to go there would be a mere mockery. Indulgences granted by the underwriter, ought to be and certainly are always paid for by the insured; that of going to any port in the Indian seas, was no doubt, considered in the present policy. But the insured would never avail himself of the permission to go to ports in the Indian seas, unless for the purpose of trading. If, then, the policy is to be so construed, what does it amount to? A license to trade at the Isle of France, and at any port or ports in the Indian seas. If the insured might trade at those ports, he might buy and sell at them, not in the limited manner contended for by the defendant's counsel, but by repeated acts; for I state it, that buying and selling to this extent, is the very essence of trade. It is by repeated acts of buying and selling, and taking in barter, that trade is carried on; and therefore, the words used in this policy are broad enough in their general import to cover such a trading, unless they be restrained by usage, or other expressions used in the policy.

The words used in this policy describe the risk in its utmost latitude, both as to the course of the voyage, and as to the trading outward. As to the voyage, the termination not being stated, the vessel was unfettered as to its course; and this is an additional proof of the great latitude intended to be given to the insured. Second; is this construction opposed by any well established usage of trade? An attempt was made by the defendants to prove such an usage; but, so far as usage was proved at all, it was directly against the defendant, and in support of the construction given to the policy.

The calling at the Isle of France on the return voyage. It is in proof by the testimony of a witness, that the Isle of France is out of the direct course of the voyage from Batavia to New York; and without a stoppage there, would protract the voyage about twenty days. Permission to call at the Isle of France on the home voyage is not granted by the policy, and consequently the going thither was clearly a deviation. But a deviation, if committed against the will of the master, or even volun-

tarily, for the purpose of saving the property, is excused upon the ground that all the parties to the contract, impliedly consent to it for their mutual benefit. But then it must appear that the master, in making the deviation, acted bona fide, according to the best of his judgment, for the general benefit of all the parties concerned; and in estimating the fairness of the measure, it is proper to attend to his motives, to the end he had in view, and to the consequences. He may err in judgment; the necessity may not have been extreme; but a necessity or justifiable cause must exist, and must be satisfactorily proved. His real motive ought to correspond with the one assigned, or he will furnish strong ground of suspicion that he has not acted bona fide.

The instances of necessity which are generally met with, are stress of weather; injury sustained by the ship, which requires to be repaired; to avoid an enemy; going to join convoy, and the like. But these are only examples, which serve to illustrate the principle. There may be many other instances, where the necessity will be equally great, and equally valid, to excuse the deviation. Our inquiries will then be directed to the following points: What was the asserted object in calling at the Isle of France? Was it the real one? The first officer on board, then the second, and lastly the captain, all died before the vessel left the Straits of Sunda, and before the vessel's course had been shaped. Upon the death of the first officer, the captain had appointed another; but he seems never to have acted, and we never hear any thing further of him. The captain, previous to his death, but after he was seized with a lock-jaw, and when he was certain of dying in a short time; inquired of Beardsley, a young man, and a common seaman, if he could shape the course of the vessel to the Isle of France. Upon being answered in the affirmative, he directed him to conduct her thither, and deliver her to the American consul. Unless a deviation had been previously meditated by the captain, it is strongly to be inferred from his conduct on this occasion, that he thought Beardsley the most competent of the crew to navigate the vessel; but yet, that he had not sufficient confidence in his skill, to entrust him with the command further than the Isle of France, which was not much more than half the distance they had to run to the Cape of Good Hope. This opinion of the captain seems to have been confirmed by that of the crew, who, in a council called after the melancholy fate of the captain, determined, that in their situation, it was proper to go to the Isle of France. One of the witnesses has deposed, that if the crew had not been extremely good, he doubted if Beardsley could have conducted the vessel even to the Isle of France. This, then, was the situation of the vessel. What was the end proposed by going to the Isle of France? If the witnesses are to be believed, it was to be relieved from the danger to which the vessel and crew were exposed, by the unfortu-

nate loss of all the officers who could be depended upon. But was this the real purpose for going there? It is denied by the defendant's counsel, who contend that it was a mere pretext to conceal a previously formed plan of Captain Wickham, to go from Batavia to the Isle of France. If this should be made out to your satisfaction, it will be difficult to give credit to the necessity resulting from the loss of officers, which is assigned as an excuse for the deviation.

The evidence relied upon by the defendant is; first, a letter from the American consul to the plaintiff in which he states, as coming from Beardsley, that the vessel had come in on her voyage from Batavia to that island, in consequence of her being overloaded. It is strange that Beardsley should have assigned that as a reason, when it is admitted on all hands that she was not overloaded; and Beardsley, in his deposition, declared that he never heard of an intention to go to the Isle of France from any of the officers, and that she was not overloaded. Second; the reports of the persons appointed at the Isle of France to inspect the vessel, who state that she required repairs and lightening. This, however, is strongly opposed by other evidence taken in the cause. Third; a letter from Adamson to the plaintiff, after the loss, in which he states that the vessel sailed from Batavia to the Isle of France. But it is to be remarked, that Adamson was picked up at the Isle of France, after the arrival of the vessel; and, therefore, could not have known any thing which had previously taken place. Fourth; the journal of Beardsley, which is headed, "Journal of a voyage from Batavia to the Isle of France." You will judge what weight ought to be given to this evidence. Lastly, the protest of Beardsley, and of some of the crew, made at the Isle of France.

On this evidence it is proper to remark, that the court allowed it to be read for the purpose of discrediting the witnesses who had signed the protest, and given evidence in the cause; but not to establish any one fact. If it has the effect for which it was permitted to be read, then you will consider whether there is evidence sufficient, without the depositions of those persons, to prove the case, and to justify the motives of the deviation; but not whether the protest establishes the contrary; and in presenting this inquiry, it may be proper to attend to what all these witnesses have deposed; that they did not understand the paper as it was interpreted to them; if they had, they would not have signed it. Though I should be very cautious in crediting such testimony, in contradiction of the certificate of a foreign competent consul; yet the certificate, in this case, goes no farther than to say that the protest was interpreted and sworn to, which might be, and yet might not have been understood.

On the other side, you have heard the following evidence: first, two letters from Captain Wickham shortly before he left Batavia, in which he speaks of sailing on his return to New-York, and to touch at the Cape of Good Hope, in order to settle some business there. Whether he could have any motive to conceal from his owners his intent to go to the Isle of France, if he entertained it, you must judge. Second; the evidence of Beardsley, of the boatswain, and of one of the crew; who depose that they never heard of any intention to touch at the Isle of France, until after the captain was sick, and sensible of his danger. The boatswain states that he was told by the captain and mates that they were to return to New-York, and to touch at the Cape. These witnesses, as well as Captain Lacher, give the reasons for their belief, that the Isle of France was not in the contemplation of Captain Wickham. But what seems most strongly to corroborate the evidence of these witnesses, is the order given by Wickham to Beardsley, shortly before his death. The diffidence he manifestly indicated of Beardsley's skill to navigate the vessel, even as far as the Isle of France; his directions to deliver her, not to Mr. Sauliera, the correspondent of his owners, but to the American consul; not by name, for probably he knew neither his name nor character, but as distinguished by his official station, as the commercial agent of the United States; without a single direction what this public character was to do, after he had received possession. These circumstances seem strongly to persuade the mind, that the order to deviate grew out of the necessity of the case, and could not be the result of any previously formed intention. As to this, however, you are the proper judges.

Third; the changing of, and adding to the cargo at the Isle of France; trading, except for refreshments, not being permitted on the homeward voyage. The changing of the cargo was sufficient to avoid the policy, if, under the circumstances of the case, it were imputable to the plaintiff. The reason is, not that the risk insured is increased, but that it is not the risk insured; and, therefore, it could be no excuse to say that the load was lightened by the change. If a necessity exist to throw overboard, or to land a part of the cargo, the act of doing so may be excused; but, in this case, there is no evidence of any necessity to lighten the vessel. She is proved to have been tight, and fit to perform any voyage.

The next inquiry is, were the transactions at the Isle of France, imputable to the insured? Was the result varied by the act of any person representing him, and acting, constructively, as his agent? The affirmative is asserted by the defendants. Or did they result from a misfortune occurring in the voyage, which, for a time, took

the property out of his possession, and afforded an occasion for the interference of a third person, acting for the benefit of all concerned. This is contended for, on the part of the plaintiff.

This is a question, which, in point of law, presents the greatest difficulty in the cause. Let us go by steps. Had Captain Wickham lived, and done these things, the defendants would have been discharged. Had he authorized or permitted the American consul or any other person to do them, the consequences would have been the same. Had Beardsley been appointed by Captain Wickham his successor, generally, and had he done, authorized, or permitted the doing of these things, still the policy would have been avoided. But who was Beardsley, and what were his powers? He was a sailor, taken from the crew of the vessel, clothed by the captain with a limited authority to conduct the vessel to the Isle of France, and there to deliver her and the cargo to the American consul. The moment he executed this order, all his authority ceased, and he returned to his former situation of a common seaman. He gave and could give no power or authority whatever to the American consul. Who was Buchanan? Not the consignee or agent of the owners, either so appointed by them, or by the substitution of the captain; who was, whilst living, both master and consignee. The captain clothed him with no special powers whatever; and if he possessed any, they were such as flowed from the necessity of the case, and from his official character as the commercial agent of the country he represented, and to which the vessel belonged. The vessel came to the Isle of France in distress—if you think, from the evidence, there existed a necessity strong enough to justify her going there; and, in such a situation, as required the American consul to take care of the vessel and cargo, and to afford his assistance to both. Wickham gave no directions to that officer; and, therefore, seems to have had nothing in view, but to call upon him to perform his duty as consul. He is no more to be considered as the agent of the plaintiff, than he would have been had the captain died without giving a direction, or if she had floated into the Isle of France, without officers, or without a crew. In addition to the circumstances of the case which threw her under his care, he states that he acted for the benefit of all concerned, and he acted too under the sentence of a competent tribunal, who vested him with the possession of the property.

The question of law, then, upon this point is, is the insured responsible for the conduct of third persons, done in consequence of a misfortune occurring in the voyage, from which misfortune alone, and not from any act of the owner or his agents, such third persons derived their power to inter-

ferre? The court is of opinion that he is not. The decision of this point settles the only remaining one, the putting an English captain on board. Let this have been right or wrong, it was not the act of the assured, expressly or constructively.

To conclude. The first question is purely a question of law; as the defendant admits, that an usage, such as was stated in the opening, is not proved, and the law is in favour of the plaintiff. The second is a mixed question of law and fact. If you are of opinion, upon the whole of the evidence, that the going to the Isle of France was a measure of necessity, produced by the loss of officers, that the captain, who gave the order, and Beardsley, who executed it, acting according to their best judgment; were actuated by honest motives to promote the general benefit of all concerned, and did not assign this motive as a mere cover to a previously formed plan to go there: then this point is also in favour of the plaintiff; if your opinion upon the evidence should be otherwise, then it is in favour of the defendant. If your sense of the evidence upon the second point should be in favour of the plaintiff, and that the authority given to Beardsley was such as I have considered it, then the next question, in point of law, is also with the plaintiff.

The jury found a verdict for the plaintiff, the full amount of his demand.

WIRT (UNITED STATES v.). See Case No. 16,745.

WIRT (WARFIELD v.). See Case No. 17-174.

WIRTZ (JOY v.). See Cases Nos. 7,553 and 7,554.

WISCONSIN, The. See Case No. 6,317.

WISCONSIN, The (BOYER v.). See Case No. 6,317.

Case No. 17,902.

WISCONSIN v. DULUTH et al.

[2 Dill. 406; 11 Am. Law Reg. (N. S.) 709; 5 Am. Law T. Rep. U. S. Cts. 299; 4 Chi. Leg. News. 405; 7 Am. Law Rev. 369; 29 Leg. Int. 268.]

Circuit Court, D. Minnesota. June, 1872.

RIGHT OF STATE TO SUE IN FEDERAL COURT.

A state cannot maintain as plaintiff an action in the circuit court of the United States.

[Cited in *State of Texas v. Lewis*, 12 Fed. 3; s. c. 14 Fed. 66; *Harvey v. Com.*, 20 Fed. 421; *Ames v. State of Kansas*, 111 U. S. 469, 4 Sup. Ct. 447.]

The bill in equity of the state of Wisconsin asserts the interest of the state and of her citizens in the navigation of the river St. Louis, from its mouth, where it empties into Lake Superior, at Superior City, for about

twenty miles up the river, a part of which, by reason of the expansion of the river, is known as the "Bay of Superior," and it alleges that the city of Duluth, and Mr. Luce, the mayor of that city, and the Northern Pacific Railroad Company, are now extending a dyke into the navigable waters of said river, whereby the use of the river for navigation will be seriously obstructed, and the rights of the state of Wisconsin and of her citizens will be impaired. The bill prays for an injunction, and other appropriate relief.

Orton & Setzer, for the State of Wisconsin.
Mr. Stearns, for defendant.

Before MILLER, Circuit Justice, and DILLON, Circuit Judge.

MILLER, Circuit Justice. The case comes before us at this time for a preliminary injunction, and the defendants raise the question of the jurisdiction of the circuit court, and move to dismiss the bill on that ground.

The question thus presented is whether a state of the Union can maintain a suit in a circuit court of the United States. It is one of interest and of great importance. As we shall presently see, it does not appear to have ever been decided by the supreme court, and has only received the attention of the circuit courts in two or three reported cases.

It is not claimed in behalf of plaintiff that the jurisdiction can be maintained on the nature of the rights asserted in the bill without regard to the character of the parties, but it is insisted that as one of the states of the federal Union, Wisconsin can sustain any action which can properly be brought in a circuit court. The constitution, in the second section of the third article, declares that the judicial power shall extend to controversies between a state and citizens of another state, and as the defendant Luce and the city of Duluth are undeniably citizens of the state of Minnesota, the case in that respect comes within that provision of the fundamental law. The succeeding clause, however, of the same section, in defining the jurisdiction of the supreme court, the only court established by the constitution, uses language which cannot be disregarded in this connection. It says that in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all other cases before mentioned, it shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

As this is a case in which a state is a party, the supreme court undoubtedly has original jurisdiction of it, if it is one to which the power of the federal judiciary extends; and this jurisdiction it has without the aid of any act of congress, for it is con-

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

ferred in clear and express terms by the constitution. Nor is this affected by the eleventh amendment to the constitution, for that only protects the states from suits commenced or prosecuted against them when brought by citizens of another state or of a foreign state. It may, therefore, be safely affirmed that the supreme court would have jurisdiction of this suit, so far as the character of the parties can give it, if brought in that court. *Pennsylvania v. Wheeling Bridge Co.*, 13 How. [54 U. S.] 518. As that court has original jurisdiction of such suits, it would seem that it cannot have in any such case appellate jurisdiction. The section in the constitution which confers it as original is followed by the declaration that in all other cases before mentioned the supreme court shall have appellate jurisdiction. Did the framers of the constitution intend to give to the supreme court both an original and appellate jurisdiction in the same class of cases founded in the character of the parties? Or did it by this clause intend to define the cases in which it should have original, and those in which it should have appellate, jurisdiction, and to distinguish and separate them from each other? The natural import of the language used, defining specially the cases in which it has original jurisdiction, and declaring that in all others its jurisdiction shall be appellate, favors very strongly the idea that in those classes of cases of which it has original cognizance, it can have no appellate jurisdiction. If this be a sound exposition of the constitution, it follows that if there is in the circuit courts a jurisdiction concurrent with the supreme court in cases to which a state is a party, no appeal or writ of error can be taken when the suit is brought in the former. This would be an anomaly in our system of jurisprudence, which stands alone, and it weighs very heavily against a construction of the act of congress creating the circuit courts, and conferring their powers, which brings such cases within their jurisdiction by mere implication.

But waiving this view of the subject for the present, these propositions may be fairly deduced from the constitution in regard to suits brought by a state against citizens of another state: (1) That the judiciary power of the federal government extends to such cases. (2) That the supreme court has original jurisdiction of such cases. (3) That jurisdiction is conferred on no other court of such cases by the constitution *propria vigore*.

Conceding, then, that the jurisdiction of the supreme court as derived from the constitution is not exclusive in this class of cases, we must still look to some other source of authority than that instrument when a concurrent jurisdiction is claimed for some other court. It may also be conceded, and perhaps that is the established doctrine, that the states have lawfully conferred such a power on their own courts

when exercised on persons or property within their territorial limits, and that to this extent such a concurrent jurisdiction exists. But when it is claimed for any other federal court than the supreme court, the power must be found in an act of congress.

It is a proposition which admits of no further debate, and needs the citation of no authorities at this day, that all courts of the United States, except the supreme court, being the mere creatures of congressional statute, can exercise no jurisdiction but such as is given by those statutes; and even the supreme court is limited in all except the original jurisdiction given it by the constitution—a very small portion, indeed, of the power which it exercises—by the will of congress as expressed in its legislation. We turn, then, to the act of 1789 [1 Stat. 73], establishing the judiciary system of the United States, to which alone we can look for the requisite authority; for though there are many subsequent statutes conferring jurisdiction on the federal courts, there are none which can affect the question before us. The fourth section of that act creates the circuit courts, and the eleventh defines their powers, and confers their jurisdiction. The latter declares that they shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioner, or an alien is a party, or the suit is between a citizen of the state where the suit is brought and a citizen of another state.

This is all that is to be found in this section conferring jurisdiction on the ground of the character of the parties, and we look here in vain for any jurisdiction where a state is a party. I do not know if the idea has ever been advanced that a state is a mere aggregation of its own citizens, and therefore has the same right to bring suit that any one of its citizens has. It has not been asserted by counsel in the case before us. It certainly cannot be maintained upon any sound view of the constitution. If the word "state" is used in that sense in the constitutional provision, it is useless, because there is the provision that the judicial power extends to controversies between citizens of different states, and if a state is but the aggregate of its citizens, then the other is unnecessary. The clause in that instrument conferring original jurisdiction on the supreme court in cases where a state is a party, certainly does not confer jurisdiction when citizens of different states are parties. In view, then, of the constitutional foundation on which alone a state can be a party in the federal courts, no such construction of the statute defining the jurisdiction of the circuit court can be sound.

A like conclusion results from an exam-

ination of the thirteenth section of the judiciary act. It declares that the supreme court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, and except, also, between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. Now, in all these cases congress makes a very clear distinction between a state and its citizens, and it denies to the supreme court any original jurisdiction between a state and its own citizens, and confers on it jurisdiction original but not exclusive, as between a state and citizens of other states. This latter is the precise class of cases to which the one before us belongs; and it would be a violation of all sound rules of construction to say that the same jurisdiction exactly is conferred on the circuit court, by using the phrase, "controversies between citizens of different states,"—a phrase applied both in this statute and in the constitution to a very different class of controversies from the case under consideration.

This precise question was raised in the case of *Osborne v. Bank of U. S.*, 9 Wheat. [22 U. S.] 841, in which the jurisdiction conferred by the constitution, where a state is a party, is held to apply only where a state in its corporate or sovereign character is by name an actual party to the record.

It is argued, however, that inasmuch as the constitution, in conferring original jurisdiction in this class of cases on the supreme court, did not make that jurisdiction exclusive, and the thirteenth section of the act of 1789 declares expressly that it shall not be exclusive, that the concurrent jurisdiction which is thus implied to be or remain in some other court must be in the circuit court. It would be a sufficient answer to this to say that if it must necessarily be in a court of the United States, it might as well be sought in the district court as in the circuit court, for there is nothing in the statute defining the jurisdiction of either of those courts which refers to this jurisdiction, even by implication. But even if the language of the thirteenth section of the judiciary act does imply a concurrent jurisdiction in some other court, we have already seen that such a jurisdiction exists now, and has always probably existed in the state courts. And the probability that it was to this that the thirteenth section had reference is the stronger, because in many other cases that statute recognizes, both in express terms and by fair implication, such a concurrent power in the state courts with those of the United States. Such is the case with the great body of the jurisdiction of the circuit courts in regard to aliens, citizens of different states, and suits brought by the United States. So, also, of admiralty courts, where the common law furnishes a remedy, and other grounds of jurisdiction of the district

courts mentioned in the ninth section of the same statute. There is every reason, therefore, to infer that congress in declaring that the original jurisdiction of the supreme court in this class of cases shall not be exclusive, had reference to the jurisdiction over the same class of cases intended to be left with the state courts, and which, as we have already seen, they have uniformly and constantly exercised without objection. But if congress can confer on the circuit courts an original jurisdiction in this class of cases, concurrent with that of the supreme court, it is a sufficient answer to say that it has not done it. And in the face of the fact that congress has not in any other instance whatever, during a period of over eighty years that the government has existed, attempted to confer on those two courts a concurrent jurisdiction, is an argument of great force against implying such exercise of the power, in the absence of words expressly granting it. It would indeed be curious if, when the constitution which gave so limited an original jurisdiction to the supreme court, made a suit brought by a state against citizens of another state, one of that limited number, congress had conferred the same jurisdiction on an inferior tribunal without an appeal to the former.

Looking at the question which we are considering as it may be affected by the authority of judicial decisions, we have been unable to find, with the limited opportunity which the exigency of this case gives for investigation, any case in which it has been decided that such jurisdiction exists in the circuit court.

Some reference is made to the remarks of the supreme court, and in the dissenting opinion of the chief justice in the *Wheeling Bridge Case*, 13 How. [54 U. S.] 18, which are supposed to favor such a doctrine. But no such question was before the court, and both the chief justice and Justice McLean said nothing more than that the merits of that case, which was an original suit in the supreme court, must be governed by the same rules of law as would govern the circuit court of the district of Virginia, if the case was pending before it; but it does not appear that the question whether the case with such parties could be sustained in that court had occurred to their minds. Such a suit, brought by the state of Indiana, was tried by Mr. Justice McLean in the circuit court, without the question being raised. It is the case of *Indiana v. Miller* [Case No. 7,022], and was removed by consent from the state court and the facts stipulated for the judgment of the court on the case. No thought seems to have been given, either by the court or counsel, to the question of jurisdiction.

On the other hand, we have the judgment of the circuit court for the district of Georgia, as stated by Judge Iredell, in the case of *State of Georgia v. Brailsford*, 2 Dall. [2

U. S.] 402. The case, as reported in Dallas, was a suit brought in the supreme court by the state of Georgia, by a bill in chancery. Judge Iredell, in his opinion, says that in a suit about the same subject matter before him in the circuit court, he had refused to permit the state of Georgia to intervene, because the circuit court could have no jurisdiction of a case in which a state was a party. He had, then, at that early day, decided this question; and though Mr. Justice Wilson thought it was error, he gives no reason for it which at this day would have any weight.

The case of *Gale v. Babcock* [Case No. 5, 188] is also directly in point. Mr. Justice Washington, in that case, remanded it to the state court, on the ground that the circuit courts had no jurisdiction of a suit to which a state was a party. And in a very recent case (*North Carolina v. Trustees of University* [Id. 10,318]) the circuit court of North Carolina decided the same way. These three are all the direct decisions we have found, and they all deny the jurisdiction.

We are well satisfied that such is the sound construction of the constitution and the acts of congress bearing on the question; and we have the less reluctance in dismissing the bill, as we must for want of jurisdiction, in this court, because we have no doubt that both the state courts of Minnesota and the supreme court of the United States are open to the state of Wisconsin for such relief as she may be entitled to.

NOTE. A similar bill was afterwards filed by the state of Wisconsin in the supreme court of the United States, but the controversy is said to have been subsequently adjusted. [See 96 U. S. 379.] As to the former bill by the United States, see *U. S. v. Duluth* [Case No. 15,001.]

WISCONSIN (MADISON & P. R. CO. v.).
See Case No. 8,938.

WISCONSIN CENT. R. CO. (STERN v.).
See Case No. 13,378.

WISCONSIN M. & F. INS. CO. BANK (ROBINSON v.). See Case No. 11,969.

WISCONSIN VALLEY R. CO. (WARREN v.). See Case No. 17,204.

Case No. 17,903.

WISDOM v. MEMPHIS.

[2 Flipp. 285; ¹ 8 Cent. Law J. 109; 7 Reporter, 298; 11 Chi. Leg. News, 138.]

Circuit Court, W. D. Tennessee. Nov. Term, 1878.

PRACTICE OF FEDERAL COURTS—MANDAMUS—LEVY OF TAXES.

1. Where writs of mandamus are resorted to for the purpose of compelling a municipal corporation to levy a tax, this court will conform as much as possible to the state practice in similar cases.

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

2. Unless special circumstances should require it, a peremptory writ will not be issued, commanding a levy of taxes to pay a judgment against a municipal corporation at a time different from the next general levy.

At law.

Before BAXTER, Circuit Judge, and HAMMOND, J.

HAMMOND, J. The writ of mandamus at common law issued out of the court of king's bench, and could only be applied for in term time, but was returnable before the court at any time to be fixed by the court, in its sound discretion, to suit the exigencies of the particular case. In Tennessee the practice is regulated by statute, and under the act of 1831 (Code § 3567) it has been the practice of the judges authorized to issue the writ, upon a petition being presented, duly verified, to grant in vacation a fiat for the alternative writ returnable to the next term of the court. This alternative writ is in the nature of an order to show cause, and if on the return day no cause is shown against it, the peremptory writ issues, commanding the act to be done. While the federal courts have no general jurisdiction, like the court of queen's bench, or of the circuit courts of the state, to issue writs of mandamus for all purposes where applicable at common law or under the state statutes, they do have power to use them when necessary to enforce jurisdiction already acquired, and it is auxiliary to their general jurisdiction. One of the most frequent uses to which the writ is put, is to compel a municipal corporation to levy a tax authorized by law to pay a debt on which a judgment has been rendered in this court. When used for that purpose, we think we are not only authorized, but required by the act of congress making the practice in the state and federal courts uniform, to conform as much as possible to the state practice in similar cases.

We shall, therefore, on a proper petition filed and verified, either in vacation or term time, direct the alternative writ to issue, returnable to the next succeeding term of the court, or to some day of the same term, as the case may require, giving reasonable notice to the defendant corporation to show cause why a peremptory writ shall not issue. If no sufficient cause is shown, or default is made, the peremptory writ will command the corporation to levy the tax on or before the time of its next annual levy, as required by the law governing it in levying taxes for like or general purposes, and returnable accordingly. We do not doubt the power of the court in a proper case to compel a special levy of the tax to pay the judgment, at a time different from the general levy; such, for instance, as the disobedience of a peremptory writ, or some other special circumstance requiring such a course. In this case we do not think the plaintiff is without fault in failing to have had the tax levied at the last annual levy. It is undoubtedly true that it is the duty of the

city to obey the alternative writ, and not put plaintiff to the expense or delay of a peremptory writ; but if it fails to do so, like any other debtor it can only be compelled by the ordinary course of legal process to discharge the duty. The application for a special levy is denied, and the peremptory writ will issue, commanding the city to levy a tax to pay this judgment at its regular levy, and that it make such levy on or before the 15th day of next July, and certify the said levy to the proper officers for collection as required by law, and that said writ be returnable to the next November term of this court thereafter.

We have taken this occasion to define and regulate the practice which will govern us hereafter in the ordinary course of business in cases like this, with the reservation that the discretion of the court will be exercised to accommodate the remedy to the exigencies of any extraordinary case which may arise, according to the rights of the parties and the justice of the case.

Rule is now, in the first instance, to show cause why peremptory mandamus shall not issue; so made because of the indisposition of parties to make levies.

Case No. 17,904.

WISDOM v. WILLIAMS et al.

[Hempst. 460.]¹

Circuit Court, D. Arkansas. April, 1846.

PLEA PUIS DARREIN CONTINUANCE.

A plea puis darrein continuance, admits the plaintiff's cause of action, displaces all previous pleas and defenses, and the defendant must stand on that alone.

[This was an action of debt by William S. Wisdom against John W. Williams and Hugh A. Blevins.]

A. Fowler, for plaintiff.
Daniel Ringo and F. W. Trapnall, for defendants.

PER CURIAM (JOHNSON, District Judge). A plea puis darrein continuance admits the plaintiff's cause of action, and even if the plea is established still the plaintiff is entitled to costs. It has the effect of displacing all other pleas and previous defences, and the party is obliged to stand on that alone. 10 Wend. 679; 1 Chit. Pl. 441; [Bank of U. S. v. Carneal] 2 Pet. [27 U. S.] 548; Stephen, Pl. S1, 83; [Wallace v. McConnell] 13 Pet. [38 U. S.] 152; Story, Pl. 53, 54. By operation of law the previous pleas are considered as stricken from the record, and every thing is confessed except the matter contested by the plea puis darrein continuance.

WISE (ALEXANDRIA v.). See Case No. 187.

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

Case No. 17,905.

WISE v. BOWEN.

[2 Cranch, C. C. 239.]¹

Circuit Court, District of Columbia. April Term, 1821.

COMPETENCY OF WITNESS — INTEREST — OFFICER JUSTIFYING UNDER EXECUTION.

The defendant in replevin, who justifies under an execution directed to him as a constable, if indemnified by the plaintiff in the execution, and having no other interest than the possibility of receiving commissions and fees upon an execution which may be issued again in the same cause, is a competent witness for the defendant.

[Cited in Dixon v. Waters, Case No. 3,936; Hilton v. Beck, Id. 6,509.]

Replevin. The defendant pleads property in one Bellmyer, and justifies the taking, as constable, under an execution, to him directed, in the cause of Holtzman v. Bellmyer [unreported]. Holtzman, the real defendant, had indemnified the defendant Bowen, who, upon voir dire, stated that he was indemnified by Holtzman, and did not think himself interested, unless to the amount of his fees on an execution which might be issued in the case of Holtzman v. Bellmyer, in case the property should be found to be in Bellmyer.

THE COURT (CRANCH, Chief Judge, doubting) thought this interest too remote, and permitted the defendant to be sworn as a witness.

Case No. 17,906.

WISE v. DECKER.

[1 Cranch, C. C. 171.]¹

Circuit Court, District of Columbia. June Term, 1804.

ASSUMPSIT FOR RENT.

Assumpsit will not lie at common law on a parol demise. The statute 11 Geo. II. c. 19, is not in force in Virginia.

Assumpsit for rent, on a parol demise. Demurrer to 1st count.

Mr. Taylor and Mr. Jones, for defendant. Assumpsit will not lie at common law for rent on a demise. 11 Geo. II. c. 19; Esp. N. P. 20; 4 Bac. Abr. 366; Chapman v. Southwicke, 1 Lev. 204; Johnson v. May, 3 Lev. 150; Dartnal v. Morgan, Cro. Jac. 598; Clerk v. Palady, Cro. Eliz. 859; 2 Bl. Comm. 41; Co. Litt. 141 (6). There must be a special and collateral promise. Reade v. Johnson, Cro. Eliz. 242; Symcock v. Payn, Id. 786; Slack v. Bowsal, Cro. Jac. 668; Brett v. Read, Cro. Car. 343; Acton v. Symon, Id. 414; Ashbrooke v. Snape, Cro. Eliz. 240.

The statute 11 Geo. II. was made to remedy this inconvenience; but that statute is not of force in Virginia.

Mr. Young, for plaintiff, cited Dartnal v.

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

Morgan, Cro. Jac. 598; 4 Bac. Abr. 366; Hunt v. Sone, Cro. Eliz. 118.

The count was adjudged bad by THE COURT, nem. con.

[See Case No 17,907.]

Case No. 17,907.

WISE v. DECKER.

[1 Cranch, C. C. 190.]¹

Circuit Court, District of Columbia. Nov. Term, 1804.

USE AND OCCUPATION — SUBSTITUTED PLAINTIFF.

1. In Virginia an action for use and occupation will lie although there be a parol demise for a time and rent certain, if it be waived, and a promise to pay for the time occupied.

2. The writ is not abated by substituting the assignee as plaintiff in place of the bankrupt.

Assumpsit, for use and occupation. Plea in abatement, for variance between the writ and the amended declaration. General demurrer and joinder. The writ was sued out before the bankruptcy of McCrea. After the assignee was appointed he was admitted plaintiff, under the 13th section of the bankrupt law. The general demurrer to the plea was adjudged good, and respondeas ouster awarded. Plea, non assumpsit, and issue.

Mr. Taylor, for defendant, prayed the court to instruct the jury that if, from the evidence, they should be of opinion that the agreement was for a year certain, at a certain price, the plaintiff was not entitled to recover on either of the counts.

THE COURT instructed the jury that, if they should be of opinion, from the evidence, that there was such an agreement, but that it was afterwards waived, and that the defendant promised to pay for the time he occupied, then the evidence would support the counts.

[See Case No. 17,906.]

Case No. 17,908.

WISE v. GEIGER.

[1 Cranch, C. C. 92.]¹

Circuit Court, District of Columbia. April Term, 1802.

DEFECTIVE AWARD.

An award may be good in part and void in part.

Debt on an Award.

Mr. C. Lee, for the defendant, objected that the award was not complete, in this, that it does not ascertain how the outstanding debts due to the partnership shall be valued; it says only that they shall be divided equally, value and value alike. Kyd, Awards, 83, 88.

Mr. Simms, for plaintiff. An award may be good for part, and void for part. Independent

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

of the provisions respecting those debts, they have awarded the sum of four hundred dollars to be due by the defendant to the plaintiff; and for this sum the action is brought. 1 Bac. Abr. 142; Fox v. Smith, 2 Wils. 267b; Addison v. Gray, Id. 293; Wills v. Maccarmick, Id. 148.

THE COURT were of opinion that the award was good as to the part upon which the suit was brought, it being an independent matter.

Case No. 17,909.

WISE v. GETTY.

[3 Cranch, C. C. 292.]¹

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

SUIT BY ADMINISTRATOR — PLEADING AND PROOF.

In an action by an administrator, upon the trial of the issue of non assumpsit, the plaintiff need not produce his letters of administration.

Assumpsit on a promissory note to the intestate. Plea, non assumpsit and issue.

On the trial the defendant's counsel (Mr. Marbury) called for the plaintiff's letters of administration.

Mr. R. S. Coxe, for plaintiff, cited Starkie, pt. 4, pp. 547, 548.

THE COURT said, that the representative character of the plaintiff is not in issue, and the plaintiff need not prove it.

Case No. 17,910.

WISE v. GROVERMAN.

[1 Cranch, C. C. 418.]¹

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

RIGHT TO CONTINUANCE.

If, after a plea of nil debet, by the appearance-bail, the principal comes in and gives special bail, and pleads the same plea, the plaintiff is entitled to a continuance of course.

There had been a plea of "owe nothing," by the appearance-bail and issue. The principal defendant now came in, and gave special bail, and pleaded the same plea, "owe nothing."

Mr. Jones, for plaintiff, contended for a continuance, as a matter of course.

Mr. Youngs, for defendant, cited the case of Alexander v. Patten [Case No. 171], where the court refused a continuance to the defendant, on account of the appearance of the administrator of the plaintiff.

But THE COURT thought the plaintiff entitled to a continuance of course, in the same manner as on setting aside a writ of inquiry, it being the default of the defendant that he did not appear before. Continued.

DUCKETT, Circuit Judge, absent.

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

Case No. 17,911.

WISE v. RESLER.

[2 Cranch, C. C. 182.]¹

Circuit Court, District of Columbia. Nov. Term, 1819.

ACTION BY EXECUTOR FOR RENT—ALIENAGE OF REAL PARTY.

In the year 1796, A. covenanted with B. to pay rent to the "heirs and assigns" of C. a citizen of the United States, who had died in the year 1785, having as his nearest of kin and heir at law, a sister who was then an alien; and a British subject, and who was born and always resided in Scotland; held, that the executor of B. might recover the rents against the executor of A. in an action of covenant for the use of the sister, notwithstanding her alienage.

The parties agreed upon a state of the facts, as follows:—Wise, in 1796, conveyed a lot of ground in Alexandria to Resler, in fee, rendering an annual rent, to be paid "to the heirs and assigns" of one John Adams, a citizen of the United States, who had died in the year 1785, leaving as his next of kin and heir at law, his sister Janette Barrett, who was an alien, born in Scotland, and who always resided there. The rent being in arrear, the executor of Wise brought this action of covenant against the executrix of Resler, to recover the rents for the use of Janette Barrett, the alien heir.

Mr. Swann, for defendant, contended that as this suit was brought for the use of Janette Barrett, her alienage was a bar, because she could not take real estate by descent, nor claim as heir at law.

Mr. N. Herbert, contra.

THE COURT (nem. con.) was of opinion that the plaintiff was entitled to recover..

Judgment for the plaintiff.

[See Case No. 17,912.]

Case No. 17,912.

WISE v. RESSLER.

[2 Cranch, C. C. 199.]¹

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

INTEREST ON RENT.

In covenant for rent, interest does not accrue until demand.

In the trial, a question arose, whether the jury was bound to give interest on the rents from the time they became demandable, or from the time of actual demand.

N. Herbert and Mr. Taylor, for plaintiff.
Mr. Swann, for defendant.

THE COURT (MORSELL, Circuit Judge, contra.) The tenant is not in default until demand; and interest ought not to be given

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

unless from the time of the default of the tenant.

[See Case No. 17,911.]

WISE (SCOTT v.). See Case No. 12,548.

WISE (UNITED STATES v.). See Case No. 16,746.

WISE (VIRGINIA v.). See Case No. 16,972.

Case No. 17,913.

WISE v. WITHERS.

[1 Cranch, C. C. 262.]¹Circuit Court, District of Columbia. Nov. Term, 1805.²

JUSTICE OF THE PEACE—LIABILITY TO MILITIA DUTY.

A justice of the peace in the District of Columbia, is not an officer, judicial or executive, of the government of the United States, and is liable to do militia duty.

Trespass for distraining goods for a militia fine; special justification under a warrant, &c.; replication, that the plaintiff was a justice of the peace; demurrer and joinder. The act of 3d of March, 1803 (2 Stat. 215), to provide for the organization of militia of the District of Columbia, excepts from enrolment all those who are exempted from military duty by the laws of the United States; and the act of the 8th of May, 1792 (1 Stat. 272), exempts from military duty "the officers, judicial and executive, of the government of the United States."

THE COURT (CRANCH, Circuit Judge, contra) decided that the defendant, who was a justice of the peace in the District of Columbia, was not an officer, judicial or executive, of the government of the United States.

This judgment was reversed by the supreme court. 3 Cranch [7 U. S.] 331.

WISHART (SLACOM v.). See Case No. 12,933.

WISNER v. BARNETT. See Case No. 17,914.

Case No. 17,914.

WISNER et al. v. OGDEN et al.

[4 Wash. C. C. 631.]³

Circuit Court, District of Columbia. April Term, 1827.

CONSTRUCTION OF WILL—PARTIAL INTESTACY—LIMITATIONS—TRUSTS—SUIT AGAINST EXECUTOR'S ADMINISTRATOR—PARTIES—JURISDICTION—DIVERSE CITIZENSHIP.

1. The testator devised as follows: "I give to my wife, her heirs and assigns, all my estate, real

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

² [Reversed in 3 Cranch (7 U. S.) 331.]

³ [Originally published from the MSS. of Hon. Bushrod Washington, Associate Justice of the Supreme Court of the United States, under the supervision of Richard Peters, Jr., Esq.]

and personal, excepting my outstanding debts, which I order my said wife, whom I appoint my executor, to collect, and give three persons that I shall hereafter direct her to give the same to." The testator died without naming the three persons, and giving any direction. The wife collected the debts, and invested them in securities; for one half of which the next of kin of the testator brought this suit. Held, that these outstanding debts did not pass by the will to the wife, as residuary legatee, or devisee or executrix, or as a trustee by implication; but they are to be distributed according to the statute of distributions of the state.

2. Where a bill in equity states a case to which the act of limitations applies, without bringing it within some one of the savings, the defendant may take advantage of the bar by demurrer.

[Cited in brief in *Derrickson v. Cady*, 7 Pa. St. 30; Cited in *Perkins v. Rogers*, 35 Ind. 141.]

3. The rule in equity as to the statute of limitations in cases of trusts is, that those trusts which are mere creatures of a court of equity, and not within the cognizance of a court of law, are not within the operation of the statute. So long as there is a subsisting and continuing trust, acknowledged or acted upon by the parties, the statute does not apply. But other trusts, which are the ground of an action at law, are within it. Under this rule, the statute does not apply in the state of New Jersey to a bill by legatees or distributees.

[Cited in *App v. Dreisbach*, 2 Rawle, 305; *Hayward v. Gunn*, 82 Ill. 389; *Hedges v. Norris*, 32 N. J. Eq. 197; *Webster v. Newbold*, 41 Pa. St. 492.]

4. This suit was against the administrator pendente lite of the executrix, (charging in the bill that the administrator had possessed himself of all the securities in which the outstanding debts had been invested, and claimed them as the property of his intestate,) and such of the next of kin as the bill charges had refused to join in the suit. It is in this case no objection for the want of parties that the legal representative of the testator is no party.

5. The executor or administrator of the deceased next of kin, who might be made a party, must be. It is not sufficient to make his devisee, or persons entitled to his estate parties.

6. If the jurisdiction of the court could be ousted by making all the parties concerned in interest plaintiffs; those who are citizens of the same state, with the real defendants, may refuse to join in the suit, and may be made defendants.

WASHINGTON, Circuit Justice. This is a bill in equity brought by some of the next of kin of Oliver Barnet, according to the statute of distributions of the state of New Jersey, against the administrator of Elizabeth Barnet, the executrix of the said Oliver Barnet, appointed by the orphan's court of this state, pending a controversy in that court concerning the validity of the asserted will of the said Elizabeth, and the rest of the next of kin of Oliver, the testator. The merits of the controversy depend upon the true construction of one of the clauses in the will of Oliver Barnet, deceased; and this question, as well as many others of minor importance, comes before the court for decision upon a special demurrer to the bill, filed by Isaac Ogden the administrator, pendente lite, of Mrs. Barnet. It becomes necessary, therefore, to state the material parts of the bill, upon which the different questions are raised. The bill alleges that Oliver Barnet, a

citizen of this state, departed this life in December 1809, without issue, leaving his wife (the aforesaid Elizabeth,) and one brother named Joseph, and the children of a deceased sister Sarah Wisner, viz. Polydore B. Wisner, Henry B. Wisner, one of the plaintiffs, Harriet, the wife of Libeus Lathrop, and Mary, the wife of Oliver W. Ogden. That Joseph, the brother, and Polydore, the nephew of the testator, afterwards died; the former leaving two sons, Gideon and Ichabod, to whom he devised all the residuum of his personal estate; and the latter, leaving the other plaintiffs, his children. That Oliver Barnet, being at the time of his death seised and possessed of a large real and personal estate, and entitled to a considerable amount of outstanding debts, duly executed his last will and testament, in which is contained the following clause, viz: "I give and bequeath to my beloved wife, Elizabeth Barnet, her heirs, and assigns, forever, all my estate both real and personal, excepting my outstanding debts, which I order my said wife, whom I hereby constitute and appoint my sole executrix, to this my last will and testament, to collect, and give three persons that I shall hereafter direct her to give the same unto." That the testator gave no direction to his wife as to the three persons to whom she should pay these outstanding debts; whereby they are to be considered (as the bill alleges) as undisposed of; and passed to the executrix as assets to pay debts, and to distribute according to the statute of distributions of New Jersey. The bill then charges that Elizabeth Barnet duly proved the above will, and took upon herself the burthen of its execution. That she collected all the outstanding debts, and placed the amount at interest, on bonds, mortgages, and other securities, which remained due at the time of her death, which happened in June 1825. That she left a paper purporting to be her last will and testament, which was fraudulently imposed upon her, whereby she was made to appoint Jonathan Ogden, since deceased, and Isaac Ogden, her executors; which paper, being offered for probate, was caveated, and is now sub judice in the orphan's court, where administration of her estate and effects, pendente lite, was granted to the said Isaac Ogden, who has possessed himself of all the evidences of the outstanding debts of Oliver Barnet. The bill further charges, that Ichabod and Gideon Barnes, Libeus Lathrop, and Harriet, his wife, and Oliver W. Ogden, and Mary, his wife, all of them citizens of the state of New Jersey, although equally entitled with the plaintiff, Henry B. Wisner, to the share of the outstanding debts of Oliver Barnet, as the representatives of Sarah Wisner, having refused to unite with the plaintiffs in this suit; and for this reason, they are prayed to be made defendants. The prayer of the bill is for an account as to a moiety of the outstanding debts, one fourth

of which is claimed as belonging to the children and grand children of Mrs. Wisner, and the other fourth to the two sons and devisees of Joseph Barnet; the bill admitting that the other half belonged to the widow of the testator.

The demurrer to this bill assigns eleven causes, the whole of which may be considered under the following heads: (1) The construction of the will of Oliver Barnet. (2) The bar of the act of limitations; and (3) The want of proper parties. The first presents the important question, since, if it be determined against the plaintiffs it renders the consideration of the other objections unnecessary; and if, in their favour, it will dispose of all the objections except those which come under the second and third heads.

I. It is contended in behalf of the representatives of Mrs. Barnet; that, by the omission of the testator to name the three persons to whom the outstanding debts were to be given, his widow became entitled to them—(1) As residuary legatee; if not so, then, (2) that she took them as undisposed of, in the character of executrix; and if in neither of these characters, then, (3) as a trustee by implication, upon a trust which the omission to name the cestui que trusts prevented her from executing; and consequently, that the property excepted from the devise to her, cannot be considered as undisposed of, but it remained with her, discharged of the trust.

1. In support of the first ground upon which the claim of Mrs. Barnet is asserted, the counsel for her administrator cited, and relied upon the case of the Duke of Marlborough v. Lord Godolphin, 2 Ves. Sr. 61. I have examined that case with attention, and am clearly of opinion, that it is, in all its essential features, unlike the present. The Earl of Sunderland, by his will, devised to his wife £30,000, and, after some other bequests, he gives all the rest and residue of his personal estate to his eldest son Robert Lord Spencer, except such other legacies as he should indorse on his will in nature of a codicil. He afterwards indorsed on his will, that the £30,000 given to his wife should be to her use for life only, and after her death, to be distributed amongst such of his children, and in such proportions, as she, by any instrument in writing, in nature of a will, or by deed should appoint. His widow made a will, and thereby gave certain portions of the above sum to two of the children, who died in her life time, and the legacies to them were consequently lapsed. One of the questions in the cause was, whether those legacies passed under the residuary clause to Robert Lord Spencer, or were undisposed of, and belonged to the children of the first testator. Lord Hardwicke decided that they were not withdrawn by the exception from the residuary bequests, and of course could not be considered as money

undisposed of. That a residuary legatee or executor, stands in the place of an heir to take whatever may fall in, without the intention of the testator, as by operation of law; and consequently that the lapsed legacies must fall under the bequest to the residuary legatee. Now it is manifest that that case differs from the present in two essential particulars. In the first place, the £30,000 was not in fact excepted from the residuary bequest, the exception, as to its terms, being not of any specific sum or article, but "of such other legacies as he the testator should indorse on his will in the nature of a codicil." But the £30,000 was disposed of in the body of the will, and not by the indorsement, which operated merely as a modification of the bequest of that sum made by the will, by limiting the interest of the wife to a life estate, and disposing of the remainder among such of her children as she should appoint; but no legacy is given by the indorsement upon which the exception could, or was intended to operate. This is not a fanciful distinction; the reasons which have been stated being those assigned by the chancellor himself, as one of the grounds upon which he decided that part of the case.

Another ground upon which that decision was founded, and which strikingly distinguishes it from the present, was, that even if the £30,000 had been excepted, still the exception would say no more than the law would imply; since, if the exception had not been made, the personal estate was subject to any disposition which the testator might afterwards make by a codicil, and consequently, the exception, in the language of the chancellor, "nil operatur." It is very manifest that the exception of a sum of money from a general bequest which is not distinguished or distinguishable from the mass of the testator's property, is no indication of an intention to withdraw it from such general devise of all the testator's property, and can amount to nothing more than a declaration of his intention to dispose of that sum by a subsequent codicil, which leaves the general devise in full operation, if such subsequent disposition should not be made. This is a very different case from an exception, or reservation of specific property, which the testator declares an intention to dispose of to some other person; in which case, the property, so excepted, is expressly and absolutely withdrawn from the general bequest. This distinction is taken and strongly enforced by the chancellor in the above case, in answer to the case of Davers v. Deves, 3 P. Wms. 40, which was cited at the bar in opposition to the claim of the residuary legatee. In that case, the testator declared in his will, that he intended to dispose of all his household furniture by a codicil. He then proceeds to make some bequests, and afterwards gives all the residue of his personal estate not disposed of,

or intended to be disposed of by his codicil, to A. He afterwards made a codicil, but omitted to dispose of his furniture. The court decided that the furniture was not bequeathed by the will, but was reserved to be disposed of by the codicil; and consequently that it could not go to the residuary legatee, without a violation of the intention of the testator. This case is not to be distinguished from that now under consideration. In the one, furniture is excepted from the residuary bequest, and, in the other, the exception is of outstanding debts. They are both of them specific, distinguishable from the general mass of the personal estate, and, if disposed of by will, they would be equally treated as specific legacies, subject to all the rules applicable to that species of legacy. See, also, the case of *Frederick v. Hall*, 1 Ves. Jr. 396. I cannot, in short, imagine, how property of this description, excepted out of a general bequest, can be decided to pass under it, without violating the manifest intention of the testator. For I know of no form of words which could more distinctly express his intention that the specific property should not be included in the general devise than by excepting it from that devise, and reserving it to be disposed of to some other person, and in some other way. The claim of Mrs. Barnet, therefore, as a devisee of these outstanding debts, cannot be maintained.

2. We are next to inquire, whether she is entitled to those debts, in her character as executrix, by operation of law? The rule upon this subject is at this day perfectly well settled. The appointment of an executor vests in him, at law, all the personal estate of the testator, and if there be a surplus remaining, after satisfying the debts and legacies, he is entitled to it, in exclusion of the next of kin. But if it can be collected from any circumstance, or from any expressions in the will, that the testator intended for the executor, the office only, and not the beneficial interest in such surplus; equity will carry that intention into effect; by considering and treating him as a trustee for those to whom the law would have given the surplus in case of a complete intestacy. The rule is correctly stated by *Fonblanc*, vol. 2, p. 131, note 11, where all the cases in support of it are collected. One of the instances stated by him, in which this equitable principle prevails, is, where the testator appears to have intended to make an express disposition of the residue, but by some accident or omission such disposition is not perfected. A stronger case to illustrate and enforce this instance, in which the equitable principle prevails, can hardly be imagined than that of *Bishop of Cloyne v. Young*, 2 Ves. Sr. 91. Another instance is, where a legacy is given by the will to the executor, expressly for his trouble, or is given generally and absolutely, which last position is fully sup-

ported by the case of *Cook v. Walker*, cited in 2 Vern. 676; *Farrington v. Knightly*, 1 P. Wms. 544; *Nourse v. Finch*, 1 Ves. Jr. 344. It is true that the case of *Foster v. Munt*, 1 Vern. 473, would seem to place the exclusion of the executor from the residue upon the circumstance of the legacy being given to him for his care and trouble. But upon a view of all the cases upon this point, it is manifest, that there is no distinction between a legacy given to him upon that consideration, and where it is given generally. Both of the reasons which have been stated for excluding an executor from his legal right to the surplus, apply in their full force to the present case; for it is manifest that the testator intended, not only to dispose of the outstanding debts to three persons, most probably in his contemplation at the time he made his will, but to exclude his executrix from taking them, by withholding them from the general bequest to her. She is also a devisee of all his estate real and personal, with the exception of those debts, which she is ordered to collect for the use of the persons for whom they were intended.

3. The remaining ground upon which this claim is placed is, that the right to the outstanding debts vested in Mrs. Barnet by necessary implication, to enable her to dispose of them amongst the three persons to be designated by the testator.

The whole error of the argument upon which this claim is founded consists in the supposed necessity for vesting a legal estate by implication in Mrs. Barnet, in order to enable her to execute the trusts which the counsel for the defendants, not the will, raises. For, what trust had she to execute under this will, which the law did not require her to execute in her capacity of executrix? She is ordered to collect the outstanding debts, and to give them to the three persons that the testator should thereafter direct her to give them to. As executrix, it was her duty to collect the debts, and afterwards to dispose of the money as the testator should direct. The law constituted her a trustee for those purposes, and the will invests her with no other or greater powers. It gave her no power to select the objects of the testator's bounty, or to exercise a discretion as to the manner of apportioning the legacy among those objects in case he had named them. Had he named the three persons, and directed in what proportions they were to take, the case would have been precisely the same as if the nomination and direction had been contained in the will, and the law would then have pointed out the duties of the executrix. If the persons had been named, but no directions given as to the proportions to which they were severally to be entitled, the law would have considered them as tenants in common, and entitled to share the debts which might be collected equally between them. Their right would have been derived immediately under

the testator, and not under any act to be performed by Mrs. Barnet. But these new trusts and powers are inferred by the counsel from a particular expression in the devise, which they construe to vest in Mrs. Barnet a discretion which is no where expressed in the will. She is to give the money so collected to the three persons to whom he shall direct her to give it. It may well be asked, what sort of a gift is that which one person is compelled to make by the exercise of another's will, and in unconditional submission to that will? A gift implies, *et vi termini*, the exercise of an uncontrolled will in the donor, and if that does not exist, the disposition of the thing parted with flows from a duty or obligation imposed upon the agent by some superior, whose injunctions he is not at liberty to disobey. It is certainly any thing but a gift. The expression, therefore, when used in this sense, is most clearly synonymous with pay, transfer, deliver over, or any other expression of similar and appropriate meaning. It is stated in the fourth volume of Bacon's Abridgment (page 339), that any words in a will which manifest an intention to create or give a legacy, are sufficient for that purpose, as if the testator say "I do order or appoint to be paid, given or delivered" such a thing to a particular person. So, if the testator desire his executor to give a certain sum of money to another, it is a good bequest; clearly showing, if authority were required for that purpose, that the expressions mean the same thing, and that either of them amounts to a gift or bequest by the testator. The cases cited and relied upon by the defendants' counsel in support of the last proposition under this head, are in all their essential features unlike the present. In that of *Harding v. Glyn*, 1 Atk. 469, the wife took the estate, which she was desired to distribute at or before her death amongst the relations of the testator, beneficially as devisee; the objects of the testator's bounty were sufficiently designated to enable the court to execute the trust, and the power to select amongst those relations the individuals most deserving of the bequest, was vested by the will in the wife. Under these circumstances the court construed the estate devised to the wife to be only for her life, with a trust in favour of such of the relations of the testator as she might choose to give the property to. But it is added that, if the objects of the trust had been so uncertain that the court could not say who were intended, then the word "desire" would be construed, not as a trust, but merely as a recommendation, in which case the estate of the wife would be absolute. In the case now under consideration, Mrs. Barnet took no interest whatever under the will in the outstanding debts, which, in consequence of the omission of the testator to nominate the objects of his bounty, can be construed into an absolute estate in her, and she had no trusts to execute other than those

imposed on her by law, as executrix. In the case of *Martin v. Dough*, 1 Ch. Cas. 198, there was an express devise of the £40 to the trustee, upon trusts which could not be executed in consequence of the failure of the testator to state them to the trustee. The devise was considered to amount to an exclusion of the right of the executor, and no question arose as to that of the next of kin. These are all the cases cited by the defendants' counsel which seem to bear upon this point; and I am of opinion, upon this first head, that the next of kin of Oliver Barnet are entitled to a moiety of the debts outstanding at the time of the testator's death, to be distributed amongst them according to the statute of distributions of this state.

II. The second general head of inquiry presented by the demurrer is, whether the right of the next of kin of Oliver Barnet is barred by the statute of limitations?

A preliminary question under this head was made by the plaintiffs' counsel, which must first be decided; and that is, whether the bar can with propriety be interposed in the form of a demurrer to the bill? This is a mere question of practice, and if it be unsettled in the English chancery court, the circuit courts of the United States may adopt that which is most likely to subserve the ends of justice. There can be no doubt but that the general course of the practice in those courts, as well as in the American courts of chancery, has been to set up the bar of the statute in the form of a plea. It must nevertheless be admitted that there are some very strong cases to sanction the practice which has been adopted in the present instance. In the case of *Jenner v. Tracy*, 3 P. Wms. 287 [note], a demurrer to a bill to redeem, after twenty years possession in the mortgagee, was allowed. In 2 Madd. Ch. Prac. 246, it is stated that, to a bill to redeem, if it appear that the defendant has had twenty years possession, he may plead the statute of limitation, or demur. This author cites Mitf. Pl. 213, who states that a demurrer has been allowed in such cases, and cites the above case from P. Williams, and the case of *Orde v. Heming*, 1 Vern. 418, as his authorities; but he adds that "the latter cases seem to the contrary." In the case from *Vernon*, the demurrer was overruled, not because advantage could not be taken of the statute by demurrer, but because the bill stated that the mortgager had agreed that the mortgagee should hold possession till he was satisfied. In the case of *Foster v. Hodgson*, 19 Ves. 182, which was a bill for an account, which stated that there had been no demand for twelve years, the chancellor allowed a demurrer to the bill, but with great hesitation. And it was stated by the counsel in the case of *Deloraine v. Browne*, 3 Brown, Ch. 646, that Lord Kenyon had allowed a demurrer in the case of *Beckford v. Close* [cited in 4 Ves. 476]. These are all the cases I have met with on that side of the question. The case of *Aggas v. Pickerell*, 3 Atk. 225, is the only one

which was cited against the practice. In that Lord Hardwicke positively denied that advantage could be taken of the statute by demurrer; assigning as the reason for his decision, that it would prevent the plaintiff from bringing himself within the savings of the act, by replication, or by evidence on the plea, or by amending his bill. The soundness of the reason upon which this decision is founded may, I think, be questioned, since the plaintiff may, in all cases, avail himself of any savings in the statute applicable to his case, by alleging the fact upon which it is founded in his bill, which would compel the defendant to resort to his plea or answer. In the above case of *Foster v. Hodgson*, it was stated by the chancellor that in cases where the statute of limitations might be pleaded, the bill ought to allege the facts, to take the case out of the statute, if such exist. Where the defendant means to rely, not upon the act of limitations as a bar, but upon length of time, upon which to raise a presumption against the plaintiff, he undoubtedly cannot do so by demurrer. *DeLoraine v. Browne*, 3 Brown, Ch. 646; *Edsell v. Buchanan*, 2 Ves. Jr. 83; 4 Brown, Ch. 254.

Upon the whole, I am inclined to think that in cases where, from the allegations in the bill, the statute of limitations may be urged as a bar of the remedy, it may be done in the form of a demurrer. I should have been very glad to have got clear, for the present, of the statute of limitations, by putting the defendant to his plea; as the question, whether the act of limitation will apply to a suit brought by legatees, or distributees, will turn very much upon another, which is, whether those persons have an adequate remedy to recover their legacies or distributive shares at common law, under the statute of this state; which latter question was merely glanced at by the counsel upon the argument, but was by no means as fully spoken to as its importance required.

The rule applicable to this subject appears to me to be very intelligibly and correctly laid down in the case of *Kane v. Bloodgood*, 7 Johns. Ch. 90; which the learned chancellor states to be, that those trusts which are mere creatures of a court of equity, and not within the cognizance of a court of law, are not within the operation of the statute of limitations; that so long as there is a subsisting and continuing trust, acknowledged, or acted upon, by the parties, the statute does not apply; but that other trusts which are the ground of an action at law are within the statute of the limitations. Upon these principles, he questions the correctness of his own decision in the case of *Decouche v. Savetier*, 3 Johns. Ch. 190, that the statute could not be pleaded to a suit in equity brought by legatees or distributees, the statute of New York having provided a legal remedy in those cases. Upon examining this statute, I find that it enables a legatee, or distributee to bring an action of debts, detinue, or account, against the executor or administrator, to recover, (in case it appear

that there are assets sufficient to pay the debts and other legacies) the whole, or if not, his proportionate share, and the court before whom the action is brought is empowered to appoint auditors to ascertain the facts necessary to enable it to decide the cause.

If I rightly comprehend the statute of New Jersey upon this subject, its provisions are different from the one just referred to. It directs the executor's or administrator's bond to be taken to the ordinary, but gives him no power, as it would seem, to call the executor or administrator to account; this power being vested in the orphan's court; which is to order distribution, on the account being allowed, and to decree and settle such distribution when the persons entitled may have their remedy at law. See *Rev. Laws*, pp. 177, 178, §§ 11, 12. "But in point of fact," observes Mr. Griffith in his very useful and learned work entitled the *Law Register*, vol. 4, 1192, 1193, "the orphan's court seldom make any decree for distribution, or decide to whom the surplus is to be paid. The practice has been for those entitled to distribution, either to sue the bond, or to bring assumpsit at law against the administrator, founded on the statute, stating the amount settled, the plaintiff's title, and averring the sum due to him as a distributee." "Doubtless," he adds, "the true way is for the orphan's court to decree distribution, and from time to time to settle the sums due to any particular person on application and hearing, &c. And then the court can proceed to compel payment (perhaps) by attachment, or the party may apply to the ordinary to sue the bond, or an action would lie on the statute after a decree made, settling the right and the amount." "It may be questioned," he observes, "if the ordinary can sue the bond till the orphan's court has ordered distribution, and determined to what the party is entitled, as distributee." The above quotations, taken in connection with the provisions of the statute, render it, I think, doubtful at least, whether the courts of common law in this state have a concurrent jurisdiction with the other courts in suits of legatees and distributees; since it would seem that no action can be brought except for what is settled and decreed by the orphan's court; the action at law seeming to have been provided merely to enforce the decree of, or adjustment made by that court. My present impression is, that the act of limitations does not apply in this case, although it is entertained with so much hesitancy, that I shall consider the question as open for argument, should it be relied on in the answer.

III. The last general head under which the objections raised by the demurrer have been classed, is the want of proper parties.

It is objected: (1) That the executor or administrator of Oliver Barnet ought to be made a party. (2) That the executors or administrators of Joseph Barnet, and of Polydore Wisner, are not parties. (3) That Ichabod and Gideon Barnet, and Libeus Lathrop and Harriet his wife, and Oliver W. Ogden and Mary his wife;

ought to have been parties plaintiffs, instead of defendants.

1. The first of these objections seems to be fully answered and removed by the case stated in the bill, and the relief prayed for. The bill charges that Elizabeth Barnet, in her life time, collected all the outstanding debts; and that since her death, the defendant, Isaac Ogden, as her administrator, possessed himself of all the mortgages, bonds, bills and notes, and other securities for the outstanding debts due to Oliver Barnet; as well those which remained outstanding in his name, as those which had been changed and renewed in the name of his executrix; that he has made an inventory thereof as the property of the said Elizabeth Barnet, claiming the whole as such, and denying the right of the plaintiffs to any part thereof; and the prayer is, that Ogden may account for the outstanding debts; the evidences of which he has in his possession, and may pay over to the plaintiffs their proportion of the same, or may assign to them the securities taken therefor. Now, although it is true that if this bill were brought for an account of the administration of the estate of Oliver Barnet, and for a distribution of the general assets of that estate; the only proper party to such a suit would be the legal representative of that estate, which the administrator of Mrs. Barnet certainly is not; yet it is not to be questioned, that if her administrator has obtained the possession of specific property, to which others are entitled, either as legatees or distributees, those persons may follow such property into his hands, and may treat him as a trustee thereof for their use; and in such case, the legal representative of the testator need not be made a party, since no decree is asked against him. That is precisely the present case, particularly in regard to such of the securities as were renewed in the name of Elizabeth Barnet. How far it may be necessary to make the legal representatives of Oliver Barnet a party defendant, as to such of the securities as may continue to be in the name of the testator, if any such there be; is a question which does not arise upon this demurrer.

2. The second objection is unquestionably well taken. The only person entitled, in law or in equity, to the assets belonging to the estate of Joseph Barnet, and of Polydore Wisner, is the executor or administrator of those persons, upon whom the duty to pay their debts and legacies, and to distribute the surplus which may remain, is devolved by law. Those who are entitled to the assets remaining after debts and legacies paid, may undoubtedly maintain their bill for an account against the executor, in case the assets have come to his hand, or against him and those who withhold the assets; but it is absolutely necessary in the latter case, that the executor or administrator in whom the legal right to the assets is vested, should be made a party.

3. The last objection is entirely without foundation: as I hold it to be a settled rule

of practice in the courts of chancery, that if there be more parties than one, all of whom must be before the court, in order to enable the court to make a decree, and some of them refuse to join in the suit as plaintiffs; those who bring the suit may, and are obliged to make the other parties defendants, unless in those cases where the parties, being very numerous, some of them are permitted to sue for themselves and on behalf of those others.

In this case, the bill states, and the demurrer admits, that the persons to whom this objection applies had refused to join in the suit; which I hold to be a sufficient reason for making them defendants. But it is suspected by the defendants' counsel, and the argument proceeded mainly on that suspicion, that the alleged refusal of those defendants to unite in the suit was a mere contrivance to give jurisdiction to this court; since those defendants, being citizens of this state, could not sue their co-defendant, who is also a citizen of the same state. This fact may have a better ground than suspicion to stand upon; it may be admitted as a truth; and yet there is no act of congress, and no principle to be extracted from the constitution of the United States, which forbid such an arrangement to be made for the avowed purpose of maintaining a suit in the courts of the United States. If a citizen of one state, with a view to enable him to bring a suit in those courts, should change his domicile, bona fide, and make himself a resident citizen of another state, I am yet to learn that the motive for his removal, if clearly proved, or avowed, would oust the jurisdiction of the court. The ninth cause of demurrer, which could not be well included under either of the above general heads is, in substance, that the plaintiffs claim as distributees, and yet set forth a will of Oliver Barnet, and show that he died testate. There is certainly nothing in this objection; speaking technically, the claim of the next of kin to a part of the personal estate which is undisposed of by the will, and to which the executor is not entitled, is not that of distributees, in the strict sense of the statute of distributions, which is confined to cases of intestacy. But a court of equity, where the right of the next of kin is established, will declare the executor to be a trustee for them, and will follow the rule of the statute in distributing the personal property so undisposed of. See the case of *Davers v. Dewes*, 3 P. Wms. 40. Upon the whole, my opinion is, that the only valid cause of demurrer which is assigned is the not making the executor or administrator of Joseph Barnet, and of Polydore Wisner, parties. The consequence is, that, unless the plaintiff obtains leave to amend, so as to get rid of this objection, the demurrer, which goes to the whole bill, must be allowed.

THE COURT overruled the demurrer as to all the causes assigned, except as to the want of parties as above mentioned, and allowed it so far; and on motion to amend the bill, so as

to make the legal representatives of Joseph Barnet and Polydore Wisner, parties, THE COURT ordered the cause to lie over for that purpose; reserving till the next court a decision as to costs.

WISSMAN (SAGORY v.). See Case No. 12,217.

WISTAR (YORK v.). See Case No. 18,141.

Case No. 17,915.

The WITCH QUEEN.

[3 Sawy. 17.]¹

District Court, D. California. March 4, 1874.

VESSEL IN LEGAL CUSTODY—CREATION OF LIEN.

An owner who has regained possession of his vessel after seizure, either by successfully defending the original suit or by paying or giving bonds for the payment of the debts for which she was seized, cannot defeat an otherwise valid lien on the ground that the contract out of which it arose was made, and the consideration for it rendered, before the release and while the vessel was in the custody of the law.

[Cited in *The Young America*, 30 Fed., 790; *The Willamette Valley*, 62 Fed. 298.]

In admiralty.

F. B. Mildram, for libellant.

E. J. Pringle, for claimant.

HOFFMAN, District Judge. The libel in this case is filed to recover compensation for services rendered by the libellant to the vessel as shipkeeper. At the time the alleged contract for these services was made, the vessel was in the custody of the marshal, having been seized on a warrant out of the admiralty in various suits then pending. She has since been released on bond, and on coming into the hands of her owner she was again libeled and seized in the present suit.

It is objected that inasmuch as she was in the custody of the law at the time the alleged contract was made, and the services rendered, the owner could not, by any contract which he might make, create any valid lien upon her.

In support of this view, the advocate for the claimant contends that the state statute, under which this lien is claimed to arise, and which authorizes a proceeding in rem, cannot be construed as intended to confer a right of action in a state court against a vessel in the custody of this court, and such, it is argued, would be its effect if the lien now claimed be allowed.

It is further argued that any lien, whether maritime or by municipal law, is founded upon a supposed credit given to the rem, and that no such credit can be given where the vessel is in the custody of the court, and that "no lien can grow out of a contract

made by a party not having any possession or control, and where the party in possession (the court) is confessedly not liable."

That if such liens could be created while the vessel is in the custody of the court, they would attach to the vessel in the hands of a purchaser at the sale by the marshal, and the court would thus be unable to give a good title.

To determine the validity of these objections, it will be necessary to consider what are the relations of the owner to a vessel attached under a warrant of the admiralty and in the possession of an officer of the court, and what are the rights which third persons may acquire against the vessel, in the nature of a privilege or lien; and in doing so I will, for clearness, assume in the first instance, that the lien now claimed is such as the maritime law recognizes, and that it would be incontestable, except for the fact that the contract which gave birth to it, was made and the services rendered when the vessel was in custodia legis.

1. It is not contended that the owner of a vessel seized under a process in rem, and in the custody of the court, can, by any contract he may enter into with third persons, interfere with or affect the action of the court in proceeding to condemn and sell the vessel to satisfy the demands for which she has been libeled. The security of the libellants can in no degree be impaired by any act of the owner after the seizure, nor can any of the acquired liens so created be set up either against the vessel in the hands of a purchaser at the judicial sale or against her proceeds when brought into court for distribution.

Thus a wharfinger whose demand has accrued after seizure, can set up no lien on the vessel even if his possession could be considered such as to create one, but he must present his claim to the court for allowance, as part of the expenses of justice; and if he has obtained possession of the rem, or having become the purchaser, refuse to pay the whole purchase-money, the court will, by summary process, enforce a redelivery or payment. The *Phœbe* [Case No. 11,066].

Even where a party is in possession at the time of the commencement of the suit of some of the apparel of the ship (e. g. sails), which he has repaired, and on which he has a lien at common law, the court will order him to deliver them up and look to the court for the protection of his rights. The *Harmonie*, 1 W. Rob. Adm. 178.

But the point under consideration is different from that presented in these cases. The inquiry here is, can the owner, after he has regained possession of the vessel, either by successfully defending the original suit or by paying or giving bonds for the payment of the demands for which she has been seized, defeat an otherwise valid lien, on the ground that the contract on which it

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

is claimed was made, and the consideration for it rendered, before the release, and while the vessel was still in the custody of the law?

Property in the possession of an officer of a court under lawful process is in the custody of the law, and the possession of the officer partakes of the inviolability of the law itself. It, and the rights growing out of it, will be firmly upheld against all interference which might obstruct the court in the fulfillment of its functions, or impair the rights of the suitors before it.

But the effect and consequences of taking property into the custody of the court must be measured by the objects to be attained by it, and there would seem to be no reason to deprive the owner of any right, the exercise of which is consistent with the attainment of the objects of the seizure and the enforcement without hindrance or diminution of the rights growing out of it.

If the owner of property so situated is incapable of making a contract which will give rise to a lien or privilege, he would be equally incapable of making an express hypothecation or mortgage, or even, so far as is perceived, making a valid bill of sale of the vessel; and yet these contracts, subordinated as they would necessarily be to the authority of the court, and the rights of the suitors before it, he might make, without in the least degree interfering with the one or impairing the other.

The consequences of the principle contended for might be pernicious in the extreme. The owner would be deprived of all power of disposing of his property, or, on the faith of it, obtaining the means to make necessary repairs, supplies for a new voyage, or funds to enable him to satisfy the very demands for which she had been seized.

He also might use this alleged incapacity as an instrument of fraud; for, by suffering the vessel to remain under attachment in the custody of the marshal's ship-keeper (a circumstance which might easily escape observation), he might, while she so remained, cause extensive repairs to be made or supplies furnished, and upon her release, deny all right of recourse against the vessel on the pretense that she was in custodia legis when the repairs were made, or the supplies furnished.

I see, therefore, no reason for the principle contended for, either in the interests of the owner or those of commerce, or those of the administration of justice. It is said that liens are grounded upon the credit, express or presumed, given to the vessel, and that no such credit can be given to a vessel in the custody of the law, for such a credit is impossible. But this is obviously a statement of the position of the advocate of the claimant, not an argument in support of it.

It is equivalent to saying that no lien was contemplated by the parties because none

could, by law, be created, and that no lien was created by law, because none was contemplated by the parties. Where there is no proof of an exclusively personal credit, a party dealing with the owner of a vessel is presumed to look to the remedies which the law gives him. What those remedies are, is in this case the very question at issue.

I am, therefore, of opinion, that the fact that the contract under which the lien is claimed, was entered into while the vessel was in the custody of the law, is no bar to a libel in rem, to enforce the lien against the vessel in the hands of the owner, to whom she has been restored on dissolution of the admiralty attachment.

2. If this general proposition be true, I do not perceive that the circumstance that the lien arises under the municipal, and not under the maritime law, will make any difference; provided this be a case where the state has legislative authority to create a maritime lien, and this court has jurisdiction to enforce it. On these points no objection was raised.

The suggestion that the framers of the state statute could not have contemplated a lien or a remedy in rem against a vessel in the custody of this court, is answered by the observation that no such intention is attributed to the framers of the statute, and no such effect given to the law.

The lien claimed in this case, though founded on services in part rendered while the vessel was in the custody of the law, attached to her only after she had been restored to the owner. It is sought to be enforced against her, not in the hands of a purchaser at a sale ordered by the court, but in the hands of her original owner, by whom the contract to which the law annexes a lien was made. The evidence with regard to the facts is irreconcilably conflicting.
* * * Decree for the libellant.

Case No. 17,916.

The WITCH QUEEN.

[3 Sawy. 201.]¹

District Court, D. California. Nov. 30, 1874.

LIEN OF MATERIAL MEN—PROPERTY COVERED.

Where a vessel was supplied with a diving-bell, air-pump, and other apparatus not required for her use as a "navigating ship," but indispensable for the accomplishment of the enterprise in which she was about to engage, *held*, that the lien of the material men extended to all articles belonging to the owner which (not being cargo) have been placed on board for the objects and purposes of this voyage.

In admiralty.

Milton Andros, for libellants.

E. J. Pringle, for claimant.

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

HOFFMAN, District Judge. There can, I think, be no doubt that the material and supply men by whom the libels in these cases have been filed, are entitled to a lien under the general maritime law, independently of the state statute. The vessel, although enrolled here, was owned in New York. The claimant is a New York corporation. The authorities are clear that the question whether a vessel is to be regarded as foreign or domestic within the rule laid down in the case of *The General Smith* [4 Wheat. (17 U. S.) 438], depends upon the residence of her owner, and not on the place of her registry or enrollment. *Hill v. The Golden Gate* [Case No. 6,492]; *Bond v. The Superb* [Id. 1, 624] 2 Pars. Adm. 326, and cases cited.

This vessel must therefore be regarded as a foreign vessel, to which supplies have been furnished in a port other than her home port. For these supplies she is, by the maritime law, liable in rem.

The voyage contemplated by the vessel, and for which supplies were furnished, was a pearl-fishing voyage. As part of her necessary equipment for this enterprise she was provided with a diving-bell, air-pump, and other apparatus—not required for her use as a “navigating ship,” but indispensable for the accomplishment of the objects of the particular voyage she was about to enter upon.

It is contended that these articles are not subject to the lien of material men.

No case in point has been cited, but the question seems to be settled by the eighth rule in admiralty of the supreme court.

That rule provides that “in all suits in rem against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal.” In what sense the word “appurtenances” is used by the supreme court, cannot be doubtful.

The previous enumeration of “tackle, sails, apparel, furniture and boats,” includes everything belonging to the vessel as a “navigating ship.” Unless the word “appurtenances” applies to other objects on board belonging to the owners, for the purposes of the voyage, it can have no operation. The word was, no doubt, used advisedly by the supreme court.

In the case of *The Dundee*, 1 Hagg. Adm. 109, Lord Stowell held that whatever is on board a ship for the objects of the voyage and adventure on which she is engaged, belonging to the ship and not being cargo, constitutes a part of the ship and “her appurtenances,” within the meaning of the statute of 53 Geo. III. c. 139. And this decision was affirmed in the court of king’s bench. *Gale v. Laurie*, 5 Barn. & C. 156. The articles in

that case claimed to be “appurtenances” were “boats, fishing tackle, such as harpoon’s-lines, rockets, casks and various other implements termed fishing stores.”

The value of the ship, her tackle, etc., was £2685, and that of her “fishing stores” was £2236. It is plain that if the “fishing stores” in that case, though their value was nearly equal to that of the ship, were properly considered as part of her “appurtenances,” the diving-bell, air-pump, etc., in the case at bar, must be treated as embraced within the same description. The judgment in the case of *The Dundee* was rendered more than twenty years before the admiralty rules were framed by the supreme court, and the latter must be deemed to have purposely employed the term in the sense which had so long been attached to it by express judicial decisions.

I consider the language of the admiralty rule above cited so clear and decisive, that further discussion of the point is unnecessary. An additional observation however, may be permitted. The common law rule, derived from the civil law, by which the ship-owner was held responsible in solido for all damages caused by the acts of his servants, the master and crew, has both in England and America been modified by statute.

The liability of the owner is now limited to the value of the ship and freight, or, in the language of the statute of 53 Geo. III., c. 139, “the ship, freight and appurtenances.” By abandoning these he may discharge himself from all personal liability. The creditors are thus restricted to a particular fund, and being so restricted, the maritime law gives them a privilege or lien upon it.

“When the law,” says Mr. Justice Ware, “confines a creditor to a particular fund for his remuneration, it cannot be so absurd as to prohibit him from making that fund available, by laying his hand on and securing it. The maritime law is not chargeable with any such absurdity after it has, on principles of a general policy, restricted him to a particular fund; it not only permits him to proceed directly against it in specie but gives him a privilege against it over the general creditors of his debtor.” *The Rebecca* [Case No. 11,619].

If, then, the lien of the creditor is co-extensive with the liability of the ship-owner, in ascertaining the limits of the latter, we necessarily determine the extent of the former. Any general considerations, therefore, which show that appurtenances of a ship, such as those in question in this case, and in *The Dundee*, ought not to be exempt from liability, also show that they should be subject to the creditor’s lien.

The statutes in England and America, to which I have referred, merely re-establish the ancient rule of the maritime law, which prevailed universally among the commercial nations of the continent. *Norwich Co. v.*

Wright, 13 Wall. [80 U. S.] 48. These laws were for the encouragement of commerce, but were not intended to favor one class of vessels more than another.

"If a ship," says Lord Stowell, "is run down at sea by a merchant vessel, the wrongdoing vessel is by the act that diminishes the general responsibility, still liable to contribute not only to the extent of herself, but to that of her freight outward and of her freight homeward if contracted for, and for what her owner's property would have paid for freight if it had been liable for freight. But in this class of vessels (i. e. fishing vessels) there is no freight either outward or homeward, nor any owner's property on board, and unless the fishing stores are made responsible in contribution, there is no fund for compensation but the vessel itself, as is actually contended for in the present instance. This class of vessels is highly favored by the British legislature and most deservedly. * * * But surely it can be no part of the intended encouragement that they shall be qualified to do mischief at a cheaper rate than other vessels. If nothing but the vessel itself be liable, that would present a result apparently very unequal and unjust, not only to the injured vessel whose compensation was so much abridged, but likewise to all other vessels which, having committed the like injuries, were subjected to a so much severer retribution." The *Dundee*, ubi supra.

There is great force in these observations, and if they show that "fishing stores" ought not to be, and are not exempt from liability to contribution, they also, as before remarked, prove that the lien of the creditor must extend to them.

The denial of the lien in the present case would be peculiarly unjust.

It is not disputed that the persons who have furnished the diving-bell, air-pump, etc., have a lien on the vessel for their price. They thus come in concurrently with the other material-men for their proportion of her proceeds. It would be most unjust that the very articles, the supplying of which gave birth to this lien, should be exempted from its operation.

I think, therefore, that the lien in this case extends to all the articles belonging to the owner, which (not being cargo) have been placed on board for the objects and purposes of the voyage and enterprise in which she was about to engage.

The supplies appear to have been ordered in part by the master, with the owner's knowledge and consent, and in part by the latter.

Under such circumstances the supply-men have a lien in rem, for the satisfaction of their claims. The *Grapeshot*, 9 Wall. [76 U. S.] 129; The *Gay*, Id. 758; *Stringham v. Schoener* [Case No. 13,536].

The parties may, very possibly, be able to settle by agreement, the amounts due to

the several libellants. Should any controversy arise, it may be brought before the court or referred to the commissioner to take testimony and report.

WITHERBURY (UNITED STATES v.).
See Case No. 16,747.

Case No. 17,917.

WITHERELL v. WIBERG.

[4 Sawy. 232; 9 Chi. Leg. News, 271; 15 Alb. Law J. 392.]¹

Circuit Court, D. Oregon. April 12, 1877.

NATURE OF MORTGAGE—MORTGAGEE'S RIGHT TO POSSESSION—FRIVOLOUS PLEA.

1. In Oregon a mortgage is a mere security, and the mortgagor, both before and after condition broken, is the owner of the premises, subject to the lien of the mortgage, and he cannot be deprived of the possession of the same against his will otherwise than by foreclosure and sale.

[Cited in *Oregon & W. Trust Inv. Co. v. Shaw*, Case No. 10,556; *Semple v. Bank of British Columbia*, Id. 12,659 and 12,660; *Gest v. Packwood*, 34 Fed. 373.]

2. A mortgagee has no right or authority to take possession of the mortgaged premises and hold the same for the satisfaction of his debt without the consent of the mortgagor.

[Cited in *Edwards v. Wray*, 12 Fed. 44; The *Holladay Case*, 29 Fed. 230.]

3. A plea stating that the defendant is in possession as assignee of an unsatisfied mortgage, but which does not allege that he entered with the assent of the mortgagor, is frivolous, but not sham or redundant.

[Cited in *Oregonian Ry. Co. v. Oregonian Ry. & Nav. Co.*, 22 Fed. 249.]

4. The nature and duration of an estate license or right to the possession, how pleaded within the meaning of section 316, Civ. Code Or.

[Cited in *Lewis v. Oregon Cent. R. Co.*, Case No. 8,329.]

[This was an action by Timothy D. Withereil against C. M. Wiberg.]

Charles B. Upton, for plaintiff.

Walter W. Thayer, for defendant.

DEADY, District Judge. This action is brought by the plaintiff as a citizen of New Jersey, against the defendant as a citizen of Oregon, to recover the possession of the undivided one-half of two hundred and twenty-two acres of land, situate in Multnomah county.

Among other defenses, the answer contains a plea that the defendant "has a right to the possession" of the premises; "that the nature and duration of said right is that of a mortgagee in possession under a certain mortgage executed by H. F. Davis, the owner of said lands in fee to I. A. Davenport, on January 11, 1859, of which defendant is assignee, and upon which there is now due

¹ [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 15 Alb. Law J. 392 contains only a partial report.]

the sum of \$4786; and that he is entitled to the possession of said property until the payment of said amount due upon said mortgage."

The plaintiff moves to strike out this defense "because the same is sham, redundant and frivolous." The defense is neither sham nor redundant. A sham defense is one which is palpably false. *Bachman v. Everding* [Case No. 708]; *Hadden v. New York Silk Manuf'g Co.*, 1 Daly, 388. Nothing appears from which the court could even surmise, let alone declare that this plea is false. If redundant matter be inserted in a pleading, it may be stricken out on motion. Civ. Code Or. § 84. But an answer or defense cannot be stricken out, as a whole, upon the ground of redundancy. Redundancy consists in irrelevant allegations or unnecessary repetitions, or perhaps prolixity of statement of such as are material; and the motion to strike out must be directed at such allegations, repetitions or statements. *Bowman v. Sheldon*, 5 Sandf. 657; *Fasnacht v. Stehn*, 53 Barb. 651. Section 74 of the Code authorizes an answer or defense to be stricken out as a whole if it be frivolous. Under the New York Code (section 247) the plaintiff, in case of a frivolous answer or defense, is entitled on motion to judgment on the pleadings. An answer or defense is frivolous when it contains nothing which affects the plaintiff's case—when it denies no material averments of the complaint and sets up no defense thereto. *Hull v. Smith*, 1 Duer, 649.

Counsel for the plaintiff maintains that this plea contains no defense to this action, because: (1) It does not comply with section 316 of the Civil Code, which provides that "The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license, or right to the possession, shall be set forth with the certainty and particularity required in the complaint." And (2) it does not allege that the defendant took possession of the premises with the consent of the mortgagor.

On the argument it was suggested by counsel for defendant that the phrase, "nature and duration of such estate," etc., was uncertain, and therefore it was difficult to say how much or how little particularity and detail is required in a defense of this kind. But the force of the suggestion is not perceived. The "duration" of an estate, whether it be in fee or at will, signifies the quantity or duration of the tenant's interest in the premises. The term is well known to the common law. 2 Bl. Comm. 103; 1 St. Wash. 45.

To set forth in a plea, then, the duration of the estate or right to the possession which a defendant may claim in the premises, is

simply to state the quantity of his interest therein, or the length of time he is entitled to the possession thereof. The "nature" of an estate signifies its qualities or incidents, without reference to its duration or extent, as that it is upon condition, or is held jointly or in severalty. This term is also well known to the common law. 2 Bl. Comm. 152, 178; Wash. St. 406.

To set forth this "nature" and duration, then, in an answer, "with the certainty and particularity required in a complaint," must ordinarily be a very simple matter. It is sufficient to allege that the party is the sole or part owner in fee-simple or upon condition, or for life or years of the premises, as the case may be; or, in case of some special license or right to the possession for a limited time or special use, to state succinctly the license or right to the possession as claimed, with the necessary facts constituting it.

This defense may be insufficient on demurrer for not stating the fact directly with the circumstance of time that the mortgage or debt secured thereby was duly assigned to the defendant, instead of the allegation, "of which the defendant is the assignee." But it is not frivolous on that account. The fact is stated that the defendant is the assignee of the mortgage, and if that is deemed insufficient or too uncertain, the objection must be made by demurrer or motion to make more definite and certain. Civ. Code, §§ 66, 84.

But, if it is necessary that it should appear that the defendant is in possession with the consent of the mortgagor or his assignee, I suppose this defense is frivolous. This is a question upon which this court follows the law of the state, as expounded by its supreme court.

At common law a mortgagee in fee of land is considered as absolutely entitled to the estate, subject to its being defeated by the grantor's performance of the condition in his deed—as the payment of a sum of money in a prescribed time and manner; and also, if so provided, to the grantor's right to occupy until a failure to perform the condition. But upon such failure the mortgagee at once becomes the absolute and unconditional owner of the estate. 1 St. Wash. 510; 4 Kent, Comm. 154.

But this doctrine was long since modified by the courts of equity. In *Casborne v. Scarfe*, 1 Atk. 603, Lord Hardwicke laid down the rule that the mortgagor in possession was the owner of the land; and in *Rex v. Inhabitants of St. Michael's in Bath*, 2 Doug. 632, Lord Mansfield held that the mortgage was only a security, saying: "It is an affront to common sense to say the mortgagor is not the real owner."

The doctrines of equity on this subject have been gradually recognized by courts of law, so that a half century ago Chancellor Kent could exultingly say: "The case of

mortgages is one of the most splendid instances in the history of our jurisprudence of the triumph of equitable principles over technical rules, and the homage which those principles have received by their adoption in the courts of law." 4 Kent, Comm. 158.

At this day, in some of the states, notably New York, Wisconsin and California, the equitable doctrine has been followed to its logical results, so that a mortgage is there considered a mere chose in action, a security for the debt, while the mortgagor is considered the owner of the premises, subject only to the lien of the mortgage, until a foreclosure and sale. Jackson v. Willard, 4 Johns. 42; Runyan v. Merserau, 11 Johns. 538; Waring v. Smyth, 2 Barb. Ch. 135; Jackson v. Bronson, 19 Johns. 325; Gardner v. Heartt, 3 Denio, 234; Kortright v. Cady, 21 N. Y. 363; Trim v. Marsh, 54 N. Y. 603; 4 Kent, Comm. 157; Russell v. Ely, 2 Black, 576; McMillan v. Richards, 9 Cal. 409; Fogarty v. Sawyer, 17 Cal. 592; Dutton v. Warschauer, 21 Cal. 621; Kidd v. Teeple, 22 Cal. 262; Bludworth v. Lake, 33 Cal. 264.

This result has been facilitated by the force of legislation, of which section 323 of the Oregon Civil Code is a substantial copy. It declares, "A mortgage of real property shall not be deemed a conveyance, so as to enable the owner of the mortgage to recover the possession of the real property without a foreclosure and sale according to law." In Kortright v. Cady, supra, the court in speaking of this statute, says, "that the legislature in enacting it undoubtedly supposed they had swept away the only remaining vestige of the common law which regarded a mortgage as a conveyance of the freehold."

In Anderson v. Baxter, 4 Or. 110, the supreme court of this state held that "a suit to foreclose a mortgage is not for the determination of any right or claim to or interest in real property, but a proceeding to have the mortgaged property adjudged to be sold to satisfy the debt secured thereby. * * * It is the mere collection of a debt charged upon specific property by resorting to the property as a means of satisfying it." This is equivalent to saying that the mortgage is a mere security for the debt, and that the mortgagee acquires no interest in the property by virtue of the mortgage, but only the right to subject it, according to a prescribed proceeding, to the satisfaction of his debt.

In Roberts v. Sutherlin, 4 Or. 222, the same court, commenting upon the case of Anderson v. Baxter, said that it was therein determined "that the execution of a mortgage does not vest in the mortgagee any title to or interest in the mortgaged premises, but that it is only a security for a debt, similar to that created by a judgment." In effect, this squares with the celebrated dictum in Gardner v. Heartt, supra: "The mortgagee has neither a jus in re nor ad rem, but a

specific lien, similar in character to a general lien created by a judgment upon the land of the judgment debtor." In Roberts v. Sutherlin the action was ejectment, and the defendant pleaded that the premises were mortgaged to secure the payment of a certain sum of money of which a certain portion was still due, and that the mortgage was duly assigned to the defendant, who "entered into the possession of the premises with the full assent of plaintiff."

On demurrer this was held a good defense, the court saying, that while by reason of section 323, supra, "a mortgagor cannot against his will be divested of his possession of the mortgaged premises, even after a default without a foreclosure and sale, * * * we know of no law or of any good reason to prevent the mortgagor from placing his mortgagee in possession of mortgaged premises if he chooses to do so. * * * And when the duration of the possession of the mortgagee thus acquired is not limited by his agreement with the mortgagor, we think that the legal effect of the same is, that he may retain it until his mortgage debt is paid. And we do not think that this doctrine conflicts with the rule that a mortgage is simply a security for a debt, and vests in the mortgagee no legal title to or interest in the mortgaged premises." From these decisions, it appears that the rights of parties to a mortgage in this state are governed by what is called the doctrine of equity, as distinguished from the original common law rules on the subject. As was said by Mr. Justice Field, in McMillan v. Richards, supra, "the original character of mortgages has undergone a change. They have ceased to be conveyances, except in form. They are no longer understood as contracts of purchase and sale between the parties, but as transactions by which a loan is made on the one side and security for its repayment furnished on the other. They pass no estate in the land, but are mere securities, and default in payment of the money secured does not change their character."

Notwithstanding this change in the law of mortgages, the mortgagee is still so far favored that, if after default in the payment of the debt he acquires possession of the premises lawfully, he may hold them until the rents and profits satisfy the same. And this brings us to the real question in this case, what under the circumstances constitutes a lawful possession of or entry upon the mortgaged premises by the mortgagee? In Roberts v. Sutherlin, the court said that possession obtained with the assent of the mortgagor is lawful, and no case has been found which expressly makes such possession or entry lawful without such assent. Indeed, it is impossible to conceive how a person like a mortgagee, who, in the language of Roberts v. Sutherlin, has "no legal title to or interest in the mortgaged

premises," could lawfully enter upon and possess the same without the assent of the owner. It follows as a logical deduction from the premise, that a mortgage passes no estate in the land, and a default in payment does not change its character, that a mortgagee cannot acquire lawful possession of the mortgaged premises by an entry thereon, even if peaceable, without the consent of the owner, the mortgagor. Otherwise the mortgagor might be divested of his possession against his will; and this the court in *Roberts v. Sutherland* say cannot now be done.

In *Waring v. Smith*, supra, the court say: "The only right the mortgagee now has in the land itself is to take possession thereof, with the assent of the mortgagor, after the debt has become due and payable, and retain such possession until the debt is paid." In *Fogarty v. Sawyer*, 17 Cal. 593, the court say that the statute preventing the mortgagee from maintaining ejectment against the mortgagor, "takes from the mortgagee all right to the possession, either before or after condition broken." In *Johnson v. Sherman*, 15 Cal. 287, the court, after stating that the possession of the mortgagee under the mortgage "does not change what was previously a security into a seisin of the freehold," says: "Possession taken by consent of the owner"—the mortgagor—"or by contract with him, may confer rights as against third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support." This language was quoted with approval in *Dutton v. Warschauer*, 21 Cal. 625; in which latter case the court say: "Although a mortgage in this state of itself confers no right of possession, yet, when possession is taken by the mortgagee after condition broken, by consent of the mortgagor, it will be presumed, in the absence of clear proof to the contrary, to be the understanding that the mortgagee is to receive the rents and profits and apply them to the payment of the debt secured." In *Russell v. Ely*, 2 Black, 578, the supreme court, in commenting upon the Wisconsin statute which prevents the mortgagee from recovering possession until the equity of redemption has expired, say: "If the mortgagee has no right to recover the possession by legal proceedings, it would seem that he should not be permitted in any other manner to obtain that possession against the consent of the mortgagor or the person holding under him." But in *Pell v. Ulmar*, 18 N. Y. 142, it is stated that if "the mortgagee obtains possession without force," he is entitled to hold against the mortgagor; citing *Van Duyne v. Thayre*, 14 Wend. 236; *Phyfe v. Riley*, 15 Wend. 254; *Watson v. Spence*, 20 Wend. 262; and *Fox v. Lipe*, 24 Wend. 164. Now a possession obtained "without force" may also be obtained without the consent of the mortgagor, and if that is the sense in which this dictum

is used in *Pell v. Ulmar*, it appears to stand alone, and is certainly not borne out by the authorities cited in its support. In *Van Duyne v. Thayre*, the court say: "If the mortgagee, after forfeiture entered into possession, either by the consent of the mortgagor or by means of legal proceedings, he may defend himself there, at least until his debt is paid." In *Phyfe v. Riley*, the language used is: "But if the mortgagee, after forfeiture, obtains possession in some legal mode other than by an action," why should the mortgagor recover the possession without paying the money secured by the mortgage? In *Watson v. Spence*, the expression is: "If the mortgagee, as such, had obtained possession, he could still hold until payment," the court citing the last two cases, thereby indicating that the possession intended must be obtained with the consent of the mortgagor, or by legal proceedings. In *Fox v. Lipe*, it was held that a mortgagee who enters under a sale made by authority of a power in the mortgage, may defend his possession against the mortgagor, even if the authority be doubtful. And in the comparatively late case (1874) of *Trim v. Marsh*, 54 N. Y. 604, it is said, that since the statute has taken away the right of the mortgagee to recover the possession of the premises, "the mortgagor, both before and after default, is entitled to the possession of the premises, of which he cannot be deprived without his consent, except by foreclosure."

Considered, then, either in the light of authority or reason, it seems that the possession of the mortgagee must be taken with the assent of the mortgagor. Upon the modern doctrine concerning the nature and effect of mortgages, which appears to prevail in this state, the mortgagee has no interest in the mortgaged premises. His lien is likened to that of a judgment lien creditor. His right is to have satisfaction of his debt, and his remedy, as mortgagee, is not a right to take possession of the premises, but to have them sold upon judicial proceedings. This being so, he cannot lawfully enter upon the mortgaged premises without the consent of the owner, any more than the judgment lien creditor can enter upon the lands of his debtor. Because the premises happen to be vacant, or the mortgagor's back turned, and the mortgagee is thereby entitled to get upon them without a breach of the peace, this does not make his entry lawful. A person cannot lawfully enter upon the lands of another without some right or authority for so doing. A peaceable entry is not per se lawful. An entry without right or authority, however peaceable, is tortious, and cannot avail the party making it anything. As the mere relation of mortgagor and mortgagee does not give the latter the right to enter and occupy for any purpose or time, the authority to do so, if any exists—apart from legal proceedings—must arise out of some

contract, consent or agreement with the mortgagor by matter collateral to and independent of the mortgagee.

It follows that, as this plea does not show any right or authority in the defendant to take possession of or occupy the premises as against the owner, the plaintiff, it is frivolous and worthless. The motion to strike out is allowed.

WITHERS (BOYD v.). See Case No. 1,752.

WITHERS (McCLELLAN v.). See Case No. 8,696.

WITHERS (PAYSON v.). See Case No. 10,864.

Case No. 17,918.

WITHERS v. THORNTON.

[3 Cranch, C. C. 116.]¹

Circuit Court, District of Columbia. May Term, 1827.

ACTION FOR LIBEL—SPECIAL BAIL.

In ordinary cases of libel, special bail is not required without some special reason other than the publication of the libel itself.

Action on the case for a libel which charged that the plaintiff's patent for an improvement in winged gudgeons, was a gross imposition, and the plaintiff an imposter.

The affidavit to hold to bail, did not aver the charge to have been made either falsely or maliciously; nor that any damage has resulted to the plaintiff exclusively, from the libel charged in the declaration; but that the damage, of which he complains, resulted from that and other publications, and verbal denunciations, "together with certain other letters, handbills, and publications of the said Thornton," so that it does not positively appear to the court by the affidavit, whether any, or if any, how much of the damage arose from the libel charged in the declaration.

THE COURT (nem. con.) refused to require the defendant to give special bail. In ordinary cases of libel, special bail is not required without some special reason other than the publication of the libel itself, such as non residence of the defendant, or the like. See Norton v. Barnum, 20 Johns. 337; Clason v. Gould, 2 Caines, 47; Van Vechten v. Hopkins, 2 Johns. 293; Barnes, Notes, 79, 80, 108; Chetwin v. Venner, 1 Sid. 183; Marquis of Dorchester's Case, 2 Mod. 215.

WITHERS (WISE v.). See Case No. 17,913.

WITHERSPOON (OGDEN v.). See Case No. 10,461.

WITHINGTON (BALL v.). See Case No. 815.

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

Case No. 17,919.

WITHROW v. FOWLER.

[7 N. B. R. 339; 6 Alb. Law J. 422; Pac. Law Rep. 102.]¹

District Court, E. D. Missouri. Nov. 7, 1872.

BANKRUPTCY—ASSIGNEE OF PARTNERS—RECOVERY OF FIRM PROPERTY.

An insolvent firm made a transfer to a creditor in fraud of the provisions of the bankrupt act [of 1867 (14 Stat. 517)]. One of the partners died, and, within four months of the date of the transfer, the remaining partners, but not the firm, were adjudged bankrupt. *Held*, that the assignee could not recover the property transferred by the partnership to a partnership-creditor, by way of a preference or otherwise.

The plaintiff in this suit [James E. Withrow] sought to recover, as assignee of Thomas S. Dunbar and Edward T. Smith, bankrupts, \$512.32, the value of certain accounts and claims alleged to have been transferred by the bankrupts to the defendant [M. K. Fowler] within four months of the filing of the petition in bankruptcy against Dunbar and Smith, they being at the time insolvent, and the defendant having, at the date of the transfer, reasonable cause to believe them insolvent, and that the transfer was made in fraud of the provisions of the bankrupt act. Defendant in his answer denied all the material averments of the petition. The case went to trial before a jury. It appeared that Dunbar and Smith, the bankrupts, were members of the firm of Dunbar, Smith & Co., composed of themselves and George W. Thompson. Defendant was a creditor of the firm, and the transfer of the accounts and claims mentioned in the petition was made by the firm to the defendant, in satisfaction of a debt due him by the firm. Between the time of the transfer and the commencement of proceedings in bankruptcy, Thompson, one of the members of the firm, died. Dunbar and Smith, the remaining members, were thereafter adjudged bankrupts upon a creditor's petition, but the firm of Dunbar, Smith & Co. was not declared bankrupt. Plaintiff was then elected assignee, and the usual assignment was made conveying to him all the estate of Dunbar and Smith. Defendant's counsel raised the point that the assignee in bankruptcy of two members of a firm could not recover a preference given to a firm creditor by a firm composed of three members.

Krum & Patrick, for plaintiff.
Dryden & Dryden, for defendant.

THE COURT (TREAT, District Judge) sustained the point and charged the jury as follows: "The jury are instructed that the plaintiff cannot recover in this action for any property or accounts transferred or assigned by the copartnership of Dunbar, Smith

¹ [Reprinted from 7 N. B. R. 339, by permission. 6 Alb. Law J. 422, contains only a partial report.]

& Co., to a creditor of said copartnership, by way of preference or otherwise."

The jury returned a verdict for defendant.

Case No. 17,920.

In re WITKOWSKI.

[10 N. B. R. 209.]¹

District Court, S. D. Mississippi. 1874.

EXAMINATION OF BANKRUPT.

The assignee in bankruptcy has no right to examine the bankrupt under the provisions of section 26 of the bankrupt act [of 1867 (14 Stat. 529)], after his discharge from his debts and liabilities provable under said act.

[Cited in *Wagner v. Superior Court of Los Angeles Co.*, 100 Cal. 361, 34 Pac. 820.]

In bankruptcy.

HILL, District Judge. The only question which need now be considered arising out of the proceedings before the register as certified, is, "Has the assignee a right to examine the bankrupt under section 26 of the bankrupt act, after the discharge of the bankrupt from his debts and liabilities provable under the bankruptcy?" This is the first time this question has been presented to me, and aside from its importance to the parties interested in these proceedings, is one of no small importance to bankrupts and those entitled to their examination, and should be definitely settled, that the latter may know the time in which the examination must be made, and the former when he is freed from liability to such examination. The act does not in express terms limit the time for the examination, but there must be a time when this right ceases, and this time must be ascertained from the evident intent and purpose of the law, as found from an examination of its different provisions, and from which it will be found that all questions pertaining to the bankrupt, his estate, and those having claims upon it, shall be settled and terminated within the shortest period in which it can fairly and reasonably be done. Hence it is provided that proceedings in involuntary bankruptcy must be commenced within six months after the act of bankruptcy is committed; suits to recover property and assets from those to whom they have been sold or transferred in fraud of the bankrupt act must be commenced within six months from the sale or transfer. Proceedings to recover back property, money, or other means given as a preference, against the provisions of the act, must be commenced within four months from the time the preference is given. Exceptions to the report of exemptions must be filed within twenty days. Opposition to the bankrupt's discharge must be made on the very day fixed to show cause against it, and specifications must be filed within ten days thereafter. Suits by or against the as-

signee respecting the property rights of the bankrupt estate must be brought within two years after the appointment of the assignee, and to this no exceptions are engrafted. The discharge of the bankrupt is conclusive of the regularity of the proceedings, and can only be attacked in the court granting it upon proceedings for that purpose, commenced within two years from its date, and for some of the causes mentioned, unknown to the attacking party, when it was granted. The reason for this speedy action is obvious. The purpose of the law is to place within the possession of the creditor that to which he may be entitled, within the shortest reasonable time, and at the same time, if the bankrupt has made a fair and honest surrender, and complied with the requisitions made of him, to give him a speedy release, and let him begin anew to provide an honest living for himself and those dependent upon him, and again become a useful and active member of society.

To attain these objects, the whole machinery is framed and adjusted. The creditors are at the earliest period notified of the proceedings and made parties to it; it is their right, and they have the opportunity to except to everything done prejudicial to their interest. This they must do at the proper time so as not to retard or embarrass the proceedings. They are notified of the different meetings of the creditors, and especially of the third, generally the last meeting, when the assignee's report and account is required to be filed. This meeting is held before the register upon the day fixed to show cause against the bankrupt's discharge, when he is required to be present, and submit to his final examination by the register, the assignee, or any creditor who has proved his claim; and at any time before this the bankrupt, his wife, and any other witness may be examined by any creditor who has proved his debt upon a proper showing, or by the assignee, who is both the agent of the creditors and officer of the court. Thus ample opportunity is given all interested to look into and protect their interest, and if they neglect to do so within proper time have no one to blame but themselves. After a careful examination of the whole question, I am satisfied that this last meeting of the creditors and final examination of the bankrupt concludes the right of the assignee as well as the creditors to an examination of the bankrupt under the 26th section of the act. But, while this is so, it does not exclude the creditors from an examination of the bankrupt upon the trial of an issue opposing the discharge, or for its revocation after granted, or the assignee from calling him as a witness upon the trial of any cause by or against him touching the bankrupt's estate. But in such investigations the bankrupt occupies the position of a witness, his counsel may cross-examine him, or he may appear as a witness in his own behalf, and the ex-

¹ [Reprinted by permission.]

amination must be confined to the issue made by the pleadings. I am sustained in the conclusions reached, by Judge Woodruff, of the Second circuit, in an able and exhaustive opinion in *Re Dole* [Case No. 3,964], referring to the case of *Jones* [Id. 7,419] and the case of *Dean* [Id. 3,701].

In this case the last meeting of creditors and time for the final examination of the bankrupt, was held on the 21st day of June, 1869; but one debt had then been proved, and no exceptions filed; the assignee's account was approved, and he discharged. The register certified that the bankrupt had complied with the requirements of the law, and nothing appeared against his discharge; and nothing appearing against his discharge a decree was entered awarding him his discharge, and on his application a certificate was issued to him on 1st day of February, 1871. More than two years elapsed after the granting of the discharge, before any other step was taken by the assignee, when he filed his application for permission to bring suit for the recovery of assets alleged to have been fraudulently omitted from the bankrupt's schedules, and which had but recently come to his knowledge, which leave, upon the ex parte application, was granted. To aid this recovery is the purpose of the examination sought, and which was applied for and an order made by the register the 1st of March last, to which the bankrupt excepted, and claiming his right to exemption from such examination, refused to answer many questions propounded to him by the assignee, and which it is insisted by the assignee he should be compelled to answer.

Under the conclusions reached, the bankrupt is entitled to the exemption claimed from such examination, and cannot be compelled to make further answer under this order, which, with the proceedings under it will be set aside, without prejudice to the assignee, to have the benefit of the testimony of the bankrupt in the proceedings now pending against him or others in the court in New York, to recover the assets claimed to be due the bankrupt estate, to be taken under the rules of that court.

Case No. 17,921.

WITT v. HERETH et al.

[6 Biss. 474; 1 13 N. B. R. 106; 8 Chi. Leg. News, 41; 1 N. Y. Wkly. Dig. 436.]

District Court, D. Indiana. Oct., 1875.

REDUCING DEMAND TO JUSTICE'S JURISDICTION—
LIEN OF EXECUTION—RECOGNITION IN
BANKRUPTCY PROCEEDING.

1. In Indiana, a plaintiff may reduce his demand to bring it within the jurisdiction of a justice of the peace.

2. The lien of an execution will be respected by the bankruptcy court, though the plaintiff sued

out his execution immediately upon the rendering of the judgment, and the defendant filed his bankruptcy on the same day. The creditor has a right to follow all the remedies which the law gives him.

On the 31st day of July, 1875, Henry Hereth filed his complaint before William H. Schmitts, a justice of the peace in and for Center township, Marion county, Indiana, demanding judgment against William M. Aughinbaugh for two hundred dollars upon a note, the principal of which was two hundred dollars and eighty-three cents, and on the same day a summons was duly issued to a constable of said township, and served on said Aughinbaugh. On the 3d day of August, at 9 o'clock a. m., that being the time at which said cause was set for trial, the said Aughinbaugh was duly called and defaulted, and judgment was entered for the plaintiff for two hundred dollars and costs of suit.

Subsequently, on said 3d day of August, the plaintiff filed his affidavit with said justice, averring that the collection of his judgment would be endangered by further delay in the issuing of execution. Thereupon an execution was issued on said judgment, which was immediately levied upon the goods and chattels of the said Aughinbaugh sufficient to satisfy the debt and costs. And later, on said day, the said Aughinbaugh filed his voluntary petition and was adjudged a bankrupt.

On this agreed statement of facts the court is asked to decide whether the lien of the execution and levy was displaced by the subsequent proceedings in bankruptcy.

Morrow, Trusler & Henry, for complainant.
Bixby & Norton, for defendants.

GRESHAM, District Judge. Justices of the peace in Indiana have jurisdiction to try and determine suits founded on contract, when the debt does not exceed two hundred dollars. 2 Gavin & H. St. p. 579.

Unless otherwise directed, justices shall issue execution on all judgments, when the defendant has appeared, after the expiration of four days from the rendition thereof, and in cases of default after the expiration of ten days; but when it shall be made to appear by affidavit that delay will endanger the collection of the judgment, execution shall issue immediately. 2 Gavin & H. St. p. 600.

It is insisted that the justice had no jurisdiction to render the judgment, because the note sued on exceeded the sum of two hundred dollars, and that the statute did not allow the plaintiff to remit part of his claim so as to reduce it to two hundred dollars for the purpose of giving justice jurisdiction.

Even if it had appeared that the plaintiff had thus reduced his claim by remitting the interest and part of the principal, I would have no doubt on the question of jurisdiction.

The amount demanded determined the jurisdiction of the justice, and not the principal of the note or the amount actually due on it. If the plaintiff saw proper to reduce his claim to

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

a sum within the jurisdiction of the justice by remitting part of it, no one had a right to complain, for no one lost anything but himself. *Wetherill v. Inhabitants, etc.*, 5 Blackf. 357; *Remington v. Henry*, 6 Blackf. 63.

Clearly the plaintiff was barred from maintaining another action on the same note, even if his judgment was for less than was due him. The facts agreed upon fail to show that the plaintiff remitted any part of his claim, and the presumption is that he demanded all that was due him.

It is further insisted that the filing of the affidavit, the issuing and levy of the execution upon the same day upon which the judgment was rendered, and the subsequent commencement of voluntary proceedings in bankruptcy on the same day, show collusion between the plaintiff and the bankrupt, and something more than passive non-resistance on the part of the latter. I do not think so. All these facts might have existed without collusion. It must be admitted that the circumstances excite a suspicion that the bankrupt was trying to aid the plaintiff in obtaining a lien, but they go no further. It may be that the plaintiff knew of the insolvent condition of the bankrupt before he commenced his action, and that he hoped, by diligence, to get an advantage over the other creditors. He pursued a remedy that the law gave him. The other creditors were not equally diligent, and none of them saw proper to institute proceedings in bankruptcy and invoke the aid thereby of this court to prevent the plaintiff from obtaining his judgment, execution and levy, and the law imposed no duty on the bankrupt to go into voluntary bankruptcy to defeat the plaintiff in his efforts to procure a lien. *Wilson v. City Bank, etc.*, 17 Wall. [84 U. S.] 473.

It was as much a part of the plaintiff's remedy to file his affidavit and cause his execution to be issued and levied before the expiration of ten days, as it was to obtain his judgment.

An order will be entered requiring the assignee to pay said judgment and costs out of any funds in his hands not otherwise appropriated.

NOTE. The same rule as to reduction of demand prevails in Illinois. *Raymond v. Strobel*, 24 Ill. 113; *Simpson v. Updegraff*, 1 Scam. 594; *Bates v. Bulkeley*, 2 Gilman, 389; *Korsoski v. Foster*, 20 Ill. 32; *Ellis v. Snider*, *Breese*, 336.

WITTIG (UNITED STATES v.). See Case No. 16,748.

Case No. 17,922.

The W. J. WALSH.

[5 Ben. 72.]¹

District Court, E. D. New York. March, 1871.

TOWAGE—JURISDICTION—LIEN.

1. A lien exists upon a canal-boat, for towage services rendered to her in the harbor of New

York, which an admiralty court has jurisdiction to enforce.

2. What is a maritime contract, considered.
[Cited in *Lands v. Cargo of Coal*, 4 Fed. 480; *The Wilmington*, 48 Fed. 567.]

In admiralty.

BENEDICT, District Judge. This is a proceeding in rem to recover of the canal-boat W. J. Walsh the amount of several towing bills due the owner of the steam-tug G. H. Starbuck, for the towage by that tug of the canal-boat, on several trips from Williamsburgh, in this district, to Elizabethport, in the state of New Jersey. The performance of the service is admitted, and the amount demanded is conceded to be due. But it is set up that the services mentioned in the libel were not performed on the high seas; that the W. J. Walsh is not a sea-going craft, but a canal-boat, without masts, sails, rigging, or anchor; that she has no means of propulsion, and can only move or be moved by power not belonging or appertaining to her, and is serviceable only by being towed by steam power; by reason whereof, it is contended that this is not a case of admiralty and maritime jurisdiction.

These facts, stated in the libel and answer, are admitted, and the case is to be disposed of upon the question raised thereby. There is no room to contend that the towage contracts set up in the libel are not maritime contracts. A maritime contract in law, as now understood, is any contract which necessarily is appurtenant to navigation, such as the transportation of passengers or freight on navigable waters—or the navigation of vessels on such waters—or supplying the necessities of vessels used on such waters. A contract to furnish the motive power to a vessel so used is of the same class. It appertains to navigation, in the strictest sense, and is as distinctly maritime in character as a contract to steer the boat, or to carry cargo in her. The steamboats which tow the boats and barges, by means of which commerce between New Jersey and New York is transacted, are as much engaged in navigation as are the boats in which the cargoes are placed; and it is all not only navigation, but commerce among the states. Indeed, the contract in question contains almost all the features formerly considered necessary in a maritime contract, under a much narrower view of the jurisdiction than at present prevails. I am, therefore, at a loss for any ground upon which it can be held that here is not a maritime contract. That there is a lien is equally clear. This contract being made for the benefit of the vessel, and necessary to enable her to perform her natural functions, binds the vessel. This is the general rule of the maritime law; and the reasons of the rule are fully applicable to such contracts as the present, for nothing is more necessary to such a vessel as this than that she should, at all times and everywhere, carry

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

with her a credit which will procure for her a motive power. This she secures by the implied lien upon her bottom which the law creates in favor of any one rendering that service; and she can secure it, practically, in no other way. As to the idea that the form of the boat, or her incapacity to navigate the broad ocean, or her want of motive power within herself, can make any difference in her rights and liabilities on such a contract, I have nothing to add to the remarks made in the case of *The Kate Tremaine* [Case No. 7,622].

Let a decree be entered in favor of the libellant for the amount demanded in the libel.

W. K. MUIR & DAVIDSON, The (UNITED STATES v.). See Case No. 16,749.

WOLCOTT (FRASER v.). See Case No. 5,065.

WOLCOTT (THOMAS v.). See Case No. 13,915.

Case No. 17,923.

In re WOLF.

[4 Sawy. 168; 17 N. B. R. 423.]

District Court, D. Nevada. Jan. 18, 1877.

ACT OF BANKRUPTCY—COMMERCIAL PAPER—NON-PAYMENT.

The mere letting a note, payable one day after date, remain unpaid forty days after it falls due, is not an act of bankruptcy, in the absence of any demand of payment, or other facts to show a suspension and failure to resume.

[Cited in *Brown v. Jefferson Co. Nat. Bank*, 9 Fed. 264.]

[Cited in *Lindsey v. Flebbe*, 5 Colo. App. 218, 38 Pac. 399.]

This was a petition for an adjudication of bankruptcy, charging that the respondent had suspended and stopped payment of his commercial paper, and had not resumed in forty days. Upon the return day of the order to show cause, the only proof offered of the act of bankruptcy was a promissory note made by E. Wolf in favor of one Parker, for \$1,000, payable "one day after date," which showed upon its face that it had been due more than forty days. There was proof that no demand had ever been made on Wolf for payment of the note. No other evidence was produced tending to show a suspension of payment and failure to resume.

J. B. L. Brandt, for petitioner.

M. N. Stone, for respondent.

HILLYER, District Judge. It could not have been the intention of the framers of the bankrupt law to make the simple fact that a note like this remained due and unpaid for forty days an act of bankruptcy. There is certainly a reasonable presumption

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

that the parties to such paper made payable one day after date did not expect it would be paid on the day it fell due. No demand being made on him, the maker would be likely to let the note run for an indefinite time; and it would be, it seems to me, a most unjustifiable construction of the bankrupt act [of 1867 (14 Stat. 517)], to say that by so doing he was stopping or suspending payment of his commercial paper.

Suspension of payment means something more than a failure of the maker of such paper as this to seek the holder and pay him. Business men understand very well what the term means; there is the idea in it of a failure to pay from an inability to do so; and here there is nothing to show that the debtor was not abundantly able and willing to pay the note on presentation.

The prayer of the petition is denied.

Case No. 17,924.

WOLF v. CONNECTICUT MUT. LIFE INS. CO.

[1 Flip. 377; 1 Cent. Law J. 301.]

Circuit Court, E. D. Michigan. April Term, 1874.

FEDERAL PRACTICE—TAXATION OF COSTS—REMOVAL FROM STATE COURT.

1. Where a suit comes into the federal court by removal, it brings along with it, as an incident, all the costs which accrued or attached under the state law, during the time it remained in the state court.

[Cited in *Cleaver v. Traders' Ins. Co.*, 40 Fed. 864.]

2. The acts of congress, prescribing what costs may or may not be taxed, apply to such costs as accrue after the removal of such cause into the federal court.

3. These are the rules that the federal courts follow in taxing costs.

[Cited in *Trinidad Asphalt Pav. Co. v. Robinson*, 52 Fed. 348.]

On the mutual application of the parties for directions to the clerk as to taxation of costs. This cause was commenced in the circuit court for the county of Wayne, in this state, and after issue and one continuance in that court, the cause was removed to this court by the defendant, under and in pursuance of the acts of congress in such cases made and provided. After sundry proceedings had in the case in this court, unnecessary to mention here, the plaintiff [Helena Wolf], discontinued her suit, and judgment was entered against her for costs to be taxed. The defendant now brings its bill of costs for taxation, in which are included items of costs accrued in the state court before removal to this court, amounting in the aggregate to \$15, and \$7.50 paid to the clerk of the state court for transcripts in making the removal. These items are objected to on behalf of plaintiff on the ground that there is

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

no act of congress allowing such costs to be taxed in this court.

D. C. Holbrook, for plaintiff.
C. J. Walker, for defendant.

LONGYEAR, District Judge. A suit removed from a state court comes into this court impressed with all the rights and liabilities of parties as to costs which accrued or attached by the laws of the state while the suit remained in the state court. Acts of congress prescribing what costs may or may not be taxed apply only to such costs as accrue after the removal has become complete and this court is invested with jurisdiction.

In the state court, in case of discontinuance, the defendant would be entitled by the state laws to all his costs made up to that time, and I think this court is bound, in case of removal to this court before discontinuance, to administer those laws as to all such costs which accrued while the suit remained in the state court.

No adjudicated case involving this exact question has fallen under my notice, but the cases cited below involve principles applicable to this question, and so far as they go, fully sustain the foregoing propositions. I am also informed by my brother Judge Withey, of the Western district, that such has always been the uniform practice there. See *Ellis v. Jarvis* [Case No. 4,403]; *Field v. Schell* [Id. 4,771]; *Gier v. Gregg* [Id. 5,406]; *Ackerly v. Vilas* [Id. 120].

The clerk is therefore directed in this, and all like cases, to tax to the party recovering costs, all costs to which he would have been entitled under the state laws, accrued while the suit remained in the state court, and up to the time the suit was duly entered in this court. Ordered accordingly.

Case No. 17,925.

WOLF v. The MAITLAND.

[See Case No. 8,979.]

Case No. 17,925a.

WOLF v. MUTUAL BENEFIT LIFE INS. CO.

[2 Cin. Law Bul. 304.]

Circuit Court, S. D. Ohio. 1877.

LIFE INSURANCE—SUICIDE—INSANITY—TEMPERATE HABITS.

[1. Under a policy conditioned to be void in case the insured should "die by his own hand," there is no liability if the insured kills himself while in the possession of his ordinary reasoning faculties, and from anger, pride, jealousy, or a desire to escape from the ills of life. If, however, his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of his act, or if he was impelled thereto by an insane impulse, which he had not the power to resist, the insurer is liable.]

[2. A representation in the application that the applicant is "sober and temperate" does not

mean that he totally abstains from the use of intoxicating liquors, or that he may not have been drunk on some occasions. It means, rather, that he is temperate in the use of spirituous liquors,—not addicted to their excessive use.]

P. Houk and G. R. Sage, for plaintiff.
Young & Gotschall, for defendant.

SWING, District Judge (charging jury). The petition in this case alleges, in substance, that on the 5th day of March, 1866, the defendant entered into a contract of insurance with the plaintiff (who was then the wife of John T. Wolf), whereby, in consideration of an annual premium of \$195.30, to be paid on the 5th of March in each year, it insured the life of the said John T. Wolf for the period of life, or for twenty years if that event should not sooner occur, in the sum of \$5,000, said sum to be paid by the defendant to the plaintiff after notice and proof of the death of the said John T. Wolf. That she paid the premiums according to the terms of the policy. That her said husband died March 31, 1869. That she had made proof of death within ten days thereafter, and gave notice and proof thereof to the defendant, demanding an adjustment and payment, but defendant refused and still refuses to pay the same. That she has complied with all the conditions of the policy on her part, and asks judgment for \$5,000, with interest from the 31st day of March, 1869.

The answer sets up eight separate defenses, all of which, except the first and fifth, have been abandoned by the defendant. The first defense is, that the contract contained a condition that in case the said John T. Wolf should die by his own hand, said policy should be void, null and of no effect, and that said John T. Wolf committed suicide by drowning himself. The fifth defense is, that the contract was made and entered into and said policy was issued in consideration of the representations made to said company, in the application of said plaintiff for said policy, and it was then and there agreed that the answers of the said John T. Wolf in said application should form the basis of said contract between himself and said company, and that the said John T. Wolf, in said application, answered and represented, that he was sober and temperate, and had always been so, whereas in fact, the said John T. Wolf was not at the time sober and temperate, but was then, and for a long time prior thereto had been, intemperate, and in the habit of drinking intoxicating liquors intemperately and to excess.

The plaintiff replies to the first defense: 1. She denies that John T. Wolf committed suicide by drowning or by any other means. 2. That if the said John T. Wolf committed suicide, he was of unsound mind before and at the time of his death, and that at said time his faculties were impaired to such an extent, that he was unable to understand the moral or physical character, nature or con-

sequence of his acts, and if he committed suicide he was impelled thereto by an insane impulse which he had not the power to resist. To the fifth defense the plaintiff replies that she denies that the said John T. Wolf was at the time said policy was issued, or that he had been prior thereto intemperate or in the habit of drinking intoxicating liquors intemperately or to excess, and that his habits were then well known to said company. In order to entitle the plaintiff to a recovery in this case, she must have established by the evidence that the contract of insurance was entered into as alleged. That the premiums were paid as provided for in said contract of insurance, and that John T. Wolf was dead, and that due notice and proof thereof had been made to the defendant. If the evidence therefore establishes the existence of these several facts, your verdict will be for the plaintiff, unless the evidence has established one of the defenses relied upon.

The first defense is, that the contract contained the condition "that in case the said John T. Wolf should die by his own hand, the policy should be null and void," and that the said John T. Wolf committed suicide by drowning himself. It is admitted that John T. Wolf did take his own life by drowning himself; but the plaintiff says that at the time he did so, and before, he was of unsound mind, and his faculties were impaired to such an extent that he was unable to understand the moral or physical character, nature or consequence of the act, and that he was impelled thereto by an insane impulse which he had not the power to resist.

In the examination of the evidence bearing upon this defense, it is important for you to know the true legal meaning of the words "shall die by his own hand," and what effect shall be given to the facts set up in the reply to this defense. Literally, these words embrace death by the act of the party through accident or mistake, and yet it could hardly be said that this was the sense in which the parties to the contract understood they were using them. They would also embrace the act of self-destruction when the party was wholly without mind, and yet the authorities are uniform that that would not come within their proper meaning. But the extent of the mental capacity which should be possessed by the party taking his own life in order to bring the case within the meaning of these words, is a question upon which there was, and still exists among jurists the widest difference of opinion, the treatises and books of reports are filled with learning upon the various theories entertained; but with the view I take of the law, it would serve no valuable purpose to review the arguments in their support. It may, however, be remarked, that it is not strange that this difference should exist; for whilst science has to some extent discovered the members and organs of the body, the

parts and elements which constitute each, their different offices and functions, their relation to and effect upon each other, and their powers as a unit; yet it has failed to invent a microscope with lens powerful enough to enable us to see the mind, and no human being has ever lived with capacity sufficient to analyze it; no wonder then that philosophy and science have failed to ascertain fully the relation which the mind and body sustain to each other, or how the mind acts upon or through the body; how the material is affected by the immaterial. But in the administration of justice, the quality which shall be assigned to an act, depends so much upon the intelligence with which it is directed, that jurists have adopted certain rules by which this quality is determined by the degree of intelligence apparently professed by the author of the act, at the time of its commission. As already observed, these rules are not uniform, but we are relieved from choosing between them, for it is our duty, as well as our pleasure, to follow the rules as announced by the supreme court of the United States.

In *Life Ins. Co. v. Terry*, 15 Wall. [82 U. S.] 580, Mr. Justice Hunt, after a very elaborate review of the conflicting authorities upon the question, announced the opinion of the court as follows: "We hold the rule on the question before us to be this: If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the accused, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences and effects of the act he is about to commit, or when he is impelled thereto by an insane impulse which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable." And in *Bigelow v. Berkshire Life Ins. Co.*, 93 U. S. 284, Mr. Justice Davis, in delivering the opinion of the court, says: "There has been a great diversity of judicial opinion as to whether self-destruction by a man in a fit of insanity, is within the condition of a life policy where the words of exemption are that the insured 'shall commit suicide,' or 'shall die by his own hand.' But since the decision in *Life Ins. Co. v. Terry*, 15 Wall. [82 U. S.] 580, the question is no longer an open one in this court. In that case we held that they referred to an act of criminal self-destruction, and did not apply to an insane person who took his life."

If the jury find from the evidence that John T. Wolf came to his death by throwing himself into the river, and that at the time

he did so, he was in the possession of his ordinary reasoning faculties, and from anger, pride, jealousy, or a desire to escape from the ills of life, intending when he threw himself into the river to drown himself, the plaintiff cannot recover. But if John T. Wolf voluntarily threw himself into the river, knowing and intending that it should produce death, but when his reasoning faculties were so far impaired that he was not able to understand the moral character, the general nature, consequences and effect of throwing himself into the water, or, if he was impelled thereto by an insane impulse which he had not the power to resist, the plaintiff will be entitled to your verdict.

The second defense is: That John T. Wolf represented that he was sober and temperate, and had always been so, when, in fact, he was not sober and temperate, but was and had been intemperate, and had been in the habit of drinking intoxicating liquors intemperately and to excess. By the terms of this policy, this representation became a part of the contract between the parties, and if the testimony satisfies you that, at the time this contract was entered into, John T. Wolf was not sober and temperate, or had not been so, there can be no recovery in this case. Webster defines the word "sober" as "temperate in the use of spirituous liquors." "Not overpowered by spirituous liquors." The same author defines "temperate" as "moderate; not excessive." It will, therefore, be seen that these words do not imply that, in order for a man to be sober and temperate, that he should totally abstain from the use of intoxicating liquors. And the fact that a man may have been drunk on some occasions, does not, of itself, make him an intemperate man. Keeping in view these definitions, you will examine the evidence, and ascertain if it sustains the second defense; if so, the plaintiff cannot recover; if it does not, the plaintiff is entitled to your verdict.

The jury are the sole judges of the weight of the evidence; if there should be a conflict in the evidence, it is the duty of the jury to reconcile, if possible, such conflict. If, however, they cannot do so, they will accept that which they think, under the circumstances, ought to be believed, and reject that which they think is not entitled to credit.

Verdict for the plaintiff.

Case No. 17,926.

WOLF v. PLUNKETT.

[1 Flipp. 427.]¹

Circuit Court, W. D. Tennessee. April 2, 1875.

JUDGMENT LIEN — RIGHTS OF EXECUTION PURCHASER—PRIOR EQUITIES—EJECTMENT.

1. Notwithstanding the decree of a court of chancery divesting the legal title of a judgment

debtor before a sale under execution of the land in controversy, the purchaser at such sale will prevail at law over the owner of the junior legal title, even if it were founded on the older equity.

2. P. exchanged lands with L. and wife. This was on Sept. 28, 1867. On the 12th of September, 1867, a judgment had been rendered against P. at the suit of another person, and the lien attached, as a matter of course to the land of P. L. and wife, becoming dissatisfied at this turn of events, proposed a cancellation of the exchange; the same was agreed to by P., and L. and wife were put into possession of the land they had conveyed to P. The judgment creditor proceeded with his execution; the land now in possession of L. and wife was sold, and the owner of the judgment bought it in, and thereupon died. His devisee brought suit against defendant in ejectment to recover the same, the title to which had passed by sale from L. and wife through several hands before vesting in defendant: *Held*, that the purchaser at the execution sale had the better title, and that his devisee was entitled to recover.

3. And if L. and wife, through whom defendant traced his title, had any equity which is good and was subsisting when plaintiff's testator obtained his judgment, they can assert the same in a court of chancery, and there only.

4. Courts of law cannot notice equities.

Mrs. Looney owned the tract of land in controversy. She and Pfannenstiehl made a trade by which Pfannenstiehl conveyed her certain property in Memphis, and Mrs. Looney conveyed him the tract of land in question and other tracts. The last mentioned conveyance was made on the 23th of September, 1867. On the 12th of September, 1867, the plaintiff's testator, Louis Wolf, recovered against Pfannenstiehl in the circuit court of the United States for the district of West Tennessee, a judgment for a debt. He caused the land involved in this suit to be levied on by the marshal of the United States, under an execution issued on the judgment, and to be sold, and bought it, and took a deed from the marshal conveying it to him. A dispute arose between Mrs. Looney and Pfannenstiehl as to the trade they had made, and Mrs. Looney filed a bill to have it cancelled. On the 6th day of April, 1868, a decree was entered in the suit just referred to, which was in the chancery court of Shelby county, whereby, by the consent of the parties (Mrs. Looney and Pfannenstiehl,) the trade between them was cancelled, and the title to the tract of land now in dispute, was divested out of Pfannenstiehl and was vested in Mrs. Looney. Mrs. Looney then conveyed her title to George Gantt. The latter conveyed to Bradshaw, and Bradshaw conveyed to Elijah Plunkett, who took possession, after which the suit was brought. Pfannenstiehl was in possession of the land from September, 1867, when he made the trade with Mrs. Looney, until April, 1868, when the trade was cancelled between them and he returned the possession to Mrs. Looney. Louis Wolf died and devised the land to the plaintiff [Dorothea Wolf] by his will, and she brought the action of ejectment against Plunkett after he entered into pos-

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

session. The cause was tried before Hon. BLAND BALLARD, District Judge of the United States for the district of Kentucky, sitting in the circuit court of the United States, at Memphis, and a jury. There was a verdict for the plaintiff, and a motion for a new trial by the defendant.

Wm. M. Randolph, for plaintiff.

George Gantt and Duncan K. McRae, for defendant.

BALLARD, District Judge. I still think that the purchaser, who claims under the plaintiff's judgment and the marshal's sale, has a better legal title than the claimant under the decree rendered in the suit of Looney and wife against Pfannenstiehl, which suit was instituted after the judgment was rendered and after the lien of the judgment had attached to the land in contest.

It is not disputed that had Pfannenstiehl voluntarily conveyed the land to Looney after the judgment, the title of Looney would be inferior to that of the execution purchaser. Now, the decree under which Looney and the defendant claim having been rendered by consent, I am by no means certain, that it confers any better title than the private deed of the party would have conferred. Indeed, I am, strongly inclined to think it does not.

But, it is said that the lien of the judgment attaches only to the interest of the judgment debtor in the land, and does not disturb any prior equity. This may be true, but it is not perceived how the defendant's case is helped thereby. Concede that Looney has an equity which is not affected by the plaintiff's judgment and purchase, this equity cannot avail in this action. This is an action at law; and it is well settled that courts of law cannot notice equities.

Moreover, I do not see how it can be assumed in this case that Looney had any such prior equity. There is no evidence of it, unless it be found in the record of the suit of Looney and wife against Pfannenstiehl. But the plaintiff in the judgment against Pfannenstiehl was not a party to this suit, and it is not perceived how he can be affected by its admissions and findings.

Defendant's counsel do not insist that the institution of the suit by Looney and wife against Pfannenstiehl precluded plaintiff from enforcing his judgment. He does not claim that plaintiff is a *lis pendens* purchaser. He concedes that plaintiff's title relates to the date of his judgment, or at least to the date of his lien. But he insists that the title of the judgment debtor, having been divested by the decree of a court of competent jurisdiction—in virtue of what he calls a prior equity in Looney and wife before the sale under the execution—no title was obtained by the execution sale.

I do not admit the correctness of this propo-

sition, and I have been referred to no authority which sustains it. I have never before heard it asserted that a junior legal title could at law prevail over an older one, even though the former were founded on the older equity.

The case of *Parks v. Jackson*, 11 Wend. 442, so confidently relied on by defendant's counsel, does not at all militate against this view. The majority of the court in that case decide that a party who receives a conveyance, pending a suit against the grantor affecting his title, is not a *lis pendens* purchaser, if the conveyance were made in pursuance of a valid consideration existing prior to the institution of the suit. Consequently, as he who acquired his conveyance in pursuance of such obligation had the older legal title, his title is, at law, the better.

The unsuccessful party in that case had no title under an execution sale made in pursuance of a judgment, which was a lien. The majority of the court expressly say, that the deed of the sheriff was void; and it is because of this—as I understand the opinion—that the purchaser at the sale by execution failed.

The authority of this case is in one respect adverse to defendant. It shows that the sale under the judgment and execution was valid, notwithstanding the pendency of the suit of Looney and wife, and this position is abundantly sustained by other authority. The other cases cited by counsel of defendant do not sustain his position. They only establish that a valid equity is not affected by a subsequent judgment lien.

Counsel infer too much from the statement of the court in the case of *Nickles v. Haskins*, 15 Ala. 622. In that case the execution debtor had, prior to judgment, given a bond for title, and in performance of his bond he had, after the sale under the judgment and execution, conveyed. The court, following strictly the facts, say: "The defendant in the execution, at the time the land in question was sold, had not executed a deed pursuant to his bond, and consequently had a legal title which might be sold and conveyed by the sheriff." The court are not to be understood as intimating that, had the defendant in execution executed a deed pursuant to his bond before the sale under execution, he would have had no legal title which could be sold. They confine themselves to the facts of the case before them. The deed in that case, which was executed pursuant to the bond given before the judgment under which the plaintiff claimed was in fact executed, not only after the judgment, but after the sale and conveyance made by the sheriff; and the court, in deciding against the title under the deed, stated the fact respecting the time of its execution without at all intimating that the title would have been any better had the deed been made before the sale by the sheriff. The bond, say the court, would only invest the defendant with a mere

equitable title, etc., etc., and such title cannot be set up as a bar to a recovery in ejectment. That the inference which defendant's counsel would draw from this case is incorrect, may be conclusively shown by the subsequent case in the same court, of *Sellers v. Hayes*, 17 Ala. 749. It appears that in this case Beck obtained a patent for the land in controversy, August 8, 1832. Immediately afterwards, in 1832, he sold the land to Varner, who paid the purchase money, and in 1835 and 1836 entered into possession. Varner assigned his bond for title to Houston, who took possession and retained it until the suit; and in 1842 the patentee, Beck, conveyed to Houston.

On the other hand, the plaintiff showed that on the 17th of May, 1836, a judgment was rendered against Beck in favor of one Brown, for \$250; and in 1844 the land was sold under a pluries execution to satisfy the judgment, the plaintiff becoming the purchaser.

It thus appears that at the time of the judgment Beck had the legal title, and Varner or his assignee, Houston, the equitable title, and that at the time of the sale under the execution Houston had both the legal title and the possession. But the court decide that his legal title at law was inferior to the purchaser's under the execution; and among other cases to which they refer in support of their decision, is *Nickles v. Haskins*, supra.

The court say: "It cannot be denied that a judgment binds the lands of the defendant from the time of its rendition, and the lien thereby created is co-extensive with the limits of the state. *Campbell v. Spence*, 4 Ala. 543. It is equally clear that the legal estate or title alone is bound by a judgment at law, and that a mere equitable title, however perfect it may be, is not bound by a judgment, nor can it be sold under execution. * * * As a judgment binds the legal title, the recovery against Beck in 1836 created a lien on the land in controversy, although in a court of equity Beck would have been held as a mere trustee for Varner, who had paid the purchase money in full and held Beck's bond for title. The sale by the sheriff in 1844 gave the purchasers a title which dates back from the day of the rendition of the judgment, for from that time the land was bound. 3 Ala. 560; 13 Ala. 304. These principles, which we think incontrovertibly settled, show that the legal title of the plaintiff is the oldest; that dates back from the rendition of the judgment, whilst the deed to the defendant cannot have relation back, but gives legal title only from the time of its execution."

The principle decided in this case is supported by numerous decisions in Tennessee, and is, in fact, the general principle everywhere recognized. If there is any opposing decision, my attention has not been called to it. The decision and the doctrines announced in it are entirely conclusive against the claim of defendant, so far as it is founded on his supposed equity and the subsequent decree.

I come now to the matter which seems to be most relied on by defendant, and in respect to which I have, from the opening of the trial, had most doubt. He insists a new trial should be granted, because it does not appear that the land, of which defendant is in possession, is the same land which was sold under plaintiff's execution. But it is to be observed that this question was fairly submitted to the jury, and they have found against defendant. It is not claimed that any improper evidence was submitted to the jury. No ground, therefore, is presented for disturbing their verdict, except such as goes to the submitting of the question to the jury at all. And hence, defendant's counsel insist, with much earnestness, that the levy under which plaintiff claims is void for uncertainty, and that the court should, in consequence of this defect in plaintiff's title, have told the jury to find for the defendant.

After examining all the authorities referred to by defendant's counsel, and after the fullest consideration, I remain of the opinion expressed at the trial, that the levy is not void. It is certainly not as specific as it might have been, but it is, I think, sufficiently specific to distinguish with reasonable certainty the land levied on from other lands owned by Pfannenstiehl.

The levy describes the land as "a tract of land in the strip * * * between the old and new state line of Tennessee, containing 159 acres, known as the northwest quarter of section seventeen (17) and the John Devine Place," levied on as the property of Charles Pfannenstiehl.

Here is much more particularity and minuteness of description than any of those which were held void in the cases referred to by counsel. In *Pound v. Pullen*, 3 Yerg. 338, the land levied on was not otherwise described than as "eight thousand acres of land, lying in four different tracts." In *Brown v. Dickson*, 2 Humph. 395, as "lot No. — in the town of Greenville"; in *Huddleston v. Garrott*, 3 Humph. 629, as "all the unsold land of the heirs of McIver in the bounds of Overton county and which lies within the bounds of the forty thousand acre tract, granted by the state of North Carolina to Stockley Donelson and William Terrell by grant No. 289"; in *Taylor v. Cozart*, 4 Humph. 433, as "three tracts of land, one containing 300 acres; another 50 acres, and another 110 acres, all in the county of Carroll—the property of H. Cozart; and in *Lafferty v. Conn*, 3 Sneed, 221, as "350 acres of land the property of Edmond Collins."

Now, in all these cases it will be seen that the description is so vague that it does not, except perhaps in the case of *Huddleston v. Garrott*, furnish the slightest clue to the locality of the land referred to; and, if the description in the present case were like any of these, I should not hesitate to pronounce it void. But it is not at all like any of them. It is more like the case of *Parker v. Swan*, 1 Humph. 80, and *Trotter v. Nelson*, 1 Swan, 7, respectively. In the former the levy was "on the right, title,

claim and interest that John Dock has in and to 70 acres of land lying on the west fork of Stone's river;" and in the latter the levy was on "two tracts of land of the defendant John Colter lying in Sevier county, in the 6th district; one of said tracts containing 122 acres, and the other 140 acres," etc.

In the course of their opinion in the latter case the court say: "There can be no uncertainty in the matter, unless it should happen that the same person has other tracts in the same civil district containing the same quantity of acres, which is very improbable."

The description which I am asked to pronounce void, is much fuller than that which the court here adjudged good, and the language here used by the court may be employed in the present case, *mutatis mutandis*.

There can be no uncertainty in the matter, unless it should happen that Pfannenstiehl owns two northwest quarter sections in the strip between the old and new state lines of Tennessee, each containing one hundred and fifty-nine acres; which is very improbable.

It rarely happens that a description in a deed or levy of land can be so certain as to dispense with all parol proof to fix its identity, and nothing is better established than that such proof may be resorted to when the description is not on its face so vague as to render it void. There is nothing vague on the face of the description here. I do not know that there is more than one northwest quarter section No. 17, in the strip referred to in the levy—especially do I not know that there is more than one northwest quarter section which belongs to Pfannenstiel, and still more especially do I not know that there is more than one northwest quarter section No. 17 in that strip which belonged to Pfannenstiel and containing only one hundred and fifty-nine acres.

The levy not being void on its face, the case was properly submitted to the jury, and I think they were more than authorized to find as they did. The motion for a new trial is therefore overruled.

In conclusion I must be permitted to say: First, that in my opinion, Wolf was not only a proper, but a necessary party to the suit of Looney and wife against Pfannenstiehl, and that as he was not a party thereto he is not concluded by the decree rendered therein. Second, that if Looney and wife have any equity which is good, and which was subsisting when Wolf obtained his judgment—they can assert it in a court of equity, and in a court of equity only.

WOLF (RUTHERGLEN v.). See Case No. 12,175.

Case No. 17,927.

WOLF v. The SELT.

[See Case No. 12,649.]

Case No. 17,928.

WOLF et al. v. SMYTHE.

[7 Biss. 365; 1 9 Chi. Leg. News, 175.]

Circuit Court, N. D. Illinois. Feb. 5, 1877.

BILL OF LADING—BONA FIDE HOLDER—DEDUCTIONS FOR AGENT'S COMMISSIONS.

Although the bona fide holder of a bill of lading is entitled to the proceeds, the consignee has the right to deduct his commissions, and also the charges and insurance advanced by him.

[This was a suit by Aaron Wolf and others against John G. Smythe.]

H. G. Lunt, for plaintiffs.

Leffingwell & Johnson, for defendant.

BLODGETT, District Judge. This case was tried several weeks since by a jury, and a judgment rendered for \$685.88. The suit was brought to recover the proceeds of four car loads of wheat, shipped by a man named Belden, to the defendant, Smythe, which the plaintiffs claim was duly assigned to them by Belden, and that they are entitled to the proceeds. It appears that Belden was a wheat buyer in Iowa, and the plaintiffs are bankers. The plaintiffs, in due course of business, advanced money to Belden with which he bought the wheat and shipped it to the defendant, who is a commission man in this city, for sale. Smythe received the wheat in question and sold it.

The evidence shows that Belden, on the shipment of the wheat, passed the bills of lading over to the plaintiffs, who had advanced him the money, and they made the drafts, and the drafts and the bills of lading came forward together, were duly presented to Smythe for payment, and he instead of paying the money on the drafts, passed it over to Belden's private or general account. This question has been up several times before the court, and the rulings have been uniform, that the party holding the bill of lading on a draft of that kind is entitled to the proceeds. So there is no necessity of re-discussing the law in that case. The trial, however, was an *ex parte* trial, and the court allowed plaintiffs to recover the full amount of the drafts at the time of the trial. The defendant was not represented. Pleas were in, but the pleas were the general issue.

The defendant shortly afterwards entered a motion for a new trial, and the matter came up on affidavits, and in the course of the discussion and disclosure of facts, it appears that no credit was given to the defendant, Smythe, for the charges which he paid upon this wheat. The wheat was shipped forward to the defendant, in this city, to be sold by him, and he advanced the charges and insurance, and was entitled to his commission. No credit was given him for the charges and commissions, but the plaintiffs

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took the judgment for the full amount of the drafts with interest to the time of the trial. Smythe now comes in with some affidavits showing that the net proceeds of the wheat were only \$578.57. Judgment was rendered for \$685.88. I have no doubt that the defendant is entitled to that reduction, and therefore the judgment should be reduced to \$578.57 by remitting \$107.31. A remittitur of \$107.31 will be entered.

WOLF, The DAVID E. See Case No. 3,594.

WOLFE (BAIRD v.). See Case No. 760.

Case No. 17,929.

WOLFF v. CONNECTICUT MUT. LIFE INS.
CO

[2 Flip. 355; 8 Ins. Law J. 97; 7 Reporter, 357.]¹

Circuit Court, E. D. Michigan. March, 1879.
LIFE INSURANCE—SUICIDE OF ASSURED—INSANITY.

Although neither an act of suicide, nor an attempt, nor a threat to commit suicide alone creates such a presumption of insanity as would justify a jury in finding a party insane, such an act may properly be considered in connection with the previous demeanor and conduct of the party as an item of testimony tending to prove insanity.

Motion for a new trial. The action was upon a policy of insurance, which insured the life of Henry Wolff, in the amount of \$2,000. Defense was made that the assured committed suicide; which was a risk not covered by the policy; to which the assured replied that he was insane at the time he took his life. The case was brought before a jury and a verdict rendered for the full amount of the policy and interest. The motion was made for a new trial upon the ground that the evidence admitted to go to the jury to the effect that the assured was insane at the time he took his life, was improper.

The evidence of insanity consisted of certain eccentric and temporary hallucinations, occurring from about a year and a half up to about three months before the suicide; the first of which occurred about a year and a half before his death when he was walking home, at noon, with his brother. The latter relates the incident as follows: "It had rained before, and there was a puddle of water standing on the sidewalk, and when he came there he slapped me on the arm and says, 'See! there is money, can't you see? I will make money out of that. That is the biggest thing in the world to make money out of.' I laughed at him, and I says, 'What is the matter with you, are you out of your mind, or what ails you?' 'Don't you see that dog,' he says, 'he is chasing me. Why he follows

me all the time.' There was no dog there. He went to dinner as usual and returned to his work in the afternoon." At another time he awoke his wife in the night and wanted to know if she didn't hear singing outside. He said he thought he heard them singing just as in church. It appears that no person was there. Shortly after this incident he retired and went to sleep, and in the morning was up about his business as usual. His wife relates another occurrence as follows: "Then again he got up in the middle of the night when it was raining and thundering. When I woke up he was off. I didn't know where he was. I got up and made the light and waited about an hour and then he came, and he had been up on top of the house and was all wet. I didn't know where he was, and I asked him and he said he had been on top of the house. He did that two or three times in one summer, the last summer of his life. He said it was very nice on top of the house when it rained; he liked it. * * * Again: he woke up one night and wanted to go off; I had just been sick and I could not follow him. He got up in the middle of the night, in his night clothes—as I was I could not go—and took the key out of the door, and he got up and went off. He just put on slippers and went off with nothing on. About five o'clock in the morning a policeman came and wanted some clothes for my husband. He said they had him in the police station and they wanted some clothes for him to put on; he often did that nights. This was in the summer before his death." At another time his brother relates that "he came to my house very early in the morning, about five o'clock, knocked on the door and I got up out of bed and asked him what was the matter. He says, 'Can you see all those men out there? All these men want to kill me, every one of them. Don't you see them? Every one, straight up there on the whole street want to knock me down.' I says, 'What is the matter with you. Come here and sit down.' My wife gave him a cup of coffee and he sat down, but he talked of different things, took his coffee and went off. He went to work after breakfast as usual." On another occasion he came into the store in the middle of the afternoon, locked the door, and taking the key, went up stairs where his brother was and made some remarks betraying hallucination and temporary derangement. At another time he came up stairs where his men were at work and compelled one of the men to walk up and down the room briskly forty or fifty times. This was because he thought he had been slow about some errand. He bought a horse, after that, for \$120, but not being satisfied tried to sell him to his clerk for twenty-five cents. The clerk paid the money. At night when he went home he found the horse at his stable, Wolff having ordered his teamster to take him there. The next day the clerk says, "I told him I was only joking when I gave

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 7 Reporter, 357, contains only a partial report.]

him the twenty-five cents; that I would like to have him taken the horse back; 'No,' he said, 'I was sick of my bargain;' he did not want the horse; so I kept him. I offered it to him several times. He would not take it back until after he died, I gave it back to Mrs. Wolff." At another time his sister-in-law came with her husband, on Sunday, to his house. Wolff told her he did not want her there, and she must go home. This seemed strange to his wife as he had always before been glad to see her when she came. On the day he died, a female acquaintance and friend of the family came to visit at his house. Wolff sent her home, so much to his wife's chagrin that she went home with her. On her returning she found her husband lying upon the sofa with a discharged pistol in his hand. The testimony showed that several times within this time he threatened to take his own life, declaring to his brother that he would not live longer. He had returned home from his work on the occasion of dismissing the friend of his wife, as above stated, and soon after shot himself. This was, substantially, all the testimony tending to show insanity.

Trowbridge & Dowling, for plaintiff.

C. I. Walker and A. B. Maynard, for defendant.

BROWN, District Judge. In considering whether there was sufficient evidence of insanity to be submitted to the jury, it was insisted at the outset of the argument that the act of suicide in itself was no evidence of mental aberration, and, indeed, it was conceded that, standing alone, it would not be sufficient proof to justify a verdict for the plaintiff. I find no case which goes further than this. In *Terry v. Insurance Co.* [Case No. 13,839], and *Coverston v. Connecticut Mut. Life Ins. Co.* [Id. 3,290], it is stated, "There is no presumption of law, prima facie or otherwise, that self-destruction arises from insanity." In *Moore v. Connecticut Mut. Life Ins. Co.* [Id. 9,755], Judge Longyear says, "The fact of suicide is not, in itself, evidence of insanity." In *McClure v. Mutual Life Ins. Co.* [55 N. Y. 651], it is said by the New York court of appeals, "Insanity cannot be presumed from the mere commission of this act." The question was fully and ably discussed and considered in *Coffey v. Home Life Ins. Co.*, 35 N. Y. Super. Ct. 314. The court upon the trial at nisi prius charged that, "The law cannot and does not presume that a party, in the full possession of his mental faculties in that normal condition of mind that we call sanity, will deliberately take his own life, and, therefore, as there is no presumption, it favors insanity at the time of the committing of the act of self-destruction. I therefore charge you as a matter of law, that as affecting this case, you must presume that the deceased, when he took his life, was not in a sound state of

mind." This was held to be error, and Chief Justice Barbour, in delivering the opinion, says: "The most that can be said is that, inasmuch as many and perhaps most persons who destroy their own lives, are insane at the time, the fact of such self-destruction itself wholly removes the presumption of sanity." Sedgwick, J. in concurring, also announces that "a judge cannot determine whether an individual case of suicide is the result of insanity; that he cannot make a presumption upon the subject which is a generalization, more or less perfect, from individual cases." The same judge remarked in a subsequent case, in the same volume (*Weed v. Mutual Ben. Life Ins. Co.*, Id. 387): "The mere fact that a man kills himself does not create a presumption that he was insane. The general presumption is that every man is sane until the contrary facts are proved by the facts of the case. Suicide is but one fact which goes to the jury with all the other pertinent facts, for the purpose of getting from them a verdict as to whether the facts prove insanity."

This is the limit of authority upon the subject. It follows, then, that neither an act of suicide, nor an attempt, nor a threat to commit suicide, standing alone, creates a presumption of insanity that would be sufficient to justify a jury in finding the party insane. None of the cases, however, go so far as to say that such an act cannot be considered in connection with the previous demeanor and conduct of the party, as evidence of insanity. Indeed, to say that suicide under no circumstances is evidence of insanity is to contradict the experience of every person who has dealt with the insane. One of the most frequent forms of mental disease is known as the suicidal mania. Dean, *Med. Jur.* 508. The author remarks in connection with this form of derangement: "Another feature it possesses in common with other forms of mental hallucination, is the occasional exacerbations that are continuous; when its symptoms for a time disappear the clouds of melancholy seeming to vanish, and all appearances indicating a return to health and its enjoyments. Again the propensity will reappear and generally, in the end, accomplish its purpose." I think no court could be found to hold that the repeated and causeless attempts to take one's life would not be proper to go to the jury as evidence of insanity. If repeated attempts are evidence, it is difficult to say why a single attempt or an act of suicide may not also be permitted to go to the jury, as there must be a first time. From motives of public policy rather than upon strict philosophical principles, the law has pronounced, and I have no doubt properly, a single act insufficient evidence of mental disease; but in connection with other circumstances it has always been deemed worthy of consideration. In the leading case of *Borradaile v. Hunter*, 5 Man. & G. 639, Erskine, Judge, told the jury that they must

take the act itself into consideration in connection with his previous conduct, and then say whether, at the time of its commission, they thought him capable of knowing right from wrong. So in *Brooks v. Barrett*, 7 Pick. 94; and in *Burrows v. Burrows*, 1 Hagg. Ecc. 109, it is said the law does not consider the act of suicide as conclusive evidence of insanity; but in both these cases it was laid before the jury in connection with other circumstances. See, also, 1 Redf. Wills, 116; *Duffield v. Robeson*, 2 Har. [Del.] 375; *Chambers v. Queen's Proctor*, 2 Curt. Ecc. 415. In all these cases it is inferentially, if not directly, decided that suicide is a legitimate item of testimony.

The rule of the criminal law is the same. From motives of public policy the law will not permit a person charged with larceny to say that the act itself proves him insane, while repeated and causeless acts of the same kind would be the strongest and only possible evidence of a species of mental disorder known as kleptomania. *Dean, Med. Jur.* 502. Instances are by no means rare of ladies whose birth and education would render them abhorrent of a criminal act, and whose circumstances would naturally remove them from temptation, being detected in frequent attempts to steal articles of trifling value, apparently from no motive except gratification of an abnormal passion. Such facts are undoubtedly proper to be laid before a jury, as evidence of kleptomania. A like rule would quite frequently obtain in cases of arson, homicide, and possibly other crimes. In determining, then, whether the evidence of insanity in this case was sufficient to justify a verdict for the plaintiff, I think the fact of the suicide and the threats, made upon the day of the death of the deceased, were proper to be considered by the jury in connection with his previous conduct.

It is insisted, however, that the insane acts, relied upon, were simply eccentricities of demeanor or, at most, temporary hallucinations, which lasted but a few minutes at a time, and ceased entirely some months before his death, leaving him perfectly sane and able to take care of his business. It is quite true there is no presumption of continuous insanity, temporary in its character, but I apprehend in most, if not all the cases, that support that doctrine, that the delusions were connected with some bodily disease, such as fever, pleurisy or delirium tremens, and necessarily ceased with returning health, or that they occurred so long previous to the commission of the act in question there could be no possible presumption of their repetition. *People v. Francis*, 38 Cal. 183; *Staples v. Wellington*, 58 Me. 459, 460; *Hall v. Unger* [Case No. 5,949]; *Knickerbocker Life Ins. Co. v. Peters*, 42 Md. 414; *Carpenter v. Carpenter*, 8 Bush, 283; *Greenl. Ev.* 689.

It does not appear in this case that Wolf was affected with any disorder likely to be

accompanied by insane manifestations. The delusions to which he was subject extended over a period of several months, and recurred without regularity, and apparently without cause. While nothing unusual was observed in his demeanor, for some months before the day of his death, his manner upon that day was such as to attract his brother's attention, and his conduct towards a visitor at his house such as to excite his wife's anger and induce her to leave his house. In this class of cases courts are very loth to take the question of insanity from the jury, and in the recent case of *Charter Oak Life Ins. Co. v. Redel* [95 U. S. 232], the supreme court of the United States said, if there was evidence of insanity the judge could not properly take the case from the jury. While I think there is nothing in this case indicating that the court intended to vary the rule announced in *Pleasants v. Fant*, 22 Wall. [89 U. S.] 116, and that the court would still be justified in disregarding a scintilla of evidence and instructing a verdict for the defendant, I think very great caution should be exercised in withdrawing from their consideration questions of insanity upon which the opinions of men, equally wise, are likely to differ. While it is quite possible there may be a strong bias in this class of cases against insurance companies, this is an argument which should be addressed to the legislature rather than the courts. I think there was no error in submitting the question of insanity to the jury in this case.

This case should be read in connection with *Moore v. Connecticut Mut. Life Ins. Co.* [Case No. 9,755].

WOLFINGER (ROSS v.). See Case No. 12,081.

Case No. 17,930.

In re WOLFSKILL.

[5 Sawy. 385.]¹

District Court, D. California. Jan. 21, 1879.

DISCHARGE OF BANKRUPT—EFFECT OF PREFERENCE.

Where the bankrupt had made a conveyance constituting a preference fourteen months before the commencement of the proceedings, held, that the discharge should be granted notwithstanding. The words "in contemplation of becoming bankrupt" considered.

[In the matter of Berry Wolfskill, a bankrupt.]

James T. Hoyt, for bankrupt.

W. V. Wells and John C. Hall, for creditors.

HOFFMAN, District Judge. The discharge of Roberts, one of the bankrupts, is opposed on the ground that being insolvent, and in contemplation of becoming bankrupt, he

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

made a payment to one of his creditors for the purpose of preferring him over his other creditors, and of preventing the money so paid from coming into the hands of his assignee in bankruptcy, and being distributed under the act. The testimony shows that the payment made was of an honest debt, and although it amounted to a preference, yet it was not made in contemplation of being adjudged a bankrupt; for the present proceedings were not commenced until fourteen months afterwards. It is contended that the words "becoming a bankrupt" mean committing an act of bankruptcy for which the debtor might be adjudged, and the words "in contemplation of becoming bankrupt" mean, in contemplation of committing an act of bankruptcy. In the bankruptcy act of 1841 [5 Stat. 440] the expression used is "in contemplation of bankruptcy."

In *Everett v. Stone* [Case No. 4,577], Mr. Justice Story explains and defines their meaning. He held that they do "not point merely to cases where the bankrupts contemplate a formal adjudication in bankruptcy, either in voluntary or involuntary proceedings, but they extend to cases where the bankrupts contemplate a complete and total stoppage of their business and trade. In short, contemplation of bankruptcy means a contemplation of becoming a broken-up and ruined trader, according to the original signification of the term—a person whose table or counter of business is broken up—*bancus ruptus*."

In *Buckingham v. McLean*, 13 How. [54 U. S.] 168, the supreme court gave for the first time a construction to the phrase. Mr. Justice Curtis delivering the unanimous opinion of the court says, after remarking that at common law conveyances by a debtor to bona fide creditors are valid, even though intended as preferences: "This common law right it was the object of the second section of the act to restrain, but at the same time in so guarded a way as not to interfere with transactions consistent with a reasonable accomplishment of the object of the act. To give to these words 'contemplation of bankruptcy' a broad scope, and somewhat loose meaning, would not be in furtherance of the general object for which they were introduced. The word bankruptcy occurs many times in this act. It is entitled an act to establish a uniform system of bankruptcy, and the word is manifestly used in other parts of the act to describe a particular legal status to be ascertained and declared by a judicial decree. It cannot be easily admitted that this precise and definite term is used in this clause to signify something quite different. It is certainly true in point of fact that even a merchant may contemplate insolvency, and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, and the state of his affairs, and the disposition of his creditors are such that

when they shall have examined into his condition, they will extend the time of payment of their debts, and enable him to resume his business. A person not a merchant, banker, etc., and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of these states not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them would be a departure from sound principles of legal interpretation."

The construction given to the expression by the court was that to render the security void, the debtor must have contemplated "an act of bankruptcy, or an application by himself to be decreed a bankrupt." In the enumeration in the act of 1841 of the cases in which a debtor may be adjudged, the giving of a preference is not mentioned. But by the act of 1867 [14 Stat. 517] a preference given in contemplation of bankruptcy or insolvency is declared to be an act of bankruptcy (section 30); and under section 35 the transaction may be avoided by the assignee, if the proceedings in bankruptcy be commenced within the prescribed period, and the creditor had the reasonable cause for belief and the knowledge mentioned in the section. It has, therefore, been held that the words in contemplation of becoming bankrupt mean in contemplation of committing an act of bankruptcy, and that inasmuch as a preference by an insolvent, or by a person in contemplation of insolvency, is an act of bankruptcy, such a preference must be deemed to have been given "in contemplation of becoming bankrupt."

In *Re Goldschmidt* [Case No. 5,520], Mr. Justice Blatchford refused a discharge to a bankrupt who had made an assignment of all his property for the equal benefit of all his creditors more than ten months before the commencement of the bankruptcy proceedings, holding that the assignment was made with intent to hinder and delay his creditors, and to prevent his property from coming into the hands of the assignee. But in *Re Freeman* [Id. 5,082], the same learned judge held that a transfer of property alleged to be fraudulent made nine months before the filing of the petition, was not fraudulent within the meaning of the act.

The same construction of the clause in question appears to have been adopted by Bradford, J., in *Re Pierson* [Case No. 11,153]. And in *Re Jones* [Id. 7,446], Mr. Justice Lowell held that preferences given without regard to the bankruptcy, and more than six months before the filing of the petition, could not be set up in opposition to a discharge. This case is a strong one, for it was alleged that a previous proceeding in the state of Maine had been dismissed "for the purpose of getting rid of the objection that the preferences had been given within four months of the petition in that case." See, also, *In re*

Locke [Id. 8,439], and *In re Burgess* [Id. 2-153].

In the case of *In re Lutgens* [unreported], this court followed the ruling of Mr. Justice Blatchford in *Re Goldschmidt* [supra], but the point was not very carefully considered as a clearly fraudulent conveyance, made with intent to hinder, delay and defraud creditors appeared to have been made. In *Re Kafore* [unreported], Mr. Justice Wallace held that a general assignment made in good faith, and without preferences, was an act of bankruptcy, and would defeat a discharge, notwithstanding that it was made more than six months before the filing of the petition.

In *Re Warner* [Case No. 17,177], to which I have been referred, the point under consideration did not arise as the preferences were given about a month before the filing of the petition. In *Re Cretiew* [Id. 3,390], the ground of objection was actual fraud. It will be seen from the foregoing that the authorities are conflicting.

I confess that I am not wholly satisfied with the construction of the clause in question, which treats every technical preference upon which an adjudication might be made as given "in contemplation of becoming bankrupt," because, being "an act of bankruptcy," it renders the debtor liable to be adjudged a bankrupt.

Were it not for the fact this construction seems to have been generally adopted, I should have been disposed to hold that the expression "in contemplation of becoming bankrupt" was intended to mean the contemplation of becoming a bankrupt, i. e., of being so adjudged, as the observations of the supreme court above cited seem to imply, or else the contemplation of the condition of affairs described by Judge Story in *Everett v. Stone* [supra], viz., the contemplation of a complete and total stoppage of the debtor's business and trade, and of becoming a broken-up and ruined trader.

This construction would preserve the distinction between a "contemplation of becoming bankrupt," as mentioned in section 29, and the contemplation of bankruptcy, or insolvency, as mentioned in section 39. But with regard to the second point, the weight of authority seems to be that to constitute "the fraudulent preference under this act," mentioned in section 29, it must have been such as are mentioned in section 35 and section 39, and have been given within, at most, six months preceding the filing of the petition. See *In re Harper* [Case No. 6,085].

I adopt this construction not without grave misgivings. It is open to serious objections. But it avoids the seeming incongruity of refusing a discharge on account of a preference which constituted an act of bankruptcy, when that preference could not, at the time of the commencement of the proceedings, have been the basis of an adjudication. If, after the expiration of six months, an act of bankruptcy committed by the debtor can

no longer be alleged against him in proceedings in invitum, it would seem reasonable that a similar prescription should run in his favor, when the commission of the same act is urged as an objection to his discharge.

On the whole, though with considerable hesitation, I decide to grant the discharge.

WOLGA, The (CHATFIELD v.). See Case No. 2,632.

Case No. 17,931.

WOLVERTON v. The ALLEGHENY.

[The case reported under the above title in 1 Chi. Leg. News, 81, is the same as Case No. 205.]

Case No. 17,932.

WOLVERTON v. LACEY.

[18 Law Rep. 672.]

District Court, N. D. Ohio, Feb., 1856.

CONSOLIDATION OF ACTIONS—DEBT FOR PENALTIES UNDER ST. 1790, CH. 29, § 1 (1 STAT. 131)—DECLARATION IN—FEMALE SEAMEN—SHIPPING ARTICLES—MARITIME JURISDICTION ON THE LAKES.

1. Where the plaintiff has several causes of action which may be joined, one suit only should be brought; otherwise, the court will compel a consolidation with costs of the application therefor.

2. In an action of debt, to recover several penalties under the act of congress of 1790, c. 29, § 1, against the master of a vessel for shipping seamen without articles, a single count for all the penalties is sufficient.

3. A female shipped on board a vessel as cook and steward is entitled to all the rights and subject to all the disabilities of a seaman or mariner, and the provisions of the statute concerning shipping articles apply as well to such cook and steward as to the sailor before the mast.

4. The provisions of this act, imposing a penalty on masters of vessels in the merchant service for shipping seamen without articles, extend to the merchant marine upon the lakes and public navigable waters connecting the same.

5. Independent of the act of congress of February 26, 1845 (5 Stat. 726), under the constitution, the maritime law of the United States has the same application to cases upon the lakes as upon tide waters.

At law.

John Crowell and F. T. Wallace, for plaintiff.

D. K. Carter and D. O. Morton, Dist. Atty., for defendant.

WILLSON, District Judge. This is an action of debt, brought to recover penalties under the first section of the act of congress of July 20, 1790. The declaration contains but one count, and is, as to form and material averments, substantially in accordance with the established precedents for declarations on penal statutes. The plaintiff alleges that the defendant, on the 6th of May, 1855, was master of the schooner Yorktown, a vessel

of over fifty tons burden, and navigating the waters of the lakes, and that with her he made a voyage from Cleveland to Chicago. That he employed and shipped on board for said trip, at Cleveland, ten persons as seamen in various capacities, one of the ten a female cook. That said voyage was performed with such crew, none of whom had signed shipping articles of agreement, as required by the statute. Whereby he insists that the defendant has forfeited the sum of twenty dollars for each of the persons so employed, and thereby claims that an action *qui tam* hath accrued to him, to recover for himself and the United States the aggregate sum of two hundred dollars.

The defendant's plea is *nil debet*. During the progress of the trial several questions have been raised by the defendant's counsel, and argued on both sides with much ability. One ground taken is, that separate suits should have been brought for each penalty. Another is, that if it is competent to consolidate in one suit the actions to recover the several penalties, then the declaration should contain separate counts for each penalty. The third and main point is, that the first section of the statute of 1790 has no application to the merchant marine of the lakes.

This action is properly brought so far as relates to the consolidation in one action of the suits to recover these penalties. The law abhors an unnecessary multiplicity of suits. Where a plaintiff has two or more causes of action which may be joined in one, he ought to bring one suit only; and in such case, if he commences more than one, he may be compelled to consolidate them, and pay the costs of the application. 1 Chit. Pl. 228. This is a principle of law designed to protect a defendant from an unreasonable accumulation of costs. In this case, had the plaintiff commenced ten different suits, the court, on motion, would have ordered a consolidation at his costs.

We are equally clear that the second objection is not well taken. If the action of debt is the proper mode to recover penalties accruing under this statute (and this seems not to be questioned), then a single count is sufficient. It matters not whether it is alleged that the defendant shipped one or a dozen seamen without articles for the voyage, provided the plaintiff in his declaration has set forth specially and accurately the facts bringing the defendant within the statute declared on. The object and purpose of pleading is to apprise the opposite party of the facts constituting the cause of complaint against him; and they should be set forth with sufficient certainty, that the record may be a protection against future recovery. We do not see how the defendant would be better informed as to the subject-matter of the suit, and thereby be enabled to make a better defence, had this declaration contained a count for each penalty. Each seaman is

named and described, to the number of ten, the full complement of the crew on the particular voyage. The defendant is thus as fully informed of the acts complained of, as if particularly set forth in separate counts. It is competent to embrace in one count several penalties upon a penal statute. *People v. McFadden*, 13 Wend. 396.

Equally well settled is another point raised in the case, *viz.* that a female may be entitled to all the rights and subject to all the disabilities of a seaman or mariner. Since the decision of Lord Stowell in the case of *The Jane & Matilda*, 1 Hagg. Adm. 187, this doctrine has been fully recognized by the courts of England and the United States. It is now well determined that the term "mariner" includes cooks, stewards, carpenters, coopers, and firemen as well as sailors. In fact, all on board the vessel, employed in her equipment, her preservation, or the preservation of the crew, are denominated "seamen." And hence services performed by a female in the capacity of cook, entitle her to a proceeding in rem to recover her wages therefor as a mariner. *Thackarey v. The Farmer of Salem* [Case No. 13,852]; *Conk. Adm. 72*; *Fland. Mar. Law, 354, 355*. The requisition of the statute, therefore, as to signing shipping articles, extends as well to the cook or steward as to the sailor before the mast.

Without further discussion of questions which may be regarded as incidental to the main matter in controversy, I proceed to the inquiry, does the act of July 20, 1790, extend to and become operative for the government and regulation of seamen engaged in the merchant service on the lakes? This question has been raised and argued by counsel as if this suit was a proceeding in the admiralty, and in its determination, the court should apply the rules and be governed by the principles of admiralty law. It is insisted that the statute of 1790 never was intended for, and in fact never had any binding force and effect on waters not subject to admiralty jurisdiction; that until 1845 there was no admiralty law applicable to the lake marine; that the act of February 26, 1845, extending the jurisdiction of the district courts to certain cases upon the lakes, in providing, "that the maritime law of the United States so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits," vested in the courts judicial power to determine the question of the applicability of the statute of 1790 to the lakes. And the defendant resists such application on the ground of public policy; that it would be detrimental alike to seamen and owners of vessel property; that the requirements of the statute have never been enforced here, owing to the want of adjudged cases as authority, and that it would be as difficult to make seamen sign shipping articles as required by the first section, as it would be absurd to enforce the provisions of the eighth section

as to vessels engaged in the Canada trade. This court has cognizance of this suit by virtue of the ninth section of the act of 1789 [1 Stat. 76], which declares that the district courts shall have exclusive original jurisdiction of all suits for penalties and forfeitures under the laws of the United States. This proceeding is not a suit in a case of admiralty and maritime jurisdiction. It is a common law action, and the process, pleadings, and proceedings are in accordance with the practice and principles of the common law.

But suppose we grant the point claimed by the defendant, viz. that the statute of 1790 is operative only on waters subject to admiralty and maritime jurisdiction, wherein does this benefit the defendant? In passing the act of 1845 (at least in the provisions before referred to) congress performed a work of supererogation. Since the decision in the case of *The Genesee Chief v. Fitzhugh*, 12 How. [53 U. S.] 443, it has been a settled principle of law, that admiralty jurisdiction is not confined to tide water, but extends to the public navigable waters of the United States. The narrow and restricted definition of "tide-water admiralty jurisdiction," as declared by the courts of England and explained by English writers on the subject, is now rejected by the federal courts. The supreme court has boldly, and we think wisely, overruled the case of *The Thomas Jefferson*, 10 Wheat. [23 U. S.] 428, and the *Orleans v. Phœbus*, 11 Pet. [36 U. S.] 175; and in so doing has shown the unreasonableness of giving a construction to the constitution which would measure the jurisdiction of the admiralty by the tide. The great and increasing magnitude of the commerce of the lakes, and the almost fabulous increase of the lake marine, has finally caused the courts to pause and inquire, whether, in all its varied rights and business arrangements, there is anything to distinguish this great lake commerce from the other maritime commerce of the world. It has been truly said that "a salvage, an average, a bottomry, a case of wages on Lake Erie, are as clearly cases of admiralty and maritime jurisdiction, and have reason to be subject to the same rules and regulations of maritime law, as similar cases on the Black Sea, the Baltic, or on Long Island Sound. Their nature is the same everywhere—they are maritime everywhere." It is not surprising, therefore, that for the purpose of extending equal justice to all, the supreme court should have departed from its narrow construction of the constitution, as given in the case of *The Thomas Jefferson*, and placed the admiralty jurisdiction upon a basis of perfect equality in the rights and privileges of the citizens of the different states, not only in the laws of the general government, but in the mode of administering them. This is done in the case of *The Genesee Chief*.

Independent of the act of 1845, under the constitution, the maritime law has the same application to cases upon the lakes as to those upon tide-waters. Congress, doubtless, has

the power to prescribe the mode of proceeding in admiralty, as was done by the act of 1845, in saving to the parties the right of trial by jury. The admiralty jurisdiction on the lakes, however, lies deeper and beyond the act of 1845. Hence the objection that the statute of 1790 is operative only on waters subject to the admiralty jurisdiction, has no force in the case. Besides, there is nothing in the language of the law of 1790 restricting its operations to cases upon tide water. Its language is, "every ship or vessel," "every seaman or mariner," without any allusion to salt water or the tides; clearly covering all cases of seamen employed and serving on ships or vessels engaged in the merchant service on the public navigable waters of the United States. The registry and enrollment act of 1793 [1 Stat. 287] is not more specific than this as to the waters on which it should apply; yet its binding force and effect upon the shipping of the lakes has never been questioned or disregarded in practice.

Aside from the importance of divesting the law of its uncertainty, it is in our opinion equally important as a matter of public policy, that the first section of the act of 1790 should be enforced here. The loss of life and property on the lakes is annually on the increase. From authentic sources it is ascertained that in the single year of 1854, the loss of life was one hundred and nineteen persons, and the loss of property \$2,187,285 by disaster. These alarming facts induced this court, at a recent session of the federal grand jury, to call the attention of that intelligent body to this subject; and the jurors were instructed to inquire whether these losses were occasioned by the noncompliance with the statute of 1849 [9 Stat. 380] in relation to signal lights, and the steam vessel acts of 1838 [5 Stat. 304] and 1852 [10 Stat. 61]. The grand jury, after devoting much time and examining a great number of witnesses, reported to the court, among other things, "that a frequent cause of disaster on the lakes has been the want of sufficiency of seamen and a lack of efficiency in them, and a want of control on the part of masters of vessels over their men. This results in a great part from the neglect of masters of vessels to comply with the statute requiring them to have their men sign shipping articles. Insubordination results at times when legalized authority is most needed. The men abandon the vessel (perhaps in the first port), and she is obliged to return, it may be, without an adequate supply of hands, or if there is, a continual changing makes them always strangers to the vessel and the ways of working her." We are satisfied that a just and fair interpretation of the law, as well as the dictates of a sound public policy, demand the enforcement of the first section of the statute of 1790.

This brings us to the testimony in the case. It is in evidence that in May, 1855, the schooner *Yorktown* (of which the defendant was master) was a registered vessel of over fifty

tons burden, and that she made the trip from Cleveland to Chicago with a crew of ten persons, as charged. Four only of the persons employed on the vessel for the trip have been sworn and examined in the case. These are Daniel Chottison and his wife Jane, Samuel W. Wolverton and Robert McKay. They all testify that on or about the 5th of May, 1855, they were shipped on board of said vessel at Cleveland, in the various capacities of mate, sailor, and one of them, Jane Chottison, as cook; that they made the trip from Cleveland to Chicago and back, and that neither of them signed shipping articles, and that they had no knowledge of any such papers on board the vessel. Neither of the witnesses were able to state whether the remainder of the crew signed shipping papers or not. Some conversation had in the presence of the defendant, between two of the crew, at the time they were paid off and discharged in Chicago, is in evidence, tending to show that they also had not signed articles. But the conversation was not addressed to the defendant, and it is doubtful whether he, in fact, heard it; at all events, it is too vague and uncertain to justify the court in giving it any weight. As to the remaining six men of the crew, there is no evidence before us that will warrant a charge of delinquency of the defendant and subject him to penalties. We therefore pronounce for four penalties, and judgment is accordingly rendered against the defendant for the sum of \$80 and costs of suit.

Case No. 17,933.

WONSON v. GILMAN et al.

[2 Ban. & A. 590; 1 11 O. G. 1011.]

Circuit Court, D. Massachusetts. April 13, 1877.

INFRINGEMENT OF PATENT — PAINT FOR SHIPS' BOTTOMS.

A patent for paint for preventing the fouling of ships' bottoms, and composed of (1) a suitable medium, (2) the oxide of copper yielding a poisonous solution in water, and (3) mineral matters separating the particles of the oxide, and retarding such solution, is not infringed by a paint containing a similar medium and similar mineral matters for retarding solution, but, in place of the oxide, containing arsenite of copper.

[This was a bill in equity by Augustus H. Wonson against Sumner Gilman and others, for the infringement of letters patent No. 40,515, granted to Tarr & Wonson, November 3, 1863, reissue Nos. 4,598 and 4,599, granted October 17, 1871.]

Browne & Holmes, for complainant.
A. A. Ranney, for defendants.

SHEPLEY, Circuit Judge. The patent in this case, so far at least as division B is concerned, was sustained by the court in the case

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

of Tarr v. Folsom [Case No. 13,756]. It was there decided to be for an improved paint to prevent the fouling of ships' bottoms by the adhesion of barnacles, sea-weeds and other substances, a paint which can be applied with a brush like ordinary paint, and which is compounded of, first, a suitable vehicle or medium; second, the oxide of copper, yielding a poisonous solution in water; and, third, such earthy and mineral matters as separate the particles of the oxide and retard such solution. That case did not necessarily involve, nor does the present case, any decision as to division A, for, if the defendants infringe in this case, the infringement is of division B, as defendants use the suitable vehicle, and also earthy and mineral matters which retard the solution of the poisonous ingredient, and if that poisonous ingredient be an oxide of copper, then they use all the elements of the combination in division B.

The real question presented in this case is one of infringement only, and the solution of that question is dependent upon the other question, whether the poisonous substance which is used as an ingredient in the defendants' paint can, within the limitations of complainant's patent, and within the terms also of the contracts between the parties, be properly classed as an oxide of copper, or as such an equivalent of the oxide of copper as is not disclaimed in the patent, or licensed to be used by the contract between the parties.

Certain agreements between the parties, which are in evidence, contain stipulations that the defendants shall not be prevented thereby from "the making, compounding, using or vending of any paint wherein metal, copper, or the sulphurets, sulphates or sulphides of copper are ingredients, whether with or without a suitable basis, and whether used alone or with any other preservative ingredients except only the oxide of copper."

By the terms of the patent, and according to the principles upon which the complainant's patent, in view of the state of the art, was sustained in Tarr v. Folsom [supra], the patent is limited to the use of oxide of copper, and does not embrace, as equivalents for the oxide, any of the salts of copper, however poisonous. The defendants use, as the poisonous ingredient, in their paint, the arsenite of copper, prepared by precipitating the copper from a solution of the sulphate, chloride or nitrate of copper with arsenite of soda.

Inasmuch as the salt of copper used by defendants, which was generally the sulphate of copper, was a substance composed, according to the old nomenclature in chemistry, of oxide of copper on the one side and sulphuric acid on the other, or, according to the new nomenclature, as sulphuric acid in which two atoms of hydrogen have been replaced by copper, the salt being expressed as one whole, consisting of copper, oxygen and sulphur, it necessarily results that as oxide of copper, according to the old notation, or oxygen and copper, according to the new, can

be found by analysis of the sulphate of copper, so in like manner these same elements can, by analysis, be found in the basic arsenite of copper prepared by precipitating the copper from a solution of the sulphate of copper with arsenite of soda.

Accordingly, we observe that several chemists of distinction, examined as experts in the case, find, by analysis of the defendants' paint, oxide of copper; but they admit that the arsenious acid and the oxide of copper were chemically combined. If sulphate of copper were used in the defendants' paint, and such use of sulphate of copper is admissible without infringement, under the license given both by the disclaimer in the patent and the stipulation in the agreements, an analysis of the paint would show the oxide of copper. So, after the conversion of the sulphate of copper into arsenite of copper, by the use of arsenite of soda, an analysis of the paint into which the arsenite of copper enters as an ingredient, will show the presence of copper and oxygen. But these elements, in their new chemical combinations in the new substance, a basic or tribasic arsenite of copper, cannot strictly be said to exist as an oxide of copper, with any more propriety than metallic copper, or arsenic, can be said to exist, as such, in the sulphate of copper or the arsenite of soda. Nor was arsenite of copper a known equivalent for the oxide of copper as a poisonous ingredient in a marine paint, at the date of complainant's patent.

Without undertaking to decide upon the different theories, respecting chemical combinations, maintained by the eminent chemists who have been examined by the respective parties, after a careful examination of all their testimony, I am satisfied that this case must be decided on the practical views above expressed. The conclusion is, that the paint of the defendants, manufactured in the manner testified to by Professor Ordway, is not an infringement of the complainant's patent. Bill dismissed.

[For other cases involving this patent, see note to Tarr v. Webb, Case No. 13,757.]

Case No. 17,934.

WONSON v. PETERSON et al.

[3 Ban. & A. 249; 13 O. G. 548.]

Circuit Court, D. Massachusetts. March 11, 1878.

REISSUE OF PATENT—VALIDITY—INFRINGEMENT—PAINT FOR SHIPS' BOTTOMS.

1. The validity of division B of reissued patent No. 4,599, dated October 17th, 1871, granted to James G. Tarr and Augustus H. Wonson, reaffirmed. Tarr v. Folsom [Case No. 13,756] followed.

2. Doubts expressed as to the validity of division A of the said reissued patent.

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

3. The defence that the reissue is invalid on the ground that the patent does not contain a sufficient specification of the proportions of the ingredients to meet the requirements of the law, unless set up in the answer, cannot be considered.

4. The defendants held to infringe division B of complainant's patent by the use of sulphuret of antimony in combination with oxide of copper and a suitable vehicle or medium, notwithstanding that, to the oxide of copper is added a small quantity of arsenite of copper or arsenate of copper, or both, it appearing that sulphuret of antimony is an earthy or mineral matter which dissolves in water more slowly than the oxide of copper.

[This was a bill in equity by Augustus H. Wonson against Benjamin D. Peterson and others for the infringement of letters patent No. 40,515, granted to Tarr & Wonson, November 3, 1863, reissue Nos. 4,598 and 4,599, granted October 17, 1871.]

Causten Browne and Browne, Holmes & Browne, for complainant.

Chauncey Smith and Shattuck, Holmes & Munroe, for defendants.

SHEPLEY, Circuit Judge. In the case of Tarr v. Folsom [Case No. 13,756], this court decided that division B of the reissued patent to Tarr and Wonson was not void by reason of describing an invention different from the one described and claimed in the original patent, because the original patent clearly suggested a marine paint composed of oxide of copper, an earthy or mineral base, and a vehicle or medium. A doubt was then entertained by the court, which it has since had occasion, on a motion in another case for a preliminary injunction, to express, that division A could not be sustained for a paint compounded of two only of the ingredients, viz.: oxide of copper and a vehicle or medium. But, after careful re-examination in the light of the more elaborate discussion of the question in this case, the court adheres to the opinion that the invention substantially, though not accurately and fully described in the original patent, is the one more accurately and clearly described in the reissue division B. The object of the reissue was to correct this inadvertence in the original description. There is no ground to conclude that it was intended to embrace something not invented by or known to the patentee at the time of his original application. The marine paint he described and made and sold had the three ingredients described and claimed in division B. The substance he mixed with the vehicle or medium was a substance produced by roasting the pyritous friable ores, the exposure to air and heat converting the contained copper into an oxide, and the other mineral and earthy substances remaining after the roasting serving in the paint to interpose, between the particles of oxide of copper, substances which dissolve in sea-water more slowly than they do.

An objection is raised, in argument, against the validity of the reissue, on the ground that

the patent does not contain a sufficient specification of the proportions of the ingredients, to meet the requirements of the law. This defence is not set up in the answer and cannot be considered. *Goodyear v. Providence Rubber Co.* [Case No. 5,583]; *Rubber Co. v. Goodyear*, 9 Wall. [76 U. S.] 793.

The defence of the anticipation of this patent by the Wetterstedt patent was fully considered in *Tarr v. Folsom* [supra]. The disclaimer, in the Tarr and Wonson patent, of such mixtures as are referred to in the Wetterstedt patent should be construed as the Wetterstedt patent itself is to be construed. That patent describes a ship's paint to be made of pulverized antimony and pure oxide of copper, in which a protective influence of the antimony upon the copper is incorrectly ascribed to a supposed galvanic action. The antimony in the Wetterstedt patent was not so used that it performed the function of a base, retarding the dissolution of the copper, by itself dissolving more slowly than the oxide of the copper.

The testimony of Brown and Gardner, when carefully considered, does not prove an anticipation of the Tarr and Wonson invention. Sulphuret of antimony, used by defendants in their paint, is an earthy or mineral matter, which dissolves in water more slowly than the oxide of copper. It comes within the description of the retarding earthy or mineral basis described in the division B, and the use of it, in combination with oxide of copper and a suitable vehicle or medium, constitutes infringement, notwithstanding to the oxide of copper is added a small quantity of arsenite of copper or arsenate of copper, or both.

Decree for injunction and account as prayed for in the bill.

[For other cases involving this patent, see note to *Tarr v. Webb*, Case No. 13,757.]

WONSON (UNITED STATES v.). See Case No. 16,750.

WOOD, Ex Parte. See Case No. 6,825.

Case No. 17,935.

In re WOOD.

[6 Ben. 339; 1 13 N. B. R. 96; 1 N. Y. Wkly. Dig. 366.]

District Court, S. D. New York. Feb., 1873.

VOLUNTARY BANKRUPTCY—AMENDMENT OF PETITION.

A bankrupt's petition, which was filed in February, 1868, alleged only that he "had a place of business in New York." In February, 1873, he asked to file an amended petition, in which the words, "and has there carried on business of his own," were added. *Held*, that the amendment could not be allowed, as the words "business of his own" are not found in the act [of 1867 (14 Stat. 517)], but that the applica-

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

tion to amend might be renewed, on an affidavit showing the facts and the reasons why the amendment was not asked for sooner.

[In the matter of Edward T. Wood, a bankrupt.]

The petition in this case was filed February 29, 1868. It stated that the petitioner "had a place of business in New York." In February, 1873, the petitioner asked to file an amended petition, in which the following words: "And has there carried on business of his own," were added to the above allegation.

BLATCHFORD, District Judge. The amendment asked cannot be granted in the form proposed. The words, "business of his own," are not found in the act. The motion may be renewed on notice, on an affidavit showing the existence, at the date of filing the petition, of the facts specified in section 11 as necessary to give jurisdiction, setting forth specifically the words proposed to be stricken out and those proposed to be inserted, and the reasons why the petition was not made originally in the proper form, and the reasons why the amendment was not applied for sooner after the filing of the specifications.

Case No. 17,936.

In re WOOD.

[8 Ben. 237.]¹

District Court, S. D. New York. Sept., 1875.

BANKRUPTCY—TIME OF APPLICATION FOR DISCHARGE.

1. W. was adjudged a bankrupt on March 2, 1868. His application for a discharge was not made till June 19, 1869. A debt was proved and assets came to the hands of the assignee. *Held* that, under the decision of the circuit court for the Northern district of New York, in *Re Sloan* [Case No. 12,945], the application was made too late, and that no discharge could be granted in the case.

2. All applications for discharge must be made within one year from the adjudication. Where no debts have been proved, or no assets have come to the hands of the assignee, the application may be made after the expiration of sixty days from the adjudication. Where debts have been proved, and assets have come to the hands of the assignee, the application may be made after, but not till after, the expiration of six months from the adjudication.

[In the matter of Edward T. Wood, a bankrupt.]

S. G. Courtney, for bankrupt.

BLATCHFORD, District Judge. The adjudication of bankruptcy in this case was made March 2, 1868. The application for a discharge was not made till June 19, 1869. Under the recent ruling of Mr. Justice Hunt (concurring with the opinion of Judge Wallace), in the case of *In re Sloan* [Case No.

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

12,945], in the Northern district of New York, the application was made too late, because not made within one year from the time of the adjudication. Mr. Justice Hunt says: "The authority to apply for a discharge rests entirely upon section 29. It must necessarily be taken with the limitations in that section contained. The only right to apply, there given, is to be exercised within one year from the time of the adjudication. In my judgment, this applies to all cases, whether there are debts proved, or assets received, or not. It is a case of limited authority, and there is no power to grant a discharge, unless it is applied for within the time prescribed. The excuse of the bankrupt for the delay is a reasonable one, and, if there was power, I should accept it as satisfactory." It has heretofore been the practice of this court to allow applications for discharge to be made after the expiration of one year from the adjudication of bankruptcy, in cases where the two circumstances concurred, that debts had been proved, and assets had come to the hands of the assignee, the construction given by this court to section 29 of the act [of 1867 (14 Stat. 531)],—section 5108 of the Revised Statutes,—being, that the application within one year from the adjudication was required only where no debts had been proved or no assets had come to the hands of the assignee; that, where either of those circumstances existed, the application might be made at any time after the expiration of sixty days from the adjudication, and within one year from the adjudication; and that, where debts had been proved and assets had come to the hands of the assignee, a discharge might be applied for at any time after the expiration of six months from the adjudication, and even after the expiration of one year from the adjudication. In the present case a debt was proved, and assets had come to the hands of the assignee. Therefore, under the former rulings of this court, the application was in time, although not made until more than 15 months after the adjudication. But the decision in *Re Sloan* [supra], is that of the circuit court, in review of the decision of the district court, and is controlling on this court. It is to the effect that the proper interpretation of the statute is, that all applications for discharge must be made within one year from the adjudication; that, where no debts have been proved, or no assets have come to the hands of the assignee, the application may be made after the expiration of sixty days from the adjudication; and that, where debts have been proved, and assets have come to the hands of the assignee, the application may be made after, but not until after, the expiration of six months from the adjudication. Under this construction, no discharge can be granted in this case. The question is one of the power and jurisdiction of the court, and not one depending upon the opposition of a creditor.

Case No. 17,937.

In re WOOD.

[5 N. B. R. 421.]¹

District Court, W. D. Tennessee. 1871.

BANKRUPTCY—FRAUDULENT TRANSFER.

A transfer which is only the execution of a contract made when there was no circumstance to impeach it as an intended fraud on the bankrupt law, and when the parties were acting in good faith and long before anything occurred to throw a suspicion over the solvency of the debtor, will be protected, and a bill brought by the assignee in bankruptcy to recover personal property conveyed under the above state of facts will be dismissed.

[Cited in *Smith v. Craft*, 17 Fed. 706.]

In December, eighteen hundred and sixty-nine, within six, but more than four months prior to the filing of the petition in this case, James P. Wood, the bankrupt, proposed to one Willingham, to whom he owed a note for five thousand dollars, to convey to him certain land in payment of the debt, which proposition Willingham declined. Wood then told him that he could very easily sell the land and would do so to pay that debt if Willingham would take the purchase notes, to be secured by lien on the land in payment, to which Willingham agreed, but not in writing. Wood did afterwards sell the land and took notes for the purchase money for about the amount of the Willingham debt. Before they were delivered, Howell, Wood & Co., an extensive mercantile firm at Memphis, became bankrupt, and it was generally rumored that J. P. Wood was, by their failure, rendered insolvent by reason of his liabilities for that firm, but there was no proof that Willingham knew or had cause to know of these rumors about James P. Wood. He had before that come to Brownsville by appointment, to settle with Wood and take the purchase notes, but owing to sickness of one of the parties the settlement was not made. A few days after the failure of Howell, Wood & Co., James P. Wood and Willingham did settle by the surrender of Wood's note and the transfer to Willingham of the purchase notes for the land, and within four months afterwards James P. Wood became bankrupt. It was in proof that James P. Wood was regarded as solvent, and that at the time of the transfer of the notes it was not positively known in the community, when these transactions took place, to what extent he was involved in the failure of Howell, Wood & Co.; but it was the general belief that he was very largely so involved. The assignee filed a bill in the district court to set aside the transfer of the notes to Willingham and to recover them for the estate.

Smith & Jefferson, for assignee.

Estes & Jackson, for Willingham.

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TRIGG, District Judge, held that the transfer was not fraudulent under the bankrupt act in the above state of facts. He held that the transfer was only the execution of a contract made when there was no circumstance to impeach it as an intended fraud on the act, and when it was conceded the parties were acting in good faith, and long before the failure of Howell, Wood & Co. had thrown a suspicion over the solvency of James P. Wood; that it was not necessary that the contract then made should have been in writing, nor was it necessary that the notes should have been transferred to entitle Willingham to them, or to make the contract binding on Wood. In delivering the notes after he became insolvent he was only doing what he was bound by his previous agreement to do, and in the absence of all actual or intentional fraud in such delivery, it was the completion of a contract valid in itself and made in good faith before the insolvency, and the bill was dismissed, the assignee taking an appeal.

Case No. 17,938.

WOOD et al. v. ABBOTT et al.

[5 Blatchf. 325.]¹

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

COPYRIGHT—PHOTOGRAPHIC PRINTING.

A picture on paper, made by the art of photography from a glass "negative," is not a print, cut or engraving, within the 1st section of the copyright act of February 3, 1831 (4 Stat. 436).

[Cited in *Yuengling v. Schile*, 12 Fed. 107.]

This was an action [by Hamilton Wood and others against Milton S. Abbott and others] in the nature of a *qui tam* suit, founded on the 1st, 4th, 5th, and 7th sections of the act of February 3, 1831 (4 Stat. 436), relating to copyrights. At the trial, a verdict was taken for the plaintiffs, for the sum fixed by the 7th section of the act, subject to the opinion of the court, and the plaintiffs now moved for judgment on the verdict.

George W. Wingate, for plaintiffs.
Thomas C. Fields, for defendants.

SHIPMAN, District Judge. The plaintiffs charge the defendants with pirating certain alleged "prints or engravings," the copyrights of which the plaintiffs allege belong to them. The case presented by the proofs is a novel one, at least in this court, and requires a statement of the facts in order to see the precise point which the judgment of the court determines. The plaintiffs are photographers in the city of New York, and are engaged in business as partners, under the name of the New York Photographing Company. One Fish, an artist, drew in crayon two original drawings or designs of the human figure, one called "The Golden Age,"

and the other "School Days." These pictures he sold to the plaintiffs, and assigned to them, so far as he could legally do so, all the rights which he had to, or growing out of, the same. The object of this sale and assignment by Fish and purchase by the plaintiffs was to enable the latter to manufacture and copyright photographs of the original drawings. To carry out this object, the plaintiffs caused what are known in photography as "negatives" to be taken. From these negatives they produced great numbers of copies of the original designs, but of a very much smaller size. Before the publication and sale of these copies, the plaintiffs deposited in the clerk's office of the United States district court for the Southern district of New York, printed titles of the designs, together with photographic copies thereof. They also, before the publication and sale of such copies, impressed on the latter the words, "Entered according to act of congress, &c." There is some dispute, in the evidence, as to whether or not these words were impressed on all of the pictures before they left the hands of the plaintiffs, but, for the purposes of this motion, I shall assume that they were placed on them all. These photographic copies were quite small, and were mounted on cards of nearly the same size, about two and a half inches by four. The pictures themselves were on a piece of thin paper, and these were pasted on the cards. The words "Entered according to act of congress, &c.," were not on the thin paper upon which the pictures were taken, but were impressed on the cards upon which they were pasted, just at the foot of the pictures. The defendants insist that, inasmuch as the statute requires these words to be "impressed on the face thereof," in order to entitle the party to the benefit of the act, the impression of the words on the card at the foot of the picture was not a compliance with this requirement, and that, therefore, the alleged copyright furnishes no protection to the publishers. It is not necessary to determine this point in the present case, for there is another one more prominent and strongly marked, which, in the judgment of the court, is decisive of the controversy between these parties.

The defendants, having purchased a copy of each of these small photographic pictures, made negatives from them, and, from such negatives, printed and sold in the market copies almost identical with those made and sold by the plaintiffs. The plaintiffs insist that, upon these facts, they have shown valid copyrights for these small photographs, made from the original designs in their possession, and that the defendants have infringed their rights in the premises, and the question is, whether the verdict taken at the trial can be supported by the 1st section of the act of 1831, upon which the alleged copyrights are founded. That section provides, that "any person or persons,

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

being a citizen or citizens of the United States, or resident therein, who shall * * * invent, design, etch, engrave, work, or cause to be engraved, etched, or worked, from his own design, any print or engraving, and the executors, administrators, or legal assigns of such person or persons, shall have the sole right of printing, reprinting, publishing and vending such * * * print, cut, or engraving, in whole or in part, for the term of twenty-eight years from the time of recording the title thereof, in the manner herein-after directed." A glance at this section will show that the question in controversy is, whether or not these photographs are prints, cuts or engravings, and, therefore, protected by the statute.

The principal ground upon which the plaintiffs claim the validity of the copyright is, that, as they allege, the photographs are "prints." The process by which these photographs are taken, is substantially as follows: The original picture is transferred to a prepared glass plate, according to the well-known practice of photographers. This copy of the original is called a negative, and, as seen in the medium of transmitted light, the lights and shadows of the original are reversed. A sheet of prepared paper is then laid upon the plate, both paper and plate are put into a frame of the proper size, in which pressure is applied to the paper by appropriate means, so as to bring the paper into contact with the plate throughout its entire surface, and then the plate is exposed to the light of the sun. The rays of light transmitted through the glass, throw the picture on the prepared paper, and fix it there in positive light and shadow. By this means, reduced copies of the original are extensively multiplied. The pressing of the paper upon the glass plate, is to make the contact of their surfaces perfect throughout, in order to prevent the diffusion of the light, and the consequent blurring of parts of the picture, which would occur in spots where this contact did not take place. In other words, the pressure is to hold the paper to the glass plate, in such a way as to secure a uniform chemical action of the light on the paper, controlled or disturbed in no way, except by the shadowy image on the glass itself. The rays of light paint or delineate, by chemical action, the image on the paper, guided by the image on the glass. These rays paint it in just the same way in which they paint the negative on the glass, except that, in the latter case, they are reflected from the original, while in this they pass directly through the transparent plate. This is a new and beautiful art, discovered long after the statute in question was enacted. It is not a development of the art of making prints or engravings which existed at the date of the act. Then, a print was defined to be "a mark or form made by impression or printing; anything printed; that which, being impressed, leaves its form, as a but-

ter print, a cut in wood or metal to be impressed on paper; the impression made; a picture; a stamp; the letters in a printed book," &c. As used in this statute, it was synonymous with the term "engraving," with which it is connected in the act, which means, in this relation, "an engraved plate; an impression from an engraved plate." This new art of photography, and all its kindred processes, is an entirely original and independent mode of taking pictures of material objects, and multiplying copies of such pictures at pleasure. That combination of creative or imitative power and mechanical skill by which the artist works out his own conception, or the embodied conception of another, in a fixed form, the fruits of which the law was intended to protect, is not brought into play. No block, plate, or stone is engraved. No figure is drawn, etched, raised, or worked on any surface from which copies are to be produced by impression or printed. The image thrown by light reflected from the original and passed through a camera produces a negative, and, when the light passes through the transparent negative on to paper held in contact with glass, it produces a positive. The image is no more formed by pressure when the positive is made on the paper held in contact with the glass plate, than when the negative is made on the glass by rays reflected from the original at a distance. In both cases, the only force that contributes to the formation of the image is the chemical force of light, operating on a surface made sensitive to its power. The springs in the pressure frame hold the paper firmly in contact with the glass, and thus prevent the diffusion of the light after it passes through the negative. This position of the paper and plate renders the operation of the light direct and strong, and brings out the lines of the picture clearly and sharply. The manufacture of these positives is called, in the language of this new art, "photographic printing." But names are not things. It is not printing in any sense known to the arts at the time this copyright act was passed; nor is it an extension of the old processes, or a new development of the art of printing or the art of engraving, as those arts were then understood. It is an entirely original and independent method of producing and multiplying pictures—an art, not of printing or engraving, but of securing the delineation of pictures by light operating on sensitive surfaces. In no just sense, therefore, can it be said to be within the act of 1831. Congress, proceeding upon this view, by the act of March 3, 1865 (13 Stat. 540), extended the protection of the copyright act to this new art of photography. This, however, was not done till after the copyrights in question were taken out, and this suit was brought. These plaintiffs, therefore, have no remedy in the present case. The verdict must, therefore, be set aside.

Case No. 17,939.

WOOD v. ALLEGHENY COUNTY.

[3 Wall. Jr. 267; 1 20 Leg. Int. 228.]

Circuit Court, D. Pennsylvania. Nov. Session, 1859.

COUNTY BONDS PAYABLE TO BEARER—NEGOTIABILITY.

1. Where a county is authorized by statute to issue bonds, but is subjected to certain restrictions in limitation of its power, and disregarding the limitations, issues them absolutely payable to bearer, and they pass into the hands of a bona fide holder for value, who has bought them in the market in the course of trade, the county is liable on them. The court will in such case not look behind the face of the bond, nor inquire whether the bonds have been issued with all the forms prescribed or not.

2. Ex. gr. the county of Allegheny was authorized by the legislature of Pennsylvania to issue bonds in aid of certain railroads—but it was prescribed that the subscription should be advised by the grand jury of the county; and until the railroad was completed the railroad company should pay the interest on them. The jury advised the subscription, providing that no sales should be made below par. The bonds were issued to the company, who, having procured an act of assembly to that effect, sold them greatly below par. Having passed into the hands of bona fide holders, who bought them in the course of trade, and being on their face payable to bearer, the county was *held* liable on them for the interest, the railroad having failed to pay it.

This was a suit brought to recover the interest due on several bonds of the county of Allegheny, which had been issued in aid of certain railway companies, and under authority or pretence of authority of statutes of Pennsylvania, giving the county power to take stock in them. The railways ran to other counties, and even into other states. The statutes, however, authorized the subscription, only after a previous recommendation had been made by the grand jury of the county in favor of it; and contained a provision that the railway companies, and not the county, should pay the interest on the bonds until the roads were completed. The grand jury had recommended the subscription, coupling their recommendation, however, with a proviso, as a condition of their recommendation, that the bond should not be sold below par. As soon as the recommendation had been obtained from the jury, the parties projecting the railways, or jobbers and brokers whom they employed, procured, by very irregular ways, an act of assembly authorizing a sale irrespective of price; and the bonds were bartered away by the same class of people, at enormous, not to say at fraudulent rates of discount; the county officers, who had supposed that the railway companies would always be able to pay both interest and principal and that the county was but lending its credit, having been grossly negligent of the interests entrusted to them, while the railway agents themselves were men of no higher charac-

ter than such as belongs to low politicians and swindlers. The acts of assembly requiring the railway companies to pay the interest till the roads were completed, were printed in full on the backs of the bonds. The bonds were all payable to bearer, and the coupons in the now common form of such things. The railway companies having neither completed their roads nor paid their interest, the county was now sued by bona fide holders of the coupons of bonds for value.

For the county it was argued—

I. The county, as a corporation, has no power to make any subscription of this kind; and the legislature cannot confer power on a body merely municipal, to exercise rights which belong only to its own competence.

II. But if this were not so, and if the county had power, the sale at anything less than par was illegal and void. The grand jury, which was a party to the contract of subscription, had stipulated that the bonds should be sold only at par. They meant that the money to be received by the railway companies should go *pari passu* with the increasing indebtedness of the county; and to prevent that exact thing which has occurred, *st.*, a claim on the county for millions, while the money received by the railways has been less than thousands. The railway managers—receiving, doubtless, a large commission for the operation—“engineer” the matter through the grand jury room. They inveigle that body into a subscription, on the assurance that the bonds shall not be sold below par. Nor is this all: the grand jury themselves declare it to be a condition of their recommendation, that the bonds, if not thus sold, shall not issue at all. The managers of the railways then procure an act of assembly annulling the condition. The county, engaging in an enterprise of risk, had a right to say on what terms it would engage; and it did say. It said: “If you can get as much money as is represented on the face of our bonds, we believe that you can build your road, and that it will be profitable; but unless you put dollar for dollar into your road against the debt which we are incurring for it, we will not take your stock at all.” This was a vital point every way; vital in point of law, and vital as respected the chance of the county’s getting dividends from the stock subscribed for. For unless the managers could get money enough to complete the road, the enterprise was certain to leave the county a debtor, while it was equally certain to bring nothing to pay the debt. The success or failure of the road depended on adherence to the condition. The grand jury contracts for such adherence. Can the legislature, of its own power, annul the contract?

III. The statute made it obligatory on the companies to pay the interest on the bonds till the road was completed. This act be-

¹ [Reported by John William Wallace, Esq.]

ing printed on the back of the bonds, was notice to the person about to buy the bond, that the county assumed but a limited responsibility. Subscribing to railways is no regular or proper business of counties, even conceding it to be lawful under any circumstances. But for the statute authorizing it, the subscription would be confessedly void. That is now, an adjudged point in Pennsylvania. The statute which makes valid the subscription, validates it only *quatenus et quodam modo*. As soon as a person saw one of these bonds at all, he saw the qualified liability. It must be observed, that this was not an unusual sort of limitation of a well known and usual sort of contract. Municipal bonds payable to bearer, and in aid of railroads, had not theretofore been usual instruments in the United States. They were quite new. The thing, in its general nature, was special. Why may it not be considered so in its particular character as well? The whole subscription might or might not have been rendered nugatory by such a provision as was here notified to the person about to deal in the bonds; but there the provision was, and was plainly. There was nothing illegal in it, and being as legible as the contract, and on the same sheet, makes part and parcel with it.

GRIER, Circuit Justice. If the right of a municipal corporation to subscribe, even when authorized by the legislature, to purposes so alien to its general purpose as the construction of works of improvement which, in their largest part, are in distant counties and in other states, were open to me for consideration as a new point, I cannot say that I should hold such subscription other than simply void. The strongest arguments at law have been made against such subscriptions, and they are worth recurring to as containing true and lawyer-like views of the extent and character of municipal powers. But the matter is not open in this court. The legislature of Pennsylvania has authorized counties to make such subscriptions, and the supreme court of the state has decided (though by a bare majority) that the act is constitutional. The views of that court upon the statutes of their own state bind this court.

In spite, then, of all the resistance by the county to paying these bonds, here are the bonds, upon which the county "promises to pay." The county said to the railroad companies, "We want to help you: we have not the money, but we will lend you our credit: our promise to pay." That promise is, or should be, sacred. Doubtless many improper things have been done. The whole business of making cities and counties subscribe to railways was unwise. This will be admitted now; though the counsels of the able and conservative men who took ground against it was not heeded when given. Mer-

cantile and popular clamor demanded "subscription." Traders, politicians, and all kinds of interested jobbers urged and drove the matter, while commissioners, grand jurors and legislators have been led in the train. It is to be lamented that such things should be done; but they have been done. If the electors of our cities choose to hand over the great concerns of our public offices to ignorant and unprincipled administrators, they must suffer for it. They must themselves bear the burdens which they put it in the power of knaves to pile upon them. Whatsoever a man soweth, that he shall reap; and when he sows the wind, he is apt to reap the whirlwind.

The objections urged against the plaintiff's claim would have force, if the question were between the county and the railway companies. But it is not. It is between an innocent holder for value of a bond payable to bearer, and the party who sent it out into the market (or handed it over to others to do so) where it has been sold in the course of trade. It is useless to bring forward here, as against the business operations of this day, abstract dogmas out of Blackstone and the Institutes of Coke. Such instruments as these are were never dreamed of in their day. The laws of trade suggest and govern these matters. As I said in the beginning: "Here is the bond. Here is the fact." Your promise to pay is put upon the market. You gave it this negotiable and coupon form for the purpose of facilitating sale, and preventing all questions of equity about it. And now, when the promise has been put on the market, and sold to an innocent holder, you set up these equities. That won't do. Why did you issue your bonds, if you meant that the holder should look to the railways? Why did you not leave the railways to issue their own? For this reason only, that you knew that capitalists would trust you and would not trust them. I esteem the bold, and hardy, and industrious people of this county. I feel for them, with this load of debt put upon them by the careless and unworthy persons whom they have elected into office. But they have allowed the bonds to be issued and sold, and they must pay them.

Judgment for plaintiff.

NOTE. The county commissioners of Allegheny having still refused to pay the bonds, and refused obedience to a mandamus of the supreme court of Pennsylvania, to levy a tax for the said purpose, were all put into gaol, where they remained for many months. An arrangement was finally effected between the creditors and the county, by which the principal of the bonds was acknowledged, and a reduced rate of interest accepted.

WOOD (ARGUELLES v.). See Case No. 520.
WOOD (BOUCICAULT v.). See Case No. 1,693.

Case No. 17,940.

WOOD v. CARR.

[3 Story, 366; ¹ 6 Law Rep. 156.]

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

SET-OFF OF EXECUTIONS—RIGHTS OF ASSIGNEE.

All actions and matters of difference between the parties having been referred to referees, they made separate reports, upon which executions issued and were placed in the hands of the sheriff. Before the executions were issued, one of the parties assigned the amount he might recover to third persons, who had full notice of all the facts. *Held*, that the assignee was not protected by the proviso of the statute of Maine, of the 13th March, 1821, c. 6, § 4, the claim not having been "assigned to him bona fide and without fraud;" and that the original parties having mutual executions against each other, the sheriff had a right to set off one against another, notwithstanding the notice given to him of the assignment.

The defendant, being sheriff of the county of Penobscot, had placed in his hands for collection, an execution issued on a judgment recovered by the Bangor House Proprietary against the plaintiff. He had also placed in his hands for collection an execution issued on a judgment recovered by the plaintiff against the Bangor House Proprietary. Thereupon, at the request of said plaintiff, the defendant satisfied the plaintiff's execution, by setting the amount thereof, due and unpaid off, upon the execution in favor of the Bangor House Proprietary, indorsing the said amount on the said execution in part payment and satisfaction thereof. This action was brought against the defendant for an alleged misfeasance in making the said set-off. It appeared in evidence, that the plaintiff and the said proprietary having got into difficulty and dispute, several actions were brought by the proprietary against the plaintiff; all of which were referred, with all matters of difference between the parties, to three persons. The referees made separate reports in and by way of final disposition of each of the said actions, and the judgments, on which the said several executions issued, were judgments in pursuance of and upon acceptance of the said referee's report. After the said referees had so agreed to report, the plaintiff assigned the amount he might recover in the action, in which judgment was entered up in his favor, and execution issued, as herein before stated, to third persons, for the consideration and purposes therein expressed. And this action was brought by such third persons, in the name of the plaintiff, for the benefit of such third persons, who well knew the whole transaction and facts here stated. A verdict was taken for the plaintiff, by consent, subject to the opinion of the court. If the sheriff had a right to make the set-off, he having been notified of the assignment, the verdict

was to be set aside. If he had by law no right so to do, but was bound to collect the amount, and pay the same over to the assignee of Wood, said Wood being insolvent at the time of said assignment, then judgment was to be entered on the verdict. The statute of Maine, of the 13th of March, 1821, c. 6, § 4, provides that whenever any sheriff shall at the same time have several executions wherein the creditor in one execution is debtor in the other, he may cause one execution to answer and satisfy the other so far as the same will extend; with a proviso (among other things) that it shall not "affect the rights of any person, to whom, or for whose benefit, the same judgment, or execution, or the original cause of action thereof, may have been assigned bona fide, and without fraud."

C. S. Daveis, for plaintiff.

W. P. Preble, for defendant.

For the defendant was cited Hatch v. Greene, 12 Mass. 195; and for the plaintiff, Greene v. Darling [Case No. 5,765], and Howe v. Sheppard [Id. 6,773].

STORY, Circuit Justice, after stating the facts, and reviewing the decisions, said: I have no doubt whatsoever, that the assignment having been made with a full knowledge of all the facts, the assignee must take the same, subject to all the known equities between the original parties. To give it any other and further effect would, in my judgment, contravene the policy of the statute of Maine, and make it an instrument of injustice, as well as of fraud. In no sense can an assignee be said to be a bona fide holder of an assignment without fraud, who, by procuring that assignment, seeks to defeat the just rights of the other party. Notice is universally deemed, if not at law, at least in equity, to place the party in a situation of a trustee, as to all the rights, which he acquires, affected by that notice. He, who has notice of equities, which he seeks to defeat, is, in the eyes of a court of equity, deemed guilty of a constructive fraud; and he is not a bona fide holder, although he may have paid a valuable consideration therefor. In the sense, then, of the statute of Maine the assignee is not within the saving of the proviso: for the claim has not been "assigned to him bona fide and without fraud."

It appears to me, therefore, that the verdict for the plaintiff ought to be set aside. I wish to add, that there is nothing in the case of Greene v. Darling [Case No. 5,765], or that of Howe v. Sheppard [Id. 6,773], that, in the slightest degree, infringes the doctrine stated in the present opinion.

Verdict set aside.

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

Case No. 17,941.

WOOD et al. v. CLEVELAND ROLLING-MILL CO.

SAME v. UNION IRON-WORKS CO.

[4 Fish. Pat. Cas. 550.]¹

Circuit Court, N. D. Ohio. May, 1871.

PATENT FOR INVENTION—TIME OF APPLICATION—
SUIT FOR INFRINGEMENT—IMPROVEMENTS
IN MAKING NUTS.

1. The acts of congress in force in 1851 did not prescribe the time within which a patent should be applied for, after the invention was perfected.

2. Where it had not been abandoned to the public, and had not been in public use or on sale with the consent and allowance of the inventor, no lapse of time, however protracted, barred an application for a patent, nor after it had been granted, affected its validity.

3. Prior to the act of July 8, 1870 [16 Stat. 198], there was no act of congress limiting the time within which a suit must be prosecuted, either at law or in equity, for the infringement of a patent.

[Cited in May v. County of Logan, 30 Fed. 257.]

4. It is not a subject of inquiry, upon the trial of a suit for infringement, whether a prior machine could have been so modified as to do the work of the patented machine.

5. Where the existence of a prior machine is attempted to be proved, and the maker of it is at hand, but is not examined, it is a circumstance to be considered in weighing the value of the other testimony as to the existence and character of the machine.

6. A claim for "making nuts for bolts, by subjecting the blank of which the nut is to be formed, at a welding heat, to compression between swages, or dies, in a close die box, or matrix, and punching the eye of the nut during the continuance of such pressure, for the purpose of welding up any imperfections in the iron and giving a symmetrical shape and smooth finish to the nut, and of preventing any injury to the nut which it might suffer by the passage of the punch through it, if it were not thus sustained by the sides of the die box and forcibly compressed between the dies," describes a patentable subject matter.

7. In such a patent, the state of the iron is as much a part of the claim as the means and appliances by which the process is conducted and the result accomplished.

8. In the fossils of geology, belonging to certain classes of animals, regular gradations from a low form of organism to a much higher one, are found to exist. The contrast between the highest and the lowest is very striking. The same thing takes place in the progress of inventions. Models and machines in the same series, upon inspection, not unfrequently exhibit curious points of analogy to such fossils. Sometimes one will be found to reach almost the highest point afterward attained, but to fall short of it. The difference is that between success and failure.

[Cited in Westinghouse v. Gardner, etc., Air Brake Co., Case No. 17,450.]

9. When a great success is achieved in the field of mechanical invention, and the higher organism is protected by a patent, it is almost as certain that invasions will follow, as that there exists the relation of cause and effect. Such is the voice of universal experience.

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

10. When the infringer is called to account, it is usually asserted that the invention in one of the lower grades is substantially the same with that of the patentee. The confidence of the attacking witnesses is often in proportion to the distance in time that one is removed from the other.

[Cited in Hawes v. Antisdell, Case No. 6,234.]

11. When the defense of want of novelty is made out, it is the duty of courts and juries to give it effect. But such testimony should be weighed with care, and the defense allowed to prevail only where the evidence is such as to leave no room for a reasonable doubt upon the subject.

[Cited in Hawes v. Antisdell, Case No. 6,234; Miller v. Smith, 5 Fed. 364; The Driven-Well Cases, 16 Fed. 411; American Bell Tel. Co. v. People's Tel. Co., 22 Fed. 313; Thayer v. Hart, 20 Fed. 694; McDonald v. Whitney, 24 Fed. 602; Kittle v. Hall, 29 Fed. 514; American Bell Tel. Co. v. American Cushman Tel. Co., 35 Fed. 739; Electrical Accumulator Co. v. Julien Electric Co., 38 Fed. 127.]

12. Reissued letters patent for "improvement in the manufacture of nuts," granted February 15, 1859, to James Wood, assignee of William Kenyon, examined and sustained.

13. The machines described in patents granted to William Chisholm, November 17, 1863, and to James Paton, November 29, 1864, are infringements of the Kenyon patent as reissued.

These were bills in equity, filed [by Charles A. Wood and others, executors of James Wood, deceased] to restrain the defendants from infringing letters patent [No. 8,427] for "improvement in the manufacture of nuts," granted to Joseph P. Haigh, Andrew Hartupee, and John Morrow, assignees of William Kenyon, October 14, 1851, reissued to them March 18, 1856, assigned and reissued to James Wood, February 15, 1859 [No. 666], and extended for seven years from October 14, 1865; also, letters patent [No. 13,118] for "improvement in making nuts," granted to Henry Carter, assignee of Isaac H. Steer, June 19, 1855; and also letters patent [No. 8,322] for "improved nut and washer machine," granted to Henry Carter and James Rees, August 26, 1851, reissued June 19, 1855 [No. 313], and assigned to complainants. These inventions related to the manufacture of hot-pressed nuts. The mechanism covered by the Kenyon patent subjected the nut blank, while at a welding heat to compression in a close fitting die box, and then punched it while under pressure, while that set forth in the Carter and Rees patent, punched the nut, and then compressed it upon the punch.

The claims of the several patents and reissues were as follows:

Original patent to Haigh, Hartupee & Morrow, assignees of William Kenyon: "The compressing and discharging the nut and washer by means of the follower or hollow piston, the bracket, cross-head, and the moving die box, constructed and operating substantially as described."

Reissue of March 18, 1856: "(1) The use of the die T, and die box M, for severing the blank; the close die box in combination

with the dies and bracket X, for pressing; and the punch L, for perforating the same during the pressure, the whole operating conjointly as herein described, for making nuts or washers at one operation. (2) The manner substantially hereinbefore described of so arranging the dies, in relation to the punch, that any excess of iron in the blank shall be forced into the path of the punch, thus securing the compression of the nut without risking the breaking of the machine."

Reissue of February 15, 1859: "(1) Making nuts for bolts, by subjecting the blank of which the nut is to be formed, at a welding heat, to compression between swages or dies in a close die box or matrix, and punching the eye of the nut during the continuance of such pressure, for the purpose of welding up any imperfections in the iron, and giving a symmetrical shape and smooth finish to the nut, and of preventing any injury to the nut which it might suffer by the passage of the punch through it, if it were not thus sustained by the sides of the die box and forcibly compressed between the dies. (2) The use of a die box, closed at the sides, for surrounding the nut, and sustaining its sides while it is subjected to pressure, substantially in the manner hereinbefore described. (3) The combination of the compressing dies P and T, with the die box M, for the purpose of compressing the nut while it is sustained at the sides, and thus welding up any imperfections in the iron, and compacting its fibre, so as to give strength as well as exterior finish and symmetry to the nut. (4) The combination of the punch L, with the die box M, and compressing dies P and T, for the purpose of compressing, confining, and restraining the opposite faces of the nut during the passage of the punch through it, and thus preventing any injury to the nut during the process of punching; and also for the purpose of insuring the making of the bore of the nut in the proper relative position to its upper and lower surfaces. (5) The combination of the die box M, the compressing dies T and P, and punch L, constructed and arranged substantially as hereinbefore described, for the purpose of making hot pressed nuts, at a single operation, by severing a blank from a bar of heated metal, compressing it into shape, and punching a hole or eye through it, while under compression, and delivering the finished nut from the machine. (6) Arranging the compressing dies in relation to the punch, and regulating their relative motion in such manner, substantially as hereinbefore described, that any excess of iron in the blank shall be forced into the path of the punch in the compressing dies, thus securing the compression of the nut without risk of damage to the machine."

Original patent to Henry Carter, assignee of Isaac H. Steer: "(1) Making a nut at a single operation, from a heated bar or plate

of metal, by cutting off the blank from the bar, punching a hole or eye through it, and swaging it into shape, substantially as herein set forth. (2) Punching the eye of the nut in a die or press box, by which it is surrounded and firmly supported, and thus prevented from straining or bursting during the operation, substantially as set forth. (3) Shaping nuts by subjecting them, while hot, to powerful and sudden compression on the punch and in the punching die, substantially as herein set forth, whereby they are finished with such a degree of smoothness, regularity, and precision that in the condition in which they come from the machine they are fit to use in the construction of most kinds of machinery, and are, at the same time, sounder and stronger than unpressed nuts made by machinery."

Original patent to Henry Carter and James Rees: "The two punches moved at the same time with different velocities, and in the same direction, in combination with a die box, within which the nut is formed, substantially as herein set forth."

Reissue of June 19, 1855: "We are aware that Isaac H. Steer, about the year 1840, proposed to make nuts by the process we have here described, but never completed a machine which would do this automatically, therefore we do not claim this process in itself, and irrespective of machinery; but being the first to construct a machine capable of making nuts by this process, without any other or further manipulation than is required for feeding in the bar of iron, we claim as our invention, and desire to secure by letters patent, the machine substantially as herein described, for making nuts by cutting the blank from a heated bar of iron, punching its eye in a closed die box, pressing it into shape while in the die box and on the punch, and then discharging it, as specified."

The defendants were using machines constructed under letters patent, the machine used by the Cleveland Rolling Mill Company being made in substantial accordance with the machine described in letters patent for "improvement in machines for making nuts," granted to William Chisholm, November 17, 1863, and that used by the Union Iron Works Company being made in substantial accordance with the machine described in letters patent for "improvement in machine for making nuts," granted to James Paton, November 29, 1864.

In the Chisholm machine, the nut blank was cut off and forced into a matrix and against a female die, which retreated, allowing the punch to enter the iron. The movement of the male die being somewhat more rapid than that of the female die, compressed the nut.

In the Paton machine, the matrix was composed of four pieces, three of which were movable while the other was attached to the stationary die. The forward movement of

the matrix cut off the blank, and by the aid of the stationary side completely inclosed it in a close die box, in which it was compressed and punched.

Geo. Willey, S. S. Fisher, W. Bakewell, and G. Harding, for complainants.

W. H. Burrige, A. F. Slade, S. F. Andrews, and R. P. Ranney, for defendants.

SWAYNE, Circuit Justice. These cases present substantially the same questions. They have been argued together, by the same counsel, and with great ability on both sides. I have considered them with care. Some of the points which they present are not without difficulty.

But finding myself ready to decide both the cases, I shall proceed to announce my conclusions. The time at my disposal will allow me to do but little more. The announcement, however, will be so shaped as to show, as clearly as remarks more extended would, the grounds of the judgments which will be given. The analysis of the testimony, the examination of the authorities, and the processes of reasoning, which have produced the results, must, to a great extent, necessarily be omitted.

The suits are for the infringement of three patents: The Kenyon patent, granted originally to Haigh, Hartupee & Morrow, assignees of Kenyon, October 14, 1851, No. 8,427, reissued to the same parties March 13, 1856, reissue No. 361, and reissued to James Wood, assignee, February 15, 1859, reissue No. 666; the Steer patent, granted to Henry Carter, assignee of Isaac H. Steer, June 19, 1855, No. 13,118, and the Carter and Rees patent, granted to Henry Carter and James Rees, August 26, 1851, No. 8,322, reissued June 19, 1855, reissue No. 313.

All these patents were extended by the commissioner for the period of seven years from the expiration of their respective original terms. No question is made as to the title of the complainants.

In the view which I take of the cases it will be necessary to consider only the Kenyon patent. The claims in the specification of that patent, as reissued to Wood, are substantially as follows: (1) For making nuts, by subjecting them, at a welding heat, to compression between swages in a die-box, and punching the eye during the pressure to remedy any imperfections in the iron, and prevent the injury which might arise from the punching process, if the sides were not thus sustained and compressed at the time of its performance. (2) The use of the die-box as before stated. (3) The combination of the compressing dies with the die-box, as before stated. (4) The combination of the die-box, compressing dies and punch, as stated in the specification. (5) The combination of the punch and dies with the die-box, as before stated. (6) Arranging the compressing dies

in relation to the punch, and regulating their relative motion, as described, so that any excess of iron in the blank shall be forced into the path of the punch within the compressing dies, thus securing the compression without any injury to the machine.

The main feature of the invention covered by this patent, as claimed by the complainants, is, compressing iron at welding heat, in a box, between sliding dies, and forcing a round punch through the mass while thus heated and compressed, causing a hole to be formed with smooth and compact walls or sides, and finally the removal of the nut without injury.

The invention of Kenyon dates back to the year 1835. His own testimony is clear and explicit to that effect, and it is so corroborated by the other evidence in the case as to leave no room for doubt upon the subject.

Nothing is shown which tends in any degree to establish the abandonment of his rights. It is clear that he intended from the time of the making of his first model, which was in 1835, to take out a patent. His poverty, and not his will, caused the delay. The acts of congress in force when his patents were issued did not prescribe the time within which a patent should be applied for, after the invention was perfected. Where it had not been abandoned to the public, and had not been in public use or on sale with the consent and allowance of the inventor, no lapse of time, however protracted, barred an application for a patent, nor, after it had been granted, affected its validity. Act of July 4, 1836, §§ 6, 15 [5 Stat. 119, 123]; act of March 3, 1839, § 7 [Id. 353]; *Allen v. Blunt* [Case No. 217]; *Kendall v. Winsor*, 21 How. [62 U. S.] 327; *McClurg v. Kingsland*, 1 How. [42 U. S.] 208. Here there was only delay. It was unmingled with any other adverse consideration.

The Cleveland Rolling Mill Company admits, in its answer, that the machines, which it uses in making nuts, are constructed in substantial accordance with the patent to William Chisholm, dated November 17, 1863. The Union Iron Works Company makes the like admission with reference to the patent of James Paton, dated November 29, 1864. The specifications of these patents, the models exhibited in evidence, and the expert testimony—I refer particularly to that of Winter on one side and of Clough on the other—satisfy me that a case of infringement is made out.

The use of machines constructed under both patents, involves the compression of the hot metal, and the application and action of the mandrel, substantially as in the Kenyon machine. This proposition I did not understand to be seriously contested at the argument.

Such is the complainants' case, and it must prevail unless one or more of the grounds of defense relied upon by the defendants shall

avail to defeat it. The objections alleged to lie in the way of the complainants will now be considered.

When these suits were commenced there was no act of congress limiting the time within which a suit must be prosecuted either at law or in equity for the infringement of a patent. The act of 1870 does not affect them. There is no proof tending to show the abandonment of the rights secured by the Kenyon patent since it was issued. The complainants have not lost their remedy by laches in the institution of these suits. The Carter and Rees patent and the Steer patent having been laid out of view, the attacks upon them need not be considered.

The patents to Berry, Jackson, Holmes, Arnold, and to Conger and Woodbury, and Rome's French patent, and Poole's French patent, are not for machines to make nuts, and it is not shown that any machine made under either of them was ever used or attempted to be used for that purpose. Certainly neither of them is for a machine identical in any essential particular with the Kenyon invention, nor is it alleged that any of his claims are for the mechanical equivalent of any thing which either of these patents described and appropriated. They are all interesting as showing the state of the kindred mechanic arts to which they relate, but beyond this they have no bearing upon the cases under consideration.

The Colebrook machine was used only to make washers, and they were made of cold iron. It was not applied to hot iron. The spring, which was an element in it, was incapable of sustaining the intense compression effected by the Kenyon machine. The object and dominant ideas of the two machines were different. Whether the Colebrook machine could have been so modified as to do the work of the Kenyon machine, is not in these cases a subject of inquiry.

The nut machines relied upon by the defendants are four in number:

(1) The machine of Dr. Andrews. He furnished Charles Waters the means to make a nut machine, which was in existence when his deposition in these cases was taken. He thinks it was in the year 1848, but is not certain as to the time. He used other devices also for making nuts, and sold the nuts in the market. He says he used a machine for punching, about—as he believes—the year 1832, or 1833. In his examination-in-chief, he declined to describe it. In his cross-examination he seems to have been more explicit. He took out a patent. This, he thinks, was in 1853. The patent is not in evidence, and he does not state what it was for. This testimony is too vague to affect the Kenyon patent. Aside from the question of date, it describes nothing identical with either of the essential elements, which go to make up Kenyon's invention.

(2) The Ratcliff machine. Ratcliff himself was at hand when the testimony upon

the subject was taken. He was not called; why not? This is unexplained. His machine was abandoned, and went out of use. It was antedated by Kenyon's invention.

(3) The machine described in Lamb's application for a patent. The application was rejected, withdrawn, and not renewed. After a careful examination of the description which he gives, I am not satisfied that his alleged invention involved the main feature of Kenyon's—which is intense and unyielding compression of hot metal during the action of the mandrel. Kenyon's invention was also prior in date.

(4) Enoch Scott's machine. A patent was issued to Scott, December 26, 1833. The record and model were burned when the patent office was destroyed by fire. The patent has not been restored to the office. Scott's invention was for making nuts as well as other things, and was unquestionably older than Kenyon's invention. It is also clear that he made nuts out of hot as well as cold iron. His machine was made at Rochester, removed to Waterford, thence to Ramapo, and finally to Haverstraw, in New York. A large number of witnesses were examined in relation to it by the parties. The testimony upon several material points is in conflict, and can not be reconciled. It would serve no useful purpose to analyze and discuss it. A few remarks, embodying the results of my reflections, will suffice.

I entertain no doubt of the validity of the Kenyon patent here under consideration, as regards the invention described in the specification. To my mind the case of *Leroy v. Tatham*, 22 How. [63 U. S.] 134, is conclusive upon that subject.

The turning point of these cases is the alleged want of novelty in respect to the Kenyon patent, and the fate of that defense depends upon the testimony as to the Scott machine.

The subject is not free from difficulty. At the close of the argument my mind was in a state of suspense. It is not now entirely free from doubt. But after a careful consideration of the evidence and of the arguments of counsel, I am not satisfied that the idea of making nuts out of iron in the "waxy" condition of welding heat, and subjected to such pressure on every side when the mandrel passes through the blank, was ever present to the mind of Scott, or that his machine was designed or competent to perform the work of Kenyon's machine upon iron in that condition.

These, as before remarked, are the essential features of Kenyon's invention. The state of the iron is as much a part of it as the means and appliances by which the process is conducted and the result accomplished. It is not shown by any testimony in the case, that these ideas were not original with Kenyon, nor that, until after he made his first model, they ever existed in the mind of any other person.

In the fossils of geology, belonging to certain classes of animals, regular gradations from a low form of organism to a much higher one are found to exist. The contrast between the highest and the lowest is very striking. The same thing takes place in the progress of inventions. Models and machines in the same series, upon inspection, not unfrequently exhibit curious points of analogy to such fossils. Sometimes one will be found to reach almost the highest point afterward attained, but to fall short of it.

The difference is that between success and failure. When a great success is achieved in the field of mechanical invention, and the higher organism is protected by a patent, it is almost as certain that invasions will follow, as that there exists the relation of cause and effect. Such is the voice of universal experience.

When the infringer is called to account, one of two defenses is usually set up, and frequently both. First, that the invention in one of the lower grades is substantially the same with that of the patentee. The confidence of the attacking witnesses is often in proportion to the distance in time that one is removed from the other.

Their imagination is wrought upon by the influences to which their minds are subjected, and beguiles their memory. When the defense is made, it is the duty of courts and juries to give it effect. But such testimony should be weighed with care, and the defense allowed to prevail only where the evidence is such as to leave no room for a reasonable doubt upon the subject.

The other defense is, that the machine of the infringer is so different in principle, and so wide a departure from that of the patentee, as to constitute an original and independent invention. Questions of the latter kind are not difficult to deal with, and a serious error in their solution can hardly occur. Here both these defenses are interposed. The witnesses as to the Scott machine spoke of what occurred more than thirty years before. The discrepancies in their testimony, and its conflict with that of the complainants, are therefore not surprising.

The Kenyon invention is a valuable one. It had borne successfully the test of more than one litigation when these suits were instituted. The decision of Judge Morsell was not made in the case of the application, upon which reissue No. 666 was founded. In that case there was no contest and no appeal.

None of the defenses relied upon, according to my views of these cases, can avail the defendants.

These remarks have been submitted to my learned brother, the district judge, who sat with me at the argument. I am authorized to say, he concurs in them. In preparing them I have had the benefit of his views and

suggestions. A decree will be entered for the complainants in both cases.

[See Case No. 2,475.]

WOOD (COSTIGAN v.). See Case No. 3,265.

WOOD (DAVIS v.). See Case No. 3,659.

Case No. 17,942.

WOOD v. DENNY.

[1 Biss. 73.]¹

District Court, D. Wisconsin. Aug. Term, 1855.

RULES OF DESCENT—LAWS OF WISCONSIN.

A testator bequeathed a certain sum of money to a person in trust, to invest in lands in Wisconsin, in the names of six grandchildren, to be conveyed to and vested in them in fee simple, directing that in case of the death of any of said grandchildren, the share of the child so dying shall go to and vest in his or her surviving brothers or sister. After the lands were purchased, and deeds made conveying them in fee simple to the grandchildren as tenants in common, one of the grandchildren died intestate, unmarried, and without issue. The undivided interest of deceased in the lands passed, by the laws of Wisconsin, to the grandchild's father, and was subject to levy and sale for the father's debts.

The will of Dr. Gideon Jaquex, of the state of Delaware, contains the following provisions: "I give and bequeath unto my friend, John S. Newlin, of the city of Philadelphia, the sum of three thousand dollars, upon this special trust—that is to say, to invest the said sum of three thousand dollars in the names of my grandchildren, Edward Denny, Gideon J. Denny, Henry Denny, Martha Anne Denny, Alfred Denny, and Oswald Denny, in the purchase of lands in the territory of Wisconsin, and to be conveyed to and vested in my said grandchildren in fee simple. And it is my mind and will, and I do hereby declare and direct, that in case of the death of any, or either, of my said grandchildren, the share of the child so dying shall go to and vest in his or her surviving brothers or sister." The lands were selected and conveyed in fee simple to the said grandchildren as tenants in common. Subsequent to such conveyances, Oswald Denny, one of the said grandchildren, died intestate, and in his minority. Charles G. Denny, the defendant, against whom this judgment was rendered, is the father of said grandchildren. The question presented on this motion to set aside the marshal's sale is, whether the undivided share of Oswald Denny, deceased, in the lands so selected and conveyed, is subject to sale under execution issued on this judgment.

Jason Downer, for plaintiff. The provision relates to the death of the testator, or, at most, to the execution of the will. 2

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

Jarm. Wills, 621. The trust was completed and executed by the purchase of the lands. Jarm. Wills, 660, 661; Moore v. Lyons, 25 Wend. 119; Earl v. Grim, 1 Johns. Ch. 494; Murray v. De Rottenham, 6 Johns. Ch. 54.

D. A. J. Upham, for defendant, cited the following authorities: 4 Kent, Comm. 533; 2 Jarm. Wills, 449, 452, 456; Deffis v. Goldschmidt, 19 Ves. 566, 572; Hulburt v. Emerson, 16 Mass. 240; Stones v. Heurtly, 1 Ves. Sr. 165; Morton v. Morton, 8 Barb. 18; Daniell v. Daniell, 6 Ves. 297; Cutter v. Doughty, 23 Wend. 513; Newton v. Ayscough, 19 Ves. 534.

MILLER, District Judge. This is an absolute and unrestricted bequest of three thousand dollars to John S. Newlin, in special trust, to be invested by him in lands in Wisconsin, in fee simple, in the names of the testator's grandchildren. Upon the decease of the testator the grandchildren become vested as cestuis que trust, and clothed with power to compel in equity the execution of the trust. It is of little moment whether the provision of survivorship relates to the event of the decease of a grandchild or grandchildren in the testator's life time, or before the execution of the trust, as Oswald Denny died after the trust was fully executed. But it may be well to remark, that the law seems to be settled, that where the bequest is absolute and unrestricted, provisions such as this one, unlimited as to time, are construed to make them provide against the event of the legatee dying in the lifetime of the testator. Courts have seized with avidity upon slight expressions or circumstances, so to construe such provisions, to prevent a lapse, and also to avoid a restraint of alienation.

The word "share" must refer to the money, the subject of the bequest. And the words "go to and vest in," are more appropriate for passing the money, than real estate, particularly as the will appears to be drawn with legal precision. The bequest is to be construed as if the testator had directed that the trustee shall make the investment in lands in Wisconsin, in the names of such grandchildren as may survive him, or as may be living at the time of the investment, immaterial which in this case.

The money was directed to be invested in lands in the names of the grandchildren in fee simple. But if the provision of survivorship were construed to relate to the lands, the grandchildren would not become vested of an estate in fee. The technical words of the will should be construed according to their legal meaning. It would not do for the court to attempt by construction to mould the fee, so as to give effect to a conjectural intention. The testator did not direct that the fee should be defeasible throughout the entire life of the grandchildren.

The lands were conveyed to the grandchild-

ren as tenants in common in fee simple; but there was no obligation resting on the trustee to accept joint conveyances. Six tracts or pieces of land might have been selected and purchased for the consideration of five hundred dollars each, and a conveyance might have been made of a tract in severalty to each grandchild. If the will had directed that the conveyances to the grandchildren should be as tenants in common of the lands, possibly there might be some plausibility in the argument that the word "share" should apply to the lands as well as to the money. If the lands had been conveyed to the grandchildren in severalty, there would not be anything to which the word "share" could be applied. The lands are not per se the subject of a limited or conditional bequest, but they are an absolute and unconditional investment in fee simple of a bequest. The grandchildren became seized in fee of the lands by virtue of the deeds of conveyance to them in their own names, not by devise under the will. When the conveyances were delivered to the grandchildren, including Oswald, the trust was fully executed, according to the directions of the will, and the office and duties of the trustee ceased. In executed trusts, whether by deed or will, the rule of law must prevail. The deeds conveying the lands to the grandchildren as tenants in common in fee simple, were in conformity to the directions of the will, and also according to the laws of this state. By section 44, c. 56, p. 317, Rev. St., all grants and devises of lands made to two or more persons, except as provided in the following sections, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

Oswald Denny having died intestate, seized of an estate in fee simple, without living issue or a widow, by the law of Wisconsin, his share in the lands descended to his father; and being thus vested in Charles G. Denny, the defendant, they became subject to sale under execution on this judgment.

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Case No. 17,943.

WOOD v. DIXON.

[1 Cranch, C. C. 401.]¹

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

STRIKING-OUT APPEARANCE.

The court will not order the defendant's appearance to be struck out, so as to charge the marshal.

The plaintiff had ordered the writ in proper person, and his appearance was so entered on the docket. On calling over the appearance docket,—

Mr. Law, for defendant, had entered an

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

appearance for the defendant, without bail, although a note had been filed as to the cause of action.

F. S. Key now moved to appear for the plaintiff, and to have defendant's appearance struck out, and defendant ruled to bail, or the marshal amerced.

But THE COURT refused, because the marshal, by the appearance, was discharged from the duty of keeping the defendant in custody, and it is to be presumed has discharged him, and cannot retake him.

Case No. 17,944.

WOOD et al. v. DUMMER et al.

[3 Mason, 308.]¹

Circuit Court, D. Maine. May Term, 1824.

CORPORATIONS—CAPITAL STOCK—TRUST FUND FOR CREDITORS—BILL IN EQUITY—PARTIES—JURISDICTION OF FEDERAL COURT.

1. An incorporated bank divided three-fourths of its capital stock, before the expiration of its charter, among the stockholders, without providing funds which ultimately were sufficient to pay its outstanding bank notes. It was held that the capital stock was a trust fund for the payment of the bank notes, and might be followed into the hands of the stockholders.

[Cited in Curran v. State of Arkansas, 15 How. (56 U. S.) 308; Cleveland v. La Crosse & M. R. Co., Case No. 2,887; Chicago, R. I. & P. R. Co. v. Howard, 7 Wall. (74 U. S.) 410; Winans v. McKean, R. & Nav. Co., Case No. 17,862; Putnam v. New Albany, Id. 11,481; Haskins v. Harding, Id. 6,196; Sawyer v. Hoag, 17 Wall. (84 U. S.) 621; Sanger v. Upton, 91 U. S. 61; Scammon v. Kimball, 92 U. S. 369; Bowden v. Santos, Case No. 1,716; Farrington v. Tennessee, 95 U. S. 687; Union Nat. Bank v. Douglass, Case No. 14,375; Foreman v. Bigelow, Id. 4,934; Hatch v. Dana, 101 U. S. 213; Wilbur v. Stockholders, Case No. 17,636; Mutual Building Fund & Dollar Sav. Bank v. Bosseux, 3 Fed. 837; Holmes v. Sherwood, 16 Fed. 728; Scoville v. Thayer, 11 Fed. 190. Distinguished in Walsler v. Seligman, 13 Fed. 416. Cited in Fogg v. Blair, 133 U. S. 541, 10 Sup. Ct. 341; Winters v. Armstrong, 37 Fed. 521; Gould v. Little Rock, M. R. & T. Ry. Co., 52 Fed. 684.]

[Cited in Baker v. Atlas Bank, 9 Metc. (Mass.) 192. Cited in brief in Ballin v. J. & F. B. Friend Lace Importing Co. (Wis.) 47 N. W. 517; Beach v. Miller, 130 Ill. 163, 22 N. E. 464; Bent v. Hart, 73 Mo. 643; Bouton v. Smith, 113 Ill. 485. Cited in Chaffee v. Rutland R. Co., 55 Vt. 126; Clapp v. Peterson, 104 Ill. 31; Clayton v. Ore Knob Copper Co., 109 N. C. 385, 14 S. E. 38; Commercial Fire Ins. Co. v. Board of Revenue of Montgomery Co., 99 Ala. 1, 14 South. 492; Conover v. Hull, 10 Wash. 673, 39 Pac. 168; Coulter v. Robertson, 24 Miss. 298; Crandall v. Lincoln, 52 Conn. 95. Cited in Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 9 South. 133; Fear v. Bartlett, 81 Md. 435, 32 Atl. 323; First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co., 42 Minn. 333, 44 N. W. 200; Fox's Appeal, 93 Pa. St. 417; Germantown P. Ry. Co. v. Fittler, 60 Pa. St. 131; Goodin v. Cincinnati & W. Canal Co., 18 Ohio St. 182. Cited in brief in Heman v. Britton, 88 Mo. 550. Cited in Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 380; Hightower v. Thornton, 8

Ga. 486. Cited in brief in Hill v. Fogg, 41 Mo. 567. Cited in Hill v. Pioneer Lumber Co., 113 N. C. 173, 18 S. E. 108. Criticised in Hospes v. Northwestern Manuf'g & Car Co., 48 Minn. 192, 50 N. W. 1119. Cited in Hulings v. Hulings L. Co., 38 W. Va. 374, 18 S. E. 629; Jones v. Whitworth, 94 Tenn. 602, 30 S. W. 738. Distinguished in Lamb v. Laughlin, 25 W. Va. 310. Cited in Landis v. Sea Isle City Hotel Co. (N. J. Ch.) 31 Atl. 763, 764; Leathers v. Janney, 41 La. Ann. 1120, 6 South. 886; Lexington Life, Fire & Mar. Ins. Co. v. Page, 17 B. Mon. 413; Mann v. Pentz, 3 N. Y. 422; Mott v. Pennsylvania R. Co., 30 Pa. St. 9; National Trust Co. v. Miller, 33 N. J. Eq. 163; O'Bear Jewelry Co. v. Volfer (Ala.) 17 South. 527; Ohio L. & T. Co. v. Merchants' Ins. & Trust Co., 11 Humph. 32; Reid v. Batonton Manuf'g Co., 40 Ga. 98; Rouse v. Merchants' Nat. Bank, 46 Ohio St. 503, 22 N. E. 296; Shields v. Clifton Hill Land Co., 94 Tenn. 123, 28 S. W. 675, 676. Cited in brief in Stebbins v. Edmonds, 12 Gray, 204. Cited in Taylor v. Miami Ex. Co., 5 Ohio, 165. Cited in brief in Union Mut. Life Ins. Co. v. Frear Stone Manuf'g Co., 97 Ill. 538; Whitwell v. Warner, 20 Vt. 439.]

2. A bill in equity for such purpose might be maintained by some of the holders of the bank notes against some of the stockholders, the impossibility of bringing all before the court being sufficient to dispense with the ordinary rule of making all parties in interest parties.

[Cited in Omaha Hotel Co. v. Wade, 97 U. S. 21; First National Bank of Hannibal v. Smith, 6 Fed. 216; Dormitzer v. Illinois & St. L. Bridge Co., 6 Fed. 220; Swan Land & Cattle Co. v. Frank, 39 Fed. 461; Chicago Trust & Sav. Bank v. Bentz, 59 Fed. 646.]

[Cited in Adler v. Milwaukee Pat. Brick Manuf'g Co., 13 Wis. 61; Brewer v. Michigan Salt Ass'n, 58 Mich. 356, 25 N. W. 377. Cited in brief in Livingston Co. Agricultural Soc. v. Hunter, 110 Ill. 157; Merchants' Ins. Co. v. Hill, 86 Mo. 468. Cited in Williams v. Boice, 38 N. J. Eq. 371.]

3. In such case the decree against the stockholders before the court, should be only for their contributory share of the debt, in the proportion which the stock held by them, bore to the whole capital stock.

[Cited in Curran v. State of Arkansas, 15 How. (56 U. S.) 308; Payne v. Hook, 7 Wall. (74 U. S.) 432; Richmond v. Irons, 121 U. S. 45, 7 Sup. Ct. 795.]

[Cited in Brundage v. Monumental Gold & Silver Min. Co., 12 Or. 322, 7 Pac. 316; Farmers' L. & T. Co. v. Canada & S. L. Ry. Co., 127 Ind. 271, 26 N. E. 790; Hightower v. Thornton, 8 Ga. 486. Cited in brief in Lane v. Nickerson, 99 Ill. 284. Cited in Wetherbee v. Baker, 35 N. J. Eq. 506; Williams v. Traphagen, 38 N. J. Eq. 58.]

4. The holder of bank notes, payable to bearer, is not an assignee of a chose in action, within the eleventh section of the judiciary act of 1789, c. 20 [1 Stat. 78], limiting the jurisdiction of the circuit court.

[Cited in Cooper v. Thompson, Case No. 3,202.]

Bill in equity brought by the plaintiffs [Joshua B. Wood and others], as holders of the bank notes of the Hallovell and Augusta Bank, against the defendants [Jeremiah Dummer and others], as stockholders in the same bank, for payment of the same notes upon the ground of an asserted fraudulent division of the capital stock of the bank by the stockholders. The defendants put in answers, denying the fraud, but admitting the division of the capital stock, &c.;

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

and denying the plaintiffs' title to relief. The general replication was filed, and the cause was set down for a hearing upon the whole merits, at the last October term of the court, upon certain admissions of the parties.

Alden & Whitman, for plaintiffs.
Bond & Longfellow, for defendants.

STORY, Circuit Justice. The Hallowell and Augusta Bank was incorporated in March, 1804, by the legislature of Massachusetts, with a capital stock of \$200,000, divided into shares of \$100 each, for a term which expired on the first Monday of October, 1812, with the usual rights and privileges belonging to the banks in the same state. In June, 1812, the legislature passed an act (Act of 1812, c. 57) continuing all the banks, whose charters would expire on the first Monday of October, 1812, as corporate bodies until the first Monday of October, 1816, "for the sole purpose of enabling said banks gradually to settle and close their concerns, and divide their capital stock." And by a further act, passed in December, 1816 (Act of 1816, c. 110), the term was prolonged for three years from the passing of this last act. In January, 1813, at a meeting of the stockholders of the Hallowell and Augusta Bank, a vote was passed, ordering a dividend to be made among the stockholders of the bank of fifty per cent. of the capital stock thereof; and in October in the same year, a vote was passed for a further dividend of twenty-five per cent. of the capital stock, making in the whole a dividend of seventy-five per cent. of the whole capital stock among the stockholders. The notes of the bank continued to circulate in good credit until after November, 1814; and the plaintiffs were, in October and November, 1814, owners in their several rights of notes of the same bank to a sum in the aggregate amounting to more than \$29,000, which were presented for payment to the bank, and payment refused. The plaintiffs received certain notes of the directors as collateral security, but these were never paid. In fact one quarter part of the capital stock of the bank had never been paid in, but was secured by the notes of the stockholders, called "stock notes"; and about \$90,000 of debts (beside stock notes) were due from certain directors of the bank, who became insolvent and utterly unable to pay the same. So that nearly three quarters of the stock was lost or unpaid, either from insolvency or some other cause, and left the bank involved, after the division of the stock, in deep insolvency. In June, 1812, another and new bank was incorporated, composed in part of the same persons, with the same corporate name. The new bank, for a considerable time, continued to give credit to, and circulate the notes of the old bank; and the bill asserted the new bank to have become possessed of the funds of the old bank to a very large amount.

Such are the principal facts; and the claim of the plaintiffs is to be reimbursed by the defendants, (who are owners of three hundred and twenty shares) out of the dividends of the capital stock received by them, the amount of the debts, so due to the plaintiffs respectively, for the bank notes above stated.

The case is full of difficulties. The bill is drawn in a very loose and inartificial manner. It proceeds principally upon the grounds of a gross over issue of bank notes, and other violations of the charter, and of a fraudulent dividend by the stockholders with a knowledge of their insolvency; grounds, which are denied by the answers, and are not in the slightest degree established in the proofs. It does not directly proceed upon the ground, that the defendants hold a trust fund applicable to the payment of the debts of the corporation; but leaves this to be picked up in fragments by a minute analysis of the bill. I pass, however, over these objections, for the purpose of considering that, which is the principal point argued in the cause, whether the capital stock in the hands of the stockholders is liable to the payment of the debts of the bank.

It appears to me very clear upon general principles, as well as the legislative intention, that the capital stock of banks is to be deemed a pledge or trust fund for the payment of the debts contracted by the bank. The public, as well as the legislature, have always supposed this to be a fund appropriated for such purpose. The individual stockholders are not liable for the debts of the bank in their private capacities. The charter relieves them from personal responsibility, and substitutes the capital stock in its stead. Credit is universally given to this fund by the public, as the only means of repayment. During the existence of the corporation it is the sole property of the corporation, and can be applied only according to its charter, that is, as a fund for payment of its debts, upon the security of which it may discount and circulate notes. Why, otherwise, is any capital stock required by our charters? If the stock may, the next day after it is paid in, be withdrawn by the stockholders without payment of the debts of the corporation, why is its amount so studiously provided for, and its payment by the stockholders so diligently required? To me this point appears so plain upon principles of law, as well as common sense, that I cannot be brought into any doubt, that the charters of our banks make the capital stock a trust fund for the payment of all the debts of the corporation. The bill-holders and other creditors have the first claims upon it; and the stockholders have no rights, until all the other creditors are satisfied. They have the full benefit of all the profits made by the establishment, and cannot take any portion of the fund, until all the other claims on it are extinguished. Their rights are not to the capital stock, but to the residuum after all demands on it are paid. On a dissolution of

the corporation, the bill-holders and the stockholders have each equitable claims, but those of the bill-holders possess, as I conceive, a prior exclusive equity. The same doctrine has been recognized by the supreme court of Massachusetts in *Yose v. Grant*, 15 Mass. 505, 517, 522, and *Spear v. Grant*, 16 Mass. 9, 15.

If I am right in this position, the principal difficulty in the cause is overcome. If the capital stock is a trust fund, then it may be followed by the creditors into the hands of any persons, having notice of the trust attaching to it. As to the stockholders themselves, there can be no pretence to say, that, both in law and fact, they are not affected with the most ample notice.

The doctrine of following trust funds into the hands of any persons, who are not innocent purchasers, or do not otherwise possess superior equities, has been long established. Lord Redesdale in *Adair v. Shaw*, 1 Schoales & L. 243, 262, lays it down in very broad terms. He says: "If we advert to the cases on this subject, we shall find, that trusts are enforced not only against those persons, who rightfully are possessed of the trust property, as trustees, but also against all persons, who come into possession of the property bound by the trust with notice of the trust; and whoever comes so into possession, is considered as bound with respect to that special property to the execution of the trust." And a very strong recognition, as well as application of the principle, will be found in *Taylor v. Plumer*, 3 Maule & S. 562, 574, even in a court of common law. Upon this ground, assets disposed of by executors by misapplication, or existing in the hands of debtors, where the executor is insolvent, or there is collusion, are often reached in favour of creditors, as a trust fund. *Hill v. Simpson*, 7 Ves. 152, and the cases there cited fully illustrate this position.² The cases of partnership furnish also a pretty strong analogy. There, in equity, partnership funds will be followed in favour of creditors into the hands of third persons. It is true, that, as the master of the rolls said in *Campbell v. Mullett*, 2 Swanst. 551, 575, the equities of creditors are to be worked out through the medium of the partners. They have no lien, but something approaching to a lien, which courts of equity will regard and enforce, in all cases, where superior rights, which ought to be protected, do not intervene.³ It is not, however, necessary to search for analogous cases; for upon

the plain import of the charter, the capital stock is a trust fund for creditors, and the stockholders, upon the division, take it subject to all equities attached to it. They are, to all intents and purposes, privies to the trust, and receive it cum onere.

Another consideration is, whether the suit is well founded in point of jurisdiction. The 11th section of the judiciary act of 1789 (chapter 20) provides, that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. It has been objected, that this section prohibits the present suit. But my opinion is, that it is wholly inapplicable. In the first place, the bank notes were payable to bearer, and the bearer does not claim by any assignment. He is an original holder. Bank notes pass in and out of the bank many times, and the property in them vests by mere delivery in the person, who comes fairly in possession of them. In the next place, the plaintiffs do not found their title to relief solely upon their right as holders of these notes. Their present cause of action is collateral to that right. Their demand against the defendants is original in themselves upon the non-payment and insolvency of the bank, and is not derived under the title of any other person. It never vested in any other person, and has never come to them by any assignment. See *Bean v. Smith* [Case No. 1,174].

The next consideration is, whether the bill makes out a case, which upon the facts proved or admitted, entitles the plaintiffs to relief. I have already adverted to the loose structure of the bill. It primarily charges the case, as a case of fraud; that is now abandoned. If it can stand at all, it must be simply on the fact, that the defendants have the funds in their possession. That alone could not entitle the parties to relief, without allegations of insolvency on the part of the corporation or of the non-existence of other funds. Now the bill does not allege, that the corporation is insolvent, nor that it is dissolved, nor that there is no other corporate property, out of which the debts can be paid. These are extraordinary omissions; and if there had been a demurrer to the bill, it would be difficult for the court to have strained hard enough to support it. But these defects are in some degree helped by the answers, which admit the insolvency of the corporation, and show, that in fact no sufficient funds for payment of its debts are in existence, independent of the capital stock. Then again the bill (notwithstanding the intimations thrown out by the court on a former hearing of the cause) does not charge, that the capital stock is a trust fund, appropriated by law and the charter to the payment of the debts, and that the surplus

² See, also, *Moses v. Murgatroyd*, 1 Johns. Ch. 119; *Dexter v. Stewart*, 7 Johns. Ch. 52; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Long v. Majestree*, 1 Johns. Ch. 305; *Riddle v. Mandeville*, 5 Cranch [9 U. S.] 322; *Russell v. Clark's Ex'rs*, 7 Cranch [11 U. S.] 69.

³ See, also, *Ex parte Ruffin*, 6 Ves. 119, 127; *Ex parte Fell*, 10 Ves. 347; *Ex parte Williams*, 11 Ves. 3; *Ex parte Harris*, 1 Madd. 583; *Ex parte Kendall*, 17 Ves. 514, 526; *Murray v. Murray*, 5 Johns. Ch. 60; *Ex parte Lodge*, 1 Ves. Jr. 166; *Taylor v. Fields*, 4 Ves. 396; *Young v. Keighly*, 15 Ves. 557.

only, after such payment, belongs to the stockholders. Such an allegation was most fit to have been made upon the grounds, on which ultimately the plaintiffs concluded to rest their case at the hearing. The court is therefore compelled to thread it out by inference and intendment and exposition of the charter, as made part of the pleadings. Then again the bill charges the new Hallowell and Augusta Bank to be possessed of large funds of the old bank, which ought to be applied to the payment of the debts of the latter; and without attempting to bring the new bank to a hearing, the bill has, by the plaintiffs, been dismissed as against the new bank, leaving all the inferences, deducible from the charge in the bill, in full force against the plaintiffs. This ought to have been cured by an amendment of the bill.

I advert to these defects, not in the spirit of censure, (for I am well aware, that an apology is found in the fact, that chancery proceedings have, hitherto, but in a slight degree engaged the attention of the bar in this district), but in a spirit of regret, because they have been most embarrassing to the court in every step of its progress, and distressed it by creating a perpetual struggle between the desire to do justice to the parties, after so prolonged and expensive a controversy, and the difficulty of overcoming technical principles.

The exception as to parties ranges itself under this head. There is no allegation in the bill, that the old corporation is defunct, so as to dispense with its being made a party. The answers do not deny, that it yet has a legal existence, and therefore afford no help to cure the defect. Now, if in existence, nothing can be more clear, than that it ought to have been made a party to the bill. It is the original debtor; its funds are to be applied in payment of debts, and it would be wrong to touch those funds, without the most plenary proofs, that the debts were due, and the corporation had no defence.

There is a case very much like the present in many of its circumstances. It is *Curson v. African Co.*, reported in 1 Vern. 121, and somewhat more fully as to the facts in *Skin. 84*. The plaintiff was a creditor on bond of the old African Company, which became insolvent, but did not surrender its charter, and a new company was incorporated, consisting for the most part of the old members, to which the old company assigned its effects for payment of its debts. The suit was against the new company, for payment of the plaintiff's debts out of these effects, as a trust fund. The difficulty was, that the old company was not made a party to the bill. Lord Keeper North had some hesitation about the necessity of issuing process against the old company, because they had no property, on which a distringas could issue to compel them to appear. But he seems to have had no doubt of proceeding, if the

company was dissolved, nor of operating on the fund itself. He said: "If an executor convey over all the estate, and go to the Indies, or elsewhere not to be found, the estate shall be liable to satisfy the creditors; but this shall be after he hath stood out all process." *Skin. 84, 85*. The objection, however, was finally waived, and the plaintiff had a decree for forty per cent. being the same amount as the other creditors had received. This difficulty in point of averment and proof (for the fact of dissolution is notorious to all) may, however, as I think, be overcome. The acts of the legislature creating the bank, and continuing its existence for a limited time, are made part of the bill; and as a prolonged existence cannot be presumed, and is not asserted in the answers, the court must take it to be true, that the corporation expired by the legislative limitation, antecedent to the filing of the bill. Upon the clearest principles it cannot be necessary to make a non-existing corporation a party. But then it is argued, that no decree ought to be made without making all the stockholders parties to the bill, for all are liable to contribution. I agree, that if proper parties are not made, the defendant may demur to the bill, or state it by plea or answer, or may object to a decree at the hearing, or even obtain a reversal, in some cases, after a decree. Whenever, taken either by demurrer, or plea, or answer, or at the hearing, the court, if the objection is well founded, is not bound to dismiss the bill, but may retain it, giving leave to make new parties.⁴ The subject as to who are necessary parties, and when they may be dispensed with, was a good deal discussed by the court in delivering its judgment in *West v. Randall* [Case No. 17,424]. The principal cases are there collected and commented on. The general rule is, that all persons materially interested, either as plaintiffs or defendants, are to be made parties. There are exceptions, just as old and as well founded, as the rule itself. Where the parties are beyond the jurisdiction, or are so numerous, that it is impossible to join them all, a court of chancery will make such a decree, as it can, without them. Its object is to administer justice, and it will not suffer a rule, founded in its own sense of propriety and convenience, to become the instrument of a denial of justice to parties before the court, who are entitled to relief. What is practicable to bring all interest before it, will be done. What is impossible or impracticable, it has not the rashness to attempt, but it contents itself with disposing of the equities before it,

⁴ *Cooper, Eq. Pl. 33, 289; Mitf. Eq. Pl. 144, 145; Jones v. Jones, 3 Atk. 110; Wyatt, Pract. Reg. 299; 1 P. Wms. 428, 599; 3 P. Wms. 331; Palk v. Clinton, 12 Ves. 48, 58; Bishop of Winchester v. Beavor, 3 Ves. 314; Attorney General v. Jackson, 11 Ves. 365; Millegan v. Mitchell, 3 Cranch [7 U. S.] 220; Cockburn v. Thompson, 16 Ves. 321, 325; Madox v. Jackson, 3 Atk. 406.*

leaving, as far as it may, the rights of other persons unprejudiced. In respect to the exception on account of the numerosness of parties, the question has been discussed and acted upon in many cases, particularly in *Chancey v. May*, Prec. Ch. 592; *Leigh v. Thomas*, 2 Ves. Sr. 312; *Lloyd v. Loaring*, 6 Ves. 773; *Adair v. New River Co.*, 11 Ves. 429; *Good v. Blewitt*, 13 Ves. 397; and *Cockburn v. Thompson*, 16 Ves. 320.⁵ The result of the whole cases is, that where the parties are so numerous, that it is inconvenient or impracticable to bring all before the court, the rule, which is founded on the consideration of public good, shall not be applied, since it would defeat the purposes of justice.

Now, no case could afford a stronger illustration for the application of the principle, than the present. Here, the capital stock is divisible into 2,000 shares of 100 dollars each. Every share is transferable, and may be unlimitedly assigned to any persons whatsoever, whether citizens or aliens, residents or non-residents. It is obviously impracticable in such a case to bring all the stockholders before the court. Many of them may reside, and probably do reside, in other states; and the court must presume, that the shares are very variously distributed. There is no complaint, that the defendants now before the court do not represent effectually the interests adverse to the plaintiffs, or that the struggle is not maintained with all due legal pertinacity. Nor is it pretended, that the other stockholders have means of affording a more effectual defence to the defendants in respect to their own particular interests. The objection is now made upon dry technical principles of strict right, and upon these it cannot and ought not to be sustained. The case of the *City of London v. Richmond*, 2 Vern. 421, 2 Eq. Cas. Abr. 86, Prec. Ch. 156, 1 Brown, Parl. Cas. 516, is in point. There, the city had granted a lease of certain water to one A, who afterwards assigned over the lease to trustees in trust for the holders of the shares, (900 shares) into which it was divided. The rent being unpaid, the bill was brought against the assignees and some of the shareholders; and upon an objection, that all ought to have been joined, it was expressly overruled, upon the ground of its impracticability. There is an anonymous case in 2 Eq. Cas. Abr. 166, pl. 7, to the same effect. Certain persons became subscribers to a bank to be authorized by parliament, and £6,000 was expended in endeavoring to effect the object. The persons, who had advanced the £6,000, brought their bill for repayment against sixteen out of two hundred and fifty subscribers. The court overruled the objection taken for want

of all the subscribers, because the plaintiffs sought to recover only their proportion of the loss from the defendants.

Upon the whole, my opinion is, that the objection of the want of sufficient parties cannot be maintained. We may then proceed to the merits of the defence, as disclosed in the answers. One ground there taken is, that the demands of the plaintiffs respectively are barred by the statute of limitations. But this bar to a decree cannot, upon the facts, be sustained. The rights of the plaintiffs accrued as against the defendants within six years; for until a refusal of payment by the bank of its notes, followed by an inability to discharge them, there was no cause of proceeding in equity against the defendants. There is no positive bar to suits in equity; but whenever any limitation is adopted, it is ordinarily regulated by analogy to the common law. Here, the claim is against a trust fund in the hands of the defendants; and in cases, not of constructive, but of express trusts, so long, at least, as they are not encountered by an adverse possession and denial of right, the statute of limitations does not begin to run. I should have very great difficulty in allowing a bar of the statute of limitations to operate in a case of this nature, unless where the circumstances of negligence on one side, and of positive denial of right on the other were very cogent. Here the capital stock was actually divided, to the amount of \$150,000, in January and October, 1813, at a time when it was perfectly well known, or ought to have been known, that a very large number of bank notes, amounting, I believe, to more than \$90,000, were due, and outstanding against the bank. If what has fallen from the bar be correct, this large amount remains yet unpaid. How was its payment provided for? Simply by the notes due to the bank, then outstanding, the productiveness of which could not be then ascertained, and the utter insolvency of the debtors has been since fully established. These notes, indeed, to an amount of more than \$140,000 (including the stock notes, for the unpaid quarter part of the capital stock,) were due almost entirely from the directors of the bank, from whose official misconduct the stockholders ought certainly to derive no benefit, if they are not to be affected with any private responsibility.

The only other ground, suggested as a defence by the defendants is, that they have been guilty of no fraud, and that the division of the capital stock was an act authorized by law; and there is no equity to relieve the plaintiffs by throwing the loss on the stockholders. The answer to this argument, for such it is, has already been given. The stockholders have no right to any thing but the residuum of the capital stock, after payment of all the debts of the bank. The funds in their hands, therefore, have an equity attached to them, in favour of the creditors,

⁵ See, also, *Wendell v. Van Rensselaer*, 1 Johns. Ch. 344; *Wiser v. Blachly*, 1 Johns. Ch. 437; *Brasher's Ex'rs v. Vancortlandt*, 2 Johns. Ch. 242; *Van Vechten v. Terry*, 2 Johns. Ch. 197.

which it is against conscience to resist. To be sure, the plaintiffs might, if their bill had been properly framed, have shown a much stronger case for equity, and might have shown due diligence in attempting to enforce their rights. I allude to the known facts of the various suits at common law, some of which have been cited at the bar, and others brought to this court for decision, in which great efforts have been made to obtain a remedy at law, by the bill-holders, without success.

The next question is, what sort of decree the plaintiffs are entitled to. Are they entitled to a decree, to the full amount of the dividends received by the defendants respectively, towards payment of the debts due from the bank to them, or are they entitled only to a pro rata payment out of that dividend, in the proportion, which the stock, held by the defendants, bears to the whole capital stock? The bill does not allege, that the other stockholders, who have received dividends, are insolvent, or out of the jurisdiction of the court. Nor does it state what the amount of the debts due from the bank to bill-holders, or others, is. It would have been desirable, as far as it was practicable, that all the other creditors, who had a common interest, might have been brought before the court. But neither party has urged it, or waived any formal objection to the introduction of them. The court, therefore, in proceeding to do equity to those before it, must take care that it is not the instrument of injustice to others who are not represented. Non constat, if the whole fund is taken from the defendants in favour of the plaintiffs, that there will remain any solvent stockholders, from whom the other creditors can claim any share. It is true, in the case of *City of London v. Richmond*, 2 Vern. 421, 1 Brown, Parl. Cas. 518, that, though all the parties in interest were not before the court, the full rent was decreed. But that case furnishes no rule for the present, for there the trustees of all the shareholders were before the court, and they were the assignees of the estate, and therefore held it liable to the rent. In the anonymous case in 2 Eq. Cas. Abr. 166, pl. 7, the decree was only for a proportion of the money expended. But there the bill asked for no more. I rather incline to think that the judges in the cases in 15 Mass. 505, and 16 Mass. 9, meant to indicate an opinion in favour of the bill-holders only for a proportion, unless special circumstances were made out, such as insolvency, &c.

What would be the effect of the introduction of an averment of the insolvency of the other stockholders, or their being out of the jurisdiction, or of other circumstances denoting a peculiar equity, in a bill of this nature, it is not now necessary to decide. See *Madox v. Jackson*, 3 Atk. 405; *Attorney-General v. Jackson*, 11 Ves. 365. Taking into consideration the manifest defects of the present bill, the long delay in instituting the present suit

(which is not accounted for in any averments framed for this purpose,) the possible, nay, probable intermediate insolvencies of some of the stockholders, the injustice which may arise to other creditors of the bank, not before the court, by any other course, I have come to the conclusion, that our duty is best performed by holding the plaintiffs entitled to a decree, that the defendants pay out of the dividends of the capital stock received by them, so much of the debts due to the plaintiffs, as the number of shares held by them in the same capital stock (viz. 320 shares) bears to the whole number of shares in the capital stock (viz. 2,000 shares).

There is much force in the suggestion, that the corporation books have been withdrawn and secreted, so that the plaintiffs were unable originally to ascertain who the other stockholders were. But this difficulty might, in some measure, have been overcome by apt averments in the bill; and the disclosure of the names of several stockholders in the answers puts the plaintiffs in possession of facts, by which, at their choice, they might by an amendment have brought those persons before the court, or have assigned a sufficient reason for the omission.

My judgment accordingly is, that the defendants are to pay the plaintiffs, in the proportion already intimated, and no further. Decree accordingly, with costs.

In 2 Vern. 396, there is a note stating, that in the case between *Dr. Salmon and the Hamburg Company*, the members in their private capacities were made liable, the company having no goods. That case is not reported in any other book, and the circumstances of it are not therefore known.

Case No. 17,945.

WOOD et al. v. FORREST et al.

[2 Cranch, C. C. 303.]¹

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

REPLEVIN BOND—VALIDITY.

It is not necessary to the validity of a replevin bond that the plaintiff in replevin should be bound in the bond.

Debt upon a replevin bond. The bond was in this form: "Know all men, by these presents, that we, Richard M. Scott, trustee of Mrs. Elizabeth C. Watson, and Henry Forrest, James Watson, and J. G. Slye, of Washington county and District of Columbia, are held and firmly bound unto Basil Wood and Henry B. Robertson," etc., but was executed by the last-named three obligors only, Mr. Scott not having signed or sealed it. The condition was in the usual form, but it stated, in its recital, that the writ of replevin, which was about to be sued out, was "to be returnable to the said circuit court next to be held at the city of Washington, in the

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

District of Columbia, on the — of — next." The defendants, after oyer, demurred generally to the declaration.

Mr. Randall, for defendants, contended that the bond was void, because not taken according to the directions of the statute of 11 Geo. II., c. 19, § 23, which, in case of replevin for distress taken for rent, requires the bond to be taken "from the plaintiff and two responsible persons as sureties." So, a bail bond, the condition of which is not conformable to the statute, is void. 5 Com. Dig. 646, 647.

Mr. Jones, contra. That might perhaps have been a ground for a motion to quash the replevin, but the defendants cannot now take advantage of it. The blank, in the condition as to the day of sitting of the court, is immaterial, as it states it to be "the said circuit court next to be held at the city of Washington," the time for the holding of which is made certain by law.

THE COURT took time, during the vacation, to consider the case, and, at the next term, rendered judgment upon the demurrer, for the plaintiffs; and the plaintiffs executed a writ of inquiry, and the jury assessed their damages to the full amount of the debts and costs for which the property had been taken in execution by the plaintiffs, who were constables.

Case No. 17,946.

WOOD v. FRANKLIN.

[3 Cranch, C. C. 115.]¹

Circuit Court, District of Columbia. May Term, 1827.

DEBT ON REPLEVIN BOND—SUFFICIENCY OF PLEAS.

In an action of debt upon a replevin bond, setting forth the condition and averring special breaches, the plea of general performance is a bad plea; so is the plea of non damnificatus; so is the plea that the plaintiff had no property in the goods replevied; so is the plea of nul tiel record if no record is averred in the declaration; and so is a plea to the whole declaration, which is an answer to a part only.

Debt on a replevin bond given in the suit of Arguelles v. Wood [Case No. 520]. The declaration set forth the condition of the bond, and averred (1) that Mrs. Arguelles did not prosecute her writ with effect; (2) that she did not establish a lawful right to the goods replevied; (3) nor return the goods, although a return was awarded by the court; and (4) that she did not pay the damages and costs adjudged by the court.

The defendant, at the last term, had leave to amend his pleading, and now offered to plead (1) general performance; (2) as to so much of the declaration as averred that the plaintiff had recovered a judgment against Mrs. Arguelles, no such record; (3) non damnificatus; (4) that the goods were the prop-

erty of Mrs. Arguelles, without this, that the plaintiff had any property in the same.

R. S. Coxe, objected to the receiving of these pleas, under the leave to amend, because they would be all bad upon demurrer. The pleas of general performance and non damnificatus are bad after assignment of special breaches. The plea of no such record is bad, because no record was averred in the declaration. The plea that the plaintiff had no property in the goods replevied is bad, because no such property was averred in the declaration; and the plea is wholly impertinent and immaterial.

The defendant also pleaded that the court did not order a return; but this plea being pleaded to the whole declaration, when it is only an answer to one of the breaches assigned, is also bad.

And of this opinion was THE COURT, who rejected the pleas (nem. con.).

The authorities cited were Cutler v. Southern, 1 Wms. Saund. 116; 2 Chit. Pl. 528, note a; Postmaster General v. Cochran, 2 Johns. 413; Brackenbury v. Pell, 12 East, 588.

Case No. 17,947.

WOOD v. GOLD.

[4 McLean, 577.]¹

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

FOREIGN ADMINISTRATOR—RIGHT TO SUE.

1. Letters of administration can only authorize the individual to administer on the estate of the deceased, within the state in which they were granted.

[Cited in Leonard v. Putnam, 51 N. H. 250.]

2. Suit cannot be brought in any other state, without the sanction of said state.

[This was a suit by Jethro Wood's administrator against Amos and Daniel Gold.]

Baker & Willard, for plaintiff.

Mr. Gould, for defendants.

McLEAN, Circuit Justice. A motion is made for a nonsuit, on the ground that suit is brought under letters of administration granted in the state of New York. Letters of administration do not authorize a suit to be brought by the administrator in any other state. Except by sanction of other states, they can only operate within the jurisdiction under which they were issued. The statute of Michigan requires letters to be taken out in this state, to exercise the duties of administrator here, or to bring suit.

WOOD (HOPKINS v.). See Case No. 6,693.

Case No. 17,947a.

WOOD v. The INFANTA.

[See Case No. 7,030.]

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

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

Case No. 17,948.

WOOD v. LOUISIANA.

[5 Dill. 122.]¹Circuit Court, E. D. Missouri. 1878.²

MUNICIPAL CORPORATIONS—INVALID BONDS—REMEDY OF PURCHASER—IMPLIED ASSUMPSIT.

A municipal corporation issued bonds valid on their face, but in fact void, because they were antedated to evade the registration act, and were not registered. The corporation had power to borrow money, and the proceeds of the bonds passed into the city treasury and were used for lawful purposes. *Held*, that the corporation was liable in an action for money had and received to the purchaser of the bonds or his assignee, not for the amount of the bonds, but for the amount of money actually paid for the bonds to the corporation, with simple interest thereon.

[Cited in *Gause v. City of Clarksville*, Case No. 5,276; s. c., 1 Fed. 357. Distinguished in *Hall v. Scott County*, 7 Fed. 342. Cited in *Dorian v. City of Shreveport*, 28 Fed. 295; *Morton v. City of Nevada*, 41 Fed. 588.]

This was an action for money had and received by the defendant from the plaintiff [Thomas J. Wood] in part, and in part from the plaintiff's assignors. The city received the moneys sued for as the consideration of certain bonds issued by it, and antedated so as to evade the local registration act of March, 1872, which was construed in *Anthony v. Jasper County* [Case No. 488]. Apparently the bonds were valid. If the true date had been that named in the bonds, no registration was necessary. The bonds were never registered, and for this reason the city repudiated any obligation to pay them. The plaintiff and his assignors did not know that the bonds had been antedated. The defendant demurred to the petition.

C. H. Krum, for plaintiff.

David Wagner and D. P. Dyer, for defendant.

TREAT, District Judge. This is a suit for money had and received by the defendant from the plaintiff and plaintiff's assignors. The officers of the defendant, in order to evade the Missouri act of March, 1872, requiring registration, antedated certain bonds, which subsequently were bought by the plaintiff and his assignors, in open market, at ninety cents on the dollar. Those bonds were void for nonregistry. If they had not been antedated—that is, if they had been executed and issued in fact as on their face they purported to have been—they would have been valid and obligatory.

As the city had power to borrow money for the purposes defined in its charter, is it to be held liable for the money thus borrowed through sale of bonds which were void from noncompliance with the registry act? The fraudulent contrivances of the defendant's agents, whereby through invalid

bonds they obtained the money of the plaintiff and his assignors, ought not to preclude the plaintiff from recovery, if he was a bona fide holder for value, to the extent that the defendant actually received the money therefor, provided there was lawful authority to borrow money for the purpose for which the same was received and used. If money was obtained by the defendant through such invalid contrivances, and the same could have been lawfully borrowed in another manner, and if the money thus procured was received and used for lawful purposes, why should not the defendant be held liable? The bonds, as stated, were invalid, as such, and no suit could be maintained thereon. They were bought, innocently, in the open market, from the duly constituted and recognized agents of the defendant, at the rate named, and the net sum received (eighty-five cents on a dollar) passed into the city treasury and was disbursed for lawful purposes. Full and detailed reports of receipts and disbursements concerning the same were made from time to time, and received the sanction of the mayor and city council. There is no doubt that the plaintiff, as to all except two of the bonds, bought them directly from the city's agents, at the rate named, and paid to said agents accordingly. As to the other two bonds, the facts are that they were sold under like circumstances to the respective assignors of the plaintiff, at the same rate, and subsequently bought of said assignors, bona fide, for the same price.

It is of the first importance to bear in mind, however, that the city could neither borrow nor expend money except when authorized by its charter and the law. It cannot set up the fraudulent or unlawful contrivances of its agents, whereby plaintiff's money was procured and used for lawful purposes, as a defence in this action, if the plaintiff or purchaser was not in pari delicto as to said wrongful conduct.

As to the bonds bought not directly from defendant's agent, the assignee is subrogated to the rights of the assignor. This has been settled in this circuit (*Shirk v. Pulaski County* [Case No. 12,794]), and if not directly adjudged, at least broadly intimated, by the supreme court of the United States.

The next inquiry is not free from doubt. The fund commissioner was not to sell the bonds for less than eighty-five per cent. of their face value. He did pay that sum to the defendant, five per cent. having been used for commissions and expenses of sale. The city was prohibited from increasing its debt, but was bound to meet its existing indebtedness. To meet that indebtedness and current expenses, including the expenses of negotiating this loan or borrowing the sum needed, the plaintiff's ninety per cent. was received. That sum, therefore, was had and lawfully applied, and the defendant must answer therefor. Of course, the plaintiff can receive interest only at the rate of six

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

² [Affirmed in 102 U. S. 294.]

per cent. on the sum so advanced by him or his assignors, from the date when payment of interest ceased.

It is unnecessary to distinguish, more clearly, this case from one where, through the fraudulent acts of a municipal agent, money has been procured by him for unlawful purposes, or through him passed to the municipality for unlawful objects and been so used. The doctrine, not of fraud alone, would, in such a case, have to be considered with reference to the respective parties, but also the doctrine of *ultra vires*.

The case before the court is, in its worst aspects, simply this, to wit: A procurement through unlawful means of a given sum of money, which was received by the principal and by the latter lawfully used; the lender being innocent that the means used were invalid. A municipality can exercise no powers not conferred upon it, nor can it resort to forbidden means to accomplish a prohibited result. It necessarily acts through agents, and it is important that such agents should be restricted in their agency to prescribed modes of action. But suppose they violate such prohibitions, or transcend willfully the restrictions imposed on them, yet the fruits thereof, being received by them, are applied to the lawful objects of the municipality; and suppose the lender, in ignorance of any fraudulent devices of the kind, parts with his money in good faith, and the municipality has had and used the money so procured for lawful purposes, or still has it in its treasury, shall it refuse to refund the same?

It is not necessary to go into an inquiry in this case as to matters wherein an agent on one side, and the party dealing with him on the other, are in *pari delicto*. Here we have the recognized agents of the city undertaking to raise funds for lawful purposes, and by antedating the bonds raising said funds, giving, as evidence of the money borrowed, bonds which, for statutory reasons, could not be enforced as bonds. The purchaser of said bonds, or (what is the same) the lender to the borrowing city, parts with his money, which the city received and lawfully used, although the purchaser or lender received as evidence of what he advanced the bonds on which he could not recover directly; is he, therefore, to lose the money so by him loaned and used by the city? One who deals with a municipality must be sure that it is acting within its corporate powers. If its agents are acting beyond such powers, he deals at his peril.

If the municipality has the power to raise funds for prescribed purposes, but is forbidden to raise them in the manner adopted by its agents, may the innocent lender hold the city liable as for money had and re-

ceived, notwithstanding the funds came into its possession through prohibited means used by its agents? Here a technical question is encountered. If the lender knows that the means are unlawful (taking cognizance of the law as to said means), shall he have the aid of the court to recover? But if, through the designed fraud of the city's agents, he is innocently misled into the purchase of the bonds, which on their face are outside of the prohibitions of the statute, and the city receives the avails thereof, and uses such avails in a lawful way, shall he be remediless?

The broad distinction must be recognized between an effort to enable a municipality to exceed the limits fixed to its indebtedness, and a resort to prohibited means to raise funds for a lawful purpose. It was a positive requirement that the obligations of the city should not exceed a specified amount, with exceptions as to past indebtedness. It was also a positive requirement that future bonds should be registered in conformity with the act of March, 1872.

It appears from the evidence that the bonds in question, heretofore pronounced invalid for nonregistry, were the means through which plaintiff's money went into the treasury of the city, and was used for lawful purposes; and it appears also that the purchaser of the bonds did not know of the false antedating. The rules invoked concerning the relationship of vendor and vendee in open market, as to municipal bonds, cannot affect this case; for those rules pertain solely to vendors (other than the obligors) and their vendees. The obligor's liability still remains, and depends on considerations entirely distinct from those arising between an ordinary vendor and vendee.

This is a suit as between the obligor of the bond and the assignee thereof. The bond being for statutory reasons void, the assignee is not protected by the law merchant. The equities of the original transactions are open, and evidence thereon has been had. The assignee being subrogated to all the rights of the first assignor, may recover from the obligor what he (that assignor) actually paid, and no more. He cannot recover on the bond, because that was invalid, and hence not obligatory, but is entitled to a recovery of what the city actually received from the first vendee of the bond. If ninety cents on a dollar were paid, as heretofore stated, that is the amount of the recovery, with six per cent. interest on what is due. Dill. Mun. Corp. § 730, and notes.

Judgment accordingly.

See *Gause v. Clarksville* [Case No. 5,276.]

[This case was taken by writ of error to the supreme court, and the judgment was there affirmed. 102 U. S. 294.]

Case No. 17,949.

WOOD v. The LUMBERMAN.

[3 Hughes, 542.]¹District Court, E. D. Virginia. 1879.²

LIEN ON VESSEL—WAIVER.

Where a purchaser of a vessel, who takes pains before purchasing to ascertain the claims against her and to see them settled, is informed by a claimant (who is afterwards the libellant) that he has but one small claim, which is afterwards paid, and this claimant fails to inform him of the existence of a negotiable note given in payment of another claim which is receipted, and which the vendor shows as receipted to the purchaser, *held*, that this negotiable note is not a lien upon the vessel.

In admiralty. In this case John E. Wood libels the tug for the amount of \$104.24, the price of coal furnished the tug while it was owned by C. H. Hostetter. The tug was soon afterwards purchased by Brillinger, the present claimant and owner. The law of Virginia gives a lien to material men upon domestic vessels. Wood, through his agent, had given a receipt for the amount of his bill for coal, in which no mention was made of a promissory note taken by Wood in payment of the bill. Brillinger saw this receipt, but heard nothing of the note, before he paid for the tug.

Further facts in the case were the following: Before Brillinger purchased the steamer of C. H. Hostetter he required the latter to settle all bills against her, so that there should be no claim made after he should become the owner. This Hostetter did, with the exception of a few small bills which Brillinger was willing to assume, or trust to be paid. Among other bills produced to Brillinger by Hostetter as having been paid, was that of the libellant, filed with Brillinger's answer, and now attached to this paper. If Brillinger had suspected that the bill had not been actually paid, he would have deducted it from the purchase-money, as he did in the case of some small bills he assumed. He also made inquiries, so far as he could, as to outstanding bills against the steamer before he would run the risk of a final settlement. He went with H. H. Hostetter, brother of C. H. Hostetter, who was in the employment of the latter, to see libellant. Did not see him, but saw libellant's brother, who seemed to have charge of the business. On inquiry, he said he had nothing against the steamer but a small bill for coal, but that they had a note against C. H. Hostetter which would soon be due, and he hoped he, H. H. Hostetter, would provide for it. This small bill was soon after paid by H. H. Hostetter. This was just after C. H. Hostetter had left the state, and his disappearance had been talked of. After Brillinger had purchased and paid for the steamer he got coal from libellant, and paid bill when

presented, but nothing was said to him about the steamer owing anything for which C. H. Hostetter had contracted, except the small bill paid afterwards by H. H. Hostetter, as mentioned.

H. H. Hostetter confirmed the testimony of Brillinger as to the statement of libellant's clerk or superintendent at the yard, and the payment of the small bill by him as mentioned.

Captain Brown said he remained in charge of steamer after Hostetter sold to Brillinger; that once after Hostetter had left, when he was taking in some coal, he spoke to the younger Wood about Hostetter having gone off leaving debts, etc.; and that Wood said Hostetter left in debt to them, but that he did not owe them anything they could make out of the boat.

L. D. Starke, for libellant.

W. H. C. Ellis, for respondent.

HUGHES, District Judge. I think, on the facts of this case (the libellant having given a receipt for his claim, in which he made no mention of his note, and by which Brillinger, who saw it, was thrown off of his guard, and Wood's brother or clerk having declared to Brillinger that the house had no claim on the tug), that the lien was waived, and the purchaser took the vessel clear of the lien.

The decree given under this decision was affirmed on appeal by Bond, Circuit Judge. [Case unreported.]

Case No. 17,950.

WOOD et al. v. LUSE et al.

[4 McLean, 254.]¹

Circuit Court, D. Michigan. June Term, 1847.

JUDGMENT—MOTION TO SET ASIDE.

1. A judgment can not be set aside on motion, after the term in which it was rendered.

[Cited in The Illinois, Case No. 7,003; Shuford v. Cain, *Id.* 12,323; U. S. v. Millinger, 7 Fed. 189; U. S. v. Walsh, 22 Fed. 648.]

2. In New York it is otherwise.

[Cited in The Illinois, Case No. 7,003.]

3. But the supreme court follow the common-law doctrine on this subject.

[Cited in The Illinois, Case No. 7,003.]

[Proceeding by Wood, Grant & Wood against Luse & Niles.]

Mr. Davidson, for plaintiffs.

Joy & Porter, for defendants.

McLEAN, Circuit Justice. This is a motion by defendants to set aside certain proceedings, as well in the above cause as in another, in both of which judgments had been obtained more than six years ago. An affidavit is filed as the foundation of the motion. If the motion was not objectionable on other ground,

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

² [Affirmed by circuit court; case unreported.]

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

It is clear that the proceeding on the original suit and the notes on which it was founded, could not be revised in this manner. If the judgment was irregularly entered, as if no notice had been served on the defendants, so that it could not otherwise be considered than as a nullity, the court would entertain the motion. In New York, motions to set aside a judgment which had been entered at a preceding term, or perhaps years before the motion, are frequently made and acted upon, as their merits may require. But by the common law, the judgment of a previous term can not be set aside on motion. And this is the doctrine of the supreme court. It is admitted that relief, in modern practice, is given on motion where, formerly, an *audita querela* was necessary. But this does not apply to the solemn judgments of the court. A clerical error in the entry of the judgment will be corrected at any time, but judgments can not be set aside on motion, after the term at which they were entered. The motion is overruled.

WOOD (McINTIRE v.). See Case No. 8-825.

WOOD (MANHATTAN MEDICINE CO. v.). See Case No. 9,026.

Case No. 17,951.

WOOD v. MANN et al.

[1 Sumn. 506.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1833.

CONVEYANCE PROCURED BY FRAUD—BILL TO SET ASIDE—DEFENSES—BONA FIDE PURCHASER—ARGUMENTATIVE PLEADING.

1. Where a bill in equity was brought to set aside a conveyance asserted to have been procured by fraud, and one of the defendants pleaded, that he was a bona fide purchaser under the grantee of parcel of the premises, without notice of the asserted fraud, and that he had paid a part of the consideration money, and that the residue was secured by mortgage, *held*, that this plea furnished no bar to the bill; that it should have averred, that the whole consideration of the purchase had been paid before notice of the plaintiff's title.

[Cited in *Livingston v. Story*, 11 Pet. (36 U. S.) 393; *Pierpont v. Fowle*, Case No. 11-152.]

[Cited in *Dugan v. Yattier*, 3 Blackf. 248, note. Cited in brief in *Richards v. Stanley*, 50 Vt. 151.]

2. The above plea overruled absolutely, and the party ordered to answer generally.

3. A bona fide purchaser, for a valuable consideration, and without notice, under a fraudulent grantee, would hold the estate at law against the original grantor.

[Cited in *Re Estes*, 3 Fed. 142; *Dowell v. Applegate*, 7 Fed. 887.]

[Cited in *Hovey v. Hobson*, 53 Me. 452.]

4. Query, whether a bona fide purchase, for a valuable consideration, without notice, is a good

bar in equity to a legal title asserted, as it is to an equitable title.

[Cited in *Townshend v. Simon*, 38 N. J. Law, 242.]

5. The following was the denial in the plea of the notice of the fraud asserted in the bill; namely, "that this defendant had no notice whatever of any title, claim, or demand of the complainant, or of any other person, to or in the lands so purchased by this defendant, as aforesaid, which would affect the same, or any of them, or any part thereof." *Held*, that this is argumentative and insufficient. It should expressly and in terms deny, by proper averments, notice of the fraud charged in the bill.

6. The bill charged notice of the asserted fraud against one of the defendants, in general terms, to wit, "that the defendant then and there well knowing all and singular the premises," etc. *Held*, that the bill should be amended so as to charge the notice more directly.

Bill in equity to set aside a certain conveyance, made by the plaintiff [Josiah Wood, Jr.] to one John R. Adams (a defendant), asserted to have been procured by fraud and imposition upon the plaintiff. The bill averred, that Elisha Fuller, one of the defendants, had notice of the alleged fraud and imposition, in the following terms; namely, "the said Fuller then and there well knowing all and singular the premises, and combining and confederating as aforesaid, the nominal consideration of the said deed, being stated to be forty thousand dollars; but what consideration, or whether any consideration, was paid therefor by the said Fuller, your orator knows not; and the said Fuller combining and confederating as aforesaid, well knowing all the premises," etc. Fuller pleaded, that he was a bona fide purchaser under Samuel H. Mann of parcel of the premises, without notice of the asserted fraud or imposition; that he had paid a part of the consideration money, and that the residue was secured by a mortgage. Upon motion of the plaintiff, the plea was set down for argument, as to its validity in matter as well as in form.

Mr. Rand, for plaintiff.

Mr. Washburn, for defendant Fuller.

STORY, Circuit Justice. The first question made at the bar is, whether, if the plaintiff asserts a legal title, the plea of a bona fide purchase for a valuable consideration, without notice, is a good bar in equity to a bill, like the present, which is for discovery and relief. Without doubt, a plea to the whole bill, which is bad in part, and good in part, may be allowed to the extent to which it is good, and overruled as to the residue. It may be good as to the discovery, and bad as to the relief. See *Coop. Eq. Pl. 230*; *Mitt. Eq. Pl. (4th Ed., by Jeremy) pp. 294, 295*. Upon the question, whether a bona fide purchase for a valuable consideration, without notice, is a good plea in bar to a legal title asserted, as it certainly is to an equitable title, there is considerable contrariety in the authorities. Lord Nottingham is reported in the case of *Burlace v. Cooke*, 2 Freem. Ch.

¹ [Reported by Charles Sumner, Esq.]

24, to have held the plea to be a good bar. But he is said, in the subsequent case of *Rogers v. Seale*, Id. 84, to have changed his opinion. Both these cases, however, are, as Mr. Sugden has well observed, very ill reported. *Sugd. Vend.* (7th Ed.) 762. In *Parker v. Blythmore*, 2 Eq. Cas. Abr. "G," p. 79, Finch, Prec. 58, the master of the rolls held the plea good. Afterwards, in *Williams v. Lambe*, 3 Brown, Ch. 264, Lord Thurlow held the plea bad to a bill for discovery and relief. And in the later case of *Jerrard v. Saunders*, 2 Ves. Jr. 453, Lord Loughborough held the plea good, adhering to, and approving, the doctrine of Lord Nottingham in the case of *Bassett v. Nosworthy*, Finch, 102. The elementary writers, too, on this subject are as ill agreed as to the result of the authorities; Mr. Sugden adopting one view, and Mr. Belt and Mr. Beames another. *Sugd. Vend.* (7th Ed.) 762, 763; Belt's note to 3 Brown, Ch. 263; Beames, Pl. Eq. 234, 245. Mr. Chancellor Kent has come to the conclusion, that the rule in England is according to the decision of Lord Thurlow. *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. 74. If it were material to decide this point in the present case, I should take more time to consider it. It appears to me, that some of the cases admit of distinctions, which may reconcile them. There may be good ground to refuse a discovery against such a purchaser, when the bill might be maintainable for relief. And there may also be good ground not to interfere with such a purchaser, so far as to take from him any paramount legal title, which he has honestly obtained; and yet, when that title is not paramount to the legal title of the plaintiff, to give him full relief. The case of dower before Lord Thurlow may stand upon this distinction; and perhaps others. But it is, in my judgment, wholly unnecessary to decide the point; and therefore I leave it for farther consideration.²

The groundwork of the argument here fails; for it is not true, that the plaintiff does assert a title strictly legal in all aspects of the case. The argument insists, that the conveyance of the plaintiff to Adams was a mere nullity; not voidable, but utterly void. But, however, it may be treated as between the original parties, in a loose and general sense, as a nullity, it is not so in fact, or in law. The title was voidable for the fraud; and not void. A bona fide purchaser, for a valuable consideration, and without notice, under the fraudulent grantee, would hold the estate at law against the original grantor. That doctrine has been repeatedly affirmed by this court; and par-

² See *Rancliffe v. Parkyns*, 6 Dow, 149, 230; *Wallwyn v. Lee*, 9 Ves. 24; *Strode v. Blackburne*, 3 Ves. 222. In *Payne v. Compton*, 2 Younge & C. 457, Lord Abinger held the plea of a bona fide purchase for a valuable consideration without notice was good in equity as a defence against a plaintiff relying on a legal title.

ticularly in the case of *Bean v. Smith* [Case No. 1,174]. It has more recently been fully sanctioned by the supreme court of Massachusetts in *Somes v. Brewer*, 2 Pick. 184. So that, according to the well-established doctrine in this commonwealth, the deed of the plaintiff to Adams cannot be treated as utterly void, but as voidable only. See *Ricketts v. Salwey*, 2 Barn. & Ald. 360; *Fletcher v. Peck*, 6 Cranch [10 U. S.] 133. Resort, then, is now had to a court of equity, not to enforce a legal title, but to obtain a declaration, that the original deed was fraudulently obtained, and of course to procure from the defendant, Fuller, a re-conveyance, if he purchased with notice, as the bill asserts in general terms that he did. The plaintiff asks for a discovery, which itself is equitable relief, for the purpose of having a surrender of the asserted fraudulent titles of the defendants, which is also equitable relief. Whatever, then, may be the case, as to a purely legal title asserted in a court of equity, it does not strike me, that this can be treated as a case of that sort upon the actual structure of the bill and plea.

But it is very clear, that the plea furnishes no bar to the bill. In order to make it a good bar, it is necessary, that it should aver, that the whole consideration of the purchase had been paid before notice of the plaintiff's title. Now, the plea admits, that part of the purchase money has been paid, and that the residue is unpaid. It is plain, then, upon the unshaken doctrine of the authorities, that the plea is bad. Lord Redesdale has laid down this doctrine in full and exact terms in his excellent work on Pleadings in Equity. Speaking upon the subject of a plea of this sort by a purchaser, he says: "It (the plea) must aver the consideration and actual payment of it; a consideration secured to be paid is not sufficient." *Mitf. Eq. Pl.* (4th Ed., by Jeremy) p. 275; *Coop. Eq. Pl.* 282. And he is fully borne out by authority. *Hardingham v. Nicholls*, 3 Atk. 304, is directly in point; and indeed the doctrine has passed into a common axiom of equitable jurisprudence. *Harrison v. Southcote*, 1 Atk. 538; *Story v. Lord Windsor*, 2 Atk. 630; *Jewett v. Palmer*, 7 Johns. Ch. 65; *Wormley v. Wormley*, 8 Wheat. [21 U. S.] 449. Therefore I have no doubt, that the plea must be overruled. And the only question, then, will be, whether it should be overruled generally, or should be permitted to stand for an answer, with liberty to the plaintiff to except; for without such liberty, it would be establishing it as a good answer (*Maitland v. Wilson*, 3 Atk. 814; *Sellon v. Lewen*, 3 P. Wms. 239); or whether the benefit thereof should be reserved to the hearing of the cause, to avail, quantum valere possit. Lord Redesdale has fully stated the appropriate effect of each of these courses: "If," (says he,) "upon argument the benefit of a plea is saved to the hearing, it is considered, that, so far as appears to the

court, it may be a defence; but that there may be matter disclosed in the evidence, which would avoid it, supposing the matter pleaded to be strictly true; and the court, therefore, will not preclude the question. Where a plea is ordered to stand for an answer, it is merely determined, that it contains matter, which may be a defence, or part of a defence; but that it is not a full defence; or it has been informally offered by way of plea; or it has not been properly supported by answers, so that the truth of it is doubtful." *Mittf. Eq. Pl.* (4th Ed., by Jeremy) p. 303. See, also, *1 Turn. & V. Prac.* (6th Ed.) p. 826. The same doctrine was held by Mr. Chancellor Walworth in *Orcutt v. Orms*, 3 Paige, 459.

It appears to me, that the proper course in the present case is, to overrule the plea absolutely, and to order the party to answer generally; in which case he may insist upon the same matters of defence by way of answer, and have the full benefit of them. The matter of the plea does not furnish a complete bar to the bill; for even if the title in the defendant, Fuller, is unimpeachable, because he had no notice of the fraud or imposition; still, as the whole purchase money has not been paid, the plaintiff may be entitled to relief to the extent of the unpaid purchase money. It is unnecessary now to decide, whether, if the defendant stands in the predicament of a *bona fide* purchaser without notice, having paid part of the purchase money, the deed to him can be set wholly aside, or set aside *pro tanto*; or whether the remedy of the plaintiff against him is to have the residue of the purchase money paid over to him, if, upon the full hearing of the cause, the plaintiff establishes the case, as put forth in his bill. The other parties have an interest in the decision of these points; and therefore they should be reserved to the hearing.

But what is with me decisive for overruling the plea is, that it does not expressly and in terms deny, by proper averments, notice of the fraud and imposition, which are charged in the bill, and of which, (though in a very loose and inartificial manner,) the defendant, Fuller, is charged by the bill as having notice. It is clear, by the authorities, that it is not sufficient to deny generally notice of such facts, so charged, in the answer in support of the plea; but the answer must deny them specially and particularly, as charged in the bill. This was the decision of Lord Hardwicke in *Radford v. Wilson*, 3 Atk. 815, and it has been constantly adhered to, as undoubted law. See *Mittf. Eq. Pl.* (4th Ed., by Jeremy) p. 276; *Coop. Eq. Pl.* p. 283 (238, 239); *Beames, Pl. Eq.* p. 247; *Jerrard v. Saunders*,² 2 Ves. Jr. 187, 4 Brown, Ch. 322; *Senhouse v. Earl*, 2 Ves. Sr. 450; *Willis Eq. Pl.* p. 568, note; *Sugd. Vend.* (7th Ed.) p. 761; *Rancliffe v. Parkyns*, 6 Dow, 230. It is true, that the plea need not be so particular as the answer in support of it. But still

it must generally by proper averments deny notice of the fraud and imposition, otherwise the fact of fraud and imposition will not be in issue. *Id.* The case of *Pennington v. Beechey*, 2 Sim. & S. 282, fully supports this distinction. The vice chancellor on that occasion said: "It is not the office of a plea to deny particular facts, even if such particular facts are charged." At the same time he held, that there must be a general denial of notice in the plea, and special denial of the particular facts in the answer in support of the plea. But I think the averment of the plea, in this case, is too argumentative, and not sufficiently pointed. It is, "that this defendant had no notice whatever of any title, claim, or demand of the complainant, or of any other person, to or in the lands so purchased by this defendant, as aforesaid, which would affect the same or any of them, or any part thereof." Now this is no denial of notice of the asserted fraud and imposition; but it is merely arguing, that he had no notice of any title, etc., in the lands, which could affect the same. How can the court say, until it knows, what facts he had notice of, whether they would affect the title or not? The averment contains a denial of matters of law, and not of matters of fact.³

I have the less hesitation in overruling the plea absolutely on this account, because if it were permitted to stand for an answer with liberty to except, it would be defective, and upon exceptions must be amended. And no difficulty will occur in stating fully, by way of answer, all the matters which may establish the defence. At the same time I am satisfied, that the bill requires amendment, so as to charge the notice more directly; and the answer should meet the allegations more distinctly. Plea overruled.

[For subsequent proceedings, see Cases Nos. 17,952, 17,953, and 17,954.]

Case No. 17,952.

WOOD v. MANN.

[1 Summ. 578.]¹

Circuit Court, D. Massachusetts. May Term, 1834.

JURISDICTION OF COURT—CITIZENSHIP OF PARTIES —HOW OBJECTION RAISED—PLEA IN ABATEMENT—ANSWER.

1. The circuit courts of the United States are not inferior courts, in the sense of the common law.
2. Where the jurisdiction of the circuit court depends upon citizenship of the parties in different states, this must appear by proper averment in the record; and if it do not, the omission will be fatal at any stage of the cause. See *Wilson v. City Bank* [Case No. 17,797]; *Bank of Cumberland v. Willis* [Id. 885];

³ See *Coop. Eq. Pl.* p. 283; *Mittf. Eq. Pl.* (4th Ed., by Jeremy) pp. 286, 287; *Jerrard v. Saunders*, 2 Ves. Jr. 187, 4 Brown, Ch. 322; *Claridge v. Hoare*, 14 Ves. 59, 66.

¹ [Reported by Charles Sumner, Esq.]

Findlay's Ex'rs v. United States Bank [Id. 4,791].

[Cited in Brown v. Noyes, Case No. 2,023.]

[Cited in Adams v. Jeffries, 12 Ohio, 271.]

3. The exception to the jurisdiction of the court, by a denial of the fact of citizenship is of a preliminary nature, and must be taken by plea in abatement, and not by any general answer.

[Cited in Nesmith v. Calvert, Case No. 10,123; Brown v. Noyes, Id. 2,023.]

[Cited in Young v. Providence & S. S. S. Co., 150 Mass. 555, 23 N. E. 581.]

4. The twenty-third rule of the supreme court, in equity, declaring, "that the defendant, instead of a formal demurrer or plea, may insist upon any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or demurred to the bill," is simply in affirmance of the common practice of courts of equity, and applies to matters to the merits, and not to such objections as are in abatement merely. Story, Eq. Pl. § 266.

5. Where an exception to the jurisdiction was taken in the answer, it was properly struck out, on reference to a master, for impertinence.

6. Impertinences are any matters not pertinent to those points, which are properly before the court for decision, at any particular stage of a cause.

Bill in equity [by Josiah Wood, Jr., against Samuel H. Mann]. The answer of the defendant was excepted to for impertinence, and referred to a master, who reported, that the answer, being a general answer to the whole bill on the merits, was impertinent in an allegation, which traversed and put in issue the citizenship of the plaintiff alleged in the bill. The defendant filed an exception to the report on this point.

B. Rand, for plaintiff.

F. Dexter and J. Mason, for defendant.

STORY, Circuit Justice. The point now before the court is, whether the exception to the report of the master is well taken or not. The plaintiff in his bill has alleged, that he is a citizen of the state of New Hampshire, and that the defendant is a citizen of the state of Massachusetts. Upon the bill, therefore, it is clear, that the court has jurisdiction over the parties in the case. The defendant, however, instead of putting in a plea to the jurisdiction of the court, denying the citizenship of the plaintiff, has chosen to put in a general answer to the merits, and has prefaced it by a denial of the citizenship of the plaintiff; so that, if this proceeding is correct, upon the replication being filed, testimony must be taken to all the points involved in the answer, as well to that, which regards the citizenship of the plaintiff, as to those, which regard the merits; and the hearing must cover all the grounds in controversy. This course is most manifestly a very inconvenient one, and exceedingly embarrassing to the court. And the question is, whether the defendant has a title to insist upon it, as matter of right; for, as matter of discretion, to be allowed by the court, it is impossible, that any court should voluntarily submit itself to so much embarrassment.

That the denial of the citizenship of the plaintiff is matter proper for a plea in abatement; and that this is the usual form, in which it is brought before the court, cannot admit of any doubt. Whether, being thus matter properly in abatement of the suit for defect of jurisdiction, it can be insisted on in any other manner, or in any subsequent stage of the cause, is the very hinge of the present controversy. If we resort to the general analogies of law or equity for sources of argument, they seem to establish the general proposition, that matters properly pleadable in abatement cannot be taken advantage of in any other manner than by a plea in abatement. There are some exceptions; but they stand upon very peculiar grounds. There is a peculiar fitness in the application of this principle to cases of pleas to the jurisdiction; for a general answer certainly does, by necessary implication, admit the competency of the court to entertain the suit between the parties, and to take testimony, and hear it upon the merits. It is true, that if it is apparent upon the face of the record, that the court has not jurisdiction over the cause, or over the parties, the court will dismiss it, whether the parties consent to the jurisdiction or not. If therefore the subject matter is not within the jurisdiction of a court of equity; or the proper parties are not before it; or the case as made is not fit for the interposition of its authority; and the matters are apparent on the face of the proceedings, the court will of its own mere motion, in any stage of the cause, dismiss the bill. This is familiar practice in chancery in many classes of cases; and in the courts of the United States, it is also familiar in a class of cases, which, owing to their peculiar organization, can rarely occur in other courts of equity. The courts of the United States are courts of limited jurisdiction; but, as has been often solemnly settled, they are not inferior courts in the sense of the common law, whose jurisdiction is to be scanned by the niceties applied by the common law to inferior courts. The circuit courts of the United States have no jurisdiction of suits between citizens, unless they are citizens of different states; and not always even then, under the act of congress of 1789, c. 20 [1 Stat. 73]. In every writ and bill bringing a suit before the circuit court, it is, therefore, indispensable to show by proper averments in the record, that the plaintiff and defendant are citizens of different states; and the omission is fatal in any stage of the cause, unless it is cured by an amendment. But where the citizenship is properly averred, the circuit courts have complete jurisdiction, unless that jurisdiction is ousted by a denial of the citizenship and proof of the non-existence of the citizenship of either party as alleged. So many cases have been decided upon this distinction, that it has become a general doctrine, as unquestioned in fact, as it is unquestionable in its nature. But notwithstanding the circuit court may have the most clear ju-

risdiction over the parties, still the case or the subject-matter may not be within the proper jurisdiction of any municipal court in any form of proceeding, or not in the form adopted, either at law or in equity. In either case the objection is open; and the court itself will decline jurisdiction and dismiss the suit.

There is a perfect novelty in the present experiment upon the usual proceedings of courts of equity. That alone would lead one to doubt of its correctness. The very silence of the practice under such circumstances would be quite significant of what the true rule is. If the course of practice has been to take such an exception by way of plea to the jurisdiction, and not by way of general answer, or in a general answer, it would be difficult to believe, that the right existed, to take it by way of answer, and had never been tried. Upon looking into the books of practice I have not been able to find a single case, in which the slightest hint is given, that an exception of this nature can be taken otherwise than by a plea to the jurisdiction. It is uniformly stated to be a matter of abatement, and proper for a plea; and it is never alluded to, as having any place in a general answer, or as fit to be allowed to be there. Lord Redesdale, in his admirable treatise on Equity Pleadings (page 222), treats of it under this head, and this only. So do Mr. Cooper, Mr. Beames, Mr. Maddock, and Mr. Hind.² The orders of Lord Clarendon in chancery manifestly presuppose, that this is the appropriate, and, I may say, the only correct course. Beames, *Orders Ch.* pp. 172-174. Lord Hardwicke in *Penn v. Lord Baltimore*, 1 Ves. Sr. 446, puts the point in the very view which has been suggested: "To be sure," says he, "a plea to the jurisdiction must be offered in the first instance, and put in primo die; and answering submits to the jurisdiction; much more when there is a proceeding to hearing on the merits, which would be conclusive at common law. Yet a court of equity, which can exercise a more liberal discretion than common law courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree, than where a plain want of equity appears." And again, in *Roberdeau v. Rous*, 1 Atk. 544, Lord Hardwicke said, that the defendant should not in that case have demurred to the jurisdiction; for a demurrer is always in bar, and goes to the merits of the case; and therefore, that it was informal and improper in that respect; for he should have pleaded to the jurisdiction. Lord Eldon, in *Iveson v. Harris*, 7 Ves. 254, in effect remarked, that if a defendant in an inferior court has pleaded to the jurisdiction, he can plead nothing inconsistent with it; and therefore he must not do

any thing to give the court jurisdiction; and if he has waived the objection, or has so pleaded as to make it incompetent to him to stay the proceedings afterwards, the objection is gone. See, also, *Anon.*, 1 P. Wms. 476, 477. In *Edgworth v. Davies*, 1 Ch. Cas. 41, an objection, very similar to the present, was taken by way of plea; and the cases there cited show the general practice.

There being, then, a total absence of all direct authority in the case, what are the grounds, upon which the present exception can be maintained? First, it is argued that the twenty-third rule of the supreme court in equity causes (in 1822) declares, "that the defendant, instead of a formal demurrer or plea, may insist upon any special matter in his answer, and have the same benefit thereof, as if he had pleaded the same matter, or had demurred to the bill." But this rule is merely in affirmance of the common practice of courts of equity, and applies to matters to the merits, and not to such objections as are in abatement merely, and are not proper for a general answer. Again; it is argued, that the supreme court have, on various occasions, taken notice of defects of jurisdiction, and of objections thereto, although not taken by way of plea. That is true; but it was, where the matter was apparent upon the record; and not, where the matter was dehors the record, and properly to be brought forward by way of plea in abatement. Thus in *Chappedelaine v. Dechenaux*, 4 Cranch [8 U. S.] 308, the question was, whether the citizenship of the parties, as described in the record, gave the court jurisdiction; not whether that citizenship as alleged was true in fact. The case of *Wormley v. Wormley*, 8 Wheat. [21 U. S.] 422, turned merely upon the point, whether the proper parties were before the court for a decree, it being insisted, that the husband of one of the plaintiffs (a mere formal party and a defendant) appeared to be a citizen of the same state as the plaintiff, and so ousted the jurisdiction. In *Osborn v. Bank of U. S.*, 9 Wheat. [22 U. S.] 558, the question was, not whether the court had jurisdiction over the parties to the suit, for that was clear; but whether the state of Ohio was not also a necessary party to a decree, the defendant being a mere nominal party, and the state having the real interest in the suit. It was not, then, a question of jurisdiction, but of proper parties to a final decree. *Breithaupt v. Bank of State of Georgia*, 1 Pet. [26 U. S.] 238, was a mere question, whether there was a sufficient averment of the citizenship of the parties on the record. The case of *McDonald v. Smalley*, *Id.* 620, can furnish no just precedent. The manner, in which the question came before the court, was founded upon a local statute, and the circuit court dismissed the bill for want of jurisdiction, upon ascertaining the facts in the mode prescribed by the local law. The objection, therefore, was taken in a peculiar mode, quite irregular indeed, but founded in local practice. In *Conolly v. Taylor*, 2 Pet. [27 U. S.] 556, the only

² *Coop. Eq. Pl.* pp. 238-240; *Beames, Eq. Pl.* pp. 53, 56-62; *Id.* pp. 77, 79-98; 2 *Madd. Ch. Prac.* pp. 238-241. See, also, *Lube, Eq.* pp. 208, 209; *Com. Dig.* "Chancery," I, 1; *Hind, Prac.* pp. 170, 171, 195, 214; 2 *Hov. Supp.* p. 20.

question was, whether upon the facts of citizenship, as averred in the record, the court were ousted of jurisdiction. As to some of the parties, defendants, the court could not exercise any jurisdiction in the state, where the suit was brought; as to others, it could. The bill might be dismissed as to the former, and retained as to the latter. The substantial objection was, that one of the original plaintiffs was a party, who could not sue as plaintiff in the circuit court; but this objection was removed by striking out his name as plaintiff, and making him (as might properly be done) a defendant. The cases, then, which have been relied on in support of the right, totally fail to establish it. They are distinguishable upon clear and admitted principles.

But, if there were no practice, and no authority bearing on the present question, how ought it to be decided on principle? It seems to me, that upon principle it is necessarily of a preliminary nature, and ought, therefore, to be taken by plea, and not by any general answer. So the admitted rule is at common law; and it has been repeatedly recognised by the supreme court. Courts of chancery in many cases, as to pleadings, follow the rules of the common law. See *Story v. Lord Windsor*, 2 Atk. 630, 632. And many objections to the jurisdiction of courts of equity, which might be taken at an earlier stage, come too late at a hearing of the merits, or after the parties have gone on to proceedings, which presuppose jurisdiction. The rule was recognised in *Underhill v. Van Cortlandt*, 2 Johns. Ch. 369, and *Ludlow v. Simond*, 2 Caines, Cas. 56. There is good sense in the distinction; and indeed the doctrine is less founded in the mere municipal jurisprudence of a single nation, than in the principles of universal law. It is quite as much the law at Rome, as it is in England or America. All pleas to the jurisdiction are objections to entering into the *litis contestatio*; and they must, and ought, therefore, to precede the *litis contestatio*. When the party submits the merits of the case to be heard by the court on the pleadings and testimony, he admits, that the court has jurisdiction for the purpose. Until it is ascertained, that the court has jurisdiction to inquire into the merits, what authority is there to authorize the hearing? Consider for a moment the difficulties in the case now before the court. The defendant makes a general answer. He requires the court to examine the whole merits; he puts at issue all the material grounds of defence; he requires testimony, if they are contested, to be taken to establish them. How can the court order commissions to take testimony on the merits, if it has no jurisdiction? Until this is firmly established, it has no authority to take a single step beyond the facts necessary to establish it. Suppose the defendant's answer is false in its allegations; or evasive, or insufficient; can the court proceed to ascertain, whether it is subject to exceptions of this sort, until its jurisdiction is established? Suppose the

party after an insufficient answer is in contempt; can the court proceed to punish him, while the question is yet pending of jurisdiction, or not? So, if the witnesses under the commission refuse to answer to the merits, and are in contempt, are they under the like circumstances punishable? Suppose they swear falsely, are they indictable, if the jurisdiction should be ultimately surrendered upon proofs in pais? These, and many other questions may be asked; and I cannot perceive, how they can be satisfactorily answered, if the doctrine of the defendant's counsel is admitted. When the general replication is filed to a general answer, the proofs must be taken to all the material facts, which are controverted. The hearing must be upon the whole facts. The court cannot direct proofs to be taken to the single point of jurisdiction in the answer, excluding all other proofs. Such a course is utterly unknown in chancery. It would overthrow all rules on this subject. I confess myself wholly unable to arrive at any other conclusion, than that upon principle such a mixture of matters in abatement and to the merits is wholly inadmissible. I do not quote the case of *Dodge v. Perkins* [Case No. 3,954], as an authority on the point, though, at least to the judges sitting under that decision, it ought to have some weight, unless they are clearly convinced, that it was erroneous in its principles. The principle stated in that case, and applicable to the present, was not an *obiter dictum*. It was a question directly before the court, and formed the very ground-work of the ultimate order made in the cause, giving leave to the plaintiff to amend his bill, and to the defendant to withdraw his answer, and to plead. I know, that the question was then very deliberately considered by the court; and the position taken was supposed to be one sustained by established principles. In the course of my attendance in the supreme court, since that period, I have constantly supposed, when questions of this sort have arisen, that the doctrine was clear. I never have heard it doubted or denied by the judges; and if it were not, that I dare not trust my memory upon subjects, where decisions in print do not confirm it, I should be inclined to say, that the habit of the court was, at least by implication, to acknowledge and act upon the doctrine, although there may have been no formal promulgation of it. But if there be no decision in favor of the doctrine, I feel great confidence, that there is none against it. And, upon principle, I have not a single doubt, what the rule is, and ought to be. There is, however, a late case before the vice chancellor, *Chichester v. Donegal*, 6 Madd. 375, which appears to me to settle, as far as authority may settle, this doctrine, upon the footing for which I contend. And it is the stronger, because it coincides with the opinion of Lord Stowell upon the same point in the ecclesiastical court. "I state," said the vice chancellor, "without exception, as a general principle,

that in courts of equity, as well as courts of law, a party admitting a fact, which gives jurisdiction to a court, and appearing and submitting to that jurisdiction, upon general principles and upon all analogies known to us, can never recede, or, as it is called in the Scotch law, 'resile,' from those facts, and withdraw that admission." And in the very case, in which this opinion was given, the only admission was by implication arising from the party's having omitted to plead to the jurisdiction, and entering into proceedings upon the merits of the case.

The remaining question is, whether the exception can be properly taken in this form upon a reference to the master, and a report for impertinence. It does not strike me, that this point is of any serious importance; for if the court should be satisfied, that the matter was not proper for an answer, and involved inquiries, not in that stage of the cause open to litigation, I have no doubt, that it would be the duty of the court, as a matter of self-protection, to suppress it. It is a great mistake to suppose, that, if the parties do not object to a matter, the court are bound to entertain cognizance of it, and to decide it. But is this matter of impertinence or not? It is argued, that it is not, because it does not answer the description given by Gilbert in his *Forum Romanum* (page 209), where he says, that "Impertinences are, where the records of the court are stuffed with long recitals, or with long digressions of matters of fact, which are altogether unnecessary and totally immaterial to the point in question," and he then proceeds to illustrate it by instances. Doubtless such matters, as he states, are impertinences. But they are not the only matters of this sort, even if the generality of expression in the latter part of the sentence, as to immaterial facts, would not (as I am not prepared to admit) cover the present case. Impertinences are, as I conceive, any matters not pertinent or relevant to the points, which, in the particular stage of the proceedings, in which the cause then is, can properly come before the court for decision. If the cause is at issue upon a general answer, purporting to be to the merits, any matter not going to the merits is properly to be deemed an impertinence. Lord Clarendon's orders³ put this matter in a clear light. Counsel are to take care, says the order, that the bill, answer, or other pleading "be not stuffed with repetition of deeds, etc., in hæc verba; but the effect and substance of so much of them only, as is pertinent and material to be set down, and that in brief terms, without long and needless traverse of points not traversable, (that is, as I conceive, not traversable in that stage of the cause,) tautologies, multiplication of words, or other impertinences, occasioning needless prolixity," etc. The cases of *Nanney v. Totty*, 11 Price, 117, and *Wagstaff v. Bryan*,

1 Russ. & M. 28, appear to me to be very closely in point, as to this very matter of impertinence. It may be added, that the twenty-second section of the judiciary act of 1789, c. 20, manifestly contemplates matters declinatory of the jurisdiction to be in abatement, and to be taken advantage of by way of plea. It provides, that no writs of error shall be sustained and reversals had (and appeals are governed by the same regulations) for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such a plea to a petition or bill in equity, as is in the nature of a demurrer.

Upon the whole, my opinion is, that the master's report is correct; that the exception to it ought to be overruled, and the report to stand confirmed accordingly; and the allegation to be struck out from the answer for impertinence. *Livingston v. Story*, 11 Pet. [36 U. S.] 393. Decree accordingly.

[For other proceedings in this case, see Cases Nos. 17,951, 17,953, and 17,954.]

Case No. 17,953.

WOOD v. MANN et al.

[2 Summ. 316.] 1

Circuit Court, D. Massachusetts. May Term, 1836.

EQUITY PROCEDURE—PUBLICATION OF TESTIMONY
—EXAMINATION OF NEW WITNESSES—NEWLY-DISCOVERED EVIDENCE.

1. The general rule of equity proceedings is, that after publication of the testimony, no new witnesses can be examined, and no new evidence can be taken, unless where the judge himself, upon or after the hearing, entertains a doubt, or when some additional fact, or inquiry is indispensable to enable him to make a satisfactory decree.

[Cited in *Eilert v. Craps*, 44 Fed. 793.]

2. A witness may be examined to the mere credit of the other witnesses, whose depositions have been already taken and published in the cause, but he will not be allowed to be examined, to prove or disprove any fact, material to the merits of the case.

[Cited in *Teese v. Huntingdon*, 23 How. (64 U. S.) 12.]

3. The time for publication will be enlarged, or more properly, the time for taking the testimony will be enlarged, after publication has passed, though not in fact made, according to the rules of the court, provided some good cause therefor is shown upon affidavit, as surprise, accident, or other circumstances, which repels any imputation of laches. The affidavit is indispensable, except in a case of fraud, practised by the other party.

4. Exhibits in the cause may be proved after publication, and even *vivâ voce* at the hearing, when there has been an omission of the proof in due season, and they are applicable to the merits.

5. Fresh interrogatories and a re-examination have been permitted after publication, where depositions have been suppressed from the interrogatories being leading, or for irregularity, or where it has been discovered, that a proper release has not been given, to make a witness competent.

6. Semble, that new testimony may be taken after publication to facts and conversations occur-

³ Beames, Orders Ch. pp. 165, 166; Id. p. 167, and note 6. See Mitf. Eq. Pl. p. 318.

¹ Reported by Charles Sumner, Esq.]

ring after the original cause is at issue, and publication has passed.

[Cited in *Gass v. Stinson*, Case No. 5,261; *Jenkins v. Eldredge*, Id. 7,267.]

7. The court may, in the exercise of a sound discretion, allow the introduction of newly discovered evidence of witnesses to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But it will not exercise this discretion to let in merely cumulative testimony.

[Cited in *Ocean Ins. Co. v. Fields*, Case No. 10,406; *Jenkins v. Eldredge*, Id. 7,267.]

8. The same rule holds in cases of bills of review, and supplementary bills in the nature of bills of review.

[Cited in *Irwin v. Meyrose*, 7 Fed. 536.]

9. Semble, that the rule ought to be confined to cases of the discovery of new evidence of a documentary nature, and the testimony of witnesses, necessary to substantiate this.

Bill in equity [by Josiah Wood, Jr., against Samuel H. Mann and others] to set aside a certain conveyance made by the complainant to one John R. Adams (a defendant,) asserted to have been procured by fraud and imposition, upon the plaintiff. The case has already been twice before the court, on interlocutory motions [Cases Nos. 17,951 and 17,952], and was set down for a hearing, at the next September adjournment of the court. A petition was now filed on behalf of the plaintiff, to take the testimony of a witness, to be used in the cause, at the hearing, upon the ground, that it was material testimony, going to the merits of the case, as put in issue, and which has been very recently (within a few weeks) discovered by the plaintiff. The petition was supported by the affidavit of the plaintiff, as to the recency of the discovery of the evidence, any by an ex parte deposition, given by the witness himself of the facts, which he can establish, consisting of confessions made by the defendant, Mann, to the witness about five years ago, and before the institution of the present suit. Publication of the evidence in the cause passed nearly a year ago; the parties have long been in full possession of it; and indeed, for their convenience it was printed, and open to the freest inspection. The question was on the admissibility of this evidence, at this stage of the cause.

B. Rand, for plaintiff.

F. Dexter, for defendants.

STORY, Circuit Justice. Of the materiality of the testimony now proposed to be taken, no doubt can be entertained. It goes to establish many of the leading points of fact in controversy between the parties; and if not vital in the cause, it is on all sides admitted to have a most stringent force and pressure. It is under circumstances, so rare and so novel, that this court is called upon to decide one of the most important and delicate questions of practice; than which, indeed, few, if any, can be presented, better

deserving of deliberate consideration, and striking deeper into the foundations of equity jurisprudence. It is upon this account, that I have taken time to examine the whole subject, with all the aids, which could be derived from the labors of counsel and my own auxiliary researches; feeling, as I do, an anxious desire to perform on the present occasion, exactly what upon the most careful survey of principles and authorities, it is my duty judicially to perform. The general rule in equity proceedings is, that, after publication of the testimony, no new witnesses can be examined, and no new evidence can be taken. This rule is at least as old as the time of Lord Bacon, among whose Ordinances in Chancery, we find the following: "No witnesses shall be examined after publication, except by consent, or by special order ad informandum conscientiam judicis; and then to be brought close sealed up to the court to peruse or publish, as the court shall think good." The true exposition of the latter qualification of this rule would seem to be, that the new evidence to inform the conscience of the judge, should not be taken, but upon or after the hearing, when the judge himself entertains a doubt, or when some additional fact or inquiry is indispensable to enable him to make a satisfactory decree. So was the doctrine held in *Newland v. Horseman*, 2 Ch. Cas. 74; and it is strongly fortified by what fell from Lord Manners in *Savage v. Carroll*, 2 Ball & B. 444, and by the master of the rolls in *Parken v. Whitby*, 1 Turn. & R. 366. Except for such purposes and under some special order of the court itself at or after the hearing, no such testimony, taken after publication, is now deemed admissible, at least unless under extraordinary circumstances, under the rules. The practice of taking such testimony before the hearing, and keeping it sealed up to be used by the court at the hearing, if it should be deemed meet, is said by the text-writers to have fallen into disuse, and not to have been in practice for more than a century.² There is an old case reported in *Cary*, 83, which shows what the old practice was; and I quote it in the very words of the report. "Upon affidavit made by the plaintiff, that since publication granted he had divers witnesses (setting down their names) come to his knowledge; therefore ordered he may examine them before the examiner, ad informandum conscientiam judicis." No other circumstances are stated; and therefore it is impossible to know, what the facts were, or whether the other testimony taken had been actually seen by the plaintiff.

The general rule is founded in the obvious public policy of suppressing perjury, and

² *Hind*, Prac. 316; *Beames*, Orders Ch. 33, notes 117, 118; *Dalby v. Mace*, Toth. 192; *Cary*, 83; *Wyatt*, Prac. Reg. 354, 355; *Willan v. Willan*, 19 Ves. 592.

the fabrication of evidence, to meet the exigencies of the cause after the full bearing and weight of the testimony are understood by all the parties. If, under such circumstances, the parties were permitted to supply the actual deficiencies of the evidence from time to time, as they should be found out, there would be strong temptations to corrupt, and insidious practices to obtain new evidence; and there would be a premium held out for delays and omissions of diligence in taking the evidence, until the whole strength of the adversary's cause was disclosed. Courts of equity, from considerations of this sort, have always been disposed to uphold the rule with a firm and rigid exactness. Lord Eldon, in *Whitelocke v. Baker*, 13 Ves. 511, said: "This court will not enlarge publication, without a very special case made. The party's want of knowledge of the rules of proceeding, and want of attention in his solicitor, are not sufficient. The rules of justice are founded in great general principles, not to be broken down by such circumstances." Lord Macclesfield, in *Cann v. Cann*, 1 P. Wms. 727, laid down the doctrine in more emphatic terms. "The precedent methods (said he) of this court were, that, after publication is passed, and the purport of the examinations known to the parties, neither side is allowed, though they come recent, to enter into part examination of the matters in question, since otherwise there would be no end of things, and such a proceeding would tend to perjury, as well as vexation."

Exceptions, however, have been admitted to the general rule; and to these our attention will now be directed, in order to ascertain, how far they are applicable to the circumstances of the case before the court. The exceptions will be found for the most part to turn upon grounds entirely consistent with the policy of the general rule, and in no manner trenching upon its justice or inconvenience. At the same time, they exhibit in a marked manner the reluctance of the court to break in upon the general uniformity of the practice, except under very special circumstances.

It will not be necessary to go over the authorities at large; for they do not present any general diversity of judgment, requiring comment or criticism. They rather arrange themselves into classes, in each of which every successive judge has shown a solicitude to keep within the limits prescribed by his predecessors.

The first class of exceptions is, that of the examination of witnesses to the mere credit of the other witnesses, whose depositions have been already taken in the cause. This is the ordinary practice, and is done upon articles or objections filed. Beames, *Orders* Ch. p. 32, § 72; *Id.* p. 187, § 80. But, then, in these cases, the general interrogatory only, whether he (the proposed witness,) would believe the other on his oath, (which is the

usual form of putting the interrogatory in England, and differs widely from that, in which it is usually put in America; see 1 *Starkie, Ev.*, 2d Ed. London, 1833, 182; *Watmore v. Dickinson*, 2 Ves. & B. 267, 268; *Carlos v. Brook*, 10 Ves. 50), is that, upon which the new examination is allowed, unless under very special circumstances. And there is this close limitation upon such special circumstances, that the interrogatory shall not be to any facts put in issue in the suit; but only to such facts, as merely touch the credit of the witness. This doctrine was expounded very fully, by Lord Eldon in *Purcell v. M'Namara*, 8 Ves. 324, 326; *Wood v. Hammerton*, 9 Ves. 145; *Carlos v. Brook*, 10 Ves. 50; *White v. Fussell*, 1 Ves. & B. 153; and it was recognized and acted upon by Mr. Chancellor Kent in *Troup v. Sherwood*, 3 Johns. Ch. 558, where he critically examined the leading authorities. But, what is most important in its bearing on the present case, is the absolute refusal of the court in these cases, to allow the witness to be contradicted as to any fact, which he had sworn, touching the merits of the matters in issue between the parties. "If," said Lord Eldon, in *Purcell v. M'Namara*, "for instance, the fact is material to the merits of the case, and the witness has sworn to it, there is great danger of bringing other witnesses, under color of discrediting that witness, to prove or disprove such fact." See *Gilb. Forum Rom.* 147; *Smith v. Turner*, 3 P. Wms. 413.

Another class of exceptions is, where the application is made to enlarge the time for publication, or more frequently to enlarge the time for taking the testimony after publication has been, in form, though not in fact, made, according to the rules of the court. To such applications, whenever they will cause any delay in the cause, the court does not listen without some good cause shown upon affidavit; such as surprise, accident, or other circumstances, which repel any imputation of laches. See *Gilb. Forum Rom.* 124; 1 *Harris, Ch. Prac.* (by Newland) c. 43, pp. 285, 287. See, also, *Watmore v. Dickinson*, 2 Ves. & B. 267, 268; *Cutler v. Cremer*, 6 Madd. 254. And in all cases of this sort before the application is allowed, the party and his clerk in court, and solicitor, are required to make oath, "that they have neither seen, heard, read, nor been informed of any of the contents of the depositions taken in that cause; nor will they see, hear, read or be informed of the same till publication is duly passed in the cause." *Gilb. Forum Rom.* 146. See, also, *Anon.*, 1 *Vern.* 253; *Hind, Prac.* 384, 385. And this affidavit is so important, that the court will never dispense with it, except in a case of fraud practised by the other party, to evade the rule; as was the case in a memorable instance in Lord Somers's time, stated by Chief Baron Gilbert (*Gilb. Forum Rom.* 146). Lord Eldon, in commenting on the affidavit,

and the strictness of the rule requiring it, said: "That it is founded upon this, that no more dangerous mode of proceeding can take place than permitting parties to make out evidence by piecemeal, and to make up the deficiency of original depositions by other evidence." *Whitelocke v. Baker*, 13 Ves. 512. In the same case, where a motion was made, the effect of which was to introduce new evidence to be taken after the cause had been set down for a hearing, he added: "The next ground for this motion is the materiality of the farther evidence, which it is supposed can be given. If that could be represented as most highly material, I dare not trust myself with laying down a precedent, that would authorize attempts to bring forward an application in every case, where even after a cause had been set down the party might see, that it would not be convenient to hear the cause upon the evidence, on which he originally intended to put it. The danger from that would be enormous." *Whitelocke v. Baker*, 13 Ves. 512. The only material abatement from the force of this language, as applied to the present case, is, that it was spoken in a case not of newly discovered evidence, but of known evidence alleged to have been improperly and irregularly taken. Mr. Chancellor Kent, in *Hamersly v. Lambert*, 2 Johns. Ch. 432, reviewed the authorities, and sustained the doctrine, as above stated, with all the weight of his own great opinion.

Another class of exceptions is the proof of exhibits in the cause, after publication, and even *viva voce* at the hearing, where there has been an omission of the proof in due season, and they are applicable to the merits. Gilbert, in his *Forum Romanum* (p. 183), takes notice of this practice, and says: "Upon this rehearing any exhibit may be proved *viva voce*, as upon the original hearing. But no proof can be offered of any new matter, without special leave of the court, which is seldom granted." The like doctrine is fully supported in many cases. See *Wright v. Pilling*, Finch, Prec. 496; *Dashwood v. Lord Bulkeley*, 10 Ves. 238; *Buckmaster v. Harrop*, 13 Ves. 458; *White v. Fussell*, 1 Ves. & B. 153; *Higgins v. Mills*, 5 Russ. 287; *Wyld v. Ward*, 2 Younge & J. 334; *Williams v. Goodchild*, 2 Russ. 91; *Dale v. Roosevelt*, 6 Johns. Ch. 256.

Another class of exceptions is, where depositions have been suppressed, from the interrogatories being leading, or for irregularity, or where it has been discovered, that a proper release has not been given to make a witness competent; in every such case, from the obvious necessity, and in furtherance of justice, fresh interrogatories, and a re-examination have been permitted. *Lord Arundell v. Pitt*, Amb. 585; *Perry v. Silvester*, Jac. 83; *Curre v. Bowyer*, 3 Swanst. 357; *Sandford v. Paul*, 3 Brown, Ch. 370; s. c. 1 Ves. Jr. 398, 2 Dickens, 750; *Spence v. Allen*, Finch, Prec. 493; *Shaw v. Lindsey*, 15

Ves. 380; *Cox v. Allingham*, Jac. 337, 341, 343; *Callow v. Mince*, 2 Vern. 472. In the case of *Sandford v. Paul*, 2 Dickens, 750, 3 Brown, Ch. 370, and 1 Ves. Jr. 398, it appears from Mr. Dickens' Reports, that the subject was a good deal examined, and many authorities are cited by the reporter to show, that the strictness of the rule had been relaxed in special cases of this nature.

All these classes of exceptions stand upon peculiar grounds, and steer wide from any of the just objections, which have been urged against the introduction of new evidence, after the pressure of the evidence, as taken, is fully known to both parties. The qualifications and limitations accompanying these exceptions demonstrate, in the most full and satisfactory manner, that the design of upholding the policy of the general rule constitutes the main ingredient in the view of the court in acceding to, or refusing every application. If the existence of the evidence is fully known at the time of the taking of the depositions, and if it is not purely the case of written evidence, it will be difficult to find any uniform relaxation of the general rule, that after publication passed, and the depositions have been seen, no new evidence shall be admitted.

The question, then, is reduced to this, whether new evidence by witnesses, which has been discovered since publication has passed, and the contents of the depositions been made known, can, consistently with the general objects and purposes of the rule, be allowed? Now, this is partly a matter of authority, and partly of principle. And I fully agree, that, if upon a rehearing, or upon a bill of review, or upon a bill in the nature of a bill of review, the evidence of new witnesses ought to be let in, then it ought now to be allowed, to avoid circuitry of remedy and increased expenses in litigation. If, on the other hand, it would not, under such circumstances, be allowed; and if, in analogous cases, it has been rejected; and if no direct authority can be shown in favor of the motion; then, since it must be a case of not infrequent occurrence in practice, each of these considerations will furnish strong objections against the motion.

I have said, that if upon a rehearing, or a bill of review, the plaintiff would be entitled to the benefit of this testimony, he ought now to be entitled to it; and, as it is applicable to points already in issue, there is no need of a supplementary bill. In this view of the subject I feel myself strongly fortified by the language of Lord Eldon in *Milner v. Lord Harewood*, 17 Ves. 148. "There is" (said he) "no recollection of a supplemental bill of this kind; and if a new practice is to be settled, the strong inclination of my opinion is, that when the particular case arises, where either conversation or admission of the defendant becomes material after answer or replication; or, as in this instance, after examination of witnesses in the original cause; or if a new

fact happens after publication, which it is material to have before the court in evidence. when the original cause is heard, it is much better, if the examination of witnesses, if required, should be obtained upon a special application for the opportunity of examining, and that the depositions may be read at the hearing; or if discovery is required, that the party should file a bill for that purpose merely; and if relief is required, that the answer comprehending the discovery, should be read at the hearing of the original cause." This language would certainly seem to show, that there were cases, in which new testimony might be taken after publication, at least as to facts and conversations occurring after the original cause is at issue, and publication passed. Here, however, the application is to admit newly discovered evidence of confessions before the bill was filed. In *Willan v. Willan*, 19 Ves. 591, Coop. Eq. 291, the same great judge said: "It is perfectly established, that after publication, previous to a decree, and the depositions have been seen, you cannot examine witnesses farther without leave of the court, which is not obtained without great difficulty; and the examination is generally confined to some particular facts. At the hearing of the cause, the court sees all the evidence; and if, instead of deciding upon inference, it directs inquiries, the decree directing these inquiries is, in truth, the leave of the court given for farther examination of witnesses upon the very point." It is difficult to ascertain the precise limitations, which ought to be applied to language so general; and whether the learned judge meant merely to advance the suggestion, that the court might, to satisfy its own conscience, direct new evidence to be taken at or after the hearing; or whether he meant to state, generally, that new testimony might be taken, upon a case made to the court, at any time after publication, and before the hearing. Unfortunately, the case did not call for a more explicit declaration of opinion. But my impression is, that the former was all, that was intended by the language.

In *Smith v. Turner*, 3 P. Wms. 413, the cause was heard, and there appearing to the court some reason to suspect, that the defendant had a deed in his custody, it was ordered, that he should be examined on interrogatories touching the deed. Upon the examination, he denied his having the deed, and all the circumstances relating thereto. The master. certified, notwithstanding, that he thought it reasonable, that the plaintiff, who prayed a commission to examine witnesses to falsify the defendant's examination, should have one. But the court refused it, saying: "At this rate three or four causes might spring out of one; and though there could be no mischief in examining the party himself; yet the examining witnesses, after publication passed, especially where it may relate to the matter in issue, is against the rule of the court, and may be greatly inconvenient, and make causes

endless." This case certainly affords a strong illustration of the real purport of the general rule; and would make one hesitate in supposing, that Lord Eldon meant, in the cases above stated, to maintain a broader doctrine.

In *Ward v. Eyles*, Mos. 377, the court would not allow a party in a cross bill to examine witnesses after publication passed, and the depositions seen, to the matters in issue in the original cause. On that occasion, the lord chancellor said: "There is no rule in this court more sacred, than, that witnesses shall not be examined in another cause, to matters in issue in a former." Yet, certainly, in a cross bill, the party would be entitled to more favor, than upon a mere application in the original cause.

In *Mayor of London v. Dorset*, 1 Ch. Cas. 228, where a trial of an issue was directed at law, an application was made for a commission to examine a witness eighty years old, who was not discovered until that time, and was unable to travel. If she was able to travel, she would be examinable at the trial, though publication had passed. The court granted the commission, apparently, as it should seem, upon the ground, that otherwise the testimony would be lost; and yet the witness might, if living, be examinable at the trial at law.

In *Bank v. Farques*, Amb. 145, 1 Dickens, 167, where a hearing was adjourned over, and it was moved for liberty to examine a witness, to prove the handwriting of a witness to a deed, material in the cause, the motion was granted by Lord Hardwicke. So, in *Abrams v. Winshup*, 1 Russ. 526, where the evidence proved the execution of the will; but the witnesses had not been examined as to the sanity of the testator; the cause was adjourned at the hearing, and liberty given to exhibit an interrogatory to prove his sanity. In each of these cases, the object was special, to establish the verity of a necessary document in the cause.

In *Blake v. Foster*, 2 Ball & B. 457, an application was made upon the hearing for liberty to adduce newly discovered evidence partly oral, and partly documentary. It was rejected, not upon any ground of the nature of the evidence; but because it was not in reality newly discovered. The case, therefore, decides nothing to our present purpose.

In *Clarke v. Jennings*, 1 Anstr. 173, 174, a motion was made after publication for leave to exhibit interrogatories, to authenticate an old paper writing material in the cause, and for a commission to prove the same. The motion was opposed as being too late, and that exhibits only can be proved after publication. The court of exchequer thought, that though not an exhibit, it was in the nature of one, and granted the rule, so as that it did not delay the hearing of the cause. It is proper to remark, that the application was confined to a mere written document.

In *Williamson v. Hutton*, 9 Price, 194, after a title cause had been set down for a rehear-

ing, a motion was made on behalf of the plaintiff for the examination of one or more witnesses, to prove certain accounts or rentals, and a terrier or memorandum, made by a former vicar, and to read the depositions at the rehearing, upon the ground of their having been discovered since the original hearing, and were before unknown to the plaintiff. The court granted the motion; and it was added: "If these papers had been found at the hearing, we should have ordered the cause to stand over, for the purpose of giving the plaintiff an opportunity of exhibiting an interrogatory." This too was the case of a written document.

In *Cox v. Allingham*, Jac. 337, permission was given at the hearing to exhibit an interrogatory as to the loss of a deed, omitted by mistake to be proved in the proper manner. Sir Thomas Plumer, in delivering his opinion on this occasion, stated his strong impression of the dangers, that would arise, if in every instance a party, whose case broke down at the hearing, were at liberty to go into farther evidence. At the same time he admitted, that it was too late to argue, that there could be no case of exception to the general rule, after it had been departed from in some instances, and by great authorities. He also took notice of the circumstance, that the evidence proposed to be given related only to the proof of a document.

In *Ord v. Noel*, 6 Madd. 127, an application was made to file a supplemental bill, in the nature of a bill of review, on account of the discovery of some deeds and facts, connected therewith, since the decree. The vice chancellor refused the petition; and the only remarks, material to our present purpose, which he made on that occasion, are,—that if the plaintiff had applied, after he had discovered the contents of these deeds, and before the cause was finally heard, to have the benefit of this discovery at the hearing, the court would have found the means to render him that justice; and, that the new matter for a bill of the nature proposed must be such as, if unanswered, would clearly entitle the plaintiff to a decree, or would raise a case of so much nicety and difficulty, as to be a fit subject of judgment in a cause. *Brigham v. Dawson*, Jac. 243, was a similar application, and shared a similar fate.

Coley v. Coley, 2 Younge & J. 44, was an application after publication passed, and the cause set down for a hearing, for liberty to examine two further witnesses, one only having been examined, to prove the execution of a will in the pleadings mentioned. The court granted it, saying, that if upon the hearing of the cause, the plaintiff had been unable to prove the execution of the will, the case would have been allowed to stand over, for the purpose of supplying that proof, upon payment of the costs of the day.

Then came *Wylid v. Ward*, 2 Younge & J. 881, where upon a rehearing, a motion was made to exhibit an interrogatory to prove cer-

tain facts, upon the ground, that they were newly discovered since the original hearing. Upon this occasion, there was an elaborate argument by counsel. But the court granted the motion, saying; that it had a discretion to grant or refuse it, according to the circumstances of the particular case.

In *Williams v. Goodchild*, 2 Russ. 91, an application was made, upon an appeal from a decree of the vice chancellor to the lord chancellor, for permission to use on the hearing of the appeal, some old documents and bailiff's accounts, which had been discovered since the original hearing. On that occasion Lord Eldon said: "I cannot lay it down, that new evidence can in no case be received; nor will I decide, that it is not to be introduced in this case, if the evidence, here tendered, shall be shown to be in its nature admissible, and a proper ground for its introduction shall be laid." The question was afterwards adjusted by an arrangement between the parties.

These are all the English authorities, bearing directly on the point now before the court, which the researches of counsel, as well as my own, have brought to my notice. What is very remarkable is, that not one of them presents the case of an application to introduce newly discovered oral evidence; or newly discovered witnesses; but they all relate to written documentary evidence. The courts, upon deciding upon these applications, however, made no allusion to any distinction, or practice excluding oral evidence; and the generality of the language sometimes used might incline one to believe, that the evidence of new witnesses might, under some circumstances, be within the contemplation of the court. Finding no direct English authority, either way, upon the point of the exclusion of oral evidence, unconnected with new written evidence, I have sought for information in cases of an analogous nature, such as bills of review, and supplementary bills, in the nature of bills of review; for (I repeat it), if in such cases, the evidence would be admissible, it ought now to be admitted. Unfortunately, there are not many cases of this sort to be found, and those, which do exist, do not afford any very satisfactory lights to settle the question now before the court. Indeed, bills of review are of very rare occurrence. Lord Chancellor Lyndhurst in *Partridge v. Usborne*, 5 Russ. 249, 250, observed, that for the period of a century past very few instances had occurred of bills of review having been allowed to be filed. In that very case, he allowed matters, dependent upon oral as well as written evidence, which had been discovered since the decree, to be brought forward by a supplemental bill, in the nature of a bill of review. But then they related to facts, not previously in issue in the cause. He thus settled a doubt, which had long existed on this very subject; and in respect to which, there was a dictum of

Lord Eldon the other way, in *Young v. Keighly*, 16 Ves. 348.

Lord Chief Baron Gilbert (Gilb. Forum Rom. 186), in laying down the rules, as to granting bills of review, puts one of the requisites in these words: "Thirdly; they can examine to nothing, that was in issue in the original cause, unless it be any matter happening subsequent, which was not before in issue, or upon matter of record, or writing, not known before. For, if the court should give them leave to enter into proofs upon the same points, that were in issue, that would be under the same mischief, as the examination of witnesses after publication, and an inlet into manifest perjury." Now, if this is to be deemed a true exposition of the doctrine in courts of equity, it makes an end of the present application. The difficulty is, whether the modern decisions affirm the practice in so limited a form.

Lord Hardwicke in *Norris v. Le Neve*, 3 Atk. 35, said, that the rules of Lord Bacon upon bills of review had never been departed from. And, professing to give the substance of those rules, he added: "By the established practice of this court there are two sorts of bills of review; one founded on supposed error appearing in the decree itself; the other a new matter, which must arise after the decree; or upon new proof, which could not have been used at the time, when the decree passed." The ordinance of Lord Bacon is substantially as here stated; his language on the last matter is: "Nevertheless, upon new proof, that is come to light after the decree made, and could not possibly have been used at the time, when the decree passed, a bill of review may be grounded." Beames, Orders Ch. p. 2, note 3. See, also, *Patterson v. Slaughter*, Amb. 293. In the case of *Norris v. Le Neve*, the application for the bill of review was not confined to "new proof" of a mere documentary character; but it embraced other facts of an oral nature; and Lord Hardwicke took no notice of any distinction between oral and written evidence. But he did take notice, that the new discoveries amounted to no more than corroboratives only of the former points in issue. In another case (*Gould v. Tancred*, 2 Atk. 533), before the same great judge, no notice was taken of any positive distinction between oral and written evidence, although certainly there may be good ground for such a distinction. In *Young v. Keighly*, 16 Ves. 354, which indeed was an application founded on the discovery of new documentary evidence, Lord Eldon said: "As far as I can ascertain, what the court permits with regard to bills of review upon facts newly discovered (he does not say, 'documents'), the decisions appear to have been upon new evidence, which, if produced in time, would have supported the original case." He added also in the same case: "The ground is even apparent on the face of the decree; a new evidence of a fact (not say-

ing 'written evidence') materially pressing upon the decree, and discovered at least after publication in the cause." In *Partidge v. Osborne*, 5 Russ. 195, the new evidence (which went to points not before in issue) was certainly largely founded in mere oral proofs and testimony; yet it was admitted. The language of Lord Eldon in *Milner v. Lord Harewood*, 17 Ves. 148, already cited, appears to me to confirm the conclusion, that upon rehearings and bills of review, upon newly discovered evidence, parol evidence to facts is not necessarily prohibited by any general practice or rule of law.

I had occasion, in the case of *Dexter v. Arnold* [Case No. 3,856], to examine this subject with a good deal of care in reference to bills of review. I was not, at that time, able to satisfy my mind, that the doctrine, as to the admissibility of newly discovered evidence, was limited to written evidence of a documentary nature. The subsequent authorities have not helped the matter in this particular. Upon principle it may, perhaps, be found difficult in all cases practically so to limit it; although no person is more sensible than myself of the great inconvenience and danger of admitting new evidence of a parol nature, after the former evidence in the cause has been seen; and, a fortiori, after the original cause has been heard. The reasons are well stated in *Jones v. Purefoy*, 1 Vern. 47, and still more forcibly in the case of *Respass v. McClanahan*, Hardin, 350, 351, to which I shall presently advert. In examining the decisions of Mr. Chancellor Kent, in which he has collected the leading English decisions on this point, not only after publication, but upon bills of review, it will be seen, that he has exhibited a strong disinclination to allow the introduction of any newly discovered evidence, merely cumulative or not of a documentary nature. This is manifested in an especial manner in *Hamersley v. Lambert*, 2 Johns. Ch. 432, in *Livingston v. Hubbs*, 3 Johns. Ch. 124, and *Troup v. Sherwood*, Id. 558. Yet he is compelled to admit, that there may be exceptions to the general rule. I cannot find, however, that he has ever made a direct decision, that the newly discovered evidence of witnesses to the facts in issue is not admissible on a hearing, or rehearing, or bill of review. He has, indeed, on one occasion said, that the nature of the newly discovered evidence must be different from that of the mere accumulation of witnesses to a litigated fact. *Livingston v. Hubbs*, Id. 127. But his decision did not turn particularly upon that point. The language in *Taylor v. Sharp*, 3 P. Wms. 371, upon which he has placed some reliance for this qualification of the doctrine, does not seem to me to have looked to any supposed difference in regard to the nature of the new matter, that is, whether newly discovered testimony, or newly discovered documents; but singly to the

fact, that it was newly discovered matter of some sort.

I have thus gone over the principal cases (with an exception, which will presently appear), which seem to me to be applicable to the more general question before the court. The result has been already incidentally suggested. But I will give it in a more direct and positive form. It is, that there is no universal and absolute rule, which prohibits the court from allowing the introduction of newly discovered evidence of witnesses to facts in issue in the cause, after publication and knowledge of the former testimony, and even after the hearing. But the allowance of it is not a matter of right in the party, but of sound discretion in the court, to be exercised cautiously and sparingly, and only under circumstances, which demonstrate it to be indispensable to the merits and justice of the cause.

I am driven, therefore, and I regret it, by this view of the matter, to the consideration of the special circumstances of the present case, and to decide, whether the court ought, upon general principles, and in the exercise of its just discretion, to grant the present petition. The objections which forcibly present themselves against it, are: (1) The great length of time since the publication of the evidence; (2) the nature of the evidence itself, being the asserted confessions of the defendant, to many of the most material points in the case, a species of evidence, of which it has been truly remarked, that it is the most easy to fabricate, and the most difficult to refute; and (3) the fact, that it is merely cumulative or corroborative testimony to the very points in issue. In my judgment, each of these objections has great intrinsic weight. The last has been thought by Mr. Chancellor Kent as of itself decisive. I find, too, that the same view of the matter has been taken by several other of the American courts, upon very solemn occasions. In *Respass v. McClanahan*, Hardin, 350, it was held by the court of appeals of Kentucky, at that time adorned by minds of uncommon ability, that the discovery of new witnesses to prove a matter of fact in issue in the original cause is not a ground for a bill of review. The reasoning of the court is so very full and clear on the point, that I would gladly transfer it to this opinion, if it would not occupy too large a space. Upon that occasion the court said, that after the most careful search, they could not find one case reported, in which a bill of review had been allowed on the discovery of new witnesses, to prove a fact, which had before been in issue; although there were many, where bills of review have been sustained on the discovery of records and other writings, relating to the title generally put in issue. The same doctrine has been since repeatedly affirmed by the same court, and particularly in *Bowles v. South*, Hardin, 460, and *Head v. Head*, 3 A. K. Marsh. 121. It

was also adopted and acted on by the court of appeals of Virginia in *Randolph's Ex'r v. Randolph's Ex'rs*, 1 Hen. & M. 180.

I am not able to satisfy myself, that this objection to the evidence is not well founded. On the contrary, the more I reflect, the more I feel the difficulty of the admissibility of merely cumulative and corroborative testimony, though newly discovered, to the facts in issue. If I were to decide in favor of its admissibility, I should, as far as I know, be the first judge, who ever acted upon so broad a doctrine. I am not bold enough to adventure upon such a course. On the contrary, if I were called upon to frame a rule, it would be to exclude all testimony of newly discovered witnesses to any facts in issue, unless connected with some newly-discovered documents. There is no authority in favor of the petition. There is authority against it. No book of practice states any thing, which leads to the conclusion, that evidence, like that now proposed, has ever been admitted at the original hearing, or upon a rehearing, or upon any bill in the nature of a bill of review. So far as the books of practice speak, they lead in the opposite direction. See *Hind, Prac.* 59-63; *Gilb. Forum Rom.* 183; *Wyatt, Prac. Reg.* 94-97; *Id.* pp. 353-355. My judgment, therefore, is, under all the circumstances, that the motion ought not to be granted.

[For subsequent proceedings in this case, see Case No. 17,954.]

Case No. 17,954.

WOOD v. MANN et al.

[3 Sumn. 318.]¹

Circuit Court, D. Massachusetts. May Term, 1838.

SALE UNDER EQUITY DECREE — ENFORCEMENT AGAINST PURCHASER—ATTACHMENT—INTEREST.

1. Under a decretal order of the court, certain lands were sold by the master, and the purchaser, in conformity with a further decretal order, gave security to the master, in the shape of a covenant, with a surety, to pay the purchase-money within fifteen days. The money was not paid, by either the principal or surety, within the appointed time. *Held*, that, on occasion of this default, a remedy at common law would be inadequate; that no proper damages could be given at common law upon a covenant taken by a court of equity to enforce its own decretal orders; that a court of common law could not entertain a suit upon such a security; that whoever makes himself a party to the proceedings of a court of equity, and undertakes to do a particular act under its decretal orders, may be compelled to perform what he has undertaken; that a court of equity may, by attachment, compel a purchaser at a sale by the master, to complete his purchase, by paying in the purchase-money; and that a surety, who has made himself a party to the proceedings, as in the present case, is in the same predicament with the purchaser, and may be proceeded against by attachment. And it will make no difference, that the surety was not aware, that, in becoming so, he subjected himself to the summary process of the court; nor that the plaintiff had a right, on the

¹ [Reported by Charles Sumner, Esq.]

default, to resell the lands; nor can the surety take any exception to the title, if the purchaser, his principal, has failed to do so.

[Cited in *The Kate Williams*, Case No. 7,623; *American Ass'n v. Hurst*, 7 C. C. A. 598, 59 Fed. 3.]

[Cited in *Rout v. King*, 103 Ind. 557, 3 N. E. 250; *Warfield v. Dorsey*, 39 Md. 304; *Townshend v. Simon*, 38 N. J. Law, 241; *Atkinson v. Richardson*, 18 Wis. 246.]

2. A purchaser under a master's sale will not be let off from his purchase by a submission to a forfeiture of his deposit.

3. What circumstances amount to a waiver by the purchaser of a reference of the title to a master.

4. Under the circumstances of the case, and in pursuance of a decretal order, the defendant was charged with interest up to the time of the final payment of the purchase-money; although, under the circumstances, the purchaser and surety were not charged with interest, after their default.

5. The principal and surety have no claim upon the rents and profits of the estate, except from the time when the conveyance to them is completed.

[This was a bill in equity by Josiah Wood, Jr., against Samuel H. Mann, John R. Adams, and others.]

In this case, which had been several times before the court [Cases Nos. 17,951, 17,952, and 17,953], a sale of certain real estate, mentioned in the bill and proceedings, having been made by the master, pursuant to a decretal order of the court, the biddings were ordered by the court to be re-opened, by a decretal order of the 9th of December, 1837; and, in pursuance of the same order, another sale was had before the master, on the 20th of December, 1837, at which sale Simon C. Hewett became the purchaser of certain parcels of the land; and Valentine O. B. Brown became the purchaser of certain other parcels; of which sale and purchases the master made due report to the court, on the 23d of December, 1837. Among the conditions of sale, it was provided, that the purchase-money should be paid in gold or silver coin and the currency of the United States; that the purchaser should pay down, or secure, five per cent. of his purchase in cash, and the remainder on receiving his deed from the master; and should sign an acknowledgment of his purchase at the time of the sale. If the purchaser should neglect, or fail, to comply with the conditions of his sale, his deposit, and all his interest and claim in the premises, struck off to him, should be forfeited, and the lot or parcel be again put up for sale; a conveyance to the purchaser was to be made as soon as might be after the confirmation of the master's report of the sale. On the same day, on which the report of the master was filed (the 23d of December, 1837), Simon C. Hewett filed a petition in court, praying for a confirmation of the sales made to him; and Valentine O. B. Brown, at the same time, prayed a confirmation of the sales made to him. On the same 23d of December, 1837, the court passed a decretal order, confirming the sales, unless cause was shown to the contrary, on or before the 27th of the same

month. No cause was shown, or objection made. The plaintiff was to be at liberty to apply for a resale, if the purchasers did not pay the purchase-money, and complete the contract.

On the 30th of December, 1837, the master filed a supplementary report, stating that he had prepared proper deeds of conveyance of the land purchased by Simon C. Hewett, and Valentine O. B. Brown, ready to be delivered to them, upon the payment of the purchase-money. On the same day (the 30th of December, 1837) Valentine O. B. Brown filed a petition, referring to the preceding facts, praying that time might be allowed for preparation of a suitable deed from the master, and the payment of the purchase-money into court, as to the court might seem reasonable; and also stating, that he (Brown) had assumed the purchases made by Hewett, and that he was responsible for the same, and praying for a reasonable time to raise the money therefor. On the same day a decretal order was passed by the court, stating, among other things, the sales and proceedings and petition of Brown, and also, that Brown had given security for the payment of the purchase-money of the lands sold to Hewett within fifteen days; and that Hewett consented to the substitution of Brown as purchaser, as aforesaid; and thereupon it was ordered by the court, that the reports of the master stand confirmed; that Brown be substituted as the purchaser instead of Hewett; that Brown pay to the master the amount of the purchase-money within fifteen days from that day; and the master, upon the payment, should execute a due conveyance to him of the premises; that, if Brown should fail to pay the purchase-money, as above ordered, then it should be at the election of the defendant (Adams), within five days, to pay the amount, and to have a conveyance of the premises to himself; if neither Brown nor Adams should pay the purchase-money, then the premises to be again set up for sale, under the direction of the master. All the parties assented to this order. Owing to the extreme pressure of the times, the money was not paid within the fifteen days; the master then proceeded to advertise a resale of the premises. The proceedings upon the proposed sale were, however, stopped, upon an intimation from the court to the master, made with the assent of the plaintiff and the defendant (Adams). On the 27th of March, 1838, the defendant (Adams), with the assent of the plaintiff, filed a petition, which, after stating the proceedings, and that the security given to the master was a covenant by V. O. B. Brown with Ebenezer T. Andrews as surety, to pay the purchase-money within the fifteen days, and that the money had not been paid, as by a report of the master, therewith exhibited, appeared; and also, that a resale, from the embarrassments of the times, would be greatly to the prejudice of the petitioner, prayed, that the order for a resale should be rescinded, and also, that the said Brown and Andrews should

be cited to appear and show cause, why they should not pay the money, and why process of contempt should not issue against them upon their failure so to do, and for other relief. An order was accordingly passed by the court, suspending the proceedings for a resale, and directing cause to be shown by Brown and Andrews at the rules, on the first Monday of May, 1838, why the prayer of the petition should not be granted. Process was duly served on Brown and Andrews; and the cause was further proceeded in at the May term of the court, 1838, when Andrews appeared and showed cause; but Brown made no appearance, and showed no cause against the petitions. The substance of Andrews's affidavit was, that he was a mere surety, without any interest or security; that he never supposed, that by giving such covenant he should become amenable to any summary process of the court, to comply with the terms thereof; that, by the conditions of sale, the premises were to be put up again, if the conditions were not complied with; that, by the decretal order of the 30th of December, a resale was directed, if the purchase-money was not paid; that proceedings towards a resale had been had, but Brown had been taken sick soon after giving the obligation, and ever since confined to his house, and unable to attend to business, and still was sick, and has been unable to raise the money; that he (Andrews) ought not to be called on, and is not liable to pay the money, by reason of his being surety as aforesaid; that he is unacquainted with the title to the premises, and does not know who is legally competent to convey the same; that the master has never reported, that a good title can be made; that Brown has never been ordered by the court to pay the money; that no decree has been made, that he shall complete the purchase; that, upon the opening of the biddings, the sales were enhanced in price from \$11,481.88 to \$15,975; that the deposit money paid by Brown is a sufficient security; and then submits it to the court, whether he ought to be compelled as surety to pay the purchase-money; whether Brown should not first be decreed to complete the purchase, etc.; and, finally, that Adams has no right to insist on this proceeding.

The covenant delivered to the master, is as follows: "Know all men by these presents, that, whereas, Simon C. Hewett, at a sale of lands in Lowell, on the 20th of December, instant, by George S. Hillard, Esq., master in chancery, was the highest bidder, and did purchase some of the lands then sold by said master, by the order of the circuit court of the United States for the First circuit, and whereas, Valentine O. B. Brown has assumed the purchases made by said Hewett, amounting in all to about eleven thousand dollars: Now, I, the said Valentine O. B. Brown, as principal, and I, Ebenezer T. Andrews, of Boston, as surety, do covenant and agree with Josiah Wood, Jr., who is the person for whose benefit said lands were sold, that the said lands

purchased by said Hewett and assumed by said Brown, as aforesaid, shall be paid for in fifteen days from this date, agreeably to the conditions and provisions of said sale; and we will pay the same to said master within that time. In testimony whereof, we have hereunto set our hands and seals, this thirtieth day of December, A. D. 1837. In presence of," etc.

The master, on the 29th of March, 1838, reported to the court, that the purchase-money had not been paid; that he had prepared the deeds ready for delivery on the payment of the purchase-money; and that he had demanded payment under the consent both of Brown and Andrews, who declined to pay the same. And he has since returned the bond into court, stating it to have been executed in open court.

F. Dexter, for Adams.

B. Rand, for Wood.

Mr. Sprague, for respondent Andrews.

STORY, Circuit Justice. The proceedings in this case have been somewhat irregularly conducted; but the substantial merits cannot be open to much controversy. The decretal order of the 30th December, 1837, was expressly passed upon the footing of this very security or covenant given by Brown and Andrews for the payment of the purchase-money in fifteen days, the parties being present in the court and offering the security, as the foundation of the decretal order, to be passed upon the petition of Brown for further time to complete his purchase and pay the purchase-money. Now, stripped of all artificial forms and technical reasoning, what is the substance of the argument urged on behalf of the respondent Andrews? The money has not been paid according to the covenant, either by the principal, or by the surety; and although the covenant has been thus violated, the instrument itself, though in form a security to the court, through the master, for the due payment of the money to the master, is in reality no security at all to be enforced by the court. The appropriate remedy is merely a resale of the property, provided for in that decretal order; or, possibly, and at most, a remedy at the common law for damages upon the covenant. Now, if this be the true posture of the case before the court, it is one of a very extraordinary nature. Brown asked of the court an indulgence of fifteen days to pay the purchase-money into the court, giving security for the due payment at that time; and yet the security is no security at all for the due fulfilment of his undertaking to the court; but a resale is the true and proper security. Under such circumstances of what possible use could be the covenant with a surety; since the resale could be as well made without it as with it?

But then it is said, that a suit would or might lie at the common law for damages

on the covenant. Suppose it would, is it not plain that that would afford no adequate redress. A specific performance of the contract, and a completion of the purchase are what is required, and not damages possible or positive for the non-performance of it. The remedy at the common law would be utterly inadequate; and the proper suit, if any, would be a bill in equity for a specific performance of the very covenant. If such relief could be granted upon an original bill, framed for such a purpose, I should be glad to know why it may not be given in the present suit, to which the purchase is a mere incident, as the propriety of the relief must depend upon the very same facts now before the court, and upon none others. But what damages could be given by a court of common law in a case of this sort, upon a covenant or security given to or taken by the direction of a court of equity to enforce its own decretal orders? Did any one ever hear of such a suit upon such a security? What damages could be given? What means could a court of common law have to ascertain or measure the extent or nature of the damage? How could it know, what would be held to be the nature, operation, and extent, of such a security in the view of a court of equity? or what other means a court of equity might adopt to enforce it, or to redress the injury done by it, either by a re-sale or otherwise of the premises? Until the final action of a court of equity by its own modes of redress, or other exercise of jurisdiction, it would be utterly impossible for a court of common law to possess any adequate measure of damages; or to ascertain whether there were any damages at all. And even then, it could arrive at the result only upon a review of the whole proceedings in equity, which, if it were competent in point of jurisdiction to re-examine, it is not too much to say, that it would be a task of great embarrassment, and critical peril. The truth is, and I have no doubt, that a court of common law would so hold, that it has not any proper jurisdiction to entertain any suit upon a security of this sort given in the course of a proceeding in another court of justice. It might just as well undertake to enforce a stipulation taken in the admiralty, or a written acknowledgment of the purchaser at a sale before a master, or an undertaking of a party to pay money into court upon a special order. In my opinion there is and can be no effectual remedy administered in the present case, unless it can be by this court as a court of equity.

But it is said, that the present application is not made in behalf of the plaintiff, who had the conduct of the sale; but of the defendant (Adams), whose property has been subjected to the sale; and that it is not competent for Adams to ask the court to enforce an order of this court. It is unnecessary to consider, whether there is any valid-

ity in this objection upon principle or not; for the plaintiff, Wood, has adopted the petition and application of Adams, and now strenuously seeks its due enforcement. The objection, then, degenerates into a pure question of form.

Then, what are the grounds of objection to the jurisdiction of the court? First, it is said that there is no case to be found, in which a proceeding has been had of this sort against a surety. But the jurisdiction of courts of equity does not depend upon the existence of a case, in which the particular exercise of it asked for can be shown; but upon general principles and analogies, applicable to the structure of the court. No doubt is now entertained, that a court of equity may, by attachment, compel a purchaser, at a sale by the master, to complete his purchase by paying in the purchase-money. It stands upon the plainest principles of the court, that he who makes himself a party to the proceedings of the court, and undertakes to do a particular act under the decretal orders of the court, may be compelled to perform what he has undertaken. It is a mere incident to the due exercise of the principal jurisdiction, and indispensable to the due enforcement of the orders of the court upon persons who have submitted themselves to its jurisdiction. A sale before the master might otherwise become a mere mockery, and give an entire immunity to purchasers, to speculate upon the chances of the sales. Yet this doctrine, now so well established, was quite novel, as an exercise of jurisdiction, as late as 1808, when it was recognized and acted upon by Lord Eldon, in *Lansdowne v. Elderton*, 14 Ves. 512, who at first doubted, whether there was any instance of committing a purchaser, and whether the court could go further than to discharge him from his purchase. His lordship, however, did not hesitate ultimately to act upon the jurisdiction, and said, that the principle required it equally in the case of a purchaser, who could not be permitted to baffle the court and disobey an order, more than any other person. And Sir Samuel Romilly, who argued in support of the motion, said, that there was no distinction between a purchaser and any other person not a party; and he put the case of tenants in common, ordered to attorn to a receiver. The notion, indeed, is utterly groundless, that no person, but a direct party to the suit can be made subject to the orders or process of the court.

Now, what substantial distinction can there be between the exercise of the jurisdiction over the purchaser himself, and that over the surety, who has equally undertaken, under the proceedings, to pay the purchase money to the court? Each is equally a principal as to the court, and each simultaneously and substantially incurs, as to the court, the same responsibility. Suppose, the surety alone had undertaken to the court, for

and in behalf of the purchaser, to pay the purchase-money; would he not have been liable to the same process of the court, as if he were the purchaser? Suppose, the purchase had been by an agent for the purchaser, and the agent had expressly undertaken to the court to pay the purchase-money and complete the purchase, could there be a doubt that the process of attachment would lie to compel him to the performance of his undertaking? The difficulty of the whole argument consists in treating the surety, as a stranger to the proceedings; whereas he is in fact a party to the proceedings under the sale, and has agreed to become so, as far as the payment of the purchase-money is concerned. It appears to me, that the predicament of a surety is not in the slightest degree distinguishable from that of a purchaser, or of any other person, who makes himself, by his own undertaking, a party to any of the proceedings of a court of equity. He thereby submits himself to the jurisdiction of the court by the necessary implications of law, whatever may be his own private notions on the subject, with which the court cannot intermeddle; and he becomes amenable, like any other party, to the process of the court, to compel the due performance of his own undertaking.

The case of *Richardson v. Jones*, 3 Gill & J. 164, has been cited as an authority against the exercise of the jurisdiction against a purchaser or his sureties, in a case like the present. To the principal points decided in that case I perceive no solid objection; and under similar circumstances I very much incline to think that this court ought to make the same decree as that given by the appellate court, dismissing the petition of Benjamin Richardson, and dismissing the appeal from the interlocutory order of the chancellor, directing a payment of the purchase-money into court, or to show cause to the contrary. The whole force of the argument addressed to us is founded upon doctrines supposed to be given upon points and principles confessedly not then in judgment. In that case the court admitted the authority of a court of equity to enforce the payment of the purchase-money by attachment, as against the purchaser himself. But the court thought, that where, according to the terms of the sale ordered by the court, the sale was not to be a cash sale; but a bond with sureties was to be taken by the trustee at the sale for the payment of the purchase-money at a future time, there, inasmuch as the sale on those terms was, when made and ratified by the court, upon giving the bond with sureties, for a complete execution of the whole order of the court, touching the sale, the remedy for the subsequent payment of the purchase-money, was, for the trustee, by a suit at law on the bond, and not by a summary process of the court. The court, on that occasion, said: "There must be a decree or order of ratification,

amounting to a decree, for the payment of the purchase-money, as a foundation for an order to bring it into court. It is not merely on the ground that the purchase-money is remaining unpaid, that such an order is passed; but it is on the principle, that there is a decree for the payment of the purchase-money, and the purchaser, being in contempt, the order has for its object the enforcement of that decree. Where there is not such a decree, there can be no such order. And an order of ratification, sanctioning and confirming a contract of sale, by which bond and security is given for the payment of the purchase-money, cannot, we think, be construed to amount to a decree for the payment of it. Where the sale is a cash sale, the order of ratification is held to amount to a decree for payment, which must be enforced in chancery, there being no remedy at law. But where it is not a cash sale, and bond is given for the purchase-money, the order of ratification adopts the bond, which stands in the place of a decree for payment, to be enforced at law." Now, whether this reasoning be entirely satisfactory or not; or whether it does not proceed upon an assumption of the very matter in controversy, as to the jurisdiction, is a question, with which I do not intermeddle. Much of the reasoning for the proper solution of such a question might depend upon the terms of the sale and of the bond, and upon the intention to make it a sale on credit, trusting to the personal responsibility of the parties, and not to the powers of the court to enforce its own orders and jurisdiction as to the payment of the purchase-money. But, however this question may be, it is plain that the reasoning of the court proceeds upon grounds, which distinguish the case most essentially from that before this court. In the present case the sale was a cash sale, without the slightest intention of credit; and the bond was given, not as a substitution for the payment of the purchase-money in cash, but to secure it at the end of the fifteen days, asked, as a special indulgence from the court, by the purchaser. The very confirmation of the sale, and the very order to enlarge the time of the payment of the purchase-money for fifteen days, was upon the application of the purchaser himself, to save him from a forfeiture; and upon an express undertaking with his surety, that the money should then be paid. The court never intended to part with its own hold upon the purchase-money, or to discharge the purchaser from the due payment of it, according to the terms of purchase, but to take a security, as a double assurance, to make its authority effectual. If, indeed, the surety can now evade the process of the court, the whole proceeding will have been a mere mockery; and the order of the court granted under a delusion. What has such a case to do with circumstances, like those in *Richardson v. Jones*, 3 Gill & J. 164? Be-

sides, this latter case came before the court under very extraordinary circumstances of fraud and collusion, or at least of meditated misconduct. And the bond itself was sought to be enforced on one side by a party to that fraud or misconduct, and on the other side to be escaped from by a participator in the same improper conduct. Such a case was well calculated, especially when an application was made for relief after the lapse and laches of ten years and more from the time of the sale, to meet with the pointed discouragement of the court. Here there is not the slightest pretence of any misconduct. The parties applying for the relief have acted with the greatest good faith—*uberrimā fide*.

In the next place, it is said, that here the decretal order was, that in case of the non-payment of the money in the fifteen days, there should be a resale by the master. But this constitutes no ground upon which the purchaser or his surety can found any right to refuse the performance of their undertaking with the court. It is a mere order by anticipation of the ordinary authority of the court to direct a resale, which is exercisable in all cases where a purchaser is in default; and does not obtain a respite from the court. It is an order essentially for the benefit of the other parties, and not for the purchaser. The latter has no right to demand, or to enforce it. It is a mere auxiliary security belonging to the plaintiff, seeking the benefit of the sale. The court was at liberty to rescind or suspend it at any time, as indeed has been done in the present case. If this had been an ordinary contract for a purchase, in which the seller had reserved a right to resell upon the failure of the purchaser to comply with the terms of the sale, such a reservation would not have justified the purchaser in insisting on a resale, or, upon his default, have set him adrift from his contract. That would be to give him an election to violate his own contract. The very point was decided by Lord Eldon in *Seton v. Slade*, 7 Ves. 265, 276, where the contract embraced such a provision; and his lordship said: "If you make out that he (the seller) would have been at liberty to resell, that does not make out, that he lets the other off." The question here is not, whether the plaintiff has not a right to resell; but whether the purchaser and his surety have a right to violate the very terms of their contract, and to refuse to pay the very purchase-money, which, by their undertaking to the court, they were bound to pay in the fifteen days.

Then, again, it is suggested, that, upon the original conditions of sale, the purchaser, upon non-compliance with the conditions, was to forfeit his deposit, and the property might be resold by the master. But this provision obviously applied only to the case of the purchaser, refusing to comply with the conditions at the time of the sale, by signing an acknowledgment, that he was purchaser,

etc.; upon which refusal the master was to be at liberty to put the same again up for sale, that is, at the same sale; and not at a resale under a new order of the court. At all events, Brown, by his subsequent application to the court to have his purchase confirmed, and time allowed for payment of the money, placed himself in an entirely new attitude before the court, and incurred other responsibilities. But if it were otherwise, it is by no means true, that a purchaser is to be let off from his purchase by a forfeiture, or submission to a forfeiture, of his deposit.

Then, again, it is said, that no inquiry has been had into the title, which is the common practice after a confirmation of the sale by the master. It is so. But then such an inquiry is not indispensable; it is merely for the benefit of the purchaser, that he may not be compelled to take a defective title. But, if the purchaser is satisfied, and makes no objection to the title, or waives the inquiry, it does not afterwards lie in his mouth to take any exception of this nature. And, a fortiori, his surety has no right to take any such exception; for he has nothing to do with the matter of the title. That is an affair wholly appertaining to the rights and duties of the principal. In the present case, Brown has never, even to this hour, asked any reference for inquiry into the title; neither has he shown any objection to it. And his petition to have the purchase confirmed to him, in lieu of Hewett, and his application for the indulgence of fifteen days to pay the purchase-money, without asking for any such inquiry into the title, is a complete waiver of it.²

Some suggestions also have been made in the affidavit of the surety, and also at the argument at the bar, that the surety was not aware, that, by his becoming so, he subjected himself to the summary power and process of the court. That is wholly immaterial. It was his duty to know, that, by becoming a surety for the due payment of the purchase-money under the proceedings of the court, he became liable to the fullest exercise of the jurisdiction of the court, founded upon those proceedings.

Upon the whole, my opinion is, that an order ought to pass, that the purchaser, and, upon his default, the surety do, within thirty days from the passing of this order, pay the amount of the purchase-money into court, and upon default of such payment, that an attachment do issue against them, and that they do stand committed until this order is performed. And in case the surety shall pay the money into court within the same period, then he shall be at liberty to have the aid of the court in prosecution of the said attachment against the principal to

² See, as to the practice in regard to a reference of the title, and compelling the payment of the purchase-money by the purchaser, *Benet's Proceedings in the Masters' Office*, 167-170; 2 Smith, Ch. Prac. c. 19, pp. 182-193.

compel him, as primarily liable, to pay the same, with liberty also for the surety to apply for any further aid of the court within its competency, to assist his own rights in regard to his principal.

A further question was at a later day submitted to the court, to determine up to what time interest was to be calculated against the defendant, Adams. By the decretal order of the 29th of May, 1837, which was passed by the consent of all parties, it was ordered, that unless Adams should pay the \$13,000, and interest thereon, on or before the 18th of October, then next, the premises should be sold to pay that sum, and additional interest upon the principal until payment thereof, and costs, &c. The sum not being paid, the premises were accordingly sold at public auction under the direction of the master; and afterwards, upon petition, the biddings were reopened, and another sale took place for a higher price, at which Brown became the purchaser; and upon his application for an enlargement of time to pay the purchase-money, Andrews became his surety for the payment thereof at the time prescribed by the court. The payment not having been complied with by Brown, the plaintiff, Wood, according to a reservation made in his favor, in the original decretal order opening the biddings, proceeded to advertise another sale of the premises. That sale, however, was stopped by the court upon the application of Adams, with the consent of the plaintiff; and payment of the purchase-money was enforced by a decretal order against Brown and his surety, Andrews, and the latter accordingly paid the amount under the decretal order on the 7th day of July, 1838. The court, upon hearing the matter as to passing the decretal order for the payment of the purchase-money, refused, under all the circumstances, to direct the payment of any interest by Brown and Andrews on account of their failure to comply with the terms of the order above mentioned for an enlargement of the time to pay the purchase-money. Adams now insisted that he ought not to be compelled to pay any interest upon the principal sum due under the decree of the 29th of May, 1837, after the time when Brown ought to have paid the purchase-money on the confirmation of the sale to him.

B. Rand, for plaintiff.

F. Dexter, for defendant Adams.

STORY, Circuit Justice. Unless something has occurred, which in equity and justice requires the court to alter the original order of the 29th of May, 1837, which was assented to by all the parties, there is no pretence to say, that Adams ought not to be decreed to pay interest according to the terms thereof, up to the time when the whole principal due to the plaintiff was paid. The plaintiff did

not receive that sum until the 7th day of July, 1838; and he was in no default in not before receiving it. The opening of the biddings and resale to Brown were for the benefit of Adams, and the premises were actually sold at a much higher price. The subsequent stoppage of the resale, upon the default of Brown, was at the urgent petition of Adams himself; and the whole proceedings against Brown and Andrews, under which the payment of the purchase-money has been enforced, was at his instance, and for his benefit, and upon his own showing a great advantage to him; for the resale would have been at a great sacrifice. So that, whatever delay has intervened, has not been occasioned by any laches or delay on the part of the plaintiff; but has been for the benefit of Adams; and the whole proceedings against Brown and Andrews, prosecuted under his direction. It seems to me plain, therefore, under these circumstances, that the decretal order of the 29th of May, 1837, ought to be enforced against Adams, according to its terms; and that any alteration thereof would be inequitable and unjust to the plaintiff. I do, therefore, direct, that interest be calculated upon the principal sum of \$13,000 against Adams up to the seventh day of July, 1838, when the purchase-money was paid.

It has been suggested, that Adams has been in the receipt of the rents and profits of the premises up to the time, when the conveyance was perfected to Andrews, at the time of his payment of the purchase money; and that, possibly, he may be compelled to account therefor to Brown and Andrews, or to the latter. But there is no pretence for that; for neither of them has any claim for such rents and profits, except from the time, when the conveyance to them was completed. If it had been intended by the court to give them or either of them the benefit thereof, they would have been decreed to pay interest on the purchase-money. It has also been suggested, that there has been about \$3,000 in the master's hands, ever since January, 1838. But that sum was, in the first place, properly applicable to the costs and expenses of the sale, etc. And, at all events, as the plaintiff has never received any benefit therefrom, he is not to be prejudiced by the existence of a fund, over which he had no control. If Adams had desired any particular application to be made of that fund, consistently with the proper objects, for which it was retained, it was his duty to have made some motion to the court on the subject.

These are all the remarks, which occur to me to be necessary to make on the present occasion. And here, I trust, this tedious controversy is ended. "Sunt certi denique fines litium."

Case No. 17,955.

WOOD v. MATTHEWS.

[2 Blatchf. 370; 1 23 Vt. 735.]

Circuit Court, D. Vermont. May, 1852.

REMOVAL FROM STATE COURT—JURISDICTION OF
FEDERAL COURT—SEIZURE UNDER REVENUE
LAWS—MOTION TO DISMISS.

1. When a cause is removed from the state court into the circuit court of the United States, under the provisions of the 3d section of the act of March 2, 1833 (4 Stat. 633), as having been commenced against an officer of the United States, for an act done under the revenue laws of the United States, or under color thereof, the question whether the property for the taking of which the action was brought was seized by the defendant in the performance of his duty as an officer of the customs under the revenue laws, is a matter of fact involved in the merits of the case, and cannot be raised or determined upon a motion to dismiss the suit.

2. The act of congress gives the jurisdiction and right of removal "in any case" falling within the particular class of cases provided for, without any regard to the amount in controversy in the suit. Hence, no question can be raised in the circuit court based upon the trifling value of the property for the taking of which the suit was commenced.

[Cited in Galvin v. Boutwell, Case No. 5,207; Whelan v. New York, L. E. & W. R. Co., 35 Fed. 864.]

[Cited in State v. Circuit Judge, 33 Wis. 132.]

This was an action [by John Wood, Jr., against Philo A. Matthews] originally commenced in one of the subordinate courts of Vermont, held by a justice of the peace, and was removed into this court, at the instance of the defendant, by a writ of habeas corpus cum causa, under the act of March 2, 1833 (4 Stat. 633, § 3). It was an action of trespass for taking and detaining a certain horse belonging to the plaintiff. After its removal, the plaintiff appeared and filed a motion to dismiss the case for want of jurisdiction, alleging that the cause of action did not proceed from, nor the action bring in question, any act or thing done by the defendant as an officer under the revenue laws of the United States, and that the damages demanded, being only ten dollars, were too small and inconsiderable to be the subject of adjudication in this court.

D. A. Smalley, for plaintiff.

C. W. Prentiss and L. Underwood, Dist. Atty., for defendant.

PRENTISS, District Judge. The removal of the cause to this court, and the jurisdiction of this court over it, are regulated by, and dependent entirely upon, the provisions of the act of congress of March 2, 1833 (4 Stat. 633, § 3), passed in pursuance of the clause of the constitution which declares, that the judicial power of the United States shall extend to all cases in law and equity arising under the constitution, laws or treaties of the United States. After giving, in general terms, juris-

isdiction to the circuit courts in all cases arising under the revenue laws, the act provides that, "in any case where suit or prosecution shall be commenced in a court of any state, against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under color thereof," &c., "such officer or other person may, at any time before trial, remove the cause into the circuit court for trial." The act prescribes the mode of removal and what shall be necessary to effect the removal. There must be a petition to the circuit court, setting forth the nature of the suit; an affidavit, verifying the petition; and a certificate, signed by an attorney or counsellor-at-law, stating that, as counsel for the petitioner, he has examined the proceedings against him, and has carefully inquired into all the matters set forth in the petition, and that he believes the same to be true. The petition, affidavit and certificate being presented and filed, "the cause," as the act declares, "shall, thereupon, be entered on the docket" of the circuit court, "and shall be thereafter proceeded in as a cause originally commenced in that court."

The clerk of the circuit court is, thereupon, to issue a writ of certiorari, or a writ of habeas corpus cum causa, as the case may require, which shall be served in the manner prescribed by the act. And the act then proceeds to say that, thereupon, it shall be the duty of the state court to stay all further proceedings in the cause, and that the suit, upon the service of such writ of certiorari or habeas corpus, shall be deemed and taken to be moved to the circuit court, "and any further proceedings, trial or judgment therein, in the state court, shall be wholly null and void."

The action, when thus removed here, is to be proceeded in as a cause originally commenced in the circuit court. But any action in this court, either original or removed, may be dismissed upon motion founded upon proper matter, and showing that the court has not jurisdiction of the case or that it was irregularly brought here. If the property sued for in the present action was of such a nature as not to be liable to seizure under the revenue laws of the United States under any circumstances, it might, perhaps, be said to be apparent, that the case does not come within the act of congress, and, on that assumption, supposing it to be well-founded, the cause might properly be dismissed on motion, and be remanded to the state court. But horses are not only property subject to duty, and liable to seizure on being imported contrary to the provisions of law, but become forfeited whenever employed as the means of transporting or bringing into the country any goods illegally imported; and, whether the horse in question was in truth seized and taken by the defendant in the exercise of his functions and performance of his duty as an officer of the customs under the revenue laws, as set forth in his petition for the removal of

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

the cause, is a matter of fact belonging to and forming a part of the merits of the case. It is involved in the inquiry whether the taking and detention were lawful and justifiable, and must be determined, not in a summary way, on motion and affidavits, contradicting and denying the facts so stated and verified in the requisite form, but on trial of the merits in the usual course of proceeding.

As to the inconsiderable value of the property sued for, or the small amount of damages demanded in the action, it is sufficient to say, that jurisdiction and the right of removal are given "in any case" falling within the particular class of cases provided for, without any regard to the amount in controversy in the suit. We can, therefore, make no distinction between a suit involving much and a suit involving little, because the act makes none. Nor can we, for the same reason, go into any considerations of expense or inconvenience to the parties, as compared with the amount in controversy. These are all matters of legislative rather than of judicial cognizance. It may be observed, however, that, though the property be of small value, the principle or question of authority involved in the case may be important, and such as ought to be decided by the national rather than the state judiciary. It may also be added, that the jurisdiction of justices of the peace being, by the state law, final, where the sum demanded in damages does not exceed ten dollars, officers of the customs, unless cases so brought against them before these inferior local tribunals are liable to be removed into this court for trial, might, if not deterred from the performance of their duties, be made the victims of vexatious suits and unjust judgments.

The proceedings in removing the cause appearing to be in all respects in conformity with the act of congress, and the case consequently being regularly and rightly in court, the motion to dismiss must be overruled, leaving the plaintiff, of course, no alternative but that of prosecuting the action here or becoming non-suited.

Case No. 17,956.

WOOD v. MAY.

[3 Cranch, C. C. 172.]¹

Circuit Court, District of Columbia. May Term, 1827.

REPLEVIN FOR GOODS DISTRAINED — ACTION ON BOND—DAMAGES.

1. In replevin for goods distrained for rent-arrear, if the jury do not render such a verdict as will enable the court to render the statutory judgment in favor of the defendant, the court may render the common-law judgment for a return of the property replevied; and in an action upon the replevin bond, for not returning the property, the

defendant may, in mitigation of damages, show that no rent was in arrear.

2. The value of the goods stated in the replevin-bond is prima facie evidence of the plaintiff's damages; and if the defendant should contend for a less amount, the burden of proof is on him to show it.

[Cited in *Cyclone Steam Snowplow Co. v. Vulcan Iron Works*, 52 Fed. 923.]

3. If the jury, in replevin, do not find the value of the goods distrained, their finding of the amount of rent in arrear is surplusage.

Debt, on the replevin-bond of Mrs. Arguelles and her sureties. The defendant, one of the sureties, pleaded three pleas: (1) That the plaintiff in replevin did prosecute her writ with effect; (2) that she did not make a return of the goods replevied; and (3) no such record of a judgment for a return. Upon these pleas issues were joined; and, upon the trial,

Mr. Hall, for plaintiff, contended that the value of the goods was the measure of the plaintiff's damages upon the issue on the second plea; and that the amount stated in the bond is evidence of the value.

Mr. Jones, for defendant, contra.

THE COURT (nem. con) said, that if the jury should find the issues for the plaintiff, the value of the goods stated in the bond is prima facie evidence of the amount of the plaintiff's damages; and that, if the defendant should contend for a less amount, the burden of proof is on him to show it. In the action of replevin of Arguelles v. Wood [Case No. 520], in which this bond was taken, the defendant avowed for rent-arrear, and upon that issue the jury found for the defendant, and one cent damages, and that the rent arrear was \$140, but did not find the value of the distress, so that the court could not render judgment under the statute 17 Car. II. c. 7; but the court rendered the common-law judgment, for a return of the property. The present action is upon the replevin-bond given by Mrs. Arguelles in that case.

THE COURT having given the above opinion, Jones & Wallach, for defendant, offered to prove that the rent was all paid; to which Hall & Key, for plaintiff, objected, contending that the verdict rendered in the case of Arguelles v. Wood was conclusive evidence that \$140 rent-arrear were due.

But THE COURT (THERUSTON, Circuit Judge, absent) was of opinion, that so much of the finding, namely, that \$140 rent were in arrear, was mere surplusage, inasmuch as the jury did not also find the value of the distress, so as to make it a material finding under the statute, and to enable the court to render the statutory judgment; and that it was now competent for the defendant to show in mitigation of damages, that less rent was due; the question upon the issue of no rent-arrear being whether any rent be in arrear, and not whether any particular sum be due. See Starkie, Ev. pt. 4, p. 1297.

Verdict for the plaintiff \$140, with interest from 25th July, 1823; and judgment accordingly.

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

Case No. 17,957.

WOOD v. MICHIGAN S. & N. I. R. CO.

[2 Biss. 62; 3 Fish. Pat. Cas. 464.]¹

Circuit Court, D. Indiana. Nov., 1868.

RENEWAL OF PATENT—RIGHTS OF ASSIGNEE.

1. The assignee of a patent holding at the expiration of the first term a right during that term to "make, construct and use" the article patented, may, during the term of its subsequent extension, continue to use it and even repair it, but is not entitled to make it for use, or for any other purpose.

2. Section 18 of the act of July 4, 1836 [5 Stat. 124], construed.

3. Whether this doctrine applies to a process, quære.

This was a bill in equity, filed to restrain the defendant from infringing letters patent for an "improvement on the mode of operating brakes for cars," granted to Nehemiah Hodge, October 2, 1849, re-issued March 1, 1853, extended to him for seven years from October 2, 1863, and by mesne assignments vested in complainant within and for the territory within which the defendant's road was operated.

F. L. Ketchum, for complainant.
Wing & Niles, for defendant.

McDONALD, District Judge. This is a proceeding in chancery, submitted to us for hearing and decree on the bill, answer, exhibits, depositions and certain admissions of the parties, made in open court.

The bill charges that on October 2, 1849, one Nehemiah Hodge duly became the patentee of a new and useful improvement in the mode of operating brakes for railroad cars; that by reason of an inadvertence in the description thereof, another patent for the same invention was issued to him, to take effect from the date of the first, for the term of fourteen years; that on September 16, 1863, the commissioner of patents renewed and extended to Hodge the same patent, for the further term of seven years; and that by the various assignments set out in the bill, the complainant, several years ago, became and now is the legal and equitable owner of so much of the patent right and extension as is included within the territory within which the defendant's railroad is situate. The bill further charges that the defendant, in violation of the rights of the complainant, has "for a long time heretofore manufactured, vended and used, and is still using, manufacturing and vending within said territory a large number of brakes for cars, each embracing substantially in principle, construction and mode of operation, said improvement."

The bill shows that by various litigations with other railroad companies the complainant has established his exclusive right to

make, vend and use said improvement, and prays a temporary injunction and general relief.

The answer admits the issuance of the letters patent and the renewal as stated in the bill; that the defendant has manufactured and used on its road, and still manufactures and uses thereon, the brakes in question. But it denies that the defendant has ever manufactured for sale or sold any of these brakes. The answer claims that the defendant has the right to manufacture for the use of the railroad company, and to use on its road, the brakes in question. The answer founds this claim on two assignments, of which exhibits are filed. The first of these assignments is by Stephen M. Whipple, whom the bill alleges to have been the owner of so much of the patent right as relates to the state of Indiana. The other assignment is from Hodge, himself.

The assignment from Whipple is dated November 14, 1854. This assignment, after reciting that Hodge had conveyed to Whipple, on July 28, 1852, the right to his patent brakes for the state of Ohio, etc., purported to transfer to the defendant, in consideration of five hundred dollars, the right to construct and use these brakes on any and all cars belonging to the defendant, "to the extent following, viz.: from Toledo to Chicago, and branches; also the right of running their said cars, with the said improvement thereon, on and over other roads having purchased the like rights, for and during the term for which said letters patent are or may be granted."

The assignment from Hodge, dated January 17, 1854, after divers recitals, purports to assign to the defendant the right to construct, make and use said improvement on any and all cars belonging to said company and used on their said railroads, for and during the term for which said letters patent were granted.

There is the general replication. The existence and due execution of all the letters patent and assignments mentioned in the answer and bill are admitted in open court by all the parties. Nor does the complainant deny that by virtue of the said assignments to the railroad company the defendant had the right to make and use on the company's road these brakes during the first fourteen years of the existence of the patent right. Nor is it claimed in argument that the defendant has ever manufactured for sale or sold any of these brakes. But the complainant insists that said assignments to the defendant are no justification on the part of the company to make and use these brakes after the first fourteen years of the patent; and the defendant insists, on the contrary, that said assignments gave to the company the right to make and use the brakes as well during the period of the renewal as during the first fourteen years of the patent. And this is really the only

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question of any consequence in dispute between the parties.

In support of the ground thus assumed by the complainant, he argues that the words of the assignments to the defendant expressly limit the right of the company to make and use these brakes to the term of first fourteen years. As we have already seen, Whipple's assignment is "for and during the term for which said letters patent are or may be granted," and it was executed within the first fourteen years of the patent. Hodge's assignment was made to the defendant within the same period, and for and during the term for which said letters patent are granted.

Construing these two assignments without reference to the act of congress on the subject of patent rights, we should not hesitate to say that they convey no authority to the defendant to manufacture and use the brakes in question after the expiration of the first term of fourteen years of the patent; and that the subsequent making and using of them was a violation of the complainant's right. Indeed, the counsel for the defence seem to agree with us in this. But they argue that in construing the assignments we must take into consideration the eighteenth section of the patent act of July 4, 1836. That section provides that "the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein." 5 Stat. 124.

To every assignee or grantee of a patent holding the right at the expiration of the first term of it, to use the thing patented, this section of the act plainly gives the same right to use it during the term of the renewal of the patent, exactly to the extent to which he had the right to use it under the first term of the patent. And it is clear that he may not only use it, but repair it for use till it is worn out. So the supreme court has decided. *Wilson v. Rousseau*, 4 How. [45 U. S.] 646.

On the contrary, it is equally clear that this section does not authorize the assignee or grantee either to sell or to manufacture for sale the thing patented, for the terms of the section only embrace "assignees and grantees of the right to use."

But the case at bar occupies a middle ground. Here the assignee is not an assignee of the right to make for sale or to sell, nor an assignee of the right merely to use, but an assignee of the right to "make and use." And the defendant, disclaiming the right either to manufacture for sale or sell, insists merely on the right to make for use on the company's road, and to use on that road, the brakes in question.

Now it is conceded by the complainant that the defendant has the right to use any of these brakes during the renewal of the patent, which the company may have had on hand at the expiration of the first fourteen

years, and even to repair them till they wear out.

But the complainant insists that the defendant has no right, by virtue of said eighteenth section, to proceed after the expiration of the first fourteen years to make brakes to be used on the company's road, and whether the defendant has this right is exactly the point in controversy.

There is no decision of the supreme court which seems to us to favor this claim of the defendant. On the contrary, several decisions of that court seem to be against it. The case of *Wilson v. Rousseau*, above referred to, certainly is unfavorable to it. Indeed, in that case several of the judges held that the right of an assignee, for the first term of the patent, to use the thing patented was not available under a subsequent renewal of the patent, unless such right under that renewal was plainly given by the terms of the assignment.

It is true that a majority of the court held otherwise, though with some hesitation. And in the opinion of the majority strong language is employed, strictly confining the assignee to the right to use the thing patented, and more than intimating a doubt whether he could make it. In referring to the eighteenth section of the patent act, the court says: "The clause is as follows: 'And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interests therein.' It will be seen that the word 'exclusive' used to qualify the right of a grantee, in the eleventh section, and, indeed, always when referred to in the patent law, and also the words 'to make' and 'to grant to others to make and use' are dropped, so that not only no exclusive right in the grantee, in terms, is granted or secured by the clause, but no right at all—no right whatever—to make or to grant to others to make and use the thing patented. * * * The clause, therefore, in terms, seems to limit studiously the benefit or reservation, or whatever it may be called, under or from the new grant, to the naked right to use the thing patented." *Wilson v. Rousseau*, 4 How. [45 U. S.] 660, 681. This ruling in *Wilson v. Rousseau* was afterward approved in the case of *Simpson v. Wilson*, 4 How. [45 U. S.] 709.

The same doctrine was adhered to in *Wilson v. Simpson*, 9 How. [50 U. S.] 109. And Mr. Justice Wayne, in delivering the opinion of the court in that case, said that the decision in *Wilson v. Rousseau* "does not permit an assignee of the first term of a patent, after its renewal and extension, to make other machines."

The subsequent cases of *Bloomer v. McQuewan*, 14 How. [55 U. S.] 539; *Chaffee v. Boston Belting Co.*, 22 How. [63 U. S.] 217; *Bloomer v. Millinger*, 1 Wall. [68 U. S.] 340—all recognize and approve the same doctrine.

The doctrine established in all these cases

is that an assignee of a patent, holding at the expiration of the first term a right during that term to make and use the thing patented, may, during the time of its subsequent extension, continue to use it and even repair it for use; but that he cannot make it for use or for any other purpose.

It is true that in the cases in the supreme court referred to there was a remarkable diversity of opinion among the judges; but that diversity had no reference to anything favorable to the defense in this case. It seems to have arisen solely from an opinion on the part of a minority of the judges, that the assignee of a patent for its first term had no right even to use the thing patented, after the expiration of that term, unless the assignment by its terms gave him that right, and this circumstance may well admonish us not to extend this right to the thing patented.

Counsel for the defendant seem virtually to admit that if, in this case, there had only been the purchase of a right to make and use one of these brakes, the right would have been gone when that brake was worn out. But they earnestly argue that when, as in the present case, the right is granted to make and use an indefinite number of them, without any limitation except as to locality, it substantially amounts to a grant to use the invention in order to construct brakes, as well as the right to use the brake so constructed. There would be plausibility to this argument if applied to a process patented; for example, to a process by which several ingredients are so combined as to produce some valuable chemical result. For in such a case the right assigned would not be the right to make a machine and use it, but the right to use a process. A process is not made, but used. But the case at bar involves no question concerning process; it only touches the right to make and use machines. And we cannot see how the eighteenth section of the patent act, when applied to the right to make and use one machine, should receive a construction different from what ought to be given to it when applied to the right to make and use an indefinite number of machines.

Counsel for the defense called our attention to the case of *Day v. Union India Rubber Co.* [Case No. 3,691], as supporting their view. The things patented in that case were a process and machinery for the manufacture of India rubber goods—at least the learned judge held that it embraced both a process and machinery. And he decided that the assignee of the first term of the patent had the right to avail himself of the thing assigned during the term of the renewal of the patent, whether the patent was to be construed as being for a process and a machine to be used in such process, or for a process alone, or for a machine alone, and whether the machinery used by him was or was not in existence prior to the commencement of the extended term. In thus concluding, Judge Hall's argument is ingenious and able, although to us not very con-

vincing. He concludes that "if the only right to use were one which resulted from the purchase and ownership of a machine, the right to use it is co-extensive with the existence of such machine, and necessarily expires with it." He admits that his view of the question is in conflict with the reasoning of the supreme court in *Wilson v. Rosseau*. But he insists that reasoning is mere dicta, and does not bind him. We are not sure that the reasoning in that case was dicta only. We can hardly regard the language of Mr. Justice Nelson, which we have cited from that case, and that of Chief Justice Taney in *Bloomer v. McQuewan* [supra], as mere dicta. But whether in this we are right or not, we regard the reasoning of these eminent judges on the point under consideration as sound, and adopt and follow it. Were there no precedents of the supreme court on the questions before us, we might be disposed, though reluctantly, to follow the decision in *Day v. Union India Rubber Co.* [supra]. But believing, as we do, that the supreme court has settled the very point in question, we must follow the decision. We think the construction given by that court to the eighteenth section of the patent act is plainly this: That every assignee of the right to use the thing patented has the same right to use it during the period of its renewal that he had during the first term of the patent; but that he had no right, after the expiration of the first term, to make the article patented, arising out of an assignment executed before the renewal, and not expressly giving him the right to make it after the renewal. The rule thus settled by the supreme court seems to us to be a reasonable one; and it has the advantage of being a very plain and practicable rule. We cheerfully follow it; and we are the more disposed to do so because Judge Story in *Woodworth v. Sherman* [Case No. 18,019], has decided that an assignee under an original patent does not acquire any right under an extension of it, unless such right is expressly conveyed to him by the patentee; and because it is well known that Justices McLean, Wayne, Woodbury and Thompson agreed with Judge Story on that point. [*Wilson v. Rousseau*, 4 How. (45 U. S.) 688, 692, 693.]²

Upon the whole, therefore, we are of the opinion that in the making and using of the brakes, so made since the expiration of the first term of the patent in question, by the defendant, the complainant's rights have been infringed; and that for this infringement he is entitled to recover damages, and to have a perpetual injunction. But forasmuch as we are not able, from the data now before us, to determine accurately the amount of the complainant's damages, we refer the matter to the master to ascertain in the proper way, and to report the amount of damages which the complainant ought to recover.

In the investigation of the questions here de-

² [From 3 Fish. Pat. Cas. 464.]

cided, I have consulted Associate Justice Davis, and he fully agrees with me in the views above expressed.

[For other cases involving this patent, see note to *Hodge v. North Missouri & I. M. R. Co.*, Case No. 6,561.]

Case No. 17,958.

WOOD v. MORTON.

[See Case No. 17,962.]

Case No. 17,959.

WOOD et al. v. The NIMROD.

[Gilp. 83.]¹

District Court, E. D. Pennsylvania. May 2, 1829.

SHIPPING ARTICLES — CONSTRUCTION — PORTS OF CALL — FORFEITURE OF SEAMAN'S WAGES — ABSENCE — CONFINEMENT FOR MISBEHAVIOR.

1. Where shipping articles authorise the master to touch at certain intermediate ports, "or as he may direct," it is no violation of his contract with the seamen to stop at a place not named, and affords no justification to them for leaving the vessel.

[Cited in *The Moslem*, Case No. 9,875; *Magee v. The Moss*, Id. 8,944.]

2. To justify the forfeiture of a seaman's wages for absence, under the provisions of the act of 20th July, 1790 [1 Stat. 131], it is indispensable that there be an entry in the log book of the fact, of the name of the seaman, and of his having gone without leave.

[Cited in *The John Martin*, Case No. 7,357.]

3. Where a seaman is appointed to act as mate of a vessel, by the master, during the voyage, he may be removed by the master for incompetency, and is not entitled to any other wages than those originally contracted for.

4. Where a seaman is imprisoned for misbehaviour, he does not forfeit the wages accruing during his confinement.

[Cited in *The David Pratt*, Case No. 3,597.]

HOPKINSON, District Judge. The libellants, [Thomas A.] Wood and [John] Riggin, in this case, shipped on the 5th October last, at New York, on board the brig Nimrod, to perform a voyage, as mariners, from the said port of New York to Darien; thence to St. Thomas; thence to New Orleans, or as the master might direct; and back to New York, her port of discharge, at the wages of ten dollars per month. The brig sailed from New York, proceeded to Darien, went from thence to St. Thomas, thence to Maricaibo, and from Maricaibo sailed for Philadelphia, not going at all to New Orleans, and arrived at this port on the 5th April, 1829. The brig at Maricaibo took in a cargo for Philadelphia, intending, as the mate swears, to proceed to New York after landing that cargo. On the arrival of the vessel at this port the libellants left her, alleging that their contract was broken by the master by bringing the brig here. They

have now sued for the wages up to the 5th April, the time of their arrival here.

On the part of the owners of the brig this claim is resisted, on the ground that the libellants, by deserting the vessel before the termination of the voyage, have severally forfeited their wages. Whether this contract was broken and terminated, or not, by coming to Philadelphia, depends upon the meaning and construction of the shipping articles. The voyage of the contract is there described to be from New York to Darien, thence to St. Thomas, and thence to New Orleans, or "as the master may direct," and back to New York. The brig went from St. Thomas to Maricaibo, omitted New Orleans altogether, and sailed from Maricaibo for Philadelphia with a cargo, intending afterwards to proceed on to New York. The libellants contend that the captain [Neal], having substituted Maricaibo for New Orleans, was then bound to return directly to New York, and that his coming to Philadelphia was a violation of the contract, which discharged them from their obligations under it. The phrase is not to New Orleans, "and" as the master may direct, but "or"; it was not therefore compulsory on the master to go to New Orleans; and he did not. But was he restricted to one other port in the place of New Orleans, if he should not choose to go there? The contract does not say so. At St. Thomas the future prosecution of the voyage is left, under just and reasonable limitations, much to the discretion of the master; and there probably was good reason for doing so. We must give the terms of the contract their natural and obvious meaning, neither restraining them unreasonably, nor taking a latitude oppressive and unjust. At St. Thomas this brig is to be under the direction of the master; the libellants are to go with her to New Orleans, or "as the master may direct" them to go; and not to such other port as he shall direct. The terms are as broad as if it had been "or elsewhere." Under a phrase so broad, how can the libellants claim to limit the power given by it to the going to Maricaibo? Under the decisions that have been made on the meaning of "elsewhere," we will take care that these general expressions shall not have a construction obviously extravagant, unjust and impolitic, as was attempted in some of the cases that may be cited. Surely the respondent in this case does not ask for any such latitude, or unreasonable use of the liberty given to him in the contract. It is agreed that he might go to some other place than New Orleans; and there is no complaint of the substitution of Maricaibo. What further has been done by the master, under his power to proceed from St. Thomas as he might choose to direct? From Maricaibo, instead of sailing directly for New York, he stopped at Philadelphia to discharge a cargo taken in for that port; this would have been done in a few days, and the brig would have pur-

¹ [Reported by Henry D. Gilpin, Esq.]

sued her course to New York, if it had not been prevented by the desertion of the libellants. Is this such an unreasonable and oppressive use of the liberty given to the master, by the contract, as will justify these men in abandoning their duty, and leaving the vessel and her cargo to their fate; thereby preventing the very thing they affected so much to desire, that is, to be taken to New York, the place at which they shipped, and to which they were to return? I cannot but consider this as a mere pretext. They did not leave the vessel because she came to Philadelphia, and they wished to go to New York; but for some other reason and object not disclosed. This imputation upon their motives is much strengthened by the circumstance, that at Maricaibo they knew a cargo was taken in for Philadelphia, and that the brig was coming here: and no hint or objection was made to it by any of them. That was the time to speak if they thought the contract was violated; but they acquiesced; they came willingly here; and as New York was expressly stated to be the termination of the voyage, they could not have supposed the master intended to substitute Philadelphia for it; for indeed he had no right to do so. I have no hesitation in saying that there has been no violation on the part of the master, in coming to Philadelphia; and of consequence, that it affords no justification to the libellants for leaving the brig.

The next question is, as to the consequences of this misconduct on their claim for wages. Are they forfeited? While courts of admiralty are vigilant to correct and punish the irregularities of seamen; and to keep them under subordination to the law, and to their contracts, they avoid, as far as they can, to visit them with the extreme penalty of a forfeiture of all their earnings. They are a strange race of men, and indulgence is given to the habits contracted by an irregular and changing life. Certain it is, that when this forfeiture is demanded, it must be shown to be strictly due. The statute, under which it is claimed, is highly penal: and the terms, upon which it is awarded, must be rigorously pursued. Has this been done in the case before the court? By the fifth section of the act of congress, of 20th July, 1790, it is enacted, that if a seaman shall absent himself from the ship without leave of the master, and the mate, or person having charge of the log book "shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself," etc. On this statute it has been decided and settled, that the entry in the log book is indispensable to prove the absence or desertion of a seaman; that the entry must distinctly state whether the absence was with or without leave; stating that he left the ship is not sufficient. The act, too, expressly requires that the name of the absenting seaman shall be en-

tered in the log book; and where a seaman whose name was Malone, was entered as Miller, Judge Peters doubted its sufficiency, although there was no doubt he was intended, and it was proved he had gone by different names. In this case the entries begin on the 5th April and are continued to the 13th, sometimes stating that "the people went ashore" and sometimes "the people still absent;" but in no instance giving the name of any one of them, or saying whether they were absent with or without leave. There can then be no forfeiture of wages in this case, and it need not be regretted, because, although these men left this vessel in a disorderly and improper manner, there seems to have been no disappointment to the owners, in not getting the brig on to New York; indeed from the prompt manner in which they advertised her for freight from this port, in three days after her arrival, one might presume they made the change without much reluctance and probably without any loss or inconvenience.

What wages are to be paid? To [Joseph] Hussey and [John] Monk from their shipment at St. Thomas to their arrival at Philadelphia, at the rate specified in the articles; deducting of course, whatever sums they are legally chargeable with, as payments or otherwise, which, I understand, will be arranged by the counsel. The claims of Wood and Riggins, are somewhat different. They shipped at New York at wages of ten dollars a month, and severally demand an increase of compensation for reasons they respectively urge.

1. As to Wood. It seems that on the arrival of the brig at Darien, the person, who had been shipped as mate, was turned off for gross misconduct, and the captain was compelled to endeavour to supply his place from the crew. This choice fell on Wood, who was announced by the captain as mate of the vessel, at the wages of twenty-five dollars per month. He continued in his new office about two weeks, when he was removed from it, and returned to his first position before the mast, where he remained doing duty as a seaman for the remainder of the voyage. The reason given for this degradation was, that he was found to be wholly incompetent to perform the duties of the station; that he was repeatedly drunk, and in other respects grossly misbehaved himself; all of which is testified by Marcus Nelson. Wood, pretending, but by no means proving, that he was degraded unjustly and without cause, insists upon holding the master to his second contract, by which he became mate of the brig, and entitled to twenty-five dollars per month. Setting aside at present, the cause of his degradation, I am inclined to think that these temporary appointments, made by the master of a vessel on an emergency, are held at his pleasure; they must necessarily be mere experiments of the success of which he is to judge. As-

surely such an appointment stands on a very different footing from that of mate, originally shipping as such; making his contract for the office, and for the wages belonging to it. In such a case Judge Peters says (*Atkyns v. Burrows* [Case No. 618]): "The mate is a respectable officer in the ship, and generally chosen with the consent of the owners; he is under the orders of the master in his ordinary duty; but his contract is not subject to arbitrary control." Even, however, in that case, a mate may be displaced by the master for good causes, to be judged of by the court, which should "be evident, strong and legally important." In Wood's case there can be no question of the right of the master to return him to his first situation in the ship; under the circumstances of an attempt to elevate him, which his own incapacity and misconduct defeated. His pretension for mate's wages from the time of his appointment to the end of the voyage, is altogether untenable, and must be dismissed. I have no better opinion of his claim for mate's wages during the short period he nominally acted in that capacity. I say nominally, for he does not appear actually to have done any thing, he might not, and ought not to have done, as an ordinary seaman. He did not keep the log book; and he could not, being deficient in an important requisite; he could not write. For the same reason he did not and could not take an account of the cargo discharged or taken in. In short the experiment of making a mate of this man totally failed; which, added to his gross misconduct, by drinking and negligence, puts him justly back to his first contract as a common seaman on board the brig, and the wages thereby due to him; and no more. His account must be settled on these principles.

2. Riggins also shipped for ten dollars a month; he claims twelve dollars from a certain period of the voyage. He is not entitled to it. The promise of this increase was made on conditions of good conduct and additional services he never performed. On the contrary, his misbehaviour was so extreme as to make it necessary to imprison him at Darien. He must have his wages at the rate of ten dollars a month. At the same time he must not be charged with the sum paid for a hand in his place, while he was in prison. Judge Peters truly observes, this would be a double punishment for the same offence; a punishment by confinement, and also by a forfeiture of wages; for charging him with the wages of the substitute is the same in effect as forfeiting so much of his own.

Decree: The claim of Thomas A. Wood for mate's wages for part of the voyage is dismissed, and he is to be allowed wages only as an ordinary seaman according to the articles; the claims of Hussey and the other libellants to be settled on the same principles.

Case No. 17,960.

WOOD v. The NORTH.

[Betts' Scr. Bk. 31.]

District Court, S. D. New York. 1839.

SHIPPING—AUTHORITY OF MASTER—DEGRADATION OF MATE.

[A master has no right to degrade his mate in a foreign port for an alleged offense, and make him do seaman's duty; and if the mate refuse to do duty as a seaman, the master is bound to offer him a passage home.]

This was a libel claiming to recover from the brig wages alleged to be due the libellant from the 20th of March, 1840, to the month of October in the same year, for a voyage from New York to Hamburg and back, for which voyage he had signed the ship's articles for wages at the rate of \$25 per month. The libellant was first mate, and the vessel arrived at Hamburg in the month of May, 1840, where the libellant alleged he was turned off by the master of the vessel. But, as it appeared in the evidence, the master did not turn him out of the vessel, but degraded him from the rank of mate to that of a man before the mast. It appeared, from the deposition of the American consul at Hamburg, that in July, 1840, Wood called at the consul's office, and complained that the captain of the vessel had ordered the cook not to give him any thing to eat, and that, in consequence, he left the vessel. The consul then summoned the master of the vessel before him, and he admitted that he had given the order complained of, in consequence of Wood's conduct. He also stated that he had ordered Wood to go back to the vessel, not in his capacity of mate, but as a man before the mast, and in such capacity to come home in the vessel. This Wood refused to do, and now claimed his full wages up to the time the vessel arrived at New York, and also \$50 for his passage home, and \$20 for his expenses at Hamburg while he was waiting to get an opportunity to return here,—being in all \$178.

Counsel for the plaintiff contended that a master of a vessel has no right to thus degrade his mate in a foreign port, and leave him no choice but to submit to the degradation or come home in some other vessel.

Mr. Nash, for libellant.

Mr. Ellingwood, for respondents.

THE COURT (BETTS, District Judge) held that the master was bound to offer the mate a passage home, and that it was only in case of necessity, for instance, while a vessel is at sea, that the master had the right to degrade his mate for an alleged offense, and make him do seaman's duty; and that the master's right to do it then only grew out of the circumstances of the case, and the situation of the vessel. Decree ordered for the libellant.

WOOD (ORMSBEE v.). See Case No. 10, 579.

Case No. 17,961.

WOOD v. PLEASANTS.

[3 Wash. C. C. 201.]¹

Circuit Court, D. Pennsylvania. April Term, 1813.

MARINE INSURANCE—DEVIATION ON VOYAGE—JUSTIFICATION.

1. An insurance was effected on the cargo of the *Actress*, from New York to New Orleans; and after she passed Havana, she returned to that port, on the plea of a deficiency of water, when, by order of the government, the cargo was landed and put into the custom-house stores; the vessel not being permitted to depart with her cargo. The American consul sold the cargo; and the plaintiff claimed, in this suit, to recover the amount of the loss sustained by the sale. The certificate of the collector of Havana, under the seal of his office, of the arrival of the vessel at that place for water, and that before permission to take it on board was given to the captain, he was obliged to stipulate that the cargo should be landed, the articles composing it being wanted for the use of the place, is not evidence, as the deposition of the collector to these facts should have been taken.

2. If the necessity produced by the want of water really and fairly existed, a sufficiency for the voyage having been taken on board at New York, and Havana was the nearest port, a deviation was justifiable.

Action on an open policy, dated 19th July, 1808, on the cargo of the ship *Actress*, at and from New York to New Orleans; 4,000 dollars subscribed; warranted American property. The plaintiff proved the neutrality of the ship and cargo, and the plaintiff's property in the same; that she sailed on the voyage insured, July 17th, with a sufficiency of provisions, and about 900 gallons of water, and in all respects well found. She passed the Moro Castle, in Havana, on the 9th of August, and had reached the 25th degree of north latitude, in the course to New Orleans, on the 19th; when it was discovered that the water of one cask had entirely leaked out, and so much of the other as to leave only 30 gallons remaining. In this situation, the captain, after a consultation with his officers and crew, determined to return to Havana, in order to obtain a supply of water; the distance to that place being shorter than to New Orleans, and the voyage more easily to be accomplished, on account of the current setting to the southward, and the wind being more favourable. They arrived at Havana on the 28th of August, when only two gallons of water remained. The next day, a government boat boarded the ship, and left an officer on board, who ordered the ship into harbour to be moored, declaring that she would not be permitted to sail, without discharging her cargo. The cargo was accordingly landed, by the orders of this officer, and placed in the warehouse of the

custom-house, on the 5th of October. The cargo was sold by the American consul, and the proceeds remitted to the plaintiff, leaving a loss, which is claimed in this suit. In order to introduce a certificate of the collector general of the customs at Havana, under the seal of his office, a deposition was read, proving the seal and signature of this officer; that such certificate is a document usually granted at his office; that no other seal is used to certify his acts, than the one affixed to this certificate; and that no other officer is authorized to grant such certificates. The certificate states the arrival of this ship at Havana, for the purpose of watering, which was granted by the governor; but that to carry this into effect, the captain was obliged to present himself to the intendant general of the royal armies and treasury, by whom not only the unloading, but also the sale of the whole cargo was decreed, on the 1st of October, on account of the market being in want of the articles of which it consisted.

This certificate was objected to, by Mr. Binney, for defendant, because the decree itself should be produced, certified by an officer having authority to authenticate it; this certificate and seal, not relating to any acts of the officer giving it, but to those of a different department, those of the intendant.

BY THE COURT. All that we know respecting this certificate is, that the officer who gave it, is authorized, and can alone grant such a one, according to the laws which prevail in the Island of Cuba. But are we bound, on that account, to receive it as evidence? We admit, that it is an authentic instrument; but still, it is only an *ex parte* certificate of a fact, which the officer who gave it was authorized to certify. But it is not the best evidence which the case admits of, because the deposition of the officer might have been taken; and it was important for the defendant to have had the privilege of cross-examining, particularly for the purpose of eliciting the true cause of the order of sale.

WASHINGTON, Circuit Justice, added, that although a witness had been examined to prove, that the Spanish verb, which in this certificate is translated "decreed," means also, "ordered, resolved, determined," and does not necessarily imply that it was in writing; yet, that the decrees of every civilized nation, in relation to the disposition or sale of property, must be presumed to be in writing, unless the contrary appears. If, however, it was proved, that this particular decree, or that the decrees of the government generally, in relation to American cargoes carried to Havana during the embargo, were not in writing, evidence of the purport of those decrees or orders, taken in a proper manner, might be received; or, if it appeared that the officer who gave this certificate, would not be permitted by the government, at Havana, to give a deposition, inferior evidence, in that case, would be received; but no such proof is made in this case.

PETERS, District Judge, gave no opinion

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

on this last point, and doubted whether the court ought to presume, that the decree was in writing. The certificate was rejected.

WASHINGTON, Circuit Justice, (charging jury.) The plaintiff having committed an acknowledged deviation, by returning to Havana instead of pursuing his voyage to New-Orleans, he cannot expect to recover, in this action, without satisfying you by clear and unexceptionable evidence, that he had a justifiable cause for departing from the regular course of the voyage insured.

If the necessity produced by the want of water, which is stated by the mate, really and fairly existed, a sufficiency for the voyage having been taken in at New-York—if there was not enough remaining, to supply the wants of the crew to New-Orleans, and Havana was the nearest port, or one which could be most easily gained, at which water could be obtained, then, the deviation was excusable. But, it appears extremely difficult to account for the deficiency in this article, which occasioned the return of the vessel to Havana. The mate says, that the daily expenditure did not exceed five gallons, which, in thirty days, would amount to not more than about one-sixth of the quantity said to have been taken in at New-York; and adding to that the quantity which is proved to have been lost by leakage, more than one-half ought to have remained at the time when the deviation took place. Whether this quantity also leaked out, leaving only thirty gallons, or was unfairly disposed of, you must decide from all the circumstances of the case. But suppose the excuse for the return to Havana, sufficiently made out, still, it was the duty of the insured to pursue the voyage to New-Orleans, as soon as a supply of water was obtained at Havana, if it was in his power to do so. The mate has stated, that soon after the vessel arrived at that place, she was ordered into the port, and a custom-house officer was put on board, who said that the vessel would not be permitted to depart, without landing and disposing of her cargo. That the captain complained to the officer of his detention, and that the cargo was landed by the custom-house officers. But, it by no means appears, that the detention, the landing, and the sale of the cargo, were by the orders of the government, or that the captain applied for leave to depart, and was prevented. Such evidence, (for aught that appears to the court,) might have been obtained; and as it behooves the plaintiff to give you entire satisfaction that the stay at Havana was compulsory, it is for you to decide, whether this is afforded by the testimony of the mate. It is proved that this cargo, which consisted principally of paper, with some other articles, such as capers, olives, anchovies, vermicelli, raisins, almonds, soap, claret wine, butter, and boards, was equally well fitted for the New-Orleans and the Havana markets. Of course, this circumstance is entitled to some weight, in re-

PELLING a suspicion, that a deviation was originally contemplated by the owner. But, at the same time, it is not easy to discover any strong temptation in the Spanish government, to violate the rights of hospitality, due to a friendly nation, by detaining such a cargo; and this circumstance strengthens the claim of the defendants upon the insured, to make out this part of his case by unexceptionable evidence.

Verdict for defendants.

Case No. 17,962.

WOOD et al. v. The SALLIE C. MORTON.

[11 Chi. Leg. News, 377; 2 N. J. Law J. 301; 25 Int. Rev. Rec. 241.]

District Court, D. New Jersey. Aug., 1879.

GENERAL AVERAGE — LACHES — ENFORCEMENT OF CLAIM.

Libellants who might otherwise be entitled to contribution under general average, may lose it by laches in enforcing their claim, as against a mortgagee whose debt was a maritime lien before he waived it for the mortgage security.

[This was a libel by R. D. Wood and Walter Wood against the schooner Sallie C. Morton, for the non-delivery of freight.]

NIXON, District Judge. The libel is filed in this case against the schooner Sallie C. Morton to recover the losses sustained by the libellants for the non-delivery of portions of two several cargoes shipped on board of said vessel at different times in the fall of 1877. The libel alleges that the first shipment consisted of sixty-eight tons and 2,085 lbs. of iron pipe put on board at the port of Millville, in the state of New Jersey, on the fifteenth day of September, 1877, to be carried and transported by said schooner to the ports of Green Island and Troy in the state of New York, eight tons and 2,025 lbs. to be delivered to the Kingsboro Water Works at Green Island, and sixty tons and 60 lbs. to the water works commissioners at Troy, for the freight of \$1.50 per ton; that the libellants received two bills of lading from the master of the schooner of like purport and contents, in which the said master covenanted to make safe delivery of said cargo (the damage of the sea only excepted), but that owing to the negligence and want of proper care on the part of the master and crew, a portion of the said cargo, to wit: eight tons and 1,234 lbs. of iron pipe became lost, and have not been delivered to the Kingsboro Water Works or to the Troy water commissioners, to the damage of the libellants two hundred and seventy-one dollars and sixty-seven cents. The libel further alleges that the second shipment consisted of one hundred and twenty tons of pig iron, which the libellants put on board at the port of Albany, New York, on the twenty-fifth day of October, 1877, to be carried to the port of Millville, New Jersey, for the freight of \$1.50 per ton, but that owing to

the negligence and want of proper care on the part of the master and his crew a portion of said cargo, to wit: twenty-eight tons and 2,144 lbs. of pig iron, became lost, whereby the libellants sustained damage in the sum of five hundred and six dollars and seventy-seven cents. The respondent, Nathan Pennell, intervenes as mortgagee of the schooner, and sets up in answer to the libel that the libellants are not entitled to recover, because portions of the two several cargoes had been loaded on the deck of the vessel with the consent of the libellants, and had been lost, if lost at all, by being cast overboard on the high seas on account of stress of weather, and charges that the said jettisons were necessary to secure the safety of the vessel and the balance of the said cargoes.

It will be perceived that the defense set up is that the jettisons were from a part of the cargo on the deck of the vessel, and which was loaded there with the consent of the shippers. It will also be observed that the master had given to the owners of the first cargo of iron pipe a clean bill of lading, but that the second cargo of pig iron was a mere parol shipment. It is a well settled rule that a clean bill of lading, i. e., a bill of lading which is silent as to the place of stowage, imports a contract that the goods shall be stowed under the deck. This was the precise question before the supreme court in the case of *The Delaware*, 14 Wall. [81 U. S.] 579, and it was held that under such a bill of lading parol evidence that they were to be stowed on deck was inadmissible. The court would not allow the written contract to be varied or contradicted by proof that the shipper consented to the stowage on deck; but at the same time it carefully limited the decision to the case where no usage or custom of a particular trade is shown sanctioning the stowage on deck, and a strong intimation being thrown out that if proof of such an usage had been offered it would have been admissible. It not being competent to contradict the bill of lading by parol testimony of the shipper's acquiescence or consent, has there been such proof of usage in this particular trade as to establish the presumption that the contract was entered into with knowledge of such usage? No witnesses have been examined upon the subject, except two of the witnesses of the libellants (a fuller examination would have been more satisfactory); one of these was James B. Pitts, who was the mate of the schooner; and in testifying as to the custom of the trade in loading iron, he says: "We always put a little iron on deck, when we are loaded with iron, to make the vessel easier at sea. It is always customary when loading a vessel with iron to load some portion of it on deck. I never knew a vessel loaded with iron entirely under deck, either pig iron or pipes. * * * Iron loaded partly on deck, and not at all in the hold, does not

strain the vessel so badly, and makes her easier in a heavy sea. * * * I started to follow the sea in 1849, and have done nothing of consequence since." Mr. Cranshaw, in the employ of the libellants, testifies that "they had from time to time been chartering this schooner for the last five or six years; that the captain never took a full load in the hold of the vessel, and whilst the witness did not know in this particular instance who ordered any part of the cargo on deck, he did know from his three years' experience in the employment of the libellants at Millville, N. J., it was the almost universal custom to load such cargo part on deck and part in the hold." In the absence of any contradictory evidence it would seem to appear that the custom or usage of the iron trade was an excuse to the master for unloading in these instances a portion of the cargo upon the deck of the vessel, and the libellants are not entitled to payment for the full value of their loss, the jettisons being shown to have been necessary for the safety of the vessel and the residue of the cargo.

The advocate for the libellants, however, insists that if this be so, they, nevertheless, have a lien on the vessel for the contributory share due from the vessel on an adjustment of the general average, and he relies upon *Du Pont v. Vance*, 19 How. [60 U. S.] 162, as an authority to recover the same in these proceedings. That case undoubtedly justifies such relief if the facts of the whole transaction bring the case within the principles of average contribution. The court there say: "When a lawful jettison of cargo is made, and the vessel and its remaining cargo are thereby relieved from the impending peril and ultimately arrive in the port of destination, though the shipper has not a lien on the vessel for the value of his merchandise jettisoned, he has a lien for that part of its value which the vessel and its freight are bound to contribute towards his indemnity for the sacrifice which had been made for the common benefit." See Ben. Adm. § 295. But the jettisons in this case were from the deck, and the weight of authority in this country is, that in the case of a jettison of a deck load, to avoid the dangers of the seas, the owner is not entitled to the benefit of a general average. 3 Kent, Comm. 240; *Smith v. Wright*, 1 Caines, 43; *The Paragon* [Case No. 10,708]; *Cram v. Aiken*, 13 Me. 229; *Hampton v. The Thaddeus*, 4 Mart. (La.) 582; *Wolcott v. Eagle Ins. Co.*, 4 Pick. 429; *Taunton Copper Co. v. Merchants' Ins. Co.*, 22 Pick. 108; *Barber v. Brace*, 3 Conn. 13; *Doane v. Keating*, 12 Leigh, 391; *Lawrence v. Mintum*, 17 How. [58 U. S.] 100; *The Milwaukee Belle* [Case No. 9,627]. I say the weight of authority is in that direction, but there are cases where it has been urged and held that the custom of a particular trade, or the consent of a shipper to load on deck, makes an exception to the general rule, and allows con-

tribution from the ship owner for a loss by jettison. Gould v. Oliver, 4 Bing. N. C. 134, and Johnson v. Chapman, 19 C. B. (N. S.) 563 (19 J. Scott, N. S.) in England, and Vernard v. Hudson [Case No. 16,921]; The Delaware, 14 Wall. [81 U. S.] 602; and The Watchful [Case No. 17,250],—in this country, afford strong support to the doctrine or principle last stated, and I should be inclined to follow these authorities, rather than the others, if the present case did not show such laches on the part of the libellants, in enforcing their claim, that they ought not now be allowed to prevail against a mortgagee, whose debt was a maritime lien before he waived it for the mortgage security. Beaves, in his *Lex Mercatoria*, in discussing the duties of parties claiming an average contribution for the loss of goods thrown overboard in a storm, warns them "to take care to have the loss valued before the ship's discharge, in which the master ought to assist and settle all averages before he unloads." Beaves, 159. The decision of the court of king's bench in *Simonds v. White*, 2 Barn. & C. 805, that the adjustment of the average should be made according to the law of the place of the ship's destination, on delivery of the cargo, is based upon the fact that whether the loss falls upon the owner of the vessel, or upon other shippers, it is the duty of the captain to retain control of the cargo until the average is ascertained and paid, and see 11 Johns. 323. The first jettison was in October, and the second early in November, 1877. The schooner was employed wholly by the libellants at the time in transporting freight and merchandise to and from the port of Millville. She continued in their employ and made several trips after the loss. Although the libellants had frequent opportunities of proceeding against the vessel, they refrained from taking any steps to enforce an average contribution for several months, and did not file a libel until after other parties having maritime liens arrested the vessel.

It would seem from the testimony of Mr. Cranshaw, the general manager of the libellants, that some arrangement was entered into between the captain, as owner, and Mr. Walter Wood, one of the libellants, by which proceedings against the vessel were waived or postponed, and also against the captain, who it is said "promised to make all right, and who wanted the delay, as he was hard up for the cash." The schooner was purchased at the marshal's sale by the libellants, who retained the captain for a while as master. He was not made a witness in the case, and has now disappeared from the scene, quite willing, doubtless, to be relieved from the personal responsibility which he had assumed, and to have his debt paid from the proceeds of the vessel, in which he has no further interest. I think it would be inequitable to allow the libellants, in view of other facts, to maintain their lien and take

these proceeds from a bona fide mortgage creditor whose claim largely exceeds the remnants in the registry, after the payment of prior admiralty liens. The libel must be dismissed with costs.

Case No. 17,963.

WOODS v. SANDS.

[This was a suit by Enoch Woods against Obidiah Sands in the circuit court of Cook county, Ill., although sometimes cited as a federal case. See Codd. Trade-Marks, 50; Cox, Manual Trade-Mark Cas. 264.]

WOOD (SCHRIEFER v.). See Case No. 12,481.

WOOD (TAYLOR v.). See Case No. 13,808.

WOOD (TRACY v.). See Case No. 14,130.

WOOD (TROTT v.). See Case No. 14,190.

WOOD v. UNION IRON WORKS CO.
See Case No. 17,941.

WOOD (UNITED STATES v.). See Cases Nos. 16,751–16,757.

Case No. 17,964.

WOOD v. VAN HOOK.

[Nowhere reported; opinion not now accessible.]

WOOD (VAN HOOK v.). See Cases Nos. 16,854 and 16,855.

Case No. 17,965.

WOOD v. WARD.

[24 Int. Rev. Rec. 180; 6 Am. Law Rec. 675.]
Circuit Court, S. D. Ohio. April Term, 1878.

SLAVERY—PRESUMPTION OF FREEDOM—STATUTE OF LIMITATIONS—ABSENCE FROM STATE—DURESS—RES JUDICATA.

[1. Freedom, being the natural right of man, and the constitution of Ohio declaring that all men are born equally free, and that servitude shall not exist in the state, the presumption is that a person who has for several years resided in Ohio is free.]

[2. Where a cause of action arose in Ohio, and immediately afterwards plaintiff, while temporarily in another state, was seized and imprisoned, sold into slavery, and carried into another state, *held*, that if, upon emancipation, she returned to Ohio as soon as she could, and if, during her absence, she did not reside in the same states with the defendant, the statute of limitations did not commence to run against her until her return to the state.]

[3. Under the Ohio statute, if, when a cause of action accrues against a person, he is out of the state, the period of limitation does not begin to run until he comes into the state.]

[4. In order to set the statute to running in favor of a defendant, who was out of the state when the cause of action accrued, his coming into the state must either be of a permanent character, or, if not so, it must be brought to plaintiff's knowledge; or, if not, then his stay must be of such a nature that plaintiff by ordinary reasonable diligence can ascertain it.]

[5. The statute of limitations of a state does not run against one who, immediately upon coming within the state, is cast into prison, and detained there during her stay.]

[6. An adjudication by a court of one state against a plaintiff in an action to establish her right to freedom, after being imprisoned as a slave, does not preclude a court of another state, in a subsequent action for damages for abduction and the value of services while held as a slave, from examining the question whether the first suit was in fact brought by the plaintiff herself, or by some other persons in her name and without her knowledge or consent.]

Fayette Smith and H. G. Collins, for plaintiff.

E. M. Johnson, for defendants.

SWING, District Judge. The plaintiff [Henrietta Wood] in her petition alleges that in 1853 she was a free woman; that defendant deprived her of liberty, and caused her to be kidnapped and delivered to himself in the state of Kentucky, who, well knowing that she was a free woman, kept her in slavery for seven months, and then delivered her to a slaveholder, by whom she was taken into Mississippi, who did thereafter sell her to one Charles Brandon, who imprisoned her and forced her to labor for fifteen years. That by reason of her wrongful selling she was deprived of her time and labor for fifteen years, and her services for said time were worth at least \$500 per year, and during all of said time was treated as a slave, with great hardship and oppression. That by reason of the premises she was prevented from returning to Cincinnati, and that she returned as soon as she could do so, and that she has sustained damages to the amount of \$20,000, for which she asks judgment, with interest. The defendant, for answer, says: First, that he denies the allegations; second, that the cause of action did not accrue within one year; third, that it did not accrue within four years; and fourth, that it did not accrue within ten years; fifth, that when the cause of action accrued plaintiff was a resident of Kentucky, and defendant was, and ever since has been and still is, a resident of Kentucky; that the cause of action accrued in Kentucky; that by the laws of Kentucky the action was barred in one year if an injury to her, or for arrest of her person; if not for such injury, then it was barred in five years. The answer also sets up the record of the proceedings and judgment in a suit between plaintiff and defendant in the Fayette circuit court of Kentucky. The plaintiff, by reply, denies that she was a resident of Kentucky, but was a resident of Ohio, and denies that the cause of action accrued in the state of Kentucky; that she had no knowledge of the matter contained in the action; that she was held unlawfully in prison, and was not permitted to be present at, or be informed of said proceedings; that the petition claimed to have been filed by her was not filed by her, nor by her procure-

ment; that she was kept in close restraint and in fear of personal injury, and had no control over, and took no part in, said proceedings, and that said judgment is not a bar to present action.

To entitle the plaintiff to recover the evidence must satisfy your minds that at the time of the alleged injury she was a free woman, and that the defendant caused her to be kidnapped from her home in Cincinnati and delivered to him in Kentucky, and that he sold her into slavery. Freedom being the natural right of man, and the constitution of the state of Ohio declaring that all men are born equally free, and that servitude shall not exist in the state, if the evidence satisfies you that the plaintiff at the time of the alleged violation of her rights was, and had been for several years a resident of Ohio, the presumption is that she was a free woman. This presumption would, however, be rebutted by showing that by the laws of Kentucky she was a slave and was in Ohio without the consent of her owner. If, however, she was by the laws of Kentucky a slave, and belonged to Mrs. Cirod, who brought her into Ohio and manumitted her, she thereby became a free woman. Or if she belonged to Mrs. Cirod for life, and after the death of Mrs. Cirod to the heirs of Mr. Cirod, and if by their consent she was brought to Ohio and a deed of manumission executed to her, and recorded, she became a free woman. If she came to Ohio without the consent of her owner, or was brought here without his consent, she did not thereby become free.

If you find from the evidence that the plaintiff was a free woman, and the defendant caused her to be kidnapped or abducted, she will be entitled to your verdict, unless some of the defences set up by defendant defeat her recovery. If the plaintiff was not a free woman, or if the defendant did not cause her to be kidnapped, she will not be entitled to your verdict.

The view which I take of the law renders wholly unnecessary any extended remarks on these pleas. This action has, perhaps, more of the elements of false imprisonment than any other. It would seem, therefore, that the action is one under section 16, which requires the action to be brought in one year. The cause of action accrued to the plaintiff in Ohio. The 19th section of the statute provides that if any person entitled to bring an action except for penalty or forfeiture, be, at the time the cause of action accrued, imprisoned, such person shall be entitled to bring such action within the respective times after the disability has been removed. If upon her release from imprisonment she returned to Ohio as soon as she could do so, and if, during her absence, she did not reside in the same state with the defendant, the statute would not commence to run until she was in the state of Ohio.

There is also another saving in the statute

which provides that, if when a cause of action accrues against a person, he be out of the state, the period limited for the commencement of the action shall not begin to run until he comes into the state; and if after the cause of action accrues, he departs from the state, the time of his absence shall not be computed as any part of the period within which the cause must be brought. If, therefore, you find from the evidence that at the time this right of action accrued the defendant was out of the state, the statute of limitation did not commence to run against plaintiff until after the return of the defendant into the state.

As to what constitutes coming into the state there is a diversity of opinion between judges who have been called upon to pass upon this question. The view that I take of it is this, that the coming into the state must have either been of a permanent character, or if not so, it must have been brought to the knowledge of the plaintiff, or if not brought to the knowledge of the plaintiff, the stay must have been of that nature that the plaintiff by ordinary reasonable diligence could have ascertained it. If, therefore, the defendant came into the state for the purpose of residing here, and making this his permanent residence, the statute began to run from the time he came; if he came in for temporary purposes, and it was brought to the knowledge of the plaintiff that he was in the state, then the statute would begin to run from that period; or if his stay in the state was of that general nature and character, that the plaintiff, taking into consideration all the circumstances that surrounded her ought to have ascertained that the party was in the state, then it would commence to run from that period.

But if on the other hand there was no permanent residence in the state, and the stay merely temporary, and was not brought to the knowledge of plaintiff and not of that open character which the plaintiff by reasonable inquiries could have ascertained the existence of, then the statute did not run against her. The allegation in the petition is that she came to the state of Ohio in 1869 and the action was brought in 1871.

The remarks I made apply to the party coming into the state. If the party was in the state at the time the action accrued, then the statute provides that if after that period he should move out of the state, or go out of the state, that the time which elapses while out of the state should not be counted in the time in which the bringing of the action is limited. If the action had accrued, and before the expiration of one year the party had gone or was out of the state, then such time as he was out of the state did not run against the plaintiff. As far as the statute of limitation of Kentucky is concerned, the party undoubtedly could have brought her action in the state of Kentucky, had she been there at that time and under

no disability, and had she not done so, and the statute of one year had elapsed without her bringing suit, she would be barred from maintaining the action against the defendant. But if, on the other hand, she was under duress by the defendant's procurement, placed in prison, and kept in prison, the statute of limitation could not run against her. Particularly, as the right of action originated in the state of Ohio, it was a continued wrong, for which she might have brought suit in Kentucky.

The seventh and last defence by the defendant is that heretofore, to wit, on the 10th day of June, 1853, in Fayette county, Kentucky, the plaintiff filed her petition against this defendant, claiming therein that she was a free woman, that she had been induced by one Rebecca Boyd to visit the state of Kentucky, that said Boyd had sold her to this defendant . . . and prayed that her freedom might be allowed her, etc. The judgment in said case was for the defendant, and the court dismissed plaintiff's petition, which judgment was afterward affirmed by the court of appeals. The reply to that part of the answer is, that the defendant caused the plaintiff, by violence, to be abducted from her residence in Cincinnati, and brought into the state of Kentucky; that during the time said alleged proceedings were pending, plaintiff continued unlawfully in prison and in duress, at the instance of and by the procurement of defendant; that she was kept in close confinement; that she was not present at such proceedings and had no knowledge of them. The plaintiff, in her reply, further denies that she filed the petition, or that it was filed by her procurement. This raises the direct question of fact upon which you are called upon to pass, from the evidence in the case. If these proceedings were not instituted by her or by her procurement, then it is a nullity as far as she is concerned, and the recital of any fact in the record will not affect this record, and it goes for naught. So that the first question to be determined by you is, from all the facts and circumstances, was this action in the state of Kentucky instituted by this woman or by her procurement, or was it simply instituted by friends who volunteered in her behalf without her knowledge or consent?

These are questions for you to determine from the evidence in the case. If, as I said before, these proceedings were not instituted by her, then the record of that trial goes for naught. If, however, it should be found that it was brought by her procurement, and she was in such a condition that she could assent to it, and understood what was going on, then she would be bound by it. If you should find the latter, then the question arises, what is the force and effect of this record? Article 4, § 1, of the constitution of the United States, provides, "That full faith and credit shall be given in each state to the public acts, records and

judicial proceedings of every other state, and the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effects thereof." In *Collins v. America*, 9 B. Mon. 571, the court of appeals of Kentucky says: "If the law and courts of Ohio will determine the condition of the slave while in that state, they can not, by their own force, determine what shall be his condition when beyond their control. And when he returns to a state where he has been held as a slave, it is for the law of that state to determine whether he is entitled to the benefit of the foreign law and to the jurisdiction which he might claim. Then whatever may have been the effect of the decision in Ohio concerning the plaintiff's freedom, on said trial, it has no operation here except so far as our laws give them effect." The same doctrine is held by the same court in *Maria v. Kirby*, 12 B. Mon. 542. I would not have the slightest hesitation in saying that whether it be upon a question of freedom or slavery, if that question has been fully determined by a tribunal which had jurisdiction of the parties and subject matter I would be compelled to give that adjudication as full credit, as if made in a free state. If it shall be found that this proceeding was by this woman's procurement, what is the effect of this record and this adjudication? The question has been recently before the supreme court of the United States, and in two very clear and learned opinions delivered by Justice Field the question of the effect of the judgment between parties in another and different cause is clearly stated. *Cromwell v. County of Sac* [96 U. S. 51]; *Russell v. Place* [94 U. S. 606]. What, then, is this action? Is this action for the purpose of recovering or establishing the freedom of this party? It is not, certainly; it is an action brought by the plaintiff against the defendant for personal wrongs and injuries inflicted, as she alleges, by him upon her, to wit: The abduction and the servitude of fifteen years. If that is so, it comes clearly under the doctrine of the second case cited. . . . Therefore the condition which the parties sustained before this tribunal, under the rulings of the supreme court, as to the facts that gave jurisdiction is open for investigation. For instance, as I said before, whether this person brought this suit, whether it was brought by her actually or by some one for her by her assent or by her procurement, are matters which are to be determined by the jury. If the jury find that the court had jurisdiction of the parties, what does the record show was determined by the court between them? What were, in fact, the issues? I think this record puts in issue the fact of her residing in Cincinnati, and also puts in issue the fact of the purchase. They all bear, however, upon the question of the freedom of this woman. The parties having been before that court, and the question hav-

ing been determined by that court as to whether she was in fact a free woman, if she was properly before the court and brought this action, or had it been brought by her or by her procurement, or she knowing what it was, assented to it, then she would be bound by it, and the parties in this case would be concluded by the finding of that court. But if, on the other hand, as she claims, this was not brought by her or she did not assent to it, she would not be bound. Some question is made as to whether this decree is upon the merits of the case; there can be no doubt about it.

Gentlemen of the jury, if you find for the plaintiff you will assess such damages as you think the testimony warrants you in assessing against him. Fortunately for this country the institution of slavery has passed away, and we should not bring our particular ideas of the legality or morality of an institution of that character into court or the jury box in assessing penalties upon those who may have been connected with it. No doubt many of them regret its existence as much as any of us. But its history has been written, and it is never again to be reinstated upon this continent. While that is so, the plaintiff, if she has established her case, has the right to recover from the defendant a fair compensation for the injury sustained.

The jury returned a verdict for the plaintiff for \$2,500.

[For opinion on motion for new trial, see Case No. 17,966.]

Case No. 17,966.

WOOD v. WARD.

[2 Flip. 336; 8 Cent. Law J. 188; 25 Int. Rev. Rec. 64; 4 Cin. Law Bul. 42; 7 Reporter, 422.]¹

Circuit Court, S. D. Ohio. Feb. 15, 1879.

ESTOPPEL BY RECORD — MUTUALITY — JUDGMENT AGAINST SLAVE — VALIDITY — SUIT FOR FREEDOM — LOSS OF JURISDICTION.

1. A slave could not sue, nor be sued, while slavery existed in the slave states. Where, therefore, the judgment of a court was against one who, being kidnapped into slavery, brought suit to regain liberty, the court holding that plaintiff was a slave and not a free person as claimed, such judgment will not estop plaintiff from a re-examination of the same question in a subsequent suit brought against the kidnapping party.

2. Mutuality is an essential ingredient in all estoppels; slaves are not answerable civilly; are subject to no suit; no civil liability can attach to them; they can neither be bound by covenant, nor hindered by estoppel, nor will the law allow them to claim the benefit of an estoppel against others.

3. A judgment rendered against a slave, where he appears in an action, is a nullity. No one can be concluded by a judgment or decree rendered in a judicial proceeding, which he had no legal capacity to prosecute or defend.

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 7 Reporter, 422, contains only a partial report.]

4. Suits for freedom were entertained in the slave states, but upon the idea that the party suing was free. If free, he had a right to sue, but when the court reached the conclusion that he was a slave, that was the end of the litigation for the want of a competent plaintiff, and the proceeding was dismissed without further inquiry.

On motion for new trial.

Lincoln, Smith & Stephens, for plaintiff.
Hoadly, Johnson & Colston, for defendant.

BAXTER, Circuit Judge. The plaintiff is a woman of color. For several years prior to her removal to Cincinnati, she resided with a Mrs. Cirode, in Louisville, Ky., as a slave. About 1847 Mrs. Cirode left Louisville, taking the plaintiff with her and settled in Cincinnati, where she executed and delivered to the plaintiff a formal instrument of emancipation. Thus the plaintiff became, so far as Mrs. Cirode, her apparent owner, could confer the boon, a free person, endowed with all the rights and immunities incident to freedom. And from that time until the restraint imposed by the defendant, to be hereinafter fully stated, the plaintiff remained in Cincinnati, in the undisputed and undisturbed enjoyment of personal freedom.

We infer, however, from the depositions given in another suit (but which are not evidence in this case), to be hereinafter mentioned, between these parties in Kentucky, that the children of Mrs. Cirode claimed some title to or interest in the plaintiff, as a slave, conjointly with or adversely to their mother's title; and that they repudiated their mother's action in the premises, and desired to regain possession of her. But no active steps seem to have been taken to effect that object until the spring of 1853. At or about this time they united in a conveyance, in and by which they professed and assumed to convey the plaintiff as a slave to the defendant in consideration of \$300 to be paid in the event he succeeded in obtaining possession of her. The defendant then resided in Covington, Ky. Shortly after said conditional sale, the plaintiff was inveigled by one Rebecca Boyd, in whose service she was then employed, across the Ohio river and into the state of Kentucky, where by chance or pre-arrangement they were met by defendant, who claimed the plaintiff as his slave, forcibly restrained her of her liberty, and sent her back to Lexington, and had her there confined in a private slave prison belonging to one Lewis C. Robards.

Whilst thus imprisoned, to-wit: on the 10th of June, 1853, a petition was filed in the Fayette county circuit court in plaintiff's name for the purpose of regaining her liberty. In it she averred that she was a free woman. To this petition Lewis C. Robards, the proprietor of the prison in which she was detained, was made a defendant. But at defendant's instance an interlocutory order was soon after entered in the cause, substituting the defendant "Zeb. Ward as a defendant in the place of

Lewis C. Robards," and dismissing her petition as to Robards.

The defendant Ward then answered, and in his answer alleged "that the plaintiff was not a free woman, but his slave."

Upon the issue thus made proofs were taken and the case regularly heard, when a final decree (24th June, 1854) was entered in the following terms: "This cause having been heard and the court advised, decrees and orders that the plaintiff's petition be dismissed."

From this decree the plaintiff appealed to the court of appeals.

There is no transcript of the record from the court of appeals, and consequently we are not advised of the action of that court, except in so far as the same is supplied by the record offered from the Fayette county circuit court. From this we see that, on the 13th day of February, 1855, the following entry was made in said last named court: "The defendant, Zeb. Ward, produced a mandate of the court of appeals, which is ordered to be recorded as follows: 'Court of Appeals, January 20, 1855. Henrietta Wood, appellant, vs. Zeb. Ward, appellee. Appeal from a judgment of the Fayette county circuit court. The court being sufficiently advised, it seems to them that there is no error in the judgment. It is therefore adjudged that said judgment be affirmed, which is ordered to be certified to said court.'"

Here the litigation between these parties in Kentucky terminated. Whereupon the defendant, soon after the termination, sold the plaintiff to one Wm. Pulliam. He caused her to be conveyed to Mississippi and sold to one Girard Brandon. Brandon continued to subject her to his service in the states of Mississippi and Texas until the latter part of 1865, and until she was emancipated by the thirteenth amendment to the national constitution. On being thus the second time emancipated from slavery, the plaintiff began preparations to return to her home in Cincinnati, but owing to various hindrances, not necessary to be enumerated here, she did not get back to Cincinnati until some time in the year 1869.

During all this time, from 1853 to 1870, the defendant resided in Kentucky and Tennessee. He visited Cincinnati in 1870, when this suit was instituted. Plaintiff's petition, which, under the practice in Ohio, is filed as a substitute for a declaration, embodies substantially the facts hereinbefore stated—except those connected with the Kentucky litigation.

The defendant's answer interposed three defenses: First, a general denial of the facts charged; second, the statutes of limitation; third, the adjudication of the Kentucky court hereinbefore referred to.

The plaintiff replied, and the issues thus made came on and were tried at the last April term, 1878, before the honorable the district judge and a jury, resulting in a verdict for the plaintiff, and an assessment of \$2,500 damages. [See Case No. 17,966.]

The defendant then moved for a new trial,

and it is this motion that it now before us for determination.

Defendant's exceptions upon the trial were numerous. He excepted to the rulings of the judge on questions of admitting and excluding evidence, as well as to his instructions given in relation to the statutes of limitation, and in relation to the force and effect of the decree rendered in Kentucky, and pleaded and relied on as a defense to this action.

We have neither the time nor the inclination to discuss in detail all the exceptions that were taken, nor is it, in our judgment, necessary for us to do so. If the court fell into error, in the admission or exclusion of testimony, or indulged in instructions upon immaterial and abstract matters, the errors in no way affect the merits of this controversy, or prejudice the defendant's right. With the charge relating to the statutes of limitation we are entirely satisfied. The real contest, as we think, arises out of the defendant's third defense, to-wit: "Is the plaintiff, by reason of the decree rendered in her suit, by the Fayette county circuit court of Kentucky, precluded from a re-examination in this court of the same question decided in that case?" If she is, then that judgment is a full and complete defense to this action. The question is an important one, and deserves, as it has received, the most thorough consideration.

The facts, as we have detailed them, present a case of peculiar and complicated oppression. The plaintiff was quietly, and, as she believed, securely domiciled, under the protection of the laws, in a community friendly to her aspirations, and within a jurisdiction which prohibited slavery, and presumed everything in favor of freedom. But while thus reposing in confidence she was, by false pretenses, decoyed into Kentucky, and there enslaved by violence. It was a most grievous wrong to have been thus betrayed into a distant and unfriendly jurisdiction, in which her color was prima facie evidence of servility, and forced to submit to the deprivation of liberty, or litigate in a tribunal where the presumptions of law, supposed public policy and established prejudices of long standing, combined to defeat her claim. And when to these we add that, pending the controversy, the plaintiff was prima facie under the ban of slavery with all attendant disabilities, left in defendant's custody, subject to his unrestrained will and amenable to his punishment, and without the means necessary to defray the expenses of litigation, her wrongs appear more and more obvious, and appeal strongly to the sympathies of the court for redress.

But these considerations cannot prevail with the court unless a remedy can be found within recognized legal principles. A judge dare not know any code of morals higher than the constitution and the laws enacted in pursuance of that instrument. These, as they then existed, not only recognized, but protected the slave owner in the enjoyment of that species of property, and we must admin-

ister the law as it then existed, uninfluenced by the subsequent change in public sentiment on this interesting subject.

By the national constitution—the instrument under and in virtue of which we hold our office—we are required "to give full faith and credit to the records, public acts and judicial proceedings" of the several states. It follows that the decree of the Kentucky court is entitled at our hands to the same force and legal effect that ought, under the laws of Kentucky, to be accorded to it in that state. The question therefore narrows itself down to the single inquiry: Does the decree rendered by the court of Kentucky and here pleaded and relied on as a bar to this action forever preclude the plaintiff from a re-examination of the issue decided in that case? If it does, as we have already said, it is a complete defense to the plaintiff's present suit.

Judgments of courts are not always conclusive upon the litigant parties in collateral or other proceedings. The jurisdiction of the court is always open to inquiry. In order to confer jurisdiction the suit must be by and against parties competent to sue and be sued. But the plaintiff was repelled by the Kentucky court, on the ground that she was a slave. If a slave, she was a chattel, a mere piece of property, without civil rights, and incompetent to prosecute or defend a suit. 14 Am. Cyclopaedia, tit. "Slavery," p. 92. This status is inseparably connected with slavery, and has prevailed in the slave-holding states of the Union, including Kentucky, from the time slavery was first legalized to the abolition of the institution in 1865.

Their disabilities have been iterated and reiterated by the courts in a uniform current of decisions, covering almost every possible phase of the subject. Where a slave finds lost property, it inures to the benefit of the master until the true owner can be found. *Brandon v. Planters' & Merchants' Bank of Huntsville*, 1 Stew. (Ala.) 320. A special plea that either plaintiff or defendant is a slave is a good plea in bar. *Amy v. Smith*, 1 Litt. (Ky.) 326, and *Bentley v. Cleaveland*, 22 Ala. 814.

Slaves cannot appear as suitors, either in courts of law or equity. *Bland v. Dowling*, 9 Gill & J. 19. Nor can a master sue his slave. *Catiche v. Circuit Court*, 1 Mo. 608. Slaves are incapable of entering into valid contracts, or of taking property, by demise or otherwise, to themselves, directly or through the intervention of a trustee. *Hall v. Mullin*, 5 Har. & J. 190; *Taylor v. Embury*, 16 B. Mon. 340; *Trotter v. Blocker*, 6 Port. (Ala.) 269; *Lamb v. Girtman*, 26 Ga. 625; *Graves v. Allan*, 13 B. Mon. 190; *Jones v. Lipscomb*, 14 B. Mon. 239; *Turner v. Smith*, 12 La. Ann. 417; *Hinds v. Brazeale*, 3 Miss. 837; and *Cunningham v. Cunningham*, Cam. & N. 353.

Even a bond executed by a slave, with a free man as surety, is against public policy and void. *Batten v. Faulk*, 4 Jones (N. C.)

233. Money acquired by a slave by permission of his master, inures to the latter. *Jenkins v. Brown*, 6 *Humph.* 299.

Courts of chancery, with their ample powers, cannot enforce a contract between master and slave, though fully performed on the part of the slave. 1 *Leigh*, 72. And a conveyance of lands and slaves in trust, to allow the slaves to occupy and receive the rents of the land, and the profits of their own labor, is void. *Smith v. Betty*, 11 *Grat.* 752. It is not felony in Georgia, by the common law, to kill a slave. *Neal v. Farmer*, 9 *Ga.* 555. It is lawful to track runaway slaves with dogs, provided it is done with caution and circumspection. *Moran v. Davis*, 18 *Ga.* 722. They are recognized, in a restricted sense, as human beings, in this: Masters have no right to inflict such cruel and inhuman punishment, even to enforce obedience, as must result in death or loss of limb as a consequence of the punishment. *Craig v. Lee*, 14 *B. Mon.* 119.

But unconditional submission of the slave is due to the authority of the master; and the master may, therefore, use such force and means as may be necessary to enforce submission to his authority, even to the destruction of life or limb of the slave. *Oliver v. State*, 39 *Miss.* 526. The law of slavery is absolute authority on the part of the master, and unconditional submission on the part of the slave. And the master may punish the slave at will, in such manner and degree as his judgment and humanity may dictate, provided he does not maim or kill. *State v. David*, 4 *Jones (N. C.)* 353. The right of the master to obedience and submission in lawful things is perfect. The power to inflict any punishment not affecting life or limb, which the master considers necessary to enforce obedience to his commands, is secured to him by the law. Now, if in the exercise of his authority, the slave resists and slays the master, it is murder, and not manslaughter, because the law cannot recognize the violence of the master as a legitimate provocation. *Jacob v. State*, 3 *Humph.* 493.

Mutuality is an essential ingredient in all estoppels, and as slaves are not answerable civilly; as they are subject to no suit; as no civil liability can attach to them, and they can neither be bound by covenant nor hindered by an estoppel, the law will not allow them to claim the benefit of an estoppel against others. *Bentley v. Cleaveland*, *supra*. A judgment rendered against a slave, in an action in which he appeared, is a nullity. *Stenhouse v. Bonum*, 12 *Rich. Law*, 620.

From these authorities, which might be indefinitely extended, it will be seen that although slaves are protected as persons against the destruction of life and limb, they are in all other respects treated as property, and subjected to all the disabilities incident to that condition. They are without power to contract, to acquire, or hold property, sue or defend a suit. And being without capacity to sue or defend, no valid judgment can be ren-

dered against them. It would be an anomaly to hold that any one could be concluded by a judgment or decree rendered in a judicial proceeding which he had no legal capacity to prosecute or defend.

It is true that such a suit was brought by the plaintiff, and prosecuted in her name, and that the Kentucky court did entertain, sit in judgment upon and decide it. Similar suits were not infrequent in the courts of the slave states. But these suits were always entertained upon the allegations that the plaintiff was free. If free, the plaintiff had a right to sue; but when the question of freedom was traversed, and put in issue, it was equivalent to denying the plaintiff's right to sue, and whenever the court reached the conclusion that the plaintiff was a slave, the litigation, whatever its scope, necessarily ceased for the want of a competent plaintiff. In other words, the courts held there was no suit pending, and dismissed the proceeding without further inquiry. In *Bentley v. Cleaveland*, *supra*, the court ordered the allegation that complainants were slaves to stand as a plea to be first disposed of before it would take cognizance of the other parts of the complaint. The same principle, as we understand the record, was applied by the Kentucky court to the proceeding instituted by the plaintiff against the defendant. Plaintiff alleged her freedom. This, *prima facie*, gave jurisdiction. But as soon as the court reached the conclusion that plaintiff was a slave, it found itself without jurisdiction for the want of a plaintiff competent to sue, and did the only thing which, under the circumstances, it could have done—struck the case from the docket. The decree simply dismisses plaintiff's petition. There is no declaration of facts, no special findings, no judgment for costs, and no execution awarded.

In the opinion of the court, the plaintiff was defendant's property. She, and all she had, and all that she might afterwards acquire, belonged to him.

To permit such a decree, obtained under such circumstances, against a human being, for the time treated as a chattel, and without legal capacity to sue, to operate as a bar, or an estoppel, and conclude the plaintiff in a matter of such vital importance as is involved in this case, would be a just reproach to the jurisprudence of any country.

On the trial of this case in this court, the plaintiff offered full and satisfactory evidence of her freedom at the time of the committing of the several grievances complained of, whilst defendant offered no opposing testimony. He rested his case wholly on the judgment pleaded and relied on by him. As this judgment does not, in our opinion, conclude the plaintiff, the verdict of the jury must stand. The damages are not excessive; the motion for a new trial will be disallowed, and judgment entered thereon in plaintiff's favor.

NOTE. The learned judge uses the present tense in making quotations from decisions in

slavery cases, but the reader will understand them all in the past tense. In Tennessee, to maim a slave was felony. The writer remembers a case where a wealthy man was sent to the state prison for this offense. The master was liable to be indicted for cruel and inhuman treatment upon a slave. See *Werley v. State*, 11 *Humph.* 172. So exposure of slave by master to inclement weather with intent to injure him, was a felony. 2 *Code*, § 31, § 4620. Kidnaping, by section 4621, was, likewise, a felony. The owner of a slave, on a trial of his slave, could attend and aid in his defense, challenge jurors, etc. Section 2634. The law is correctly stated in the foregoing opinion as to his general disability.

This, as it obtained in the Southern States, was the same that has existed in most countries, ancient or modern. Yet it is curious to note that in the dependencies of the crown of Spain, it was and is much more liberal than in most states. If the reader will examine *Las Leyes de las Indias*, and the royal ordinances for the government of Cuba and Porto Rico, promulgated by the Spanish government, he will learn that a slave in those islands can contract with his master for his freedom. More than that, he may pay his master on account, any sum of money on hand, and have a credit therefor on his purchase of himself. Further, he may buy himself outright, and if his master will not agree to a reasonable price, he can compel him to go before the syndico, an officer who is a sort of trustee as well as judge, by whom the price will be settled. And should the slave be maltreated, he may complain to the same officer, and if the latter thinks a proper case has been made out, he will compel the master to make sale of the slave to another, the slave, in such case, being permitted to choose his master.

Case No. 17,967.

WOOD v. WELLS et al.

[6 *Fish. Pat. Cas.* 382.]¹

Circuit Court, D. Connecticut. April, 1873.

PATENTS FOR INVENTIONS—RESTRICTED LICENSE—
CONSTRUCTION—FORFEITURE.

1. Restricted license under patent construed.

2. Where defendants held a license under complainant's patent, granting them "the right, license, and privilege to manufacture and vend landau carriages, with the said invention attached," containing the provision that "the right, privilege, and license hereby granted, is not, nor is any part of the same, to be transferred or assigned, or in any manner imparted, to any other person or persons whatsoever; but the same shall be exercised solely, and only, by the licensees personally, or by workmen in their employment, in their own manufactory or manufactories, warehouse or warehouses;" and the further provision, "nor shall this license authorize or empower said licensees to sell, exchange, or in any manner dispose of any part, parts, or portions of carriages with, or fitted, or adapted for the said invention, or any carriage or carriages with, or adapted for, the said invention, otherwise than in a finished state, and ready for market."—*held*, that these restrictions do not prohibit the defendants from procuring the patented fixtures to be made wherever they can be manufactured, and still less does it prohibit them from sending fixtures, already cast, to another establishment to be finished.

3. This license does not grant the right to deal in these fixtures as an article of merchandise.

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

4. If they sell them apart from the carriage, it is a violation of the patent, but not a breach of any condition of the license.

5. As a general rule, a violation of a patent does not work a forfeiture of a license under that patent. The exceptions to this rule are, where the licensee has assumed such a hostile attitude toward the patent as to amount to a repudiation of the right conveyed by the license.

6. When a license conveys a distinct right which has been once paid for, courts of equity, as well as courts of law, are bound to recognize it.

7. If this license had contained a condition, that the license should terminate if the licensee should in any wise infringe the patent, the court would give effect to it, subject to the influence of any special circumstances which might induce a court of equity to relieve against the forfeiture.

[This was a bill in equity by Charles B. Wood against Wells, Crittenden & Co.]

Final hearing on pleadings and proofs. Suit brought upon letters patent [No. 53,075] for an "improvement in landau carriage-doors," granted to Frederick Wood, March 6, 1866.

Henry T. Blake, for complainant.

John S. Beach, for defendants.

WOODRUFF, Circuit Judge. The complainant is the assignee of a patent for a distinct and specific fixture applicable to the doors of landau carriages. The defendants procured from the patentee, prior to the assignment to complainant, a license to use the patented improvement in the manufacture of their carriages. Subsequently, one of the defendants, conceiving that he had made an invention applicable to the same purpose, obtained a patent therefor, which, it is conceded, for the purposes of this case, does not entitle him to make the patented fixture, either because it is substantially the same as that previously invented, or because it was simply an improvement upon it; so that, before the defendant could make or use it, he must procure the allowance of the owner of the prior patent.

In this condition of things, it appears that one of the defendants sold, to a person named Lines, one or more of these fixtures, constructed under his own patent. It also appears that the defendants have procured these fixtures to be finished, polished, and hinged by an establishment in Bridgeport. It was claimed that the castings also were procured by the defendants to be made by others for the defendants' use. I do not deem it to be material to the decision of the case, but I do not find any evidence in the proofs that the defendants did not cast the fixtures themselves, procuring them to be finished, as already stated, by others.

The bill charges that the sale of the fixtures to Lines, and the procuring of fixtures to be finished by others, was a violation of the license granted to the defendant; and the bill seeks a decree, declaring that the license is null and void, and has been forfeited by the defendants by the sales made by the

defendants to Lives, and by their causing fixtures to be finished at a manufactory not their own, and seeks a further decree, restraining the parties, by injunction, from further making and selling fixtures, either under the license or otherwise, and for an account of profits.

It becomes material, therefore, to ascertain what the rights of the defendants are under the license, upon the construction and effect of which the whole question depends. This paper is, in brief, for a consideration in gross paid by the defendants to the patentee, a conveyance or grant of "the right, license, and privilege to manufacture and vend landau carriages, with the said invention attached thereto, under and according to the letters patent, for, during, and unto the full end of the term for which said letters patent are granted; but the right, privilege, and license hereby granted is not, nor is any part of the same, to be transferred or assigned, or in any manner imparted, to any other person or persons whatsoever, but the same"—i. e. the privilege of making and selling landau carriages, with the improvement attached thereto—"shall be exercised solely and only by the licensees personally or by workmen in their employment, in their own manufactory or manufactories, warehouse or warehouses." And then, to make this restriction more plain and definite, it is further stated, "nor shall this license authorize or empower said licensees to sell, exchange, or in any manner dispose of any part, parts, or portions of carriages, with or fitted or adapted for the said invention, or any carriage or carriages with or adapted for the said invention, otherwise than in a finished state and ready for market."

Now, in my opinion, the meaning of this license is this, and simply this: "You, the licensees, may make carriages and apply the patented fixtures thereto, but you shall only apply these fixtures in your own establishment, and you shall in no wise farm out this right to others; and, to secure this condition against evasion, you shall not make parts of carriages adapted to the use of this invention and sell them to others."

Neither by the terms nor the good sense of this paper, nor by anything implied therein, does it prohibit the defendants from procuring these fixtures to be made wherever they can be manufactured, and still less does it prohibit them from sending fixtures already cast to another establishment to be finished; so that I can not hold that the sending of such fixtures to the Bridgeport company to be finished, polished, and hinged, or jointed, is any violation of this license.

On the other hand, the license grants to the defendants the right to attach the invention to landau carriages, but does not grant the right to deal in the fixtures as articles of merchandise. As to this, the defendants stand in the same situation as persons having no license. If they sell, they sell in viola-

tion of the patent, but not in breach of any condition of the license. They stand as any other person does who violates the patent without authority. That brings me to the second question discussed before me, which is, whether, where a patentee has granted a license, a violation of the patent, by abuse of the patented privilege, outside of the license, works a forfeiture of the right conveyed. As a general rule, I have no hesitation in saying that it does not. I do not say that there might not be cases in which it might have that effect, but it could only be where the licensee has taken a stand against the patent, and has assumed such a hostile attitude toward it as amounts to a repudiation of the right conveyed by the license. The mere fact that, in the course of business, the licensee has infringed the patent, will not work a revocation of the license, and especially in a case where the license covers a distinct and specific privilege, which has been paid for, once for all, and conveys, without further fee or consideration, rights which are fixed and definite. Such a privilege, conveyed absolutely and for consideration paid, becomes a clear vested right, and to the extent to which it has become so vested, a court of equity, as well as a court of law, is bound to recognize it.

A case lately decided in Vermont (*Steam Cutter Co. v. Sheldon* [Case No. 13,331]) presented, in some of its features, striking analogies to the one before me. The defendant in that case had purchased, and paid for the right to use, one machine for cutting stone, and was licensed to use five other machines, upon paying to the patentee prices named in the license. He, however, did not do this. He procured the one machine, but thereafter, instead of claiming or exercising the right to use the other five machines, on paying the price of the privilege to the patentee, he bought five machines from an infringer in defiance of the patent. A suit having been determined against his vendor, in which it appeared that the machines were infringements, he became alarmed, and tendered to the patentee the sums named in the license. The court held that, while he was entitled to use the first machine, for which he had paid, he had repudiated the license as to the others, and had assumed such a position of hostility toward the patent, that he could no longer avail himself of his privilege of purchase.

The present license was paid for by a sum in gross, and was paid for once for all. If it had contained a condition, that the license should terminate if the licensee should in any wise infringe the patent, no doubt the court would give effect to it, subject of course to the influence of any special circumstances which might induce a court of equity to relieve against the forfeiture. But the license contains no such proviso. The grant is absolute in this respect.

Now, although the infringer has not been

put upon the stand to testify as to his motives in making the sale to Lines, yet the explanation, as it appears in the proof, seems to be this, that one of the defendants, having procured a patent for an improvement upon this device, stated to the person to whom he made the sale, "I have a clean patent from the patent office, and have a right to sell my own fixture;" supposing, apparently, that his patent conferred the right to dispose of all that was described or shown in it. In this he was mistaken; but that sale, of some four or five fixtures, was his only violation of the patent. We can not pronounce that transaction of such a nature as to call for the interference of a court of equity, further than to enjoin the defendant from transactions of that character hereafter, and to order an account of the profits made upon the fixtures actually sold.

Decree accordingly.

Case No. 17,968.

WOOD v. WILLIAMS.

[Gilp. 517; 1 Robb, Pat. Cas. 717.]

District Court, E. D. Pennsylvania. Dec. 9, 1834.

VALIDITY OF PATENT RIGHT—PARTIES TO CONTROVERSY—UNITED STATES AS PLAINTIFF.

1. A controversy, respecting the validity of a patent right, is one strictly between the parties immediately concerned, although the public may have an eventual interest in it.

2. Under the patent laws, the United States are not a party in a litigation respecting the validity of any rights claimed or denied by virtue of those laws.

3. Where the district court, under the provisions of the act of 21st February, 1793 [1 Stat. 313], orders a scire facias to be issued against a patentee, on the prayer of a petitioner, they will not permit the United States to be substituted as plaintiffs in the place of the petitioner.

[This was a suit by Benjamin Wood against William Williams.] On the 23d May, 1834, a rule was granted on the defendant, to show cause why process should not be issued to repeal his patent, for a certain machine for hulling and clearing clover seed; under the provisions of the tenth section of the act of congress of 21st February, 1793,—1 Story's Laws, 303 [1 Stat. 323].

Meredith, for plaintiff. The affidavit of the plaintiff, on which the rule was granted, was read. This affidavit was not received as evidence, but read, *de bene esse*, by consent. The depositions of several witnesses, taken under a rule of court, were also read to support the motion.

Kittera, for defendant. It is denied that either the deposition of the plaintiff, on which the rule was granted, or a subsequent deposition made by him, is any evidence on this hearing. If the other testimony of the plaintiff furnishes a probable case against

the defendant, then the scire facias will be issued; otherwise the process will be refused. The facts of the case do not furnish such a one as will warrant the process prayed for.

Meredith, for plaintiff, in reply. The deposition of the plaintiff is evidence on this hearing. This is a prosecution, by the government of the United States, to repeal a patent improvidently issued by them; and the complainant is but the mover of the proceeding. The opinion of this court, in the case of *Delano v. Scott* [Case No. 3,753], shows that the original affidavit, on which the rule was granted, is good evidence at this hearing.

HOPKINSON, District Judge. No such thing was decided, or intended to be so, in that case. No such question was raised. In my opinion, I referred to the affidavit of the complainant, as exhibiting the ground of the application, and showing the allegations of the complainant against the defendant. I then proceeded to state the evidence by which the complainant had maintained his allegations; to wit: (1) A certain patent; (2) depositions of witnesses. The affidavit of the complainant is not mentioned as any part of the testimony. The paragraph quoted, towards the conclusion of the opinion, is a simple declaration, that the defendant had given no evidence to contradict the allegations of the complainant in his affidavit. From this it cannot be inferred that the affidavit was a part of the evidence on which the court acted. Whether, under the act of congress, this affidavit would be sufficient *prima facie* evidence, to call for some proof on the part of the defendant, and would be enough to grant the process upon, if not impeached or contradicted, is a question that remains open.

Meredith, in continuation. It is contended that, on a full examination of the depositions produced, they are sufficient to sustain this application without the complainant's affidavit.

HOPKINSON, District Judge, observed that there was sufficient cause on the other depositions, exclusive of that of the complainant, which he put out of the case, without giving any opinion on its competency. It was unnecessary. A probable case had been made out against the defendant.

Rule made absolute, and process in the nature of a scire facias ordered to issue.

Afterwards, the counsel for the complainant, previous to taking out the scire facias as above ordered, moved the court for an order, that the cause be recorded and docketed, as an action wherein the United States are plaintiffs and William Williams is the defendant, and that the process of scire facias be issued as between those parties.

HOPKINSON, District Judge. The petitioner, in this case, has so far sustained his complaint, in the manner prescribed by the

¹ [Reported by Henry D. Gilpin, Esq.]

act of congress, that process has been ordered to issue against the said William Williams to repeal his patent. This process is a scire facias, and, previous to taking it out, the complainant has moved for an order, that the cause be now recorded or docketed, as an action wherein the United States are plaintiffs, and the said William Williams is the defendant; and that the process of scire facias be issued as between these parties.

No decision or practice, under the patent laws of the United States, has been adduced to support this motion; but a reliance is had upon the practice in the courts of England, in cases for the repeal of patents. The whole proceeding, both for obtaining a patent, and for revoking it, is so different in England from that prescribed by our law; the character and foundation of the right, are so dissimilar in the two countries, that we cannot look, for a rule on this question, to the courts of England; especially if, upon an examination of our act, we shall there find such an indication of the course of proceeding intended to be given, as will guide us through the present difficulty. In the case of *Stearns v. Barrett* [Case No. 13,337], Judge Story adverts to the difference between our patent laws and those of England. He says: "A scire facias is a process altogether confined to the crown, with the exception of the single case, where two patents have issued for the same thing, in which case the prior patentee may maintain a scire facias to repeal the second patent. But under our patent act, any person, whether a patentee or not, may apply for the repeal. There are other differences which it is not now necessary to enumerate."

I shall not find it necessary to go further than the act of congress, and the practice that has been adopted under it, so far as I have been able to obtain a knowledge of it, for the decision of the question now under consideration. This simply is, when process has been ordered and issued, by this court, for the repeal of a patent, and the allegations, upon which the process was ordered, are to be put in a shape for trial, who are the parties to the suit? By and between whom is the issue to be made? Are the United States to be introduced as the plaintiffs to maintain the issue, to prove the truth of these allegations against the patentee, who is, of course, the defendant? Is the petitioner or complainant, at whose instance and on whose affidavit of the truth of the cause of complaint, the proceeding was commenced, who called upon the patentee to answer the complaint, at whose prayer the process was granted, who, up to this point, has appeared alone as the adversary of the patentee, now to withdraw himself from the record and the case, and, at his pleasure, without the co-operation or assent of any officer or authority of the United States, to put them in his place to carry on the war which he has provoked; which he only has the

means of sustaining, or ought to have had when he commenced it?

On a careful review of the patent laws of the United States, I have found no indication of an intention, that the United States are to be brought in as a party to a litigation, respecting the validity of any rights claimed or denied under those laws. On the contrary, these rights are considered as the private rights of the party who has duly obtained them, and are afterwards to be impeached and defended as such. The parties to every suit for the trial of the right are the petitioner, on whose complaint the inquiry was instituted, and the patentee who asserts the right. The first is bound to make good his allegations that the patent was obtained surreptitiously, or upon false suggestions, and the other to defend himself against them. It is a controversy strictly between these parties, although the public may have an eventual interest in it. They have the same interest in every suit, in which the validity of a patent is contested; for if it be defeated, the pretended invention becomes a common property, as fully as if the letters patent had been repealed by the proceeding here adopted.

The proceeding, now in progress before the court, was instituted under the authority and directions of the tenth section of the act of 21st February, 1793. Do any of the provisions of this section give any countenance to the motion of the complainant? The first step in the proceeding to obtain the repeal of a patent, is an oath or affirmation, made before the district judge by the petitioner for the repeal, that the patent was obtained surreptitiously, or upon false suggestions. Upon this the judge, if the matter alleged appear to him to be sufficient, shall grant a rule, that the patentee show cause why process should not issue against him to repeal such patent. If, on the return and hearing of this rule, the cause shown to the contrary shall not be sufficient, the judge shall order process to be issued against the patentee. This process is a scire facias, upon which an issue is made, of fact or law as the case may be, and, on the trial, the petitioner or complainant is bound to make good the allegations contained in his petition and verified by his affidavit. He must prove affirmatively that the patent was obtained surreptitiously or upon false suggestions. The issue being thus tried, what is the judgment which, by the directions of the act, the court must render, as it is determined, for the one party or the other? If it shall be against the patentee, the judgment is, that his patent be repealed; "and if the party, (so he is denominated,) at whose complaint the process issued, shall have judgment against him, he shall pay all such costs as the defendant shall be put to, in defending the suit, to be taxed by the court."

Is it not clear that the makers of this law considered the parties before the court, the

parties to the suit commenced by the process of scire facias, to be the petitioner or complainant, now the plaintiff, on the one side, and the patentee, now the defendant, on the other? There is no meaning in the language of the act, on any other construction. The complainant is expressly called the party, against whom, if the complaint is not sustained, the judgment of the court is to be rendered; and who, by that judgment, is to be compelled to pay the costs of the patentee or defendant, as in other cases. Can the judgment in any suit be rendered against a person not a party to it? Is any one of these provisions consistent with the idea, that the United States are, at any stage of the proceeding, to be brought in by the motion of the complainant, and put upon the record as the plaintiffs in the suit, to have a judgment for costs rendered against them as "the party at whose complaint the process issued." The person or party, at whose complaint the process did issue, and who was bound to sustain the allegations upon which it was issued, withdraws himself, on his own motion, from the controversy, and puts the United States there in his place, to suffer the penalty of his failure to support his own cause of action or complaint. The judgment is to be rendered against the party at whose complaint the process issued, and this cannot be done, unless the same party is also the party to the suit when the issue is tried and the judgment upon it rendered.

The act of the 7th June, 1794 [1 Stat. 393], was passed to restore suits which had been commenced under the act of 10th April, 1790 [Id. 109], and had been suspended or abated by the repeal of that law. The enactment is, that such suits and process may be restored at the instance of the plaintiff or defendant, and "the parties to the said suits, actions, process or proceedings are entitled to proceed, provided that, before any order or proceeding, other than for continuing said suits, after the reinstating thereof, shall be entered or had, the defendant or plaintiff, as the case may be, against whom the same may have been reinstated, shall be brought into court by summons, attachment or such other proceeding, as is used in other cases, for compelling the appearance of a party." Assuredly this provision was never intended for a suit to which the United States are a party: nor could the court compel their appearance by summons, attachment or any other proceeding. The complainant and the patentee, are clearly considered by this act, to be the parties, plaintiff and defendant in the suit.

The practice of the courts, so far as I have obtained a knowledge of it, is in conformity with this view of the law. The case of Stearns v. Barrett [Case No. 13,337], stands on the docket, as reported, as a suit between the complainant and the patentee. Upon the return of the scire facias, the patentee, (that is, Barrett) as defendant, plead-

ed, "that his letters patent were not upon false suggestion or surreptitiously obtained, as set forth in the said writ, and thereof he puts himself upon the country; and the plaintiff (that is, Stearns) puts himself, as to this issue upon the country likewise." Upon the issue thus formed, the parties, that is, Barrett and Stearns, went to trial before a jury. A special verdict was returned, in which the complainant and patentee, and nobody else, are treated and spoken of as the parties, plaintiff and defendant. The jury find that the plaintiff has not supported his allegations, and therefore they find for the defendant: and, accordingly, the judgment of the court was rendered for the defendant. The learned judge, throughout a long examination of the case, on several controverted points, uniformly, as the jury in their verdict had done, speaks of the complainant and the patentee, as the plaintiff and defendant in the suit, and no other party is alluded to.

The clerk of this court has examined its records, and produced several actions for the repeal of patents. Some of them are upon motions for process, and some after the scire facias has issued. In all, the parties are stated on the record to be the complainant, as the plaintiff; and the patentee, as the defendant. Not an instance, in which the United States were introduced as the plaintiffs, or, in any other way, as a party to the proceeding or suit, has been shown by the counsel for this motion, or come to the knowledge of the court. The motion was overruled.

WOODBRIDGE (GAULT v.). See Case No. 5,275.

Case No. 17,968a.

In re WOODBURY.

[See 7 Fed. 705.]

Case No. 17,969.

WOODBURY v. CRUM.

[1 Biss. 284; 1 West. Law Month. 522.]

Circuit Court, N. D. Ohio. May Term, 1859.

NEGOTIABLE NOTE — LIABILITY OF INDORSER — NOTICE OF NONPAYMENT — WHEN DISPENSED WITH — PROPERTY TRANSFER BY MAKER TO INDORSER.

1. The transfer of property by the maker of a promissory note to the indorser for the express purpose of paying the debt will dispense with notice of non-payment, if the amount of property thus assigned be sufficient to satisfy the liability; not otherwise, although all the property of the maker may have been thus assigned.

2. If, however, the assignment to the indorser is in trust for general creditors, and sufficient only for the payment of a small portion of the debts of the maker, such transfer, although including all the debtor's property, is not sufficient to excuse the want of notice to the indorser.

This was an action on a promissory note for \$1,144, bearing date May 23, 1853, made by

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

U. P. Coonrod, payable to Robert Crum, or bearer, thirty months after date, with interest after six months, and indorsed by the payee to the plaintiffs. The declaration contained, in addition to the common counts, a special count averring that the note was made by Coonrod to the defendant, and by him assigned to plaintiffs in payment of a debt due them from the defendant at the time, and that prior to the maturity of the note, the maker became insolvent, and assigned all his property to the indorser in trust for the payment of his debts generally. It also contained the usual averment of non-payment by the maker, with notice to the indorser.

[The second count omitted the averment of notice, but alleged that the indorser sustained no injury by reason of want of notice, because he had taken an assignment of all the property of the maker previous to the maturity of the note. To this second count the defendant had demurred, and his demurrer was sustained by Judge Wilson, at the April term, 1859.]²

The trial, with a plea of the general issue and notice of set-off, was had before a jury. The plaintiffs produced the note and proved its execution, and also that at or about the time it bears date the defendant, who had been a dry goods merchant in Tiffin, Seneca county, Ohio, and who had become largely indebted to plaintiffs and others, for goods purchased in New York, sold and transferred his stock of merchandize in Tiffin, to U. P. Coonrod, and received in payment his promissory notes, payable on long time; one of which—the note in suit—was transferred to the plaintiffs by defendant in payment of the debt due them at that time, to \$1,225 or thereabouts.

On the 11th of November, 1854, U. P. Coonrod, the maker of the note, having become badly insolvent, assigned all his property to Robert Crum, the defendant, in trust for the benefit of his creditors. The amount thus assigned would pay the creditors on final distribution, no more than fifteen cents on the dollar.

On the 26th day of November, 1855, the note having matured, payment was demanded of the maker, then in Tiffin, where the defendant also resided, and notice of non-payment was made out in writing, placed in an envelope directed to the defendant, and lodged in the post-office at Tiffin, by the notary, on the same day.

Spalding & Parsons and W. F. Stone, for plaintiffs, contended that, under the circumstances, no notice to the indorser was necessary as he had no right to require the holders of the note to make demand of the maker, and to give notice of nonpayment after he had deprived him of responsibility, by taking from him "all his property." And they strongly contended that where the ability of the maker to pay, was entirely exhausted by the assignment of his effects to the indorser,

in person, it made no difference in the law of the case, whether the assignment was made directly and exclusively to the indorser, to satisfy his liability on the note, or, whether, as in the case at bar, it was made to him in the character of a trustee for all the creditors of the insolvent debtor. In either case a notice of non-payment to the indorser, could be of no possible service. The following among other authorities were cited by plaintiff's counsel: *Bond v. Farnham*, 5 Mass. 170; *Barton v. Baker*, 1 Serg. & R. 334; *Prentiss v. Danielson*, 5 Conn. 480; *Mechanics' Bank v. Griswold*, 7 Wend. 165; *DeBerdt v. Atkinson*, 2 H. Bl. 336; *Valk v. Simmons* [Case No. 16, 815]; *Corney v. DaCosta*, 1 Esp. 302; *Rhett v. Poe*, 2 How. [43 U. S.] 457; *Develing v. Ferris*, 18 Ohio, 170; *Watt v. Mitchell*, 6 How. (Miss.) 131; *Torrey v. Foss*, 40 Me. 74; *Commercial Bank of Albany v. Hughes*, 17 Wend. 94.

S. B. & F. J. Prentiss, with whom was *James Pillars*, for defendant, maintained that, in no case, could notice of non-payment be dispensed with in a suit against the indorser, upon the ground that property had been assigned to him by the maker of the note, unless it appeared in evidence that the amount thus assigned was fully sufficient to satisfy the debt. They further contended that a substantial distinction could be taken between an absolute assignment of property to the indorser to pay the specific debt, though not sufficient in amount for the purpose, and an assignment of all the maker's property to the indorser, as a trustee for all the creditors; that in the former case notice might well be dispensed with without producing the like consequences in the latter. They cited several cases, but relied mainly on *Creamer v. Perry*, 17 Pick. 332.

McLEAN, Circuit Justice, charged the jury, that in case the maker of a note transferred property to the indorser for the express purpose of paying the debt, then subsequent notice of non-payment by the maker would be dispensed with, if the amount of property thus assigned was sufficient to satisfy the liability; not otherwise, although all the property of the maker may have been thus assigned.

The learned justice admitted the strength of the authorities referred to by plaintiffs, but said he was inclined, for the present, to rule that the assignment by Coonrod to Crum, being in trust for general creditors, and being sufficient in amount for the payment of no more than fifteen cents on the dollar of the debts, although it included all his property, was not sufficient in the law to excuse the want of notice to the indorser, or to show due diligence in the holder.

The jury returned a verdict for the defendant.

[Motion for a new trial was immediately filed by plaintiffs, and continued by the court, under advisement.]³

² [From 1 West Law Month. 522.]

³ [From 1 West Law Month. 522.]

WOODBURY (THOMAS v.). See Case No. 13,916.

Case No. 17,970.

WOODBURY PATENT PLANING MACH.
CO. v. KBITH.

[4 Ban. & A. 100.]¹

Circuit Court, D. Massachusetts. Jan., 1879.²

PATENTS FOR INVENTIONS—PLANING MACHINES—
ANTICIPATION—ABANDONMENT OF INVENTION.

1. The question as to what constitutes an abandonment of an invention, considered.

2. The improvement in planing machines, by which flat bars are placed before and behind the cutters, to keep the stock firm during the operation, instead of rollers previously used, for which letters patent No. 138,462 were granted to Joseph P. Woodbury, April 29, 1873, was not new, having been anticipated by the Anson machine.

3. A feature in a machine, anticipating the invention described in the patent in suit, will none the less anticipate such invention, because the inventor of such anticipating feature had not in view or did not understand the particular advantage of, or function performed by the anticipating feature.

In equity.

E. N. Dickerson, S. A. Duncan, J. A. L. Whittier, and A. A. Strout, for complainant.
B. F. Thurston, D. H. Rice, and Charles E. Pratt, for defendant.

LOWELL, District Judge. The patent in suit, No. 138,462, was issued to Joseph P. Woodbury April 29, 1873, and is for an improvement in planing machines, by which flat bars are placed before and behind the cutters to keep the stock firm during the operation, instead of the rollers which were used by Woodworth, the inventor of this class of machines. This change, though slight, has proved to be of great value, and is now in general use; and this suit is defended by an association of persons who are interested to continue such use. The patentee is dead, and the plaintiffs are a corporation to whom he had assigned his patent.

The history of this grant, which was made twenty-five years after it was first applied for, and twenty-seven years after the invention was completed, is remarkable. The inventor made application June 3, 1848, and appointed an attorney, but did not give him all the usual authority. The power was so worded as not to enable him to withdraw the application. The office rejected the application February 20, 1849, and nothing further was done until October, 1852, when the attorney withdrew the application, and received back \$20, of which Woodbury had no notice. In February, 1854, Woodbury instructed Mr. Cooper, a well-known patent solicitor of Boston, who was acting for him

in another case, to call up and prosecute this rejected application. There was a misunderstanding as to the invention referred to, and it was only in September, 1854, that Mr. Cooper learned exactly how the case stood. There was, at that time, a rule in the patent office, that an application which should not be renewed or prosecuted within two years after it had been rejected or withdrawn, should be conclusively presumed to have been abandoned. This rule was not always acted on, but Mr. Cooper says that it was very rigid, and that in all his experience, which is understood to have been large, he had not known it to be departed from. I think it a fair inference from the testimony, that Cooper instructed Woodbury that it was useless to attempt to reinstate his case at the patent office. There is evidence that Woodbury thought himself unjustly deprived of a patent, and that he often afterwards expressed a hope that something would be done by congress for his relief. He says, in an ex parte affidavit, which forms part of the record, that he heard in 1869 that Mr. Fisher, then commissioner of patents, had reversed the former rule of presumption arising out of neglect for two years, and that he then intended to apply again, but heard that congress was about to pass a law to meet such cases, and he waited for that.

When revising the patent laws in 1870, congress did enact: "That when an application for a patent has been rejected or withdrawn, prior to the passage of this act, the applicant shall have six months from the date of such passage to renew his application, or to file a new one; and if he omit to do either, his application shall be held to have been abandoned. Upon the hearing of such renewed applications, abandonment shall be considered as a question of fact."

Upon the question of abandonment, it is argued: First, that the decision of the commissioner was final, under section 35 of the statute of 1870 [16 Stat. 202]. But the same statute gives the commissioner, in all cases, jurisdiction of the question of abandonment, and, at the same time, makes the fact a defence upon the trial of the action. Sections 24 and 61 (16 Stat. 201, 208). And this thirty-fifth section was so construed by Shipman, J., in *United States Rifle Co. v. Whitney Arms Co.* [Case No. 16,793]. Second, that there was a conclusive abandonment by virtue of the statute of 1861, § 12 (12 Stat. 248), which required that all applications should be completed and prepared for examination within two years after the filing of the petition, or, in cases then pending, within two years after the passage of the act, unless it should be shown to the satisfaction of the commissioner of patents that the delay was unavoidable. This was not the case of an incomplete application in 1861, but of one that had been rejected. Third, that Woodbury had actually aban-

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

² [Affirmed in 101 U. S. 479.]

done this invention. Each case, of course, must be decided on its own circumstances; and I am inclined to think that Woodbury had not abandoned his invention. This is a somewhat difficult question to decide, especially as Woodbury cannot be cross-examined; but the general adoption of his improvement which would estop him, if he knowingly permitted it, without taking steps to enforce his rights, appears to have occurred later than 1854, when he had no means, or was advised that he had no means, for such enforcement. This appears to me the turning point upon the matter of abandonment; for that he had, in his mind, any actual intention of that sort, cannot be maintained. I am further of the opinion that the machine built by one Anson, at Norwich, Connecticut, anticipated the invention of Woodbury.

The plaintiffs maintain that most of the evidence in respect of this machine is inadmissible, because the names of the witnesses called to prove this defence were not given in the answer. I was of that impression at the trial, and I think the practice here is to give all the names. The statute is substantially the same as it has been since 1836, excepting that the act of 1870, adopting the decisions of the courts, applied to cases in equity the rule of notice which the act of 1836 [5 Stat. 117] laid down for actions at common law. The rule is now found in Rev. St. § 4920, and declares that the defendant shall state in his answer the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used. I have examined, I believe, all the decisions, and while there are many which speak of notice of the names of "witnesses," yet this is an ambiguous term, which does not necessarily mean that all witnesses are to be mentioned. It was decided by Grier, J., after careful argument, that it was only those persons who had invented or used the machine, or improvement, and not those who were to testify to such invention or use, who must be pointed out. *Wilton v. The Railroads* [Case No. 17,857]. *Nelson and Conkling, JJ.*, made a similar ruling. *Many v. Jagger* [Id. 9,053]. Mr. Justice Clifford, in giving the opinion of the supreme court, has twice cited the former of these cases, though not to this precise distinction; and in a third case he has adopted its language. See *Teese v. Huntingdon*, 23 How. [64 U. S.] 10; *Agawam Co. v. Jordan*, 7 Wall. [74 U. S.] 596; *Roemer v. Simon*, 95 U. S. 219.

The deposition of Anson, the inventor of the machine, may be read, because no objection was made at the time of his examination. See *Graham v. Mason* [Case No. 5,671]; *Brown v. Hall* [Id. 2,008]; *Barker v. Stowe* [Id. 994]. And there was notice of the name and residence of one witness to the use of the machine at Norwich.

If the rulings that I have above cited, and which appear to have been adopted or approved by the supreme court, mean that after notice of the name and residence of the inventor, and of the place of use, and of the name of some one who has used it, has been given or waived, all other witnesses may be examined without notice,—and I do not see that it can mean less than that,—then the evidence in this case is all admissible, because Anson invented and used the machine at Norwich, and notice of his name and residence was waived.

Another ground for admitting the depositions relating to Anson's machine, is taken by the defendant. As the evidence was offered, the objection was as follows: "Counsel for complainant objects to the testimony of this witness, for want of notice." It was stated at the argument, and not denied, though it does not appear of record, that when the defendant's counsel gave notice for taking this testimony at Norwich, he did not give the names of the witnesses he intended to examine, and that the complainant's counsel insisted that he was bound to do this by the practice in equity, and that there was correspondence upon this subject. Now, the objection for want of notice might mean, the want of this notice of the names of witnesses to be produced and examined at a particular time and place, according to an asserted practice in equity, a point not now insisted on. When it came to the Reynolds machine, the objection taken was that "neither the name nor residence" of the witness "appears in the answer," etc. Upon this point I do not pass.

The invention of Woodbury was made in 1846, and the machine of Anson was made in 1843. Of the date there is no doubt, for Anson applied for a patent on his invention in 1844. His machine was organized to mould or "stick," as the witnesses call it, sashes for windows, and similar articles, was adapted to planing, and was used for planing slats for blinds. There is no doubt that Anson's machine had bars instead of rollers, for he says so in his specification. The machine has been running ever since, and is in court at present.

Two points are taken against this machine: (1) That the bed is not sufficiently solid to answer the purpose of Woodbury's bed, which is to resist firmly, like an anvil, as he says, the blows of the cutter. Upon the evidence, and upon inspection, I think the bed is a solid bed, within the meaning and use of the Woodbury machine, for all purposes of planing such stock as was likely to be planed upon it. And if the machine were to be enlarged to do general planing work, I see no reason to suppose that a similar bed, modified only as any mechanic would modify it, would not answer the purpose. The solid bed was not new with Woodbury, but was part of the Woodworth organization, which was the starting point of all these ma-

chines, and its benefits were well known and likely to be adopted by Anson. (2) The other question is whether the bars which Anson made instead of rollers, had a yielding pressure. If not, they would not work on an ordinary planing machine, though they might possibly do in a small machine for special purposes. The machine in court has a yielding pressure, by means of weights, which allow the bar to give about three-eighths of an inch. Mr. Waters says about three-sixteenths of an inch; but he is considerably under the mark. To all appearance this organization is as old as the rest of the machine; but as the question of novelty on the part of Woodbury depends upon whether the weights were introduced thirty-five years or thirty-three years since, the appearance is of no great significance. The witnesses all think that the machine has remained unchanged in this particular from the beginning. It seems probable that any one who substituted bars for rollers would make them yield, because the rollers of Woodworth's machine were made in that way. It was not the yielding which was new, but the substitution of bars for rollers. The distinguished expert of the plaintiffs says: "I have never seen a Woodworth planing machine organized with either rollers or bars to bear down the rough stock upon the bed-piece, by acting upon the rough surface of the stock, that was not so constructed as to allow the roller or bar, as the case might be, to yield to the inequalities almost always existing in sawed lumber; nor do I ever expect to see such a machine in practical use." His meaning is, that the machine would stop whenever a board having the usual inequalities was attempted to be passed through it.

In a machine like Anson's, the difficulty might not present itself so often, or so soon, but I should suppose it would make itself felt sooner or later, and would need to be remedied before the machine had been run for a day.

The witnesses, sixteen in number, are all on one side, and include, apparently, all persons now living who ought to be called. They testify from their recollection, with more or less positiveness, and with apparent fairness. None of them points to any change, by which the pressure bars were made yielding, after the machine was finished in 1843, but, as I before said, they all think them unchanged.

Against this there is the evidence, which is entitled to much weight, that the drawings accompanying Anson's application for a patent do not show any opportunity for a yielding pressure, or but little. The model is somewhat damaged, and the suggestion is made that it may have been tampered with. As it appears to-day there is some play to the rods of the pressure bars.

I do not think this negative evidence sufficient to discredit the recollection of the wit-

nesses. The patent which Anson asked for had nothing to do with the bars, and there is no reason to suppose that he understood that there was any such advantage in bars over rollers as Woodbury saw and made known. He was not concerned with the particular matter of a yielding pressure bar; but if he made it to yield, he made the thing which Woodbury is, by a very proper and indeed necessary fiction of the patent law, presumed to have had knowledge of; and, therefore, when Woodbury pointed out the great advantage of this organization, he was merely, in intendment of law, applying an old machine to a more extensive use. I believe him to have been an original and meritorious inventor, but of a change which was not difficult to make or to invent, and of which, as it turns out, he was not the first inventor.

Bill dismissed, with costs.

[This case was taken by appeal to the supreme court, and the decision was there affirmed. 101 U. S. 479.]

Case No. 17,971.

WOODCOCK v. PARKER et al.

[1 Gall. 438; 1 Robb, Pat. Cas. 37; Merw. Pat. Inv. 218.]¹

Circuit Court, D. Massachusetts. May, 1813.
PRIORITY OF PATENT RIGHTS—ORIGINAL INVENTION.

1. The original inventor of a machine, who has reduced his invention to practice, is entitled to a priority of patent right, although subsequently the same machine may have been invented by another person.

See Bedford v. Hunt, Case No. 1,217; Evans v. Eaton, 3 Wheat. (16 U. S.) 434; s. c., Case No. 4,559; Shaw v. Cooper, 7 Pet. (32 U. S.) 292; Dawson v. Follen, Case No. 3,670; Reutger v. Kanowes, Id. 11,710; Whitney v. Emmett, Id. 17,585.

[Cited in Dietz v. Wade, Case No. 3,903; Treadwell v. Bladen, Id. 14,154; Reed v. Cutter, Id. 11,645; Brooks v. Bicknell, Id. 1,944; Hudson v. Bradley, Id. 6,833; Johnson v. Root, Id. 7,411; Judson v. Bradford, Id. 7,564. Distinguished in Hill v. Dunklee, Id. 6,489. Cited in Christie v. Seybold, 5 C. C. A. 40, 55 Fed. 76.]

[Cited in Davis v. Bell, 8 N. H. 503.]

2. The inventor of an improvement cannot entitle himself to a patent more broad than his invention.

See Lowell v. Lewis, Case No. 8,568; Moody v. Fiske, Id. 9,745; Wyeth v. Stone, Id. 18,107. See, also, Brunton v. Hawkes, 4 Barn. & Ald. 541; Rex v. Else, Dav. Pat. Cas. 144; Phil. Pat. 223-231; Whitney v. Emmett, Case No. 17,585; Earle v. Sawyer, Id. 4,247.

[Cited in Re Fultz, Case No. 5,156.]

This was an action on the case for a violation of a patent right of the plaintiff for splitting leather. The cause was tried at this term before Story, J., in the absence of the district judge. The plaintiff [John Woodcock], at the trial, produced his letters patent, dated 8th May, 1809, securing to him the

¹ [Reported by John Gallison, Esq. Merw. Pat. Inv. 218, contains only a partial report.]

patent right of a machine for splitting leather. The defendants [David Parker and another] admitted the use of a similar machine, but contended that the machine was the invention of one Samuel Parker, (under whom they claimed, who had obtained his original letters patent for the same invention, dated the 9th July, 1808, and letters patent for certain improvements therein, dated the 26th of April, 1809. The principal questions between the parties were: (1) Whether Woodcock or Parker was the first inventor of the machine in controversy, and entitled to the patent. (2) Whether, admitting the plaintiff to be the original inventor of the machine, in its present improved state, his patent was not too broad, and did not include machinery previously invented and applied to the same purpose by the said Parker.

George Blake and Mr. Dexter, for plaintiff.
Prescott & Otis, for defendants.

STORY, Circuit Justice, in summing up the cause, directed the jury as follows: The first inventor is entitled to the benefit of his invention, if he reduce it to practice and obtain a patent therefor, and a subsequent inventor cannot, by obtaining a patent therefor, oust the first inventor of his right, or maintain an action against him for the use of his own invention. In the present case, as the defendants claim their right to use the machine in controversy by a good derivative title from Samuel Parker, if the jury are satisfied that said Parker was the first and original inventor of the machine, the plaintiff cannot, under all the circumstances, maintain his action; notwithstanding he may have been a subsequent inventor, without any knowledge of the prior existence of the machine, or communication with the first inventor. It is not necessary to consider, whether if the first inventor should wholly abandon his invention and never reduce it to practice, so as to produce useful effects, a second inventor might not be entitled to the benefit of the statute patent: because here there is not the slightest evidence of such abandonment. Parker is proved to have put his machine in operation; it produced useful effects, and he followed up his invention by obtaining a patent from the department of state.

As to the second question, if the machine, for which the plaintiff obtained a patent, substantially existed before, and the plaintiff made an improvement only therein, he is entitled to a patent for such improvement only, and not for the whole machine; and under such circumstances, as this present patent is admitted to comprehend the whole machine, it is too broad, and therefore void. It is not necessary, to defeat the plaintiff's patent, that a machine should have previously existed in every respect similar to his own; for a mere change of former proportions will not entitle a party to a patent. If he claim a patent for a whole machine, it must in sub-

stance be a new machine; that is, it must be a new mode, method, or application of mechanism, to produce some new effect, or to produce an old effect in a new way. In the present case, if all parts of the machine, except the spring plate, (which the plaintiff claims as emphatically his own invention,) existed before, and were applied to produce the same effects in the same manner; and the plaintiff has established the spring plate to be his exclusive invention, still his patent ought to have been confined to such improvement, and not to have comprehended the whole machine. Unless, therefore, the plaintiff establish his exclusive right to the whole machine, as now organized, as his own invention, he cannot be entitled to the verdict of the jury.

The jury found a verdict for the defendants; and a bill of exceptions was taken to the direction of the judge, but no writ of error has ever been sued to the supreme court.

WOODEN (PETERSON v.). See Case No. 11,038.

WOODFIN (KITCHEN v.). See Case No. 7,855.

Case No. 17,972.

In re WOODFORD et al.

[13 N. B. R. 575; ¹ 1 Cin. Law Bul. 37.]

District Court, N. D. Ohio. 1876.

INVOLUNTARY BANKRUPTCY—SUFFICIENCY OF PETITION—NUMBER OF PETITIONERS.

1. Creditors whose claims are under two hundred and fifty dollars are not to be counted in computing the number who must unite in an involuntary petition, if one-fourth of the creditors whose claims are above that sum join in the petition.

2. In computing the amount, all the claims must be counted irrespective of the amount.

[Cited in *Re Broich*, Case No. 1,921; *Re Lloyd*, Id. 8,429.]

3. A party may purchase a claim in good faith, in order to join in an involuntary petition and make the necessary number.

4. If the sale of a claim is void for fraud or want of consideration, the claim is to be deemed to belong to the assignor.

WELKER, District Judge. Exception to report of commissioner to whom petition, etc., were referred, to ascertain number and amount of creditors.

Held: First. That in counting the number of creditors necessary to join in the petition, creditors under two hundred and fifty dollars are not to be counted, if one-fourth of the creditors above that sum join in the petition. If such number do not join, then creditors below two hundred and fifty dollars may be counted, to obtain the necessary number.

Second. That in counting the amount of claims of creditors, provable claims in all

¹ [Reprinted from 13 N. B. R. 575, by permission.]

amounts are to be reckoned, those less than two hundred and fifty dollars as well as over that amount; and the aggregate of the petitioners' debts must be equal to one-third of all the debts provable, irrespective of amounts thereof. The cases *In re Hadley* [Case No. 5,894], decided by Judge Brown, and *In re Currier* [Id. 3,492], decided by Judge Lowell, approved and followed.

Third. That a creditor has a right to sell and a party a right to purchase, in good faith, claims against a debtor, with a view to enable the purchaser to join in a petition in bankruptcy, in order to make the necessary number to file a petition.

Fourth. That where a sale of such claims is void for want of consideration or fraud, and is set aside for that reason, the claims so attempted to be sold or transferred go back to the assignor, and in the count are to be reckoned as belonging to the assignor.

Fifth. If such assignee join in the petition, and such assignment is set aside, he is not to be counted in the number necessary to join, nor to be reckoned in the amount of provable debts, but the assignor is to be counted instead if he be a party to the petition, and the amount of such indebtedness reckoned to him—such assignee thereby dropping out of the proceedings as creditor.

WOODHOUSE (HODGSON v.). See Case No. 6,571.

WOODHOUSE (THOMAS v.). See Case No. 13,917.

Case No. 17,973.

Case of WOODHULL.

[Cited in *U. S. v. Williams*, 3 Fed. 486. Nowhere reported; opinion not now accessible.]

WOODHULL (BEACH v.). See Case No. 1,154.

Case No. 17,974.

WOODHULL v. BEAVER COUNTY.

[3 Wall. Jr. 274; 1 20 Leg. Int. 76.]

Circuit Court, D. Pennsylvania. Nov. Term, 1859.

DIFFERENCE BETWEEN PREVENTIVE AND REMEDIAL JUSTICE—COUNTY BONDS—DOUBTFUL VALIDITY.

1. A court will frequently issue process to prevent acts being done on the ground that they are unauthorized, which same acts, after they are done, the court will enforce as having been made in pursuance of authority sufficiently given.

2. Ex. gr. It will hold a county bound to pay bonds actually issued and negotiated by it under an authority assumed from an ambiguously and ill expressed statute—although had any citizen of the county applied for an injunction to restrain the issue on the ground of want of

authority clearly given by the statute, the court would have granted such preventive remedy.

[Cited in *Lewis v. Shreveport*, Case No. 8,331; *Memphis v. Brown*, Id. 9,415.]

Motion for a new trial; the case being thus: A statute of Pennsylvania (Act April 7, 1853, p. 335) authorized the county of Beaver to subscribe to the stock of a railroad; "provided," such is the language of the act, "that the amount of subscription shall not exceed \$100,000; the amount thereof shall be fixed and determined by one grand jury of the county, and upon report of such grand jury being fixed, it shall be lawful for the county commissioners to carry the same into effect by making, in the name of the county, the subscription so directed by said grand jury. Nothing was here said about the issuing of any bonds by the county; but a second proviso enacted that "whenever bonds of the county are given in payment of subscription, the same shall not be sold by said railroad company at less than par value." The grand jury, without either "fixing" or "determining" any amount, "recommended the commissioners to make the subscription in conformity to the act of assembly." The commissioners accordingly issued negotiable bonds, binding the county (to what extent did not here appear); and having given them to the railroad company, this last put them in the market and sold them bona fide for what they would bring; in most cases much below par. The present plaintiff having bought certain of the bonds, and the county not paying interest, he sued it and got a verdict here for the amount.

On a motion for a new trial, two questions were now presented: I. Had the commissioners authority to issue bonds by virtue of the above-mentioned act of assembly, authorizing it to subscribe to stock? II. Was the recommendation of the grand jury, which fixed no amount, sufficient to authorize the commissioners to make the subscriptions which they have made, and to execute the bonds issued thereon? This court having in a former case declared that when authority to do acts so far out of the ordinary range of county action was given, it ought to be given "in clear and unambiguous terms."

GRIER, Circuit Justice. This court has said that statutes conferring such doubtful and important powers on county or city officers as have here been exercised, should express the intention of the legislature "in clear and unambiguous terms." We do not intend to retract the assertion, and if the only question before the jury had been whether these powers were vested in these commissioners in terms such as we have declared they ought, in all cases, to be given in, we might well have instructed them, that such was not the case. But it does not follow as a consequence of what we have

¹ [Reported by John William Wallace, Jr., Esq.]

declared to be the proper sort of language in which to vest such powers, that courts and juries must treat the legislation as a nullity, which is not conformable to our rule. I am sorry to say that too many of the acts of the Pennsylvania legislature granting powers most dangerous to individuals and the rights of property, cannot bear this test. As an excuse for this criminal negligence in those entrusted by the people with the exercise of this sovereign function, it is said that all these acts of assembly are drawn up by the persons known as outside or lobby members, who are employed for "a consideration" to solicit legislation by which speculators may advance their interests at the expense of the community. Be the reason what it may, we can only say that the persons who have drawn many of the statutes about railroad subscriptions lately brought to our notice, have exhibited an astonishing obliquity of genius in their selection of the terms used to express the intention of the legislature. I will not say that it was the deliberate intention of these scribes to make the legislature speak in such ambiguous terms, that they might be used to give credit and currency to certain securities by one interpretation, and by another to disown the bond and defraud the community. In the case of the bonds issued by the city of Pittsburg to the Allegheny Valley Railroad, such has been the result. But in this case, the meaning of the legislature has not been so absolutely obscured by ingenious generalities of expression. Though not expressed in "clear and unambiguous language," this act is sufficiently capable of the construction that "the commissioners or a majority of them, are authorized to pledge the faith of the county by bonds drawn in the best approved forms to give them value in the money market, to such an amount, not exceeding \$100,000, as the grand jury of the county may approve or direct;" and to provide for the payment of principal and interest of the same by taxation. And this interpretation we think it reasonable to give to it in the circumstances of this case.

II. As respects the report of the grand jury. It cannot be denied that this report has been drawn by some blundering scribe who perhaps did not take the trouble to look at the statute under which he was acting. But if it requires charitable criticism to support the intention of the legislature, how much more should it be extended to the acts of a grand jury! While the report fixes no amount, it yet recommends a subscription in conformity to the act of assembly. If the commissioners have not yet subscribed to the full amount of \$100,000, they can so far as the report gives them authority. If, indeed, this were an application to enjoin or suppress the issue of these bonds, I would say—(i.) As respects the language of the act of assembly, that we would be satisfied with nothing short of direct terms (which it would have been as easy to

use as those that are used), and that we would not infer these great and dangerous powers from circumlocution and vague terms; and (ii.) as respects the grand jury's report, that it was insufficient, because it does not in "clear terms" fix and determine the amount. If any citizen of Beaver county had chosen to dispute the construction assumed by the commissioners both of the statute and of the report, the courts were open. He could have asked for an injunction and we would have granted it. But now, when all parties have given their construction to the act, and it can by its terms be made to include the power, the court will not exercise astutia to give it a stringent interpretation in order to enable a county to disown its obligations after having received their value. New trial refused.

WOODHULL (DUTCHER v.). See Case No. 4,204.

Case No. 17,975.

WOODHULL et al. v. WAGNER.

[Baldw. 296.]¹

Circuit Court, D. Pennsylvania. April Term, 1831.

STATE INSOLVENT LAW—EXTRATERRITORIAL EFFECT
—CONTRACT TO PAY MONEY—PLACE
OF PAYMENT.

1. A discharge of a debtor under the insolvent law of Pennsylvania, does not protect him from arrest by a citizen of New York, for a debt payable in New York, or to a citizen of that state.

[Cited in dissenting opinion in *Beers v. Haughton*, 9 Pet. (34 U. S.) 373.]

2. Insolvent laws of a state have no effect beyond the limits thereof.

[Cited in *Babcock v. Weston*, Case No. 703; *Towne v. Smith*, Id. 14,115; *Mygatt v. Green Bay*, Id. 9,998; *Baldwin v. Hale*, 1 Wall. (68 U. S.) 234; *Von Glahn v. Varenne*, Case No. 16,994; *Pritchard v. Norton*, 106 U. S. 141, 1 Sup. Ct. 116.]

[Cited in *Brigham v. Henderson*, 1 Cush. 432; *Savoy v. Marsh*, 10 Mete. (Mass.) 595, 596; *Deering v. Boyle*, 8 Kan. 535; *Hawley v. Hunt*, 27 Iowa, 308; *Felch v. Bugbee*, 48 Me. 14; *Scribner v. Fisher*, 2 Gray, 47.]

3. A residing in Philadelphia, consigned goods to B residing in New York, and drew his bill on B, promising to pay the balance which might be due after the sale of the goods, if the proceeds did not reimburse B the amount of the bill. B accepted and paid the bill which exceeded the amount of sales: *Held*, that A was bound to reimburse B at New York.

[Cited in *Grant v. Healey*, Case No. 5,696.]

4. The decisions of the supreme court on state insolvent laws collected and classed.

This was an application to discharge the defendant from custody under a *capias ad satisfaciendum*, and was submitted to the court upon a statement of the facts, as follows: William Wagner, residing in Philadelphia, drew a bill upon Woodhull & Davis,

¹ [Reported by Hon. Henry Baldwin, Circuit Justice.]

residing in New York. It was accepted and paid at maturity by the acceptors. The late firm of Snowden & Wagner had consigned to Woodhull & Davis a cargo of turpentine, which was not disposed of at the time of accepting the bill, at which time the firm was dissolved, and the defendant was carrying on business alone. After winding up the sales and crediting the net proceeds, a balance remained due on Wagner's bill, upon the New York house. Suit was brought against William Wagner for not indemnifying Woodhull & Davis for their acceptance on his account. The defendant being in custody on a ca. ad sa., applied for his release, on the ground of his discharge by the insolvent laws of Pennsylvania. This was opposed on the allegation, that the debt was contracted in New York, and therefore not affected by this discharge here.

BALDWIN, Circuit Justice. The statement of the case agreed on by the parties, presents only one question for the consideration of the court, which is, whether the defendant's discharge under the insolvent laws of Pennsylvania, entitles him to be discharged from the arrest made under a *capias ad satisfaciendum*, issued from this court in execution of a judgment obtained against him eleven months before his discharge. The power of the states of this union to pass bankrupt or insolvent laws, and the effect of the exemption of the person of the debtor, or property acquired after the discharge, have been the subject of much discussion and difference of opinion. In the supreme court, they have been so fully examined by counsel and the judges, as to make it necessary only to state the result of such cases as bear upon the present application.

In *Sturges v. Crowninshield*, 4 Wheat. [17 U. S.] 122, 91, it was decided: 1st. That a state had a right to pass a bankrupt law, provided there was no act of congress in force establishing a uniform system of bankruptcy, conflicting with such state law; and provided it did not impair the obligation of a contract, within the tenth section of the first article of the constitution; 2d. That such state law, liberating the person of the debtor, and discharging him from liability on contracts made previously to the law, was unconstitutional and void, so far as it discharged the contract, or attempted to do so; but, 3d. That it was valid so far as it discharged the person of the debtor from confinement, as imprisonment was merely a remedy to enforce the obligation of the contract, but no part of the contract itself, a release from it did not impair the obligation. [*Sturges v. Crowninshield*] 1d. 200, 201. Though the court, in the latter part of their opinion (1d. 207), confine it to the second point, yet the first and third having been considered, and their judgment exercised on them, it has always been understood (and so we feel it our duty to view it), that the

law is settled on these points, according to the reasoning of the court, if not their direct decision. The same principle on the third point was affirmed in *Mason v. Haile*, 12 Wheat. [25 U. S.] 370, which was decided independently of any considerations arising from the locality of the contract or the parties. In that case the court declared, that a state law abolishing imprisonment for debt, would be valid as a measure regulated by the state legislature, acting on the remedy, and that in part only, and repeat the doctrine asserted in *Sturges v. Crowninshield*, 4 Wheat. [17 U. S.] 378.

In *M'Millan v. M'Neil*, Id. 209, the court are said to have declared that the circumstance of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle; and in *Farmers' Bank v. Smith*, 6 Wheat. [19 U. S.] 131, they decided that the fact of both parties being citizens of Pennsylvania when the contract was made, made no difference between that and former cases.

From the opinion of all the judges in *Ogden v. Saunders*, 12 Wheat. [25 U. S.] 213, 333, it seems that the point decided in *M'Millan v. M'Neil* [supra] was not correctly stated in the report, and that it was not interded to settle the question of the effect of the law upon contracts made subsequent to its passage. The question remained open till the case of *Saunders v. Ogden*, in which four of the judges gave their opinions that the contract could be discharged by a state law passed before the contract was made; putting the case on the distinction between bankrupt or insolvent laws which were retrospective, and those which were prospective in their operation. But these opinions led to no final judgment on this point, which in strictness may therefore be considered as not having been adjudicated, though it was the deliberate opinion of a majority of the court; but this point does not arise here, and it is therefore not necessary to the decision of this motion to notice it further. Another point of more immediate application arose in that case. The suit was brought on a bill drawn by Jordon in Kentucky, on Ogden, a citizen of New York, resident there, and accepted by him in favour of Saunders, a citizen of Kentucky. One of the judges who composed the majority on the first question, being of opinion that a discharge under the law of New York, was void as to a citizen of Kentucky, four judges concurred in giving judgment for the plaintiff, on the ground of the invalidity of the law. [*Mason v. Haile*] 12 Wheat. [25 U. S.] 369. Judge Johnson was the only judge who gave an opinion on the second point, the three who concurred with him on the first dissented on this, the three who dissented on the first assented to the judgment which was entered for the defendant in error, but without assigning any reasons beyond those given in

their dissenting opinion on the first question. If the case of *Ogden v. Saunders* had turned upon the mere point of citizenship of the plaintiff, it would be difficult to say what was the direct judgment of the court. Three judges thought the law of New York was valid, having been passed before the debt was contracted, and that it operated on the case, the contract having been made and to be executed there. Three gave no opinion on the locality; it was not necessary to do so, as they thought the plaintiff entitled to judgment on the first point. Thus considered, this case, standing by itself, directly adjudicates no definite question involved in the one now under hearing, as we are not informed whether the three judges who concurred with Judge Johnson in rendering judgment against the party claiming under the law, did it for the reasons assigned by them in their dissenting opinion on the first point, or those assigned by him on the second. No question arises here as to the right of the plaintiff to all remedies against the defendant's property. The law under which he has been discharged is not unconstitutional, as it attempts to discharge only the person. The only doubts are: (1) as to the effect of a discharge on a debt contracted in New York; (2) with a citizen of that state; (3) on process issued from this court. All the judges, in *Ogden v. Saunders*, stated that the point decided in *M'Millan v. M'Neill* was, that a discharge of the defendant under a law of Louisiana, could not discharge or operate on a contract made and to be executed in South Carolina, where both parties then resided. Thus affirming individually, if not in their collective judgment, the principle then settled. In several cases preceding that of *M'Millan v. M'Neill*, as well as in that, the supreme court have declared that the discharge by the bankrupt laws of a foreign country was no bar to an action brought on a contract made in this. [*Barr v. Gratz*] 4 Wheat. [17 U. S.] 213; [*M'Ilvaine v. Cox*] 2 Cranch [6 U. S.] 298, 302; *Robertson's Adm'rs v. Bank of Georgetown*, January term, 1831 [unreported]; [*Ogden v. Saunders*] 12 Wheat. [25 U. S.] 358 et seq.

In *Buckner v. Findley*, 2 Pet. [27 U. S.] 586, the court declared that "for all national purposes embraced by the federal constitution, the states and the citizens thereof are all united under the same sovereign authority, and governed by the same laws. In all other respects the states are necessarily foreign to and independent of each other; their constitution and forms of government being, although republican, altogether different, as are their laws and institutions." Id. 590. This principle appears to be directly applicable to the laws of the states, discharging the persons and future acquisitions of debtors. Such laws are wholly unconnected with the federal relations of the states to the general government, where they do not impair the obligation of contracts. Discharges under

them are, in other states, to be considered as made under foreign laws, within the uniform decision of the supreme court, having no extra-territorial effect on contracts made beyond their jurisdiction, or with persons not subject to their laws at the time when it was to be carried into effect. In this light, and taken in connexion with these cases, the case of *Ogden v. Saunders* is important, as showing the concurrence of all the judges in the general principle as to the effect of discharges under foreign bankrupt laws. It is also important as connected with the case of *Shaw v. Robbins*, in a note to [*Ogden v. Saunders*] 12 Wheat. [25 U. S.] 369, in which the court decided, that a bill of exchange, drawn by a citizen of Massachusetts on a citizen of New York, and accepted by him, being a resident there, could be recovered in a state court, though the defendant had been discharged under the insolvent laws of New York. The facts of the case were those of *Ogden v. Saunders*, the decision in which was held applicable, and governed the one before them. Thus connected with the preceding case of *M'Millan v. M'Neill*, and the subsequent one of *Shaw v. Robbins*, the case of *Ogden v. Saunders* must be considered, at least in the circuit court, as settling both principles; that a discharge by the law of a state operates only on contracts made between its own citizens, and to be executed within the state. The opinion of Judge Johnson may then be taken by us as that of a majority of the court on the effect of their decision of that case in pages 368, 369. He declares it to be an adjudication in that case, "that as between citizens of the same state, a discharge of a bankrupt by the laws of that state is valid as it affects posterior contracts; that as against creditors, citizens of other states, it is invalid as to all contracts." The learned judge maintains these propositions: (1) "That the power given to the United States to pass insolvent laws is not exclusive." (2) "That the fair and ordinary exercise of that power by the states, does not necessarily involve a violation of the obligation of contracts, a multo fortiori, of posterior contracts." (3) But when states pass beyond their own limits, and the rights of their own citizens, and act on the rights of citizens of other states, the exercise of such a power is incompatible with the rights of other states, and the constitution of the United States. In [*Boyle v. Zacharie*] 6 Pet. [31 U. S.] 643, this point was declared to be finally and conclusively settled.

In the next case which came before the supreme court on the effect of discharges by state bankrupt laws (*Clay v. Smith*, 3 Pet. [28 U. S.] 411) the plaintiff was a citizen of Kentucky, the defendant of Louisiana, who was discharged, "as well his person as his future effects, from all claims of his creditors," by a law of that state passed in 1811. The debt sued for was incurred in 1808. The plaintiff made himself a party to the

proceedings under the law, and was thereby held to have abandoned his extra territorial immunity from the operation of the bankrupt law of Louisiana, which released the defendant from all demands on his person, or subsequently acquired property.

The result then of what we must consider in this court as the decision in the foregoing cases is, that a state law discharging the person of a debtor from arrest for debts contracted in the state between its own citizens as affecting only the remedy to enforce, not the obligation of the contract, is valid, and not within the prohibition of the constitution, whether the debt was contracted before or after the law. *Sturges v. Crowninshield*, *Ogden v. Saunders*, *Mason v. Haile* [supra]. So is a law discharging both the persons and future acquisitions of the debtor from contracts posterior to the law; or from anterior ones, if the creditor makes himself a party to the proceedings which lead to the discharge in the state court. *Ogden v. Saunders*, *Clay v. Smith*. But such laws have no operation out of the state over contracts not made and to be carried into effect within it, or over the citizens of other states. *Harrison v. Sterry* [5 Cranch (9 U. S.) 289]; *M'Millan v. McNeill*, *Ogden v. Saunders*, *Shaw v. Robbins*, *Robertson's Adm'rs v. Bank of Georgetown* [supra]. That it makes no difference whether the suit is brought in a state court, or the court of the United States; the rule is the same as to rendering judgment or issuing process. *Farmers' & Mechanics' Bank of Pennsylvania v. Smith*, *Shaw v. Robbins*, *Ogden v. Saunders*. A state law not repugnant to the constitution, laws or treaties of the United States is, by the thirty-fourth section of the judiciary act, a rule for the decision of all cases to which it applies in the federal courts; and we must decide on this precisely as the state courts ought to do. [*Satterlee v. Matthewson*] 2 Pet. [27 U. S.] 413, 414; [*Wilkinson v. Leland*] Id. 656; [*Hinde v. Vattier*] 5 Pet. [30 U. S.] 401.

With these settled principles to control our decision, it only remains to apply them to the contract, on which the plaintiffs have obtained their judgment. The defendant, residing in Philadelphia, consigned to the plaintiffs, residing in New York, a quantity of turpentine to be sold on his account. In anticipation of the sale he drew a bill on the plaintiffs, which was accepted and paid, the sales did not reimburse them, they brought their suit to recover the balance, and obtained the judgment on which the *capias ad satisfaciendum* was issued. By the nature of this contract the defendants undertook in law to pay this balance to the plaintiffs, were bound to reimburse them at the place where the money was advanced, and the plaintiffs had a right to draw for the difference between the amount of the bill so accepted and paid, and the proceeds of the sale. We can perceive no difference between this right in the plaintiffs to draw for this

balance, and the obligation of the defendant to pay, which arose from the nature of the contract, and a letter expressly authorising the drafts for acceptance. The case comes within the principle settled in *Lanusse v. Barker*, 3 Wheat. [16 U. S.] 101; where *Lanusse* having advanced money in New Orleans, on the faith of letters written by *Barker* in New York, it was held that the money was to be replaced at New Orleans, and *Barker* was adjudged to pay the balance at New Orleans interest of ten per cent. The undertaking then being to replace the money in New York, that was the place where the debt was payable; and the plaintiffs being citizens of that state, the discharge of the defendant by the insolvent laws of Pennsylvania can have no operation on the contract, or the remedies to enforce performance.

As the decisions of the supreme court are authoritative, we have not thought it necessary to go into detailed examination of those in the circuit courts. They will be found in accordance with the principles settled in the supreme court on all the points arising in the case. [*Conard v. Atlantic Ins. Co. of New York*] 1 Pet. [26 U. S.] 404; [*D'Wolf v. Raband*] Id. 484; [*Camfranke v. Burnell*] [Case No. 2,342]; [*Golden v. Prince*] [Id. 5,509]; [*Glenn v. Humphreys*] [Id. 5,480]; [*Fairchild v. Shivers*] [Id. 4,611]; [*Riston v. Content*] [Id. 11,862]; [*Babcock v. Weston*] [Id. 703]; [*Van Remsdyk v. Kane*] [Id. 16,871]; [*Shieffelin v. Wheaton*] [Id. 12,783]; [*Hinkley v. Marean*] [Id. 6,523].

Defendant remanded to custody.

Case No. 17,976.

The WOODLAND.

[7 Ben. 110.]¹

District Court, S. D. New York. Jan., 1874.²

LIEN ON VESSEL—ADVANCES IN FOREIGN PORT—LIMITATION OF MASTER'S AUTHORITY—JURISDICTION OF ENGLISH ADMIRALTY.

1. The barque *W.*, a British vessel, bound from Montevideo to New York, put into St. Thomas, a Danish port, in distress. The master applied to N. & Co., merchants there, to do the business of the vessel. The cargo was discharged, some of it was found to be damaged and was sold, and the rest was reshipped on the vessel, after she had been repaired. Her repairs took about two months. For the balance of the amount claimed by N. & Co. for services and expenses for the vessel and her cargo, after deducting the proceeds of cargo sold, N. & Co. received from the master drafts on his owners, each containing on its face the words, "place to account of disbursements of barque *W.* and cargo, at this port, and recoverable against the vessel, freight and cargo." The owners of the vessel had written to the master, from St. John, New Brunswick, a letter containing these words: "As soon as H. & P. heard of the dis-

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

² [Affirmed in Case No. 17,977. Decree of circuit court affirmed by supreme court in 104 U. S. 180.]

aster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to S. & Co. to show their standing. With these we doubt not you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry; or, if it could be done better, draw on us, either payable here or in New York, in gold." H. & P. were the agents in New York of the owners of the vessel. S. & Co. had refused to furnish the funds, and N. & Co. had agreed to raise them by bottomry and respondentia, before this letter arrived. On its arrival, the agreement for bottomry and respondentia was given up, and a conditional agreement to take the master's drafts on the owners of the vessel was made. N. & Co. then offered to sell the proposed drafts to F. & Co., showing them the above passage in the letter of the owners. F. & Co. thereupon declined to buy the drafts, unless the master would put in the clause making them recoverable against vessel, freight and cargo. This was done, and F. & Co. then bought the drafts of N. & Co., at $2\frac{1}{2}$ per cent. discount, paying for them in cash. F. & Co., on the arrival of the vessel in New York, filed a libel against her to recover the amount of the drafts: *Held*, that the authority of the master to pledge the vessel to raise money for the repairs, was, by the letter of the owners, expressly limited to a pledge by way of bottomry; and that, as that letter was shown to F. & Co., they took the drafts with knowledge that the master was exceeding his powers in putting the hypothecation of the vessel into the drafts, and that F. & Co., therefore, had no lien on the vessel.

[Cited in *The Columbus*, Case No. 3,044; *The Wexford*, 7 Fed. 679; *The William Cook*, 12 Fed. 920; *Stephenson v. The Francis*, 21 Fed. 726; *The Scotia*, 35 Fed. 908; *The Lykus*, 36 Fed. 921; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 450, 9 Sup. Ct. 475.]

[Cited in *Mitchell v. Chambers*, 43 Mich. 164, 5 N. W. 67.]

2. Whether the high court of admiralty in England would, under the 5th section of the act of May 17, 1861 (24 Vict. c. 10), take jurisdiction of a suit in rem against this British vessel to enforce a lien for necessities furnished her in a Danish port, quære.

[This was a libel by J. H. Fechtenburg and J. A. Lovengreen, trading as J. H. Fechtenburg & Co., against the British barque *Woodland*.]

J. Ridgway, for libellants.
T. Scudder, for claimants.

BLATCHFORD, District Judge. The libel in this case sets forth, in its first article, that this is an action founded upon contract, civil and maritime. It sets forth, in its second article, that, in January, 1871, the British barque *Woodland* being in the port of St. Thomas, in the West Indies, and standing in need of advances for repairs and supplies, disbursements and charges, J. Niles & Co., merchants in St. Thomas, advanced to the master of said vessel, for the purposes of said vessel, and on the credit of said vessel and owners, the sum of \$4,606 24, for which the said master drew his two certain drafts or bills of exchange upon the owners of said vessel, dated January 25th, 1871, one for \$2,000, in American gold coin, payable ten days after sight, and one for \$2,606 24, in American gold coin, payable ten days after

sight, whereby he pledged the said vessel, freight and cargo for the payment of the same, and gave to whomsoever might be the holders of said drafts a lien upon said vessel, freight and cargo; that said J. Niles & Co. took up said money, on said drafts, of the libellants, and duly assigned to the libellants the said drafts, and said demand for repairs and supplies, disbursements and charges, and advances, and the lien therefor upon said barque, freight and cargo; and that the libellants advanced said money on the credit of said vessel and cargo and freight, and are owners of said lien. The third article of the libel sets forth, that said advances, repairs, disbursements and charges were material and necessary for said vessel, without which she could not safely proceed upon her intended voyage and earn freight and passage money; and that the whole amount of said advances, in American gold coin, is due and unpaid to the libellants. The fourth article of the libel sets forth, that neither of said drafts has been accepted or paid, although duly presented to said owners; and that the libellants are the legal owners and holders thereof. The libel prays process against the vessel and freight.

The answer of the owners of the barque (being the same persons who were her owners at the time of the transactions set forth in the libel) denies the foregoing allegation of the first article of the libel. It admits that the barque was in the port of St. Thomas in January, 1871, and denies all the other allegations of the second article of the libel, except as afterwards admitted in the answer. It denies the allegations of the third article of the libel. It admits that, while the barque was at St. Thomas, her master drew three drafts on her owners, and delivered them to the firm of J. Niles & Co. It denies that such drafts created any lien upon either vessel or cargo, and denies that J. Niles & Co. took up the money, on said drafts of the libellants, or assigned to the libellants the drafts, or the alleged demand for repairs, supplies, disbursements, charges or advances, or the alleged lien therefor, and denies that the alleged advances for which the drafts were given were made for the purposes of the vessel, or on her credit. It avers that a large portion of the alleged advances, if made at all, were made for the pretended purposes of the cargo of the vessel, and on the credit of such cargo, and neither the vessel nor the freight is liable for the same; and that this court has no jurisdiction over the case, and neither vessel nor cargo should be held responsible.

The barque was a British vessel, owned by persons residing at St. John, in New Brunswick. In November, 1870, while on a voyage from Montevideo to New York, with a cargo, she put into St. Thomas, a Danish port, in distress, leaking badly and needing repairs. The firm of J. Niles & Co. had been established there for twelve years, as com-

mission merchants and ship agents. The master of the barque, Captain Titus, applied to J. Niles & Co. to attend to the business of the vessel, stating that he had been instructed to do so by her owners, in the event of his having to call at St. Thomas. J. Niles & Co. took charge of the vessel and cargo. The cargo was discharged and stored, in order to ascertain the full extent of the damage to the vessel and to enable the repairs to be made. The vessel was taken out of water, the metal was stripped from her bottom, her bottom and her top sides were recalked, her spars and rigging were renewed or repaired, and she was put into a seaworthy condition to proceed on her voyage with her cargo. Some of the cargo was found to be badly damaged by sea water, and was sold at public auction, and the rest was reshipped on the barque for New York. This occupied about two months. For the balance of the indebtedness claimed by J. Niles & Co., for services and expenses for the vessel and her cargo, after deducting the net proceeds of the damaged part of the cargo that was sold at auction, J. Niles & Co. received from the master three drafts, drawn by him at St. Thomas, on the owners of the barque at St. John, New Brunswick (who are the present claimants of her), payable to the order of J. Niles & Co., in American gold coin, in New York, for the several sums of \$2,000, \$2,606 24 and \$1,500. The drafts were dated January 25th, 1871, and were payable ten days after sight, and each contained, on its face, the words, "place to account of disbursements of barque Woodland and cargo, at this port, and recoverable against the vessel, freight and cargo." The draft for \$1,500 was, as Mr. Niles testifies, "returned to Captain Titus, in accordance with agreement, for benefit of owners." J. Niles & Co. first endeavored, unsuccessfully, to obtain the necessary funds through the firm of G. W. Smith & Co., of St. Thomas. They then made an agreement with Captain Titus to raise the required funds by bottomry on the vessel and respondentia on the cargo. But that was not carried out, because it was superseded by a conditional agreement by J. Niles & Co. to take drafts drawn by the master on the claimants. On the 24th of December, 1870, the claimants wrote, from St. John, a letter to Captain Titus, at St. Thomas, to the care of J. Niles & Co., which letter reached St. Thomas on the 11th of January, 1871. In that letter, after acknowledging the receipt of advices from the master and from J. Niles & Co., in reference to the disasters to the vessel, the claimants say: "The vessel and freight are but partly insured, but, whether insured or not, you have simply to do your duty. We may say to you, however, that, unless the vessel is much worse than would appear from the vague information furnished us, you would not be justified in having her condemned. Should she be improperly condemned, we

could not recover a penny of our insurance. The underwriters talk of sending out their agents, and will certainly do so, unless they think everything has been fairly and properly done. On the other hand, should it cost more to repair than the vessel will be worth when done (she is valued in the policies at \$10,000), we would have trouble, at least, in collecting. As we are so entirely ignorant of the real facts of the case, we can give no positive advice in regard to the foregoing. It seems to us, almost, as if you were out of the world, the communication is so tedious. On receipt of Messrs. Niles' letter, this morning, we were greatly alarmed, and we telegraphed to Heaney & Parker, New York, as follows: 'Send following instructions to Titus, quickest manner, cable or otherwise, namely—make only such repairs as will bring vessel and cargo to New York, hiring extra hands; otherwise, proceed to St. John, under temporary repair, reshipping cargo on other vessel.' This explains itself. Of course, if you have to reship the cargo in another vessel, you will procure as low freight as possible, as the Woodland will receive the difference between what she was to have as per bills of lading and what you may have to pay from St. Thomas to New York. You will also have to retain a lien upon the cargo for its contribution towards the general average expenses. [As soon as Heaney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co., to show their standing. With these, we doubt not you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry; or, if it could be done better, draw on us, either payable here, or in New York, in gold.] We will merely add, that we hope you will use your best judgment, and your best exertions, for the interest of all concerned." G. W. Smith & Co. having declined to furnish the funds, and the agreement to provide them by bottomry and respondentia having been made, the letter from the claimants arrived, and, in consequence of their views expressed therein, the idea of bottomry was abandoned, and the conditional agreement to take drafts drawn on the claimants was made. To carry that out, J. Niles & Co. offered to sell the proposed drafts which were to be drawn to the libellants, at the same time showing to them the passage in the said letter from the claimants, authorizing the master to draw on them, and referring to bottomry, being the passage, above recited, embraced in brackets. After reading the passage, the libellants declined to purchase the drafts, on the ground that they were not acquainted with the standing of the claimants, unless the master would, in drawing the drafts, make them recoverable against vessel, freight and cargo. This was agreed to by the master and carried out. The libellants bought the

two drafts mentioned in the libel, at 2½ per cent. discount, and paid for them in cash to J. Niles & Co. J. Niles & Co. indorsed the drafts in blank and delivered them to the libellants. The money and materials furnished, and the work done, were furnished and done on the recommendation of surveyors appointed with the approbation of the master, and by the authority of the master.

It is contended, on the part of the claimants, that, according to the law of Great Britain, as the law governing in dealings with a British vessel, no implied authority exists in the master of a British vessel, even when in a foreign port, to pledge his vessel for necessaries, by any other form of hypothecation than a formal bottomry; and that the master of this vessel had no such authority, either express or implied.

There is no doubt, that, from the time of Charles II. until the year 1840, it was the law of Great Britain, that no implied lien existed on a vessel, for necessaries supplied or repairs made, so as to enable the creditor to attach and sell her, to pay the debt. The rule established was, that an express, formal instrument of hypothecation was necessary to give a lien for necessaries or repairs; that such instrument must be one making the repayment of the money borrowed dependent on the arrival of the vessel at her destination; and that a master had no authority to hypothecate a vessel in any other manner. *Stainbank v. Fenning*, 11 C. B. 51; *Stainbank v. Shepard*, 13 C. B. 418. The high court of admiralty in England took no jurisdiction of a suit against a vessel, founded on such an implied lien. *The Two Ellens*, L. R. 4 P. C. 161, 166. But, by the general maritime law and the civil law, such implied lien existed, and it extended to all vessels, foreign and domestic; and the courts of admiralty of the United States always took cognizance of suits in rem founded on such implied liens for supplies and repairs, in the case of foreign vessels. The rule of the courts of admiralty of Great Britain operated to the prejudice of persons in Great Britain furnishing supplies and repairs to foreign vessels, and also to the prejudice of foreign vessels, in the ports of Great Britain, in circumstances of distress or necessity, whenever personal credit failed the master. It was, therefore, provided by statute (Act Aug. 7, 1840; 3 & 4 Vict. c. 65, § 6), "that the high court of admiralty shall have jurisdiction to decide all claims and demands whatsoever * * * for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the * * * necessaries were furnished in respect of which such claim is made." The courts of admiralty of Great Britain hold that this provision gives a maritime lien on a foreign vessel for necessaries supplied in a British port, which can be enforced in admiralty against the vessel. *The Ella A. Clark*, 8 Law

T. (N. S.) 119; *The Two Ellens*, L. R. 3 Adm. & Ecc. 345, 354, and on appeal, in the privy council, L. R. 4 P. C. 161, 167. But such provision only applies to foreign vessels. On the 17th of May, 1861 (24 Vict. c. 10, § 5), it was enacted, that "the high court of admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it be shown, to the satisfaction of the court, that, at the time of the institution of the cause, any owner or part owner of the ship is domiciled in England or Wales." This provision is held to extend to necessaries supplied in a British port to a vessel belonging to another British port. But, it has been held by the high court of admiralty (*The India*, 9 Jur. [N. S.] pt. 1, 417), that the 6th section of the act of 1840 does not apply to necessaries furnished in a foreign port, and that the 5th section of the act of 1861 does not apply to foreign ships. The latter clause of the 5th section of the act of 1861 is held to have the effect to prevent the ship from becoming chargeable with the debt for necessaries at the time the necessaries are furnished, so that all valid charges on the ship, to which any person other than the owner of the ship who is liable for the necessaries is entitled, must take precedence of such debt, as a charge on the ship; but, as against the owner of the ship, the debt for necessaries becomes a charge on the ship when a suit in rem therefor against the ship is instituted. *The Pacific*, Brown & L. 243; *The Troubadour*, L. R. 1 Adm. & Ecc. 302; *The Two Ellens*, L. R. 4 P. C. 161, 170.

I do not deem it necessary to inquire whether the high court of admiralty in England would, under the 5th section of the Act of 1861, take jurisdiction of a suit in rem against this British vessel, to enforce the lien claimed in this case for necessaries supplied to such vessel in the Danish port of St. Thomas. For, I am of opinion that the transactions above recited created no lien on this vessel. I do not mean to intimate that the jurisdiction of this court fails because the necessaries were furnished to a foreign vessel at a port foreign both to her and to the United States, or that jurisdiction in such cases, in rem, cannot be exercised by the admiralty courts of the United States.

The authority of the master of a vessel as to repairing her or supplying her with necessaries, whether abroad or at home, is limited by the express or implied authority derivable from the laws of the vessel's country, or the usage of the trade, or the business of the ship, or the instructions of the owner; and he cannot bind either the vessel, or her owner, beyond such limits. In respect of money advanced in a foreign port, for necessaries, the inquiry is not as to the authority of the master by the law of the foreign port, but as to whether the money was advanced for necessaries, or within the scope of the master's authority, according to the law of the vessel's country. The master has no power to bind the owner

of the vessel, or the vessel herself, beyond the authority given to him by the owner; and the extent of such authority must be limited to the express instructions of the owner, or to instructions to be implied from the law of the country where the vessel belongs and the owner resides. Private instructions, unknown to the person who advances money for necessities, cannot affect the rights of such person, where he knows that the general maritime law of the country to which the vessel belongs imports authority in the master to make the contract relied on. But, even where such law, in the absence of instructions, would import such authority, instructions which limit such authority will, if made known to the party who contracts with the master, before the contract is made, operate to prevent such party from claiming against the owner of the vessel anything which does not fall within the scope of such limited authority. *Abb. Shipp.* (Am. Ed. 1829) pp. 190-192; *Pope v. Nicker-son* [Case No. 11,274].

In the present case, the libellants have put in evidence the letter of December 24th, 1870, from the claimants to the master. That letter was made known to J. Niles & Co. and to the libellants. It authorizes the raising of the funds by drafts on Heaney & Parker, or by drafts on the claimants, and states that the claimants have no doubt that the master will be able to obtain funds in that way. But it contemplates, as the alternative means, only a bottomry. It authorizes a bottomry if a resort to drafts fails. But it authorizes only drafts or a bottomry. It must be regarded as excluding the master from resorting to anything but drafts or a bottomry, and as excluding him from resorting to the creation of a lien on the vessel by any form of hypothecation other than a bottomry, or to the creation of such a lien as is asserted in this case, whether an implied lien to result from the transactions, or whatever lien the language of the drafts may be claimed to create. J. Niles & Co. and the libellants declined to take the master's drafts, as authorized by the letter, and insisted that the master should undertake to create a lien on the vessel by other means than a bottomry. They insisted that the master should exceed his authority, as defined and limited by the letter.

It is of no consequence to show that a resort to bottomry would have been more expensive to the claimants. They had a right to limit the authority of the master, and they did so. It is of importance to so administer the maritime law, that vessels in distress in foreign ports shall not be deprived of the means of obtaining relief, but it is no less important that masters of vessels, and persons dealing with them with knowledge of the instructions under which they are acting, shall keep within the limits of such instructions.

As this is not a case communis juris, and both parties are foreigners, and the contract was made with reference to the law of the vessel's country, it is a case where the ques-

tion of the liability of the owners of the vessel can, with especial propriety, be determined by the tribunals of such country.

The libel must be dismissed, with costs.

[This decree was affirmed by the circuit court (Case No. 17,977), and the decree of the latter court was affirmed by the supreme court (104 U. S. 180).]

Case No. 17,977.

The WOODLAND.

[14 Blatchf. 499.]¹

Circuit Court, S. D. New York. June 13, 1878.²

LIEN ON VESSEL—DRAFTS BY MASTER—REPAIRS IN FOREIGN PORT—FRAUD.

A British vessel, in distress, put into the Danish port of St. Thomas. Repairs to her were necessary. N. attended there to the business of the vessel, and, with the connivance of T., the master, made out fraudulent accounts against the vessel, and T. drew three drafts on the owners of the vessel, for over \$6,000, which were expressed, on their face, to be "recoverable against the vessel, freight and cargo." F., in good faith, and without knowledge of the fraud, discounted two of the drafts. They not being paid, F. libelled the vessel and freight, in rem, at New York: *Held*, that the fraud of N. and T. did not invalidate the drafts in the hands of F. *Held*, also, that the question of a lien on the vessel must be determined by the law of Great Britain, and that, by that law, the master had no right to create a lien on the vessel and freight by any other instrument than a bottomry bond.

[Cited in *The Wexford*, 7 Fed. 679; *The Scotia*, 35 Fed. 908; *The Lykus*, 36 Fed. 921; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 450, 9 Sup. Ct. 475.]

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

[This was a libel by J. H. Fechtenburg and another, trading as J. H. Fechtenburg & Co., against the British barque Woodland. There was a decree by the district court in favor of the vessel (Case No. 17,976), and libellants appeal.]

James Ridgway, for libellants.

George A. Black, for claimants.

HUNT, Circuit Justice. In this cause I find the following facts: "The British barque Woodland, owned by the claimants, who are residents of St. John, New Brunswick, in November, 1870, while on a voyage from Montevideo to New York, with a cargo, being in distress, put into the Danish port of St. Thomas, for repairs. Repairs were necessary before she could safely proceed on her intended voyage. On December 24th, 1870, the claimants wrote a letter, from St. John, to Captain J. H. Titus, the master of the barque, at St. Thomas, which he received on January 11th, 1871, and, before any ad-

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

² [Affirming Case No. 17,976. Decree of circuit court affirmed by supreme court in 104 U. S. 180.]

vances had been made by the libellants, he exhibited the same to them. This letter is set forth in the apostles. J. Niles, who carried on business under the name of J. Niles & Co., attended to the affairs of the vessel at St. Thomas, landed the cargo, and sold a portion of it, on which he received an amount sufficient to reimburse all the moneys expended, and charged commissions and insurance amounting to \$6,875. As to the insurance, none was actually effected, and the commissions are on an excessive valuation. Titus, the master, approved all the bills, drew drafts on his owners for the balance, \$6,106.24, which were expressed, on their face, to be 'recoverable against the vessel, freight and cargo.' Two of these drafts the libellants discounted, and for them this recovery is sought. The third was given by Niles to the master, upon a corrupt understanding, that it was to be his share. The two drafts have not been accepted or paid, and the libellants are the owners thereof. By the law of Great Britain, the master of a British vessel has no implied authority, even when in a foreign port, to pledge his vessel for necessities, or create a lien thereon by any other form of hypothecation than a formal bottomry bond; and the master of this vessel had no such authority, either express or implied. The vessel and freight only were libelled in this action. The bills were received, and the money advanced upon them by the libellants, in good faith and without knowledge of the fraudulent acts of Niles and the captain of the Woodland."

Of the facts that the bark put into St. Thomas in distress, that repairs were there made upon her, that the drafts in question were made professedly on account of such repairs, and that the libellants advanced their money upon them, without knowledge of any fraud on the part of Niles and the captain, there can be no doubt.

The bills for the repairs were made out extravagantly, fraudulently and collusively. If the drafts were made by those having authority to act as the agents of the owners of the vessel in such an emergency, and to bind them by drafts given honestly and wisely, I cannot see that the frauds of such agents can be charged upon the bona fide holders of the drafts, so as to defeat their collection. The captain was not the agent, in any manner, of the libellants, but the agent of the owner and of the vessel, so far as his position gave him authority, and for his frauds the owner is the party responsible. It is proved, affirmatively, by the evidence of the libellants, that they paid their money for the drafts before their maturity, and without knowledge or suspicion of fraud or irregularity; and there is no evidence to contradict their statements. I, therefore, find and decide, that, so far as the fraud and irregularity are concerned, the drafts were not avoided in the hands of the libellants.

Neither am I able to concur in the conclu-

sion, that the authority of the captain was limited and restricted by the letter of his owners, dated December 24th, 1870, and which was shown to the libellants. It is contended that this letter authorizes the captain to draw on Heaney & Parker for the expenses, or on the owners, if it can be better done, or to give a bottomry bond, and that it excludes the authority to create a lien on the vessel in any other form. The language of the letter supposed to have this effect, is as follows: "As soon as Heaney & Parker heard of the disaster, they wrote you to draw on them for funds to pay for your repairs, and sent letters to G. W. Smith & Co., to show their standing. With these, we doubt not, you will be able to obtain your funds cheaply, and thereby avoid the great expense of a bottomry—or, if it could be done better, draw on us, either payable here or in New York, (in gold)." The letter proceeds: "We will merely add, that we hope you will use your best judgment and your best exertions for the interest of 'all concerned,' and, inasmuch as you must have friends to advise and assist you, endeavor to select those who are honest and honorable, and have nothing to do with men who would counsel fraud, as too many are disposed to do when they think they have an opportunity to make money out of underwriters." This is a letter from the owners, at a distance, to their captain, in an emergency, giving their advice and counsel, and suggesting what appear to them the best modes of relieving himself and his vessel from the difficulties surrounding them. It advises, first, that drafts be drawn on Heaney & Parker, or that drafts be drawn on them directly, payable either at St. John, N. B., or in New York, and that the expense of a bottomry proceeding be avoided. There is not, however, anything that will bear the construction, that he may not resort to any legal method of obtaining the necessary repairs for his vessel. This is strikingly evident from the clause following, where the letter says: "We hope you will use your best judgment and your best exertions for the interest of all concerned." The sum of it is, that the writers suggest what to them, at a distance, appear to be the better modes of raising the money, but leave it, in the end, to the judgment and discretion of the captain. This left it with him to raise the supplies in any manner that the law would permit. If he had raised them by drafts on Heaney & Parker, or by drafts on the owners, there would have been secured the personal liability of the parties named; if by bottomry bond, with the formalities required by law, a lien would have been created upon the vessel. He took neither of these courses, but drew bills upon his owners at ten days' sight, concluding with these words, "which place to the account of disbursements of bark Woodland and cargo, at this port, and recoverable against the vessel, freight and cargo," and signed them as master; "where-

by," (the libel alleges,) "he pledged the said vessel, freight and cargo for the payment of the same, and gave to whomsoever might be the holders of said drafts or bills of exchange, a lien upon said vessel, freight and cargo;" and the libel prays that the court may condemn the said vessel, her freight and cargo, to pay the said sum, with interest and costs.

The question here presented is—did the transactions described, or did the drafts thus given and thus expressed, create a lien upon the vessel and her freight? Had this English master of an English vessel authority to create a lien in the foreign port of distress, in any other mode than by a written instrument of hypothecation, which made the debt dependent upon the safe arrival of the vessel, to wit, by a bottomry bond? If the vessel had sailed under the flag of the United States, and her master had been a citizen of the United States, this question would be answered in the affirmative. The case of *The Emily Souder*, 17 Wall. [84 U. S.] 666, decides, that the furnishing of the supplies and materials in a foreign port of distress, itself creates a lien upon the vessel in favor of the person furnishing them, and that such lien is not destroyed by the acceptance of drafts on the owners, in the ordinary form, making no reference to the lien, and the departure of the vessel from the port of distress, and that the admiralty has jurisdiction to enforce this lien against the vessel.

But, it seems to be settled, that the question is to be determined by the law of the country or which the master was a citizen, and under whose flag the vessel sailed, and not by the law of the port where the supplies were furnished, or of the country where the lien is sought to be enforced. *Lloyd v. Guibert*, 6 Best & S. 100, 117.

On the point of the right to create the lien otherwise than by bottomry security, reference is made to *Carrington v. Pratt*, 18 How. [59 U. S.] 63, where Nelson, J., uses this language: "It has been recently held, in the court of exchequer, in England, that the master can pledge the ship for repairs, or loan of money for that purpose, in the foreign port, only by bottomry security; and that, in the absence of this, the merchant must look to the responsibility of the owner or master." The point was not decided in that case, but was expressly waived by the court. In *Stainbank v. Fenning*, 11 C. B. 51, the master borrowed money necessary for repairs, and gave a mortgage or hypothecation of the vessel for the amount, payable absolutely, and drew bills on the owner for the same, the payment not being made dependent on the arrival of the vessel. It was held, that the lenders could not proceed against the vessel in the admiralty court of England, and, therefore, had no insurable interest on which the suit could be maintained. *Stainbank v. Shepard*, 13 C. B. 418, was an action by the same plaintiff against

different defendants, upon substantially the same facts, and it was held, that, there not being such an hypothecation as could be enforced in the court of admiralty, the payment of the money not being made to depend upon the arrival of the vessel, the merchant had no insurable interest in the ship. Both of these cases were decided upon the ground, that it is essential to the validity of hypothecation, that the sea risk should be incurred by the lender, and that the pledge on the ship should take effect only in the event of her safe arrival. The opinion in the latter case was delivered by Baron Parke, and in the former by Jervis, Chief Justice. In each case, as in the case before us, the instrument of hypothecation was accompanied by the drafts of the master upon the owners. Upon the authority of these cases, and from my high respect for the experience and learning of the district judge who decided this case below, I shall affirm the decree dismissing the libel [Case No. 17,976].

The amount in controversy, with the added interest, make this case one which can be carried by appeal to the supreme court of the United States, and I make the decision with the less hesitation, knowing that the party can correct the error, if there be one, by such appeal. Should I be mistaken in supposing that there is a right of appeal, I will entertain a motion for a rehearing, and confer with such of my brethren of the supreme court as I may be able conveniently to reach.

[This decree was affirmed on appeal to the supreme court. 104 U. S. 180.]

Case No. 17,978.

WOODMAN v. KILBOURN MANUF'G CO.

[1 Abb. (U. S.) 158; 1 Biss. 546; 6 Am. Law Reg. (N. S.) 238.]¹

Circuit Court, D. Wisconsin. Jan. Term, 1867.

ORDINANCE OF 1787—POWER OF CONGRESS TO REGULATE COMMERCE—NAVIGABLE STREAMS.

1. The ordinance of 1787, for the government of the Northwest Territory, has been superseded by the adoption of the constitution of the United States, and the admission to the Union of the states formed from that territory; and the provision of the ordinance declaring the navigable waters leading into the Mississippi and the Saint Lawrence "common highways and forever free," does not restrict the powers of congress, or of the states, to legislate respecting those waters.

2. In the absence of any conflicting enactment by congress relative to the use of a navigable stream, the state within which such stream lies has power to legislate respecting it.

3. The right of the public to use a navigable river as a highway, is paramount to every other use of the water; but it does not exclude or forbid the legislature of the state (where no con-

¹ [Reported by Benjamin Vaughan Abbott, Esq., and James H. Bissell, Esq., and here compiled and reprinted by permission. The syllabus and opinion are reprinted from 1 Abb. (U. S.) 158, and the statement from 1 Biss. 546.]

flicting enactment by congress exists) from authorizing the construction of public improvements upon the stream, although they may involve a partial obstruction or inconsiderable detention to navigation.

[Cited in *Benjamin v. Manistee R. Imp. Co.*, 42 Mich. 634, 4 N. W. 486.]

4. Under the constitution and laws of Wisconsin, any obstruction to the use of a navigable stream by the public for purposes of navigation, which is erected without a constitutional legislative authority, is a nuisance, and liable to be abated either at the suit of an individual or at the instance of the state.

[Cited in *Ladd v. Foster*, 31 Fed. 834.]

[This was a bill by one Woodman against the Kilbourn Manufacturing Company to enjoin it from constructing a dam across the Wisconsin river.

[I. Holmes, for complainant, cited *Davis v. Mayor, etc.*, of New York, 14 N. Y. 526; 2 Story, Eq. Jur. § 927; *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Brown v. Chadbourne*, 31 Me. 9; *Moore v. Sanborne*, 1 Gibbs, 519; *Morgan v. King*, 35 N. Y. 454.

[G. W. Lakin, also for complainant, cited *City of Georgetown v. Alexandria Canal Co.*, 12 Pet. [37 U. S.] 94; *Crowder v. Tinkler*, 19 Ves. 617; *Irwin v. Dixon*, 9 How. [50 U. S.] 25; 2 Story, Eq. Jur. §§ 921-924; 9 Stat. 83, land grant to improve Fox and Wisconsin rivers; act of Wisconsin (Sess. Laws 1846, p. 16) accepting the grant; act of same session (p. 58) to provide for the improvement, etc.; memorial of legislature of Wisconsin territory approved January 20, 1846, to congress; Sess. Laws 1846, p. 229; memorial of legislature of Wisconsin to congress, approved December 18, 1843; appendix to Sess. Laws 1844; article 4 of ordinance of 1786; Laws 1839. Wis. T. p. 13; article 9, § 1, of the constitution of Wisconsin incorporating the same provision in the same language (Rev. St. Wis. 1853, c. 1, § 1, enacts the same); *Pennsylvania v. Wheeling & B. Bridge Co.*, 9 How. [50 U. S.] 647, etc.; 13 How. [54 U. S.] 518; *The Hine v. Trevor*, 4 Wall. [71 U. S.] 555 (asserts the broad doctrine that the principles of admiralty jurisdiction, as conferred on the federal courts by the constitution, extend wherever ships float and navigation successfully aids commerce, whether internal or external); *The Moses Taylor*, Id. 411; *The Genesee Chief*, 12 How. [53 U. S.] 457; *Jackson v. The Magnolia*, 20 How. [61 U. S.] 296.]²

Finches, Lynde & Miller, for defendants.

MILLER, District Judge. It is alleged and charged in the bill, that the Wisconsin is one of the navigable rivers leading into the Mississippi river, and a common highway, free to be navigated and used as such highway by complainant and all other citizens of the United States. That said river is navigable from its source to its mouth, and

² [From 1 Biss. 546.]

capable of being used for rafting and for driving lumber, and also for steamboat navigation; and that it runs through a district of pine lands lying above the town of Newport. That the owners of said lands, including complainant, annually raft down said river large quantities of lumber and logs to saw mills and to market; and that they are dependent upon the unobstructed use of the river in this employment. The bill further charges, that in 1859 a dam was constructed in said river at the town of Newport, by a chartered company, for hydraulic purposes, which being an obstruction to navigation, was partly removed. And that the company defendant are building a dam at the same place, using a portion of the old dam; and that this company are doing so under color or in pursuance of an act of the state legislature, entitled "An act to aid in the development of manufacturing interests in this state," approved April 10, 1866, as follows: "The Kilbourn Manufacturing Company, whenever organized in pursuance of any law in this state, shall have power, and said company is hereby authorized to complete the water power in sections three, four, nine, and ten in township thirteen north, of range six east, in the counties of Columbia and Sauk, by raising the dam sufficient height for that purpose, not exceeding three feet above the usual low water mark in the Wisconsin river, and so forming the same that rafts of lumber can pass safely and conveniently, without hindrance or delay." The bill then charges that it is physically impossible to build a dam at that point, the town of Newport, in such form as that rafts of lumber can pass safely or conveniently, or without hindrance or delay; and that such dam would wholly obstruct the navigation of the river by steamboats and other vessels; and will entirely obstruct navigation up stream; and that the structure, as at present towards completion, has obstructed free passage to rafts, and caused to the owners thereof delay and damage. It is further charged, that the act authorizing the construction of the dam is contrary to the ordinance of 1787, the constitution and laws of the United States, and of this state. Defendants Anderson and Kilbourn are alleged to be agents of the company defendant in the work of building the dam. The bill prays an injunction restraining defendants from further proceeding in the building of the dam; and that at the final hearing the dam may be decreed to be abated as a common nuisance.

Affidavits read on the part of complainant sustain the charges in the bill in regard to the obstruction of navigation by the proposed dam. Those on the part of defendants state that the dam will be an improvement to navigation at that point. It does not satisfactorily appear that the river above the site of the dam is navigable for steamboats employed in the ordinary business of commerce. It is conceded that rafts of logs

and lumber can be floated down stream from several miles above the dam.

The ordinance of the confederate congress, for the government of the territory of the United States northwest of the river Ohio, adopted July 14, 1787, created a temporary government; and also contained six articles, "to be considered as articles of compact between the original states and the people and states in said territory, and forever remain unalterable, unless by common consent." After the adoption of the constitution of the United States, an act of congress, passed August 7, 1789 (1 Stat. 50), continued the ordinance in force, and modified it in conformity to the conditions of the constitution, so far as it related to the temporary government of the territory.

That portion of the ordinance referred to in the bill is: "The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor." The constitution of the United States, subsequently adopted, contains the provision that "new states may be admitted by the congress into this Union," which implies that new states shall be admitted into the Union on an equality with the original states. The ordinance directs that the territory may be divided into not less than three nor more than five states; but the territory has been divided into six states, including that portion of Minnesota east of the Mississippi river. The ordinance further directs, that in case of a division into five states, one boundary shall be an east and west line drawn through the southerly bend or extreme of Lake Michigan, which we know to have been entirely disregarded by congress in the acts admitting new states. If the ordinance were obligatory in every particular, and not altered by common consent, nor superseded by the constitution of the United States, the states embraced within the Northwest Territory could not have been admitted into the Union on an equality with the other states, which is a fundamental principle of the constitution, the basis of this Union. Each new state presented its constitution to the consideration of congress, with its application for admission into the Union under the federal constitution. Congress, composed of members from the original states, approved the constitution of the new state thus presented, and passed an act for its admission into the Union. By the act of congress admitting the new state upon its application, the several articles of the compact were not merely altered by the common consent required in the ordinance, but were superseded. "Whatever may have been the force accorded to the ordinance at

the period of its enactment, its authority and effect ceased, and yielded to the paramount authority of the constitution of the United States from the time of its adoption." *Pollard v. Hagan*, 3 How. [44 U. S.] 212; *Parmalee v. First Municipality of New Orleans*, Id. 589; *Strader v. Graham*, 10 How. [51 U. S.] 82; *Dred Scott v. Sandford*, 19 How. [60 U. S.] 393, 490-492. It therefore follows that the act of the legislature authorizing the construction of the dam in question is not prohibited by the ordinance.

The general government, under the constitutional power of congress "to regulate commerce among the several states," has done no act prohibiting or interfering with this state in regulating the navigation of the Wisconsin river. No act of congress has been passed upon the subject of commerce on that river, which includes the navigation. Nor have boats or vessels been licensed, nor ports of entry established on said river by federal authority. The Wisconsin river being a domestic stream, rising, running, and emptying into the Mississippi river within the state, local legislation is unrestricted by federal authority, unless it is in conflict with the navigation laws, or some other enactments of congress. In the absence of action on the part of the United States in regard to the navigation of the river, as a stream bearing a necessary relation to commerce among the several states, the power of the legislature, under the state constitution, to pass the act authorizing the construction of the dam in question, is the next subject for consideration.

The Wisconsin river is a meandered stream according to the government survey of public lands. Although it is not navigable in its unimproved condition above the site of the dam for steamboats navigating the Mississippi river, yet it is navigable in the common sense of the term. The soil or bed of the river is not granted to riparian purchasers *usque ad filum*, but the body of the stream is reserved to the public. The river is therefore open and free to all persons for purposes of navigation; not a personal right, but subject to governmental authority. The right to unobstructed navigation of the river is to be regarded as a clear and undoubted right, paramount to every other use of the water. It is an inherent paramount right of the people, but not exclusive of a partial obstruction or inconsiderable detention by a dam constructed in pursuance of governmental authority for the development of the country, for the accommodation of public necessities, or of commerce, or travel upon the land. Partial diminution of the navigability of a stream for these purposes, unless restrained by the superior legislation or authority of the general government, has been within the established power of the states since the formation of the government. In the case of *Wilson v. Blackbird Creek Marsh Co.*, 2 Pet. [27 U. S.] 245, it appears that the

creek was a navigable stream flowing into the Delaware river; and that the legislature of the state of Delaware passed an act empowering the company to build a dam in said creek for the purpose of excluding the water from the surrounding marsh, and thereby enhancing the value of the property on its banks and probably improving the health of the inhabitants. The dam was a total obstruction of navigation. The court decided that the measure authorized by the act stops a navigable stream, and must be supposed to abridge the rights of those accustomed to use it. But this abridgment, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of the state of Delaware and its citizens. In *Martin v. Waddle*, 16 Pet. [41 U. S.] 410, the court say: "When the Revolution took place, the people of each state became themselves sovereign, and in that character held the absolute right to all the navigable waters and the soil under them for their own common use, subject only to the rights surrendered by the constitution of the general government." The admission of the new states into the Union on an equality with the original states gives them the same absolute rights, notwithstanding the title to the soil was originally in the United States. *Pollard v. Hagan*, 3 How. [44 U. S.] 212. See, also, *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1; *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. [54 U. S.] 519, and 18 How. [59 U. S.] 421, 430, 432; *Gilman v. Philadelphia*, 3 Wall. [70 U. S.] 713; and the opinion of Grier, J., in the *Passaic Bridge Case*, *Id.* 782.

It cannot be claimed that the complainant, a citizen of the state of Massachusetts, has a right to the navigation or use of the Wisconsin river superior to that of the inhabitants of the state. By the federal constitution "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

It is claimed, on the part of the complainant, that the act authorizing the construction of the dam in question is repugnant to the provision in article 9 of the state constitution, that "the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost, or duty therefor." This article was incorporated into the constitution from the ordinance of 1787. The navigable waters, such as the Wisconsin river, running into the Mississippi river, shall be common highways, and their navigation, to the extent of their navigable capacity, cannot be materially obstructed. Such rivers may be considered navigable waters without any such constitutional provision, as congress has the power to regulate commerce between the states, which includes the navigation of

navigable streams. The paramount right of navigation being in the people who may wish to use a navigable stream, any obstruction, however inconsiderable, without constitutional legislative authority, is a nuisance, to be abated at the suit of an individual or of the state.

This principle is prescribed in a general law of the state, "that all rivers and streams of water in this state, in all places where the same have been meandered and returned as navigable by the surveyors employed by the United States government, be declared navigable to such an extent that no dam, bridge, or other obstruction may be made in or over the same without the permission of the legislature." This law establishes by statute the inherent common law right of the legislature to investigate and ascertain the extent of the navigability of streams, and of the kind of proposed partial obstructions to navigation, for the general convenience and use of the people. In the Case of the Blackbird Creek, in the state of Delaware, navigation was totally obstructed by the dam built in pursuance of a legislative act; but whether such an obstruction could be built in one of the navigable streams of Wisconsin, this case does not require a decision. It is very clear that neither in Delaware nor in Wisconsin can even a partial obstruction be made without governmental authority. The legislature has the power to inquire into the necessity for a structure, such as a bridge or dam, over or in a navigable stream, and to prescribe the conditions and plans upon which the proposed improvement may be made. It is also the province of the legislature to inquire into the navigability of a stream and the uses to which surplus waters may be applied. The navigability of the stream is the subject of proof. The return of the surveyors, showing a stream to have been meandered, is not conclusive. *Jones v. Pettibone*, 2 Wis. 308. That case announced the principle that the effect of the statute is not to declare that meandered streams are navigable in fact, so as to dispense with proof of their navigability, when the fact is to be established, but only that they shall be regarded as navigable to such an extent that no obstruction shall be placed in them without the consent of the legislature. The statute declares that the legislature possesses the exclusive power to direct and control the municipal policy of the state in regard to improvements and partial obstructions of navigable streams. The constitutional provision is a declaration of a principle inherent in a sovereign state of the Union, and the statute is notice of such power.

It is not for an individual, but for the state to decide whether the whole of a public highway is necessary for the public accommodation or not; hence any partial obstruction of any navigable stream or highway,

or any portion of it, without legislative authority, is a nuisance. The public have a right to the use of the entire highway; and no citizen can appropriate a portion, upon the principle that enough remains for public use. The legislature is no judge of that. The act authorizing the construction of the dam in question is in the nature of a public grant of the use of surplus water of the river for the improvement and development of the country, and for the accommodation of the people in the vicinity. In making this grant, the legislature probably were influenced by the consideration that the man who builds a mill or manufactory in a new country is a public benefactor. See *People v. City of St. Louis*, 5 Gilman, 351; *Hart v. Mayor of Albany*, 9 Wend. 571; *La Plaisance Bay Harbor Co. v. City of Monroe*, Walk. [Mich.] 155; *Flanagan v. City of Philadelphia*, 6 Wright [42 Pa. St.] 218. Several acts have been passed by the state legislature, from time to time, authorizing the construction of dams in meandered rivers, upon such plans, or in such forms, that rafts of lumber can pass safely and conveniently, without hindrance or delay. Such acts were also passed by the territorial legislature while the ordinance was considered in force in the territory. I have come to the conclusion that the act authorizing the construction of the dam in question is within the constitutional power of the legislature.

The bill complains of a prospective abridgment of complainant's right to the free navigation of the river. He has not been injured by the dam at present in process of construction. Defendants must be allowed a reasonable time to construct the dam, not exceeding three feet in height above low water mark, and in such form as rafts of lumber can pass safely and conveniently without hindrance or delay, according to the act. The work cannot be restrained by injunction, upon the theory that no dam can be constructed at that point that will not obstruct the navigable use of the river. The legislature have authorized defendants to make the experiment, if a dam can be constructed as required by the act, and the court will permit the practical test to be applied. If the speculations of complainant's bill should be realized, and defendants' efforts prove unsuccessful, the dam will have to be abated at their costs. Mere theoretical opinions are not sufficient in law for enjoining the progress of a work in the nature of a public improvement authorized by a legislative act.

If a dam shall be constructed according to the requirements of the act, the paramount right of those navigating the river with rafts of lumber is satisfied. They cannot complain if the dam should detain their rafts a few minutes, or should require caution in passing through or over it. The only question on final hearing will be whether the dam not exceeding three feet above the low water mark is so constructed that, with

proper care and caution, "rafts of lumber can pass safely and conveniently without hindrance or delay." Since the year 1838 a dam with a lock for ascending and descending trade has stood in the Fox river, at Depere, in this state. The time required for passing the lock is no hindrance or delay. In the year 1840 a bill was brought before me, as territorial judge, to restrain the erection of a bridge over the Milwaukee river at Milwaukee, which is at that place an arm of the lake, navigable for all classes of boats and vessels. Being satisfied that the bridge was to be built with a draw, which could be opened or closed in fifteen or twenty minutes, I considered that the interests of commerce must submit to an inconsiderable delay or inconvenience for the accommodation and necessity of the people, and dismissed the bill. Since that day bridges with draws have been constructed, in pursuance of legislative acts, over almost every river in the land. Dams, too, are built by the same authority in navigable streams, with locks or sluices, for the accommodation of the whole people.

The injunction prayed for is refused.

NOTE [from 1 Biss. 546]. At the September term, 1868, this case came on for final hearing, upon the pleadings and proofs, before Justice Davis and District Judge Miller, and the bill was dismissed. As to enjoining a public work, see case of *Hartford Fire Ins. Co. v. City of Chicago* [unreported]. The United States may enjoin a work of internal improvement conducted by state authority, if it interferes with improvements on navigable waters made by authority of congress. In such case the power of the federal government is exclusive. *U. S. v. Duluth* [Case No. 15,001]. See also, *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. [59 U. S.] 421; *Conway v. Taylor's Ex'r*, 1 Black [66 U. S.] 603; *Mississippi & M. R. Co. v. Ward*, 2 Black [67 U. S.] 485; *Gilman v. Philadelphia*, 3 Wall. [70 U. S.] 713.

Case No. 17,979.

WOODMAN v. STIMPSON.

[3 Fish. Pat. Cas. 98; Merw. Pat. Inv. 665.]¹
Circuit Court, D. Massachusetts. June, 1866.²

CONSTRUCTION OF PATENT—PRIOR INVENTION—
COMBINATION—MACHINE FOR ORNA-
MENTING LEATHER.

1. Patents are to be construed, if possible, so that the inventor shall have the benefit of what he has actually invented.

[Cited in *Stover v. Halstead*, Case No. 13,509.]

2. To ascertain what the patentee has invented, we look in the first place at the claim.

3. A new combination or arrangement is patentable, although each part, taken by itself, is old.

4. The inventor of a machine has made it for all the uses to which it is applicable, and no one

¹ [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 665, contains only a partial report.]

² [Reversed in 10 Wall. (77 U. S.) 117.]

can obtain a second patent for the machine by applying it to a new use.

[Cited in *Stow v. Chicago*, 104 U. S. 550; *McComb v. Brodie*, Case No. 8,708.]

5. The second patent, if good, must be for the improvement in the art in which the new application is made.

6. The true test of invention is not whether an ordinary mechanic can make the combination, if it is suggested, but whether he would make the combination without suggestion, by means of his ordinary knowledge.

7. The date of invention is the time when the patentee conceives the idea of doing the thing in substantially the way in which he patents it.

8. Prior machines relied upon to defeat a subsequent patent must have been working machines, which have either done work or been capable of doing it. They must not be mere experiments, afterward abandoned.

9. If a previous patent so far describes a machine covered by a subsequent patent that any mechanic of ordinary skill could, from the description in the first patent, construct or supply all the essential parts of the mechanism described in the second patent, the latter is void.

10. The value of an event, by which as aid to recollection, a witness attempts to fix the date of the use of a prior machine, depends, first, on the importance of the event itself, and next, on the closeness of its connection or association with the fact which is sought to be proved.

11. The patent of Woodman, dated March 29, 1864, for "improved machine for ornamenting leather," is not for "a pebbling roller, however it may be used," but for a combination of the short revolving roller with a figure engraved or sunk on its periphery, a radial arm to give pressure, and springs to equalize the pressure, moving over the table in such a manner that the rollers shall be properly pressed upon the leather and move over it in substantially the same line at each operation of the machine.

12. In considering whether one element of a combination is substantially the same as an element of another combination, the fact that one works better than the other, coupled with the fact that the change is not within the ordinary knowledge and skill of all mechanics, is highly important and often decisive.

This was an action on the case [by Charles T. Woodman against James C. Stimpson] tried by LOWELL, District Judge, and a jury, which was brought to recover damages for the infringement of letters patent for an "improved machine for ornamenting leather," granted to Charles T. Woodman, March 29, 1864. The invention consisted in producing a pebbled or boarded grain or finish upon leather, by subjecting it to the pressure of a short revolving cylinder or roller of steel or other metal, having the required design or figure engraved upon its periphery, and rolling over a table supported by springs on its under side, and so arranged as to be raised or lowered when desirable. The claims of the patent were as follows: "I. Boarding or pebbling skins or leather by means of a single short cylinder rolling over a table, with the requisite pressure, substantially as described. II. Raising and lowering the table A by means of the toggles Q, arm S, spring U, arm T, and cam P, or their equivalents, substantially as set forth and for the purpose described."

T. L. Wakefield, for plaintiff.

S. B. Ives, G. L. Roberts, and Causten Browne, for defendant.

LOWELL, District Judge (charging jury): I congratulate you that we have got so near the end of our labors in this case. The questions of law which apply to it have not been fully argued in your hearing, because it has happened to be more convenient for counsel to take them up at a time when you were not present, and when it was more for your convenience not to be present. I shall endeavor to explain my views in such a way that, whether right or wrong, they can not be misunderstood; because if they are wrong, either party can have recourse to the supreme court of the United States, by which any such points of law may be definitely and forever settled, so far as this case is concerned.

What the plaintiff says is his invention he is bound to describe and set out in what has been very properly called his "title deed." The law requires that the patent office shall, before a patent is issued, have a description from the inventor, of his machine—taking the case of a machine, which is this case—a substantial, full, and accurate description of the machine, so that anybody acquainted with the art to which it refers, should be able to make one by the description, accompanied with drawings and with a model, and, of course, we are to look to that description and to what is technically called "the claim," what he says he claims as new, to see what his invention is. If he had made a mistake in his claim by having imperfectly described his machine, that can be corrected by another process; that question does not, however, arise in this case.

Now, there is no dispute in this case that the machine is described with sufficient accuracy and fullness to enable anybody to make it; but there is considerable difference of opinion, as to the extent of the claim which the inventor makes. The general rule on the subject is, that patents are to be so construed, if possible, that the inventor shall have the benefit of what he has actually invented, if he has invented anything; and that is a rule which is beneficially applied to the advantage, undoubtedly, of patentees. Taking this whole description together, and the claim, I am reasonably satisfied and shall instruct you, though I think the specification is a little ambiguous, in some parts, that the plaintiff does not mean to say, "I claim a pebbling roller, however it may be used, whether by hand or by any combination of mechanism." If that were the claim, undoubtedly it would be defeated by showing that such a roller had been used in any way. I do not think that is the fair result of the whole patent, although there are some parts of it which look as though he thought he was the first inventor in that broader sense. I dare say he did think so; perhaps he was

corrected by information from the patent office which was referred to here, though not directly by evidence. Taking it altogether, I think he does not claim that; and although on reading the patent you may think he does, still it is my duty to assume the responsibility of stating what his claim is, subject to correction hereafter.

What, then, does he claim? To find out that, we look in the first place at the claim. He says: "I do claim, first, boarding or pebbling skins or leather by means of a single short cylinder rolling over a table, with the requisite pressure, substantially as described." The phrase "substantially as described," is an important one; and so also I think the words "with the requisite pressure," are very important. I think that "substantially as described," and "the requisite pressure," entitle him to say: "I claim the combination of parts which I have shown, or the substantial combination of parts that I have shown, and the requisite pressure that I have shown." That is, including the springs. "The requisite pressure." Not merely pressure enough to make the figure, but the "requisite pressure" to make it properly. And it is on that ground that I overrule the prayer of the defendant, and instruct you that it is not simply a claim for any mode of pebbling leather by means of a cylinder, but it must be by the described means, or substantially those means. It is what is called, technically, a combination or arrangement of parts, and if the arrangement is new, there may be a patent for that, although each part, taken by itself, is old. I shall come more particularly to the points of law which bear upon that hereafter. What he claims, then, is a combination of those parts. They are, the short revolving roller, with a figure engraved or sunk on its surface (or its periphery, as he says), a radial arm to give the pressure, and springs to equalize the pressure (perhaps giving some part of it; I don't know how that may be expressed), moving over the table in such a manner that the rollers shall be properly pressed upon the leather placed upon the table, and shall move over it in substantially the same line at each operation of the machine. Then he describes certain means for giving motion. He describes a bed which is so contrived that it fits precisely to the curve described by the arm. I think he must have something which is substantially of that character. That is my impression.

Now I do not mean to confine myself to any particular cases. His mode of getting his roller off the table is different from the Green machine. There is no question made about that. What he says, in effect, as I understand it, applying the facts in this case is: "Granted that this Green machine existed, and granted that this pebbling roller, used by hand, existed, I have put the two together. The Green machine," he says, "is different from mine, because that machine

is described in the patent, and was originally built to perform the operation of smoothing leather by a rubbing tool; mine is for the purpose of pebbling leather by an engraved tool which rotates." There is a difference, and no doubt, a very substantial difference, though that is a question for you. There is no question made that if it were entirely new, if nobody had heard of that roller before, that would be a substantial difference. He says: "My machine differs from the hand roller in several important particulars. This is merely a roller with a handle. Mine is the means which I have described, the radial arm, the springs, and the adapted bed; whereas, in the case of this hand machine, all those adaptations, both of pressure and equalizing the pressure, must be done by hand, by the will of the operator, and by his own strength; a much less complete machine than mine, and not having the elements of mine."

Now, to entitle a person to a patent he must be the original and first inventor of the arrangement, whatever it is, of the invention which he claims. If that invention is an arrangement of machinery by which he makes up a certain whole, he must be at least the inventor of the combination. He may have invented the parts or not, but if his claim is for a combination, he must at least have invented the combination. He must have been the first person to put those things together to effect the same result in substantially the same way. If it does not produce the same result in substantially the same way, that is evidence that it is not the same thing. He must be the first person who has put those things together to effect that result in substantially that way. It is not enough that he thinks he is original in his invention; it is not enough that he was not aware that anybody had invented it before, because the patent law is giving him an exclusive right; and to undertake to give him an exclusive right for what somebody else has really invented before, and perhaps gone to the patent office and patented, would be unjust. If it has been given to the public, it would be unjust; if it has been patented, it would be contradictory and absurd.

He must be the original and first inventor, and if the defendant in a case of this kind shows to your satisfaction that the patentee is not the first inventor of what he claims as his invention, then it is not his invention, and he is not entitled to a patent, and his patent will be void. The difficulty is in drawing the line and showing what is invention and what is mere construction, and it is on that point that I have been asked by the counsel, in various forms, to give instructions.

Now, there are some things that everybody knows. The common uses of common materials are supposed to be known. If a man merely makes a machine out of iron that has been made out of wood, and the

jury find that that is the same machine, producing the same result in the same way, that is no invention, because everybody knows that any constructor can make a machine of iron instead of wood. It is not a question ordinarily left to the jury, because it is so clear, although, strictly speaking, it is a question of fact. And there may even be a discovery which is not an invention. For instance: after Green's machine has been invented for rubbing leather, a man may discover that that machine is equally good to rub pasteboard, or something else; still he can not have a patent for it, that is to say, for the machine, though he might perhaps for an improvement in the art of manufacturing pasteboard. The man who has made the first invention has made it for all the uses to which it is applicable.

In this connection I have been asked to rule in this case, and do hereby rule in favor of the defendant. That if you find a machine existed exactly or substantially like this machine of the plaintiff's, except that it was moved by hand power instead of water power or steam, and you find that to make the change is within the ordinary knowledge and skill of any constructor, then merely applying horse power, or water power, or steam power, would not be an invention, because that has come to be, in the progress of the arts, one of those matters of common knowledge that everybody is presumed to know, unless you find that there was some unusual contrivance applied to the apparatus. That may be explained in some other way. The mere means of giving motion to a machine would not ordinarily be a part of the essence of the machine. That is stating the same thing in a different way. But on the other hand, if the plaintiff has combined old parts in a new way, so that he gets a machine which operates differently and produces a different result in kind, then the law presumes that he has something that is patentable. The mere question whether any mechanic of ordinary skill could make the combination if it is suggested, will not do as a general test of the novelty of a machine. If the machines are similar—if they produce similar results, and the question is whether it is a new combination, whether it is a new arrangement of machinery, then it is very important to know whether any constructor acquainted with one machine could, by his common knowledge and skill, make the other, and work out that result in a somewhat more perfect manner. It is an important test in that sense; not a test whether an ordinary mechanic can make the combination if it is suggested, but whether he can make the combination without such suggestion; whether he can make the change by means of his ordinary knowledge, as a means of determining the question whether there is any new machine at all. That is to say, it is the ordinary knowledge and skill of the mechanic that are in

question, not merely the ordinary skill of the mechanic.

Suppose, for instance, the man who invented gunpowder gets a patent for it. If it was nitroglycerine, perhaps it might not be useful, and so would not be the subject of a patent; but suppose it was gunpowder. There is no question but that gunpowder is useful, and it is an invention. Suppose he had said: "I combine saltpetre, sulphur, and charcoal, in a certain way, and produce a somewhat startling result." It would be no answer to the novelty of that invention to say that any chemist could do it after he had been shown how. The question is: Did every chemist have the knowledge as well as skill? Because, if not, there is invention, and it is a proper subject for a patent.

Another point which I have not before seen in the precise way in which I am about to put it, is the principle of law which is to govern you in determining the time when this invention was made. For the purposes of this case, I shall rule that the principle of law is, that he is the original and first inventor of a machine, or combination, or whatever it is, if it was not known or used by others before his discovery or invention; the man who has made an invention that was not known before he made it. That does not mean that he got his machine into the complete state in which you find it in the patent. Neither does it mean the first moment at which he conceived the idea that it would be a good thing to do that. It means not only when he conceived that such a thing would be a desirable thing to do, but when he had conceived the idea of how to do it substantially as he has done it. I shall not have occasion to refer to that again, perhaps. That is my view of the law.

Now, the defendant says that there were machines which were substantially like the plaintiff's invention before the date of his discovery. On that point there is this to be observed in the outset. They must have been working machines, not mere experiments. They must have done work, or been capable of doing work, and not been mere experiments, afterwards abandoned. Whether they were in fact operated for a greater or less time, is of no importance except so far as that may tend to make you believe that they were or were not mere experiments; in that view, the fact is of some consequence. But if you are satisfied that they were machines capable of doing work, substantially by the same arrangement as the plaintiff's, actual working machines, then the fact that they were operated but a short time, and then abandoned for other reasons than because they had failed as machines, is of no consequence.

The first in order of time is the English machine, described in a specification which, for the purposes of this case, it is admitted was published, the machine appearing to have

been made in 1808, and the specification published in 1856, both dates anterior to the plaintiff's invention—admitted, so far as date is concerned, to be anterior.

Now, the question is: Did that machine contain substantially the combination and arrangement of parts which the plaintiff claims, and would it do the same work? That is, would it accomplish the same result in substantially the same way? You have heard both parties, and I do not intend to go over the arguments or the evidence. The defendant has pointed out wherein he thinks they agree substantially; the plaintiff has pointed out the differences. If you find that there are no differences that are material in the operation of the machine, as a machine for pebbling leather, then it supersedes the plaintiff's invention. If you find that it does differ essentially, that the parts are different, the combination different, and that it would not operate in the same way to produce the same result substantially, then they are different.

The plaintiff says there are no springs for the purpose of equalizing the pressure. I have not examined the patent since he made that suggestion, and it is for you to say what the machine is. If there was anything in the language that was ambiguous, of course it would be for me to construe it; but you are to say what the machine is. If it does not contain any springs to equalize the pressure, or if it does contain something called a spring, if it is a spring substantially different, and that would not operate to produce the same result in substantially the same way, then the plaintiff's combination is wanting.

Mr. Browne.—I understand your honor to leave that to the jury, to find on the description.

THE COURT.—Yes, taking the machine as described and drawn. So of the other parts. If it has not a bed which is substantially like that of the plaintiff, for the purposes of this arrangement and accomplishing this result, if it is not substantially an arm like that, it would be a different machine, a different combination.

But there is another point, a little closer, upon which the parties have asked more special instructions. That machine in the drawings, as explained by the experts, it is said (and that is a matter of fact), does not show any revolving roller. There is a passage toward the end of the patent in which it is suggested or said that a roller may be used in a certain way for "dicing or printing." Now, the plaintiff has pointed out, very forcibly, that that contradicts flatly the description of the machine given in the other parts of the specification. There is no doubt about that. It does, because when he describes it in other parts, at any rate in those passages which were cited, he describes the

tool used distinctly as a rubbing tool. I mean the tool he was then speaking of. I do not think it necessarily follows that he may not afterwards have got the idea: "Well, after all, this may be used with a revolving tool." His language is ambiguous; it is doubtful; but, on the whole, I have thought and am still of the opinion that he meant to say in that passage, that a revolving tool may be used. I think that is the fair import of his language, even when it is considered that it is directly contradictory to the other parts of the patent.

Now, the defendant asks me to instruct you that if you find that the Hebert machine, as shown in the drawings and described in the descriptive parts of the specification, contains the plaintiff's combination of mechanism substantially, with the single exception that in that combination a tool, which is firmly held and rubs, is used, or is described, and that the Hebert specification suggests the substitution for such tool, if desired, of a tool which shall have an ornamental figure engraved upon it, and shall be revolved upon its own axis, so as to indent the leather, and if you find that such is substantially the tool used, and that that is the operation described by the plaintiff; and if you further find that the substitution required no change except such as is within the ordinary skill and knowledge of mechanics, involving no invention of the means of applying said revolving tool, then the Hebert patent anticipates the plaintiff's: the defendant of course assuming that all the other parts are substantially similar. I instruct you, that if the suggestion which he there makes is of itself such a description of the machine, that any mechanic of ordinary skill and knowledge could at that moment have made the substitution, there being such a tool in existence, and well known; that is to say, if it would be within the ordinary knowledge and skill, just as I ruled before, of a mechanic, who would know what tool was meant, and could make it by his ordinary skill, then it would anticipate the plaintiff's patent, but not otherwise.

Now, whether there was such a tool well known at that time, it is for you to say. The case has been fully argued upon this point as to the likeness or difference between these two machines, whether the Hebert machine has substantially the same combination as the plaintiff's, and whether, after all, it could do the work, and that is of great importance. I do not mean to express any opinion upon that point of fact, or any point of fact; if I do, you are to take it for nothing. But, would it do the work? Undoubtedly, that is a point for the defendant to prove. He is to prove a machine existing before the date of the patent, which would do the work. If your minds are balanced exactly on that question, you will have to find for the plaintiff on that point.

The other machine which has been princi-

pally relied upon by the defendant, if it may not be called two machines, is that which has been known in this case as the Garner, or Garner-Davis machine; first the Garner, and second, the Garner-Davis.

As I understand the arguments, the differences which the plaintiff finds between his machine and that of Garner, supposing you find, as matter of fact, that the Garner machine existed, with the pebbling roller, for the purpose of ornamenting leather, before the date of the plaintiff's invention, are, as I understand it, that the spring is different (and it is quite different in form), and that the bed is different, so that the coöperation, as he says, between the arm and the bed will be substantially different, and make the machine so much different that it will be substantially a different combination of machinery, and that the Garner machine does not have the advantages of his. A mere difference in form is not usually very important, if the work is done in substantially the same way. He says that the spring is different, because this spring gives an equal pressure throughout, and the elliptic spring gives a varying pressure throughout; and so of the bed; that the precise coöperation of this arm and this bed in his machine enables you to be certain that you get exactly the same pressure. You have the spring giving the same pressure; you have the bed in exactly the same as described by the arm, so that you get exactly the same pressure, both by the spring and the bed in the plaintiff's machine, while in the Garner machine you get a varying pressure throughout, not only because the spring varies in its pressure, but because the bed varies. I believe I have stated the proposition of the plaintiff correctly.

Now, the question for you is, if you find that that difference exists, whether it is a substantial difference in the operation of the machine. You have heard the experts upon that subject; you have heard to some extent, I do not know that it has been very fully gone into, the evidence as to the result in practice. It is for you to say, supposing you find that that machine existed as I have said, and was used as an actual working machine for pebbling leather, it is for you to say whether the differences are such that the plaintiff's combination is new. I do not know that I can help you much in that. If the change is not important; if it merely makes the machine work a little truer, but that degree of trueness is of no essential importance, then certainly you can not say that the combination is different. If it is of essential importance, then you can say that the combination is different. Now, in ascertaining whether it is of substantial importance, no doubt it is very useful to find out whether, as matter of fact, they would do the same work. The plaintiff says it is not shown that the Garner machine would work anything but sheepskin; that it is not

calculated to give the amount and kind of pressure necessary for other work. I shall leave that matter to you, gentlemen, as a matter of fact. But on the matter of law, I wish to be understood that my ruling is distinct, that if they are not substantially different, and if the change that was made in that machine to get it into the plaintiff's machine was a change which any mechanic of ordinary skill, using skill and not invention, could have made, on finding that that machine did not operate quite so well as it should, if it was merely a difference in construction, which any mechanic could make, it would be no invention. But if the parts are substantially different, and were not within the common knowledge of constructors, and the plaintiff has made the new combination, it is no answer to say somebody else found out that bed, somebody else found out these springs. His patent is not for the bed or the springs alone. If he first combined them, the same parts not differing in themselves, if it was beyond the ordinary knowledge and skill of the mechanic to make the combination, then there is invention in the patent.

Passing from that, the defendant introduces what he calls the Garner-Davis machine, which, as I understand it, was substantially the Garner machine, up to the time when Mr. Davis put in a contrivance for allowing the arm to go back without touching the table. Up to that time it was substantially the Garner machine, as Garner himself describes it. And that machine; in any view, comes into the case properly enough, even if it is the Garner machine, because you may say that the Garner machine was never used, and you may think the Davis machine was. At all events it is brought in to show that the table and roller were used before the date of the plaintiff's machine.

Now, there has been a good deal of controversy upon that matter of date. The defendant insists that he has shown, with reasonable certainty, that it was six weeks or two months after August, 1860; the plaintiff says that on the evidence, it was probably 1861. The defendant's witnesses support their views of the date by reference to certain events, and you will remember what those events were, and how likely they are to enable them to fix one year rather than another. The value of these aids to recollection depends upon two or three circumstances. On the importance of the event itself, primarily, and next on the closeness of its connection or association with the fact it is adduced to support. If Mr. Perkins tells you: "I enlisted at such a time, and I did this job immediately before I went," there is a natural connection between the events, and he would be likely to remember them. If he went to the war, and knew that he did this job just before he went, he would be pretty likely to remember it. If he had not been

to the war, and had been doing jobs for the defendant all along, it would be difficult for him to recollect in what year he did do it. You ask a farmer in what year he saw a new plow which his neighbor was using, but which he did not think much of, and which he did not think it worth while to buy. His neighbor is dead now, and you want to know when that plow was first used. Well, he thinks it was the year that he had a certain field sowed with rye. His wife thinks it was the year he had it sowed with barley. His head man thinks it was the year he had it sowed with clover. They talk it over, and finally settle that it was the barley year, and they all come and swear it was the barley year. They do not recollect the time, but that is the best they can do, and you have to take it with that qualification.

You are to inquire whether the Davis machine, with the pebbling roller, was used before the date of the plaintiff's invention, taking the date of that invention to have been such as you shall fix under the instructions already given; and if so, whether it is substantially the same combination. In that point of view, I do not know that it differs very much from the Garner machine, and the observations that I have made about the Garner machine would apply substantially to that.

The jury subsequently came into court and propounded the following questions: "The jury respectfully ask the following questions of his honor the judge: Query.—Supposing that parts of a machine taken from prior inventions, which parts existed separately beforehand, should be combined in a new machine which should work substantially better than any pre-existing machine, would said machine be a new invention, and therefore patentable? Edward N. Perkins, Foreman."

LOWELL, District Judge. A new combination of old parts is patentable. If the essential parts which go to make up a combination or arrangement of machinery have never been combined before, it is no matter that they existed separately in other machines, if by their combination a new and beneficial result is produced, or even an old result, in a better manner. The question is of the novelty of the combination of the essential parts. If, however, there are two combinations in which you find it difficult to decide whether they are the same or not, and you find they accomplish results alike in kind, the fact of an improved result and improved working is useful in aiding you to come to a decision; and the question in that case often is whether the changes are such as a mechanic of ordinary skill, from the knowledge and skill which competent mechanics have naturally, would make to improve the working of the machine. But if the combination is new; if you are satisfied

of that, it is no matter that the parts are old.

In considering whether one element of a combination is substantially the same as an element of another combination, the fact that one works better than the other, coupled with the fact that the change is not within the ordinary knowledge and skill of all mechanics, is highly important and often decisive. This is to be taken in connection with what I have before instructed you.

The jury found a verdict for the plaintiff, assessing damages at \$417.

[The judgment based on this verdict was subsequently reversed by the supreme court. See 10 Wall. (77 U. S.) 117.

[For another case involving this patent, see note to Woodman Pebbling-Mach. Co. v. Guild, Case No. 17,981.]

WOODMAN PEBBLING-MACHINE CO. v. GUILD. See Case No. 17,981.

Case No. 17,980.

WOOD M. & R. CO. v. BROOKE.

[2 Sawy. 576; 19 N. B. R. 395.]

District Court, D. Oregon. March 17, 1874.

SALE OF PERSONAL PROPERTY—PASSING OF TITLE.

1. An agreement concerning the sale of specific or ascertained chattels is prima facie a bargain and sale, and transfers the property therein to the purchaser, in consideration of his becoming bound to pay the price therefor; but the intent of the parties is to govern, and the contract may provide that the property in the chattel shall remain in the seller until payment, although the possession thereof be given to the buyer in the meantime.

[Cited in Heinbockel v. Zugbaum, 5 Mont. 344, 5 Pac. 901.]

2. Where C. & Co. had the exclusive right to sell the agricultural implements manufactured by the W. W. Co., in Oregon and Washington, and during the year 1873 C. & Co. ordered and received certain machines, with the understanding that they were to pay for them if sold within the year, and if not, that they were "to take them for the next season," and the transaction appeared upon the invoices of the W. W. Co. and the books of C. & Co. as a sale: *Held*, that the property in the machines passed to C. & Co. upon delivery, and upon their being adjudged bankrupts, to their assignee.

[This was an action in replevin by the Walter A. Wood M. & R. Co. against Lloyd Brooke, to recover the possession of certain machines.]

T. V. Schaup, for plaintiff.

William Strong, for defendant.

DEADY, District Judge. This is a petition asking that the plaintiff be adjudged the owner of thirteen reapers and five mowing attachments, now in the possession of the defendant as the property of the bankrupts, and for an order directing the defendant to deliver the same to the plaintiff.

From the petition, answer, stipulation and

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

evidence, it appears that the plaintiff is a corporation engaged in the manufacture of agricultural implements at Hoosick Falls, N. Y., and that E. S. Whitcomb is and has been for some years past the agent of the company for the territory west of the Rocky Mountains, with a place of business at San Francisco; that Whitcomb agreed in writing with Comstock & Co., of Portland, Or., to sell, during the year 1872, within the limits of Oregon and Washington, the implements manufactured by the plaintiff, exclusively to said C. & Co., to be by the latter resold within said limits and paid for during the year, unless shipped without specific orders from C. & Co., in which case the machines were to be paid for when sold; that on September 9, 1872, said C. & Co., at the request of Whitcomb, sent plaintiff an order for one hundred and forty machines for the season of 1873, whereby it was understood between the parties that the agreement of 1872 was substantially continued in force between them, with the right on the part of the plaintiff to terminate it at the end of any year; that the one hundred and forty machines above mentioned were shipped to C. & Co., at Portland, Or., before June 1, 1873, to be paid for, as appears from the bills of sale on September 1 of the same year, but in shipping the reapers, unmatched parts of six machines were sent by mistake for three perfect ones; that to correct this mistake, Whitcomb, on June 10, shipped to C. & Co. the parts of six other reapers to match those, with a letter of advice of June 5, explaining the transaction, and saying, "We do not expect you to pay for the machines this season, unless sold"—that is, the three extra ones not ordered; that on May 12, 1873, Whitcomb shipped to C. & Co. a lot of mowing attachments complete, in pursuance of their order of September 9, 1872, together with five other like machines, without any special direction or understanding concerning the same; that on June 23, 1873, C. & Co. wrote Whitcomb to send them "ten more reapers, and if we sell them this season we will pay for them; if not, we will take them for the next season; if you think favorable, ship them by sail; not insure;" that on June 26, 1873, Whitcomb shipped ten machines to C. & Co., in pursuance of this order, and by letter of July 4 advised them of the fact, and added, "we would be glad to send you ten more (machines), as we shall probably have some to carry here this season, and should you wish more now we will ship them on terms proposed by you in your last letter"—that is of June 23d, aforesaid; that the bills sent to C. & Co., for all said implements were made out without qualification or reservation: "C. B. Comstock & Co., bought of Walter A. Wood Mowing and Reaping Machine Co.; terms September 1;" with this notice printed on the margin: "No goods sent on commission;" except the one of June 10th, for the parts of six reapers sent to match

those before missent, which contained no date as to terms.

That on January 12, 1874, C. & Co. were adjudged bankrupts, and the defendant thereafter appointed assignee of their estate, to whom six of said reapers and four of said mowing attachments were delivered by the agents of said C. & Co. as the property of the latter; that the bankrupts returned these implements, and others not found, in their schedule as assets of the firm, but afterward, on February 12, amended the same, so as to state that all of said thirteen reapers and five mowing attachments, not included in the order of September 9, 1872, if not sold prior to September 1, 1873, "should be and remain the property" of the plaintiff; that all the implements received from plaintiff were kept together undistinguished from one another, and whether the implements in the possession of the assignee are the ones mentioned in said amended schedule does not appear, except one reaper; and that said reapers cost one hundred and forty dollars apiece, and said mowing attachments sixty dollars apiece, in San Francisco, with fifteen and five dollars apiece, respectively, freight to Portland, which freight was paid by C. & Co.

Upon these facts the plaintiff claims that as to the thirteen reapers and five mowing attachments, C. & Co. were simply the agents of the plaintiff with authority to sell the same, and until a sale, that the property in the machines remained in the latter. In support of this proposition, counsel cites *Meldrum v. Snow*, 9 Pick. 444, and *Reed v. Upton*, 10 Pick. 523.

I do not think that the cases are in point. In *Meldrum v. Snow* it was proven to be the usage for brewers to supply retailers with beer in the spring, to be kept on sale during the summer at the risk of the former, and paid for by the latter, as and when it was sold. As against the creditor of the retailer, the court held that the property in the beer did not pass to the latter on the delivery.

It is well settled, that where payment before delivery is waived by the seller, and immediate possession given to the purchaser, upon an express agreement that the title is to remain in the seller until payment on a future day, or contingency, that the payment is a condition precedent to the property in the thing sold, vesting in the purchaser, notwithstanding the sale and delivery. 1 Pars. Cont. 449. So in the case cited, the usage was equivalent, in the judgment of the court, to an agreement between the brewer and retailer, that the property in the beer should remain in the former until a resale by the latter. But in the absence of any such usage or agreement the sale and delivery of the beer, although upon a payment to be made at a future day or a contingency yet to happen, would have passed the property in the beer to the purchaser at once.

According to the evidence, these machines

were all sold and delivered absolutely to C. & Co., without any agreement or reservation as to the title to the property. The only condition was the one in regard to the time of payment. That was a provision in favor of C. & Co., and amounted, in effect, to a stipulation that the machines were to be paid for when sold—whether in 1873 or 1874.

Beyond this there was no understanding between the parties, and probably the agreement should be so construed as giving the plaintiff the right to have payment at the end of the season of 1874, whether the implements were then sold or not.

In *Reed v. Upton*, supra, it was held that an agreement to sell a brick-pressing machine, upon payment therefor, on or before a future day, and also that the buyer should have the use of the machine in the meantime, followed by delivery under the latter stipulation, did not pass the property in the machine to the purchaser prior to the payment therefor.

But there was an express provision that the sale should not take effect until payment, and also that the delivery in the meantime was only to the use of the purchaser. An agreement concerning the sale of specific or ascertained chattels is prima facie a bargain and sale, and transfers the property therein to the purchaser, in consideration of his becoming bound to pay the price therefor; but the intent of the parties to the contract is to govern, and the agreement may provide that the property in the chattel shall remain in the seller until payment, although the possession thereof be given to the buyer in the meantime. *Blackb. Sales*, 147; 1 *Pars. Cont.* 440; *Reed v. Upton*, supra, 523.

The contract or transaction concerning these machines was a bargain and sale of them to C. & Co., and consequently transferred the property in them to the bankrupts, unless the parties thereto otherwise intended and agreed.

It is admitted that the one hundred and forty machines which C. & Co. first ordered for the season of 1873 were purchased outright, and that the property in them passed to the purchasers at the time of delivery on ship board at San Francisco. The machines in controversy were ordered and sent, or sent and received, upon the same terms as the others, except the time of payment. The invoices are all made out as absolute bills of sale. Nothing was said or done by the parties which indicates that the goods were merely sent on consignment to be sold on account of the plaintiff. On the contrary, the bills contain a notice that the plaintiff did not send goods on commission. C. & Co., when ordering the ten reapers direct, first, that they shall be shipped by sail, and then changed the order by telegraph, to steamer, and expressly direct the plaintiff not to insure. The plain English of all this is, that the parties understood that these machines were at the risk of C. & Co. as soon as deliv-

ered on board at San Francisco, and if destroyed by any casualty, the loss would be theirs. This is utterly inconsistent with the idea that it was intended and agreed that the property in them was to remain in the plaintiff, until a sale by C. & Co. Still further, the bankrupts, in their account with the plaintiff, credit it absolutely with all machines received in 1873, and enter those on hand on February 14, 1874, on their sworn schedules as assets of their estate; and the subsequent change of their schedule was not made until the arrival here of the plaintiff and his claim to the contrary.

Whitcomb also testified that the company never made a contract to sell their machines to any one for more than one year, and that they always reserved the right to change their agents, as he called them, every year, and effect was sought to be given to this testimony by counsel for plaintiff, as showing that machines sent by it to C. & Co., and not disposed of within the year, in some way reverted to the plaintiff at that time. Admitting this to be the general rule under which plaintiff did business, I do not see how it affects the question in this case.

If C. & Co. were not continued as the exclusive buyers and sellers of plaintiff's machines for Oregon and Washington in 1874, still by the terms upon which they received these machines, they had a right to keep them if not disposed of sooner, and sell them within the year 1874. In the meantime the machines would be at C. & Co.'s risk, and the plaintiff could not deprive them of the possession of them, although, as has been suggested, the right of the latter to have the price of them might become absolute at the end of the season of 1874, whether they were then sold or not.

On the other hand, it may be that C. & Co., if they were not continued as the exclusive buyers and sellers of the plaintiff's machines for 1874, would have a right thereafter to treat this sale as a conditional one of the class called "contracts of sale or return," and return the machines upon the ground that, as the plaintiff had materially deprived them of their opportunity to sell them, by withdrawing their exclusive right contrary to the implied understanding, their obligation to pay for them was at an end.

However this may be, I am satisfied that the transaction by which these machines were delivered to C. & Co. amounted to a bargain and sale, which, in the absence of any agreement or understanding to the contrary, transferred the property in them to the bankrupts.

This conclusion makes it unnecessary to consider the question whether the plaintiff, in case he was entitled to the possession of the thirteen reapers and five mowing attachments, not included in the one hundred and forty machines, ordered September 9, 1872, could have judgment for the possession of any like number and kind of machines of its

manufacture, in the hands of the defendant as the assignee of the bankrupts.

Although this proceeding is nominally a petition to the court for an order upon the assignee to deliver these machines to the petitioner, it has been heard and considered as an action of replevin tried by the court, without a jury.

This court has no authority to deprive the assignee of the possession of the property of the bankrupts without due process of law, which means in this case an action and trial by jury, unless the parties consent to a trial by the court. *Smith v. Mason*, 14 Wall. [81 U. S.] 429.

The rule in replevin is, that the thing sought to be recovered must possess indicia, or ear-marks, by which it may be distinguished from all others of the same description; therefore, replevin cannot be maintained for loose money, but may be for money tied up in a bag, and taken from the plaintiff in that state.

These machines are not very readily distinguished from one another by their mere appearance, if at all. But the thirteen reapers and five mowing attachments might be distinguished from the one hundred and forty machines if they had been so kept that the parties having the custody of them could satisfactorily testify to their identity. In this case, the evidence only shows that one of the machines in the hands of the assignee is one of the thirteen reapers.

But the claim of the plaintiff is, that there is a usage in this trade, to the effect that where machines are delivered, as in this case, and any number, not exceeding those sent without specific orders, or ordered to be paid for when sold, are left at the end of the season unsold, they revert to the company and become its property *ex vi facti*, for which it may maintain replevin. There was evidence tending to prove such a usage, but it was not sufficient. Besides, Comstock testified that he knew nothing of it, but purchased the machines to be paid for September 1, 1873, or when sold.

The plaintiff is not entitled to the possession of the property, and judgment must be given for the defendant for costs.

Case No. 17,981.

WOODMAN PEBBLING-MACH. CO. v.
GUILD et al.

[4 Cliff. 185.]¹

Circuit Court, D. Massachusetts. May Term,
1872.²

PATENT FOR INVENTION.

This case was regarded as controlled by the principles of the decision in *Stimpson v. Woodman*, 10 Wall. [77 U. S.] 120, otherwise the court would have ordered a decree for the complainants.

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

² [Reversed in 154 U. S. 597.]

Bill in equity [by Woodman Pebbling-Machine Company against Charles H. Guild and others] for infringement of letters-patent No. 42,136, date March 27, 1864, for ornamenting leather. The nature of the invention was stated to consist of producing the pebbled or boarded grain or finish on leather, by subjecting it to the pressure of a short revolving cylinder or roller, of steel or other suitable metal, having the desired design or figure engraved on its periphery; also of certain mechanical devices for managing the roller, and accomplishing the object with rapidity and cheapness.

The following is an extract from the descriptive portion of the schedule annexed to the letters-patent:—"A is a wooden table, about four feet and six inches long and five inches wide, the two ends of which slide up and down freely in vertical slots in the uprights, G and H, as shown in Fig. 1. The upper surface of this table, on which the leather to be 'boarded' or 'pebbled' is placed, is the arc of a circle whose centre is at J, at the top of the pendulum I. This table, when the roller Z is going back over it, is lowered, and rests on three strips of rubber W W W placed upon the stationary beam B, the extremities of which are framed into the uprights G and H. The rubber strips W are also designed to prevent noise and jar when the table descends." The claim was as follows:—"I do not claim embossing by means of two or more cylinders working together; but what I do claim as new, and desire to secure by letters-patent, is: First. Boarding or pebbling skins or leather by means of a single short cylinder rolling over a table, with requisite pressure, substantially as described. I also claim raising and lowering the table A by means of the toggles Q, arm S, spring U, arm T, and cam P, or their equivalent, substantially as set forth, and for the purpose described."

T. L. Wakefield, for complainants.

Geo. L. Roberts and B. R. Curtis, for respondents.

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

CLIFFORD, Circuit Justice. Irrespective of the decision of the supreme court in the case of *Stimpson v. Woodman*, 10 Wall. [77 U. S.] 120, the court here would be of the opinion that the complainants are entitled to a decree that their patent is valid, and for an account and an injunction; but we are both of the opinion that the case is controlled by the principles of that decision, and that the bill of complaint must be dismissed with costs.

[The judgment in this case was reversed by the supreme court by stipulation of the parties. See 154 U. S. 597, 14 Sup. Ct. 1216. For other cases involving this patent, see *Stimpson v. Woodman*, 10 Wall. (77 U. S.) 117; *Woodman v. Stimpson*, Case No. 17,979.]

Case No. 17,982.**WOODROW v. COLEMAN.**[1 Cranch, C. C. 171.]¹

Circuit Court, District of Columbia. June Term, 1804.

ARTICLES OF APPRENTICESHIP.

The father of an apprentice who binds himself, is liable upon the indentures, by reason of his signature and seal, although there be no express words of covenant binding the father.

Covenant against the father on articles of apprenticeship of the son, the boy having run away. Oyer and general demurrer to the declaration.

Mr. Taylor, for defendant, contended that the signature and seal of the father, is only evidence of his consent. As there are no words in the indenture to bind the father, no action can be maintained upon it against him. Co. Lit. 172; Evelyn v. Chichester, 3 Burrows, 1719; Old Rev. Code Va. c. 95, § 15; Maddon v. White, 2 Term R. 161; Rex v. Inhabitants of Hindringham, 6 Term R. 557.

Mr. Swann, contra. By the law of Virginia, a father may bind his child, and the father is liable if the son embezzles the master's money. It is upon the faith of this that the master takes the apprentice. A father has a right to bind the son without his consent. The father might have brought an action against the master upon this indenture. The words are, "the said parties bind themselves each to the other." 3 Bac. Abr. 547; Gylbert v. Fletcher, Cro. Car. 179; Whitley v. Loftus, 8 Mod. 191; Branch v. Ewington, Doug. 518.

Judgment for plaintiff on the demurrer.

[See Cases Nos. 17,983 and 17,984.]

Case No. 17,983.**WOODROW v. COLEMAN.**[1 Cranch, C. C. 192.]¹

Circuit Court, District of Columbia. Nov. Term, 1804.

OVERRULING OF DEMURRER—PLEADING DE NOVO.

After judgment for the plaintiff on the defendant's demurrer, and writ of inquiry awarded, the court will not permit the defendant to plead de novo, unless he will withdraw his demurrer.

THE COURT, at last term, overruled the defendant's demurrer [Case No. 17,982], but the judgment was not entered until this term; and the jury being now called to be sworn to inquire of damages,—

Mr. Taylor, for the defendant, offered to plead a breach of covenant on the part of the plaintiff in bar of the action, and contended that the covenants were dependent.

THE COURT refused to suffer the defendant to file the plea offered.

Mr. Taylor then offered the general issue to the breach assigned.

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

THE COURT intimated that they would not permit the plea, unless the judgment on the demurrer should be struck out, and the demurrer withdrawn.

Mr. Taylor refused to withdraw the demurrer, and the writ of inquiry was executed.

[See Case No. 17,984.]

Case No. 17,984.**WOODROW v. COLEMAN.**[1 Cranch, C. C. 199.]¹

Circuit Court, District of Columbia. Nov. Term, 1804.

Costs.

Full costs will be given in covenant.

Motion, by the defendant's counsel, that the clerk be ordered to tax only so much costs as damages. New Rev. Code, p. 109, § 17.

The action was covenant, and verdict for plaintiff, one cent.

Mr. Swann, for the plaintiff, contended that the section applies to actions of trespass. Gilb. Cas.; Bac. Abr. "Costs."

THE COURT gave judgment with full costs.

[See Cases Nos. 17,982 and 17,983.]

WOODROW (COOKE v.). See Case No. 3, 181.

WOODROW (JONES v.). See Case No. 7, 509.

Case No. 17,985.**Ex parte WOODRUFF.**

[3 App. Com'rs Pat. 233.]

Circuit Court, District of Columbia. Nov. 12, 1859.

PATENTS—COMBINATIONS—NOVELTY AND INVENTION.

[A combination, to be patentable, must disclose something new, either in the combination itself, or in the result achieved.]

An appeal from a decision of the commissioner of patents refusing to grant letters patent to Andrew Woodruff for an improvement in harrows.

MORSELL, Circuit Judge. The specification particularly describes the various parts of appellant's improved harrows. At the closing part thereof appellant says: "I claim as my invention, and as a new article of manufacture, the folding harrow above described, composed of two X shaped tooth frames supported and connected at their ends as described and shown." The acting commissioner adopts for his decision the report of the board of examiners, which states: "The applicant claims a folding harrow, composed of two X shaped frames connect-

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

ed together by iron straps, which serve not only as braces but hinges to effect the connection. The reference, Fig. g, g, plate X, in Mach. n, Verzee ss, &c., is a folding harrow connected together by iron straps which act not only as braces but hinges to effect the connection, and possess this advantage over the applicant's device, to wit: The parts can fold in two directions, and thus the harrow is enabled to accommodate itself to inequalities of ground which Woodruff's as constructed cannot do, as it only folds in one direction. It is true that the two parts which make up Woodruff's harrow are made in X form, but this is a difference in form merely, which the constructor chooses to have the parts assume, and unless there is something novel in the effect produced, due to such form, then the form cannot be considered as an element conferring patentability to the device. As to the question of cheapness of construction, there need be no more parts in the one than in the other; the draft in both is applied in the same direction, with regard to the body of the implement, and the effect produced by both is the same, with the exception of the advantage in favor of the reference above named. Aside from this, the reference to Wood's cultivator rejected May 19th, 1856, shows that the X form is old. We must therefore recommend the final rejection of this application." The acting commissioner's decision immediately follows, thus: "The foregoing report is confirmed, and the application for a patent finally rejected," dated March 18, 1859. From which decision the appellant filed the following appeal: "Inasmuch as the said Woodruff claims a harrow made up specifically of a certain combination of parts, and so claimed in his application for a patent, which combination of parts is not shown or described in either of the references given by the commissioner in this rejection of the said application, that the commissioner used in deciding the X form of harrow was old, and that as no hinges like those used by said Woodruff in his harrow had been used in connecting the parts of folding harrows before that, therefore the said Woodruff is not entitled to receive the patent as prayed for in view of the references given." The commissioner refers to the hereinbefore recited report of the examiner as stating all the grounds of his objection to the part or parts of the invention which he considers as not entitled to be patented. After due notice of the time and place of trial given, the commissioner laid before me all the original papers in the case, and the appellant, by his attorney, filed his argument, and the case was submitted.

The appellant, in his argument, says: "That, so far as the X form of harrow frame is concerned, so long as Mr. Woodruff does not claim this form, but only its combination with other features which are conjoined with it to make the article of manufacture, which he claimed as produced by such com-

bination," &c., it should not be urged as a reason, &c. The rule of law is that there must be something new either in the combination itself, or in the result, neither of which appears to be the case in the present instance. If the result shows a new and valuable article of manufacture, so as to afford ground of itself to presume invention, then there ought to have been sufficient proof of the fact in the case laid before me, which there is not. My opinion therefore is that the decision of the acting commissioner is correct, and ought to be affirmed, and the same is accordingly therefore affirmed.

Case No. 17,986.

WOODRUFF et al. v. BARNEY et al.

[1 Bond, 528; 2 Fish. Pat. Cas. 244.]¹

Circuit Court, S. D. Ohio. Feb. Term, 1862.

COSTS IN PATENT CASES — MODELS AND COPIES — FEES OF WITNESSES.

1. The words "pursuant to law," in the act of February 26, 1853 [10 Stat. 161], are equivalent to the word "summoned" in the act of February 28, 1799 [1 Stat. 624], and, in both cases, import that witnesses who attend without being summoned, are voluntary witnesses, whose fees can not be taxed against the losing party.

[Cited in Spaulding v. Tucker, Case No. 13,-221; Haines v. McLaughlin, 29 Fed. 70. Disapproved in The Vernon, 36 Fed. 116; Dennis v. Eddy, Case No. 3,793; U. S. v. Sanborn, 28 Fed. 303.]

[Cited in Alexander v. Harrison, 2 Ind. App. 52, 23 N. E. 121; Meagher v. Van Zandt (Nev.) 2 Pac. 58.]

2. If a witness, whose residence is not at the place of holding court, is summoned at the place of trial, he is allowed mileage for returning to his home, but not for coming to the court; and by a liberal construction of the statute, return travel has been allowed, even beyond the limits of the district for which the court was held.

[Cited in Burrow v. Kansas City, Ft. S. & M. R. Co., 54 Fed. 282.]

3. Models of the invention described in the plaintiff's patent, and procured by the defendant in good faith, may be included in the taxation of costs, but not other models.

[Cited in Wooster v. Handy, 23 Fed. 62. Followed in Cornelly v. Markwald, 24 Fed. 187. Cited in Ryan v. Gould, 32 Fed. 754.]

4. Copies of patents, either that of the plaintiff or others, procured by the defendant, can not be taxed as costs to the plaintiff.

[This was a suit by Theodore T. Woodruff, John S. Miller, Orville W. Childs, and George R. Dykeman against Elam E. Barney, C. Parker, S. F. Woodsum, and J. A. Tenney. Heard on motion to retax costs.]

George E. Pugh, for plaintiffs.

T. D. Lincoln, for defendants.

LEAVITT, District Judge. On the part of the plaintiffs in this case, a motion is made

¹ [Reported by Lewis H. Bond, Esq., and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission.]

to relax the costs, by striking from the cost-bill the charges for mileage to such of the defendants' witnesses residing out of this district, and more than one hundred miles from Cincinnati, as attended at the request of the defendants, and without service of process requiring their attendance. And the defendants move for a retaxation, by which they may be allowed for expenses incurred in procuring certain models and copies of patents deemed necessary in their defense.

The plaintiffs' motion will be first considered. It presents simply the question whether a party, against whom a judgment for costs has been entered, is chargeable with the mileage of the witnesses who have attended without being summoned by legal process.

The facts necessary to notice, and about which there is no controversy, are, that the suit was brought for alleged infringements of four different patent rights for distinct improvements in railroad sleeping cars, of which the plaintiffs had the title by assignment from the patentee. The defendants, by their pleas, put in issue, not only the infringements charged, but also the novelty of the different patented improvements. The case was on the docket for trial at the last December term, and, by arrangement between the counsel, was continued to, and especially assigned for trial, on the first day of the last June term. When called for trial at that term the plaintiffs entered a discontinuance of the suit, and a judgment was rendered against them for costs, in the usual form. A large number of witnesses, residents of the city of New York, and perhaps other places outside of this district, were in attendance at the December and June terms, on behalf, and at the request of the defendants, without being summoned, either out of, or within the district. At each of those terms, these witnesses proved their attendance before the clerk; and in taxing the costs against the plaintiffs, mileage is allowed to them at both terms, for travel in coming to and returning from Cincinnati, the place of holding the court. There is no reason to doubt that these witnesses attended in good faith. It appears satisfactorily to the court, that their testimony was deemed material by the distinguished counsel for the defendants, by whose advice they were requested to attend.

The subject of costs in cases at law, in the courts of the United States, is wholly governed by statute, and is not dependent on the discretion of the judges of those courts. Section 6 of the act of congress of February 23, 1799 (1 Stat. 626), after providing that jurors shall receive a per diem compensation for their attendance, and fees for traveling at the rate of five cents per mile from their place of abode to the place of holding court and the like sum for returning, closes with this provision: "To the witnesses summoned in any court of the United

States, the same allowance as is provided for jurors." In the case of *Dreskill v. Parish* [Case No. 4,075], it was held by this court, under the act of 1799, that the fees of a witness who voluntarily appeared without subpoena could not be taxed to the losing party in the case. Judge McLean, who gave the opinion of the court, says: "If he (a witness) attend voluntarily, or without summons, his fees can not be taxed against the losing party. The attendance, if not summoned, is voluntary." And again: "The service must be made by the marshal, or one of his deputies. As no such service was made on the witnesses above named, their per diem and traveling expenses can not be charged to the defendant, but must be taxed to the party summoning them." In a case between the same parties [Id. 4,076], the same question arose and was decided in the same way.

But it is insisted by the counsel for the defendants, that the above cases were decided under the old law, and that the act of 1853, under which the taxation in the present case was made, is different in its terms, and justifies a different construction. There can be no doubt that the latter act must control the question before the court. It provides, in section 1, that the fees which it allows to the various officers and persons named, shall be "in lieu of the compensation now allowed by law;" thus virtually repealing the act of 1799, so far as it regulates the fees and compensation of those referred to. The provision of the act of 1853, relating to witnesses' fees, is in these words: "For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents per mile for traveling from his place of residence to said place of trial or hearing, and five cents per mile for returning." Thus it will be seen that the diversity in the phraseology of the act of 1799 and the act of 1853 is this: by the former act, witnesses summoned to attend court were entitled to a certain per diem compensation, and mileage to and from the place of holding court; and by the latter act, they are allowed, "for each day's attendance in court, or before any officer pursuant to law," mileage at the rate of five cents per mile in going to and returning from court. But clearly, the language of the two sections is of the same legal import. In the one, is required expressly the service of a summons; in the other, the witness must attend "pursuant to law." Now, by every just rule of grammatical construction, these words must be held to apply, both to witnesses attending a court, and to those attending before an officer having authority to summon witnesses. In either case, to entitle them to compensation, they must attend, pursuant to law, and not merely on the request of a party without process. The words of the act of 1853 are more comprehensive than those used in the old

law, and were adopted to supply an obvious omission in that law. The old law did not provide for the case of a witness attending before a master in chancery, commissioner, or other officer, authorized for any purpose to call witnesses before him; nor did it provide for a witness attending before a court, under a recognizance by which he was legally bound to attend. These cases are plainly embraced in the act of 1853. But clearly there is not a word in that act, from which, by any just reasoning, it can be inferred that a witness who voluntarily attends, can claim per diem compensation, or allowance for traveling.

The case of *Whipple v. Cumberland Cotton Co.* [Case No. 17,515], referred to by the counsel for the defendants, does not sustain the taxation of the witnesses' fees in the case before the court. The decision of Judge Story was to the effect, that if a material witness for a party residing in another state, or more than one hundred miles from the place of holding court is summoned to attend court, his travel may be allowed and taxed to his place of residence. This rule was also recognized by Judge Woodbury, in *Hathaway v. Roach* [Id. 6,213]. In these cases, however, the witnesses were actually served with process requiring their attendance, though it does not appear in the reports whether they were summoned within or without the district. And this accords with the practice in this court. If a witness whose residence is not at the place of holding court is summoned there, he is allowed mileage for returning to his home, but not for coming to the court. And, by a liberal construction of the statute, return travel has been allowed, even beyond the limits of the district for which the court was held. But it has never been held by this court or any other, that the fees of a witness attending merely by the request of a party, without subpoena, can be legally taxed against the losing party, as a part of the costs for which he is liable. Such a witness, under the act of 1799, is not "summoned," and under the act of 1853 does not attend court "pursuant to law."

The construction contended for by the defendants' counsel would not only conflict with the plain reading of the acts referred to, but would open the door to great abuses. If a party in any case could, by mere request, procure the attendance of any number of witnesses, from remote parts of the country, and tax their travel to his adversary in case the judgment was against him, he would not only be subject to a ruinous amount of costs, but might be taken wholly by surprise at the trial. No process having been ordered to procure the attendance of the witnesses, he could not anticipate their presence, and would have no means of contradicting or counteracting their evidence. There is no principle of public policy or justice justifying such a practice. If a wit-

ness resides out of the district in which the court is held, or at a greater distance than one hundred miles from it, the act of congress authorizes his deposition to be taken and used on the trial. It is undoubtedly true that it is often desirable to have the personal presence of a material witness, as the oral examination before the court and jury is more satisfactory than his testimony presented in the form of a deposition. But this is for the benefit of the party who wishes the testimony thus exhibited. He can not, however, avail himself of this benefit at the expense of his adversary. If he brings witnesses into court without process, he must pay them for their attendance. He may relieve himself from this burden in part at least, by causing them to be served with process after they come within the district. This, however, the defendants, for reasons best known to themselves, failed to do, and the witnesses, therefore, who attended, can be regarded only as mere volunteers, and their fees can not be taxed against the plaintiffs as a part of the legal costs. The plaintiffs' motion to retax is therefore sustained, and the fees of these witnesses will be excluded from the taxation.

I have yet to consider the motion by the defendants, to include in the taxation the expense of procuring models of sleeping cars, and copies of patents from the patent office. These, it is insisted, were necessary for their defense, and were obtained by them in good faith; and that they should be indemnified for this outlay. The issues presented by the pleadings were no doubt numerous and somewhat complicated, by reason of the number of distinct improvements, which were claimed as embraced in the four patents held by the plaintiffs. The novelty of all these improvements was in issue, under the various notices given by the defendants, and it was, doubtless, necessary, in sustaining their defenses against the alleged infringements, to exhibit these models to the jury. It would materially assist them in coming to a conclusion as to the novelty of the claims of the patents. The defendants allege that they procured these models at an expense exceeding six hundred dollars. Can this be taxed to the plaintiffs as a part of the legal cost in the case? There is no statutory provision by which such an expenditure is taxable as costs; and it is perhaps within the discretion of the court to tax them, if necessary to the processes of justice. It does not occur to me that this question has before been presented for the decision of this court. Nor are any authorities referred to, which sustain the claim of the defendants' counsel to the extent urged by them. It is obvious that it would subject litigants in contested patent cases to onerous burdens, if either party was permitted, ad libitum, to procure models, and tax his unsuccessful adversary in the case with the entire expense. I am not

aware that any of the courts of the United States have given any sanction to such a principle. The case of Hathaway v. Roach [supra] is referred to by counsel, but clearly it does not sustain the claim of the defendants in this motion. That was an action for the infringement of the plaintiff's exclusive right to certain improvements in a stove, for which a patent had been granted. The defendant had procured several models of stoves, to be used on the trial, and the expense of these had been taxed in the bill of costs. Judge Woodbury held, that so far as these were models of stoves described in the plaintiff's patent, as the plaintiff was not bound to exhibit them, it was proper for the defendants to produce them to be used on the trial. To that extent he held, that the expense was properly carried into the taxation of costs. These models, the learned judge remarks, were likely to be beneficial in explaining the patent, and were competent evidence of its coincidence or difference compared with other stoves, as they related to the doings of the plaintiff himself on the subject of his patent. The judge proceeds to say: "If other models are taxed, I do not think them proper items for the bill of costs, any more than the drawings of other patents procured, or the books which describe them; they all being rather arguments than proofs."

I concur with Judge Woodbury in the case cited. It is reasonable and just, that so far as the defendants in this case have, in good faith, procured models of sleeping cars, or improvements therein, embraced in the four patents, for the infringement of which the plaintiffs have brought suit, they should be indemnified, and to that extent the expense of the models may be included in the taxation. The court is not informed how many, if any, of the models procured by the defendants, fall within the rule prescribed. If necessary, it can be referred to a competent expert to inquire and report, as to the number and cost of the models procured by the defendants, which correspond with the improvements described in the plaintiffs' patent, and are claimed by the patentee as his inventions.

As to the copies of patents obtained by the defendants from the patent office, I do not know of any principle or any precedent by which the expense can be taxed as costs in the case. I am not aware of any case in which it has been allowed in this court, nor of any authority which sanctions it. If the motion now made includes the expense of copies of the plaintiffs' patent, it can not be allowed, for the obvious reason that the plaintiffs are bound to exhibit these as a necessary part of their evidence, and there could be no necessity that the defendants should procure them. If they are copies of patents for other improvements, not included in the patents held by the plaintiffs, they are clearly within the decision of the court in the case of Hath-

away v. Roach, before referred to, and the expense must be excluded from the cost-bill. If the defendants deemed these copies necessary in making their defense, the plaintiffs can not be held chargeable with their cost. It is possible that there may be circumstances, which being made known to the court before the trial of the case, an order would be made authorizing the procurement of copies of patents or other documents, the cost of which might be taxed in the case, to await the result of the trial. Without such previous order, I am clear, they can not be properly included in the taxation. This part of the defendants' motion is therefore overruled.

Case No. 17,986a.

WOODRUFF v. BENTLEY.

[Hempst. 111.]¹

Superior Court, Territory of Arkansas. Jan., 1831.

DETINUE—WHEN LIES.

1. Detinue lies against a person who has quitted the possession of property prior to the institution of suit.
2. If a defendant has been legally evicted, or returned the property before suit, this will bar the action.

Appeal from Pulaski circuit court.

[Action by George Bentley against William E. Woodruff.]

Before JOHNSON, ESKRIDGE, CROSS, and BATES, JJ.

CROSS, J. This was an action of detinue brought by the appellee against the appellant, in the Pulaski circuit court, for the recovery of a negro boy. The suit was commenced on the 22d February, 1830, and at the following June term, a verdict and judgment were recovered by the appellee. From the bill of exceptions taken by the appellant during the trial, it appears that the judge of the circuit court instructed the jury, that if they found from the evidence that the negro slave in contest was the property of the plaintiff, and that the defendant had possession of said slave in December or January last, although he might not have been in his possession at the date of the writ, they ought to find for the plaintiff, &c. In giving these instructions, it is contended that the court erred: First, because the appellant had restored the negro to the person from whom he had received him, in whose power it was to have affected a legal eviction before the commencement of the suit; and second, that the relation of bailor and bailee existed between the appellant and a certain Thomas Mathers, to whom the negro had been returned. The evidence, as collected from the bill of exceptions, is, that the appellee sent the negro in contest to a certain Thomas Mathers, his son-in-law, on the 23d Decem-

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

ber, 1827, where he remained in his employ and possession until October, 1829, when he (Mathers) hired him to the appellant. The negro remained in the possession of the appellant, under this contract of hire, until the early part of January, 1830, when a man by the name of Harris came and demanded him, stating that he had purchased him from the appellee, upon condition that he could get peaceful possession of him. Appellant refused to deliver up said negro, declaring that he would deliver him to no person without an order from Mathers. A few days afterwards Mathers was seen in possession of the negro, on the way to his residence in Conway county. Two weeks thereafter he sent the negro to Little Rock, where appellant resides, with directions that the appellant would hire him, or that he should hire himself to some other person. The negro came to appellant's, and remained with him five or six days; when Chester Ashley put him in possession of the Messrs Elliots, under a previous contract of hire from said Mathers. In January preceding the commencement of the suit, the appellee called on Mathers, and told him to send home his negro, then in his possession. The question is, are the instructions given to the jury by the judge of the circuit court correct, when applied to the facts above detailed?

It is certainly a well-settled principle, that detinue lies against a person who has quit- ted the possession of the property prior to the institution of the suit. Com. Dig. tit. "Act," 364; *Bastie v. Lambert*, 1 Wash. [Va.] 176. When, however, the defendant has been legally evicted before the institution of the suit, it would operate as a bar, and a recovery could not be had in detinue. *Id.* 116. And so where the relation of bailor and bailee exists, a return of the property by the bailee would bar the action, and after a demand made by a person who had title. 1 Bac. Abr. tit. "Bailment," 375; *Rolle*, Abr. 607; 2 Bos. & P. 462.

This doctrine, as was justly remarked by the counsel for the appellant, is founded in the best policy. Were it otherwise, a door would be open placing it in the power of corrupt individuals, by combining, to practise incalculable frauds and impositions upon society. Besides, it would greatly impair the beneficial relations growing out of contracts of hire, or any other species of bailment. But does the evidence in this case show that the appellant was legally evicted, or that he stood in the attitude of a bailee and returned the property to Mathers, the bailor? We think not. His contract for the hire of the negro took place in October, 1829, under which he remained in possession until some time in January following. A demand was then made by Harris, who alleged that he had purchased from appellee. Shortly afterwards appellant returned the negro to Mathers. With this return the relation of bailor and bailee ceased; and if nothing further

had appeared from the evidence, we would be disposed to reverse the judgment. But it did not close at this stage of the transaction. After the return of the negro, the appellee called on Mathers for him, and immediately afterwards he was sent back to appellant, without any contract or obligation on the part of Mathers to do so. He remained in the possession of, or, to use the language in the bill of exceptions, stayed with the appellant five or six days. The appellee, it seems, ascertained in the mean time where his property was, and, intent upon requiring it in specie, brings suit against the appellant. But before the writ was sued out, the negro is taken by Ashley, and by him placed in the hands of Messrs. Elliots. The appellant, therefore, had not been legally evicted prior to the institution of the suit; nor can he be regarded, under the circumstances, as having stood in the attitude of a bailee. Mathers himself appears to have held the negro only in that character under Bentley, as his bailor. And the appellant was apprised of his (Bentley's) claim before the negro came to his possession the second time. It is questionable whether he was not, under this state of case, equally responsible with Mathers to Bentley. We are, therefore, of opinion that the instructions of the circuit court given to the jury, when applied to the facts of the case, are substantially correct. Judgment affirmed.

WOODRUFF (BINNS v.). See Case No. 1, 424.

Case No. 17,987.

WOODRUFF v. The LEVI DEARBORN.

[4 Hall, Law J. 88.]

District Court, D. Georgia. July 17, 1811.¹

VESSEL IN PORT—LIEN FOR SUPPLIES.

Where cordage and other materials are furnished, at the instance of the owner, to a vessel not on a voyage, but lying within the body of a county, no lien on the vessel is created, so as to affect her in the hands of a bona fide purchaser, without notice.

In admiralty.

Mr. Charlton, for claimant, argued, (1) Whether the admiralty court has jurisdiction? (2) Whether, if a jurisdiction can be sustained, there can be a lien on this ship, under the particular facts and circumstances of the case?

First point. As to the question of jurisdiction: The admiralty proceeds in rem, and therefore, if these are not charges upon the ship in specie, the court has no jurisdiction. The most important matter under this head which presents itself for the consideration of the court, is, whether it is to proceed according to the principles and doctrines of the civil law, as it obtains in those nations,

¹ [Affirmed in Case No. 17,988.]

which have made it the foundation of their jurisprudence, or according to the maritime law, as it has been adopted and explained by the courts of Great Britain. If, according to the civil law, it is admitted that the ship is specifically liable. *Abb. Shipp.* (Story's Ed.), and the authorities there cited, 151-153. It is contended that the same doctrine has been adopted by the English courts in the case of *Rich v. Coe*, by Lord Mansfield. *Cowp.* 636. It is there laid down that the person supplying necessaries, has three remedies: 1st. Against the owner. 2d. Against the master. 3d. Against the ship. But this case appears not only to have been subverted by other decisions, but by a subsequent decision of Lord Mansfield, himself. *Wilkins v. Carmichael*, 1 *Doug.* 101, cited in *Abb. Shipp.* (Story's Ed.) 158.

In this case, Lord Mansfield, after stating the reason why the master should not be permitted to retain the ship, adds that if "there was any lien originally, it was in the carpenter, and he, by giving up the possession, had parted with the lien, if he ever had one." Here is a strong doubt suggested whether even the carpenter, whose labour enables the ship to prosecute her voyage, can resort, specifically, to the ship; and it is impossible to reconcile this case with the opinion expressed in *Rich v. Coe*, because in the conclusion of this case his lordship observes: "Work done for a ship in England is supposed to be on the personal credit of the employer." The supplies in *Rich v. Coe* were furnished in England; the treble security was therefore as inapplicable in the one case as the other. Mr. Abbot considers this latter case subversive of the former. *Abb. Shipp.* 153.

In *Westerdell v. Dale*, 7 *Term R.* 312, Lord Kenyon questions the authority of *Rich v. Coe*, as establishing the principle upon too broad a basis. *Abb. Shipp.* 153. A shipwright who has taken a ship in possession to repair it, may retain that possession until he is paid, but if he parts with the possession, he abandons also his lien upon the ship itself. So it is with a tradesman furnishing supplies. *Id.* The master may hypothecate for supplies and repairs abroad; but if the ship is within port, *infra corpus comitatus*, they are not a lien or charge on the ship. *Hoare v. Clement*, 2 *Show.* 338; *Abb. Shipp.* 154. In *Watkinson v. Bernadiston*, the law is clearly laid down: "That if a ship be in the river Thames, and money is expended there, either in the repairing, fitting out, new rigging, or apparel of the ship, this is no charge upon the ship, but the person thus employed, or who finds these necessaries, must resort to the owner thereof for payment, and in such a case, in a suit in the court of admiralty to condemn a ship for the non-payment of the money, the courts of law will grant a prohibition." 2 *P. Wms.* case 107, p. 367. The law contained in this decree was considered to be so well estab-

lished, that the reporter observes: "It was decreed by the master of the rolls, and seemed to be admitted by the counsel on both sides." See, also, *Buxton v. Snee*, 2 *Ves. Jr.* 521, in notes. The Scotch Case, *Abb. Shipp.* 159, and *Ex parte Shank*, 1 *Atk.* 234.

The doctrine of these cases does not appear to have been shaken by any of the later decisions in the admiralty of England. The case of *The John*, 3 *C. Rob. Adm.* 288, was an application by material men against the proceeds remaining in the registry. In this case Sir Wm. Scott observes: "I find, that it has continued to be the practice of this court to allow material men to sue against remaining proceeds in the registry, notwithstanding that prohibitions have been obtained on original suits instituted by them." This is a proceeding of material men, by original suit, against the Levi Dearborn, and if instituted in the admiralty of England would be a ground for prohibition, according to the admission of Sir William Scott and the authority of all the cases, with the exception of *Rich v. Coe*. In *The Favourite*, 2 *C. Rob. Adm.* (Am. Ed.) 232, it was said by Dr. Swabey, that material men, by the indulgence of the court, may be allowed to be paid out of proceeds in the hands of the court, although they would not be allowed to proceed originally against the ship. Sir Wm. Scott admits this to be true, where there remained an "undisputed surplus, after payment of the debt, which was the original cause of action," and no person objecting. (For the meaning of "material men," see the note a in the same page.) There has been no decision on the subject by the supreme court of the United States. There are two, however, one in the district court of Maryland, and the other in the district court of Pennsylvania, which are relied upon by the opposite counsel, as supporting the claim to jurisdiction. In the former it was decided by Judge Winchester that a shipwright has a lien on the ship for repairs in a port of the United States (*Stevens v. The Sandwich* [Case No. 13,409] note), and it is contended that a similar opinion is expressed in the latter, by Justice Peters (*Gardner v. The New Jersey* [Id. 5,233]). Anything that emanates from so great a man as was Judge Winchester, must carry with it a great weight of respect and authority, but the principles of this decision are founded upon the doctrines of the civil law, which cannot be received in our country; and it must also be remarked that Zouch, upon whose authority the learned judge principally relies, does not state correctly the practice of the English courts, which he brings in to the aid of the civil law opinions. Be this, however, as it may, we have only the isolated opinion of Judge Winchester in opposition to the whole current of English adjudications, and what the whole profession have been in the habit of considering the settled and established law and practice of this

country. An opinion directly opposite to that of Judge Winchester is expressed in the case of *Shrewsbury v. The Two Friends* [Id. 12,819] (admiralty court of South Carolina), in which all the leading British decisions are cited, and commented on by the learned judge with considerable ability. It results, I think, from a view of all the cases, and the reasoning in support of them, that this court has no jurisdiction.

Second point. But if the court should be of a different opinion, then we contend that the peculiar circumstances and facts of this case will exempt the ship from any liability. The lien attempted to be imposed must be predicated upon the idea of there being an owner and a master: for the treble security is against the owner, the master, and the ship. Now we say that at the time these repairs were made and supplies furnished, there was not, legally and technically speaking, either owner or master. This will appear from a short history of the case, as it was presented to the court on a former occasion. This ship was formerly called the *Little Sally*, owned by British subjects, and condemned in the admiralty for an infraction of the non-intercourse law. At the sale, pursuant to the decree of condemnation, she was knocked off to a Mr. C. H. Fisher, who previous to the obtainment of a title from the marshal transferred his right to the purchase, to a Mr. A. W. Scribner, who was put in possession of the ship, and appointed Lightbourne as master, in contemplation of an intended voyage. During the period of this possession by Scribner, the repairs and supplies, the subject of the present litigation, were made and furnished, upon the contract of Scribner, or the master Lightbourne. Only a small part of the sum which Scribner had agreed to pay Fisher for his purchase, was actually paid, and he had no other title than the memorandum of an agreement between him and Fisher, and the possession which he had obtained. The balance being demanded by the custom-house, and no further payment having been made by Scribner, the marshal again took possession, and advertized a second sale. In the meantime, the present claimant, Mr. John H. Dearborn, agreed to pay into the custom-house, the amount of the sum for which Scribner had purchased the ship of Fisher. This proposal was acceded to by the marshal and the custom-house,—a bill of sale was given by the marshal to Mr. Dearborn, and a register by the collector, under the new name of "*The Levi Dearborn*." The register is dated on the 16th of June. From the day of sale then to the obtainment of the register, the ship was in *custodia legis*, it was vested in the United States, not as owners technically considered, but for the purposes of sale. The United States cannot be owners, nor, can the marshal, or officers of the customs be considered as owners, the latter by the express inhibition of the act of congress. Nor, to

use the language of the civil law, could there be even a quasi ownership in the officers of the customs, because it would result from that doctrine, that the officers of the customs could give a bill of sale. Such a power would be inseparable from the character of ownership.

It is absurd to contend, that there could be an ownership without the power to transfer. Now the marshal only could give a bill of sale. If neither the government, or any officer representing it, can be considered as owners, or owner, there could be no master, and consequently no person whose contract could impose a specific liability on the ship for repairs and supplies. It must be admitted that all repairs are made, or supplies and necessaries furnished at the request of the owners, or master, and that the master derives his authority from the owners. Hence the law imposes a liability upon both. For what purpose is the master appointed? Why, to command a ship in the prosecution of a voyage. His functions have an extensive relation to the operations of a ship in the course of a voyage: all his contracts must bear upon that point. Now, if there were no owners, no master could be properly appointed where contracts can fix a lien upon this ship, because these contracts cannot be considered as furnishing the means for the employment of the ship in a voyage; and if the ship was in the hands of the officer of the government, they could not be considered as furnishing the means for the active employment of the ship, because the ship could not be employed by the government, or its officer. The liability of the ship (if she is liable at all) arises from the contract of the owner or the master. The corollary is, that there being in this case neither owner nor master at the time of the repairs and supplies, there is no foundation for this admiralty proceeding.

On the — day of June a bill of sale was given to J. H. Dearborn, the claimant, and his complete title is established by the exhibition of the register. He has paid all the expenses, which the collector admits to be due by the ship, antecedent to this transfer. The question then is, is this property, thus guaranteed to him under the faith of the United States, to be taken fettered with the burthens and contracts, imposed upon it by persons claiming an ownership, in direct opposition to a judgment of this court; or by the person acting as master by virtue of an appointment derived from the pretended owner? Did the government, the marshal, or the collector, previous to the sale to the claimant, recognize Mr. Scribner, as the owner, or — Lightbourne as his master? Mr. —, the officer, representing the government, contended, that this court decided on a former occasion, that the claim of Scribner was totally unfounded, and that the ship antecedent to the sale to Mr. Dearborn, was never out of the legal custody and possession

of the marshal. Upon what ground of law, reason, or justice, then, can this ship in the possession of the present owner be made liable for antecedent repairs? By parity of reasoning, she could be charged specifically, for repairs and supplies in England, or any other contract previous to her condemnation, which operates as a lien. It results, that the remedy which these libellants have is confined to the persons who contracted with them, and that the ship is discharged.

Mr. Noel, for libellants.

Mr. Charlton, for claimants.

STEPHENS, District Judge. This ship is libelled for sundry articles, work done and for a claim of wages due several seamen; to avoid a multiplicity of suits several claims are consolidated so as to bring the demands of all or either before the court, against the jurisdiction of which a plea is interposed in the claims of J. H. Dearborn. It was necessary to have a full knowledge of this case, not only to hear argument as to the jurisdiction, but to have authenticated and proven the demands of such of the libellants as were principally before the court, and from which investigation the following facts appear. The ship Levi Dearborn was formerly called the Little Sally, a ship owned by British subjects, libelled by the United States for violating the non-intercourse law, and condemned as forfeited to the United States, in form, and decreed by this court to be sold: which was carried into effect. It appeared that Mr. A. W. Scribner was the first purchaser of this vessel, and had permission from the collector to proceed to lade her, but it also appeared that Scribner failed to comply with his contract, whereby the marshal re-advertised the ship, upon which some compromise took place between the parties interested, and John H. Dearborn became the purchaser, received the marshal's title and on the 19th of June last received a register for the said ship from the custom-house in Savannah. From the time Mr. Scribner undertook to be the owner of this ship he employs Captain W. Lightbourne as master, and proceeds to prepare the vessel for sea, under the name of the Franklin. An account is opened with Woodruff and Brant for ship's articles as appears by the exhibit, as also supplies of cordage by Fountain, and work and labour by Hewit, a shipwright. All these accounts were opened by express direction of Scribner, and they are admitted to be just by Lightbourne, the captain. It is also in evidence that at the time John H. Dearborn purchased this vessel he was apprised of some demands against her by the collector, which were satisfied, and hence became a fair bona fide purchaser. So far as the above relates to the libellants mentioned, it appears to be the summary of their case. The demands of seamen will form another subject of enquiry to see if they can proceed for their dues in this way.

The variety of authorities adduced to support the libel, and those opposed to it, it should seem have compressed all the reading on the subject, and which has been illustrated with great ability by the gentlemen on both sides; indeed, so much so as to leave very little research for the judge on a question of real importance taken in every point of view. It is to be understood that this court is of special jurisdiction and its exercise can only extend to maritime cases. All the transactions between these libellants were, with Scribner, the actual and reputed owner living in Savannah, the ship was on no voyage that caused the injury to repair her, or for the supplies to aid her, so as to create any lien on the vessel whatever: the whole was a contract within the body of the county, a part of a sovereign state, whose constitution and laws afford daily an opportunity to seek redress in the very many tribunals of justice in this city. Now as I cannot see this case to be of admiralty or maritime jurisdiction so as to work a lien on a ship lying in the river, because labour was bestowed and supplies furnished the person who exercised an ownership, and at his instance, I cannot sustain the libel and subject a vessel in the possession of a bona fide purchaser for valuable consideration, to claims which he never could have supposed to have attached to the ship.

The various opinions that have been afloat on the points before me, seem now to be very well understood and the reading and result well digested in the case before Judge Bee, of Shrewsbury v. The Two Friends [Case No. 12,819], in Charleston, a case very similar to the present, and therefore the redress to the libellants must be at common law. The libel is dismissed, each party paying his own costs. As to the seamen, I find there are no ship articles or agreement signed by them, but they were daily labourers. They must be referred also to those who employed them, as divers others, who exhibited demands for various supplies to this ship.

[The decree was affirmed by the circuit court on appeal. Case No. 17,988.]

Case No. 17,988.

WOODRUFF et al. v. The LEVI DEARBORNE.

[4 Hall, Law J. 97.]

Circuit Court, D. Georgia. Dec. Term, 1811.

ADMIRALTY LAW — MARITIME LIENS — REPAIRS — HOME AND FOREIGN PORTS.

[1. The admiralty law cognizable in the federal courts is not the civil law of the Roman government, but the admiralty law of Great Britain.]

[2. There is a maritime lien for material and labor furnished in repairing a vessel in a foreign port. The ports of the different states are

¹ [Affirming Case No. 17,987.]

foreign to each other within the meaning of the admiralty law in relation to liens.]

[Cited in *Jane v. The President*, Case No. 18,201; *The Jerusalem*, Id. 7,294; *Leland v. The Medora*, Id. 8,237; *Ramsay v. Allegre*, 12 Wheat. (25 U. S.) 637.]

[3. Where a British ship was adjudged forfeited to the United States and was ordered sold by the marshal, but the purchaser failed to comply with his contract so that a subsequent sale was necessary, held that the vessel was subject to a maritime lien in the hands of the last purchaser for materials and labor expended in making repairs between the dates of the two sales.]

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

[This was a libel by Woodruff & Brant and others against the ship *Levi Dearborne* to enforce an alleged lien for repairs. From a decree of the district court dismissing the libel (Case No. 17,987), the present appeal was taken.]

The libel charges, that the ship is answerable specifically for materials furnished and work done, in refitting her, between the ninth of May and the seventh of June, 1811. That the ship *Levi Dearborne*, formerly the *Little Sally*, a British bottom, was forfeited to the United States, and a sale decreed to be made, on the eighteenth of April, 1811. That she remained unsold. That the materials and work were furnished by request of the master. The claim states that the ship was forfeited, for a violation of the non-intercourse laws, and sold on the 18th of April, 1811. That the terms of sale not being complied with, she was resold on the 18th of June last; when the claimant (*Dearborne*) became the purchaser, and received from the marshal a bill of sale, dated April 18th. That he purchased on the faith of the government and its officers, without being notified of the supplies and repairs alleged in the libel. That Captain L. did not take charge of the ship, by authority from the claimant, nor was he authorized by the claimant to direct the supplies and repairs, but received his authority from *Scribner*, who was in possession.

Mr. Noel, for the libellant.

It is alleged in the libel and proved by the testimony, that when the materials and repairs were furnished, there was no responsibility to the libellants, except that of the ship. There was no actual ownership or existing operative title. The right acquired by the government, by seizure and condemnation, before sale, was imperfect. *Scribner* was in possession for a short time, but without title; he had not paid the purchase money. The actors in this suit did not know, or treat with *Scribner*, as the owner. They furnished the materials and work on the sole credit of the ship. The claim admits that *Scribner* was not the owner, and it is not proved that *Scribner* had assumed payment. Captain *Lightbourne* did not call for the repairs and materials, on the credit of any other person, but as master of the ship.

2d. The appellants have a specific remedy against the ship, admitting the statement of facts made by the respondent. The district court has jurisdiction, as an instance court of admiralty, to make the ship liable for repairs and materials. This jurisdiction is derived from the civil law. In maritime cases the courts of the United States are governed (except in questions of prize) by principles of the civil law, or by positive statutes. Every man who has repaired or fitted out a ship, or lent money to be employed in those services, has by the civil law, a lien on the ship. *Abb. Shipp.* p. 151; *Domat*, Civil Law, B.

3d. It may be said that the maritime law is a part of the common law of Great Britain, and that the common law is the law of the United States, where not superseded by positive statutes. The correctness of these positions shall be considered, after having taken notice of the British adjudications, upon this subject.

There is no rule of the common law, which makes property subject to specific liability, or creates a lien by implication, as a security for the performance of a contract or payment of debt. This is a remedy peculiar to the civil law. The exercise of it by the courts of admiralty early became a source of jealousy, and produced the statutes 13th and 15th Richard II. Yet we find that even the courts of common law disregarded the restrictions intended by those statutes, for several centuries after they were enacted. It has uniformly since been held, that suit may be maintained in the admiralty for seamen's wages, though the agreement was made on land. *Rolle*, Abr. 533, 2 Bac. Abr. 181. In Hilary term, 8 Car. II., it was resolved by all the judges, that if suit be in the admiralty for building, amending, saving or necessary victualling of a ship, against the ship herself, no prohibition shall be granted, though this be done within the realm. *Cro. Car.* p. 296. The first case opposed to that decision is *Watkinson v. Bernadiston*, 2 P. Wms. 367, afterwards *Buxton v. Snee*, 1 Ves. Sr. 154. Notwithstanding these cases, we find Lord Mansfield declaring, in unqualified terms, that whoever supplies a ship with necessaries has a treble security: (1) The master; (2) the ship; (3) the owner. His lordship adds: "Suppose the owner in this case, had delivered the value of the goods in specie, to the master, with order to pay it over to the creditors, and the master had embezzled the money, it would have been no concern of the creditors, for they trust specifically to the ship, and generally to the owners." *Cowp.* 639; *Rich v. Coe*. Mr. Abbot has mentioned the decision by Lord Mansfield, in *Wilkins v. Carmichael*, 1 Doug. 101, as somewhat repugnant to the former. His lordship there is made to say, that "work done for a ship in England is supposed to be on the personal credit of the employer," the amount of which is, that

work done where the owner is present shall be considered prima facie as done on his credit. From this review of the adjudged cases in England, it must be inferred, that the doctrine by which a lien upon the ship has been restrained to a foreign ownership is not so clearly settled, as stated by Abbot. Judge Winchester has remarked in *Stevens v. The Sandwich* [Case No. 13,409], that "the reports of decisions in that country, are perfectly irreconcilable. That no principle can be extracted from the adjudged cases in England, which will explain or support the admiralty jurisdiction, independent of the statutes, or the works of jurists who have written on the general subject."

But, however well settled the doctrine may be in the British courts, it cannot operate here, in repugnance to a principle of maritime law. From what source do we derive those principles? They do not take effect here, as a part of the common law of England. The state governments adopted the common law as to all cases to which it is adapted. But this is not the medium through which the maritime code has obtained operation in the United States. The courts of the United States are tribunals of special jurisdiction. Their powers are derived, exclusively, from the constitution and laws of the United States. Const. art. 3, § 2: "The judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties." Various classes of cases are specified. Among these are "all cases of admiralty and maritime jurisdiction, and controversies between citizens of different states, and between citizens and foreigners."

As to real and personal remedies, no principles of decision are designated by the constitution—they were left to be prescribed by the legislature. The legislature has not prescribed. The *lex loci* has therefore necessarily been resorted to by the courts, and in most cases which have arisen, the common law has prevailed, not as the law of the nation, but as the law of the place—not of the state where the court sits, but as the law of the place where the cause of action may have arisen, in whatever clime, or under whatever government. Respecting maritime cases, principles of decision were recognized and adopted by the letter of the constitution. The terms there used are "cases of admiralty and maritime jurisdiction." These terms relate to a jurisdiction, peculiar in its operation, and in the principles by which it adjudicates. They essentially appropriate to that jurisdiction, those peculiar principles which characterize "admiralty and maritime cases," and by which alone they must be decided. Hence, if congress should by law enact, that a cause of action arising on the high seas, shall be cognizable by courts proceeding according to the course of the common law, would not such provision, by destroying the principle of decision, break

down a jurisdiction created by the constitution? We infer, that the maritime code is the law by which the right of the libellants is to be decided. That this system operates, not as it does in England, as a set of customs, forming a part of the *lex non scripta*, but as a separate and distinct code.

Mr. Harris, for claimant, commenced his argument, and was stopped by the court.

JOHNSON, Circuit Justice. It must be conceded, that the question made in this cause, is one hitherto unsettled in the courts of the United States. The argument in support of this libel, has proceeded on the ground, that the admiralty law of the United States, is the civil law of the Roman government; but the civil law has undergone many changes and modifications, which we are not bound to trace. The admiralty law of Great Britain is the admiralty law here. The lien on vessels for material-men and ship-wrights, exists only in a foreign port. Where the owner is present and resident, the common law principle must govern. In such case, no lien on the vessel is created. In the case of an owner, who, though present, when the work and materials are furnished, is transient and non-resident, I am disposed to think otherwise, and that in such case, the lien attaches. It is proper also to state, what shall be deemed a foreign, and what a domestic port, as to this question: The seaports of the different states ought, in this respect, to be considered as foreign ports, in relation to each other. Charleston, for instance, is a foreign port, as to a claim of this nature, made in Savannah. In the present case, the ship must be considered as having become a domestic ship from the time of the marshal's sale. The decree of the district court is therefore affirmed.

WOODRUFF (McDONALD v.). See Case No. 8,770.

WOODRUFF (NELSON v.). See Case No. 10,117.

WOODRUFF (SARGENT MANUF'G CO. v.). See Case No. 12,368.

WOODRUFF (SPAFFORD v.). See Case No. 13,198.

WOODRUFF (TIERNAN v.). See Cases Nos. 14,027 and 14,028.

WOODRUFF (UNITED STATES v.). See Case No. 16,758.

Case No. 17,989.

Ex parte WOODRUFF and COBB.

[3 App. Com'rs Pat. 262.]

Circuit Court, District of Columbia. Jan. 12, 1860.

PATENTS — PRIORITY OF INVENTION — EFFECT OF CAVEAT.

[1. When a caveat is not general enough in its terms to cover a principle or a class, but is pre-

cise and definite in every detail of an agreement and combination of parts, which are severally familiar, and the patentability of the invention depends on the particular combination alone, the caveator cannot, after applying for a patent not varying in any respect from the caveat, claim that the caveat protected anything more.]

[2. A caveat will protect only one of several distinct patentable subjects falling within its general scope, though in connection with other circumstances it may furnish strong proof of his claim to priority in another invention in the same line.]

MERRICK, Circuit Judge. The appeal in this cause is from a decision of the commissioner of patents awarding priority of invention to Zenos Cobb, patentee, over T. T. Woodruff, applicant for an improvement in convertible seats or couches for railroad cars. The only point presented by the reasons of appeal and the commissioner's response to those reasons is the question of priority of invention. Whether in the present state of the mechanic arts, in view of numerous contrivances for reclining seats and convertible couches as used in railroad cars or elsewhere, there be any patentable novelty in the devices now under consideration, I have not been directly called upon to determine, and therefore I prefer to pass over that question, which seems to have been conceded to the parties by the office, inasmuch as the conclusions I have reached upon the question of novelty will probably occasion a contest before the courts, when this enquiry can be more satisfactorily made than upon the record as now made up before me.

To prove the date of his invention, Woodruff relies upon a caveat filed by him in the office in the month of February, 1857, reversed in 1857, renewed in 1858, as containing the devices in question, and also upon the testimony of two witnesses. Cobb stands entirely upon the date of his application dated June 8th, 1858. The precise device caveated by Woodruff in 1858, was patented to him May 31st, 1859, in the very words of the caveat, and, if his present invention is so embraced by the caveat, it would seem to follow that the patent, being in the same words as the caveat, must necessarily cover and protect his present claim, and that it is therefore not the subject of a separate patent. To avoid this consequence, the applicant contends that a larger interpretation is to be given to a caveat than to a patent, in order to cover a party's claim to priority of invention if he subsequently matures anything patentable to which the caveat may be construed to apply. With whatever force such argument might operate where a caveat is in general terms, describing an object imperfectly contemplated and not yet reduced to precise shape, yet when the caveat is not general in its terms, so as to cover a principle or a class, but is precise, definite, and minute in all the detail of arrangement and combination of parts which severally are familiar, and for the accomplishment of a principle of no special novel-

ty, and standing on the particular combination alone for its patentability, the office has no suggestion from the caveat of anything beyond what is described in it, and when the party follows up that caveat by a patent, without any variation therefrom, he himself would seem to be estopped from saying that the caveat protected anything more. Unless it should be held that one caveat may cover two or three or an indefinite number of distinct inventions, which I am not aware has ever been asserted successfully.

I presume the most that could be said for a caveat is that it will directly protect only one of several distinct patentable subjects falling within its general scope at the election of the party inventing them, although indeed, connected with other circumstances, it may furnish strong adminicular proof in favor of his claim to priority from the other over another invention in the same line. This leads me to consider the position taken by the office, that the caveat is proof that the party had invented nothing else than what he has described in his caveat. Standing by itself, of course, the caveat furnishes, as I have already intimated, no proof in favor of the caveator upon his other concurrent invention, but when that other invention is so very close to the first as to occasion a doubt whether it might not be considered as one of the several modes in which the inventor contemplated the application of the principle by which his machine may be distinguished from other inventions, this very small additional proof will be potential in determining the contemporaneous date of his second invention. In the present case I find in the testimony of the witnesses, considering the very close resemblance between the pending application and that described in the caveat, enough to satisfy my mind that Woodruff had developed fully in his own mind the invention covered by his present application as early as December, 1856, and that he fully described it to others in such manner that any one skilled in the business could from that description construct the device in question long before the invention of Cobb, and that he set about embodying that description in a working model certainly nearly as early as February, 1858, and that all the essential parts were completed before Cobb's, and the whole perfected, with reasonable diligence by the month of October, 1858, which perfecting with reasonable diligence being by relation carried back to the commencement of the model, if not to the very date of the proclamation of the matured idea, is sufficient to show that by many months Cobb was anticipated. I refer particularly to the answer of the witness Dykeman to 24th, 25th, and 26th interrogatories in chief, 9th and 10th cross and 28th direct, and the answer of George J. Woodruff to 6th, 7th, 8th, and 9th interrogatories in chief. The suspicions to which this testimony would be obnoxious,

standing alone, is relieved by the conclusive proof furnished by the caveat, and the two prior patents of Woodruff, of December 21st, 1856, that he already occupied a large space in this particular field of invention, and that he for this reason is not to be distrusted as a pirate of other people's ideas.

Now, for the reasons aforesaid, I hereby certify to the Hon. William D. Bishop, commissioner of patents, that having assigned the 15th of December for hearing said appeal, and having, at the request of both parties, postponed the hearing until the 6th of January, they were both present and argued the case by oral and written arguments, and having fully considered the premises, I am of opinion that there is error in the decision of the office in awarding priority of invention to Zenos Cobb, and said judgment is hereby reversed, and priority of invention is hereby adjudged in favor of T. T. Woodruff, and a patent is directed to be issued to said Woodruff as prayed.

WOODRUFF COUNTY (CULVER v.). See Case No. 3,469.

WOODRUFF, The F. See Case No. 6,763.

WOODRUFF, The J. W. See Case No. 5,770.

Case No. 17,990.

In re WOODS.

[7 N. B. R. 126; 29 Leg. Int. 236; 20 Pittsb. Leg. J. 21.]¹

District Court, E. D. Pennsylvania. 1873.

ACTS OF BANKRUPTCY—NEGOTIABLE PAPER—SUSPENSION OF PAYMENT—PROCUREMENT OF JUDGMENT.

1. The owner of oil lands, who divides it into leaseholds and receives the rent in oil, is not a trader within the meaning of the bankrupt law [of 1867 (14 Stat. 517)], inasmuch as he deals only in the products of his land. Hence, he does not commit an act of bankruptcy by any suspension of payment of his negotiable paper for a period of fourteen days, however multiplied the transactions of his business through the leases, and however extended his credits.

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

2. Although the assets of a debtor may be rightly estimated at four times the amount of his debts, yet he is insolvent if unable to meet his engagements as they accrue and become due.

3. The procuring or suffering a judgment to be obtained against him by a debtor, without giving any warrant of attorney, is not in itself an act of bankruptcy; yet, if he directly or indirectly assists or facilitates the obtaining of judgment on which an execution has followed, this may be evidence in support of an allegation that he has committed an act of bankruptcy by procuring or suffering his property to be taken in execution.

G. H. Vanzant and J. M. Moyer, for creditors.

L. R. Fletcher, G. W. Wollaston, G. S. Selden, and Mr. Woods, for debtor.

¹ [Reprinted from 7 N. B. R. 126, by permission. 20 Pittsb. Leg. J. 21, contains only a partial report.]

CADWALADER, District Judge (charging jury). We are living in an extraordinary age, and there has not often occurred a more striking example of the good or evil spirit of the age than this case. Here is a gentleman who seems to be unable to pay his creditors their dues, but who was in the year eighteen hundred and sixty-nine in such a condition that he paid an income tax on one hundred and sixteen thousand dollars. In less than two years we find his note for the small amount of one thousand four hundred dollars discounted for his own accommodation at two per cent. a month; and we find all his corporeal moveable effects at the place where he resides, sold by the sheriff for less than one thousand three hundred dollars. If he has committed an act of bankruptcy, there perhaps never was a case requiring more urgently the application of the salutary principles of the bankrupt law. The most salutary tendency of this law is to prevent overtrading. In this respect its operation will be gradual, but must be highly beneficial. When relations and friends of a debtor, and when capitalists who, without affection or friendship, would make profit from his embarrassments, learn that they cannot be secured a preference out of the wreck of his affairs, they will not furnish him the means of overtrading. So long as he could, by securing advances and accommodations, obtain them, the temptation to attempt to retrieve his losses, by doubling his investments, was, before the enactment of the bankrupt law, irresistible; and the system of business was that of mere gambling adventure. But when a debtor who suffers losses knows that he cannot prefer his relations and friends, and when capitalists know that they cannot, without risk, assist him to the injury of other creditors, he will stop his business in season to give a fair dividend to all his creditors, and thus make a fair settlement with them in the court of bankruptcy, or much oftener out of it. Thus, in the course of time, few judicial bankruptcies will occur. If this gentleman has been assailed by misfortune, or has suffered disappointment without any fault of his own, and if he rightly estimates the ultimate value of his assets at four times the amount of his debts, he nevertheless admits his inability to meet his engagements as they accrued and became due. He was therefore insolvent, within the meaning of the bankrupt law. It is true, as his counsel urge, that he was under no obligation to file a voluntary petition in bankruptcy. But if he has committed an act of bankruptcy he is liable to be made a bankrupt involuntarily, and it is, in that case, the right of his creditors that his estate should be administered in the court of bankruptcy. Either the bankrupt law should not exist, or it should be thus applied. Otherwise creditors may starve while their debtor is building castles in the air. This, and other general suggestions which I have

made, may or may not be material to the decision of this case. It is for you, as men of business, to determine their materiality or immateriality.

One of the alleged acts of bankruptcy is, that this debtor has, within the meaning of the thirty-ninth section of the bankrupt law of second of March, eighteen hundred and sixty-seven, as amended by the act of congress of fourteenth of July, eighteen hundred and seventy, "suspended and not resumed payment of his commercial paper within a period of fourteen days." It is admitted that he suspended payment of his negotiable paper, and that it remained unpaid more than fourteen days before the commencement of proceedings in bankruptcy. But the laws on the subject have not made this an act of bankruptcy unless he was "a banker, broker, merchant, trader, manufacturer or miner;" and the question discussed by counsel has been, whether he was a trader within the meaning of these laws. On this point, considering the magnitude, multiplicity, and commercial semblance of his transactions, I have had great difficulty; and, if I have mistaken the law, I hope that my opinion will be carefully revised hereafter. My first impression was, that he was a trader, or that there was evidence from which you might find him to have been one. He had divided fifty acres of oil land into fifty or more separate leaseholds, with fixtures put up by the lessees, and from these leases received at one time an immense income, through the factorage or agency of his son, who collected in oil, or in cash, one-half of the gross avails, and was, nevertheless, largely in advance to the father. My first impression, I say, was that a person who, in the course of such dealings, obtained a credit upon negotiable paper, whether discounted for his use or not, was, in respect of such paper, a trader, though the only source and subject of his dealings might be the products of his land in their crude state. But, on further consideration (reserving the question for my own revision or that of others) I instruct you that he was not a trader. I think that the word "trader" is to be interpreted according to its meaning in the English bankrupt law. When the interpretation of the word was, in this respect, established, lands were not liable in England to be sold for their owner's debts, and the products of land were not considered subjects of trade. Nor did the intervention of a factor, and the commercial disposal of the products by him, and the accommodations which he may have extended as a banker, make his principal a trader. On this question your verdict will therefore be for the alleged bankrupt.

The other alleged act of bankruptcy is, that he has procured or suffered his property to be taken in execution with a view to prefer one or both of the creditors who sued him during his visit to Pittsburgh. The proceedings in the suits at Pittsburgh were, in form,

adversary. If they were wholly so in fact, and were neither directly nor indirectly promoted wilfully by him, or facilitated by him, with a view to an execution being issued, there was no act of bankruptcy. The only question to be considered is, whether he procured his property to be taken in execution. Here a point of law is pressed earnestly by his counsel. The creditors allege the act of bankruptcy to have consisted in procuring the executions to be levied. The point of law is founded upon an argument that the proof tends only to show that he procured the judgments to be obtained. It is objected that this is not an act of bankruptcy, and if it were one, is not the act of bankruptcy alleged. The act of congress does not make it, in itself, an act of bankruptcy for a debtor to procure a judgment to be obtained against him; but makes it an act of bankruptcy to procure his property to be taken in execution. This explains the form of the question. The answer to the objection is, that an execution is the legal purpose of a judgment, its end and fruit, as the old law books say. We can judge of men's motives and intentions only from the tendency of their acts. We cannot dive, say the books, into the secret recesses of men's hearts. But we may rationally believe that a man designs to do that to which his acts tend. Every ordinary person knows that a judgment is regularly followed by an execution; in other words, that the tendency of procuring the judgment is that the execution shall follow. If a man is tried for murder, the indictment may charge that he fired a loaded pistol at the person killed, and may not aver that the defendant was the person who loaded it. The latter averment cannot be necessary. But although there may be no direct proof that the defendant fired the pistol, yet if it was fired with fatal effect the evidence that he fired it may be circumstantial. In such a case, proof that he loaded it would not be immaterial to the question whether he fired it, and might, under some circumstances, be very material. I do not see much difference, between the tendency of the judgment to produce an execution, and that of loading the pistol to produce a shot from it, except that in the former case there can be no doubt who is the intended sufferer. The objection, as a mere point of law, is thus explained and answered. But I will not state it as an absolute legal inference, that a man who procures a judgment to be obtained against himself intends that an execution shall follow. I will leave it to you, whether, in fact, this debtor, directly or indirectly, brought about or facilitated the obtaining of the judgments at Pittsburgh, with a view to their being levied by execution at Philadelphia, and with a view to preferring these two judgment creditors, or either of them.

On such a question creditors can ordinarily prove such facts only as, if unexplained, fairly authorise a reasonable inference of the

procurement and of its purpose. If such facts are proved, and the debtor, having the means of giving explanation, does not give it, the inference against him may sometimes be strengthened from the omission. If the legal proceedings appear to have resulted in anywise from arrangement between debtor and creditor who are near relatives, and the same lawyers appear to have been acting for both parties, a very full explanation from the parties who alone know the details of the transaction, has, in the course of proceedings under the bankrupt law in other cases, been thought necessary in order to rebut the inference of procurement. If the debtor goes to the creditor's lawyer, or the creditor goes to the debtor's lawyer, it is not easy to say of which of them he was counsel or attorney. Where he appears to have acted for both parties, or to have officiated between them without any distinct relation to either of them, this, if unexplained, may be evidence that the judgment was brought about by an understanding, and by the permission and connivance of the debtor. The debtor does not ordinarily go to the office of the creditor's attorney and allow service to be made on him there unless he means to promote the proceeding. These are matters for your consideration. There were two creditors, one a friend who had been for a long time very indulgent to him, the other a son. Pittsburgh was not the place of the debtor's residence, and not a place where he would, under ordinary motives, wish to be sued or would facilitate a suit against him, unless for some special purpose. It seems from the statement of his brother, who was counsel on this trial, which was received by consent as testimony, that a judgment by default can be obtained at Pittsburgh sooner than at Philadelphia, where this debtor resides, and in an easier manner. You will consider what counsel on both sides have said as to parties and certain of their companions finding their way concurrently from different places to Pittsburgh, while he was there, three hundred miles from home. I think it perhaps more important to consider what occurred there. The debtor and his son met at the law office of the debtor's brother; an account between the son and the father is there speedily adjusted, and is filed of record in the suit in which a judgment for the balance is speedily obtained. The processes were served, one in the office, and the other in the street in front of the office of the brothers, who were the lawyers. Well, gentlemen, it is for you, and not for me, to say whether all this requires explanation, and whether it has been satisfactorily explained. If you think, upon the facts, that explanation was necessary, I then say, that in law there is sufficient evidence to authorize you to think so, and to require such explanation as to satisfy you that there was no facilitation of the proceedings by the debtor amounting to the procurement alleged;

that there was no facilitation intended and effected by him. If so, how are the facts explained, if explained at all? The son has not been examined as a witness. Now it is not for me to say which party ought to have produced him as a witness. The burden of proof was upon the creditors. If they have not succeeded without his testimony in establishing a case requiring explanation, they have no right to object that he has not been examined. But if they have made out such a case, it may be proper for you to consider whether he was not the proper person from whom to expect, in great part, the explanation required. You may desire to know what induced him to go back from Pittsburgh for his books of account and bring them to Pittsburgh, where the account was settled; who told him to go for them, and why he did it. The debtor himself does not supply the omission. He appears to be a pretty candid person, but careless in his recollection. In the short time of seven months he had forgotten an interview with his son at the Monongahela House, and would not now have recollected having seen the son there if he had not been reminded of it by being shown his former deposition. He does not profess to recollect all that occurred. On the whole, if explanation was reasonably requireable, has it been satisfactorily made?

There is only one question which you can find against the bankrupt. It is whether he procured or suffered his property to be taken in execution, that is to say, wilfully facilitated it, either directly or indirectly. The other facts are not material except as evidence of the alleged procurement.

The judge then read ten written points upon which he had been requested by the counsel of the alleged bankrupt to charge the jury, and answer each of them in succession. The answers were in writing. The substance of them is in the above note of the previous charge.

The jury found for the petitioning creditors on the question whether the alleged bankrupt had procured his property to be taken in execution; and on the other questions found in his favor.

Case No. 17,991.

WOODS et al. v. BUCKEWELL et al.

[2 Dill. 38; 7 N. B. R. 405; 6 Alb. Law J. 291.]¹

Circuit Court, D. Missouri. 1872.

ASSIGNEE IN BANKRUPTCY—APPOINTMENT BY DISTRICT COURT—REVIEW.

1. The district court has large discretionary powers in matters of bankruptcy, and the circuit court will not interfere with the exercise of such powers, and set aside the appointment

¹ [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 6 Alb. Law J. 291, contains only a partial report.]

by the district court of an assignee, in a case where it is only claimed that the district court erred in holding that no election had been made by the creditors, there being no allegation against the fitness of the person appointed.

[Cited in *Re Adler*, Case No. 82.]

2. Nature of the jurisdiction conferred upon the circuit courts by the second section of the bankrupt act [of 1867; 14 Stat. 517], considered by Mr. Justice Miller.

Petition for review of appointment of assignee in bankruptcy. O'Fallon & Hatch were adjudged bankrupts in the United States district court for the Eastern district of Missouri, on the petition of Archie Woods et al., creditors of said bankrupts. The usual warrant in bankruptcy was issued and a meeting of the creditors called thereunder for the purpose of electing an assignee. At that meeting there was a close contest among the creditors as to the person to be elected assignee. The register reported to the district court that twelve votes, representing debts amounting to \$39,192.78, were cast for Leonard Matthews as assignee, and eleven votes, representing \$33,456.43, were cast for Henry Overstolz, the other candidate for the assigneeship, and certified that Leonard Matthews had been elected. Several other claims, however, had been withdrawn, rejected, or postponed, and questions arose concerning the action of the register or of the claimants themselves thereon. The facts relating to such claims were also reported by the register to the district court. Exceptions to the register's report were filed by Robert A. Buckewell and other creditors, and upon a hearing thereof the district court adjudged that no election of assignee had been made by the creditors, and appointed Robert K. Woods as assignee. [Case unreported.]

The petitioning creditors in the original bankruptcy proceeding brought the present petition in the circuit court against those creditors who excepted to Mr. Matthews' election, alleging that Mr. Matthews had been duly elected, and asking the circuit court to review and reverse the action of the district court, to annul the appointment of Mr. Woods, and to declare Mr. Matthews duly elected.

Hendershott & Chandler, for petitioners.
Basil Duke and Dryden & Dryden, for respondents.

MILLER, Circuit Justice. This is a petition for review of the proceedings at the election of the assignee of the bankrupt's estate. The election was a close one. There were twenty-three or twenty-four votes cast, and the register decided in favor of Leonard Matthews as the assignee, and against Henry Overstolz, the other candidate for the assigneeship. The proceedings at the meeting of creditors were brought to the attention

of the district court, which held that there had been no election by the creditors, and appointed Robert K. Woods as assignee. It is not claimed in the petition that any objection exists against Mr. Woods, but the quarrel seems to be among the creditors themselves. This court is asked to examine the details of the election, to count the votes, and to go into the qualifications of the voters. Now, I do not consider that the bankrupt act contemplates the bringing of this class of cases before the circuit court for review. The second section of the act provides "that the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except where special provision is otherwise made, may, upon bill, petition, or any other proper process, of any party aggrieved, hear and determine the case in a court of equity." To decide upon the legality of the votes or the qualifications of creditors involves no principle of equity, unless fraud in the election is alleged. The district courts are vested with large discretionary powers, in reference to the appointment and approval of assignees. Section 13 of the act contains the following provisions: "The creditors shall at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at said meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees. * * * All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees or order a new election." The discretionary power thus vested in the district court could scarcely be in stronger terms. Assignees and registers are but officers of the court and subject to its orders. The chief difficulty complained of concerning district judges (and in saying this I am not to be understood as referring to Judge Treat) in connection with the bankrupt law has been that they do not hold a strong enough hand over the officers of the court, and see that they are prompt and efficient in the discharge of their duties. Such being the case, I shall not be the first to interfere with the discretionary powers of the district court in regard to the appointment and control of its officers. The petition is dismissed.

Petition dismissed.

Case No. 17,992.**WOODS v. FORSYTH.**

[2 West. Jur. 348; 16 Pittsb. Leg. J. 234.]

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

BANKRUPT ACT—JURISDICTION OF CIRCUIT COURT.

The circuit court has not jurisdiction of suits brought by the assignee of the bankrupt, simply to collect the assets assigned.

[Cited in Goodall v. Tuttle, Case No. 5,533; Smith v. Crawford, Id. 13,030.]

Suit by the assignee of Tesson & Co., bankers, to collect a debt due by the defendant to the bankrupts prior to the bankruptcy. Pleas: general issue and set off. Demurrer to special pleas.

Before TREAT and KREKEL, District Judges.

PER CURIAM. The circuit court has not concurrent original jurisdiction given it by the bankrupt act [of 1867 (14 Stat. 517)] for the collection of the debts due the bankrupt, and the settlement of his estate. The concurrent jurisdiction conferred by the second section of the act is confined to cases in which there is a disputed title or claim to property; to suits in which some title or claim to the property or assets adverse to that of assignee is set up. As this court has no jurisdiction, the suit will be dismissed without passing upon the demurrers. Suit dismissed.

WOODS (HYDE v.). See Case No. 6,975.

Case No. 17,993.**WOODS v. JACKSON IRON MANUF'G CO.**[Holmes, 379.]¹

Circuit Court, D. New Hampshire. May 1, 1874.

STATUTE—REPEAL BY IMPLICATION—CONVEYANCE OF STATE LANDS—RECORD.

1. The provisions of a statute, so far as they are inconsistent with those of a subsequent statute relating to the same subject-matter, are by implication, if not expressly, repealed by the later statute.

2. Under the resolve of the legislature of New Hampshire, approved June 22, 1831, conveyances of state lands by a land commissioner may be recorded in the office of the secretary of state at any time, and take effect only on being so recorded.

At law.

Gilman Marston, A. A. Strout, and R. D. Smith, for plaintiff.

M. W. Tappan, William Heywood, and Henry Heywood, for defendant.

SHEPLEY, Circuit Judge. This is a real action, brought for the recovery of a tract of land containing eleven hundred acres, situ-

¹ [Reported by Jabez S. Holmes, Esq., and here reprinted by permission.]

ate in Bartlett, in the county of Carroll, and state of New Hampshire. A stipulation is filed that the case shall be heard and tried by the court without the intervention of a jury, saving to either party the right of exceptions, writ of error, or appeal, according to law.

Both parties claim title under grant from the state of New Hampshire. It is admitted that the title was in the state of New Hampshire prior to July 2, 1835. The following act of the legislature of New Hampshire was approved June 25, 1830:

"An act providing for the recording of deeds of state lands in the office of the secretary of state.

"Section 1. Be it enacted by the senate and house of representatives in general court convened, that all deeds of land belonging to the state, which may hereafter be executed and delivered, by any officer or agent of the state authorized to make such conveyance, shall be recorded in the records of the state by the secretary; and no deed of conveyance, or lease of any lands, or of title or claim to any lands, in this state, shall be of any force or effect for the conveyance of the same, or for the release of any title or claim of the state, unless the same shall have been recorded, as aforesaid, within one year from the date of the same."

The following resolve of the legislature was approved June 22, 1831 (chapter 51): "Resolved, by the senate and house of representatives in general court convened, that his excellency the governor, by and with advice and consent of the council, be, and he hereby is, authorized and empowered to appoint some suitable person or persons, not exceeding two, as land commissioners, who shall be sworn to the faithful performance of the duties of their trust, and to continue in office during the pleasure of the executive for the time being, whose duty it shall be to advertise and expose to sale such public lands as he or they may think proper, for the interest of the state; and, upon application made to any such commissioner by any person or persons for the purchase of any lands belonging to this state lying south of the forty-fifth degree of north latitude, to sell and convey to such person or persons any such lands for such consideration as to such commissioner or commissioners the interest of the state may seem to require; and to execute deeds thereof, which deeds, being first recorded in the office of the secretary of state, shall be effectual for conveying all the right and title of this state to such land, saving the right of jurisdiction: provided, that all the expenses of surveying and conveying any such lands shall be paid by the person or persons to whom such lands shall be conveyed; and said commissioner or commissioners shall receive from the amount of all sums of money arising from such sales, and which sums he or they shall pay to the

treasurer of this state, the amount of six per cent. in full compensation for his or their services. And be it further resolved, that it shall be the duty of each and every such commissioner so appointed to deposit all moneys by him received for such lands with the treasurer of this state as soon as may be after receiving the same, and shall annually in the month of June make report to the governor of this state of all lands conveyed and sold by him aforesaid, including the quantity and value thereof, where the same lies, and such other information as he may deem expedient."

At a meeting of the governor and council on the first day of July, 1831, James Willey, of Conway, was appointed land commissioner, and he was duly commissioned and qualified. On the third day of July, 1835, in consideration of \$300 paid by Daniel Eastman, of Conway, "James Willey, of Conway, in the county of Strafford, and state of New Hampshire, land commissioner, remised, released, and forever quitclaimed unto said Daniel Eastman, and his heirs and assigns forever, all the right, title, claim, and interest which said state now has in and unto the following described tract of public land, viz." (Here followed a description of the demanded premises by metes and bounds.) After the usual habendum clause, and a special covenant of warranty against "persons claiming by, from, or under me in my official capacity as land commissioner aforesaid," the deed concludes as follows: "In witness whereof I have hereunto set my hand and seal this third day of July, in the year of our Lord one thousand eight hundred and thirty-five. James Willey (Seal), Land Commissioner."

The deed was duly witnessed and acknowledged. The consideration was paid by the grantee to Willey, and by him paid over to the state of New Hampshire. This deed was not recorded in the office of the secretary of state for New Hampshire until June 28, 1837, nearly two years from and after date of the same. It was recorded in the registry of deeds for Coos county on the eighth day of July, 1835.

By sundry mesne conveyances through Jeremiah Eastman to Trickey and Meserve, and from them to one Odiorne, and from him to the Jackson Iron Manufacturing Company, whatever title Daniel Eastman had in the premises passed to the defendant on the twenty-sixth day of June, 1837.

The demanded premises have been taxed in the town of Bartlett to the grantees in the deeds under Daniel Eastman from 1836 to the present time, and from 1844 to the present time to the Jackson Manufacturing Company; and the defendant proved the payment of these taxes.

The tract is a mountain; some portion of it on the south side, where cattle can pasture; the rest is wild-land. Meserve and

Trickey took a bond of the land Oct. 5, 1835, from Daniel Eastman, made a partial survey, and ascertained that iron ore was on the tract, and took out about one hundred pounds of the ore, which they took to Franconia and had tested. They then took their deeds of Eastman, and in March, 1836, surveyed the tract with compass and chain, and erected monuments. In May, 1837, Dr. Jackson went on to the tract with Odiorne, one of the grantees, and explored it. In June, 1838, Meserve and Odiorne and others employed twelve men on the tract in uncovering another and different vein of the ore, and took out about a ton of the ore, which they sent to Dover to be tested. In 1842 Meserve and others went on to the tract with a Mr. Lang, of Boston, and Sanderson, of Sheffield, England. In the succeeding autumn they took out a ton of the ore, which was forwarded to Sheffield, England. In 1844 Mr. Parrott, of Boston, an engineer in the employment of the defendant corporation, surveyed a road leading through the woods up the side of the mountain about two miles, and extending about one hundred rods on to this tract, which road was built about that time. Mr. Meserve was the agent for the defendant corporation, and went on the tract every year after the conveyance to the Eastmans three or four times a year, sometimes oftener. In 1847 he went on with Mr. Coe, who went on to examine as agent of the defendant; also in 1848, with Pingree and Cowes, who were interested in the corporation. Ore was also taken from the tract in 1870 by him.

There has never been any adverse possession or exercise of any acts of ownership on the tract by any other persons than those claiming under the title under which defendant claims.

Plaintiff read from the Public Laws of the state of New Hampshire:

"Chapter XLII., joint resolution in relation to the public lands.

"Section 1. Governor authorized to sell lands: proceeds to be added to literary fund.

"Resolved, by the senate and house of representatives in general court convened:

"Section 1. That his excellency the governor be requested to investigate the condition of all the public lands belonging to the state, and that he is hereby authorized and empowered, with the advice of the council, to sell and dispose of the same, together or in parcels, as may be by him deemed most advantageous to the state; the proceeds of such sale or sales to be placed in the state treasury, and constitute a part of the literary fund, to be divided among the several cities and towns, and by them applied to the maintenance of common schools, or to other purposes of education as now provided by law, and that the treasurer be empowered to make and execute conveyances thereof, in accordance with the contracts of sale entered into

by the governor." Approved June 28, 1867.

Plaintiff also introduced in evidence the records of a meeting of the governor and council of the state of New Hampshire, held Oct. 15, 1867, in which record was the following entry:

"Sold all the public lands in Grafton, Carroll, and Coos counties, for the sum of \$25,000, to Aurin M. Chase, of Whitefield."

Peter Sanborn was the treasurer of the state of New Hampshire for the year 1867, duly elected, qualified, and sworn. The plaintiff then offered in evidence, subject to the objection duly made by defendant, a deed acknowledged Oct. 21, 1867, from Peter Sanborn, treasurer, to Noah Woods, the plaintiff, and William H. Smith, quitclaiming and releasing to Woods and Smith, their heirs and assigns forever, "all and singular the lands belonging to the state of New Hampshire, or in which the said state of New Hampshire has or might have any right, title, interest, or claim in any way whatever, situate and lying within the limits of the counties of Grafton, Carroll, and Coos, in said state of New Hampshire, however located and bounded, estimated one hundred thousand acres, more or less, meaning and intending hereby to assign and convey to said Woods and Smith, their heirs and assigns forever, all and singular the land in said counties of Grafton, Carroll, and Coos, to which the said state of New Hampshire has or might have any claim or title in any way whatever, excepting and reserving from said grant the arsenal lot in Lancaster, in the county of Coos, and any gun-house lot owned by the state in said counties of Grafton, Carroll, and Coos aforesaid."

This deed was duly recorded in the office of the secretary of state Nov. 21, 1867. It appeared in evidence that this deed was made by direction of the governor, and at the request of Aurin M. Chase, to Woods and Smith; and that the sum of \$25,000 was paid to the governor, and by him to the treasurer of state, and by him carried to the credit of the literary fund. The sum of \$25,000 was the consideration of this and other conveyances, made at the same time to Aurin M. Chase, and to others under his direction and by his request.

By subsequent conveyances, Noah Woods obtained the interest of William H. Smith in the demanded premises.

The principal objection made by the plaintiff to the title of the tenant is, that the deed of Willey, the land commissioner, to Eastman, was not recorded in the records of the state, by the secretary of state, within one year from the date of the deed, in accordance with the provisions of the act of June 25, 1830, and therefore the plaintiff contends that the deed was for this reason absolutely null and void, and without force and effect. The act of June 22, 1831, under which Willey was appointed land commissioner, and by authority of which he sold the land and made the conveyance to Eastman, authorized him "to execute deeds thereof, which deeds, being first recorded in the office of the secretary of state,

shall be effectual for conveying all the right and title of this state to such land, saving the right of jurisdiction." This deed was recorded, as we have seen, within two years of its date, and more than thirty years before the date of the deed under which plaintiff claims; and the state of New Hampshire retained in its treasury during all this time the consideration paid for the land, and the grantees exercised during all that period a possession as open, notorious, and exclusive, as is ordinarily exercised over lands of that description, in what was then a wild and uninhabited mountainous region. This possession, occupancy, and claim of title was well known to Aurin M. Chase, as he himself states; and from the evidence in the case there can be no reasonable doubt that the parties who took the deeds as his appointees had full notice of all the facts. Yet it is claimed by the plaintiff that the condition in the act of 1830 was a condition precedent; and, not having been complied with, the deed was null and void, and no entry was necessary by the state to reinvest the title. The cases of *Greenleaf's Lessee v. Birth*, 6 Pet. [31 U. S.] 302, *Robinson v. Minor*, 10 How. [51 U. S.] 641, and *Easton v. Salisbury*, 21 How. [62 U. S.] 426, would seem to support this view, if the act of 1830 is to be considered as applicable to the case. To the same effect is the opinion of the court in the learned opinion in *Hill v. Dyer*, 3 Greenl. 441, and of the supreme court of New Hampshire in *Stone v. Ashley*, 13 N. H. 38. But the true answer to this position is, that the act of 1830 did not apply to this conveyance. The act of 1831 was a distinct and independent piece of legislation. It furnished of itself a complete mode by which the conveyances of state lands sold under its provisions could be made. The provisions of that act are inconsistent with and repugnant to the act of 1830, and, so far as inconsistent with and repugnant to those provisions of the act of 1830, it repeals them. The deed to Willey was executed, delivered, and recorded in strict compliance with the act of 1831.

The grantee, in a deed executed under the provisions of the act of 1831, was notified, by the terms of the act under which he claimed title, that his deed was effectual only "when first recorded in the office of the secretary of state." Until that record was made, he had no title and no seisin. When recorded, the deed became operative. The plaintiff contends that the effect of the statute is as if it read, "when first recorded as provided in the act of June 25, 1830." It is not enough for his purpose to read, "when first recorded according to law," for the general law made deeds operative between the parties and persons having actual notice of them without record, and as to other parties after record. The rule in the act of 1830 was a special one, applicable to conveyances from the state alone. It required them to be recorded "in the records of the state by the secretary," and allowed one year's time from the date of the

deed within which to make the record. The grantee under that statute paid his consideration, and took a valid, effectual, and operative deed, not requiring for its validity to "be first recorded," but one which ceased to be "of any force or effect, for the release of any title or claim of the state, unless the same shall have been recorded as aforesaid within one year from the date of the same." The difference in the phraseology used in the two acts with reference to the record shows also the intention of the legislature to make the provision in the act of 1831 complete in itself, without reference to the act of 1830.

The act of 1830 required the conveyance to "be recorded in the records of the state by the secretary." The act of 1831 provided, "which deeds, being first recorded in the office of the secretary of state, shall be effectual for conveying all the right and title of the state," &c. It is well settled, that where the subject of a former statute is embraced in the provisions of a later statute, if the later statute appears to be intended to prescribe the only rules which should govern that subject, the particulars of the old law in which they differ will be regarded as repealed by implication; but the old law is repealed by implication only pro tanto to the extent of the repugnancy. *Dexter & L. Plank-Road Co. v. Allen*, 16 Barb. 18; *Goddard v. Boston*, 20 Pick. 410; *Davies v. Fairbairn*, 3 How. [44 U. S.] 636; *State v. Wilson*, 43 N. H. 419; *U. S. v. Tynen*, 11 Wall. [78 U. S.] 92; *New London R. Co. v. Boston & A. R. Co.*, 102 Mass. 389. The condition in the act of 1831 was fully complied with when the deed to Eastman was recorded, June 28, 1837. After that time the deed was "effectual for conveying all the right and title of the state." The view we have taken of the construction of the act of 1831 establishes the title of Eastman and the tenants claiming under him, and renders it unnecessary to decide whether the act of June 28, 1867, which authorized the governor to sell and dispose of the public lands belonging to the state, would authorize the sale of lands which the state had once conveyed by deed, and for which the state had received full consideration, and where the seisin of the tenants for thirty years and more had been under a delivery of seisin by the agent of the state, it is not a wrongful intrusion on the public lands.

The defendant did not disseise the plaintiff, and there must be judgment for defendant, with costs.

WOODS v. LAWRENCE CO. See Case No. 59.

WOODS v. OCEAN TOW BOAT CO. See Case No. 13,175.

WOODS (RITCHIE v.). See Case No. 11,865.

WOODS (TAYLOR v.). See Case No. 13,809.

WOODS (UNITED STATES v.). See Cases Nos. 16,759 and 16,760.

Case No. 17,994.

WOODS et al. v. YOUNG et al.

[1 Cranch, C. C. 346.]¹

Circuit Court, District of Columbia. July Term, 1806.²

CONTINUANCE—ABSENT WITNESS.

The court will not continue a cause for the absence of a witness, who has been summoned, if no attachment has been moved for, if the witness resides within one hundred miles of this place, although he resides out of this district.

[Cited in *Park v. Willis*, Case No. 10,716; *Lewis v. Mandeville*, Id. 8,326.]

THE COURT refused a continuance, because the plaintiff had not taken or moved for an attachment against his witness, John Wood, who lived at Port Tobacco, out of the District of Columbia, and within one hundred miles of this place; not having decided yet that an attachment will not lie for a witness who resides out of the district, and within one hundred miles. See *Voss v. Luke* [Case No. 17,014]; *Park v. Willis* [Id. 10,716], November term, 1806.

[The judgment of the court was affirmed on appeal to the supreme court. 4 Cranch, 237.]

WOODSIDE (ALLEGHANY FERTILIZER CO. v.). See Case No. 206.

Case No. 17,995.

WOODSIDE v. BALDWIN.

[4 Cranch, C. C. 174.]¹

Circuit Court, District of Columbia. May Term, 1831.

PHYSICIAN'S LICENSE.

A physician, practising in Washington, D. C., without a license from "the Medical Society of the District of Columbia," may maintain an action at law for his services, if, during the time of those services, there was no existing "medical board of examiners of the District of Columbia."

This was an appeal from the judgment of a justice of the peace for the county of Washington in favor of the appellee [Ethan Baldwin] for \$48, for the balance of an account for medical attendance and services from March, 1829, to March, 1830. Upon the appeal, one of the parties demanded a trial by jury, who found a verdict for the appellee for the amount claimed, subject to the opinion of the court upon the question whether the appellee had a right to maintain an action for his medical services without having obtained a license, or diploma, as required by the 5th section of the charter of the Medical Society of the District of Columbia, granted by the act of congress of the 16th of February, 1819 (6 Stat. 221), entitled "An act to incorporate the Medical Society

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

² [Affirmed in 4 Cranch (8 U. S.) 237.]

of the District of Columbia." The 3d section of the charter provides: "That it shall and may be lawful for the said Medical Society, or any number of them attending (not less than seven), to elect by ballot five persons, residents of the District, who shall be styled 'the Medical Board of Examiners of the District of Columbia;' whose duty it shall be to grant licenses to such medical and chirological gentlemen, as they may, upon a full examination, judge adequate to commence the practice of the medical and chirological arts, or as may produce diplomas from some respectable college or society; each person so obtaining a certificate, to pay a sum not exceeding ten dollars, to be fixed on or ascertained by the society." By the 4th section, any three of the examiners shall constitute a board for examining candidates; and any one of the examiners may grant a license to practise until a board can be held. By the 5th section it is "enacted that after the appointment of the aforesaid medical board, no person, not heretofore a practitioner of medicine or surgery within the District of Columbia, shall be allowed to practise within the said District, in either of the said branches, and receive payment for his services, without first having obtained a license, testified as by this law directed, or without the production of a diploma as aforesaid, under the penalty of fifty dollars for each offence, to be recovered from the county court where he may reside, by bill of presentment and indictment, one half for the use of the society, and the other for that of the informer." By the 2d section the officers, namely, president, two vice-presidents, one corresponding secretary, one recording secretary, one treasurer, and one librarian, were to be appointed at the annual meeting in January, forever; but no time was designated for the election of the board of examiners by the society. It was proved or admitted that there had not been any election of the officers of the society for several years, nor any proceedings by the society; and that there was no existing board of examiners during all the time of the appellee's services for the appellant [James D. Woodside].

Mr. Baldwin, for himself, contended, that the 5th section contained no prohibition of practice, and only gave a penalty to the society, which they only could recover by presentment or indictment; that his practice was not a *malum in se*, even if there had been a board of examiners to whom he could apply for a license. But there was no such board, and consequently he could not have offended against the 5th section of the charter, as it was impossible for him to obtain a license. Nobody has a right to interfere but the society. The act does not forbid any one to practise gratuitously, nor to receive fees without practising. The Maryland statute of 1798, c. 105, §§ 3, 4, 5, and 6, is exactly like the act of congress incorporating the

society; and the Maryland act of 1821, c. 217, shows that plaintiffs could before that act, recover notwithstanding the act of 1798, c. 105. *Berry v. Scott*, 2 Har. & G. 92, in the year 1827. He contended also, that the society was not in existence. It had become extinct by nonuser. 2 Kent, Comm. 233; *Head v. Providence Ins. Co.*, 2 Cranch [6 U. S.] 127; *De Wolf v. Johnson*, 10 Wheat. [23 U. S.] 393.

Mr. Coxe, *contra*. The charter makes the practice and the receiving of payment therefor unlawful, and a contract to pay for such services cannot be maintained. The object of the 5th section of the act was the preservation of the public health; and although the corporation may not exist, yet that section remains in force. 2 Kent, Comm. 245-251. But the corporation has never ceased to exist; and, if it had, the board of examiners would still remain. It is not subject to annual election, as the officers are. But, if the corporation is extinct, the Maryland act of 1798, c. 105, is revived, and the practice is unlawful under that act. The act of 1821, c. 217, only guards against surprise, by the defendant's availing himself of the defence given by the act of 1798. It contains no prohibitory words.

THE COURT (THRUSTON, Circuit Judge absent) affirmed the judgment, with costs.

Case No. 17,996.

WOODSON v. FLECK et al.

[Chase, 305; 1 3 Am. Law T. Rep. U. S. Cts. 97; 9 Am. Law Reg. (N. S.) 435; 2 Leg. Gaz. 230; 2 Abb. U. S. 15.]

Circuit Court, D. Virginia. May, 1870.

DE FACTO GOVERNMENT—MUNICIPAL AUTHORITIES
—REMOVAL TO FEDERAL COURTS.

1. The government of Virginia organized at Wheeling, has been recognized by the United States as the rightful government of that state.

2. After all organized resistance to the national authority had ceased in Virginia, that government was established in undisputed exercise of its authority at Richmond. That government was thus established during the year 1865.

3. When the de facto government of Virginia was dispersed by the superior force of the United States, the civil authorities did not necessarily cease at once to exist.

4. They continued in being de facto, charged with the duty of maintaining order until superseded by the regular government.

5. Thus the common council of Harrisonburg, though elected under the de facto government, remained charged with the government of the town, notwithstanding the temporary occupation of the place by the United States forces.

6. It might have been superseded, for the government of the United States was not bound to recognize any authority which originated with the de facto government. But it was not superseded.

7. The mayor and common council, therefore, exercising their authority derived from their

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

election, and not by virtue of a military order, have no right to remove a suit from the state to a federal court, when that suit has been brought for an alleged false imprisonment, and malicious prosecution thereon, charged to have been committed by them in the discharge of their municipal functions.

8. The courts of the United States are not constituted guardians of the public peace under state laws.

9. These matters are left absolutely to the state courts.

10. These courts watch over personal rights and private security so far as these depend on state laws, and individuals who exercise local authority are responsible to them.

The town council of Harrisonburg in Rockingham county, Virginia, had been elected under the laws of the state at the regular town election during the war, and some time before its termination, the town and county being part of the recognized state of Virginia, and within the Confederate military lines of occupation. After the surrender of the Confederate army under General Lee, on April 9, 1865, the war in fact terminated in Virginia, and in a very short time all resistance to the Federal troops ceased. The town authorities of Harrisonburg, their town having been occupied by a garrison, ceased to meet or discharge any of their duties for a while, the military undertaking the entire police and management of affairs on themselves. On June 16, 1865, however, the post commander at Harrisonburg issued a general order which was published and promulgated to the citizens as general order No. 10, addressed to them and notifying them "that the mayor and council of the corporation last in office upon the resumption of their duties, will be sustained in all their acts consistent with existing laws and proclamations of the government." Upon this the local government reorganized itself and resumed the exercise of its functions; among other things electing as town sergeant one of the defendants. Some time after this a riot broke out which was quelled by the exertions of the mayor and town sergeant, and in the course of their efforts to maintain the public peace they arrested the plaintiff Woodson. It seems that Woodson was asserting, and may be proclaiming, that the mayor and town sergeant had no authority to act as officers; that they were mere usurpers; the government of the town having perished with the state government under which it was elected, and that general order No. 10 could not legally nor constitutionally recall into existence that power which had ceased to be, nor could it create them a new power ab initio. Be that as it may—the powers that be arrested Woodson for inciting to riot or aiding it, and Woodson on examination before a magistrate was discharged. Whereupon he brought his action for malicious prosecution against the mayor, some members of the town council, and the town sergeant. After much contention before the state courts, and several trials and removals from

one county to another, the defendants brought the case here on the ground that they were acting by virtue of the authority of general order No. 10, and being sued for acts done under or by virtue of orders of military officers of the United States, they had the right to remove it into this court by virtue of the acts of congress of March 3, 1863 [12 Stat. 756], and May 11, 1866 [14 Stat. 46], and their supplements. The plaintiff appeared in this court, and moved that the cause be remanded to the court whence it came, because it had been improperly removed, this court having no jurisdiction.

W. W. Crump and Mr. Roller, for the motion.

Bradley T. Johnson, opposed.

CHASE, Circuit Justice. This is a motion to remand the cause described in the record to the circuit court of Rockingham county. In considering it we are not at liberty to look at the merits of the controversy between the parties. The only question which we have to examine is that of jurisdiction.

The suit was originally brought in the county court of Rockingham county, in the state of Virginia, by a citizen of the state against other citizens of the state for malicious prosecution, and involved, apparently, no question arising under the constitution and laws of the United States.

It was removed from the state court into this court by an order of the circuit court of Rockingham county, in supposed conformity with the acts of congress providing for such removal of certain suits for acts done in obedience to the orders of the national authorities during the recent war.

We are to inquire whether the suit thus removed is one of those for the removal of which provision has been made by congress. If not, it is clear that we have no jurisdiction of it, and it must be remanded to the court from which it came. The modes of removal were provided by the acts of March 3, 1863 (12 Stat. 756), and May 11, 1866 (14 Stat. 46),—one by transfer before verdict, another by appeal after judgment. It is not necessary here to consider the second. The first, under the act of 1863, was a proceeding by petition of the defendants filed after entering an appearance; or if appearance had been entered prior to the date of the act, then at the next session of the court. Under the act of 1866, the proceeding for removal might be resorted to at any time before the empaneling of a jury to try the cause.

The suits which might be removed in one or the other of these modes, according to the condition of the particular case at the time of the proceeding for removal, are fully described in the two acts already referred to. If the suit now under consideration comes within any description of these acts, it is certainly described by the first section of the act of May 11, 1866. That description includes

suits for any act done during the Rebellion by any officer or person under any order issued by any military officer of the United States holding the command of any district or place within which such act was done by the person or officer for whom the order was intended, or by any other person aiding or assisting him therein. If this description does not sanction the act for which the suit in controversy was brought, it was not, as we think, within the meaning of either act of congress.

What, then, were the facts in relation to these suits?

Two of the defendants were members of the town council of Harrisonburg. The other was the sergeant of the corporation appointed by the council. The members of the council were elected during the war, while Harrisonburg was within the Confederate lines and under the control of the insurgent government of Virginia.

The sergeant of the corporation was elected after all organized resistance to the national authority had ceased in Virginia, and after the state government, which had been organized at Wheeling, and recognized by the United States as the rightful government of Virginia, had been established in undisputed exercise of its authority at Richmond.

This suit was brought by Woodson against certain members of the town council of Harrisonburg, and against the town sergeant, for malicious prosecution. The facts appear to be that he was arrested; that his case was examined with reference to further proceedings; and that he was discharged by the justice of the peace who conducted the examination.

The first question is, whether that arrest under the direction of the town council by the town sergeant was an act done in pursuance of any order of the officer in command of the district? We have been referred to general order No. 10, issued from the post head-quarters on June 16, 1865, by the military officers then commanding the district in which Harrisonburg was situated.

It is to be borne in mind that the members of the common council of Harrisonburg had been elected to that office while the insurgent government of Virginia was in entire control of that portion of the state. When that government was dispersed by the superior force of the United States, the civil authorities did not necessarily cease at once to exist. They continued in being de facto, charged with the duty of maintaining order until superseded by the regular government.

Thus the common council of Harrisonburg remained charged with the government of the town, notwithstanding the temporary occupation of the place by the United States forces.

Doubtless it might have been superseded. The government of the United States was

not bound to recognize any authority which originated under the insurgent government. But it was not superseded. On the contrary, an order was issued, addressed to the citizens of Harrisonburg, Virginia, June 16, 1865, by which the citizens were notified "that the mayor and council of the corporation last in office, upon the resumption of their duties, will be sustained in all their acts consistent with existing laws and proclamations of the government."

Upon the promulgation of this order the council which had suspended its meetings, resumed its functions. It appointed a town sergeant, who was duly qualified. Shortly afterwards a riot broke out in the town, and the defendants, especially the mayor and the town sergeant, were very active in quelling the disturbance. We have no means of judging how great or how dangerous the disturbance was. It had no connection with the military occupation, nor any relation to the authority of the United States. It was an ordinary riot, and the mayor and town sergeant busied themselves in suppressing it. In doing so they arrested rightfully or unrightfully Woodson, the plaintiff in this suit.

Now, was that act done in pursuance of the order of the post commander? There was nothing in the order relating to any such matter. It was not addressed to the council. It did not require them to arrest anybody. It did not command them to suppress a riot. It simply declared that the council would be sustained in its legitimate action as the town government. It would be going too far, we think, to regard this arrest as an act done in pursuance of an order of any officer of the United States. On the contrary, it seems to us to have been an act intended, at least, as an ordinary exercise of authority by the town council and town sergeant under the laws of Virginia.

The courts of the United States have nothing to do with such matters. They are not constituted guardians of the public peace under state laws. On the contrary, these matters are left absolutely to the state courts. The state courts watch over personal rights and private security so far as these depend on state laws. Individuals who exercise local authority are responsible to them, and both are responsible to the people of Virginia.

We think, therefore, that this is not a case within the description of the act of congress. We are clearly without jurisdiction of it, and must remand it to the circuit court from whence it came.

A second question has been somewhat discussed, namely: Whether, if the order in question could be regarded as directed to the corporate authorities of Harrisonburg, and the arrest of Woodson as actually made under that order, the arrest so made would warrant the removal of Woodson's suit for

malicious prosecution into the United States court, after the restoration of the state government at Richmond, in the spring of 1865? But the view which we take of the first question in this case makes the present consideration of this point unnecessary.

Case No. 17,997.

WOODSON v. FLEET.

[The case reported under above title in 2 Abb. (U. S.) 15, is the same as Case No. 17,996.]

WOODSON (LETCHER v.). See Case No. 8,280.

WOODSON (MURDOCK v.). See Case No. 9,942.

Case No. 17,998.

WOODSUM v. BRAY et al.

[5 Savy. 133.]¹

District Court, D. California. April 2, 1878.

PREFERENCE BY BANKRUPT.

A bill of sale by the bankrupt *held*, under the circumstances, to be a preference.

[This was an action by C. A. Woodsum, assignee in bankruptcy, against Frank Bray and Isaac N. Thompson.]

J. A. Yoel and D. L. Delmas, for plaintiff.
Moore, Lane & Leib, for defendants.

HOFFMAN, District Judge. This action is brought by the assignee of the bankrupt to recover the value of certain property conveyed by the latter to the defendants in fraud of the bankrupt act [of 1867 (14 Stat. 517)].

The facts of the case are as follows: In the latter part of the year 1875 the several creditors of the bankrupt, having attached his property, he convened a meeting of his creditors to effect a settlement. They agreed to accept a payment of sixty-six and two-thirds per cent., in full satisfaction of their claims. The requisite funds were advanced by the defendants, who received from the bankrupt an absolute conveyance, intended as a mortgage, of his farm, already mortgaged for five thousand dollars. He appears at this time to have been indebted to the defendants in about four thousand dollars. He was also indebted to Woodsum, the present plaintiff, and to other creditors, to an amount somewhat over three thousand dollars. In 1877, it appears that another meeting of the creditors was held at the store of the defendants. The bankrupt testifies that Mr. Bray told him that he had heard he was getting into trouble, and that he had better call his creditors together, and they (defendants) would pay them. This proposition was accepted by the bankrupt and he thereupon gave them the security they demanded, viz. an assignment of a lease

of the Martinez farm, and conveyance of his farming implements. He afterwards consigned to them the produce of the Martinez farm. The bankrupt swears that he never afterwards had the ready money to pay, and that they certainly knew the state of his affairs. About the last of July, 1877, the bankrupt again applied to Bray for money "to finish up his crop." Bray demanded more security which the bankrupt objected to giving, on the ground that if he gave them a bill of sale for the Martinez crop others would sue him "and the whole thing would be thrown into law." Bray then offered to deduct one thousand dollars from the amount of his claim if the bankrupt could raise five thousand dollars to pay the balance. Shortly afterwards the defendants obtained the bill of sale for the property which it is sought to recover in this action. It included all the property of the bankrupt not even excepting some articles exempt from execution. It was exacted of the bankrupt, as he states under the threat, that they would otherwise "throw the thing into bankruptcy at that time." "The bill of sale was made to cover everything I might possibly have."

The bankrupt also testifies that he refused to execute this bill of sale unless the defendants agreed to pay off his Mayfield debts, amounting to about twelve hundred dollars, to which they finally assented; whether they also agreed to pay off his Santa Clara debts, he is unable to say.

The account of the transaction given by Mr. Bray substantially agrees with that of the bankrupt. Among the reasons assigned by Mr. Bray for exacting the bill of sale from the bankrupt was the fact that Manning owed debts about Mayfield and Santa Clara, and he feared the creditors might attach and cause loss to the estate; that he expected a rise in the price of wheat and he desired to get Manning's crop into his hands to save it from attachments, and to hold for the expected rise. He also stated as an additional reason that he feared the bankrupt was becoming intemperate, and might cause him a loss through mismanagement. He differs from the bankrupt, however, in one particular; but the difference is certainly to his disadvantage. He states that he agreed with the bankrupt that if the crop produced six thousand dollars, they would defer their claim to the amount of one thousand dollars, and would pay the Mayfield creditors; but those creditors were to be paid only in case the crop produced that sum.

Mr. Thompson, his partner, makes the same statement: "My understanding was that if the crop, farming utensils, horses, etc., produced six thousand dollars, we were to pay the creditors one thousand two hundred dollars."

Antonio Martinez, who was present when the bill of sale was executed, testified that he told Bray that he had a bill against the

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

bankrupt, and inquired if he thought he could collect it; to which Bray replied that he did not know. Martinez then said that he thought that Manning was about to be attached. Bray answered that he thought so too, and that he had come there to provide against it by making him sign a bill of sale.

The above are all the facts it is deemed necessary to mention. A clearer case of an illegal preference could hardly be presented. That the bankrupt was hopelessly insolvent cannot be disputed; and that the defendants had reasonable cause to believe him so is equally plain. Mr. Bray swears that he believed him to be solvent; that is, that if his crops turned out well, and if his farm could be sold for a considerable sum in excess of the mortgage (which, under the testimony, seems to have been highly improbable), and if his horses, farming implements, etc., brought fair prices, enough might have been obtained to satisfy all the indebtedness which Mr. Bray supposed he owed.

It is unnecessary to dwell upon the fact, that even if there had been more grounds for this conjecture or estimate than appear to have existed, the condition of the bankrupt would nevertheless have been, in legal contemplation, that of insolvency. He was certainly then, and for a long time previously had been, unable to pay his debts. From the time that the defendants had advanced the funds to enable him to settle with his creditors at sixty-six and two thirds cents on the dollar, his indebtedness then had been constantly increasing. They had taken from him a deed for his farm, an assignment of his lease, and even of a policy of insurance on his life for one thousand dollars. He had also placed in their hands a large quantity of grain, and they had obtained from him a bill of sale of his horses, farming implements, etc., the possession of which does not appear to have been transferred.

Shortly before obtaining the bill of sale in question in this suit, they had offered to reduce their claim by one thousand dollars, provided he could obtain five thousand dollars to pay them; and when the bill was executed it was insisted on with the full knowledge and for the avowed reason that attachments by other creditors were impending. They were not aware, it is true, of the debt to Woodsum, amounting to some three thousand dollars, but they knew there were debts due to creditors in Mayfield and Santa Clara, and these they, according to their own statement, agreed to pay to the amount of one thousand two hundred dollars (although the bankrupt demanded one thousand five hundred dollars) only in case the crop and other property produced six thousand dollars, a condition wholly inconsistent with a belief in the solvency of a man whom they were compelling to convey all the property he possessed, of every kind and description, including some articles exempt by law from execution.

Their own avowal, that their reason for demanding the transfer was to save the property from attachments which were about to be levied, is a confession that they intended to make the bankrupt put the whole of his property beyond the reach of his other creditors, and to secure for themselves the means of appropriating it exclusively to the satisfaction of the debt due them. It is precisely such transactions that the provisions of the bankrupt act, with respect to preferences, were intended to prohibit and avoid. Of the property conveyed to the defendants, only the wheat and the spring wagon appear to have come into their possession, or to have been retained by them. The quantity of wheat seems to have been in all, ninety-eight thousand and seventy-four pounds, which at two dollars and seventy-five cents per cental, amounts to two thousand six hundred and ninety-seven dollars and three cents; spring wagon, two hundred and thirty dollars, making two thousand nine hundred and twenty-seven dollars and three cents.

I have taken these figures from the brief of the counsel for the plaintiff. Their accuracy is not controverted in the brief filed on the part of the defendant. If any error in them can be pointed out it will be corrected. But if no suggestion to that effect be made, judgment for the sum of two thousand nine hundred and twenty-seven dollars and three cents, in gold coin, will be entered.

Some conversation occurred at the hearing with regard to expenses incurred by the defendants after the execution of the bill of sale in preparing the wheat for market. No mention is made of this in the brief of the defendants. If any such expenses as for threshing, sacking, hauling, etc., were incurred, they should be allowed so far as they contributed to enhance the value of the property conveyed to them.

Case No. 17,999.

In re WOODWARD et al.

[4 Ben. 102; 1 3 N. B. R. 719 (Quarto, 177).]
District Court, E. D. New York. March, 1870.

PRIVILEGE OF COUNSEL—WITNESS.

A witness who claims to have acted as counsel for a bankrupt, cannot, on that ground, refuse to be sworn as a witness in the bankruptcy proceedings.

[In the matter of George Woodward and Julius C. Woodward, bankrupts.]

In this case, the assignee for the bankrupt, by his counsel, attended before the register, and one William McKeag attended as a witness, but refused to be sworn, on the ground that he had acted as counsel for the bankrupt, and was still his adviser.

The register decided as follows: "The

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

right to refuse to answer a question on the ground of privilege, does not warrant a refusal to be sworn as a witness. The privilege cannot be interposed until a question is asked which invades the privilege."

On request the register certified the question to the court.

BLATCHFORD, District Judge. The decision of the register is correct.

Case No. 18,000.

In re WOODWARD.

[8 Ben. 112; 12 N. B. R. 297; 1 N. Y. Wkly. Dig. 33; 7 Chi. Leg. News, 387.]¹

District Court, E. D. New York. May, 1875.

REGISTER IN BANKRUPTCY—SUMMONS OF WITNESS.

A summons to a witness to attend before a register in bankruptcy may be served outside the district but within 100 miles of the place where the witness is required to attend.

[Proceedings in the matter of William S. Woodward, a bankrupt.]

BENEDICT, District Judge. A proceeding in bankruptcy having been commenced in this court, the question of the discharge of the bankrupt being before the court upon specification filed in opposition to the discharge, it was referred to a register in bankruptcy of this district to take and report to the court the evidence to be adduced by the respective parties upon the said issue. Such reference being thereupon commenced, a summons in accordance with form No. 48 was issued, requiring one George S. Scott to attend as a witness in said proceedings before such register, at his office in the city of Brooklyn. The summons was served upon Scott in the city of New York, where he resides. Scott failed to attend in accordance with the summons, and thereupon application is made to the court to attach the witness for his failure so to attend.

The application is opposed, for the purpose of obtaining a determination of the question whether a witness is bound to regard a summons served upon him out of the district for which the register is appointed, requiring attendance before that register in a district where the witness does not reside.

The general rule undoubtedly is, that process does not run beyond the limits of the judicial district. But to this there is a well-known exception in the case of witnesses. Section 876 of the United States Revised Statutes expressly provides that subpoenas for witnesses who are required to attend a court of the United States may run into another district.

The provisions of the bankruptcy laws confer upon a register in proper cases "all the

¹ [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict, Esq., and here reprinted by permission. 1 N. Y. Wkly. Dig. 33, contains only a partial report.]

powers of the district court for the summoning and examination of witnesses." In the present case the register before whom the witness was required to attend in the city of Brooklyn had been duly directed in pursuance of section 5001 to take the testimony in the proceeding described in the summons; and therefore by virtue of section 5002 the register had all the power of this court for the purpose of summoning and examining witnesses in said proceeding.

The witness, Scott, was therefore liable to be subpoenaed to attend before the register in this district, notwithstanding the fact that he resided out of the district, as it is conceded that he did not live more than 100 miles from the city of Brooklyn. The summons served upon the witness had all the effect that would have followed due service of the ordinary subpoena in a civil case requiring that attendance of the witness before the court. Unless, therefore, the failure to attend is excused, the right of the parties to an attachment cannot be denied. Some facts, by way of excuse, are stated in the papers, and they are accompanied by expressions of entire willingness on the part of the witness to attend, if he could be legally required to do so. I shall not, therefore, at this time, consider the matters offered in excuse, but shall postpone the examination of that question, to give the witness the opportunity of demonstrating the sincerity of those expressions by attending before the register at such reasonable time as may be fixed by the register for the next hearing on the proceeding referred to.

[For subsequent proceedings, see Case No. 18,001.]

Case No. 18,001.

In re WOODWARD.

[8 Ben. 563.]¹

District Court, E. D. New York. Nov., 1876.

OPPOSITION TO DISCHARGE—SPECULATOR IN STOCKS NOT A MERCHANT—CONCEALMENT OF PROPERTY—ADMISSION OF FICTITIOUS DEBTS.

1. W., a speculator in stocks who failed for a large sum and went into bankruptcy, applied for his discharge. It was opposed on the grounds, that he was a merchant or tradesman and had not kept proper books of account; that he had concealed property—a horse and wagon—belonging to him at the time of filing his petition; and that he had admitted fictitious debts in making up his schedules and had falsely sworn thereto. *Held*, that a speculator in stocks is not a merchant or tradesman within the meaning of the statute.

[Quoted in *Ex parte Conant*, 77 Me. 278.]

2. As the only proof of concealment of property was a statement made by the bankrupt two years after filing his petition in these words: "I now have a horse and wagon," the court would not hold, in a case involving millions of dollars, that it was meant that he owned the property

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

at the time of filing his petition, and that he had therefore concealed it.

3. As the debts alleged to be fictitious, while stated in the schedules and upon the books of the bankrupt, arose out of transactions in stocks, for the statement of many of which the bankrupt relied entirely upon his brokers and could himself furnish no information, it could not be said that such want of recollection, or even slight inaccuracies shown, warranted the belief that the bankrupt had wilfully sworn falsely or made false entries. A discharge must be granted.

[Proceedings in the matter of William S. Woodward, a bankrupt. For prior proceedings, see Case No. 18,000.]

BENEDICT, District Judge. This proceeding comes before the court upon an application for a discharge. The application is opposed by creditors upon various grounds set forth in several specifications. The principal question presented to me for my decision is whether the occupation of the bankrupt was that of a merchant or tradesman within the meaning of the bankrupt law [of 1867 (14 Stat. 517)]. If he was a merchant or tradesman a discharge must be refused, as it is conceded that he kept no proper books of account.

The evidence shows that the bankrupt was a speculator in stocks and had no other occupation. His contracts in respect to stocks were often made in his own name and often by brokers upon his order and for his benefit. His dealings in stocks were large and frequent, and he thereby acquired a credit which enabled him to make contracts in stocks to an enormous amount. The number of his creditors according to his schedule is 178; the amount of his debts \$2,894,684.71. Of the 138 creditors who have proved claims amounting to \$2,201,167.07, ninety-one whose debts amount to \$1,345,991.76, have consented to his discharge. It is also insisted that the evidence shows that the bankrupt kept an office, and that he transacted the business of a broker in stocks. He was a member of the board of brokers. Upon these facts the court has been urged to hold that the bankrupt was a merchant or tradesman, and to refuse the discharge, because of his failure to keep proper books of account. But my opinion is that the bankrupt can not be held to have been a merchant or tradesman within the meaning of the bankrupt law. The words merchant and tradesman involve the idea of a dealing with merchandise in some form or other. In their ordinary and natural signification they do not include one who makes profits by buying and selling of shares on speculation, whether for himself or for others. Such a person would not in ordinary parlance be said to be engaged in trade. No case has been cited which furnishes authority for extending the meaning of these words, so as to include the occupation of this bankrupt. The adjudged cases look the other way. The Case of Marston [Case No. 9,142] is quite in point. It is supposed that the

present case differs from the Case of Marston in that the dealings of this bankrupt were not casual, that he had an office, made contracts in his own name as well as for others, and acquired by his dealings a credit that enabled him to make extensive purchases of stocks. But these circumstances, assuming them to be proved, do not bring him within the statute, for they do not disclose the characteristic feature of the occupation of a merchant or tradesman, namely, a trading in goods, wares or merchandise. I am therefore of the opinion that the discharge of this bankrupt cannot be refused upon the ground that he kept no proper books of account.

A further ground of objection to the discharge is the omission from the bankrupt's schedules of claims against various parties named in the specifications, arising out of certain written agreements made in May and June, 1871, in relation to purchasing 60,000 shares of Chicago, Rock Island and Pacific Railroad stock, forming what is called a "pool."

In regard to this objection it is sufficient for the present case to say that the evidence fails to prove that there was any profit made, or that any claim arising out of those agreements exists, to be stated by the bankrupt in his schedules. It is in proof that the bankrupt made large contracts in Chicago, Rock Island and Pacific Railroad stock, in addition to the 60,000 shares, purchased by the agreement of the "pool," on which additional contract there was a large loss; and an effort has been made to show that these additional purchases were in fact made for the benefit of the parties to the pool agreement, so as to render these parties liable to share in the losses upon such additional purchases. But such a conclusion cannot properly be drawn from the evidence presented in this case. All the direct testimony is opposed to such a conclusion; and the circumstances, relied upon as conflicting with the direct testimony, are not sufficient to justify holding that the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, or has concealed claims of this character outstanding against parties who were interested with him in such additional contracts.

A remaining objection to the discharge is that the bankrupt omitted to mention in his schedules a horse and wagon, that it is contended the evidence shows him to have possessed. This objection is taken in a specification filed by consent of the bankrupt after the testimony had been closed, and rests entirely upon the testimony, given by the bankrupt on his examination.

The objection that property has been concealed by a bankrupt, whenever it is made, is entitled to careful consideration, and the validity of such an objection is not affected by the value of the property alleged to have been concealed. Still, in a case like the present, instituted by the bankrupt for the purpose of obtaining a discharge from debts

amounting to some millions of dollars, the objection that the bankrupt has concealed a horse and wagon, and wilfully sworn falsely in his affidavit attached to his schedules because of the omission of a horse and wagon therefrom may well be held to require explicit proof. The advantage to be gained by such an omission is too slight to render its existence at all probable. It is but just, therefore, to take the statement made by the bankrupt in respect to the horse and wagon as he makes it. All that he says—and there is no other evidence—is “I now have one horse and wagon.” This statement was made nearly two years after the filing of the petition and does not show that the bankrupt had the horse and wagon when he made his schedules and affidavit. It was open to the creditors to examine fully as to the horse and wagon; and, having failed to elicit any other fact than that the bankrupt had a horse and wagon some two years after he filed his petition, they have no ground on which to contend that the bankrupt has concealed any part of the estate possessed by him at the time of filing his petition.

The observations already made dispose of all the specifications that the evidence requires should be noticed, unless it be the additional propositions numbered 4 and 5. In specifications 4 and 5, the charge is that the bankrupt has falsified his books and made false and fraudulent entries therein with intent to defraud his creditors, in this, that certain persons are named as creditors when in fact they were not indebted to him, and that certain debts set forth as due by the bankrupt had no existence in fact. The main support of these specifications is the fact that with regard to some considerable debts mentioned in the schedules and stated in his books, the bankrupt is unable to give any information as to the transaction out of which the indebtedness arose. In one or two instances it seems that a debt mentioned as the debt of one person was in fact owing to another. But when the nature of the bankrupt's transactions is considered, and the method of conducting these transactions between brokers acting for principals at the time undisclosed, and when it is remembered that the most of the bankrupt's indebtedness, amounting to some millions, arose in the space of four days out of a gigantic speculation in stocks, conducted through various brokers, and of which in very many cases the bankrupt kept no memorandum, but relied upon the brokers' statements sent to him and which were subsequently collected and arranged in books, it will be deemed no strained conclusion to say that mere want of recollection on the part of the bankrupt of some of these transactions, and the few inaccuracies which have been disclosed in the accounts so made up, do not prove that the bankrupt has wilfully sworn falsely in his affidavit or has admitted false and fictitious debts against his estate.

I have now considered all of the specifications that appear to require consideration, and, finding none of the specifications to be supported by evidence, it is my duty to grant the application of the bankrupt for a discharge.

Case No. 18,002.

WOODWARD v. CALHOUN COUNTY.

[2 Cent. Law J. 396.]¹

District Court, N. D. Mississippi. Dec. Term, 1874.

COUNTY BONDS—VALIDITY—AIDING RAILROAD CONSTRUCTION—CONSENT OF ELECTORS—SECOND ELECTION—CONSTITUTIONAL PROVISION—NEGOTIABILITY OF BONDS.

1. It is now too well settled to be controverted, that the legislature may authorize a county or other municipal corporation to aid in the building of a railway in which the inhabitants are interested; and that such authority may be given with or without the assent of the qualified electors of such municipality, unless there be some provision in the constitution denying or limiting this power.

2. The legislature of Mississippi authorized the board of police of Calhoun county to subscribe for stock in a railway company, provided, that there should be an election first held in that county, at which the question should be submitted to the qualified electors. And the act provides that, in case said election should result favorably, the subscription should be made; and in case a majority of the votes be cast against the subscription, the same shall not be made. Under the act, an election was held in 1860, and a majority voted against subscription. In 1869, the board of police again submitted the question to the voters; and at that election, a majority voted for subscription. *Held*, that the first election did not exhaust the power of the board to subscribe; that the manifest meaning of the act was to authorize the subscription on an approving vote whenever it should be had; that the voters of the county, in this matter, like individuals in making similar contracts, were not bound finally by a rejection of the proposition; that circumstances might change so as to justify a change in their action; and that in acting on a proposition to subscribe, the voters might deliberate, reject at one time, and accept at another. Citing *Society for Savings v. New London*, 29 Conn. 174; *Smith v. Clark Co.* [54 Mo. 58]; *Woods v. Lawrence Co.*, 1 Black [66 U. S.] 386.

3. Nor did it affect the validity of the second election, that by the constitution in force in 1860, only whites were allowed to vote, and that when the last election was held freedmen were legal voters.

4. Nor is it any objection to such second election, that nine years had passed since the power to hold it was granted. Whatever might have been the effect in times of peace, the civil war which ensued soon after the power was granted, and the consequent disorganization of business, etc., in the state, justified the delay.

5. The act authorizing Calhoun county to subscribe for stock in the railroad company was passed in 1860; an election was held in October, 1869, at which a majority of the voters assented to the subscription. The new constitution of the state, which prohibits the legislature from authorizing cities, counties, and towns from giving such aid unless upon assent of two-thirds of the qualified voters, was ratified by a popular

¹ [Reprinted by permission.]

vote under the reconstruction laws of congress, on the 1st of December, 1869, and the subscription of the stock for the county was actually made on the books of the railway company, on the 1st of January, 1870; and the state was admitted to representation in congress on the 17th of February, 1870. *Held*, that the new constitution did not apply, because, (1) it did not abrogate prior authorities already granted by the legislature, but only prohibited the granting of such authority thereafter; (2), because the new constitution had not on the 1st of January, 1870, taken effect, as to that clause of it which prohibits the granting of such authorities except on terms prescribed. Citing *Cass v. Dillon*, 2 Ohio St. 607; *State v. Union Tp.*, 8 Ohio St. 394; *State v. Sullivan Co.*, 51 Mo. 531; *Kansas City, St. J. & C. B. R. Co. v. Alderman*, 47 Mo. 349; *State v. Nodaway Co. Ct.*, 48 Mo. 330; *State v. Macon Co.*, 41 Mo. 453.

6. The said clause of the constitution in relation to municipal subscriptions, does not apply where a debt has already been created for subscription to a railway company; and the legislature might, after the new constitution went into effect, authorize a county to issue its bonds in payment of such debt, and that without submitting the question to the people.

7. The act of 1871, which authorized the issuance of the bonds to pay the county subscriptions to the railway company, directed that the bonds so issued should be made payable to "the president and directors of the railroad company, and their successors and assigns." The bonds issued were made payable to "the railroad company, or bearer." *Held*, that the power granted was sufficiently pursued, and that the bonds so issued were valid; that it was the intention of the legislature to authorize the issuance of bonds which were negotiable, and which, in the hands of innocent holders, for value, would not come under the operation of the statute which subjects innocent holders to the equities existing between the maker and the payee.

8. When negotiable municipal bonds are issued, payable out of the state, or to bearer, they are unimpeachable in the hands of a bona fide holder for value, if there be a law authorizing their issuance. And if the act giving the authority annexes to its exercise certain conditions, and the bonds on their face recite that these conditions have been complied with, then the municipality, on being sued on the bonds by an innocent holder for value, is estopped to deny the truth of the recital.

At law.

Mr. Mayes and Harris & George, for plaintiff.

H. A. Barr, for defendant.

HILL, District Judge. This is an action of debt brought by the plaintiff [Amos Woodward] against the defendant, to recover the amount due upon 218 coupons, upon certain bonds, issued by said board in payment of a subscription of capital stock in the Grenada, Houston & Eastern Railroad Company, which had been subscribed by said board on behalf of said county, and which coupons it is claimed are held by plaintiff as the bona fide owner thereof. Among other pleas pleaded to said action, are five special pleas, to which plaintiff has filed his demurrer and upon which the questions now for decision arise. These pleas taken together, in substance state: That these bonds and coupons were issued on the 1st of September, 1871, in aid of the said railroad company, under the pro-

visions of an act of the legislature of this state, approved on the 25th of March, 1871, and in payment of a subscription for \$100,000 as capital stock, subscribed by said board on behalf of said county on the 1st of January, 1870, under the authority of an election, held by the voters of said county on the 25th of October, 1869, in pursuance of an order made by the board of police of said county, on the 22d of September, 1869, and under which order said election is claimed to have been authorized by an act of the legislature of this state, approved the 10th of February, 1860. That on the 1st Monday in August, 1860, the proposition to subscribe for said capital stock, was submitted to the qualified voters of said county, at an election held in pursuance of the act of 1860, and the order of the board of police of said county, made in pursuance thereof, and was then rejected by a majority of said voters. That said rejection exhausted all authority in said board to submit said proposition to said voters, or to make any subscription of capital stock in said company. That when said act of 1860 was passed, none were intended to vote upon said proposition but white persons, who alone were the qualified voters of said county. That when said vote was taken the enfranchised freedmen had become qualified voters of said county. That before said subscription was made the present constitution was adopted, which prohibits the legislature from authorizing counties to subscribe capital stock in, or give aid to railroad companies, without the assent of two-thirds of the qualified voters of the county; and that the subscription of capital stock and the issuance of the bonds and coupons were made and issued in violation of this provision of the constitution, and void, and conferred no authority therefor. That the act of 1871, authorizing the issuance of bonds and coupons in payment of the capital stock subscribed for in said company, required that they should be made payable to the Grenada, Houston & Eastern Railroad Company, their successors and assigns, but that they were made payable to said company or bearer. That by reason of the said several causes, the subscription for said stock and the issuance of said bonds and coupons were without authority of law, void and not binding on the defendant.

The question to be determined is whether any or all of the facts alleged in these several pleas, and admitted by the demurrer to be true, constitute a valid defence to the action. The question is not now whether it is wise or unwise, just or unjust to compel a citizen or owner of property to become a stockholder in a corporation, and to contribute his means for its support, because a majority of the voters of the county or other municipality have by vote so determined, as it is now well settled that such may be done when authorized by the legislature. The question is, did the legislature in this case

authorize it, and were the bonds, the coupons for the interest on which the suit is brought, issued and put in circulation in pursuance of that authority? The declaration alleges that they were, and the pleas deny it. The pleas admit that there was an act passed in 1860, authorizing the board of police to subscribe for \$100,000 of capital stock in the Grenada, Houston & Eastern Railroad Company, upon condition that a majority of the qualified voters of said county, at an election to be held for the purpose, should vote in favor of said subscription, but allege that the election provided for was held and the proposition rejected, which exhausted the power conferred; the demurrer admits the election and the vote adverse to the proposition, but does not admit the effect, that is, the exhaustion of the power; and this is the first question to be determined, as this is the only act of the legislature under which it is claimed the subscription was authorized. This question and indeed all the questions which have been raised, and ably argued by the distinguished counsel on both sides upon these pleadings, are of first impression in this court, and so far as I am informed in any court in this state, are important to the holders of the bonds and coupons issued and first put in circulation, to the tax-payers of Calhoun county, and to those interested in this railroad enterprise, and should be considered with all the care, aided with all the lights attainable, so as to arrive at a correct conclusion as to the rights of the parties.

The legislature might have authorized the subscription without a vote of the citizens, as there was then no constitutional inhibition, but it wisely provided that it should not be done without the assent of a majority of the voters, who should vote in the election to determine the question. That majority was not then obtained, and had the act contained any provisions either in positive terms, or from which it could reasonably be inferred that that vote should be final and conclusive, then any subsequent vote would be without authority. In construing all statutes, the true intent of the legislative mind is the thing to be ascertained, and in the ascertainment of which resort must be had to the purpose of the enactment, the benefits to be secured, and the evils to be prevented. The purpose of this legislation was to give pecuniary aid to the construction and operation of a railroad which was to pass through Calhoun county, which it was supposed would afford facilities to its citizens and develop their resources. The circumstances of the citizens might greatly change in even a short time, their ability to pay depending very much upon the amount of their marketable productions, and their price. Also the necessity of the aid which was sought might be greater at one time than at another; at one time it might have been thought the enterprise could be successful without resorting to this means;

at another it must fail without it. It was authority given to the board of police to make a contract for the taxpayers of the county, provided a majority of the qualified voters assented to it, and, unless restricted like individuals, a proposition might be rejected at one time and accepted at a future time. There is no express provision that the vote taken should be conclusive, and when looking to the purpose of the act, I find nothing in it from which that inference can necessarily be drawn. I am of the opinion that the proper construction to be given to this statute is, that authority was given to the board of police to make the subscription whenever a majority of the qualified voters of the county should assent to it, by the vote of a majority of the qualified voters who should vote on the question at an election to be held, to decide upon the acceptance or rejection of the proposition. This construction is sustained by the numerous adjudicated cases in other states upon like propositions, in some of which the proposition for subscription was made and rejected repeatedly, and then accepted, and its acceptance held binding. See *Society for Savings v. New London*, 29 Conn. 174; *Smith v. Clark Co.* [54 Mo. 58]. See, also, *Woods v. Lawrence Co.*, 1 Black [66 U. S.] 386.

Another objection to the validity of this election insisted on by defendant's counsel, is that when the act was passed, none but white persons were qualified voters, and that when the election was held, those formerly slaves, then freedmen, were made voters. The plea does not aver that any of them voted in the election, and as the present constitution by which they were made voters, did not take effect until after that time, I take it that they did not vote. All the votes which they had before that time cast were under the act of congress, and confined to the special elections provided by the act; and were it otherwise, this objection is not maintainable. The act of 1860 evidently intended to embrace all the qualified voters who were such at the time the election was held. The voters constantly change by death and removals, by new accessions, by becoming of lawful age, and by immigrations at all times. And by the addition of the lately enfranchised, under the present constitution, another class was added, but when added, became as much entitled to vote as any who had preceded them. Still another objection urged, is, that more than nine years had elapsed from the passage of the act before the election was held. Whatever force there might have been in this objection, had the war not intervened and the consequent disorganization of civil government ensued, and which continued up to the time, or nearly so, when the election was held, these circumstances must be held sufficient to avoid this objection.

After a careful consideration of all the objections urged against the validity of this elec-

tion, I am of the opinion that none of them are maintainable. And it must be held that the board of police was authorized to make the subscription, unless prevented by some subsequent obstacle, and which it is insisted did intervene by the adoption of the constitution submitted to the vote of the qualified electors of the state in November thereafter, and before the subscription was made, one provision of which inhibits the legislature from authorizing any county, city or town to become a stockholder, or to lend its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special or general election to be held therein, shall assent thereto. The subscription was made January 1, 1870, after the election was held by which the constitution was ratified by the electors of the state, but it was nugatory until the state government created by it was authorized by congress, which was not done until after that time, on the 17th of February, 1870. So that it can not be held that this subscription is in any way affected by this provision of the constitution. But I am of opinion that this inhibition, being placed upon the legislature, was intended only to apply to the action of that body afterwards to be had, and not to any authority theretofore given, and for a very good reason. Others upon the faith of this subscription might have been induced to subscribe for stock under the belief that the enterprise would be thus rendered successful. Contracts might have been entered into upon the faith of the subscription; but not so with regard to subscriptions of stock afterwards authorized, which will further appear from the following (the fifteenth) section of the constitution which inhibits the sale of lottery tickets and further inhibits the drawing of any lottery theretofore authorized, or the sale of lottery tickets. This section is self-executing; the fourteenth section is not. If it had been intended to apply to subscriptions before that time authorized, no reason can be perceived why it was not expressed. I am satisfied that this provision can not be made applicable to this subscription; and this conclusion is sustained by a number of adjudications by the supreme courts of our sister states. See on this point, *Cass v. Dillon*, 2 Ohio St. 609; *State v. Union Tp.*, 8 Ohio St. 398; *State v. Sullivan Co. Ct.*, 51 Mo. 531; *Kansas City, St. J. & C. B. R. Co. v. Alderman*, 47 Mo. 349; *State v. Nodaway Co. Ct.*, 48 Mo. 339; and *State v. Macon Co.*, 41 Mo. 453. I am, therefore, compelled to the conclusion that no valid objection is shown against this subscription. The next, and not less important question, is, were these bonds and coupons authorized by law to be issued, and are they of binding force upon the defendant as the representative of the taxpayers of Calhoun county? To make them so obligatory they must have been issued by legislative authority. This authority is claimed to have been

given by the fourth section of an act passed March 20, 1871, entitled "An act to amend an act entitled 'An act to aid in the construction of the Grenada, Houston and Eastern R. R., approved February 10th, 1860,'" which reads as follows: "That it shall and may be lawful for the board of supervisors of any county which shall have voted a tax as provided by this act or of an act to which this act is amendatory, to issue bonds due and payable at such time or times as said board of supervisors may deem best for the taxpayers of their respective counties, not to extend beyond ten years from the date of their issuance, for such sums as said boards of supervisors may deem necessary to meet, pay off and discharge the subscriptions of said counties, respectively, for capital stock in the Grenada, Houston and Eastern Railroad Company, which have been, or which may hereafter be subscribed by said boards of supervisors, or by the boards of police (as the case may be) respectively, not to exceed the total sum of such stock subscriptions, which said bonds shall be signed by the president of the board of supervisors issuing the same, and be made payable to the president and directors of the Grenada, Houston and Eastern Railroad Company, and their successors and assigns, and may be assigned, sold and conveyed with or without guarantee of payment by the said president and directors, or may be mortgaged in like manner, at their discretion, as they may think best for the company." The defendant's counsel insists that the issuance of these bonds and coupons under this act was a pledging the credit of the county of Calhoun to the company, which, by the provisions of the constitution above stated, could not be made binding upon the tax-payers of the county, unless assented to by a majority of two-thirds of the qualified voters of the county, which, it is admitted, was never procured. This was but a means provided for the payment of an obligation already incurred. The act limits the amount to be issued to a sum sufficient to pay off and discharge this obligation, and unless it changes the amount and time of payment, can work no hardship upon the tax-payers, and the plea does not allege any such change; therefore without further comment or reference to authority, I must hold this objection not well taken.

But it is insisted on behalf of defendant that the bonds and coupons were not issued as directed by this act, in this that they were directed to be made payable to the president and directors of the Grenada, Houston & Eastern Railroad Company, their successors and assigns; whereas, they were made payable to the Grenada, Houston & Eastern Railroad Company, or bearer, and that this departure created them different obligations from those directed and intended, and renders them void and of no binding obligation. So far as the mere name of the payers, or payee of this obligation is concerned, it is

sufficient if substantially the same. It was not intended to vest the president and directors of the company, as individuals, with any interest whatever; they were the mere agents of the corporation; the corporation was intended to be the payee, and such being the case, they could be sold, transferred and assigned as though made payable to the company by its corporate name. For authority to sustain this position, see *Maddox v. Graham*, 2 Metc. (Ky.) 78, and authorities therein referred to.

It is next insisted that it was the intention of the legislature that these obligations should be governed by what is known as the "anti-commercial statute" of this state, first passed in 1822 and continued in the Codes of 1857 and 1871, by which the holder of the obligations, therein made assignable so as to vest the legal title in the assignee and allow him to sue in his own name, holds the same, subject to the same infirmities and equities as existed against the payee when the assignment was made, and that these bonds being made payable to bearer, made them commercial paper, unimpeachable in the hands of a bona fide holder for value and without notice of such infirmities or equities, and hence different in their effect and binding obligation, and therefore void. This question has never before been presented to me, but questions arising under this anti-commercial statute are not new either to this court or to the supreme court of the state. The act is as follows: "All bonds, obligations, bills single, promissory notes and all other writings for the payment of money, or any other things, shall and may be assigned by endorsement, whether the same shall be made payable to the orders or assigns of the obligee or payee or not; and the assignee or endorser may sue in his own name and maintain any action which the obligee or payee might or could have sued or maintained thereon previous to assignment; and in all actions commenced or sued upon any such assigned bond or obligation, etc., the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts and sets-off made or had against the same previous to the notice of the assignment, etc., in the same manner as if the same had been sued and prosecuted by the payee or obligee, and the assignee or endorsee may maintain an action against the person or persons who may have endorsed the same, as in case of inland bills of exchange."

I have, heretofore, decided, in construing this act, that it was intended to embrace such instruments only as were not before that time assignable under the laws in force in this state, so as to vest the holder with the legal title, and authorize suit thereon in the name of the assignee or endorsee, and not such instruments as before that time were negotiable and vested the legal title in the holder, with the right to sue in his own

name, and in justice to the makers of such instruments reserved such equities which they might have before notice of such transfers. The obligations, the transfer of which are authorized, are such as are usually only transferred in the vicinity of their creation, and where it is an easy matter for the party desiring to take the transfer to enquire and ascertain whether there are any equities or off-sets against it. I am satisfied with this construction, and am not aware of a materially different construction having been given by the courts of the state obligatory upon this court. The high court of errors and appeals in the case of *Craig v. City of Vicksburg*, 2 George, 216; *Stokes v. Winslow*, Id. 518; *Mercien v. Cotton*, 5 George, 64; and *Winstead v. Davis*, 40 Miss. 785,—hold that bills, bonds and promissory notes payable to bearer, were negotiable at common law and not within the statute. So is a note made payable to the order of the maker, and endorsed in blank, not embraced within this anti-commercial provision. So is a note or other obligation made payable within another state, not so embraced, but is governed by the laws of the state where payment is to be made. As a general rule obligations made for the purpose of being thrown upon the market and becoming a portion of the circulating medium of the country in commercial transactions, are usually held as unimpeachable commercial obligations. These rules, I am satisfied, will be found sustained by the elementary books and adjudicated cases. The purpose of the issuance of these bonds and coupons must be ascertained from an examination of the powers given in the act itself, and the custom of the country with reference to similar obligations issued by other corporations and municipalities. The company was authorized to sell, transfer, assign and mortgage the same as the discretion of the president and directors might deem best for the company, thus giving them an unlimited power of disposition over them to raise money, or to be used in any other way deemed most to the interest of the company.

No restriction is placed upon the board of supervisors as to the time or place of payment, except that all shall be payable within ten years from their issuance. There being no restriction as to the place of payment, no reason is shown why they should not have been made payable in the city of New York, the great money centre of this country. At the time of their issuance, as now, there was but little money in this state for such investment; consequently the bonds, to subserve their purpose, had to be sold where there was a market for them. If these obligations were properly made payable in the city of New York, where commercial law prevails, and where obligations of this character are unimpeachable in the hands of a bona fide holder, then the objection under consideration must fail. Or if to carry out the pur-

pose of their issuance by making them payable to bearer, the same result must follow.

I am satisfied, after a careful consideration of the act authorizing the issuance of these obligations, and the purpose for which they were issued, that no such departure from the provisions of the statute has been made as to invalidate them. Other reasons might be stated, but those given are deemed sufficient. According to the conclusions reached, these obligations could not be impeached if they were now held by the company, or that which has succeeded to the rights of the former company, the payees of these obligations. But being payable in the city of New York, and payable to bearer, they are unimpeachable in the hands of a bona fide holder without notice, the holder being only required to know that there was legal authority for their issuance, the bonds reciting upon their face that all the acts had been substantially performed that the act of the legislature, authorizing their issuance, required. To sustain this position I refer to many decisions made by the supreme court of the United States upon similar obligations, from the case of Commissioners of Knox Co. v. Aspinwall, 21 How. [62 U. S.] 543, up to the present time, embracing one or more cases at every term of that court of last resort in the nation, and binding on this court at least.

Admitting that the objections insisted upon in these pleas were sufficient to have justified the defendant or the tax-payers to have restrained by injunction the board of supervisors from issuing these bonds, or the company from using or transferring them after issued, had it been done in time, yet having acquiesced for so long a time in their issuance and transfer into the hands of bona fide purchasers without notice of any objection, and until after contracts had been made and labor performed, I am inclined to the opinion it is now too late to raise the objection, but upon the other grounds stated, I am satisfied the demurrer to all these special pleas must be sustained, with leave to plead over. Sixty days allowed in which to plead.

NOTE. The act of 1860, is as follows: "The board of police of the several counties, Yallobusha, Calhoun, etc., through which the G. H. & E. R. R. may pass, may, for their respective counties, open (sic) such conditions as they think proper, subscribe for capital stock not to exceed in amount two hundred thousand dollars, for any one county. Provided, however, that an election shall be held in the county for and on account of which stock is proposed to be subscribed by the qualified electors thereof, at the regular precincts of said county, twenty days notice of the time of holding such election, and of the amount proposed to be subscribed, and in what number of installments, being first given by the board of police; and if at said election a majority of the qualified electors voting shall be in favor of such subscription, then said board shall make such subscription for and in behalf of the county, for the amount specified by the president of said board of police, subscribing the amount so specified to the capital stock of said company, but if a majori-

ty of those voting shall be opposed to such subscription, the same shall not be made." Section 1.

The clause of the new constitution, referred to, is as follows: "The legislature shall not authorize any county, city, or town, to become a stockholder in, or to lend its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election, or regular election, to be held therein, shall assent thereto." Section 14, art. 12.

Section 4 of the act of 1871 is as follows: "That it shall and may be lawful for the board of supervisors" (former board of police) "of any county which shall have voted a tax as provided by this act, or of the act to which this act is amendatory" (i. e., act of 1860, supra), "to issue bonds due and payable at such time or times as said boards of supervisors may deem best for the tax-payers of their respective counties, not to extend beyond ten years from the date of issuance, for such sums as said boards of supervisors may deem necessary to meet, pay off and discharge the subscriptions of said counties, respectively, for capital stock in the G. H. & E. R. R. Co., which have been or which may hereafter be subscribed by said boards of supervisors, or by the boards of police (as the case may be), respectively, not to exceed the total sum of such stock subscriptions, which said bonds shall be signed by the president of the board of supervisors issuing the same, and be made payable to the president and directors of the G. H. & E. R. R. Co. and their successors and assigns, and may be assigned, sold and conveyed with or without guarantee of payment by the said president and directors, or may be mortgaged in like manner at their discretion, as they may deem best for the company."

WOODWARD (CORBETT v.). See Case No. 3,223.

Case No. 18,003.

WOODWARD v. DINSMORE.

[4 Fish. Pat. Cas. 163; Merw. Pat. Inv. 430.]¹
Circuit Court, D. Maryland. Feb., 1870.

PATENT FOR INVENTION — SOLAR CAMERA — REISSUED PATENT—NEW COMBINATION.

1. Under the doctrine of *Battin v. Taggart*, 17 How. [58 U. S.] 85, as in a cause in equity, the court passes on the facts as well as on the law, the original and reissued patents are for the court to construe and reconcile or declare to be irreconcilable.

2. It is immaterial whether or not the patentee could or did describe the rationale of his invention, if he gave the invention itself to the public.

3. Being the inventor of the device, he might subsequently, when he had it in his power to make fuller explanation of it, reissue and modify his claims.

4. An original and sole claim for the combination of a condensing lens, a photographic lens, a negative and an inclined mirror, might be amended on reissue by dropping the mirror from the combination.

5. Although the only change in an apparatus might consist in the substitution in the solar microscope of a photographic lens for a microscopic lens, yet if the latter did not produce the

¹ [Reported by Samuel S. Fisher, Esq., and here reprinted by permission. Merw. Pat. Inv. 430, contains only a partial report.]

effect or perform the function of the former, it is a new and patentable combination.

[Cited in *Rodebaugh v. Jackson*, 37 Fed. 886; *Consolidated Roller-Mill Co. v. Coombs*, 39 Fed. 34.]

6. Even if the elements are unchanged, yet if with one arrangement they are incompetent to an end for which a different arrangement makes them competent, such new arrangement becomes patentable, unless it is such as would naturally suggest itself to persons skilled in the art to which the subject makes it akin.

7. The novelty of the Woodward solar camera examined and sustained.

This was a bill in equity filed to restrain the defendant [Christopher Dinsmore] from infringing letters patent [No. 16,700] for an "improvement in solar camera," granted to complainant [David A. Woodward] February 24, 1857, and reissued July 10, 1866 [No. 2,311]. The invention consisted in an apparatus for producing enlarged copies of photographic pictures, and consisted of the adaptation to the camera obscura of a lens for condensing the sun's rays, and focussing them at or near the achromatic lens.

The claim of the original patent was as follows: "Adapting to the camera obscura a lens and reflector in rear of the object glass, in such manner that it is made to answer the twofold purpose of a camera obscura and camera lucida, substantially as and for the purposes specified."

The claims of the reissued patent were: "(1) Adapting to the camera obscura a lens, or lenses, and reflector, in rear of the object glass, in such manner that it is made to answer the twofold purpose of a camera obscura and a camera lucida, substantially as and for the purposes specified. (2) The arrangement and combination of the condensing lens H, or lenses D', and E, negative slide or holder N, and achromatic lens or lenses B, made adjustable with regard to each other for condensing the sun's rays upon and through the negative, and focussing them upon prepared paper, canvas, or other suitable material for photographic purposes substantially as described."

Henry Stockbridge, H. L. Emmons, Jr., and J. H. B. Latrobe, for complainant.

Constant Guillon and Benjamin Price, for defendant.

GILES, District Judge. This case has been carefully and deliberately tried, after the fullest preparation, and with great ability. It involved matters altogether new to the court,—the principles of optics and the instruments and practice of photography,—and has received at the hands of the court the most attentive consideration.

The first question has been the validity of the reissued patent of 1866. Formerly, it seems to have been held, that the reissue was conclusive as to its own validity, except in cases of fraud and collusion; and it has been supposed that this was laid down in *Stimpson v. Westchester R. Co.*, 4 How. [45

U. S.] 380. Whatever may be the construction given to the opinion in that case, I do not regard such doctrine to be law at this time, as the supreme court say, in the case of *Battin v. Taggart*, 17 How. [58 U. S.] 85, "the jury are also to judge of the novelty of the invention, and whether the reissued patent is for the same invention as the original patent." And as in a cause in equity, the court passes on the facts as well as on the law, therefore the original and the reissued patents are for the court to construe and reconcile, or to declare to be irreconcilable: and although the decision of the patent office is entitled to great weight, yet the reissue is but prima facie evidence, and the duty devolves on the court, as it has done in this case, to determine, whether the reissue claims more than the original specification shows the patentee to have invented.

Limited to the claim made in the original patent, the complainants would not be able to recover in the present case, because the reflector is there one of the elements of the combination claimed, and the defendant's apparatus is without one. In the reissued patent, while the patentee retains the first claim, he adds a claim, omitting the reflector, and claiming "the arrangement and combination of the condensing lens, the negative slide or holder, and achromatic lens or lenses made and adjusted, in regard to each other for condensing the sun's rays upon and through the negative, and focusing them upon prepared canvas or other suitable material for photographic purposes, substantially as described."

Now, while this is an addition to the claim of the original patent, it is fully warranted by the description contained in the specification and the drawings connected with it; and this being so, the complainant's case is exactly that which is provided for by the thirteenth section of the patent act of July 4, 1836 [5 Stat. 122].

I am, by no means, sure that the complainant was, himself, aware of the rationale of his own invention, when he took out his patent in 1857. He did what never seems to have been done before. He made a great improvement, the value of which was at once recognized by the photographic world. But whether he was able, in his original specification, to give the rationale of his invention or not, he nevertheless gave the invention itself to the public. He was the first and original inventor in the eye of the law, and was entitled to a patent; and subsequently, when he had it in his power to make a fuller explanation, and more efficiently protect himself, he had a right to a reissue, and to claim the combination which made the sun's rays effective to produce the result, whether they were brought to bear directly upon the condensing lens, or were reflected by a mirror, for convenience sake, upon it. I hold the reissue, therefore, to be valid.

The next question was the originality of the invention; and here the opposing evidence was of two kinds: First, publications in printed works; second, oral testimony in regard to what was alleged to have been done before. Of the first kind, the publication in the *Photographic Journal* for 1856, was relied on, and, at first sight, the drawing looks very much like the patented invention. But it is only necessary to examine the same in connection with the references, to see that a most important element of the combination, a condensing lens, is altogether omitted. The French instruments were also relied on: but here, although these instruments have a condenser, the illustrative drawings show that the great principle of the Woodward camera does not exist in them. The rays from the condensing lens, instead of being focussed in the achromatic lens, including the negative within the cone of light formed by them, are focussed either before or behind the negative, and not at or near the achromatic lens, and the light in the camera being a diffused light, is wholly incompetent to produce the effect of the solar camera of the complainant. The other publications referred to by the defendants were even less like the patented invention than those just mentioned. The great principle of the solar camera is, in my opinion, altogether unaffected by the fact that the negative is moved, while the condensing and achromatic lenses are stationary. It comes to the same thing as though the negative were stationary and the two lenses were moved, provided they retained their relative positions. On referring to the testimony of the witnesses examined to prove the existence of a solar camera in Philadelphia, as far back as 1849, and in Cincinnati, at a later date, but anterior to Woodward's patent, with every possible disposition to accord to parties under oath, at all times, full credit in their sworn statements, I find it impossible to believe, that either the Philadelphia or Cincinnati instruments were solar cameras competent to do the work of the Woodward invention. To me, it seems that the Philadelphia invention was nothing more than a copying box, and the specimens of its work that have been exhibited are far from favorable. It is admitted to have been thrown aside and abandoned, and it did not make its appearance again until the success of Woodward and litigation brought it forward as a defense. I do not dwell upon the fact that there is evidence that shows, that whatever was done with it was done in private, because, as already stated, I have not been able to convince myself, that it was ever used except as a copying box. In regard to the Cincinnati invention, about whose date there is a good deal of uncertainty, the evidence shows that Hall sold the two instruments he made, one to Grob and the other to Sickendorff, and they have both been seen and described, and they never

seem to have been competent to produce satisfactory results, and were considered by the purchasers worthless.

As I said before, in a case of this description, the court has, not only to pronounce the law, but to determine questions of fact in the capacity of a jury. It is thus that I am called upon to deal with the evidence before me, after its more careful elaboration by the respective counsel, and to state the impressions it has made on me. There is a fact connected with it, however, that I can not altogether pass without remark. Both the Philadelphia and Cincinnati alleged inventors were themselves experienced opticians, and one a photographer; and it is difficult to believe, that, if they had made an invention which is admitted by all parties, both in Europe and America, to be so valuable and important, neither would have claimed it. Nor can I well understand how, if the discovery had been made seven or eight years before the date of Woodward's patent, it would not have become known among the photographers of the country,—of whom some seven or eight of the most experienced have testified in this case,—and not one of whom knew any thing of the invention until after the date of the Woodward patent. As already said, with an habitual leaning to give the fullest credit to parties under oath, I am obliged to determine the question of originality in favor of the complainant.

A prominent feature of the defense, that was ably urged, was that the solar microscope was the same, in principle and mode of operation, as the solar camera; and it was insisted, that here, as well as in the solar camera, the rays that passed through the condenser were focussed at the enlarging lens. Still, in my judgment, this does not make the solar microscope the equivalent of the solar camera. The microscope, like the magic lantern, produces enlarged images of objects; but neither are competent to print the image on the screen on which the images are thrown, without development. In the microscope, this is owing, in part, to the want of that combination of the actinic and visual rays which is due to the photographic lens employed in the solar camera; and in answer to the argument, that a person wishing to employ a solar microscope for photographic purposes, on an enlarged scale, would only have to substitute a photographic lens in place of the microscopic lens, with a suitable arrangement to accommodate it and the negative,—and the only lenses used for photographic purposes being achromatic lenses,—it is to be said, that this changing of one of the elements of a combination that will not produce a desired effect, and substituting another that makes it effective, is to produce a new and patentable combination, and even if the elements are unchanged, yet if, with one arrangement they are incompetent to an end for which a different arrangement makes them compe-

tent, such new arrangement becomes patentable, unless it is such as would naturally suggest itself to persons skilled in the art to which the subject makes it akin.

That the substitution and arrangement, made by the complainant, did not naturally suggest themselves to the photographers in America or Europe,—although in both countries there were attempts made in this direction, beginning with such as may have been made in Philadelphia in 1849, and by Mr. Waldack in Belgium,—may be taken as sufficient proof, that they were not so used as to deprive the complainant of a patent for making them. The solar microscope and the photographic camera doubtless gave to the patentee the materials that he subsequently contrived and arranged in the solar camera. His merit consisted in being the first to combine the elements there taken from the two.

The last question is that of infringement. About this there can be no difficulty. It is settled by my decision sustaining the reissued patent. Whether the sun's rays are brought to bear directly upon the condensing lens, or through the agency of a mirror, can make no difference. The result is the same, and the mode in which the sun's rays are introduced, or made to strike upon the condenser at right angles to its plane, whether directly or by reflection, is immaterial. I sustain, therefore, the reissue, decide the question of originality in favor of the complainant; as well as the fact of infringement, and will sign a decree for a perpetual injunction.

WOODWARD (GARRETT v.). See Case No. 5,253.

Case No. 18,004.

WOODWARD v. GOULD.

[Cited in Brooks v. Jenkins, Case No. 1,953. Nowhere reported; opinion not now accessible.]

WOODWARD (GRIFFIN v.). See Case No. 5,818.

Case No. 18,005.

WOODWARD v. HALL.

[2 Cranch, C. C. 235.] ¹

Circuit Court, District of Columbia. April Term, 1821.

DEPOSITION—SUFFICIENCY OF CERTIFICATE—PAROL EVIDENCE.

1. The magistrate who takes a deposition under the act of congress must certify the reasons of its being taken.
2. The amount of the costs of a suit in New York may be proved by parol.

This was a suit brought to recover the amount of costs in an action in New York,

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

for which the defendant had agreed to be responsible.

Mr. Law, for plaintiff, offered the deposition of Richard Riker, prothonotary of the court in New York, stating the amount of the costs taxed, and a copy of the bill of costs as taxed.

Mr. Jones, for defendant, objected that the judge who took the deposition had not certified the reasons of its being taken.

Mr. Law, contra. The judge certifies that the deponent is of New York, and a counselor at law, and that the deposition was taken at New York. The fact thus appears that the deponent resided more than one hundred miles from the place of trial, which is a good reason for taking the deposition.

THE COURT (THRUSTON, Circuit Judge, absent) decided that the certificate was not sufficient, and for that reason rejected the deposition. But it was afterwards read, by consent, subject to the question as to the competency of the matter thereof.

Mr. Jones, for defendant, objected that the existence of the suit in New York, and the amount of the costs taxed, were matter of record, and could only be proved by an exemplification of the record; so, also, that the plaintiff was attorney in the cause. This is not a suit for the attorney's fees only, but for costs paid by the attorney.

Mr. Law, contra. The defendant, by his letter to the plaintiff, admits the existence of the suit in New York, which is equivalent to record evidence. Mr. Riker is the officer whose duty it was to tax the costs. When a cause is settled by the parties as this was, it is not necessary or usual to tax the costs.

THE COURT (nem. con.) was of opinion that the parol evidence was competent to prove the bill of costs.

WOODWARD (HUNT v.). See Case No. 6,901.

Case No. 18,006.

WOODWARD v. ILLINOIS CENT. R. CO.

[1 Biss. 403.] ¹

Circuit Court, N. D. Illinois. July Term, 1863.

BILL OF LADING—THROUGH CONTRACT—LIABILITY OF CARRIER—EXCEPTIONS IN BILL OF LADING—MEASURE OF DAMAGES—PORTION SAVED FROM FIRE.

1. A steamboat bill of lading for the delivery of goods at a certain point, specifying the rate of freight to a more distant point, is a through contract, and binds the carrier to deliver at the latter point.
2. Although common carriers generally contract for safe transit only over their own lines, there is no valid reason why they cannot contract for the safe conveyance of freight over the different lines of communication to its place of destination.
3. The exception from fire liability inserted in a bill of lading, does not excuse the carrier in all

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

cases of destruction by fire; he is, notwithstanding, bound to use reasonable care and vigilance, such as an ordinarily prudent man would exercise over his own property.

[Cited in brief in *Gray v. Missouri River Packet Co.*, 64 Mo. 48.]

4. Fire having caught, the carrier is bound to do all that reasonable and prudent men could, to prevent the entire destruction of the property; otherwise he is responsible for so much as could have been reasonably saved.

5. Measure of damages is the net value of the property at its point of destination, deducting freight. Interest may also be added.

6. A portion of the goods having been saved from a car, loaded in part with plaintiff's property, and in part with property of other parties, the carrier, in the absence of proof that the portion saved had been delivered to the owners, is liable for that portion in any event.

In the fall of 1862, the plaintiffs, who were merchants in Baltimore through their agent, Mr. Meyer, purchased and forwarded to that and other eastern cities from Memphis, Tennessee, considerable quantities of cotton, the transit being over the road of the defendant. At that time Dan. Able & Co. were the agents of the defendant in Memphis, for the purpose of making contracts for the shipment of merchandise, and Graham, Able & Co. were the transfer agents of the defendant at Cairo, in the shipment of property from the railway to the river, and from the river to the railway. On the 24th of October, 1862, Mr. Meyer, as agent of the plaintiffs, shipped on the steamboat John H. Dickey, fifty bales of cotton, and took a bill of lading from Dan. Able & Co., as the agents of the defendant, in the following form—the words printed in italics being written—the remainder the ordinary printed form:

"Shipped by Dan. Able, (*for account E. Meyer*) forwarding and commission merchant, Bradley Block, foot of Jefferson street, in good order and condition, on board the good steamboat called the *John H. Dickey*, whereof — is master for the present voyage, the following articles being marked and numbered as below; and are to be delivered without delay in the like good order and condition at the port of *Cairo*, (fire and unavoidable dangers of the river only excepted), unto *Graham, Able & Co.*, or to *their* assigns, he or they paying freight at the rate of *two and 97-100 dollars per 100 lbs. through to Baltimore*, and charges. In witness whereof the owner, master, or clerk of said boat hath affirmed to five bills of lading all of this tenor and date, one of which being accomplished, the others to stand void.

"Dated at Memphis the 24 day of Oct., 1862.

Marks.	Articles.	Weight.
<i>L. D.</i> <i>from 1 to 50</i>	(50) <i>Fifty bales cotton.</i>	

"Not accountable for condition, hoops off or bagging torn, and owner assumes all risk

of fire and unavoidable accidents en route to destination.

"W. G. Cirode,
"For Dan'l Able & Co.,
"Agents Ills. Central R. R.
"For Woodward, Baldwin & Co.,
"Baltimore, Md."

A few days thereafter, the cotton, having arrived at Cairo, was placed on what are called platform cars on the railway, and on the 30th of October, while the train which carried the cotton was proceeding from Prairie Green to Ashkum, a station about seventy miles from Chicago, the cotton took fire, from a fire on or near the railway, and was almost entirely consumed. The plaintiffs thereupon brought an action upon the case against the company as common carriers. The bill of lading was introduced by the defense, the company claiming that under the exception as to fire they could not be held liable.

Gookins, Thomas & Roberts, for plaintiffs.

McAllister, Jewett & Jackson, for defendant.

DAVIS, Circuit Justice (charging jury). There is no question that the agents of the Illinois Central Railroad, at Memphis, did contract with the agents of the plaintiffs for the safe delivery of this cotton, either at Cairo or Baltimore. It is contended by the plaintiffs' counsel that the bill of lading, given in evidence, was only the contract of the parties as far as Cairo; and that from Cairo the general responsibility of common carriers must attach. The court is of a different opinion, and holds that the bill of lading in this case, which is the contract between the parties, and by which their rights are to be determined, binds the defendant to deliver the cotton safely at Baltimore, unless it should be destroyed by fire. Common carriers, whether steamboats or railroads, generally contract for the safe transit of freight only as far as their railroad or steamboat route extends. But there is no valid reason why the Illinois Central Railroad Company, if it chooses to employ agents at Memphis to feed the road, cannot make a contract there for the safe conveyance of freight, over the different lines of communication, to its place of destination.

Evidence has been given tending to show the existence of a custom, at Cairo, for the railroad company to give the steamboat a receipt for goods delivered, and in the absence of such receipt in this case, it is argued that the cotton could not have been received on this bill of lading.

This is a question of fact for you to determine. If it was the intention to send the cotton by way of the Illinois Central Railway, and the jury find that the cotton was actually received on the road, and transported over it in pursuance of the bill of lading in evidence, then the bill of lading is the contract between the parties, and it is immaterial whether the usual receipt was given at Cairo or not. A

bill of lading usually particularizes the articles carried as freight, but it frequently specifies the terms on which the freight is carried, and by those terms the parties are bound. Common carriers, in the absence of express contracts, are insurers of the freight carried by them, and are only exempt from liability, when the injury is the result of the "act of God," or open public enemies. But common carriers have a right to restrict their liability, especially when so inflammable an article as cotton is offered to them for transportation. And in this case, if the jury believe that the cotton was shipped over the Illinois Central Railroad on this bill of lading, then the clause exempting the road from liability for loss or damage by fire, is operative, and binds both shipper and carrier.

It is proved, that on the 30th day of October last, this cotton was burned near Ashkum station, on the Illinois Central Railroad, while on the cars of the road on its way from Cairo to Chicago. The exemption from fire liability, inserted in a bill of lading, does not excuse the carrier in all cases of destruction by fire. A carrier, notwithstanding that objection, is bound to use reasonable care and vigilance in the transportation of freight, such care and vigilance as an ordinarily prudent man would exercise over his own property; and if, for the want of them, loss occurs, the liability attaches. If loss results from a fire that could not have been prevented by any reasonable degree of vigilance, and could not have been foreseen by care and prudence, the carrier is discharged.

It is for you, gentlemen, applying the rule of liability to the facts, to determine whether blame attached to the servants of the defendant. You must first decide upon the origin of the fire. If the fire originated on the east of the road, was smouldering there when the train of cars passed by, and was blown into a flame by the wind caused by the motion of the cars, and could not have been foreseen or guarded against by reasonable care and watchfulness on the part of the employes of the road, then you should find for the defendant. But if, on the contrary, the cotton was destroyed by a fire which was burning the prairie on the west, running directly to the road, in full view of every one, then it is for the jury to say whether it was not an act of gross negligence to run a train into the fire, or across it. And whether a conductor, who had a proper consideration for the value of the property entrusted to him, should not have stopped his train until all danger from fire had passed.

The evidence is conflicting. It is for you to reconcile it. There is no artificial rule of evidence to control your belief. You should, in weighing testimony, regard the appearance of the witness on the stand, his manner of testimony, the readiness with which he answers cross interrogatories, as well as direct ones; the consistency of his statements with any of the admitted facts of the case, and the in-

telligence with which he testifies. If you should come to the conclusion that the fire was communicated to the cotton, without any fault of the servants of the defendant, then you will consider whether, after the fire ignited the cotton, they did all that reasonable men could have done to prevent its entire destruction. After the cotton caught fire they were bound to exert themselves, as fair and prudent men should, to save as much of the cotton as possible. If they did not put forth the necessary efforts to save the burning cotton, then the defendant is responsible for so much of the cotton as could have reasonably been saved. If the jury should find that the fire was communicated to the cotton by means of such negligence as would be inexcusable in a prudent man when managing his own property, then they will find for the plaintiffs the net value of the cotton at Baltimore, which was its market value there at the time of its loss, deducting freight. The jury will also add interest.

There is evidence that there were two bales of cotton saved from a car loaded in part with cotton for a firm in New York, and which were not delivered either to the plaintiffs or the New York firm. The plaintiffs having entrusted cotton on that particular car, to the defendant, the burden of proof is on the defendant to show that the two bales saved from the fire did not belong to the plaintiffs. Having offered no evidence on that point, the jury will, in any event, find for the plaintiffs, the value of those two bales.

The jury failed to agree.

For report of next trial and citation of authorities, see [Case No. 18,007].

Case No. 18,007.

WOODWARD v. ILLINOIS CENT. R. CO.

[1 Biss. 447; 1 5 Leg. Op. 92.]

Circuit Court, N. D. Illinois. May Term, 1864.

LIABILITY OF COMMON CARRIER—DUE CARE AND DILIGENCE—PRECAUTIONS AGAINST FIRE—MEASURE OF DAMAGES—THROUGH BILL OF LADING.

1. Under a contract exempting a carrier from liability in case of fire, he becomes an ordinary bailee, and is held only to that kind of care and diligence applicable to a bailee under the circumstances of the case. He is still held to due care and diligence as to the kind and quality of cars, the running and management of trains, the proper precautions against fire, etc., having reference to the season of the year, the character of the property, the country through which it was to be carried and the nature of the transit.

2. Though the property catches fire without the negligence of the carrier, if his agents do not make all proper and necessary efforts to save it, he is still responsible for all that might have been saved. For any portion saved, the carrier is responsible, no matter what afterwards becomes of it.

3. The measure of damages is the value of the property at the contracted destination, at the time when it should have arrived there, deduct-

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

ing freight. The jury may also allow additional damages by way of interest.

4. A steamboat bill of lading for the shipment of goods at Memphis, to be delivered at Cairo, specifying the rate of freight through to Baltimore, and signed by the agents of the connecting railroad company, is a contract for through shipment, and the railroad company are entitled to the benefit of the exceptions contained in the bill of lading.

Action against the defendant as a common carrier, to recover the value of one-hundred bales of cotton burned on the cars in transit. The statement of the case will be found in [Case No. 18,006.]

Gookins, Thomas & Roberts, for plaintiffs.
McAllister, Jewitt & Jackson, for defendant.

DRUMMOND, District Judge (charging jury). Under the uncontroverted facts of the case, the true construction of the bill of lading is that it was a contract for the shipment of the cotton from Memphis to Baltimore, and that the rights of the parties are to be controlled by it. There is no evidence of any other or different contract at Cairo concerning the transit of the property.

By the terms of this contract, therefore, the defendant was not to be held responsible in the case of a loss by an accidental fire, if the defendant used due care in transporting the cotton. When the defendant has shown that the cotton has been destroyed in whole or in part by fire, then he is prima facie relieved from responsibility for such destruction, and the shipper must show that the carrier has been guilty of negligence or of a want of due care in relation to it.

Where property is transported by a carrier, under a contract exempting him from liability in a case of fire, he in that respect becomes an ordinary bailee and is held only to that kind of care and diligence applicable to a bailee under the circumstances of the case.

Notwithstanding the clause of exemption in the contract, the defendant was required to use due care and diligence in transporting the cotton, as to the kind and quality of the cars, as to the running and management of the trains, as to the proper means of extinguishing fires caused by a spark from the engine or otherwise, and as to the train hands;—having reference to the season of the year, the character of the property, of the country through which it was to be carried, and the nature of the transit, viz: by railroad.

An illustration often given of the kind of care and diligence required, is that care and diligence which a prudent person, under similar circumstances, would exercise over his own property.

Did the defendant use such care in this case? It is to enable the jury to answer this question that the evidence on both sides has been principally directed. It is contend-

ed on the part of the plaintiffs, that there was a want of proper care in many, or all, of these respects, and particularly in running the train, under the circumstances in proof, from Prairie Green to Ashkum. It is insisted on the part of the defendant, that all due care was used in every respect.

Before you can determine as to one point,—the prudence of running the train then and there,—you must ascertain, if possible, what appeared on the face of the prairie and on the line of the road to those who had the management of the train. By what they saw, or by what they could have seen by the exercise of proper diligence, it is to be determined whether, or not, they acted prudently. The position of the plaintiffs is that there was a fire on the prairie, on the track, or so near as to indicate to the managers of the train great danger and risk in proceeding. The position of the defendant is, that there was no such fire on or near the track as to show a reasonable probability of danger, but that there was a smoldering fire, so slight as not to attract attention, which was wafted into a flame by the wind created by the motion of the train. What was the condition of the track and its immediate vicinity at the time? Was it prudent, under the circumstances, to run the train as it was run,—that is, did it seem prudent to those having the management of the train, they exercising due care and diligence; because you must bear in mind you are not to judge by the event, but by what appeared at the time.

If there was a want of due care and diligence on the part of the defendant in any respect, and thereby the cotton was destroyed, then the defendant should be held responsible for the loss, otherwise not. If you shall find that the burning was not occasioned by the want of due care and diligence on the part of the defendant, then the next question is, did the agents of the defendant make all proper and necessary efforts to save the property, and was any of it destroyed in consequence of the want of such efforts. If so, then the defendant ought to be held answerable for all that could have been so saved. But you will determine this by the actual circumstances surrounding them, and with the means and appliances at their command. It was not, of course, necessary that they should incur actual danger to their persons by fire, but only that they should do all in their power to preserve the property, having reference to the rapidity of the fire and the means at their disposal.

The only ground upon which the defendant can escape liability under its contract is by showing that the cotton was destroyed by fire; for whatever was not destroyed by fire, no matter who took it or what became of it, the defendant is answerable. In addition to what was taken by the persons who came to the train, there were two bales

saved. For all this the defendant must be held accountable in any event, because, I think, it was incumbent on the defendant to show to whom the cotton saved belonged, if it did not belong to the plaintiffs. If there were two fires on the prairie, the want of diligence must have been in reference to that fire which destroyed the cotton.

Whether the jury shall find for the plaintiffs for the whole or a part of the loss, the measure of damages in either case will be the value of the cotton at Baltimore when it should have arrived there, but for the loss, deducting the freight; and the jury may, if they choose so to do, allow additional damages by way of interest.

Verdict for plaintiffs of \$10,000.

NOTE. As to measure of damages in loss, see Krohn v. Oechs, 48 Barb. 127; Adams Express Co. v. McDonald, 1 Bush, 32; Rice v. Ontario Steamboat Co., 56 Barb. 384; Bazin v. Steamship Co. [Case No. 1,152]. That carriers may limit their liability, but not as against their own negligence, Seller v. The Pacific, 1 Or. 409; Merriman v. The May Queen [Case No. 9,481]; Beck v. Evans, 16 East, 244; Birkett v. Willan, 2 Barn. & Ald. 356; Brooke v. Pickwick, 4 Bing. 218; Parsons v. Monteath, 13 Barb. 353; Stoddard v. Long Island R. Co., 5 Sandf. 180; Western Transp. Co. v. Newhall, 24 Ill. 466; Illinois Cent. R. Co. v. Adams, 42 Ill. 474; Goldey v. Pennsylvania R. Co., 30 Pa. St. 242; Illinois Cent. R. Co. v. Morrison, 19 Ill. 136; Ashmore v. Pennsylvania Steam Towing Transp. Co., 4 Dutch. [28 N. J. Law] 180. For a similar case of loss of cotton by fire, see Levering v. Union Transp. Co., 42 Mo. 88.

Common carrier, undertaking to deliver at a certain point, is liable, though the loss occur beyond its line. Barter v. Wheeler, 49 N. H. 9; Perkins v. Portland R. Co., 47 Me. 573; Peet v. Chicago & N. W. R. Co., 19 Wis. 118; Morse v. Brainerd, 41 Vt. 550; Tuckerman v. Stephens Transp. Co., 3 Vroom [32 N. J. Law] 320; Mosher v. Southern Exp. Co., 38 Ga. 37; Southern Exp. Co. v. Shea, Id. 519; Nashua Lock Co. v. Worcester & N. R. Co., 48 N. H. 339; Fatnam v. Cincinnati R. Co., 2 Disn. 248; Schneider v. Evans, 25 Wis. 241. Receiving payment for the whole route is evidence of the undertaking and liability. Muschamp v. Lancaster & P. J. R. Co., 8 Mees. & W. 421, which is the leading English case, and followed in Crouch v. Great Western R. Co., 2 Hurl. & N. 491, and 3 Hurl. & N. 183; St. John v. Van Santvoord, 25 Wend. 660 (reversed in 6 Hill, 157); Wilcox v. Parmelee, 3 Sandf. 610; Willey v. West Cornwall Ry. Co., 2 Hurl. & N. 703; Noyes v. Rutland & B. R. Co., 27 Vt. 110; Kyle v. Laurens R. Co., 10 Rich. Law, 332; Hart v. Rensselaer & S. R. Co., 8 N. Y. 37; Scothorn v. South Staffordshire R. Co., 8 Exch. 341; Wilson v. York, N. & B. R. Co., 18 Eng. Law & Eq. 557; Webber v. Great Western R. Co., 3 Hurl. & C. 771.

The court of appeals of New York, have lately laid down the important distinction, that where a common carrier under a special contract, limiting his common law liability, undertakes to carry to the terminus of his line, and there deliver to another carrier, he has no authority on behalf of the owner to contract with the second carrier limiting his liability; the full common law liability attaches to the latter at once. Babcock v. Lake Shore & M. S. R. Co., 49 N. Y. 491. Effect of receipting for goods marked to a point beyond terminus, Id.

A carrier receiving goods marked for a certain place, undertakes to deliver at that place, and is liable for a loss beyond his line. Illinois Cent.

R. Co. v. Johnson, 34 Ill. 389; Angle v. Mississippi & M. R. Co., 9 Iowa, 489; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88; Watson v. Ambergate N. & B. R. Co., 3 Eng. Law & Eq. 497; Coxon v. Great Western Ry., 5 Hurl. & N. 274.

A railroad company selling tickets over its own and other roads is liable for the safety of baggage to the point of destination. Illinois Cent. R. Co. v. Copeland, 24 Ill. 332; contra, Straiton v. New York & N. H. R. Co., 2 E. D. Smith, 184; Wilcox v. Parmelee, 3 Sandf. 610; Quimby v. Vanderbilt, 17 N. Y. 315; Candee v. Pennsylvania R. Co., 21 Wis. 582; Cary v. Cleveland & T. R. Co., 29 Barb. 35. This is the English rule. Thomas v. Rhymney Ry. Co., L. R. 6 Q. B. 266; Great Western Ry. Co. v. Blake, 7 Hurl. & N. 987; and in Toledo, P. & W. R. Co. v. Merriman, 52 Ill. 123, the carrier was held liable for a loss beyond his line on a through contract under the bill of lading; even though it limited the liability to loss on the line of the company. Nor does "privilege of reshipping" affect his liability for safe delivery at destination. Little v. Semple, 8 Mo. 99.

Consult also Jenneson v. Camden & A. R. & Transp. Co., 4 Am. Law Reg. 234; Rome R. Co. v. Sullivan, 25 Ga. 228; Brintnall v. Saratoga & W. R. Co., 32 Vt. 665; Johnson v. New York Cent. R. Co., 33 N. Y. 610. But in Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468, it was held that a railroad company could not contract to carry beyond its own limits, and in Northern R. Co. v. Fitchburg R. Co., 6 Allen, 254, the first company was considered as a forwarding agent. Also in Briggs v. Boston & L. R. Co., Id. 246, and in Connecticut and Massachusetts, the courts have refused to extend liability beyond the carrier's line. Hood v. New York & N. H. R. Co., 22 Conn. 1; Elmore v. Naugatuck R. R., 23 Conn. 457; Converse v. Norwich & W. T. Co., 33 Conn. 166; Nutting v. Connecticut River R. Co., 1 Gray, 502; Darling v. Boston & W. R. Co., 11 Allen, 295; Gass v. New York, P. & B. R. Co., 99 Mass. 220; Burroughs v. Norwich & W. R. Co., 100 Mass. 26; Hill Manuf'g Co. v. Boston & L. R. Co., 104 Mass. 122. The tendency of the courts, however, and the weight of authority, as well as the better reason, seems to be to hold common carriers liable to the destination to which they profess to convey.

Case No. 18,008.

WOODWARD v. MORRISON et al.

[Holmes, 124; 5 Fish. Pat. Cas. 357; 2 O. G. 120; Merw. Pat. Inv. 126.]¹

Circuit Court, D. Massachusetts. March 22, 1872.

PATENTS FOR INVENTIONS — FLOUR PASTE — INFRINGEMENT — SUBSTITUTION OF CHEMICAL EQUIVALENTS.

1. An invention of a flour-paste containing corrosive sublimate to prevent putrefaction, but in such small quantities in proportion to the flour that its poisonous and corrosive qualities are neutralized by the flour and the paste thus rendered innocuous, is not anticipated by a flour-paste in which a larger proportion of corrosive sublimate was used for the purpose of making the paste poisonous and corrosive.

2. A patent for a compound is infringed by the manufacture of a compound in which known chemical equivalents are substituted for one or more of the elements of the compound.

¹ [Reported by Jabez S. Holmes, Esq., and here reprinted by permission. Merw. Pat. Inv. 126, contains only a partial report.]

3. The use of chemical equivalents in place of one or more of the elements of a patented compound may infringe the patent for the compound, although in some respects the substituted equivalents are improvements.

4. A specification in a patent of the mechanical parts or chemical ingredients of the patented invention, includes known mechanical or chemical equivalents of the parts or ingredients named.

5. If there are equivalents existing, but previously unknown to ordinarily skilful mechanics or chemists, these are not included in the specification, unless expressly stated therein.

6. The complainant's patent was for a paste having as one of its ingredients chloride of sodium. The defendant, in the manufacture of paste, used chloride of zinc, a known chemical equivalent of chloride of sodium, for such purpose, the other ingredients being the same as complainant's. *Held*, that the defendant infringed; it appearing that in the process of manufacture, chloride of zinc produced practically the same result, in the same way, as chloride of sodium.

Bill in equity [by Joseph Woodward against L. P. Morrison and others] to restrain alleged infringement of letters-patent [No. 52,779] for a paste for bookbinders, granted the complainant Feb. 20, 1866.

James B. Robb, for complainant.

B. C. Moulton, for defendants.

SHEPLEY, Circuit Judge. This suit is founded on letters-patent of the United States granted to the complainant on the twentieth day of February, 1866, as the inventor of a new article of manufacture, "an improved prepared paste for bookbinders;" that is, paste deprived of its tendency to putrefaction and fermentation, and made a standard article of commerce.

To a proper understanding of the case it is necessary at the outset to give a construction to the claim in the complainant's patent. The claim is substantially for, "as a new article of manufacture," a new and improved prepared paste, consisting in the addition of ingredients to the common article of paste used by bookbinders and others, and usually formed of wheat-flour and water, which ingredients shall have a chemical action upon the flour or equivalent substance, so as to preserve it in condition for use for any desired length of time,—the preparation to consist of the following ingredients, in substantially the following proportions: flour, two pounds; chloride of sodium, one ounce; alum, one quarter ounce; bichloride of mercury, six grains; and so made and compounded as to obviate the objection which would naturally arise from the use of the rank poison, corrosive sublimate, in this composition, by the well-known fact in chemistry, that the gluten of the flour acts as an antidote to the poisonous qualities of the bichloride of mercury, thus rendering the compound innocuous and harmless. The paste in common use is usually formed of wheat-flour and water. The wheat-flour con-

tains vegetable albumen, fibrine, gluten, and other albuminous or nitrogenous bodies; also, starch, sugar, gum, and other non-nitrogenous bodies. While the non-nitrogenous constituents have intrinsically no power or tendency to pass into decay or change in composition, the other albuminous or nitrogenous constituents, when exposed to moderately heated air in a moist condition, begin to putrefy and decompose, and when in that state they are brought in contact with the starch, sugar, gum, and other non-nitrogenous constituents, they cause them also to change into other compounds, and it is this process that constitutes fermentation. The object of this invention was to prevent this fermentation, by which the common flour-paste soon becomes unfit for use, and to produce that effect by means which should not impart to the paste corrosive or poisonous properties, and thus to prevent the great waste which necessarily resulted from the souring of the paste, and thus to make flour-paste a standard article of commerce.

We proceed now to consider the state of the art prior to the date of the complainant's invention. Flour-paste had been made with an admixture of alum and water, with an admixture of salt, and with the addition of corrosive sublimate, long before the date of complainant's patent. In fact, preserved paste had been made containing every ingredient that Woodward's patent contains, separately, and every ingredient in combination except salt; but from the evidence in the case it does not appear that any prepared paste had been previously made containing in combination every ingredient that Woodward's patent contains, in substantially the same proportions, for substantially the same purposes, or effecting substantially the same results.

Corrosive sublimate, or bichloride of mercury, had been used by Dr. Turner in the year 1847, and subsequently mixed with alum and water, in a paste by which he secured paper-labels to wooden boxes; but he used corrosive sublimate and other poisons in his paste, because the boxes contained pills manufactured to be sold in the Southern markets, and the paste was purposely made poisonous to prevent insects from destroying the labels, boxes, and contents. When, therefore, he used corrosive sublimate, it was not in such small quantities, or in such proportions to the flour, that the poisonous or corroding qualities were neutralized by the chemical action of the albuminous bodies in the flour, but in such quantities and proportions as were intended to leave, and did leave, the prepared paste corroding, poisonous, and destructive to animal life. Noah, one of the respondents, who manufactured from scraps of leather inner-soles and layers of leather to be pasted together for heels and stiffenings, had also used corrosive sublimate in his paste to kill the rats that trou-

led him by eating the paste between the layers of the leather. In "Cooley's Cyclo-pedia of Practical Receipts," London, 1856, it was stated, on page 938, that the addition of a few drops of creosote, or oil of cloves, or a little powdered camphor, colocynth, or corrosive sublimate (especially the first two and the last), will prevent insects from attacking it (paste), and preserve it in covered vessels for years; and on page 216 of the same book, "the addition of a few grains of corrosive sublimate or a few drops of creosote will prevent it turning mouldy, and is said to preserve it for years." Salt, or chloride of sodium, had also been used in paste long before the complainant's invention.

What, then, remained to be discovered in the art of making a prepared paste as a standard article of commerce? It was known that corrosive sublimate and other poisonous substances might be used for the purpose of arresting or preventing spontaneous decomposition of the paste, and also for preventing the attacks of vermin or insects on the paste. It does not appear to have been known that paste could be preserved by means of these substances, without making a corrosive and poisonous composition, unsafe to handle, and to a certain extent unfit to use. The desired result which remained to be attained was to arrest the fermentation and prevent the spontaneous decomposition and consequent great waste of the paste without making a composition corrosive or poisonous. The complainant, who was a paper-hanger, and whose attention was therefore constantly directed to the necessity of attaining this new and improved result in the manufacture of paste, seems to have devoted much time and study to the investigation of the theory of fermentation, and to experimenting with various substances known to possess the property of arresting the different kinds of fermentation to which the different ingredients or constituents of flour were subject. He did not discover that the poisonous qualities of corrosive sublimate were neutralized by albumen, but he does appear first to have discovered that by the use of a quantity of corrosive sublimate, so small that its poisonous qualities were neutralized by the albuminous bodies in the flour, a comparatively large quantity of paste could be preserved from putrefactive decomposition. He also appears to have ascertained, and practically to have demonstrated by experiment, that in the manufacture of the article of common paste, as previously made with flour-water and alum, a practically useful and beneficial result and improvement in the manufactured product was attained, beyond the use of the few grains of corrosive sublimate with each pound of flour, by the addition of chloride of ammonium, or chloride of sodium, or some salt or substance (equivalent to these for the desired result)

which was soluble in the aqueous solution of corrosive sublimate, or in the same solution in which that was soluble. Of these, for this purpose, equivalent salts, he selected for the formula in his patent the chloride of sodium, because it was attainable at a less price than the others. The experts examined by the respective parties differ widely in some respects as to the chemical or other actions of the chloride of sodium in the composition of the complainant's product. Professor Babcock, examined by the complainant, testifies that, first, "it tends partly to preserve the paste;" second, "it is useful also in raising the boiling-point of the water of which the paste is made, enabling the paste to receive a higher temperature without burning;" and, third, that "it is of advantage in increasing the solubility of the bichloride of mercury so as to carry it more thoroughly into the body of the paste." Dr. Adams, an expert examined by the defendants, says the "salt may increase the solubility of the corrosive sublimate, but it has little or no preservative action on the constituents of the flour." Mr. Merrick, also examined by the defendants, is "not aware that it has any effect, unless it may possibly tend to raise the boiling-point of the paste." Upon this evidence the court could not be expected to decide that in the process of manufacture as described in the complainant's patent, there was no practical advantage or utility in the admixture of the chloride of sodium with the other ingredients; and, for the purpose of determining the question of the novelty and utility of the invention, it is not necessary to decide between the conflicting theories of scientific experts as to the exact extent of its utility or the precise nature of its chemical or other action. We see no reason from the evidence in this case to doubt that the complainant was the original and first inventor of a new and useful prepared paste, as claimed in his patent, and that the letters-patent issued to him therefor are good and valid.

The question whether the defendants by the manufacture of the paste made by them, and which in their answer they admit to be made according to the specifications of the patent granted to George G. Noah, one of the defendants, more than four years after the grant of the letters-patent to complainant, infringe upon the rights of the complainant, is one a solution of which is much more difficult and intricate. The defendants make a paste possessing the same properties as complainant's paste in its freedom from tendency to putrefaction and fermentation, and from being corrosive and poisonous. The ingredients of the defendants' paste are the same as those of complainant, except the substitution of the chloride of zinc in the defendants' for the chloride of sodium in the complainant's, and the addition in the defendants' of two or three drops of the oil of

cloves. The ingredients and the proportions thereof in their respective formulas of manufacture, as stated in the respective patents, are as follows:

Complainant's.	Defendants'.
Flour, 2 pounds.	Flour, 100 pounds.
Common salt (chloride of sodium, Na. Cl.), 1 ounce.	Chloride of zinc, 5 pounds.
Alum, $\frac{1}{4}$ ounce.	Alum, 5 pounds.
Corrosive sublimate (bichloride of mercury, Hg. Cl.), 6 grains.	Bichloride of Mercury, 1 ounce.
	Oil of cloves, $\frac{1}{2}$ ounce.

Although the proportions of these ingredients differ, as stated in the formulas in the respective patents, yet taking into consideration these two facts,—first, that the defendants use the solution of chloride of zinc instead of the dry salt, five pounds of the former being equal to three pounds of the latter; and the other fact, that the corrosive sublimate is so acted upon by the oil of cloves that a portion of it is changed to calomel, which is not proved to have any antiseptic or otherwise beneficial effect on the paste, and therefore may be rejected,—it will be found that, when the formulas in the respective patents are applied to the same aggregate quantities, the proportions of the essential ingredients will be substantially identical in both.

Regarding the invention or subject-matter of the complainant's patent as an entirely new manufacture, it might perhaps be sufficient in this case to find, what we think the evidence discloses, that the defendants make substantially the same thing, whether by the same or a different process. The defence is put substantially on the ground, that, in the manufacture of the defendants' paste, the substitution of one class of ingredients in the place of another described in the complainant's specification renders their process substantially different from the process of complainant. It is necessary, therefore, to determine whether in this composition of matter the defendants have or have not substituted in the place of one or more elements, known chemical equivalents; for by such substitution of chemical equivalents, patents may as well be infringed as by mechanical equivalents. When a new composition of matter or process of manufacture is invented and patented, it is easy for the chemist, with the aid of the specification in the inventor's patent, to suggest changes in the process by the substitution of chemical equivalents which may produce similar or better results. It does not necessarily follow that such a use of chemical equivalents would not infringe the patent, even if in some respects they were improvements on the original process patented.

Four classes of ingredients are common to the two patents. The first class of substances common to both is found in the material which gives the adhesiveness and forms the paste; viz., the flour. The second class is the bichloride of mercury, which arrests the putrefactive decomposition of the flour by

its antiseptic action. The third class is a metallic chloride, which increases the solubility and assists in the diffusion through the mass of the paste of the bichloride of mercury, and perhaps performs another function in preventing the fermentive action of the glucose on the starch. The fourth class is alum, a substance added to give greater body to the paste. The materials used in the first, second, and fourth classes are identical in the process of the complainant and the defendants. In the third class, the material in each is a metallic chloride,—in one the chloride of sodium, in the other the chloride of zinc. Is the metallic chloride which the defendant uses in his process a known chemical equivalent for the metallic chloride which the complainant uses,—not a chemical equivalent in every respect and for every purpose, but an equivalent in this particular process, contributing to produce the same composition of matter by substantially the same chemical action in combination with the other ingredients of the product? Such chemical equivalents are referred to in both patents, the complainant's patent claiming in terms the use of substantially the same or equivalent articles, if they accomplish the same purpose in substantially the same manner, and the respondents' specifying the other salts of zinc, such as the sulphate and acetate, and also the chloride and the sulphate of copper, as equivalents to be used in place of the chloride of zinc.

Now, it is obvious that, for all purposes and in combination with all other substances, the chloride of zinc is no more a chemical equivalent for the chloride of sodium than, under all possible conditions, the sulphate of copper referred to in the specification of defendants' patent would be a chemical equivalent for the chloride of zinc; but it is equally obvious from the testimony in this case that, for the purposes of manufacturing the product of a preserved and innocuous paste, the chloride of sodium and the chloride of zinc are, when used as described in the respective patents, practically the equivalents of each other, because in the process of manufacture they practically produce the same results. Starting from the platform of the complainant's patent, with the advantage of his discoveries, it is plain that the defendant could, by inquiring of any chemist, have learned that the one could be used in this process in place of the other, with like results. This information he appears to have obtained of Dr. Jackson. From him or some other chemist, he obtained the information that the other salts of zinc and the other salts of copper would for this purpose be the chemical equivalents of each other, and of the chloride of zinc. His knowledge in either case was not the result of discovery or experiment. He appears to have started with an appropriation of the complainant's invention, and to have pro-

ceeded in precisely the same way as a person who, after having examined a patent for a machine containing several well-known mechanical contrivances in combination, should go to a mechanical expert to substitute some one or more mechanical equivalents for the contrivances in the patented machine, hoping thereby to take his machine out of the monopoly of the patent.

Every specification is to be read as if by persons acquainted with the general facts of the mechanical or chemical science involved in such inventions. The specification of the parts in a mechanical or chemical process is a specification to ordinarily skilful mechanics or chemists of the well-known mechanical or chemical equivalents. If there are equivalents, mechanical or chemical, existing, but previously unknown to ordinarily skilful mechanics or chemists, these are not included in the specification, unless expressly stated therein. These are, in fact, new discoveries in themselves, independent of the specification, and may be used by all persons without infringing the patent.

It is further claimed that, by the action of the oil of cloves in the defendants' formula upon the corrosive sublimate, calomel is produced; and therefore the corrosive sublimate does not act upon the albumen in the flour, forming an albuminate of mercury, as in the complainant's process. But it is evident from the proofs in the case, that only a portion of the bichloride of mercury is thus acted upon by the oil of cloves, leaving sufficient for the action upon the albuminous portion of the flour, which the defendant describes in his specification, by stating, that "the objection to the use of corrosive sublimate in this composition is met by the fact that the gluten of the flour neutralizes the poisonous effect of the corrosive sublimate." The practical effect of the addition of the oil of cloves in the defendants' process, upon the bichloride of mercury, seems only to convert a portion of it into a substance of little or no use in the process, and to leave the chemical action of the residue upon the nitrogenous portions of the flour identical, substantially, with that in the complainant's patent, both as to the compound formed and the proportions of the elements effectually operative in forming it. If the preservative action in the defendants' paste results from the action of the chloride of zinc, and is not due to the action of the bichloride of mercury upon the albuminous portions of the flour, defendants can omit the use of the corrosive sublimate, or any well-known chemical equivalent of it, and make a paste which would not infringe upon the rights of the complainant. The essence of the complainant's discovery was, that the use of a very minute quantity of corrosive sublimate (in the proportion of about three grains to a pound of flour) would, in combination with another chloride or equivalent salt, arrest the tendency to fermentation in

the paste, without imparting to it any poisonous properties.

The conclusion, therefore, to be deduced from the evidence in the case is, that, so far as the ingredients in the two pastes are different, they are substantially the equivalents of each other, and, if there be any slight difference in the specific action of any of the ingredients upon each other, yet that the general results produced by the action upon each other of the several ingredients are alike, and the two pastes are substantially the same.

Decree for complainant.

WOODWARD (SMITH v.). See Case No. 13,129.

Case No. 18,009.

WOODWARD et al. v. SUTTON et al.

[1 Cranch, C. C. 351.]¹

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

PLEADING AND PROOF.

It is not incumbent upon joint plaintiffs to prove that they are joint partners.

Assumpsit [by James Woodward and others against Sutton & Mandeville] for goods sold and delivered. The plaintiffs' witness deposes that the goods were sold to the defendants by Woodward & Co.

Mr. Jones, for defendant, having required proof that the plaintiffs were the persons who constituted the firm of Woodward & Co., and having referred to the case of Tibbs v. Parrott [Case No. 14,023],—

Mr. Swann had leave to argue the point again, and contended that the plaintiffs have made a record acknowledgment that they constitute the firm. That it could only be proved by their acknowledgments. Articles of copartnership are only an acknowledgment of the parties. Wats. Partn. 36.

Mr. Youngs, contra. This declaration would not be conclusive evidence against the plaintiffs in an action against them. If it is a record acknowledgment, it binds them in all cases. The proof is in the power of the plaintiffs, not of the defendants; and the allegations in a declaration must be proved. James Woodward's declaration cannot be evidence to prove the others to be partners. If the plaintiffs are not bound to give evidence of the partnership, every man who chooses may bind others to a partnership by bringing an action in their names.

PER CURIAM. As the only evidence of the partnership must be either the declarations or the acts of the plaintiffs themselves, and as each of the plaintiffs has come into court, and averred upon the record (by the allegation in the declaration) that he is

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

one of the partners, trading under the firm of Woodward & Co., no further evidence of that fact can be required.

THE COURT in the case of Tibbs v. Parrott [supra], gave a naked opinion, that the allegation in the declaration must be proved, but did not say what would be sufficient *prima facie* evidence of the fact.

The defendants took a bill of exceptions.

Case No. 18,010.

WOODWORTH v. BARBOUR.

[Cited in Gibson v. Gifford, Case No. 5,395. Nowhere reported; opinion not now accessible.]

WOODWORTH v. CHEEVER. See Case No. 18,019.

Case No. 18,011.

WOODWORTH et al. v. COOK.

[2 Blatchf. 151; 1 Fish. Pat. Rep. 423.]

Circuit Court, N. D. New York. Nov. 21, 1850.

PATENT FOR PLANING MACHINE—CONSTRUCTION OF LICENSE—RESTRICTIONS AS TO SALE—MISTAKE IN CONTRACT—DEFENSES—SUIT FOR SPECIFIC PERFORMANCE.

1. A license given by W., the patentee, to C., to use six patented planing machines, recited that C. desired a license to use the machines in a certain county "on the conditions hereinafter mentioned," and then granted to C. permission to use the six machines within the county, "and also, within said limits, to dispose of the plank or other things dressed and prepared on the said machines;" it further provided that W. should not permit any other person than C. to use the machines within the county, and that C. should not use more than six machines there, "nor use any such machines, nor sell and dispose of any plank or other thing dressed and prepared in such machines, any where else within the United States;" and it concluded thus: "It is understood that said C. has all the rights I (W.) have in said county, under said patent, to use six machines, and no more." *Held*, that the sale of the products of the machines was restricted within the county, and that there was nothing in the prior clauses of the license necessarily repugnant to the last one.

2. But, where it appeared that the actual agreement between W. and C. at the time was, that C. was not to be restricted as to place in selling the dressed plank, and that the last clause in the license was especially inserted for that purpose, a court of equity would, probably, on a proper application, direct the contract to be reformed by the insertion of a clause to the effect claimed.

3. If so, it seems to be an established rule in equity, that the matter entitling the party to an amendment of his contract may be set up by way of defence to a proceeding to enforce a specific performance of the contract, where the clause omitted through mistake or accident would, if found in the instrument, constitute a ground of defence.

[Cited in Steam Cutter Co. v. Sheldon, Case No. 13,331.]

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

4. But such a defence cannot be set up where the rights of a bona fide purchaser have intervened, which would or might be seriously prejudiced by giving effect to the defence.

[Cited in Cohn v. National Rubber Co., Case No. 2,968.]

5. Under the license in this case, W., on a breach by C. of the condition as to the sale of the products of the machines, had a right to avoid the contract, and to be remitted to his original rights, and to prosecute C. for an infringement of the patent.

6. But C. also is remitted to his original position and rights; for the contract must be avoided altogether, if at all.

[Cited in brief in Union Manuf'g Co. v. Lounsbury, 41 N. Y. 367.]

7. And C. may set up any right he had prior to the license, to use the machines; as, for instance, where the right granted by the license was for an extension of the patent under section 18 of the patent act of July 4, 1836 [5 Stat. 124], he may set up a right, under the decision in Wilson v. Rousseau, 4 How. [45 U. S.] 646, to use the machines as having been in use when the first term of the patent expired.

8. In a suit in equity against C. to take advantage of a breach of said condition of the license, W. is properly joined as a plaintiff with G., although the latter owns the whole of the beneficial interest in the subject-matter; because W. was a party to the license, and, for aught that appears, is yet the owner of a portion of the interest in the patent, and, as such, interested in upholding it, and may be interested indirectly in the infringement itself.

[Cited in Whiting v. Graves, Case No. 17,577.]

The bill in this case was filed in June, 1847, and set forth the granting of the Woodworth patent, its extension for seven years from the 27th of December, 1842, and its re-issue on the 8th of July, 1845. See Wilson v. Rousseau, 4 How. [45 U. S.] 646. It also set forth that, on the 25th of November, 1845, the plaintiff [William W.] Woodworth, the patentee of the re-issued patent, conveyed to the plaintiff Gibson the exclusive right to the patent during the extension, for the city and county of Albany, N. Y., except the right to use two machines in Watervliet in that county; that on the same day, James G. Wilson, who, on the 9th of July, 1845, had become the assignee of the right under Woodworth for the territory specified in the conveyance next mentioned, conveyed to the plaintiff [John] Gibson all the right to the patent, during the extension, for the state of New York, excepting the exclusive right to run seven machines, in six specified places (none of them, however, in the county of Washington, N. Y.), in addition to the two machines in Watervliet, before excepted; that the defendant had had in operation for some time three Woodworth machines at Whitehall, Washington county, N. Y., and dressed large quantities of lumber with them, and sold it in Albany and Troy, and had had and still had depositaries in those cities and elsewhere, for the sale of such dressed lumber; that the plaintiff Gibson had a large and expensive establishment at

Albany for running and making the Woodworth machines and selling them and the lumber dressed by them, and his licensees had large establishments of the same kind at Troy and other places in the state of New York, the whole being of the value of not less than \$200,000; that the operations of these establishments had been materially injured by the defendant's acts, and that the defendant claimed the right to do as he had done, under a license from the plaintiff Woodworth, given on the 4th of July, 1843.

The license, which was set forth in the bill and was under seal, was executed by both Woodworth and the defendant, recited that the defendant desired a license to construct and use the Woodworth machines in the county of Washington, "on the conditions hereinafter mentioned," and then gave the defendant permission to construct and use six of the planing machines in the county of Washington, N. Y., and not elsewhere, during the extension, "and also, within said limits, to dispose of the plank or other things dressed and prepared in the said machines." The license then provided that Woodworth should not permit any other person than the defendant to construct or use the machine within the county of Washington, and further, that the defendant "shall not, nor will, during the term aforesaid, construct or use more than six machines as aforesaid within the limits above mentioned, nor construct or use any such machines, nor sell and dispose of any plank or other thing dressed and prepared in such machines, anywhere else within the United States and the territories thereof." The license concluded as follows: "It is understood that said Cook has all the rights I have, in the county of Washington, under said patent, to use six machines, and no more."

The bill claimed that the defendant [William W. Cook], by vending the products of his machines out of the county of Washington, had violated the conditions and covenants of his license and forfeited all his rights under it. The bill further set forth that, on the 20th of August, 1846, the plaintiff Woodworth, by an instrument in writing, authorized and empowered the plaintiff Gibson, in the name of Woodworth or otherwise, to prosecute the defendant for the violation of the covenant and condition in the said license contained, and to recover from him such damages as he was liable to pay therefor, and to restrain him from further violating his covenant, and to receive to his own use all damages that might be recovered. The bill prayed for an account of profits, and an injunction against the further use of the machines, and that the license might be annulled. The answer admitted the running of three Woodworth machines by the defendant at Whitehall, and the sale by him, out of the county of Washington, of the lumber dressed by them. It insisted that the

plaintiff Gibson could not have been injured by the defendant's operations, unless the lumber dressed by the defendant would otherwise have gone to the machines of Gibson to be dressed; that the defendant had a right to sell his dressed lumber wherever he thought proper; that, in March, 1838, he and his brother acquired a right, through several mesne conveyances, by deed from William Woodworth, to use two of the Woodworth planing machines in Washington county, for the residue of the original fourteen years, and that they at the same time bought two of the machines and put them in use at Whitehall, and had used them there ever since; that, at the time the license of the 4th of July, 1843, was executed, it was actually agreed between the plaintiff Woodworth and the defendant, that the latter should possess the right to vend the products of the six machines without any restriction as to place, and the parties intended that the license should so provide, and understood that it did, and the last clause in it was inserted to effect that object; that the defendant had a right, at all events, to use the two machines so purchased by him and his brother, and to sell anywhere the lumber dressed by them; that the restriction insisted on by the plaintiffs was in restraint of trade, and void; that the patent did not grant to the patentee the exclusive right of selling the products of the machines, and he had no right to restrict their sale; that this court had no jurisdiction of the case; that the bill did not show any joint interest of the plaintiffs in the relief prayed for; and that they had a perfect remedy at law. There was a replication to the answer, and the case was heard on pleadings and proofs. The material parts of the evidence are stated in the opinion of the court.

Azor Taber and Rodman L. Joice, for plaintiffs.

I. The objections to the bill, as set forth in the answer, are untenable. (1) This court has exclusive jurisdiction of the subject-matter of the bill. The objection taken is that, if the bill is founded on the forfeiture or the breach of any covenant, this court has no jurisdiction. The answer is, that we are to consider the covenant as broken and set aside, and the bill as a bill for infringement, founded on the patent. Of a bill complaining of the unauthorized use of a patent right, and praying an account and injunction, a state court has no jurisdiction, even by consent. Act July 4, 1836, § 17 (5 Stat. 124); *Dudley v. Mayhew*, 3 Comst. [3 N. Y.] 9. (2) Woodworth, the patentee, is properly joined as plaintiff with Gibson, his assignee for the territory where the injury is alleged to have been done; the lumber dressed by the defendant's machines having, contrary to the license from Woodworth, been sold in Gibson's territory. Act July 4, 1836, § 14;

Whittemore v. Cutter [Case No. 17,600]; Woodworth v. Wilson, 4 How. [45 U. S.] 712, 716. (3) The plaintiffs have not an adequate remedy at law. They pray that the defendant's license be declared void, and for an account and an injunction; for all of which they have a manifest right to come into a court of equity.

II. The planing of lumber in Whitehall, for sale elsewhere, was contrary to the terms and true meaning of the license. The last sentence of the instrument does not contradict the prior explicit restriction as to disposing of the dressed lumber. Whatever was authorized to be done by the last sentence, was to be done "in the county of Washington." It expressly relates to using the machines, and was inserted for abundant caution, to show that Woodworth reserved no rights to himself in the county. To allow such a general expression to overrule an explicit condition not mentioned or referred to in it, would violate the fundamental rules of construction. Co. Litt. 147a; Story, Cont. (2d Ed.) § 639.

III. The allegation in the answer, that the parties intended by the contract something different from what is expressed in it, is nugatory, and the oral evidence given in its support should be rejected. (1) Parol evidence is inadmissible to add to, defeat or vary the terms of a written instrument, especially where, as in the present case, an instrument in writing is required by law to give effect to the contract. Act July 4, 1836, § 11; 3 Starkie, Ev. pt. 4, pp. 100-102; 1 Phil. Ev. (C. & H. Ed.) 559; Rich v. Jackson, 4 Brown, Ch. 514; Sherman v. Mayor, etc., of New York, 1 Comst. [1 N. Y.] 316; Norton v. Woodruff, 2 Comst. [2 N. Y.] 153. (2) The construction of a written contract, or the presumption arising from it, can no more be varied by parol evidence, than can its terms. Creery v. Holly, 14 Wend. 26, 30; Hull v. Adams, 1 Hill, 601. (3) There is no pretence of any latent ambiguity in the instrument. If there be any ambiguity, it is patent, and cannot be explained by oral evidence. Story, Cont. (2d Ed.) § 677. (4) If there was any mistake or fraud in the license, Cook should have filed his bill against Woodworth, to be relieved from his contract, or to reform it according to the intention of the parties. He cannot be permitted to claim under it as it is, and then, when sued for its violation, alter some of its provisions by parol evidence. (5) Especially can he not be permitted to do this against Gibson, an innocent third person, who, on the faith of the records of the patent office, has for years conducted his business under the patent, and has incurred the expense of this prosecution.

IV. The license was, by its terms, granted on certain conditions, one of which has been violated by Cook. The violation of this condition was a forfeiture of the license. Story, Cont. §§ 28, 29; Com. Dig. "Condition," B. C.

Samuel Stevens, for defendant.

I. The defendant had a right to use, without restriction, the two machines bought by him in 1838; and the plaintiffs can, in any event, reach only the third machine.

II. The license does not restrict the defendant as to the place of selling the lumber dressed in the machines. And, even if it does, it is not a condition on which his title depends, but merely a covenant, for a breach of which the parties injured must obtain relief by damages. Courts will not create a condition by construction, when the consequence is to be a forfeiture; but will sometimes construe a condition to be a covenant, in order to avoid a forfeiture.

III. But, if the license does restrict the place of sale, the proofs show that there was a mistake in the contract, and that the agreement was, there should be no restriction.

IV. The court will, therefore, in a suit in equity, give such a construction to the license as the parties intended it to receive; especially will they do so where a different decision will work a forfeiture. Hunt v. Rousmaniere, 8 Wheat. [21 U. S.] 174.

V. The bill is defective for the reasons set forth in the answer.

NELSON, Circuit Justice. 1. The evidence is very strong in this case to show that, according to the actual agreement between the patentee and the defendant at the time of the assignment of the 4th of July, 1843, the latter was to possess the right not only to construct and use the six machines within the territory mentioned, but also to vend their products, without any restriction as to place. The deposition of Mr. Boyd is very particular and explicit on this point. It was the subject of discussion in the negotiation, and was deemed a very material part of the contract on the part of the defendant; so much so, that he refused to become the purchaser if restricted in the exercise of this right, as provided for in one of the clauses in the assignment. To remove the objection and give the unrestricted right of sale, the last clause was interlined at the bottom of the instrument, as follows: "It is understood that said Cook has all the rights I have in the county of Washington, under the said patent, to use six machines, and no more."

Upon this evidence, assuming that the clause thus inserted has not the effect, when taken in connection with other parts of the contract, to give the unrestricted right of sale, according to any legal interpretation of the instrument, a court of equity would probably, on a proper application, direct the contract to be reformed, by the insertion of a clause to the effect claimed; and, if so, it seems to be an established rule in equity, that the matter thus entitling the party to an amendment of his contract may be set up by

way of equitable defence against a proceeding involving the rights of the parties under the instrument, and which would not be maintainable if the clause in question had formed a part of the contract. In other words, it may be set up by way of defence to a proceeding to enforce a specific performance of the contract, where the clause omitted through mistake or accident would, if found in the instrument, constitute a ground of defence. Com. Dig. "Chancery," 2, C, 16; *Joynes v. Statham*, 3 Atk. 388; *Pitcairn v. Ogbourne*, 2 Ves. Sr. 375; *Legal v. Miller*, Id. 299; *Mason v. Armitage*, 13 Ves. 25; *Flood v. Finlay*, 2 Ball & B. 15; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Price v. Dyer*, 17 Ves. 357; 1 Story, Eq. Jur. § 161.

I am inclined to think, notwithstanding the insertion of the last clause in the agreement, that, taking the whole instrument together, and giving to each and all of its provisions a consistent interpretation, the sale of the products of the machines was restricted within the limits of the county within which their operation was confined; and that there is nothing in the restrictive clause necessarily repugnant to the one relied on by the defendant as qualifying it. It is not to be denied, however, that unless the view taken by the defendant as to the effect of the qualifying clause is the correct one, it is difficult to perceive its object or materiality, as that clause, if confined simply to the number of machines to be used, would be but a repetition of what had already been fully provided for. The defendant's view, therefore, though not sustainable upon any proper legal interpretation of the instrument, tends to confirm the evidence as to the mistake or misapprehension of the effects of it, claimed in the answer.

Upon the whole, I should be disposed to acquiesce in the ground and principle of the defence thus set up, were it not for the consideration that the rights of a bona fide purchaser have intervened, which would or might be seriously prejudiced by allowing the contract to be reformed at this late day, or by giving effect to the defence, which would be the same thing. *Wilson and Gibson* having purchased all the right of the patentee within the state of New York, subject to certain previous grants, and, among others, the one in question, and paid for the same a valuable consideration, the enlargement of the defendant's contract beyond what appeared upon the face of it, to the prejudice of these subsequently acquired rights, would be unjust and inequitable, and constitutes ground that must prevent the interference of the court. In the aspect of the case in which the relief is prayed for against the terms of a written instrument, these assignees are to be regarded as bona fide purchasers, and as presenting at least an equal equity against the correction of the mistake, to their prejudice, with that presented by the defendant in favor of it. The authorities on this point were re-

ferred to in the case of *Gibson v. Cook* [Case No. 5,393].

That the unrestricted sale of the products of the machines operated in the territory in question would not be prejudicial to the rights of these assignees, is a proposition I cannot assume or admit. It is manifest that a right to vend the products in the markets at the cities below on the Hudson river, would seriously affect the value of the machines in operation in those cities, and, of course, the price of the rights under the patent. If so, then the rights of the assignees, as bona fide purchasers, intervene, and, upon the principles above stated, forbid the interference of the court.

2. I am inclined to think that the assignment from Woodworth to Cook, according to the fair import of its terms, was made upon the express condition that he should observe strictly the limitation in regard to the sales of the products of the machines; and that, on a breach of the condition, the patentee had a right to avoid the contract and to be remitted to his original rights. This would seem to be not only the intention of the parties in inserting the condition, but also the legal effect and operation of the stipulation; and upon this view the bill has been framed.

It is to be observed, however, that the defendant is also remitted to his original position and rights under the Woodworth patent, as the contract must be avoided altogether, if at all. It cannot be obligatory upon the one party and not upon the other. The bill assumes, and properly, as its foundation, that the contract has been rendered null and inoperative by the breach of the condition; and that, since the breach, the defendant has been running the machines in violation of the patent. In this view of the case, he may well set up, as he has done in the answer, any right belonging to him, as it respects the use of the said machines, prior to the assignment in question.

It seems that two of these machines were constructed and used under a right acquired from the original patentee during the first term, and were in use at the expiration of that term. According, therefore, to the case of *Wilson v. Rousseau*, 4 How. [45 U. S.] 646, the defendant had a right to continue in the use of them, notwithstanding the first extension. This ground affords a complete answer to the charge of infringement as it respects these two machines.

3. Woodworth, the patentee, is, we think, properly joined with Gibson as a plaintiff. He being a party to the assignment, it was, perhaps, necessary to make him a party to the suit, in order to take advantage of the breach of the condition, notwithstanding the whole of the beneficial interest is in Gibson. Besides, for aught that appears, he is yet the owner of a portion of the interest in the patent, and, as such, interested in upholding it; and he may be interested indirectly in the infringement itself.

There must be a decree for the plaintiffs, and a reference to a master to take proof of the loss of profits sustained on account of the infringement, upon the principles above stated.

[For other cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,389.]

Case No. 18,012.

WOODWORTH v. CURTIS.

[Cited in *Gibson v. Gifford*, Case No. 5,395, note. Nowhere reported; opinion not now accessible.]

Case No. 18,013.

WOODWORTH v. CURTIS.

[2 Woodb. & M. 524; 1 2 Robb, Pat. Cas. 603.]
Circuit Court, D. Massachusetts. May Term, 1847.

PATENT FOR PLANING MACHINE—LICENSE TO USE.

1. Where A. owns the patent right to a planing machine, and conveys to B. the authority to use one in a certain county, B. may erect as well as use that one, so he may build and use another instead of it, but not both at one time.

[Cited in *Steam Cutter Co. v. Sheldon*, Case No. 13,331; *Hamilton v. Kingsbury*, Id. 5-984; *Morgan Envelope Co. v. Albany P. W. P. Co.*, 152 U. S. 425, 14 Sup. Ct. 630; *Illingworth v. Spaulding*, 43 Fed. 831.]

2. When the term expires, that machine, then in use under the conveyance from A., may, without any new license or grant, be employed till it wears out or is destroyed, either by B. or his assigns, notwithstanding A. has obtained an extension and renewal of his patent right.

This was a bill in equity, praying for an injunction against the use, by the respondent, of the planing machine invented by William Woodworth. The plaintiff claimed to be possessed of Woodworth's rights, and also Emmons's under a like patent. The answer of the respondent [*Hiram Curtis*] admits the use of one of said machines in Boston, in the county of Suffolk, but insists on his authority to do it under a license from the proprietors of the patents for said machine. Several assignments were given in evidence to sustain his authority, and several affidavits on both sides were filed, tending to prove that the present machine used by the defendant was not the first one that had been put in operation under the license, and that this and another had at times been run together, and that the respondent purchased this machine of Tothill after the first patents expired.

B. R. Curtis, for complainant.

Charles L. Woodbury, for respondent.

WOODBURY, Circuit Justice. It is conceded that Richard Urann, May 26, 1840, had become proprietor of the patent right to use the Woodworth planing machine in the county of Suffolk. On that day he granted to

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

Thomas H. Holland, under his hand and seal, as follows: "I do license and empower the said Thomas H. Holland and his assigns, to use one machine in Boston aforesaid, constructed according to the specification under either of said patents," etc. "during the continuance of the term for which the said letters patent were respectively granted," etc. On the 13th of March, 1846, Holland assigned his rights, under that conveyance or power, to "William Tothill, his heirs and assigns forever;" and Tothill, on the 8th day of August, 1846, assigned the same to the respondent, "Hiram Curtis, his heirs and assigns." It is not to be doubted, that the intention of the parties to these instruments was to convey a right to use one of these machines in Boston, during the continuance of the patents which were in being, May 26, 1840.

The first question is, did this involve the right to make or procure to be made, the machine thus permitted to be used? I think it did. Otherwise the whole license might be defeated, if the grantor refused to make for him at all, or to make at any but an exorbitant price, or demanded another consideration for a right in the grantee to make for himself, under a license like this, to use one machine. From the nature of the transaction and the subject matter, as well as the terms in the conveyance about the machine, being "constructed according to the specification under either of said patents," it is probable both parties contemplated that the grantee should construct as well as use one. In respect to some patents, the rights to make, vend or use may be distinguishable from each other, yet they all are united in this patentee; and he may so convey the right to make, as to involve or include the right either to sell or use what the grantee makes. And he may so convey the right to use, as to imply the right to sell within the same limits, as well as to make machines within them. The circumstances, nature, and words of each grant must decide the construction, which is just and legal. This point is not without difficulty; but the contemporaneous construction put on the grant, by the purchaser proceeding at once to make, or cause to be made, a machine to use under his grant, and he and his grantees continuing to use at least one so made, without complaint from either the grantor or owner of the patent, for several years and till the term expired, inclines the scales in favor of the respondent's view.

The next question is, did the grant include the use of a machine during the term, though changed or amended, within the time? The first one built might wear out, or, what was very likely, be destroyed by fire, or be constructed erroneously in some important respects, or be disused entirely for some time from want of repair. Could a different one be run in such events? My opinion is, it could, as the license to use one machine

covered the whole term, and was not limited to any particular machine then sold, but merely to what must be considered one machine in number at one time.

The next question is, whether this right to use could be assigned to a third person. I think the license must be considered assignable. But much more is a machine, and the right to use it, personal property rather than a mere patent right; and much more has it all the incidents of personal property, making it subject to pass by sale, as in this case, to Curtis.

Here, that Curtis bought the machine itself, is manifest from the affidavits of Tothill and Loring; and, beside this, the right to use it was conveyed also in the written assignment to him. The injunction, for these reasons, cannot be granted, as the sale extended the use not merely to the original grantee, as a personal privilege, and limited to him alone, but to him and his assigns; because the word "assigns" is expressly inserted in the instrument, and as the grantor was paid for the use during the whole term or continuance of the patent, and as the grantee might die or become insolvent, or wish to remove or change his business, it would be natural and useful to the grantee to stipulate for the right to assign the use, and this would be no injury to the grantor.

The next inquiry is, did the respondent use more than one machine at any one time, so as to come within the scope of the prayer for this injunction? It is certain that the conveyance would authorize the grantee and his assigns to use only one machine, at any one time, in Boston or the county of Suffolk; and though the evidence here is contradictory, some of it showing an old machine to have been used at times after a new one was procured and put in operation, and some contradicting this; yet it is clear, from the proof on both sides, that the old machine was sold by the respondent long before the filing of this bill, and not used in Boston for three or four years past, and was removed to another town and county. It went away, Loring swears, before July, 1846, and Lord swears it was in the spring of 1844. It is not, then, such an old use of that in Boston which must be regarded as now complained of, but a use of the new machine, and the new one for the work done on it since Woodworth's original patents expired on the 29th of December, 1842.

The next question left is, whether a use like this, since the expiration of the old patent, conflicts with the rights of the plaintiff under the extension of the patent which has been granted to Woodworth's representatives by the board of commissioners, November 16, 1842, for seven years longer; and whether it is or is not permissible, by the construction given to that extension by the supreme court, under the eighteenth section of the patent law of July 4, 1836. 5 Stat. 125. The leading and controlling decision

upon this question is that of *Wilson v. Rouseau*, 4 How. [45 U. S.] 682. The majority of the court there held, that where a machine or right to use a machine, had been sold before the original terms expired, the use might be continued till the machines then in operation under the grant wore out, or were destroyed. The reason assigned for this was, the expression used in the eighteenth section, extending the benefit of the renewal to "assignees and grantees of the right to use the thing patented to the extent of their respective interests therein." 5 Stat. 125.

Some plausibility exists in the idea, that where the right to use a machine till the end of the then existing term, had been paid for, there was an implied understanding on both sides, that the use of it afterwards would be free and undisturbed; but the assignment being only for one term, and the plaintiff having obtained another term from the board, my own views differed in that case from the majority. I feel bound, however, to carry theirs into effect, to their full extent, as they are to be understood from the printed opinion of the court, and the reasons applicable to the subject. The respondent then having paid for the right to use one machine in Boston till the original term expired, and having a machine in operation, which existed and was in use under that right, both when the above renewal took place and the old term expired, he must, by the decision of the supreme court, be allowed to continue the use of the same machine, till it is worn out, unless a fact, which will soon be adverted to, alters or impairs that right.

The decision seems meant for and founded on a case where the grantee had a "right to use," in the broadest terms. No distinction is taken between the acquisition of that right by purchasing a particular machine, or by purchasing the right to use a machine while the term lasted, and under this creating one which continued to be in use when the original term expired. I do not therefore feel warranted in weakening or impairing the force of their decision by a discrimination not made by the supreme court itself, and perhaps not required by any very conclusive reasons. My opinion refers only to the first renewal, and has no regard to what is proper under the second renewal made by congress. But a fact just referred to requires me to consider one other question before closing. When the term expired, December 27, 1842, this machine was owned and used by Holland and those employed under him, having, according to the testimony of Coolidge, been framed and set up the summer previous; and his right to continue that use, it is argued, could not afterwards be further assigned as it was to Tothill in 1846, and the same year by him to the respondent. The assignees and grantees of the right to use it, who are by the eighteenth section to have the benefit of the renewal, are doubt-

less those holding the right, at the time of the renewal.

But what is their right, then, obtained and confirmed by the opinion of the supreme court? Not, as before remarked, in relation to the interest or license under the conveyance from Urann, in May, 1841; not a mere personal privilege. It is a right of property. The value of it is attached to the machine used, when it is the last one used at the time the term expires. The right might be assigned, separately as before; but under the decision of the supreme court the right could not be exercised after the term closes, except in the particular machine then in use. In this respect it is unlike the right which exists before the term of the patent expires, having become fixed and limited to that machine alone. It has become like a patented medicine bought by a patient. The right to use the particular quantity sold passes with the medicine itself.

There being then this property in that machine, when the term expires, like any other property, the machine and the right attached to it may pass by sale, devise, or levy of execution, or assignment of an insolvent's effects. As to the last, see 3 Bos. & P. 565; 5 Barn. & C. 169; Phil. Pat. 357; Hind. Pat. 242, 327; Sawin v. Guild [Case No. 12,391]. In those cases in 4 How. [45 U. S.] before cited, the patent right had been considered property, and even deemed assets in the hands of the administrator, and the renewal had been in his name.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

Case No. 18,014.

WOODWORTH et al. v. EDWARDS et al.
[3 Woodb. & M. 120; 1 2 Robb, Pat. Cas. 610.]

Circuit Court, D. Maine. Sept. 18, 1847.

PATENT FOR INVENTION—EFFECT OF EXTENSION—
BILL IN CHANCERY—OMISSION OF OATH
—SUIT FOR INJUNCTION.

1. The omission to make oath to a bill in chancery, praying for an injunction, is not here a cause of demurrer, after a hearing and order to file evidence. But it should be objected to by motion when the respondents appear, and the oath will then be directed, unless good cause is shown to the contrary. There is no rule of the court, requiring an oath here to be filed with the bill.

[Cited in brief in National Hay Rake Co. v. Harbert, Case No. 10,044.]

2. After a special demurrer to a bill, the allegations of fact must, on the hearing of the demurrer, be considered as true. When a special statute extends a patent for seven years, the original patent must be treated as in law for seven years longer. So must a patent be, which is extended seven years by the board of the patent office. An original patent, extended in both of these ways, must be considered as a patent for twenty-eight years.

3. The specification for both extensions is the original specification. If all are surrendered

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

and an amended one issued, the new letters should be for twenty-eight years. If the old specification had been adjudged good, but was still questioned and litigated, and appears to be in some degree inoperative from certain defects, supposed to have happened by mistake, the commissioner, on its surrender, may issue new letters for twenty-eight years, with an amended specification, and if he does, they will be presumed—till the contrary is shown—to be for invention, and for a defect rendering the old letters, in some degree, inoperative, and which happened from inadvertence or mistake.

[Cited in Hussey v. Bradley, Case No. 6,946.]

4. When a demurrer for these causes is overruled, the respondents may have leave to answer further by the payment of costs, and they may further contest a temporary injunction, though after an order to file testimony in it none was filed, but merely a demurrer.

5. But after such neglect of the order and the overruling of the demurrer as bad, the case will not be opened for further hearing as to the temporary injunction, but be treated as if the facts were confessed, unless an affidavit is filed that the course pursued was not for delay, and indemnity is also filed against any damage caused by the delay and the use of the machine against which an injunction is desired.

6. Where one respondent run a planing machine and two others owned it, the injunction was issued as proper against the three.

7. After the supposed inventor of a machine, in a contest with these plaintiffs in another circuit, had been enjoined not to use that machine, because an infringement on the plaintiffs', those purchasing it of the supposed inventor, so enjoined, cannot be allowed to use it while that injunction remains in full force and the grounds of that decision are in no way overturned.

8. But where the respondents deny the validity of the patent of the plaintiffs, the court will dissolve the injunction at the next term, if the suit at law is not by that time brought against them to try that validity.

[Cited in Brooks v. Norcross, Case No. 1,957.]

9. The terms imposed on the suit are, that the trial be confined to the objections set up by the respondents in their answer and affidavit against the validity of the patent, and that the action may be in the name of any one claiming an interest in this district, which is supposed to have been violated by the respondents.

This was a bill in chancery, praying for an injunction against the respondents [James Edwards and others] for using a planing machine, the patent for which was alleged to be vested in the plaintiffs [William W. Woodworth and others]. The allegations were as usual in this class of cases, several of which, in this circuit, have been before tried and reported, stating, among other things, the original invention to have been made and patented in December, 1828, by William Woodworth, since deceased—his rights to have become vested in the plaintiffs—an extension to have been granted of the original patent for seven years, by the board of commissioners, in 1842—another, for a like term, by congress, in a special law in February, 1845—and a surrender of them all made afterwards, on account of mistake in the specification—and new letters of patent issued for the whole twenty-eight years, on the 8th day of July, 1845. The bill was filed 16th July, 1847, and a subpoena

and notice given that day. On the 23d July, 1847, a hearing was had before Judge Sprague, on a motion for a preliminary temporary injunction, and, after listening to both parties, an order was made by him that the plaintiffs, within twenty days, file their evidence in support of it, and the respondents file theirs within ten days. Before this last period expired, viz. 2d August, 1847—the last day to file evidence by the respondents—instead of complying with the order, they filed a special demurrer to the whole bill, setting out the following causes: (1) That no oath or testimony to the truth of the bill had been put on file with it. (2) That the letters patent, now relied on, of July, 1845, should have been issued for twenty-one years instead of twenty-eight years, and consequently were void.

B. R. Curtis, for complainants.
J. T. Tasker, for respondents.

WOODBURY, Circuit Justice. We have requested the demurrer in this case to be argued first, as a demurrer may affect both a temporary and permanent injunction. In the natural order of things, such an objection, by demurrer, which may turn out to be one of form merely, ought to be considered before the merits of the application. In a prayer for an injunction and a demurrer filed, it has been adjudged that the demurrer should be first heard and disposed of. 6 Madd. 299; 1 Smith, Ch. Prac. 214.

The first ground assigned for this demurrer, is the want of an oath to the bill, or any evidence in its support. But this is a ground more properly to be taken at a hearing on the merits against proceeding further, till such oath or such evidence is put in. It is a matter in pais and affecting the trial of the facts rather than a defect in the bill itself. Of course, at the trial, or hearing, whether a case is made out, or not, if the facts which the bill alleges are denied by the respondents, the plaintiffs must furnish evidence of them before succeeding. Generally they must do it by their oath to the truth of the bill, and always by other testimony, prima facie satisfactory, before the respondents are obliged to rebut it by evidence on their part. But sometimes this need not be done by the complainant, where the respondents do not appear and are defaulted; or, after an appearance and order, do not comply with it, and the allegations in the bill are taken pro confesso; or, if after such an appearance the respondent virtually admits the truth of the facts, by demurring merely on account of the want of law in the bill.

The only precedent cited of a different character is that of *Lansing v. Pine*, 4 Paige, 639. But that decision seems to be founded on the special rules of the New York court of chancery and its peculiar practice, requiring an oath to the truth of some bills to be filed with them, such as in that case, for discovery and other matters as to the contents of a writing, without any evidence accompanying the bill

as to its loss. See the rule stated in 1 Barb. Ch. Prac. 44. Here no such rule exists as to bills of injunction or any others. The practice here is usually for the complainant to make oath to his bill when it is signed, but this is not imperative nor uniform. It is not then done, if he is absent or indisposed, though it should be done probably before the hearing, unless it be a bill by a corporation, or unless an answer under oath is not asked, or unless an oath to the bill is waived, or its absence is not objected to by the respondents when first heard. And if the principal is not in a situation to swear to it, the oath may be made by an agent. 1 Barb. Ch. 41. When this case was before my associate at a former hearing, and when the order was made as to filing other evidence, no exception was taken to the absence of an oath to the bill, and we both concur in the opinion that afterwards, if at all, a demurrer is not good for that cause in this court.

The only remaining ground for a demurrer assigned in it, is, that the last letters patent, set out in the bill as for twenty-eight years, should have been issued for only twenty-one. Thus, after reciting the surrender and issue of new letters for twenty-eight years, the demurrer says: "Whereas the defendants are advised that by law the said last mentioned letters patent should have been granted for the term of twenty-one years from the said 27th day of December, 1828," etc. This would seem to have been stated under an impression that the bill contained no averment of a second extension of the original patent for a second seven years; and hence that from the bill on its face, the renewal, in order to cover all the terms alleged in the bill, should have been for only twenty-one years instead of twenty-eight. But, on examination, the second renewal for seven years appears to have been alleged in the bill, saying it was made by congress by a special act in February, 1845. To be sure it is not inserted immediately following the averment of the other renewal, and hence may have been overlooked by the respondents; but it is there. The bill then, on its face, contains allegations of an old patent of fourteen years and two renewals of seven years each and hence the last letters, to cover them all, are properly for twenty-eight years instead of twenty-one.

But in argument another position is taken, viz. that the renewal could not by law be made to cover the last extension of seven years by congress, as that extension had not been evidenced by any letters patent which might be surrendered. But on turning to the eighteenth section of the act of congress of July 4, 1836, concerning patents, it will be found that when the board made the first extension of seven years, and it was certified on the original letters of fourteen years, it came within the enactment which existed in express terms, that "thereupon the said patent shall have the same effect in law as though it had been originally issued for

twenty-one years." 5 Stat. 125. And when the second extension was granted by congress for seven years more, making, in all, twenty-eight, from December, 1828, the act, proprio vigore, merely extended the patent seven years longer than before. The original patent, in this way, had in law become one for twenty-eight years. The act imposed, next, an obligation on the commissioner to give a certificate as to the last extension, if desired by the administrator of the patentee, but not without. Next, the original patent had not only thus in law, de jure, as well as in common parlance, become one for twenty-eight years from December, 1828, instead of the original fourteen, or that and the next seven, but it had become a patent for twenty-eight years under one and the same original specification. There was no other in existence. But the administrator became satisfied from repeated trials, and numerous exceptions taken to his specification, that it was in some respects defective; that this cast a shade over its validity, and rendered it less operative and successful and profitable than it would be if the defect was removed, and, believing that this defect had arisen from inadvertence or mistake when the original specification was filed, he applied, as the law permits in such case, for leave to surrender his patent, as it then stood, and to receive instead of it one with an amended specification. It is difficult to conceive, then, why, when this patent was afterwards surrendered under the thirteenth section of the patent law, and new letters were obtained with an amended specification, it should not be for the whole twenty-eight years, and should not be as valid for the whole twenty-eight as it would be for twenty-one years. The demurrer seems to admit the renewal to be valid for the term of twenty-one years, but not for the twenty-eight years. But it being as valid for the latter as the former, the demurrer, with such an admission, cannot properly be sustained on this account.

There is another difficulty in sustaining this demurrer, on the ground now taken by counsel—that the old specification has been, by some courts, pronounced valid and not defective or insufficient, and therefore that it must be considered to have been valid. But it is questionable whether the defendants can now be permitted to argue that the patent was good in form at first, after the allegations in the bill of its defective character, and which the demurrer virtually admits. "On the hearing of a demurrer the courts are bound by the plaintiffs' allegations of facts," etc. *Cuthbert v. Creasy*, 6 Madd. 189; 1 *Smith*, Ch. Prac. 211; *Balls v. Strutt*, 1 *Hare*, 148. But supposing these objections to go rather to what must be considered matters of law than fact alleged, how does the case in this respect stand? The reasoning being that the renewal is not valid for even twenty-one years, on the ground

that the first letters patent and first specification had been upheld as good by judicial decisions, the respondents, therefore, are right in contending that those letters and specification could not be considered "inoperative or invalid," in the language of the thirteenth section, so as to justify the commissioners in issuing new letters with an amended specification. 5 Stat. 122.

But it would be a sufficient answer to this position, were it proper to be taken under the form of this demurrer, and after admitting the renewal to be good for twenty-one years, that the supreme court has, in the cases under this renewed patent for twenty-eight years, in 4 *How*. 646, proceeded on the ground that these identical renewed letters were valid. And though I have no recollection that this question in relation to these was discussed in those cases, yet the letters must necessarily have been considered good in order to authorize the judgments in their favor, which were then and there rendered on them. *Woodworth v. Hall* [Cases Nos. 18,016 and 18,017]. And though this would not preclude the supreme court from hearing their validity debated in another case upon this objection, yet it would be hardly decorous for a circuit court to decide differently on their validity, till the supreme court had reconsidered and changed what is involved in its former decisions. *Towne v. Smith* [Case No. 14,115]. Nor would these be of much use to the respondents, if this court, or the supreme court, should make a different decision. Because, if the renewal was not valid at all, neither could the surrender be valid, which led to it, assuming the ground of the respondents, that the old patent surrendered was, and had been pronounced by the judiciary to be good. The old letters, and the extension under them, would be considered in full force, and good also, if the surrender was by mistake, supposing new letters could be validly given instead of them, when they could not be, avoiding thus both the new letters and the surrender. All violators of the patent could be prosecuted under the old and valid patent, in the old form and with the old specification, as well as under the new letters and new specification. If these were vacated, bills and writs could be amended and would declare on the old instead of the new letters, and this done with little or no terms, under such circumstances, not altering the merits but affecting merely forms. This was intimated in *Woodworth v. Hall* [supra].

But the present respondents have not been satisfied on suggestions like these to abandon this objection, or to refrain from asking a decision by this court on the force of it. Hence, to oblige them, I would state frankly, that my impressions are strongly in favor of the validity of the new letters, independent of what has been done on them in the supreme court. I think, by law, the original patent had become one for twenty-eight

years instead of fourteen or twenty-one. I think the old specification applied to the patent for the whole term of twenty-eight years; that the surrender was of all for the twenty-eight years; the renewal for all; and that the right to renew by the commissioner probably existed, although some courts had decided in favor of the old patent. Because their decision, if right, might still rest in some doubt, might not be acquiesced in generally, and, without amendments in the specification, might be constantly open to new and prolonged litigation, so as to render the patent valueless, and, in many respects, "inoperative." If the decision was wrong—as judicial opinions by state courts and circuit courts, and even by supreme courts, sometimes are wrong—surely these amendments would be prudent and proper, in order to save the patent from becoming, ere long, entirely both "inoperative" and "invalid." The act of congress makes the commissioner the judge in relation to the allowance of an amendment, on the ground that the patent is inoperative or invalid so as to justify it, and that the error, to be corrected in the specification, has happened from "inadvertency, accident or mistake." If he permits an amendment, after a hearing on these matters, it is at least *prima facie* proof that the state of things in these respects warranted it, as well as that the amended specification relates to the same patent. For he is not by law allowed to permit any other than the old patent to be described in the amendment, and he must be presumed to have done his duty in all these particulars, till the contrary is shown. *Allen v. Blunt* [Case No. 217]. Nor is this a great or dangerous power to be entrusted to that officer; but a salutary, remedial authority, necessary often to insure justice to useful inventors, and protect the sacred rights of genius and property. But whenever there is any just ground to suppose this power has been fraudulently or corruptly abused, the door is open to prove it, and visit its consequences on the guilty, not only by avoiding the renewal, but by inflicting condign punishment for the guilt.

Viewing this objection as imputing neglect or error to a public officer, rather than the plaintiffs, it is to be considered, also, with favorable inclinations not to let individuals suffer, except in clear cases of wrong, by the neglect of such officers—persons other than the inventors, or those in their private employ—persons in official station, and to whom they are, by the laws of the constitution, and not always by their own choice, compelled to confide portions of their business. *Woodworth v. Hall*, *supra*. Much less should they suffer by others, when their error is one more of form than substance to third persons, and if to a certainty not sustainable in law, this change would work no injustice to others, and would leave the plaintiff still entitled to redress in an amend-

ed form of the bill, relying on the old letters.

Deciding against this demurrer, the next inquiry is, whether this decision must operate as final in favor of the application for a preliminary and temporary injunction. Because the order of the court, in July last, to file testimony by the respondents, in ten days, has not been complied with, and no excuse is offered for this omission except a demurrer put in on the last day of the time granted, and which has led to several weeks' further delay, and been overruled. Under the twenty-fourth rule of this court, where a demurrer is to a bill as here, and it is overruled, the party making it can still—on paying costs—have a trial on the merits or principal matter in dispute—which is here a permanent injunction. In England, without a specific rule: "If the demurrer is overruled, the defendant pays to the plaintiff the taxed cost occasioned thereby, unless the court make other order to the contrary." 1 Smith, Ch. Prac. 213.

The respondents, then, may still have a hearing as to a permanent injunction, and I am willing to allow a hearing on that, after the proper pleadings and proofs are put in, and the costs paid. But how stands the right to proceed further in the preliminary hearing and motion for the temporary injunction, after having once appeared and an order made, which has been neglected, and a demurrer put in, which has created much delay, and finally has been overruled? My impression is that the former order should not be renewed and extended after all this, unless the party, by affidavits, will satisfy the court that the order was not omitted to be complied with for purposes of delay, and will put security on file for any damage done by running the machine in dispute, during the delay to comply with the order. If this is done in a reasonable time—say forty-eight hours—I would extend the order longer; but if not done, issue the temporary injunction on account of the neglect to comply with the first order, and the virtual confession of a violation of the plaintiffs' patent by the demurrer, if the present letters are valid—as we are inclined to hold them to be. In either case—though the respondents by their course seem to admit the truth of the facts alleged in the bill—the plaintiffs, if they can conscientiously, had better file their oaths to the truth of the bill; and file any collateral evidence which has been taken on their part under the order.

The respondents then moved for leave to answer to the bill, which prayed for a permanent injunction, and were allowed to do it on payment of costs. They moved next for leave to contest the temporary injunction further, and be excused from the non-fulfillment of the first order, and were allowed to do it on filing an affidavit that their course had not been adopted for the purpose of delay, and on giving indemnity for any

damages by running the machine since the non-compliance with the order.

This case came on at an ensuing day in the term, for a further hearing as to a temporary injunction. The respondents, in the meantime, had filed an affidavit that the demurrer was not for delay, and had filed a bond that any damages during it would be indemnified against. The plaintiffs had also filed an affidavit as to the truth of the matter in the bill. Some evidence was submitted on both sides; and among that on the part of the respondents were some answers which had been prepared to the bill, as for a permanent injunction, and which had been sworn to, and were here offered as affidavits of the parties, in respect to their contents. The substance of the exceptions taken in them to the validity of the patent set up by the plaintiffs, was, that it was not original with Woodworth, several persons being named who had discovered and used it before, and that the renewals of it afterwards were obtained by misrepresentations and fraud; and that it was improperly surrendered, and improperly re-issued, with a new or amended specification. It was admitted that the machine used by Smith, one of the respondents, was owned by the Edwards's, and was the same which Rogers was, the last spring, enjoined from running. There was no evidence or admission which charged Bancroft, one of the respondents, and the motion as against him was dismissed. The evidence offered did not change the case on either side, from what has been reported in *Woodworth v. Rogers* [Case No. 18,018]. Several propositions were made for disposing of the motion by amicable arrangement, which were not acceded to, and need not therefore be repeated. An application was also made by the respondents to have the injunction, if imposed, continue no longer than the next term; and that the plaintiffs, in the meantime, should institute an action at law to try the validity of the patent denied by the respondents. The plaintiffs also moved to have the respondents make certain admissions as to evidence and points in respect to the suit at law, if ordered, and file security for the damages and costs which might be recovered.

THE COURT, after hearing the same counsel, at another day in the term, expressed by WOODBURY, Circuit Justice, its opinion in favor of the temporary injunction against the two Edwards's and Smith. THE COURT observed, that one runs the machine and the other two own it, and all hold under Brown, the supposed patentee. But in a bill against him, by Woodworth's assignees in Vermont, in the circuit court, after a full hearing, Brown has been enjoined against the farther use of this very machine. It would be sporting with the faith and confidence due to judicial proceedings in our own tribunals, to permit that machine to be used by any person claiming from Brown,

while that injunction against him remains in full force, and the grounds of it in no way overturned. At the same time, as stated in the similar case between these complainants and Rogers at the last session here, these defendants are not prevented, and should not be, from trying their legal rights in their own appropriate cases. And though the plaintiffs, by former repeated recoveries on this patent, by extensive sales and long possession of it, and especially by succeeding in obtaining an injunction against Brown from using this very machine—are entitled to a temporary injunction against these respondents, yet it should, in the first instance, be only till the validity of the plaintiffs' title—which they deny—can be tried with them at law.

As the counsel for the respondents, who is also the counsel for Rogers, prefers that the trial be had in this case instead of that,—let that one stand continued to abide the event of this, if not in the meantime otherwise arranged. And let a suit at law be brought, before the next term, against the two Edwards's and Smith for their infringement; and if not done, the injunction now ordered against them must be then dissolved. In respect to the terms and conditions attached to this suit, the most natural and appropriate one, that the trial shall be of the validity of the patent in the present bill, under the objections set out against in the before-mentioned answers, used here as affidavits by the respondents. Let this be one condition; and another, that the suit may be in the name of any assignor or assignee, claiming an interest in this district which the respondents are alleged to have infringed. Various other conditions and restrictions are asked; and it is not unusual for courts to impose many others required by the nature of the case. See 2 Smith, Ch. Prac. 90; 2 Ves. Jr. 519; 1 Ves. Jr. 284; 2 Hare, 13, 14. But some of those asked here, as to taking a model, and as to confessions of the use of the machine, etc., are easily accomplished or obviated, as the case now stands; and too minute interference in these matters, by the court, is to be avoided if possible. Nor do I think it a case for requiring collateral security to cover damages and cost, after the oath of one of the respondents to his property being worth several thousand dollars.

It is to be hoped, on account of public considerations, that some amicable adjustment may, in the meantime, without further litigation, be effected of the controversies in respect to the validity of this patent in this district—controversies, which, after numerous decisions, still seem to multiply and require great attention to them at each term of this court, to the delay and injury of other business. We do not profess to know, or state, which of the parties are most blamable for this:—but to enjoin both to a sincere spirit of compromise, forbearance,

and peace. The rights of inventive genius, and the valuable property produced by it, all persons in the exercise of this spirit will be willing to vindicate and uphold, without colorable evasions or wanton piracies; but those rights, on the other hand, should be maintained in a manner not harsh towards other inventors, nor unaccommodating to the growing wants of the community.

[For other cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,389.]

Case No. 18,015.

WOODWORTH v. FENNELL.

[Cited in *Dustin v. Murray*, Case No. 4,201. Nowhere reported; opinion not now accessible.]

Case No. 18,016.

WOODWORTH et al. v. HALL et al.

[1 Woodb. & M. 248; 1 2 Robb. Pat. Cas. 495.]
Circuit Court, D. Massachusetts. May Term, 1846.

USE OF PATENTED MACHINE—INJUNCTION—EXTENSION AND RENEWAL OF PATENTS.

1. An injunction will not be issued against a respondent's using a machine, unless it is proved, that he has used it himself, or employed others to use it for him, or at least has profited by the use of it.

2. Where long possession of a patent has existed, and frequent recoveries under it, an injunction will be issued, the originality of the invention by the patentee not being denied, unless the letters appear for some cause illegal or void.

[Cited in *Woodworth v. Edwards*, Case No. 18,014; *Woodworth v. Rogers*, Id. 18,018.]

3. Where congress granted an extension of the term to an administrator, it was held to be legal, and that the letters of administration need not be produced after such a grant.

[Cited in *Goodyear v. Hullihen*, Case No. 5,573.]

4. A signature to the patent, and the certificate of copies, by a person calling himself "acting commissioner," is sufficient on its face in controversies between the patentee and third persons, as the law recognizes an acting commissioner to be lawful.

5. A patent surrendered and renewed operates as from the commencement of the original patent, except as to causes of action, arising before the renewal.

[Cited in *Potter v. Holland*, Case No. 11,329; *Parham v. American B. O. & S. M. Co.*, Id. 10,713.]

6. If a mistake occurs in a copy of a patent, it can be corrected without causing any injury, but if it exists in the original patent, it cannot be corrected, so as to avail without the assent or re-signature of the secretary of state.

7. But the commissioner, if correcting it, need not re-sign or re-seal the letters, he being the same officer here who did it before.

8. If the mistake corrected be a material one, the letters cannot operate except on cases arising after it is made. But if a mere clerical one, quære.

9. Where a renewal of patents surrendered is void, perhaps the surrender itself becomes also void, and the original patents remain in force.

[Cited in *Woodworth v. Edwards*, Case No. 18,014.]

10. Mere technical objections to letters patent are not to be encouraged or construed liberally, for him making them.

This was a bill in chancery, filed July 28, 1845, praying for an injunction against the defendants [Isaac Hall and another] not to use longer the planing machine invented and patented by William Woodworth; and for an account of profits from the use heretofore. The letters patent were alleged to have been issued to him as the inventor of that machine, December 27, 1828, for the term of fourteen years. It was further alleged, that he died on the 9th of February, 1839, and that on the 14th of the same month administration on his estate was granted to William W. Woodworth aforesaid. That the administrator applied to the commissioner of patents for an extension of the term of the original patent for the machine, and that it was duly granted to him, after proper proceedings, on the 16th of November, 1842, for seven years after the end of the first term of fourteen years. That about the 2d of January, 1843, he disclaimed the circular saws described in the schedule to said patent; and, on or about the 10th of the same month, he conveyed to Washburn and Brown, two of the complainants, the exclusive use of said machine in the county of Suffolk and some other enumerated places, with certain reservations to himself; and on the 11th of January, 1844, assigned to Wilson, the other plaintiff, all his remaining interest in the patent, except in the state of Vermont. It is then stated, that the respondents are now using a machine like his substantially; and are thus infringing on the patent owned by the complainants, and the bill prayed a discovery how long it had been done, and an answer to several interrogatories. In aid of the prayer for an injunction, and for the account before named, the bill further averred, that said Washburn and Brown prosecuted, and in May, 1844, recovered judgment in the county of Suffolk for a violation of this patent, and soon after they instituted a similar suit against the respondent Isaac Hall, who settled the same without trial, and paid damages, and received from them a license to use one of their machines for a specified term and for a certain rent, which he had neglected to pay. It was further averred in a subsequent amendment to the bill, that William W. Woodworth, as administrator, finding the specification in the patent open to certain objections and doubts as to its sufficiency, did, on the 8th of July, 1845, surrender the patent, and procure new letters with an amended specification; and that the said Washburn and Brown approved the surrender, and agreed to accept the same rights under the

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

new patent as had been conveyed to them under the extension of the original one.

An answer was filed by Clement Hall on the 18th of September, 1845, which disclaimed any knowledge of most of the averments in the bill, and of the matters about which he was interrogated specifically; though a belief in the truth of most of them is expressed, except that he denied Woodworth to have been the original inventor of this planing machine, or that it is in other respects valid; and the answer further asserted that the new patent was for a different machine from the old one; and that the old one was not surrendered within the fourteen years of its term; and that Woodworth, before he died, had assigned to others all his interest in it; and that Washburn and Brown possessed no interest in the new patent, and wished an issue framed by the court to try these matters before a jury. In the course of the answer he admitted the use by himself alone, and not jointly with others, of a machine for planing, similar in some respects to Woodworth's, but unlike in others. The answer of Isaac Hall was in most respects similar, except that he denied any violation of his former agreement with Washburn and Brown, or any use of the planing machine, either severally or jointly with others, since the expiration of a certain license to him to use it.

Some papers and affidavits were then submitted to the court by the counsel, and an agreement made to have a hearing on the prayer for an injunction before an issue was completed and tried on the originality of the patent, and in this hearing to waive any objections to the originality of the patent in Woodworth.

B. R. Curtis, for complainants.
Giles & Dehon, for respondents.

WOODBURY, Circuit Justice. There has been no evidence whatever offered in this case of any use of the planing machine by Isaac Hall since his license expired, except what is contained in the affidavit of Aaron Pratt. This witness did not see him use it; but made a bargain with him about the 15th of July, 1845, to plane for the witness certain boards at the ordinary price, intending to set off the amount against rent due from said Isaac. Clement Hall, however, was present, and said, "We can plane them for you," and the work was done, but the witness does not say by whom, nor whether in fact the compensation for it was made to Isaac. Against this is the answer of Isaac, responsive to the bill, and sworn to, denying that he had ever used the machine since his license expired; and this agrees with Clement's assertion in his answer, that the machine was used by him alone. The facts testified to by Pratt might, standing alone, be sufficient to justify an inference that Isaac had planed the boards and used the machine.

In such cases, it may be, that any workman on the machine, though not interested in it, is liable to be restrained in order to prevent evasions, by treating all as principals who are aiding. It is a common case, also, that if one does not in person perform the work, but procures another to do it for his advantage on a machine owned by himself, he can still be restrained, and is estopped from denying, *qui facit per alium, facit per se*. Possibly, too, if one hires another to do work on such a machine, he may be restrained. 4 Man. & G. 179. But it is not necessary to give a decisive opinion on this, after comparing the evidence with the denial in Isaac's sworn answer.

After that answer thus testified to as true, the probability is, and it is a construction not inconsistent with the veracity of both Pratt and Isaac, that the boards were planed by Clement alone, and on his own contract, or his own assent to the arrangement, and for his own profit. It would seem, also, very easy to produce further evidence of the fact of Isaac's using the machine, or receiving the profits from it, if such was the truth. Until it is produced, the fairest construction of the affidavits and answer are, that Isaac did not work the machine or profit by it. If this construction were not the most reasonable, and did not reconcile what is sworn to in the affidavit and answers, the court would still be compelled to refuse to issue an injunction against Isaac, on the affidavit of Pratt alone, for the want of evidence in it to overcome Isaac's answer. Because something more must be produced than the evidence of a single witness to overcome an answer under oath, and responsive to the bill. *Carpenter v. Providence Washington Ins. Co.*, 4 How. [45 U. S.] 185. Certainly something more than the evidence of one witness, and he not testifying explicitly that Isaac either owned or worked the machine, or received any of its profits.

But in respect to the liability of Clement to an injunction, the testimony is very different; and, notwithstanding the several ingenious objections that have been urged, I have come to the conclusion that one ought to be issued against him. He admits that he uses a machine for planing, which is, in some important respects, similar to that described in Woodworth's patent. He waives, also, any opposition in this hearing to its having been originally invented by Woodworth. It is shown, moreover, that this patent has been possessed by Woodworth and others under him for something like eighteen years. It is well known, too, that, during this period, numerous recoveries have been had against persons for infringements upon it in several states in the Union; and that the sales of it by Woodworth and his assignees have been very extensive. Furthermore, two of the plaintiffs, Washburn and Brown, are admitted to have obtained verdicts in its favor against persons in this city; and a settlement

and recognition of their title by the other defendant, Isaac Hall, brother of Clement, is a conceded fact in this case.

The various questions of law which have been started in this litigation, whether technical or on the merits, have mostly been carried up to the supreme court of the United States; and after full argument and patient scrutiny have, in almost every instance, been decided in favor of the patentee and those claiming under him. But still, if objections are now taken in favor of Clement Hall, new or otherwise, which ought on sound principles to prevail, the injunction should not issue against him. Hence it becomes necessary to examine all the objections which have been urged on the present occasion; but I shall not decide on any occurring to me but not urged, presuming that they are waived till the future trial on the merits.

The first objection taken is to the new letters patent, because they are issued to the administrator of the original patentee. But that objection was overruled in the case on this patent from New York, in *Wilson v. Rosseau*, 4 How. [45 U. S.] 646. The renewal in the name of the administrator by the board of commissioners, for seven years, was considered good, on the ground that an invention was personal property. An invention possesses value beyond the first patent on it; being valuable for purposes abroad as the ground for a patent there, and also for a renewal at home, independent of any unexpired period of the original term, which might go as assets to an administrator. And congress has confirmed this view of the right, by extending the patent, through a special law, to the administrator even seven years longer, after the time given by the board expires.

The next objection is, that no letters of administration are now produced. But in the Kentucky case (*Woodworth v. Wilson*, 4 How. [45 U. S.] 712), this objection, among others, was urged, and the court did not sustain it, because the patent, being renewed to the plaintiff as administrator, was proof that he had satisfied the board at the patent office of the fact of his being administrator, and it was not now competent to go behind their decision in respect to it.

The third objection taken here is, that the patent is not certified by Mr. Burke, who was the commissioner at that time, but by H. H. Sylvester, as acting commissioner. This point was also made in the New York case. *Wilson v. Rosseau*, 4 How. [45 U. S.] 646. But on my suggestion to the counsel that there were two early acts of congress, which authorized the president to appoint acting heads to the different departments and bureaus, though the offices were not vacant de jure, but the incumbents were absent from the seat of government or indisposed; and that the law conferred on those so acting all the powers which belonged to the officers they represented; and that this might, on the

face of it, be legal, on the presumption it was such an appointment, unless the contrary was shown, the point was no further argued; and the court, in their opinion, held the patent to be good, which could not have been if this objection was deemed valid, under such a state of the facts. The laws mentioned may be seen in the eighth section of the act of congress of May 8, 1792, c. 37 (1 Stat. 281), and the act of February 13, 1795, c. 21 (Id. 415). If the provision in the patent act of 1836, that the chief clerk may perform certain duties when the office of commissioner is vacant, alone governed the present question, as was formerly supposed, then the ingenious argument of the respondents' counsel might apply. But it is an appointment of acting commissioner which may have been under the other general laws in the absence or illness, and not a technical vacancy of the head of the bureau, and whose powers, when so acting, are as full as those of the commissioner himself, and his appointment under that law by the president alone being authorized expressly by congress, it must be presumed to have been made here, in the absence of any evidence to the contrary, and to have been duly made where drawn in question incidentally or collaterally, if it be shown that the person certifying is in the public discharge of those duties. In such cases, as acting appointments may be legal, he will be presumed to be acting legally till the contrary is shown. *Potter v. Luther*, 3 Johns. 431; *Berryman v. Wise*, 4 Durn. & E. [4 Term R.] 366; 3 Durn. & E. [4 Term R.] 635. Even in cases of murder. *Dalmer v. Barnard*, 7 Durn. & E. [4 Term R.] 248, 251; *McNal. Ev.* 487, 488. In such case, too, as the laws recognize acting officers at the heads of bureaus, whose appointment is not in the hands of the secretaries alone, like the patent office since 1836, the signatures of persons as acting commissioners carry as much verity and legality on the face of the certificates themselves, as those by the commissioner himself. They meet, then, the requisitions of the past as well as the following cases (*Bleecker v. Bond* [Case No. 1,534]; *U. S. v. Burr* [Id. 14,693]), until it be shown, if it can be properly shown, in contests between third persons, that the acting appointment was not in truth made in the manner authorized by law.

There are some other objections, however, taken here, which were not decided in [*Wilson v. Rosseau*] 4 How. [45 U. S.] 647, and [*Woodworth v. Wilson*] Id. 716, and which it is proper to examine. One of them is this. The original patent for fourteen years, given in December, 1828, expired in 1842, and though it was extended by the board for seven years more, which would last till 1849, and by congress for seven more, which would not expire till 1856, yet all of these patents were surrendered July 8, 1845, and a new one taken out for the whole twenty-eight years from December, 1828. This was done, also,

with some small amendments or corrections, in the old specification of 1828. After these new letters patent for the whole term, no assignment having been made to Washburn and Brown, but only one previously on the 2d of January, 1843, the plaintiffs contend that all the previous letters being surrendered, and a new specification filed, and new letters issued, any conveyance of any interest under the old letters is inoperative and void under the new ones; and hence that Washburn and Brown possess no interest in these last, and are improperly joined in the bill. But my impression, as at present advised, is, that when a patent has been surrendered, and new letters are taken out with an amended specification, the patent has been always considered to operate, except as to suits for violations committed before the amendment, from the commencement of the original term. The amendment is not because the former patent or specification was utterly void, as seems to be the argument, but was defective or doubtful in some particular, which it was expedient to make more clear. But it is still a patent for the same invention. It can by law include no new one, and it covers only the same term of time which the former patent and its extensions did.

In the present case, these are conceded to have been the facts; and it is an error to suppose that on such facts the new letters ought to operate only from their date. By the very words of those letters, no less than by the reasons of the case, as just explained, they relate back to the commencement of the original term, and for many purposes should operate from that time. I do not say for all, as an exception will hereafter be noticed. This is in strict analogy to amended writs and amended judgments, which, for most purposes, have the same effect as if the amended matter was in them originally.

Again, if such were not the result, generally, the new letters would be treated as taking out a new patent, or an old one in a form then first valid; and, in such a view, would, of course, run fourteen years from the date of the new letters, instead of only fourteen from the issue of the original letters; or if they have been extended as here, fourteen longer, they would not run only twenty-eight years from the beginning of the original term, i. e. December, 1828, as here, but twenty-eight years from July, 1845, the date of the new letters. Besides these considerations, it has been held, that recoveries under the original patent are evidence after the new letters and new specification, to strengthen the title of the plaintiff so as to obtain an injunction; thus treating the patent as one and the same, and a conveyance of it once therefore for a specified term, as good for the term, whether an amended specification be filed or not before the term closes. See *Orr v. Littlefield* [Case No. 10,590]. Also *Orr v. Badger* [Id. 10,587], before Jus-

tice Sprague, February, 1845. It would be a little strange, that a recovery under the new and amended and corrected specification should be, as is another argument for the defendant, any stronger evidence of right than a recovery, even when the specification was more objectionable.

Independent of these circumstances, it is averred in the bill as amended, that Washburn and Brown have adopted and approved of the new specification; and that they claim under their contract, and to the extent of it, all the rights conferred by it on the patentee. There is, moreover, a clause in the act of July 4, 1836, c. 357, § 13, which seems to have been designed to dispose of such objections; and though it does not mention contracts or assignments, it is quite broad and comprehensive enough to cover them. It is: "The patent, so re-issued together with the corrected descriptions and specifications, shall have the same effect and operation in law on the trial of all actions hereafter commenced for causes subsequently occurring, as though the same had been originally filed in such corrected form before the issuing of the original patent." It would be very doubtful, also, whether a misjoinder of parties as plaintiffs in an application of this kind, could defeat a prayer for an injunction not to use a machine in which any of them were interested. At law, such a misjoinder could be objected to only in abatement, as the act sounds *ex delicto* (1 Chit. Pl. 75); and probably it could not be objected to at all in equity, though in the final judgment, of course it would be entered up in favor of those alone who appeared to have some right and interest to be protected. As the claims of two of the plaintiffs, however, have been already proved and established in several recoveries before the new letters; and the contract now offered, under which they claim, confers on them a right to use fifty planing machines within certain territory, including this city; and there is a covenant by the grantees of that right not to sell to different persons liberty to use others within those limits, during the time of Washburn and Brown's contract, their interest within them would seem to be sufficiently exclusive to make them properly plaintiffs, and entitled to judgment. The strongest doubt with me is in relation to the interests of the others in this city, so as to justify joining them; but as that objection has not been taken, and all the facts are not known to me concerning them, I pass it by for the present.

But there is one more exception in this case; and it is of a character causing some difficulty, if the evidence in respect to it was more clear, and accorded with what is supposed by the counsel for the respondent to have been the truth of the transaction. The original patent is not put in evidence here, but a certified copy from the patent office. That copy now reads, that the term

is one of twenty-eight years from December, 1828; but when produced at a former opening of the cause it is admitted that it read fourteen years from December, 1828. A letter from the commissioner is offered by the respondents, stating, as I understand it, that the change has since been made in order to correspond with the truth, the new letters patent being for twenty-eight years from 1828, and the record being so, but the forms for copies having been printed fourteen, some were filled up without altering the printed term from fourteen to twenty-eight. The respondents infer from this explanation, that the letters patent themselves, as issued in July, 1845, and not merely the copy of them, contained the same mistake, and that the record of them did also; and supposing that both have been altered since, as well as the copy, the respondents object to the legality of such amendments, and likewise contend, that if legal at all, it is so only in respect to suits and other matters arising subsequently to the alteration. But I do not understand the letter of the commissioner to go beyond the copies; and if only the copies were erroneous, and they have been corrected, he undoubtedly had the power, and ought to make them conform to the patent itself and the record.

On the contrary, if the new letters patent themselves were by mistake for only fourteen years from December, 1828, when they were intended to be twenty-eight, and thus to cover not only the original term, but both the renewed terms; and the commissioner has amended them since this bill was filed, I doubt whether, on the testimony now before us, they could be received in evidence to sustain this bill, considering its allegations to go on a patent for twenty-eight years, and one so issued on the 8th of July, 1845. It would probably be his duty to correct the letters patent in such a case, when applied to, and to minute the correction on or in them; as these matters are between him representing the government and the patentee. Nor would it be necessary for him in such case to re-sign or re-seal the letters, as is urged on English precedents. See Sharp's Case and Nickels' Case, in Webst. Pat. Cas. 645 and 658. For those do not apply here when the signing and sealing are by the same officer, and by the same also as he that makes the correction. For he adopts them as his own acts by re-delivering the patent after it is amended, as much as he adopts the writing of it on the paper or parchment. But it would seem to be necessary to have the secretary of state sign anew, or assent to the amendment, as he is a distinct officer, and without signing anew, or assenting, has never examined and authenticated the letters as amended.

The record or enrollment must also be made to correspond with the letters as amended, if it does not already. As to the effect of such alteration, I entertain an im-

pression, resting on general principles and the grounds of some of the precedents abroad, and in the absence of any statute here, to allow amendments of this kind, or to prescribe their effect in such cases, that a patent after thus amended in a material mistake, could not operate as to third persons against whom prosecutions were pending, but only for causes accruing after the correction. See Webst. Pat. Cas. 664. It may be different if the mistake was entirely clerical. If the mistake was not clerical, or one made by the patentee himself, it is quite clear that the law abroad makes it operate only from that correction, and it is so here in respect to defective specifications, when they are allowed by statute to be amended in certain cases. See Act July 4, 1836, c. 357, § 13. They are not good as to suits pending, but only as to actions for causes subsequently accruing.

But in cases like this, if it should turn out, on clear evidence, that the new letters themselves had been altered so as to be wholly void, a different and equally difficult question may arise. It is this, it might be that the surrender of the original letters, and of the extensions of them, so that all might be renewed in one, would become also void; and the party might then, perhaps, be allowed to amend his bill, and enjoin and recover on the former letters patent, if the old specification was not too defective for that purpose. On this I give no opinion at this time; but if evidence be obtained, that the new letters patent themselves have been altered as to the term in them since this action was commenced, as the respondents' counsel apprehend, it may then become necessary to decide it. The mode adopted in this case, of issuing one set of new letters patent for the three different terms before existing, when the old specification was sought to be corrected, is likewise open to some question concerning its legality. The most obvious mode would be to renew each separately, or renew only the old letters and their specification; and let the others be cured or aided by relation back to the original one. But as no such objection is pressed now, I forbear comment upon that also.

It may not be improper to add before closing, in relation to technical objections, as most of them are when urged against injunctions generally, that though they are to be weighed and examined, and allowed to prevail, as they must in other cases in equity, if legal, yet they ought to be treated with no particular indulgence. In all inquiries in equity, the leaning in doubtful points must certainly be rather against than in favor of them; and more especially must it be so in preliminary injunctions, where the decision is only temporary, and may be dissolved on motion at any time, on showing fuller proof as to any thing affecting the merits of the controversy. The injunction

as to Clement Hall is allowed till the further order of the court, but not against Isaac Hall.

[For further proceedings in this case, see Case No. 18,017. For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

Case No. 18,017.

WOODWORTH v. HALL et al.

WOODWORTH v. STONE.

[1 Woodb. & M. 389; 1 2 Robb, Pat. Cas. 517; 6 Pa. Law J. 178; 16 Hunt, Mer. Mag. 66.]

Circuit Court, D. Massachusetts. Sept. 21, 1846.

VALIDITY OF LETTERS PATENT—SIGNATURE OF "ACTING COMMISSIONER"—CLERICAL MISTAKE—INJUNCTION.

1. Where evidence is offered to prove, that the "acting commissioner," who signs a patent, was not appointed by the president, it is questionable whether it be competent to admit it in controversies where he is not a party.

2. Under the patent law of 1836 [5 Stat. 117], the chief clerk is held to be the "acting commissioner," as well in the necessary absence of the head of the office, as in case of a vacancy de jure.

3. The sanction of the secretary of state, to a correction of a clerical mistake in letters-patent, may be given in writing afterwards; and he need not re-sign the letters themselves.

4. If the correction be of only a clerical mistake, it operates back to the original date of them, unless perhaps as to third persons, who have acquired intervening rights to be affected by the alteration.

[Cited in Woodworth v. Edwards, Case No. 18,014.]

5. If a new patent, issued on a surrender of old ones, be void for any cause connected with the acts of public officers, it is questionable whether the original patents must not be considered in force till their terms expire.

[Cited in Woodworth v. Edwards, Case No. 18,014; French v. Rogers, Id. 5,103.]

6. An injunction once granted will not be dissolved on account of any doubts, as to the validity of a new patent in such cases, caused by the errors of such officers, if measures are pending in congress to remove them by legislation.

[Cited in Woodworth v. Edwards, Case No. 18,014; Woodworth v. Rogers, Id. 18,018.]

In these cases, injunctions were granted at May term, 1845, and at May term, 1846; a motion was made, in the first-named case, to dissolve the injunction. An opinion was given at the same term, stating the facts, and retaining the injunction as to one of the defendants, but dissolving it as to the other, for reasons applicable to the merits. [Case No. 18,016.]

Among the objections which were then urged against the validity of the patent, on which the claim of the plaintiff was founded, were these: Because it was signed by H. Sylvester, as acting commissioner, rather than by Edmund Burke, Esq., the commissioner; and because the patent had been altered at the patent office since it originally

issued. For further particulars in relation to these objections, and the detailed facts on which they rested, reference can be had to the opinion and case, as drawn up.

At an adjourned session of the same term, held at Boston, in September, 1846, the motion to dissolve the injunction was renewed as to the first case, and the like motion made as to the second case, both of which are now to be disposed of. They were founded on the same grounds, accompanied by new evidence, offered under the first objection, to show that Mr. Sylvester, at the time of signing this patent, was not acting under any appointment made by the president, by virtue of the 8th section of the act of congress passed May 8, 1792, c. 37 [1 Stat. 281]; but, being then chief clerk in the patent office, claimed to be authorized to sign it in the necessary absence of the commissioner, under the power conferred by the 2d section of the act of July 8, 1836, c. 357 (5 Stat. 117), reorganizing the patent office.

In respect to the second objection—the alteration of the patent—it was further proved that a mistake, as to the time it was intended to run when renewed, occurred in the patent itself, as well as the record and copy of it; the proof, at the first hearing, extending only to the copy. Thus, it was issued for fourteen years, but was meant to be for twenty-eight, and was afterwards altered to twenty-eight. In answer to this, it was now shown that the secretary of state subsequently expressed in writing his assent and sanction to the correction of the mistake, though he was not consulted at the time it took place.

Mr. Giles, in support of motion.

B. R. Curtis, against it.

WOODBURY, Circuit Justice. It is not necessary to go into many of the facts and principles considered in the former motion in this subject, and then disposed of; but the new and material facts since obtained are to be examined, so far as they may weigh upon the objections, and affect the principles before settled.

The first inquiry now is, whether the chief clerk in the patent office, not having been in fact specially appointed to be acting commissioner by the president, in the absence of the commissioner himself, could legally sign this patent, under the general provision in the 2d section of the patent law of 1836 (chapter 357). The words of that section, bearing on this question, are: "The chief clerk, in all cases, during the necessary absence of the commissioner, or when the said principal office shall become vacant, shall have the charge and custody of the seal, and of the records, books, papers, machines, models, and all other things belonging to the said office, and shall perform the duties of commissioner during such vacancy."

It is contended by the defendant that this

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

clause empowers the chief clerk to act as commissioner only when his office is entirely, or de jure, vacant; and not when he is merely absent from sickness, or other necessary cause, constituting a de facto vacancy, only, or a want of the commissioner present to discharge the duties arising from some such cause. It is certain that the words here used, looking no farther, appear to countenance the more narrow and limited view of the word "vacancy;" but if we look to the object of the clause, to other sections of this and the succeeding patent act, to the contemporaneous construction placed upon it, to the long acquiescence under that construction, and the great public as well as private interests which have grown up in conformity to it within the last ten years, a broader meaning to the term seems fortified by the whole spirit of the act, and by the analogies of the case. It is proved as a fact, that the chief clerk, since July, 1836, has been accustomed to perform, under this section, all the duties of commissioner during his necessary absence, and without any new special authority being obtained from the president, under the law of 1792. It has been uniform in the office to consider the word "vacancy" here as meant to cover an actual, or de facto vacancy, by a necessary absence from the city; and the act has been construed so as to include as a vacancy, for this purpose and object, the inability of the commissioner at the seat of government to discharge his official duties, arising from any necessary cause, as well as a vacancy arising from his death or resignation. It is conceded, also, that many patents during that period have been signed, and many records certified, by the chief clerk, as acting commissioner, under the 2d section of the patent law, and which must become invalid if this one be so pronounced, for that cause.

It is further apparent, from the fourth section of the same law, that, unless this broad construction be correct, the chief clerk is not empowered to certify copies of the original records and papers, in the necessary absence of the commissioner, however urgent may be the necessity for them, in the protection of public or private rights. But, by a subsequent act, passed March 3, 1837, c. 45, § 2 (5 Stat. 191), the chief clerk is expressly empowered, in the absence of the commissioner, to give copies of former records supplied where formerly burned. And hence it would follow, if necessary absence in the first law is not covered by the term "vacancy," he is not authorized to give copies of original records in the absence of the commissioner, though he may of records burnt, and supplied again afterwards. This would be a distinction most groundless, and hardly presumable to have been intended. It would likewise follow, that, in the absence of the commissioner, the chief clerk was to have charge of the seal and records,

but could not use them for some of the most common and necessary and urgent business connected with them. Furthermore, he is placed under oath, and also under bonds, so as to secure the community when he does act; and is, indeed, more safe for the public than a temporary commissioner selected by the president, as such a one may be under no bonds, whatever; yet, though under this security, a construction is urged that he has not been trusted by congress to act, in the very cases where a person is trusted by them to act, without security, if selected by the president. And this is the reasoning, too, though he is selected to be chief clerk, rendering him eligible to perform these duties, virtually by the president, in all cases, and often by his express wish. Nor is it any stretch of confidence, extraordinary or unnecessary, for congress to confer on a clerk such a power as the signing of a patent. It is done clearly, and is conceded to be properly done, when the commissioner dies or resigns, and a technical vacancy exists; and in case of his absence it is done, not for personal favor, but for public convenience; so that citizens are not to be delayed in getting patents till a successor is appointed, and arrives, perhaps from some remote place. So it is conceded to have been done for more than half a century, by a grant to the president from congress, by the 8th section of the act of May 8, 1792 (chapter 37). The danger from the broad construction here, is then no greater than from other powers, admitted already to exist in other ways, in relation to this same subject. But to guard against long absences, without a regular and more responsible head to a department or bureau, it is wisely provided, by the act of February 13, 1795, c. 21 [1 Stat. 415], that the temporary appointment by the president shall not continue over six months at one time, because a regular successor could in that time be procured, and the sanction of the senate should be asked for filling the office during a longer time; and by the section now under consideration it is contemplated that the temporary head of the bureau shall act only during the "absence" of the commissioner which is "necessary," or a vacancy happening in any way; both of which are, of course, not likely in any case to last longer than six months, in an age when such offices are so much sought after as in this. Again, in respect to the meaning of the word "vacancy" as used in like cases, it is obvious that the act of February 13, 1793, looked to it as covering absence and sickness, as well as death or resignation of the regular incumbent, because it speaks of a vacancy when referring to the former act, and a temporary appointment for only six months under it, and when that previous act authorized such appointment as much in case of absence and sickness as of death. All of them, then, seem to be covered by the reference, as each constituting a vacancy,

de facto, to be sure, in case of absence and sickness, but still referred to under the generic term of a "vacancy."

There is another circumstance of some importance, not yet noticed, bearing on this question. It is well known to all who have been familiar with the departments and bureaus at Washington, that the delay and inconvenience to the public in obtaining temporary appointments from the president, if absent far from the seat of government, as he sometimes is, when the head of a department or bureau, by sickness or accident, is obliged to be away from his office, has led sometimes to complaints of a suspension or postponement of business of an important character; and it has been contemplated, either by a general law, or as the department and bureaus become from time to time reorganized, to provide that the chief clerks in each should temporarily exercise the duties of the heads thereof, while they were necessarily absent. It is obvious that the public would often be much benefited by such a provision, in cases like the president's being away, so that he could not at once make a temporary appointment; and it is equally obvious that the public can never suffer by such an appointment, and by operation of law, more than it does now, when made by the president, if not away; nor would such a general provision be either novel or dangerous, considering that in the case of most ministerial offices under the government, such as collectors of the customs and marshals, their deputies, appointed by themselves, can now act for them in their absence, and do constantly perform most important duties at such times. Hence, when the land office was reorganized, 4th July, 1836, the same day the bill passed reorganizing the patent office, containing the provisions now under consideration, clauses were inserted in both bills, with a view to confer such a power or appointment on the chief clerks in both bureaus. The clause in respect to the patent office I have already quoted, and have been examining its spirit, and other analogies, in order to see if the broad one covering the present case is not the proper construction of its language and intent. The other clause, in respect to the land office, is on the same subject; but, by a different arrangement of the sentence, is too clear to admit of any different construction from that I have applied to the patent office. In the last, the language is: "And in case of a vacancy in the office of the commissioner of the general land office, or of the absence or sickness of the commissioner, the duties of said office shall devolve upon, and be performed, ad interim, by the clerk of the public lands." This clerk of the public lands was the chief clerk in the office. Undoubtedly the object to be attained was alike in both; the inconvenience to be remedied was the same; the risks similar; and it was probably only by inadvertence that

less precise language was employed in the patent act than in the act as to the land office.

It is a sound rule, in the construction of statutes generally, that "every thing which is within the intent of the makers of the act, although it be not within the letter, is as much within the act as if it were within the letter and intent also." *Walker v. Deveaux*, 4 Paige, 252, cites 1 Plow. 366; *Dwar. St.* 691. It is conceded, however, that the intent must be ascertained by the words that are used, coupled with the mischief to be remedied. But it is a mistake to argue that because ministerial officers can do only what they are specially empowered (1 Mass. 281-283) they cannot do what, on a fair and liberal and useful construction of the words used by congress, they are specially empowered to do. The intent of an act of congress, as to such offices, is to be gathered from the whole spirit, no less than the letter of the act, as much as it is in other cases.

In both of the provisions we have just been considering, the intention of congress, seeming to have been the same, the action of the chief clerks, or heads of their respective bureaus, in their absence, is not an action without pretence of justification by any express act of congress, without countenance of any law, and a mere usurpation, as it would be, if done under an idea that they can so act, and transcend limited powers by mere construction, as being clerks, and their superiors absent; or as being more convenient, at times, to the public. But they equally rely here, and for ten years have relied, on explicit and special provisions by congress to authorize their action in both cases; both provisions being made at the same time, with a like view, though one uses language not susceptible of a different construction, while the other does not; but language which, at the same time, will fairly bear a construction in conformity with the spirit of the law, and similar to that which must confessedly be put on the other act.

Besides this reasoning and these analogies on the present question, the conclusions which I have formed in favor of the validity of these letters-patent, under this objection, are strengthened by some other considerations. Here a patent is offered in evidence, valid on its face, and objected to only on account of matter dehors, that the acting commissioner who signs it was not in fact one so acting by appointment of the president. If he had been, it is conceded, the patent is valid; and this was virtually decided by the supreme court in *Wilson v. Rousseau*, 4 How. [45 U. S.] 646, 663, where this very patent, signed by Mr. Sylvester as acting commissioner, was objected to, and upheld. No proof was offered there, that he had, or had not, received any such appointment; but, in such cases, it being legal to have an acting commissioner, it was presumed he was duly appointed so, and his acts

therefore valid. So, in this case, such a presumption would be enough, provided it be not competent to go further, with evidence on the subject, in a proceeding between third persons; the power of the officer himself not being here put directly in issue in a proceeding where he is a party. That a person is an acting officer is enough in most cases, even in that of murder, see the cases collected at the last session of this court, in the case of *U. S. v. Peterson* [Case No. 16,037]. For like reasons, probably, Justice Story, in this case, when the injunction was granted, intimated that the patent must be bad on its face, in order to sustain an objection about the officer, and Judge Kane countenances, to some extent, the same idea in his opinion in *Smith v. Mercer* [Id. 13,078], connected with this same patent, August, 1846, Penn. D. Ct.

These reasons and opinions make it very questionable whether the evidence is competent, or admissible at all in this action, that the acting appointment of the chief clerk was not made by the president himself; and if it is not, the patent on its face, as in *4 How. [45 U. S.]*, must be deemed valid. I should, however, do injustice to the intrinsic difficulties of this question, and the different reasonings and analogies which have been and may be fairly brought to bear on it, were I not to add that some doubt remains in respect to the results I have reached, though the inclination of my mind is decidedly to sustain the validity of the letters.

The second objection to the patent, on account of its alteration, has been fully considered before, on some different facts, when the motion to dissolve one of the injunctions was made last spring. The correction of a mistake, though committed clerically, yet as here in a matter material, was then supposed not to be valid, though made by the commissioner, unless approved by the secretary of state. It was not thought necessary by me that the patent, after such a correction, should be re-sealed or re-signed by the commissioner, he being the officer who did both acts originally. But, as the secretary of state must by law sign it, as well as the commissioner, should the patent be altered after he signs it, he must, by analogy, be made aware of any such subsequent alteration, and sanction it, before his signature can be regarded as verifying the amended patent. No evidence was produced before of his knowledge, and his sanction of this change; but such evidence is now offered, and is probably sufficient, without any entry of the same on the letters-patent themselves. That would certainly be a convenient mode of perpetuating the evidence of his sanction; but, no law requiring it, the principles seem to demand nothing beyond his assent or ratification of it; both of which exist here in writing. Independent of form, it is in substance very seldom that he interferes at all with the issue or correction of patents;

but the commissioner practically discharges all such duties.

There is still another question connected with this point which might arise, but has not been now pressed. It is, whether a patent so amended could operate, except as from the time of the amendment; and, if not so, then those letters, being altered since the bill was filed, cannot avail the plaintiff in support of it. If new matter was inserted not originally contemplated, or corrections made not clerically, it is questionable whether they could relate back to the date of the letters-patent; but here it seems they ought to, as much as any like clerical amendments of declarations, or pleas, or judgments, under the statutes of jeofails. A different conclusion might be formed, on a fuller examination of the subject, as to third persons who had acquired rights as the patent stood before it was corrected, unless by its being in a mistaken form as to length of time, the new patent must be considered void; and the surrender of the former patents for twenty-eight years, on which it was to be founded, would be considered void, also, till a new patent in proper form issued, instead of the old ones. I merely glance, however, at these last considerations, without deciding on what has not been presented nor argued, and without going into the subject of the amendments that might then become necessary in the bill.

There has a third question been suggested, but not argued, as not being included in the notice of the motion, and will, therefore, not be examined at this time. It is, the power of the commissioner to consolidate all the terms of fourteen, seven, and seven years, into one patent for twenty-eight years. I shall merely say, that in the case of *4 How. [45 U. S.]*, before referred to, this patent, thus consolidated, was upheld; though it does not appear that this objection was taken and discussed by counsel or the court, though the counsel were numerous, and very astute to raise all objections appearing plausible. The point may still be found a tenable one; but, if so, a like conclusion may follow as in the other case just referred to—that if such renewal is void, the surrender of the former patents is likewise void, and recoveries can be had on them as if never attempted to be consolidated.

Finally, it is contended that if any doubt exists as to the validity of a patent, as some assuredly does here, as before stated, the injunction should be dissolved. This may, with some qualification as to other matters connected with the subject, be true in granting an injunction, as laid down in *Ogle v. Edge* [Case No. 10,462], if the doubt relate to the merits—that is, the originality or usefulness of a patent, or a patentee's own error in his specification. But, when the objection relates to the technical form or signature of papers connected with the letters,

and the doubts arise from acts of public officers, and not any neglect or wrong of the patentee, the position seems to me not sound. More especially should an injunction, once granted, not be disturbed for such doubts, when, as in this case, the term for trial of the merits is near; and the allowing such doubts to prevail, even to the extent of dissolving an injunction, might not merely affect the present patent and present parties, but operate injuriously on all other patents and parties where, for the last ten years, by a cotemporaneous and continued construction of the patent law, chief clerks have, under its authority, signed patents or other important papers as acting commissioner, in the necessary absence of the commissioner, or made mistakes of a clerical character in the form of the letters.

In my opinion, so far from its being proper, under such circumstances, to dissolve an injunction for doubts on such technical objections, it is rather the duty of the court if, as here, mischievous consequences are likely to ensue to others from interfering, and if, as here, legislative measures have been recommended by the public officers, which are pending, to remedy or obviate the possible evil from any public mistakes, not to dissolve an injunction already granted, unless required to do it by imperative principles of law, showing the letters-patent to be clearly void. [Grant v. Raymond] 6 Pet. [31 U. S.] 244.

The motion in these cases, therefore, is not granted.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

WOODWORTH (MONCE v.). See Case No. 9,706.

Case No. 18,018.

WOODWORTH et al. v. ROGERS et al.

[3 Woodb. & M. 135; 1 2 Robb, Pat. Cas. 625.]
Circuit Court, D. Maine. May Term, 1847.

PATENT FOR INVENTION—INJUNCTION AGAINST USE
—VIOLATOR IN CONTEMPT—MOTION TO DIS-
SOLVE—EVIDENCE—TRIAL BY JURY.

1. A party who has been enjoined against the use of a patent, is guilty of a contempt if he afterwards use another patent similar in principle, when the author of the last had previously been enjoined by the owner of the first patent.

2. He can purge himself of such contempt only by satisfying the court that he was not aware that the last patent had been enjoined.

3. If one makes an improvement in a prior patent, obtained by another, it gives him no right to use what had before been patented, without license, while the term of the prior patent continues.

[Cited in Star Salt Caster Co. v. Crossman, Case No. 13,321.]

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

4. Where a special injunction against the use of a patented machine has been imposed when a bill is filed, motions to dissolve it will not be heard on the same evidence, or new evidence improperly neglected to be offered before; but will be on new and material testimony.

[Cited in Hussey v. Whitely, Case No. 6,950; National School Furniture Co. v. Paton, Id. 10,050.]

5. When an answer is filed to the bill denying the validity of the patent, and evidence supporting the answer, prima facie, is offered, the injunction will be dissolved, unless the other side file counter-evidence sustaining the validity of the patent. What generally is proper evidence on that point, considered.

6. It is the duty of the court to weigh the evidence, and if the balance seems in favor of the plaintiff, to continue the injunction till a trial of the right can be had at law, by an issue out of the chancery side of the court, or by an action at law. If the parties cannot agree on an issue, the court will direct an action at law to be brought speedily, to settle the conflicting title; and if not done, will dissolve the injunction.

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

7. The remedy by injunction, used in this way, does not impair any right to a trial by jury, as secured by the constitution, but merely aids the party appearing to have the legal title, till such a trial, if desired, can be had.

This was a bill in equity, filed September 8, 1846. It averred, that the plaintiffs possessed the title to the patent rights of William Woodworth, Senior, to the planing machine alleged to have been invented by him. That the defendants were using one of said machines, or one substantially like them. That the plaintiffs had before recovered a verdict and judgment against one J. Gould, for the use of a like machine; and had requested the defendants to desist from infringing on the rights of the plaintiffs therein, but they refused to comply. The bill prayed for a discovery how long the defendants had used the machine, and after asking replies to several interrogatories, requested that the defendants be made to account for the profits derived from the machine, and be enjoined from any further use of it; and for such other relief as might seem meet. The respondents, in November, 1846, filed answers to the bill. That of [Lawrence] Rogers, which is the only one now under consideration, answering the interrogatories, set out, that some months before May, 1846, he used a machine similar to that claimed by said Woodworth as his, but has not done it since, nor used, since, any similar machine; and hence, considers himself not bound to answer further. Rogers then proceeded to deny that Woodworth was the original inventor of the machine patented by him in December, 1828; and that he well knew that fact, and thus obtained his letters, therefore, fraudulently. He further averred, that the surrender of the patent, July 8, 1845, and the taking out a new specification for the same machine, instead of for one before defective, was for a new and different thing from what had been before claimed; and this being known to

Woodworth, made the last patent void. Rogers then prayed that an issue be ordered by the court, and sent to a jury, to try the question of fraud in obtaining the patent in 1828, and the amended specification in 1845.

On the 19th of January, 1847, after a hearing before Sprague, District Judge, a special injunction issued against Rogers not to use the planing machine patented by Woodworth, or any one of similar construction. In February, 1847, a motion was filed to punish Rogers for a contempt in violating that injunction. At the hearing for this contempt, it was proved, that a planing machine like the plaintiffs' was used in Rogers' shop; but, on his affidavit that it was run by others who leased the shop from him for hire, and the court considering it doubtful whether his connection with it was such as to render him responsible for its use, he was exonerated from the supposed contempt, on the payment of the costs of that motion. On the 17th April, 1847, the plaintiffs filed another motion against the respondent, Rogers, for another contempt in violating said injunction, since the previous hearing. On the 27th May, 1847, he put in an answer, denying his breach of that injunction, and adding, that since the 18th of February, 1847, he had used a machine in his shop like that invented and patented by Benjamin Brown, of Vermont, on the 9th of November, 1845; and the right to use which Rogers bought of James H. Edwards, assignee of Brown; and that it is not substantially like any machine said to have been invented and patented by Woodworth, 27th December, 1828, as heretofore described by the plaintiffs in their original bill. The answer adds, that if the plaintiffs claim, under their patents, any such machine substantially as that used by Rogers, William Woodworth was not the original inventor thereof; and if any such one is described in his letters of July, 1845, they were obtained on false representations and fraud. That there was no defect in his specification of December, 1828, and if any existed, it arose from design and fraud, and not from mistake. And that the letters patent of July, 1845, if purporting to cover such a machine, were obtained corruptly and falsely, and made to embrace what he knew belonged to others. On the 1st of June, Rogers filed amendments to the above answers, denying again the title of the plaintiffs to the Woodworth patent within the limits of Boston, and restating, with formal variations, his charge of fraud in the new letters patent, issued July 8, 1845, and the want of identity between the subject of them and the letters of December, 1828, and also charges of fraud committed on congress in procuring the extension made by it. The amendments not only repeated these matters, but set up Daniel Dunbar, of South Boston, to be the earliest and true inventor of the planing machine used by Woodworth. They next averred, that the pressure rollers, named in his patent, had been well described in a patent to Samuel Bentham, in 1783, and other

parts in a patent to J. Bramah, in England, in 1802. They further alleged, that Daniel N. Smith, of Warwick, Mass., invented and patented a machine similar to Woodworth's, in 1826, and that James Hill, of Lynn, and Joseph Hill, and several others, had knowledge of a like machine made by said James and Joseph, prior to Woodworth's first patent—and similar allegations were made as to the invention of such a machine by John Hale, of Oakham, Mass., and that the rollers were known and used by James Baldwin, of Westford, Mass., as early as 1818.

At the first hearing of this case, to punish Rogers for a contempt, by violating the injunction, another motion was made by the counsel of Rogers to dissolve the original injunction imposed by Sprague, District Judge. It was agreed, that these two motions be argued together; and it was further agreed that time should be allowed to Rogers to procure and file testimony, pertaining to both motions, and the plaintiff have further opportunity to procure testimony in reply. Various affidavits and other evidence were accordingly put into the case on both sides at the times mutually agreed. Reference will be made in the opinion of the court to such portions of them as seemed important under each motion.

B. R. Curtis, for plaintiffs.
Mr. Tasker, for defendant.

WOODBURY, Circuit Justice. The first question to be disposed of, is the motion against Rogers, for punishment for a contempt in violating an injunction which was granted in this case against him in favor of the plaintiffs. That injunction was against the use of the planing machine invented by Woodworth, or any machine substantially the same. It was in these words: "You shall not use or vend any one, or more of the machines substantially the same in construction as the machine of the said Wm. Woodworth, patented as mentioned in the said bill of complaint, on the 18th day of July, A. D. 1845."

The first inquiry is, what are the matters of fact and law which are properly to be examined on this motion? They are—not the originality of Woodworth's machine, not any fraud in the renewals of it, not the propriety of the original injunction. Those questions were all passed on, so far as made and as material in this motion for a contempt, at the original hearing before my associate. They are for the present inquiry, therefore, *res judicata*.

But it is important here to ascertain whether Rogers—and that is the next step in the inquiry—while under the injunction not to use any machine, substantially like Woodworth's, has disregarded the rights of the plaintiffs and the authority of the United States, as existing in the circuit court, so as to violate the order given to him? Has he, after a full hearing, and in contempt of that

order, proceeded to use a planing machine similar in principle to Woodworth's? As to this, it is admitted by Rogers, that since the 15th of February, 1847, about the time he paid the costs on the previous motion to punish him for contempt, he has used a planing machine invented by Benjamin Brown and patented in November, 1845. But he denies that this machine is substantially like the planing machine patented by Woodworth. The plaintiffs contend, it is in principle the same, and its use is therefore a breach of the injunction. This, then, is the point controverted, which is to be settled. What is the evidence on this question? and how is the balance of it?

Various witnesses on the part of the plaintiffs, and among them some highly intelligent machinists and experts, testify unqualifiedly, that this machine, now used by Rogers, is the same in substance and principle as Woodworth's. On the contrary, several witnesses testify in his behalf, that they consider this machine as differing in substance or principle from the plaintiffs'. But some of these last describe this difference to consist in certain specified improvements made by Brown on the original machine of the plaintiffs, rather than as containing parts, all of which vary from Woodworth's, or which are independent and different from his. Thus, Isaac Adams, for one instance, speaks of Brown's machine being different, but still containing "a combination claimed in the Woodworth patent." And others, like J. E. Andrews, admit that Brown's machine uses, substantially, two parts of Woodworth's own, "the cutting cylinder and a small guide roller."

In the examination of this evidence, as well as of Brown's own letters patent, which are put into the case, and in which he claims to have "invented a new and useful improvement in planing machines," it hardly can be doubted that his machine contains some of the most important parts of Woodworth's, but is in other respects different, and perhaps an improvement on it. It is well known, however, as sound law, that where a machine has been invented like that of Woodworth's, in 1828, no one can make an improvement on it, and use important portions of the original invention, while the original term, or the renewals of it, exist, without the license of the original patentee, or a purchase from him of the right so to use what belongs to him. *Hovey v. Stevens* [Case No. 6,745]; *Washburn v. Gould* [Id. 17,214]. See Act Cong. Feb. 21, 1793 (1 Stat. 323). For the same reason, if the improvement by a succeeding inventor be genuine and important, no one can use that improvement without a license or purchase from him, although they have obtained the right to use the original machine on which the last invention is an improvement.

In this view of the evidence and law, therefore, Rogers is using a machine, which in its

substance and principle contains important portions of Woodworth's patent, though it may in other respects have some qualities or parts which are new or improved, and, in thus using what is material in Woodworth's invention, he certainly violates the injunction. But I can conceive, if the case stopped here, that some apology might exist in the apprehension of the party, that because Brown's machine was considered by several as an improvement on Woodworth's, he might use it without violating Woodworth's rights, or paying him for such parts of his as are included in Brown's. To see then whether a designed evasion of the order, or, in other words, a contempt was committed, it is proper to look further into the testimony on the part of the plaintiffs. They proceed to show further, that the question, whether Brown's machine is original and independent of Woodworth's, so as to entitle him to make and use it, or license others to, without Woodworth's permission, is a question which has already been settled. It has been settled, too, against Brown himself, and in favor of Woodworth, after a full hearing in the circuit court of the United States, in the Vermont district, where Brown resides.

The evidence is direct and plenary as to this, and furthermore that Brown has been put under an injunction, in behalf of Woodworth, not to use without Woodworth's license, the machine for which Brown took out a patent in 1845, and which Rogers is now using. The proceedings were commenced May 7, 1846, by Hickok, an assignee of Woodworth, against Brown and others, alleging that Brown's machine in all material parts was substantially the same as Woodworth's, and asking an injunction against it; and, after hearing affidavits and arguments on both sides, at the May term of the circuit court for Vermont, in 1846, an injunction was issued against the further use of Brown's machine without a license from Woodworth, or his assignees, on the ground that it was an infringement on their rights. It can hardly be tolerated after this, happening as long ago as May, 1846, that a person, under injunction not to use a machine substantially like Woodworth's, should proceed to purchase and use one, which had, after a public hearing in an adjoining circuit, been enjoined against as substantially alike,—and that in a legal proceeding against the patentee himself.

On all this evidence the court would be blind to the facts, and unfaithful to the rights of parties and the public, to allow such evasions of their orders and decrees; and it feels compelled to say on this evidence, unexplained, not only that their injunction has been violated, but in a manner highly culpable. We would not, however, bar the respondent from any exculpation which truth may warrant. If he can show that he was entirely ignorant of this injunction against Brown during the time he has

been using Brown's machine, it would go far in extenuation. This he can do, presumptively at least, by the affidavit of Edwards, his vendor, showing that Edwards was ignorant of that injunction; or if not so, did not communicate the fact to Rogers; and also by his own affidavit, purging himself of all knowledge of the proceedings in Vermont, from either Edwards or others, and all design to evade the orders of this court in the use of Brown's machine.

The other motion to dissolve the injunction, imposed on Rogers by my associate, presents a different question, and is to be governed by several rules and considerations entirely dissimilar. The main point in that is not whether an injunction should be imposed at all, for that has already been done, and after a full hearing—and till the contrary is shown it is to be presumed it was done rightly. *Woodworth v. Hall* [Cases Nos. 18,016 and 18,017]; *Maxwell v. Ward*, 11 Price, 17. "Omnia presumuntur rite esse acta." The burthen, then, is on the respondent to overcome that presumption. It is open to be overcome by new matter or evidence arising since the injunction was imposed, though very seldom by matter then existing, which the party neglected to present to the consideration of the court. If this were not the rule, the same matter might be offered anew, or matter before neglected offered on new motions to dissolve injunctions, weekly, the year round, and the court be entirely occupied either in virtual rehearings of like facts and like arguments in one and the same cause, or in considering what the petitioner had before improperly neglected to introduce. The new matter, usually relied on in cases of this category, is a subsequent answer, denying the originality of the patent or its validity in other respects and supporting the objection, if contested by the plaintiff, with prima facie proof not rebutted. *Poor v. Carleton* [Case No. 11,272]. Or⁶ it is by showing a trial at law, since had between these parties, and at times between others, involving like questions, and a judgment rendered against the validity of the patent.

The ground chiefly relied on here is, therefore, a subsequent answer, which not only denies the originality of Woodworth's patent in 1828, but the validity of the succeeding renewals of it, both by the board for the patent office and by congress, through gross frauds, alleged to have been practised on them by Woodworth and his assigns. This denial of legal title in the plaintiffs, made by the respondent, under oath, is not without some weight, when standing alone. Once it was deemed sufficient to dissolve an injunction, already specially granted on a hearing, and not a mere common injunction, issued of course. See the cases, collected in *Poor v. Carleton* [supra], and *Orr v. Littlefield* [Case No. 10,590]. But such is not the law or the practice now, either in England or

this country. See cases last cited, and 16 Ves. 49; 19 Ves. 183; 11 Price, 17; *Perry v. Parker* [Case No. 11,010]. The presumptions arising from the answer, may now be disproved by evidence on the part of the plaintiffs, and then counter testimony is admissible by the respondent to sustain his answer. After this, it becomes the duty of the court to balance these allegations and proofs, and decide how the weight of them is; and whether in the exercise of a sound discretion upon them the injunction ought to be dissolved or not. 2 Ves. Sr. 19; 2 Johns. Ch. 204; *Poor v. Carleton* [supra].

Here the plaintiffs have offered a variety of evidence to countervail and disprove the answer, and also the testimony introduced by Rogers. (1) They show not only the letters-patent themselves, to Woodworth, which are public records and acts of public officers, that are alone prima facie evidence for the patentees of the validity of their claim, but next (2) the oath of the patentee, when they were obtained, that he was the original inventor. *Alden v. Dewey* [Case No. 153]. (3) Next a subsequent confirmation of his claim as inventor, by the renewal of those letters by the board of the patent office. (4) Next, such a confirmation by congress itself, in granting a further term for the patent. (5) Next, the possession and a use and sales of this patent and numerous machines over the whole country, and for large sums of money, as if rightfully entitled to it, for nearly twenty years past. *Hind. Pat. 305*; *Drury, Register, 320-322*; *Orr v. Littlefield* [supra]. The doctrine in England, as to this alone, is very strong. In *Bickford v. Skeeves, 4 Mylne & C. 500*, the lord chancellor says: "If the patentee has been long in possession, the court will not look into the title, but will give credit to it, until displaced by a trial at law." It is stated that in the adjoining circuit, one of my brethren on the bench of the supreme court (*Nelson, J.*) has recently held this circumstance alone to be sufficient to retain an injunction. Next, (6) by a recovery of damages in a court of law for an infringement on it, after a severe contest in this circuit, under my predecessor. *Woodworth v. Sherman* [Case No. 18,019]; *Washburn v. Gould* [Id. 17,214]; *Woodworth v. Stone* [Id. 18,021]. This involved the originality of his invention as against Evans and all others then set up. (7) Next, the recovery in courts of equity in several cases where his rights were contested, not only in the different circuits of the United States, but in several cases, fully heard and considered in the supreme court of the United States, and some of them involving the originality of this very invention. [*Woodworth v. Benjamin*] 4 How. [45 U. S.] 712, 716. (8) Next, special injunctions, that have been obtained in great numbers, many of which are still pending, and none of which are shown ever to have been dissolved on a hearing upon the merits, .

as to the validity of the patent. (9) And, finally, a special injunction obtained, after resistance, against this very defendant.

Such facts, in these preliminary inquiries into the legal title, as connected with the propriety of imposing or dissolving an injunction, are proper and legal ones to influence the decision of the court, are paramount in their character over all individual opinions of witnesses, and should usually be conclusive till parties contest these claims in some issue in a court of law and disprove or rebut their force. See *Orr v. Littlefield* [supra], and the cases cited there. Their great strength, when united as here, is entirely superior to any evidence offered against them by the respondent. It is true that the matters in the answer are attempted to be sustained by Rogers by evidence and documents. But some of them relate to mere hearsay statements; some are from persons under injunctions against the use of this same machine of Woodworth's, and some are open to various other objections, soon to be explained, and decisive against them. It deserves special notice, that among several instances named, where the planing machine is supposed to have not been sustained, that not a single case is shown for Rogers, by proper proof, of a recovery at law or in equity against Woodworth's patent. The cases referred to rest on hearsay, or are apocryphal. Again, where in some instances, after special injunctions have been obtained, it is shown by him that the plaintiffs became nonsuit, the evidence or rebuttal is, that the respondents were irresponsible and not able to pay the cost of further proceedings; or they were cases in which some assignee, and not Woodworth and his immediate representatives, conducted the prosecution, and were not nonsuits or dismissals made by order of the court on a hearing. In the case cited from Maryland, where an injunction was dissolved, it does not appear to have been from want of title. The respondent was still required to keep an account, thus recognizing for some purposes the *prima facie* right as to the patent, but deeming the remedy by injunction unsuited to the circumstances there existing, or unjust, or unnecessary, as it is at times when the defendant is in large business and amply responsible for any damages. *Bramwell v. Halcomb*, 3 Mylne & C. 739. Or, what seems most probable, it was a case of a common, and not a special injunction. The former is usually dissolved as a matter of course, on the coming in of an answer denying merits, or a legal title in the plaintiffs, and without any inquiring into the truth of the allegation. See *Orr v. Littlefield*, supra; 3 Mer. 622; *Poor v. Carleton*, supra; *Eden*, Inj. 88.

Notwithstanding these exceptions to this evidence, when coupled with the denials and allegations in the answer—they all standing

alone, and not rebutted by the plaintiffs, would probably be a sufficient ground for dissolving the injunction. They would furnish this, because making, probably, when standing alone, a *prima facie* case, that the plaintiffs had no legal title; and an injunction is intended to aid or protect what seems to be a legal title. It is granted for this purpose, when issued before a trial, on presumptive evidence offered of such a title; and it stands on that till the probabilities furnished by the plaintiffs of their having a legal title are overcome by answers and counter oaths, and proofs of a stronger character by the respondents than those adduced by the plaintiffs, or by a subsequent trial at law in which such counter proofs have been examined and been successful. 3 Mylne & C. 739. But being, as the respondent's answer is, as well as his evidence, counteracted by the strong and numerous facts offered by the plaintiffs to rebut them, the probabilities seem to me wholly changed, and to be decidedly in favor of the validity of Woodworth's patent. His proofs are of a character entirely to overcome what might otherwise be inferred from the defendants. Take Dunbar's affidavit, for one instance, as to the material point concerning the originality of the invention. He testifies as to what transpired before the patent, and it has been slept over for a generation, and till Woodworth (senior) is in his grave, and till the originality has been not only sworn to by the patentee, but when attacked frequently since has been sustained triumphantly in the supreme court of the United States, as well as in several circuits, and before congress itself. Leading circumstances, like these, should also overcome the statements of the defendant from mere hearsay as to fraud—an imputation, which, above all others, is to be proved clearly or not at all. *Roberts v. Anderson*, 2 Johns. Ch. 202. And they outweigh all loose and general impressions as to no differences in principle existing between Woodworth's and other old machines, when this has been so often tested in courts where witnesses were cross-examined, and what is meant by principle has been often found and explained, to be only such changes in form as turn out to be immaterial, or a substitution of only what are well known to experts to be mere mechanical equivalents.

Another consideration has been urged against the continuance of this injunction which deserves some notice. It is the alleged illegality or oppression of this remedy and its great encroachment on the trial by jury, and consequently the propriety of dissolving it in this instance. But the power exercised under injunctions has existed from the early ages of chancery jurisdiction, and is remedial and useful as a preventative of injury and a multiplicity of lawsuits, when it is properly exercised. It is also a power

conferred on this court in one of the earliest acts of congress, passed after the adoption of the constitution. 1 Stat. 81, §§ 13, 14; Id. 334. It has constantly been used by it since for more than half a century. It is a mistake, likewise, to suppose that this power, in its legitimate use, impairs, supersedes, or prevents the trial by jury where it has ever existed. In most questions pending in courts of chancery, or on the equity side of courts of law, a trial by jury has never been usual in this country or abroad. The seventh amendment to the constitution secures that trial only in cases "at common law." But still chancery may order an issue to be tried at law to help itself as to facts, and retried, if dissatisfied with the verdict. 2 Price, 314, note; Id. 416, note. Or it may decide facts for itself in all cases, except, perhaps, in England, in the case of an heir-at-law disputing a will, and a rector suing for tithes. Bullen v. Michel, 2 Price, 423. So a jury trial can always be had, and is cheerfully allowed in cases like this, connected with injunctions, where the rights and titles of parties are doubted in law and facts are supposed to exist which are disputable and proper to be settled by a jury. Bramwell v. Halcomb, 3 Mylne & C. 737. An injunction is never issued in hostility to what seems to be the legal rights of the parties, but in the aid and protection of them. At first, it is as those rights appear before trial, and only till a trial by jury can be had, if desired. Ridgway v. Roberts, 4 Hare, 108; 17 Ves. 422. And whenever a trial is had, before a jury or otherwise, which shows that the rights at law are with the party enjoined, the injunction is, as a matter of course, dissolved. Bickford v. Skewes, 4 Mylne & C. 498. Nor does the injunction delay or retard a trial by jury, but makes the *prima facie* title prevail till then. Harman v. Jones, 1 Craig & P. 299; Hilton v. Granville, 1 Bail. Cas. 120 [Craig & P. 283].

In the present case it was imposed in favor of the party appearing on the evidence to possess the legal right to the patent and machine. It was done only the last winter, and after full hearing, and has been no obstacle since to the respondent having a jury trial as soon as he was sued in a court of law, where such trials can alone be had, or as soon as he put in an answer here which denied the legal title of the plaintiffs and requested a trial at law, and that trial can in due course be had. This he has not done till the last month; and now having had a hearing on this request, and the injunction being still retained to aid and protect what still seems to be the legal title till the contrary is fully shown, he can have a jury trial of the title to this patent whenever issues can be found by the parties and the case prepared for a hearing upon them; or, if preferred, as soon as an action at law can be instituted and prepared. The bond

which he voluntarily offers, to secure the damages and costs which may be recovered, obviates the objection which is sworn to have existed in going on further with some other cases and having a trial on them.

On the last circuit, where an answer like this was put in and the parties did not agree to form an issue to be tried by a jury, out of the equity side of this court, I directed that unless a suit at law was brought at the next term to try the legal title, the injunction should then be dissolved. See Orr v. Merrill [Case No. 10,591]; Perry v. Truefitt, 6 Beav. 418; 9 Jur. 717; 3 Mylne & C. 739; 6 Jur. 269; Caswell v. Bell, 2 Railway & Can. Cas. 782; Clarence R. Co. v. Junction R. Co., Id. 763. I am ready to do the same here, but see no sufficient grounds for ordering it to be dissolved at this time, when there appears so decided balance of testimony in favor of the plaintiffs' legal rights to this patent.

Case No. 18,019.

WOODWORTH v. SHERMAN.

SAME v. CHEEVER et al.

[3 Story, 171; 7 Law Rep. 279; 2 Robb, Pat. Cas. 257.]¹

Circuit Court, D. Massachusetts. May Term, 1844.

PATENT FOR PLANING MACHINE — INJUNCTION AGAINST INFRINGEMENT—EXTENSION OF TERM—GRANT TO ADMINISTRATOR—PREVIOUS ASSIGNMENT—SECURITY FOR COSTS.

1. Where a bill in equity was brought for an injunction against the defendants, to restrain them from using and selling a planing machine, constructed according to the specification in the plaintiff's patent—it was *held*, that, after the lapse of time which had occurred, since the patent was granted, taken together with the other circumstances of the case, the affidavit of a single witness was not sufficient to outweigh the oath of the patentee, and the general presumption arising from the grant of the letters-patent.

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

2. The patent act of 1836 [5 Stat. 117] authorizes the granting of an extended term of a patent to an administrator, as well as to the patentee.

[Cited in Pierpont v. Fowle, Case No. 11-152.]

3. The assignee or grantee, under the original patent, does not acquire any right under the extended patent, unless such right be expressly conveyed to him by the patentee.

[Approved in Wilson v. Rousseau, Case No. 17,832; s. c. 4 How. (45 U. S.) 704; Wood v. Michigan South. R. Co., Id. 17,957; Jenkins v. Nicholson Pav. Co., Id. 7,273; Johnson v. Wilcox & Gibbs S. M. Co., 27 Fed. 690.]

4. In this circuit the practice in patent cases has not been to require the plaintiff to give security for costs.

These were bills in equity, filed in the circuit court of the United States, in this dis-

¹ [Reported by William W. Story, Esq. 7 Law Rep. 279, contains only a partial report.]

trict, to obtain injunctions against the defendants [Abraham P. Sherman, William A. Cheever, and eighteen others] in twenty suits, to restrain them from using or selling any planing machine, constructed substantially according to the specification under William Woodworth's patent. See the case of Washburn v. Gould [Case No. 17,214]. The complainants produced affidavits, stating that the several defendants were using a planing machine, substantially the same in its construction and mode of operation as the machine of James Gould of Charlestown, and the bill, among other things, averred, that the plaintiffs had already recovered a judgment in an action at law, against the said Gould, for the use of his machine. Various points were relied on in answer to the motion for an injunction. It was contended: (1) That Woodworth was not the sole inventor, but that one Dunbar was a joint inventor with him. (2) That the act of congress did not authorize the granting of the extended term of the patent to an administrator, but only to the patentee. (3) That some of the defendants had purchased rights under the original patent, and that, by virtue of the act of congress, the same interest that they had in the original patent enured to them in the extended patent.

B. R. Curtis, for plaintiff.

J. Giles, Mr. Buttrick, and William D. Sohier, Jr., for defendants.

STORY, Circuit Justice, granted the injunction prayed for in each case. As to the first point, he said, it had been before him in another case, and he then declared, that the affidavit of a single witness, after the lapse of so much time, and after the occurrence of some other circumstances, which were in proof, was not sufficient to outweigh the oath of the patentee, and the general presumption arising from the grant of the letters patent. As to the second point, he said, that, on the fullest reflection, he had come to the opinion, that Mr. Justice McLean was right in his decision (Brooks v. Bicknell [Case No. 1,944]) that an administrator was competent to apply for and receive this grant. That to hold otherwise, would be going contrary to the whole spirit and policy of the patent laws. As to the third point, he said, that he had already decided, after full argument and great consideration, in a case tried in Maine, and not yet reported, that the assignee or grantee, under the original patent, did not acquire any right under the extended patent, unless such right was expressly conveyed to him by the patentee.

In the course of the case, the judge remarked, that he observed that the bills contained a charge of an actual combination to resist the patent. That it was a question of much importance, what would be the legal effect of such a combination. That he did not intend to express any opinion on this part of the case, but that in a former case he had occasion to declare, that it seemed to him that it ap-

proached very near, if it did not actually reach, a criminal conspiracy. That, in many cases, it was lawful for individuals to do what could not lawfully be done by a combination. That an individual patentee might successfully resist an individual, but it was much more difficult to resist the combined force of a great number of persons united to oppose a patent.

In the course of the case a question having arisen whether the plaintiff, in patent cases, was required to furnish security for costs,

STORY, Circuit Justice, said: In my circuit the plaintiff in patent cases has never been required to give any security for costs. But I do not recollect any reported case, in which that point was decided.

The following opinion was afterwards written out:

STORY, Circuit Justice. When these cases were heard before me at chambers, I expressed my opinion briefly on the three points made at the argument, not then having time to go into them at large. I do not desire to say any thing further upon the first two points. But the last point involves a question of so much general importance, that it has appeared to me a duty, which I owe to the public, as well as to the parties, to give at large the reasons which influenced my opinion, and governed the decision. I do this the more readily, because I have not been able to find among my papers any statement, reduced by me to writing, of the particular circumstances attending the case in Maine, to which I have already alluded, or any report of the grounds on which that decision was made. If I prepared, after the term, any written opinion (of which I am not certain), it has been mislaid, and after considerable search, I have not been able to find any. I rather think, from my general recollection, that the question arose incidentally upon a renewed patent, granted by a special act of congress, after the first patent had regularly expired, and before the passage of the patent act of 1836 (chapter 357). It may, perhaps, have been in a case involving the validity of the renewed patent, granted by the act of congress of 3d March, 1835 [6 Stat. 613], to Eastman, for "a new and useful improvement, called the 'Circular Saw Clapboard Machine.'" But of this I am not quite sure, and I have not within my reach, at this moment, the means of verifying the conjecture. The doctrine, however, which I then held, was, that every license and assignment under the old laws, before the patent act of 1836, expired with the limitation of the original patent, unless it was expressly, in terms, so granted as to be applicable to any renewal of the patent afterwards; for, otherwise, the licensee's or assignee's right was necessarily bounded by the same limits as that of the licensor or assignee, that is to say, by the original term granted by the patent to the licensor or patentee. The doctrine proceeded upon the plain

ground, affirmed by the common law, that a man can pass by a grant or assignment only that which he now possesses, and which is in existence, at the time, either actually or potentially. His grant or assignment is, therefore, by its natural interpretation, limited to the rights and things which are then in existence, and which he has power to grant, unless he uses other language, which imports an intention to grant what he does not now possess, and what is not now in existence. In the latter case, the language does not even then operate strictly as an assignment or grant, but only as a covenant or contract, which a court of equity will carry into full effect, when the right or thing comes in esse. Thus, it is laid down in Comyn's Digest ("Assignment," cc. 1-3; Id. "Grant" D), and better authority could not be, for, as was well observed by Lord Kenyon, he was the greatest lawyer of his day in all Westminster hall, that an assignment or grant cannot, at law, be of a chose in action, bare right, or possibility. And in a case in Lord Hobart's Reports, it was said, that although a man may, by grant or assignment, assign all the wool then growing on the backs of the sheep owned by him; yet he cannot grant or assign the wool that shall grow upon the backs of the sheep which he shall hereafter buy. *Grantham v. Hawley*, Hob. 132. And this doctrine was fully recognized by Lord Eldon in the case of *Curtis v. Auber*, 1 Jac. & W. 526, 532. But I need not dwell on this point, because it came under the full consideration of the court in *Mitchell v. Winslow* [Case No. 9,673], where the principal authorities were collected and commented upon at large; so that the only remedy for the licensee or assignee, where a grant or assignment has been made to him and his heirs, of a right to a thing not then in existence, but which is to operate in futuro, when the thing is created or comes in esse, is in equity, by way of specific enforcement of a covenant or contract. See 2 Story, Eq. Jur. (3d Ed.) §§ 1040, 1041.

Now, it appears to me, that this doctrine is expressly applicable to licenses and assignments under the patent act of 1836, and, indeed, as I think, a fortiori applicable, because the whole design of the 18th section of the act, providing for renewed patents, is, in terms, exclusively confined to the original inventor, and to be for his sole benefit, and not for the benefit of his licensee or assignee; and, therefore, that section is to receive a correspondent construction in favor of the inventor alone, unless the particular clause of the section, which I shall presently consider, does, by natural or necessary implication, confer the right upon the licensee or assignee.

Let us then, for this purpose, examine the 18th section of the patent act of 1836. It enacts, that, whenever any patentee (not any assignee) shall desire an extension of his patent beyond the term of its limitation, he may make application therefor to the commission-

er of the patent office, setting forth the grounds thereof; and then, after prescribing the notice, &c. to be given of the application, it provides, that the secretary of state, the commissioner of the patent office, and the solicitor of the treasury, shall constitute a board to hear and decide upon the evidence produced before them for and against the extension; and the patentee is required to furnish to the board a statement in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures, sufficient to exhibit a true and faithful account of loss and profit accruing from or by reason of the said invention. The section then proceeds to declare, that "if, upon a hearing of the matter, it shall appear to the full and entire satisfaction of the board, having due regard to the public interest therein, that it is just and proper that the term of the patent should be extended, by reason of the patentee (not the assignee,) without neglect or fault on his part, having failed to attain from the use and sale of his invention a reasonable remuneration for the time, ingenuity and expense bestowed upon the same, and the introduction thereof into use, it shall be the duty of the commissioner to renew, and extend the patent, by making a certificate thereon of such extension, from the term of seven years from and after the expiration of the first term, &c.; and therefore the said patent shall have the same effect in law as though it had been originally granted for the term of twenty-one years." Now, bearing in mind that, at this time no patent could by law issue except to the inventor, and that it was only by the subsequent act of 3d of March, 1837, c. 45, § 6 [5 Stat. 193], that it could be issued to the assignee, we have, at once, a perfect key to the true object and purpose of this 18th section of the act of 1836, that the word "patentee" is used therein as equivalent to "inventor," and that the law looked to him as the sole object of its bounty, and meant to reward him, and him alone, for his time, ingenuity and expense in perfecting his invention.

Another consideration is also important to be borne in mind; and that is, that the 18th section refers solely to applications to be made before the original patent has expired. Indeed, the very proviso to the section contemplated, that the application not only may be, but must be made while the term of the original patent is yet running, and before it has expired; for it expressly declares "that no extension of a patent shall be granted after the expiration of the term for which it was originally issued." Now, keeping this in view, we see, at once, the object of the clause of the same section immediately preceding the proviso. It is in these words: "And the benefit of such renewal shall extend to assignees and grantees of the right to use the thing patented to the extent of their respective interest therein." The clause

does not mean to enlarge the right of the assignees or grantees to use the thing patented beyond the extent of the interest originally granted to them. If that interest was, from its nature, or character, or just interpretation, limited to the original term, for which the inventor held the patent, then the assignees and grantees were to have no benefit ultra in the renewed patent. But if the original assignment or grant had expressed in terms, or by just implication conferred on the assignees or grantees a right or interest in the renewed patent, then that interest was to be protected; for it was a possibility, for the benefit of which the assignees or grantees had originally stipulated, and for which they must be presumed to have paid a valuable consideration. In this view of the matter, there would be good sense in the clause, founded upon the actual intentions of the parties to the original assignment or grant, upon a just interpretation of the language used by them. But what is the consequence of adopting a different interpretation of the clause, and applying it indiscriminately to all cases of grants and assignments of or under the original patent, where no such auxiliary intentions can be deduced from the language of the assignment or grant? Let us suppose the case, where an assignment has been made by the inventor of his whole patent right under his patent for a small, and (comparatively speaking) an utterly inadequate compensation, considering its real value, and this has been forced upon him by embarrassment, or poverty, or public indifference, or his own mistaken estimate of its value (a case by no means uncommon in the history of inventors), could it be for a moment imagined, that the 18th section intended, contrary to its professed object, to benefit, not the inventor himself, but his assignee? That the latter and not the former was to receive the whole profits accruing from the renewed patent? Or, that, in such a case, the inventor would not be entitled to take out a renewed or extended patent? And yet, if the argument be worth any thing, the 18th section applies, as fully to such a case, as it would apply to any other case; and we cannot except it from the pressure of the section, unless we look broadly into the objects, which it purports to accomplish, and limit the language to cases, where the inventor has intended to part, not merely with all his present rights, but prospectively with all the future rights and possibilities which he might acquire by a renewed or prolonged patent. Now, the words of the clause extend to the assignees and grantees of the right, (that is, of the patent right,) the benefit of the renewal "to the extent of their respective interest therein," that is, of the patent right, and no more. Now, what is the extent of their interest therein? Clearly, upon the principles of the common law, neither more nor less than the

assignor or grantor then possessed, and was capable of assigning or granting at the time of the assignment or grant, for to that the language of the grant or assignment must, in reason and good sense, be limited, unless the grantor or assignor has by express words or necessary implication shown a broader intention, an intention not merely to grant or assign the right, which he now possesses, but the possibilities, which he may hereafter acquire. And these are the best grounds to support such a limitation and interpretation of the grant or assignment.

In the first place, the grantor or assignor cannot be presumed to have received any compensation or consideration except for the very thing, and to the very extent, which the language properly indicates. In the next place, no court is at liberty to add to the terms used any meaning beyond their ordinary import, unless there are some supplementary expressions to justify such a construction. In the present case, there is no ground to suppose, that either party contemplated, that the grant, or assignment, or license was to be prolonged beyond the term of the original patent, and there are no words requiring a more expanded interpretation. In the next place, to give such an expanded interpretation, for which the inventor has received no consideration, would be to transfer the bounty intended by the government for the benefit of the inventor, whose genius had brought it out, and brought it to perfection, and who had not received a reasonable remuneration therefor, to the grantee or assignee, who had paid nothing and done nothing to deserve it, but had simply given the quid pro quo to the extent of the right or interest conferred upon him under the existing patent. The inventor may, from necessity or expediency, or otherwise, (as has been already suggested,) have conveyed his whole right and interest under the original patent, for a sum utterly unworthy of its intrinsic value. The grantee or assignee may have grown rich by the success of the inventor, and the inventor himself may be now languishing in poverty. Can it be, that the section, professing to intend a remuneration and bounty to the inventor, should, at the same time, have intended to sweep from him the future profits of the renewed invention? That if he should have parted with the half, or two thirds, or the whole of his rights and interests, under the original patent, he shall be narrowed down to a corresponding part, or excluded from all the profits of the renewed patent? If so, it would be but another sad illustration of the fate of genius, *Sic vos non vobis*. Besides; we are to recollect, that this section of the act of 1836, is not limited to cases of future patents, or to future grants or assignments thereof; but it applies to past also; and that the language, if applicable at all, reaches to both classes, the past, as well as the future;

and the present case is one of the prolongation of a patent issued long before the act of 1836. So that the section is thus made to apply to a case, where neither party could have contemplated any right of renewal, or any possibility of a future interest therein. The patentee had no right of renewal either in esse or in posse. The whole vested in the exercise of a sound discretion by congress, which it would or might apply singly to the merits of each particular case, as it should be presented to them for consideration.

Now, if we construe the language of this clause with reference to the scope of the antecedent language, and the professed objects of the section, however loose and general it may, at first view, seem to be, it admits of an easy and satisfactory exposition. The rights of assignees and grantees to use the thing patented, and to have the benefit of the renewal, is to be to the extent of their respective interests therein, and no more. If that interest was short of the whole of the original term, for which the patent was originally issued, it is not to reach the renewed term. If it was limited to the extent of the original term, it is still to be bounded by it. But if it is an interest in terms, designed to be coextensive with all the interest, which the patentee now has, or may hereafter acquire, not merely to his present rights in esse, but with his contingent rights in posse, then the section makes that a legal interest, which, otherwise, would be but a mere potential, equitable interest, to be enforced in equity, as a mere right under contract, and not as a fixed, present, vested interest. In this way, the whole structure of the section becomes harmonious with its professed objects, the benefit and remuneration of the inventor, and it saves only those rights in the renewed patent for which the inventor has already secured a compensation, and to which he has voluntarily extended his original grants, and assignments, and licenses to the very terms and intent thereof. Interpret the section in any other manner, and it speaks an intention in one part, which it contradicts or controls in another. It takes from the inventor, what he never intended to part with, and may deprive him in part, or in the whole, according to circumstances, of the reward, which the section seemed so studiously to hold out to encourage his genius and skill, and to reimburse his expenditures.

These are some of the reasons, which have influenced my mind in arriving at the conclusion which I have before stated. If they are erroneous, it will belong to the supreme court to correct the errors, and to adopt a rule, which, adhering to a literal interpretation of the clause, may, at the same time, deprive the inventor of all motives to renew the patent, or make the renewal worthless to him, and injurious to the public.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,389.]

WOODWORTH (SMITH v.). See Case No. 13,130.

Case No. 18,020.

WOODWORTH v. SPAFFORD et al.

[2 McLean, 168.]¹

Circuit Court, D. Ohio. July Term, 1840.

JOINT NOTE—MERGER—JUDGMENT AGAINST ONE PROMISOR—JUDICIAL NOTICE—COURTS OF GENERAL JURISDICTION.

1. A judgment obtained against Earl, in a suit against him, and the other two defendants, merges the instrument on which the action was founded.

[Cited in brief in *Rose v. Comstock*, 17 Ind. 6. Cited in *Maghee v. Collins*, 27 Ind. 85.]

2. And such judgment may be pleaded in bar to an action on the instrument against one or all of the defendants.

3. This court is presumed to know the laws of the respective states, and, consequently, that the circuit court of Wayne county, in Michigan, is a court of general jurisdiction.

[Cited in *Bennett v. Bennett*, Case No. 1,318.]

4. It is not necessary, therefore, in the plea setting up the judgment of the circuit court of Wayne, to aver that it had jurisdiction.

[Cited in *Earl v. Raymond*, Case No. 4,243.]

5. Where the note is joint the suit must be brought against all, and a joint responsibility must be shown, unless one or more of the promisors has been discharged by infancy, or by operation of law.

Mr. Swayne, for plaintiff.

Mr. Wilcox, for defendants.

LEAVITT, District Judge. The declaration in this case is in assumpsit, and contains four special counts. The first sets out a note for \$500, dated December 6, 1836, drawn by Saltmarsh and Boardman, and Hugh Gillis & Co., partners, &c., payable to Benjamin Woodworth, or order, in ninety days from date. The notes described in the second, third and fourth counts, are for \$1,000, each, drawn by the same parties, bearing the same date, and payable, respectively, in six, nine and twelve months. The fifth count is general, for goods sold, &c.

The defendants have put in a plea of the general issue, and, also, a special plea in bar. The matter set up in the latter plea, is as follows: "That, on the 24th of March, 1838, the said Benjamin Woodworth sued out of the clerk's office of the circuit court of Wayne county, in the state of Michigan, his certain writ of *capias*, in a plea of trespass, on the case upon promises, against the said Amos Spafford, Jarvis Spafford, and Williard Earl; and, afterwards, to wit: on the 9th day of July, in the year aforesaid, filed his declaration; and afterwards such proceedings were had in said suit, that at the December term of said court, viz: on the 28th of December, 1838, judgment was rendered therein, in favor of the said Benjamin Woodworth, against the said Amos Spafford,

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

for the sum of \$4,006.33, and costs." The plea concludes with an averment, that the said judgment is unreversed, and remains in full force; and that the notes described in the declaration, in the present action, are the same on which the said judgment, in Michigan, was obtained. To this plea the plaintiff has put in a general demurrer.

It is contended, on several grounds, that the special plea is insufficient as a bar to this action. The objection, mainly relied on, and which will first claim the attention of the court, is: that the judgment set forth in the plea does not extinguish the original cause of action, and that a suit may be sustained on it against all the parties.

In the consideration of this point, as the case is presented upon the demurrer, it is to be assumed, that the notes set forth in the declaration, on which it is sought to charge the defendants, have originated in a partnership transaction, with which they are connected, and which create, on their part, a partnership liability. And, therefore, in considering the question, whether the judgment set out in the plea has extinguished the right of action against these parties, it is important to settle, in the first place, the nature and character of their liability, as partners. If that is to be regarded as joint and several, it would clearly result, that a suit prosecuted, and a judgment recovered against one, without an actual satisfaction, would be no bar to a subsequent suit against the other parties. On the other hand, if their undertaking, and consequent liability, are to be viewed as joint, then, upon the authority of the cases which will be referred to by the court, a suit and judgment against one, is a bar to a subsequent suit against the other joint promisors.

It would seem to be consistent with the current of authorities, both in this country and in England, to consider partnership contracts as joint, and not joint and several. It is true, that the assertion of Lord Mansfield, in *Rice v. Shute*, 5 Burrows, 2611, has often been relied on, as sustaining a contrary doctrine. It is there said: "That all contracts with partners are joint and several; every partner is liable to pay the whole. But it has been remarked by an eminent American judge, in reference to this position: "That it would be straining Lord Mansfield's opinion unreasonably, to say, that he meant, technically, that all contracts with partners were joint and several." 13 Johns. 451. It seems very obvious, by reference to the facts in the case of *Rice v. Shute*, and the circumstances under which the question, before the court, was presented, that the principle asserted by Lord Mansfield must be understood with some modification. In that case it appears that the plaintiff, with a knowledge that Shute and Cole were partners, brought suit against Shute alone; and without having pleaded the nonjoinder in abatement, the defendant, Shute, on the

trial, proved that fact, and the plaintiff was, thereupon, nonsuited. And it was upon a motion to set aside the nonsuit that the opinion of the court was given. The object had in view by the court, seems not to have been the settlement of the law, as to the nature of partnership liabilities, but the establishment of a rule by which the defendant should be compelled to plead in abatement the nonjoinder of a party who ought to have been joined; and that he should not be permitted to take the plaintiff by surprise, on the trial, by proof of the nonjoinder. To this extent the doctrine laid down by the court is undoubtedly correct, and promotive of the purposes of justice.

Taking it to be a principle which is universally sanctioned by courts, at the present day, that partnership contracts are joint, and not joint and several, the inquiry is, whether the judgment against the defendant, Spafford, is a bar to the present action. The affirmative of this proposition is very fully sustained by many decisions of high authority in this country; some of which will be adverted to.

The case of *Ward v. Johnson*, 13 Mass. 148, has some close points of resemblance to the one now under consideration. The declaration in that case averred that Henry Johnson, in the name and behalf of the partnership of Henry and Thomas Johnson, executed the note in controversy. The defendants pleaded, in bar, the recovery of a former judgment against Henry Johnson, in a suit prosecuted against him alone. To this plea there was a replication of nul tiel record; and the existence of the judgment, set out in the plea, being proved, the court held it to be a good bar to the action against both of the partners. In the opinion of the court, in this case, these principles are maintained: That, in a joint action, to support the declaration, a joint subsisting cause of action must be shewn against both defendants; and, that, if one of the defendants can plead a sufficient bar, as it respects himself, it shall avail the other defendants also; for it shews that, at the time of the commencement of the action, no just cause of action remained, thereby falsifying a material averment in the declaration.

The same principle is recognized by the supreme court of Pennsylvania, in the case of *Smith v. Black*, in error, 9 Serg. & R. 142. The facts were that Black, the defendant in error, had sold goods to Nathan Smith, (one of the plaintiffs in error,) who gave his promissory note therefor; on which suit was brought, and a judgment obtained, against him. Subsequently, on the discovery that Newberry Smith was a secret partner of Nathan Smith, a suit was instituted against both; and the former judgment against Nathan Smith was held to be a good bar to that action.

In the case of *Downey v. Farmers' & Mechanics' Bank of Greencastle*, 13 Serg. & R.

288, it was held, that where a joint suit was brought against two obligors in a joint and several bond, on one of whom the writ was served, and as to the other returned non est, and the plaintiff proceeded to judgment against the obligor, on whom process had been served, without making the other a party, he thereby elected to consider the contract as joint, and could not afterwards sue the other obligor, in a separate action. The judgment against his co-obligor was viewed as an extinguishment of the bond, as to him, and being extinguished as to him, was extinguished as to both.

A very decisive authority on this subject is found in 18 Johns. 459. The case is that of *Robertson v. Smith*. The material facts may be thus briefly stated: Robertson held two promissory notes, drawn by Soulden, Smith & Co., on which suits were brought, and judgments recovered, against Soulden and Smith, the ostensible partners. Failing to obtain satisfaction on his judgments, and believing there were two other persons connected with Soulden, Smith & Co., as partners, the plaintiff instituted another suit against Soulden, and Smith, and the two other partners. One of the points, arising in the case, was, whether the plaintiff, having made the two partners, against whom judgment had been recovered, parties in the pending suit, it can be sustained against the other defendants, in consequence of the extinguishment of the simple contract debt, as to two of the defendants, by the judgment against them. The opinion of the court, as given by Chief Justice Spencer, evinces great learning and research, and may well be regarded as conclusive on the point just stated. The results, to which he is conducted, are—that in case of joint debtors, they must be jointly sued; that if a less number than the whole be sued, that is matter that can be pleaded in abatement only; that it is necessary to show a joint subsisting indebtedment, in all the defendants; and in cases of assumpsit, it is necessary to show a subsisting liability, on the part of all the promisors, except one or more of them may have been discharged by operation of law, as in the case of a release under an insolvent or bankrupt law, or where a release has been effected under a plea of infancy. And, moreover, where, as it respects any of the defendants, the right of action is gone or suspended, their joint liability being at an end, the other defendants may avail themselves of this suspension or discharge.

In the present case, the judgment against the defendant, Spafford, in the state of Michigan, must be viewed as a merger of his liability, on the simple contract set forth in the declaration; and, upon the authorities referred to, the plaintiff having, by his own act, put it out of his power to prove that there is a subsisting joint contract, on which all the defendants are liable, he can not recover against any of them.

The only case referred to by the plaintiff's counsel, as opposed to the principles settled by the cases already noticed, is that of *Sheehy v. Mandeville*, 6 Cranch [10 U. S.] 233. That case came before the supreme court of the United States, on error, to the district court, sitting at Alexandria, in the District of Columbia. It was an action of assumpsit against the defendants, on a promissory note, drawn by Jameson alone. It was alleged that the note, though thus executed, was, in fact, a partnership note, on which the defendants were both liable. In that case there was a special plea, similar to, if not identical with, the plea in the present case, both as to form and substance. It averred that Jameson had been previously sued, and that judgment had been recovered against him, in the circuit court of the District of Columbia, on the same note, and that the judgment was in full force and unreversed. The defendant, Jameson, having been discharged under the insolvent law of the District, soon after the institution of the suit, the plea was interposed by Mandeville alone, and no further notice was taken of the other defendant during the progress of the suit. Chief Justice Marshall, who delivered the opinion of the court, held, that the prior recovery of the judgment against Jameson was no bar to the action against Jameson and Mandeville, jointly.

From an examination of the opinion of the chief justice, in that case, it will be seen that he lays great stress upon the fact that the original action, in which judgment was recovered, was brought against but one of the parties, and upon a sole contract. He admits that, "had the action, in which judgment was obtained against Jameson, been brought against the firm, the whole note would, most probably, have been merged in the judgment." This language is understood, as equivalent to the assertion, that if the original action had been brought against both the partners, on a joint contract, and a judgment recovered against one only, the right of action against the other might have been extinguished. This is clearly inferable from what follows: "The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, and that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant; not to a case in which the declaration in the first suit was on a sole contract." The principle laid down by the chief justice is not, therefore, applicable to the present case. The persons originally sued in Michigan are the defendants here. That was an action on a joint, and not on a sole, promise; and, therefore, according to the position of the chief justice, the present is a case in which the doctrine of merger may be applied, since both the original and present suits are

against the same parties, and for the same cause of action. It would be doing injustice to the reputation of that great jurist, to assume that he intended to lay it down as a sound principle of law, that separate judgments can be recovered on a contract, joint in its terms and character, except where such a course may be authorized by express legislative enactment. Such a doctrine would destroy the well settled distinction between joint and joint and several contracts; and would, in effect, vest in courts a power to change by construction, the contracts of parties, and give them an operation, not within their contemplation or design.

There is another exception taken to the plea in this case, namely—that it does not contain an averment that the court in Michigan, in which the judgment is alleged to have been entered, had jurisdiction of the case. On this point it will be only necessary to observe that, by the settled practice, both of the state and federal tribunals, they take notice of the general and public laws of a state, without requiring them to be specially presented by plea. And as the circuit court of Michigan is created, and its jurisdiction and practice regulated by law, it must be regarded as a court of general jurisdiction, proceeding according to the course of the common law, and, therefore, it is not necessary that the plea should contain an averment of its jurisdiction. The court will take judicial notice of the fact, that the case, set out in the plea, is within its legal jurisdiction.

The only remaining exception to the plea is, that it does not alledge satisfaction of the judgment which is set up in bar of this action. As to this exception, the only remark called for, is—that in the view in which the judgment in Michigan is held to be a bar to the plaintiff's right to recover in this case, it is wholly immaterial, whether the judgment is satisfied or not, and the averment of satisfaction is not, therefore, necessary.

The demurrer to the special plea is overruled.

Case No. 18,021.

WOODWORTH et al. v. STONE.

[3 Story, 749; 1 2 Robb, Pat. Cas. 296.]

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

SURRENDER OF PATENT—EFFECT—INJUNCTION—ISSUE OF NEW PATENT—DECISION OF COMMISSIONER—REVIEW.

1. An injunction granted on an original bill, before the surrender of a patent, cannot be maintained, upon the new patent, unless a supplemental bill be filed, founded thereon.

2. A patentee cannot, by a surrender of his patent, affect the rights of third persons, to whom he has previously assigned his interest in

the whole or a part of the patent, unless the assignees consent to the surrender.

[Cited in *Potter v. Braunsdorf*, Case No. 11,321; *Potter v. Holland*, Id. 11,329.]

3. To support an action at law for the breach of a patent, it is indispensable to prove a breach before the action is brought; but, if the patent right be admitted or established, a bill in equity quia timet will lie for an injunction upon well grounded proof of any apprehended intention of the defendant to violate it.

[Cited in *Woodworth v. Rogers*, Case No. 18,018; *Goodyear v. Providence R. Co.*, Id. 5,583; *Potter v. Crowell*, Id. 11,323; *Wheeler v. McCormick*, Id. 17,498; *Celluloid Manufg Co. v. Arlington Manufg Co.*, 34 Fed. 325; *Sherman v. Nutt*, 35 Fed. 150; *California Electrical Works v. Hengel*, 48 Fed. 377; *Page Woven Wire Fence Co. v. Land*, 49 Fed. 935.]

[Cited in *McBurney v. Goodyear*, 11 Cush. 571.]

4. The decision of the commissioner of patents in respect to accepting a surrender of an old patent, and granting a new one, is not re-examinable elsewhere, unless it appear on the face of the patent, that he has exceeded his authority.

[Cited in *Smith v. Mercer*, Case No. 13,078; *Seymour v. Osborne*, 11 Wall. (78 U. S.) 545; *Allen v. Blunt*, Case No. 217; *French v. Rogers*, Id. 5,103; *Potter v. Holland*, Id. 11,330; *Hussey v. Bradley*, Id. 6,946; *Blake v. Stafford*, Id. 1,504; *Jordan v. Dobson*, Id. 7,519; *Chicago Fruit House Co. v. Busch*, Id. 2,669; *Combined Patents Can Co. v. Lloyd*, 11 Fed. 151.]

This was the case of a bill in equity, brought [by William W. Woodworth, administrator] for an infringement of what is commonly called "Woodworth's Planing Machine." The bill prayed for an injunction and other relief. Upon an interlocutory hearing a temporary injunction was granted by the district judge. Pending the proceedings, the patent was surrendered on account of a defect in the specification, and a new patent was granted; and upon this new patent a supplemental bill was filed against the defendant [Joel Stone] for the continuance of the injunction and other relief.

Mr. Giles, for defendant, now moved to dissolve the original injunction; and contemporaneously, B. R. Curtis, for the plaintiff, moved for the continuance of the injunction upon the supplemental bill.

Various objections were urged for the defendant against the motion for the continuance of the injunction on the supplemental bill, and the surrender of the old patent was relied upon in support of the motion to dissolve the injunction granted on the original bill. These objections were replied to on behalf of the plaintiff, and the propriety of continuing the injunction insisted on.

STORY, Circuit Justice. If the present case had stood merely upon the original bill, it appears to me clear, that the motion to dissolve the injunction granted upon that bill, ought to prevail, because, by the surrender of the patent, upon which that bill is founded, the right to maintain the same would

¹ [Reported by William W. Story, Esq.]
30 Fed. Cas.—38

be entirely gone. I agree that it is not in the power of the patentee, by a surrender of his patent, to affect the rights of third persons, to whom he has previously, by assignment, passed his interest in the whole or a part of the patent, without the consent of such assignees. But, here, the supplemental bill admits, that the assignees, who are parties to the original and supplemental bill, have consented to such surrender. They have, therefore, adopted it; and it became theirs in the same manner as if it had been their personal act, and done by their authority.

The question, then, is precisely the same, as if the suit were now solely in behalf of the patentee. In order to understand with clearness and accuracy some of the objections to the continuance of the injunction, it may be necessary to state, that the original patent to William Woodworth (the inventor), who is since deceased, was granted on the 27th of December, 1828. Subsequently, under the eighteenth section of the act of 1836, c. 357 [5 Stat. 117], the commissioners of patents, on the 16th of November, 1842, recorded the patent in favor of William W. Woodworth, the administrator of William Woodworth (the inventor), for seven years from the 27th of December, 1842. Congress, by an act passed at the last session (act of 26th of February, c. 27 [6 Stat. 936]), extended the time of the patent for seven years from and after the 27th of December, 1849 (to which time the renewed patent extended); and the commissioner of patents was directed to make a certificate of such extension in the name of the administrator of William Woodworth (the inventor), and to append an authenticated copy thereof to the original letters patent, whenever the same shall be requested by the said administrator or his assigns. The commissioner of patents, accordingly, on the 3d of March, 1845, at the request of the administrator, made such certificate on the original patent. On the 8th day of July, 1845, the administrator surrendered the renewed patent granted to him "on account of a defect in the specification." The surrender was accepted, and a new patent was granted on the same day to the administrator, reciting the preceding facts, and that the surrender was "on account of a defective specification," and declaring that the new patent was extended for fourteen years from the 27th of December, 1828, "in trust for the heirs at law of the said W. Woodworth (the inventor), their heirs, administrators or assigns."

Now, one of the objections taken to the new patent is, that it is for the term of fourteen years, and not for the term of seven years, or for two successive terms of seven years. But it appears to me that this objection is not well founded, and stands inter apices juris; for the new patent should be granted for the whole term of fourteen years from the 27th of December, and the legal effect

is the same as it would be, if the patent was specifically renewed for two successive terms of seven years. The new patent is granted for the unexpired term only, from the date of the grant, viz: "for the unexpired period existing on the 8th of July, 1845, by reference to the original grant in December, 1828. It is also suggested, that the patent ought not to have been in trust for the heirs at law of the said W. Woodworth, their heirs, administrators or assigns." But this is, at most, a mere verbal error, if indeed it has any validity whatsoever; for the new patent will, by operation of law, enure to the sole benefit of the parties, in whose favor the law designed it should operate, and not otherwise. It seems to me that the case is directly within the purview of the tenth and thirteenth sections of the act of 1836, c. 357, taking into consideration their true intent and objects.

Another objection urged against the continuation of the injunction is, that the breach of the patent assigned in the original bill can have no application to the new patent, and there is no ground to suggest, that, since the injunction was granted, there has been any new breach of the old patent, or any breach of the new patent. But it is by no means necessary, that any such new breach should exist. The case is not like that of an action at law for the breach of a patent, to support which it is indispensable to establish a breach before the suit was brought. But in a suit in equity, the doctrine is far otherwise. A bill will lie for an injunction, if the patent right is admitted or has been established, upon well grounded proof of an apprehended intention of the defendant to violate the patent right. A bill, *quia timet*, is an ordinary remedial process in equity. Now, the injunction already granted (supposing both patents to be for the same invention) is *prima facie* evidence of an intended violation, if not of an actual violation. And the affidavit of James N. Buffum is very strong and direct evidence to this same effect.

But the most material objection taken is, that the new patent is not for the same invention as that which has been surrendered, and certainly, if this be correct, there is a fatal objection to the prolongation of the injunction. But is the objection well founded in point of fact? It is said, that the present patent is for a combination only, and that the old patent was for a combination and something more, or different. But I apprehend that, upon the face of the present patent, the question is scarcely open for the consideration of the court; and, at all events, certainly not open in this stage of the cause. I have already, in another cause, had occasion to decide, that where the commissioner of patents accepts a surrender of an old patent and grants a new one, under the act of 1836, c. 357, his decision, being an act expressly confided to him by law, and

dependent upon his judgment, is not re-examinable elsewhere; and that the court must take it to be a lawful exercise of his authority, unless it is apparent upon the very face of the patent, that he has exceeded his authority, and there is a clear repugnancy between the old and the new patent, or the new one has been obtained by collusion between the commissioner and the patentee. Now, upon the face of it, the new patent, in the present case, purports to be for the same invention and none other, that is contained in the old patent. The avowed difference between the new and the old, is, that the specification in the old is defective, and that the defect is intended to be remedied in the new patent. It is upon this very ground, that the old patent was surrendered and the new patent was granted. The claim in the new patent is not of any new invention; but of the old invention more perfectly described and ascertained. It is manifest that, in the first instance, the commissioner was the proper judge whether the invention was the same or not, and whether there was any deficit in the specification or not, by inadvertence, accident, or mistake; and consequently, he must have decided that the combination of machinery claimed in the old patent was, in substance, the same combination and invention claimed and described in the new. My impression is, that at the former trial of the old patent before me, I held the claim substantially (although obscurely worded) to be a claim for the invention of a particular combination of machinery for planing, tonguing, and grooving, and dressing boards, etc.; or, in other words, that it was the claim of an invention of a planing machine or planing apparatus such as he had described in his specification.

It appears to me, therefore, that prima facie, and, at all events, in this stage of the cause, it must be taken to be true, that the new patent is for the same invention as the old patent; and that the only difference is, not in the invention itself, but in the specification of it. In the old, it was defectively described and claimed. In the new, the defects are intended to be remedied. Whether they are effectually remedied is a point not now properly before the court. But as the commissioner of patents has granted the new patent as for the same invention as the old, it does not appear to me, that this court is now at liberty to revise his judgment, or to say, that he has been guilty of an excess of authority, at least (as has been already suggested) not in this stage of the cause; for that would be for the court of itself to assume to decide many matters of fact, as to the specification, and the combination of machinery in both patents, without any adequate means of knowledge or of guarding itself from gross error. For the purpose of the injunction, if for nothing else, I must take the invention to be the same in both

patents, after the commissioner of patents has so decided, by granting the new patent.

Upon the whole, therefore, I do order and direct, that the injunction do stand continued, as to the new patent, stated in the supplemental bill, until the hearing or farther order of the court.

[For other cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,389.]

WOODWORTH v. STONE. See Case No. 18,017.

Case No. 18,022.

WOODWORTH v. WEED.

[1 Blatchf. 165; 1 Fish. Pat. Rep. 108.]

Circuit Court, N. D. New York. Oct. Term, 1846.

PATENTS—SALE OF LICENSE—FORFEITURE FOR NON-PAYMENT OF PURCHASE MONEY—INJUNCTION.

1. W. granted to J. a license to use a patented machine, for which J. gave his five promissory notes, payable at different times, and J. agreed, in writing, that if any one of the notes should become due and be unpaid, the license should be void and should revert to W. Held, that the license was forfeited the moment one of the notes became due and was unpaid, and that it was optional with W. to resort to his remedy at common law to enforce the collection of the unpaid note, or to treat the rights of J. as forfeited, and apply for an injunction against the further use of the machine.

[Cited in *Goodyear v. Congress Rubber Co.*, Case No. 5,565; *Cohn v. National Rubber Co.*, Id. 2,968. Approved in *Abbett v. Zusi*, Id. 7; *McKay v. Smith*, 29 Fed. 296; *Hat Sweat Manuf'g Co. v. Porter*, 34 Fed. 747; *Washburn & M. Manuf'g Co. v. Cincinnati Barbed Wire Fence Co.*, 42 Fed. 677.]

2. The stipulation as to forfeiture is to be considered as a double security given by J. to W. for the consideration money.

3. Where, in such a case, W. applied for a provisional injunction, an order was made granting it, unless J. should within 60 days pay to W. the amount of the due and unpaid note, and his costs.

[Cited in *Goodyear v. Union India R. Co.*, Case No. 5,586.]

The plaintiff [William W. Woodworth] filed his bill setting forth that as patentee under the Woodworth patent, as extended for seven years from December 27, 1842 (see the letters patent, etc., in *Wilson v. Rousseau*, 4 How. [45 U. S.] 658-668), he, on the 3d of July, 1843, entered into an agreement with the defendant [Joseph Weed] under seal, whereby he granted to him a license to construct and use one of the Woodworth planing machines in the town of Ticonderoga, Essex county, for which the defendant agreed to give his promissory notes, in all amounting to \$400, two for \$50 each and three for \$100 each, to be payable at different and specified times; the defendant further agreeing "that in case said notes were not paid when they or either

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

of them fell due, then the said license and permission should be void and the same should revert to said Woodworth." The bill also set forth, that the defendant, soon after making the agreement, constructed one of the machines in the town of Ticonderoga and had ever since had it in use; that he executed and delivered his notes for the several amounts, and payable at the several times specified in the agreement; and that four of the notes, amounting to \$300, were due and unpaid. The bill charged that the license and permission to use the machine had become void, and that, according to the terms and conditions of the license, the defendant had no longer any right to use it, and prayed for an injunction to restrain its use. The plaintiff now applied, on the bill, for a provisional injunction. The defendant opposed the application, on affidavits setting forth that he was the owner of a large amount of real property in Essex county, and was worth \$10,000 over and above all his liabilities.

William H. Seward, for plaintiff.

David Buel, Jr., for defendant, urged that the plaintiff ought to exhaust his remedy at common law to enforce payment of the notes, before an injunction could issue under the stipulation of forfeiture contained in the agreement.

NELSON, Circuit Justice. From the terms of the agreement the license was forfeited the moment one of the notes became due and was unpaid, and it was optional with the plaintiff to resort to his remedy at common law to enforce the collection of the notes, or to treat the rights of the defendant as forfeited under the stipulation in the agreement. The stipulation is to be considered as a double security given by the defendant to the plaintiff for the payment of the consideration money. An order must be entered granting an injunction, as prayed for in the bill, unless the defendant, within sixty days from the service upon him of a copy of the order, pay to the plaintiff the principal and interest due upon the notes mentioned in the bill, which have already fallen due, and the plaintiff's costs.

[For other cases involving this patent, see note to Bicknell v. Todd, Case No. 1,339.]

Case No. 18,023.

WOODWORTH v. WILSON.

[Cited in Smith v. Mercer, Case No. 13,078. Nowhere reported; opinion not now accessible.]

WOOD & LIGHT MACHINE CO., In re.
See Case No. 4,534.

WOODY (O'BRIEN v.). See Case No. 10,398.

WOOLBRIDGE (WEBSTER v.). See Case No. 17,340.

Case No. 18,024.

WOOLCOCKS v. MANY et al.

[9 Blatchf. 139; 5 Fish. Pat. Cas. 72.]¹

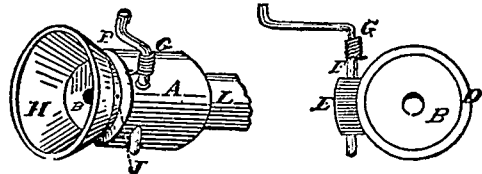
Circuit Court, S. D. New York. Sept. 20, 1871.

INFRINGEMENT OF PATENT—SPEAKING-TUBE WHISTLES.

The first claim of the letters patent granted, May 24, 1870, to Thomas J. Woolcocks, for an "improvement in speaking-tube whistles," namely, "in combination with the cylindrically formed barrel A, the stem F, having the reacting spring G attached to it, and operating on the outside of the barrel, as hereinbefore described, and for the purposes set forth," is infringed by a combination consisting of the barrel, stem and spring, the spring being attached to the stem, and operating on the outside of the barrel, and the barrel being octagonal instead of cylindrical, the combination being, in all other respects, the same, and the octagonal form possessing all the advantages of, and being the equivalent of, the cylindrical form, as contradistinguished from the previous square form.

[This was a bill in equity by Thomas J. Woolcocks against Francis Many and others.]

[Final hearing on pleadings and proofs. Suit brought upon letters patent [No. 103,406] for an "improvement in speaking-tube whistles," granted to complainant May 24, 1870. A description of the invention and the claims will be found in the opinion of the court, and will be readily understood by reference to the engravings. In the infringing device, the barrel marked A was octag-



onal in form, but the spring, G, was placed on the outside; while, in the tubes made prior to the complainant's patent, the barrel was square, and the spring was placed within it.]²

Charles F. Blake, for plaintiff.

Jonathan Marshall, for defendants.

BLATCHFORD, District Judge. This suit is founded on letters patent granted to the plaintiff, May 24, 1870, for an "improvement in speaking-tube whistles." The patentee in his specification, says: "My invention relates to certain improvements in the manufacture of speaking-tube whistles, for which a patent was granted to myself and partner, May 4, 1852, and extended for the term of seven years, from and after the 4th of May, 1866. In the invention thus pat-

¹ [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel T. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 139, and the statement is from 5 Fish. Pat. Cas. 72.]

² [From 5 Fish. Pat. Cas. 72.]

ented, the barrel was made square, and the spring attached to the rod operating the whistle secured to the inside of the barrel, thus making it difficult to get at the whistle to repair, should the spring break, and at the same time requiring a large unsightly barrel, or box (more properly) to admit of the working of the spring thus arranged within it." He states, that his invention consists, "first, in applying the spring to the rod or stem, for operating the whistle, on the outside of the cylindrical barrel, so as to be accessible at all times for repairing, without taking the whistle barrel to pieces; second, in forming a solid flange or hinge to the edge of the valve or top plate of the whistle, for supporting or holding the spring, rod or stem, when attached thereto, in contradistinction to the old method of making the valve plate of the whistle by soldering an independent flange or hinge thereto." Figures of drawings accompany the specification, and it gives a description of the construction of the parts of the apparatus which embody the improvements. The barrel or box which contains the whistle is stated to be cylindrical in form, in contradistinction to being square. The invention covered by the patent of 1852 is the introduction of an alarm valve or whistle into the speaking tube. This valve closes the mouth of the tube, when the tube is not in use, being held to its place by a spring. There is a mouth piece at each end of the tube. Immediately behind the mouth piece is a chamber containing the valve. The valve is a hollow disc, formed so as to produce a whistling noise by means of an orifice through it, whenever a strong current of air is impelled through. The valve is attached to a spindle, which has a handle worked from the outside, so as to raise the valve against the action of the spring, when it is desired to use the tube. The person desiring to speak raises the valve, and blows through the tube, and thus sounds the whistle at the other end, and attracts the attention of the person to be spoken to, who, by raising the valve at his end, enables a conversation to be held through the tube. The patent of 1852 represents the barrel or box containing the valve as being square in form, and the spring as being coiled around the spindle inside of the barrel. In the patent of 1870, the upper one of the two concave perforated discs which form the valve-whistle, has around it a marginal flange, which, at one side, is doubled in width, so as to form a solid hinge piece, to which the stem or spindle for operating or raising the valve may be attached. The specification states, that, previously, the hinge piece had been formed separately and soldered to the edge of the flange, and that then the stem or spindle was soldered to the hinge piece. In the patent of 1870, the spring for keeping the valve shut, is a spiral spring, coiled around the stem on the outside of the barrel, and

thus accessible at all times for repairs. The claims of the patent of 1870 are as follows: "(1) In combination with the cylindrically formed barrel A, the stem F, having the reacting spring G attached to it, and operating on the outside of the barrel, as hereinbefore described and for the purposes set forth. (2) The disc B, having a solid flange D and hinge piece E attached thereto, as hereinbefore described, and for the purposes set forth."

The speaking tube sold by the defendants, and alleged to infringe the patent, has, in combination with a barrel containing the valve, the stem, having attached to it a reacting spring, operating on the outside of the barrel, such combination being, in all respects, the same as that covered by the first claim of the patent, except that, in the defendant's tube, the barrel or box is octagonal, instead of cylindrical. But, in the combination, the octagonal form, as contradistinguished from the previous square form, is the equivalent of the cylindrical form, as contradistinguished from the previous square form. The evidence shows that the octagonal form possesses all the advantages which the cylindrical form has. There can be no doubt, therefore, that the defendant's tube infringes the first claim of the plaintiff's patent.

The infringement of the second claim is not established. The mode used by the defendants, of attaching the stem to the valve, appears to be a mode that was used for that purpose in making tubes under the patent of 1852, before the plaintiff made his inventions covered by the patent of 1870, and not to be the mode described by the plaintiff in that patent.

The defence that the plaintiff abandoned his inventions is not made out. There must be a decree for the plaintiff, for a perpetual injunction, and an account of profits, as respects the first claim of the patent.

Case No. 18,025.

WOOLDRIDGE v. THOMAS.

[Nowhere reported; opinion not now accessible.]

WOOLDRIDGE (THOMAS v.). See Case No. 13,918.

Case No. 18,026.

WOOLEN et al. v. NEW YORK & BRIE BANK.

[12 Blatchf. 359.]¹

Circuit Court, N. D. New York. Oct. 13, 1874.
LIABILITIES OF BANK—COLLECTION OF DRAFT—
DELIVERY OF BILLS OF LADING.

1. W., a banker at Indianapolis, sent to a bank at Buffalo a draft drawn on B., who re-

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

sided in Buffalo, and bills of lading for some lumber, in a letter stating that he inclosed, for collection and remittance of proceeds, the draft and the bills of lading. The draft was drawn by C. on B., and was payable 15 days after date, and was endorsed by M., and then, by special endorsement by W., to the cashier of the bank, "for collection." By the terms of the draft, the drawer, endorsers and acceptor waived presentment for payment and notice of protest and non-payment. The bills of lading set forth C. as the shipper of the lumber, and were dated at times two or three days prior to the date of the draft, and were endorsed by C., by M., and by W. The draft was accepted by B., and the bank delivered the bills of lading to him. B. failed before the maturity of the draft. The lumber had been sold by C. to B., and the draft was for the purchase price, and was discounted by W. for C. on the security of the bills of lading, as collateral. By ordinary course, the lumber would reach Buffalo eight days before the maturity of the draft. W. brought suit against the bank to recover the amount of the draft, on the ground that the defendant violated its duty by delivering the bills of lading before the collection of the draft. *Held*, that the bank was not liable.

2. The drawee was entitled to the bills of lading, on accepting the draft, as the draft was drawn on time.

[Cited in *Walters v. Western & A. R. Co.*, 63 Fed. 392.]

[This was an action by William W. Woolen and Willis S. Webb against the New York & Erie Bank to recover the amount of a draft.]

William H. Gurney, for plaintiffs.
Edward R. Bacon, for defendant.

WALLACE, District Judge. This action was tried before the court, without a jury. The plaintiffs, bankers at Indianapolis, Indiana, sent to the defendant, a bank at Buffalo, New York, on the 28th of October, 1872, a letter, stating that they enclose, for collection and remittance of proceeds, a draft upon one Bugbee, and bills of lading for eight car loads of lumber. The draft enclosed is dated October 26th, 1872, is drawn by Coder & Co. upon Bugbee, is payable fifteen days from date, and is endorsed by one Mayhew, and then, by special endorsement, by the plaintiffs, to the defendant's cashier, "for collection." By the terms of the draft, the drawers, endorsers, and acceptor severally waive presentment for payment and notice of protest and non-payment. The bills of lading respectively set forth, that Coder & Co., at times two or three days prior to the date of the draft, have shipped, at places therein specified, certain car loads of lumber, to be delivered to them at Albany, New York, and are severally endorsed upon the back by Coder & Co., by Mayhew, and by the plaintiffs. No business dealings had ever taken place between the plaintiffs and the defendant prior to this transaction, except a few days previously, when the plaintiffs had sent to the defendant a similar draft, drawn by and upon the same parties, with similar bills of lading and endorsements, with instructions, by letter, to "de-

liver the shipping bills on acceptance of the draft." Bugbee, the drawee, resided at Buffalo. Upon receiving the draft first mentioned, the defendant presented it for acceptance to Bugbee, he accepted it, and thereupon, at his request, the defendant delivered to him the bills of lading. Bugbee failed before the maturity of the draft. It is admitted, that the lumber mentioned in the bills of lading had been purchased by Bugbee, of Coder & Co.; and that the draft was drawn for the purchase price of the lumber, and was discounted by the plaintiffs for Coder & Co., on the security of the bills of lading, as collateral. It is also admitted, that, by the ordinary course of transportation, the lumber was due at its destination eight days prior to the maturity of the draft. The plaintiffs insist that the defendant violated its duty by delivering the bills of lading before the collection of the draft, and bring this action to recover of the defendant the amount of the draft.

Bills of exchange are negotiated upon the security of bills of lading appended to them, so frequently, and the rights and obligations of parties thereto constitute such an important subject of consideration in commercial communities, that it seems remarkable that the questions involved in this case have not been settled by numerous adjudications. Such, however, does not seem to be the fact, and the case must be determined as *res nova*. By receiving a draft for collection, the bank receiving becomes the agent of the owner, and, in the discharge of its obligations as such, is bound to present the same for acceptance without unreasonable delay, and to present the same for payment at its maturity; and, if not accepted, or not paid when presented, it must take such steps, by protest and notice, as are necessary to charge the drawer and endorser. While, ordinarily, it is not necessary to present a draft for acceptance, presentment and demand of payment at maturity, with due notice and protest, if not paid, being sufficient to hold the drawer and endorser, this rule does not obtain as to a collecting agent, but prompt presentment for acceptance is required, so that, in case of non-acceptance, the owner can resort immediately, and before maturity, to the drawer. *Allen v. Suydam*, 17 Wend. 368, 20 Wend. 321. Upon failure to discharge this duty, the receiving bank becomes liable as for negligence, for any damages resulting from the default.

In the present case, the defendant was absolved from the duty of presenting for payment, and of protesting and giving notice of non-payment of the draft, these steps having been waived by the express terms of the draft, to which waiver the plaintiffs, as endorsers, were parties.

The rights and obligations of the parties, if the draft alone had been forwarded, having been ascertained, it remains to consider how far they are changed by the instructions

contained in the letter, and those implied from the transmission of the bills of lading in conjunction with the draft. As between the parties here, the facts, that the lumber had been sold by Coder & Co. to Bugbee, that the draft they had drawn on Bugbee was for the purchase price of the lumber, and that the plaintiffs had discounted it for Coder & Co., upon the bills of lading as collateral security, are not material, except so far as notice of these facts was furnished to the defendant by the letter and its contents, because, except from this source, the defendant had no knowledge of them.

The instruction in the letter, to collect the draft and remit its proceeds, is not controlling. Had the draft alone been enclosed with such instructions, the duty of collecting it would not have devolved on defendant. Its duty would only have been to present it for acceptance, and, if acceptance was refused to protest and give due notice, and, if paid, to remit its proceeds. If its duty in the premises had not been restricted by the terms of the draft, it would not have been obligatory upon the bank to enforce collection by legal proceedings, but only so to fulfill its trust as to enable the owner of the draft to enforce promptly and completely his cause of action against the drawer and endorser. And if, instead of delivering them to Bugbee, it had retained the bills of lading until default in payment of the draft, its whole duty in regard to them would have been discharged by returning them to the plaintiffs. That some duty in reference to the bills of lading was imposed on the defendant, which would not have been required had the draft alone been sent, is evident; otherwise, their transmission is deprived of all significance; but, whether that duty was to retain them until payment of the draft, or only until it was accepted by Bugbee, cannot be determined from the language of the letter. The direction to collect is, in legal effect, not one to enforce collection, but to return the bills of lading to the plaintiffs; and upon what contingency is not specified. Resort must, therefore, be had to the instruments enclosed in the letter, to ascertain the rights of the parties and the duty of the defendant in regard to them. These instruments are to be read and construed together.

The draft is drawn by a person who has consigned lumber to himself at Albany, and transferred his title to it by endorsing the bills of lading to another, who has likewise endorsed the draft and bills of lading to the plaintiffs, who have endorsed both instruments to the defendant. The drawee resides at the city where the defendant transacts its business, and the lumber, by ordinary course of transportation, will reach a distant market several days before the draft matures. It is evident that the draft originated from the shipment of the lumber, was negotiated on the credit of that shipment, and that the parties to it intended that the

defendant should deliver the bills of lading to the drawee upon his compliance with the conditions of the agreement under which the lumber was shipped. What those conditions were must be determined by the draft and bills of lading only, and must resolve themselves into one of two alternatives. Either the drawer had consigned the lumber on his own account, to be sold for him by the drawee, and drawn upon the latter for an advancement on the consignment, or the drawer had sold the lumber to the drawee, and drawn upon him for the purchase price. On the first supposition, the drawee was under no obligation to accept the draft until he received the property consigned; on the second, the fact, that the draft was payable fifteen days after date, indicated that the sale was on a credit of that time. If the sale was on credit, the drawee was entitled to a delivery of the property, and to require him to pay for it on delivery would be to repudiate the agreement for credit. Upon either hypothesis, the drawee was entitled to the property as the consideration of his acceptance of the draft. If such was his right, evidently, the drawer, endorser, and owners of the draft had no interest in the bills of lading, except so far as they were security for the acceptance of the draft; and it was reasonable to infer that they were forwarded to the defendant to retain or return, in case acceptance was refused.

To sustain a recovery here, it must be held, that the facts implied that the plaintiffs were the owners of the lumber, and proposed to transfer it to Bugbee on payment of the draft, and had constituted the defendant their agent to consummate this transfer. If the draft had been payable at sight, this theory would seem reasonable. But, the circumstance, that the draft was on time, is a very material one. It is difficult to appreciate why time was to be given to the drawee, unless to enable him to realize funds for its payment from the property on account of which it was drawn. If it had been payable at sight, there would be no room for the inference that the lumber was sold on credit, or that the drawee was entitled to the property in order to realize from it. If the draft had been payable ninety days after date, surely it would not be reasonable to infer, that, for nearly that length of time, the property was to remain at its destination, with charges for storage or demurrage accumulating upon it, and the legal title to it controlled by a corporation in a distant city, which, awaiting the payment of the draft, was under no duty to protect, and possessed no right to dispose of, the property. The cogent inference would be, that the drawee was to have possession upon acceptance, for the purpose of using the property and meeting his acceptance. If such would be the legal presumption had the draft been payable in ninety days, would the presumption change if it had been payable in sixty

days, in thirty days, or in a shorter time? If so, where is the line of distinction to be found? Unless it can be ascertained, by some test capable of certain and general application, any such distinction must be rejected. Such a test is found, if the distinction depends upon the consideration whether the draft is on time or at sight; and the only reasonable and certain rule must be held to be, that, if the draft is on time, acceptance by the drawee is conditioned upon a transfer of the property against which it is drawn.

My conclusion, therefore, is, that the defendant had a right to assume that the duty confided to it was to procure acceptance of the draft, and, upon acceptance, to deliver the bills of lading to the drawee, or, if acceptance was refused, to protest and give notice thereof to the plaintiffs, retaining the bills of lading until the maturity of the draft, unless instructed before then to return them. This conclusion is sustained by the case of *Lanfear v. Blossman*, 1 La. Ann. 148. It is there held, that, where the holder of a bill of exchange which had been negotiated with a shipping bill appended to it, payable at a specified time after date, refused to deliver the bill of lading to the drawee on his accepting the draft, and, for that reason, the drawee refused to accept, a protest was made without reason, and the drawer of the draft was discharged. This is the only reported case which I have been able to find, except one at nisi prius, in the first circuit, where a verdict was ordered for the plaintiffs, upon facts similar to those here. The opinion in *Lanfear v. Blossman* is an elaborate and very able one, and is entitled to greater weight, as an authority, than a decision upon first impression at circuit. I, therefore, hold, that the defendant was guilty of no negligence in delivering the bills of lading to Bugbee, and order judgment for the defendant.

Case No. 18,027.

WOOLF et al. v. The ODER.

[2 Pet. Adm. 261.]¹

District Court, D. Pennsylvania. 1802.

SEAMEN'S WAGES.

Voyage broken up by seizure for debt. Extra wages claimed, and also the expenses of the mariners on shore demanded. One month's extra pay allowed.

[Cited in *Phillips v. The Thomas Scattergood*, Case No. 11,106; *Nippon's Crew*, Id. 10,277; *Nevitt v. Clarke*, Id. 10,138; *The Maria*, Id. 9,074; *The Esteban De Antunano*, 31 Fed. 925; *The Frank and Willie*, 45 Fed. 490.]

[Cited in *Van Beuren v. Wilson*, 9 Cow. 164.]

A voyage was broken up by a seizure for the debts of the owner. A claim for the wages, pro tanto, to the time of seizure was brought

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

forward and allowed. Two months' pay in addition were also claimed, under a practice in such cases: damages for the seamen's boarding and expenditures were also demanded.

THE COURT not being satisfied entirely with the allegation, that the seamen were about returning to Europe, granted only one month's additional pay, it appearing, that although they were foreigners by birth, they had for some time past sailed out of America. THE COURT held, that the granting this additional pay, was discretionary, both in quantum and principle. It varies in amount, according to distance from home, or the customs of different nations, and must entirely be controlled by circumstances. There have been frequent claims for damages, including boarding, loss of time, &c. while suits for seamen's wages were depending; but the judge said he had not been in the practice of giving damages; he perceived it was often done in foreign admiralty courts, and in many cases it would be just and proper; but it should be gone into with caution, and only where unwarrantable delay was produced by the fault of the owner or master. Seamen are often stimulated to litigation by landlords, who would, in such cases, be the only gainers, by damages allowed on account of boarding, &c. Suits for mariner's wages are seldom protracted. When they are legally and necessarily delayed, it will be most beneficial, both for commerce and the seamen, that they should leave their affairs in the hands of an agent, and prosecute their employment at sea.

Case No. 18,028.

WOOLFOLK v. MURRAY.

BRYAN v. SIMS.

[10 N. B. R. 540.]¹

District Court, D. Georgia. 1874.

BANKRUPTCY PROCEEDING—OUSTER OF STATE COURT'S JURISDICTION—HOMESTEAD AND EXEMPTION RIGHTS.

1. When the United States courts, under the bankrupt act of 1867 [14 Stat. 517], have acquired jurisdiction of the estate of a bankrupt, the state courts lose jurisdiction of all claims against him provable under the bankrupt act, except specific liens upon his property, and legal or equitable claims of title thereto; and the homestead and exemption provisions of the constitution of 1868 of Georgia do not create such a specific lien upon, or title to his estate, in favor of his family, as may be heard and adjudicated by the state courts pending the proceedings in bankruptcy.

2. Whether said claim is such a debt in favor of the family, as may be proven before the bankrupt court, independently of the exemption granted by the bankrupt law to the bankrupts, it is for that court alone to decide.

The following are the material facts in these two cases:

No. 1: Mrs. [Gertrude J.] Woolfolk applied for an exemption of her husband's land

¹ [Reprinted by permission.]

as a homestead for herself and children, and the cause came before the superior court by appeal. [Joseph E.] Murray, as trustee for her husband's creditors, and certain of the creditors below, and on the appeal, objected to the setting apart of the homestead, upon the following grounds: First. Prior to her application, the husband was adjudged a bankrupt in the district court of the United States, and all his property, including this sought to be set apart as a homestead, by order of said United States district court, passed into the hands of the United States marshal, and he had it when this application was filed; and before the hearing before the ordinary, said property had been, according to the bankrupt act, conveyed to Murray, as trustee as aforesaid, which conveyance, by relation back, is older than this application, and therefore the ordinary had no jurisdiction over the matter. Second. Because the husband claimed the exemption allowed him under the bankrupt act, and had been allowed the same. These objections were demurred to. The demurrer was overruled, and that is assigned as error.

No. 2: This was ejectment by [C. C.] Sims against Benjamin D. Bryan, for certain land in said county. It was admitted that defendant was in possession of the premises when the suit was begun, and yet that William Bryan was in possession and owned the premises on the 19th of December, 1868, and filed his petition to be adjudged a bankrupt on that day, and put this property in his schedule; that his wife knew that he intended making his application in bankruptcy when she filed her petition for exemption of homestead, and that the premises would rent for four hundred dollars per annum. Plaintiff read in evidence a deed of assignment from Hasselton, register in bankruptcy, to Holtzclaw, made the 25th of January, 1869, conveying to Holtzclaw, as assignee, all William Bryan's property, which he owned on the 19th of December, 1868. He then read in evidence a deed from Holtzclaw, assignee, to plaintiff, for said premises, made on the — day of —, 1869, and here the plaintiff closed. Defendant showed that, on the 16th of December, 1868, William Bryan's wife applied for a homestead, etc., which was granted to her by the ordinary of said county, on the 28th of December, 1868. It was admitted that Holtzclaw and Sims (the purchaser at this sale) had actual notice at the time of the sale, that these premises had been set apart to Mrs. Bryan and her children as a homestead; that Benjamin D. Bryan was but her tenant; that she was the real defendant, and that William Bryan was not yet discharged in bankruptcy. Holtzclaw testified that he was not appointed assignee till after the 28th of December, 1868, and gave notice at the sale of this homestead, but stated also that the purchaser would get a good title, and plaintiff bid off the prop-

erty at one thousand dollars. He further testified that William Bryan had two hundred and two and a half acres of land, including his dwelling and outhouses and personalty, worth in the aggregate two thousand six hundred dollars, allowed to him as exempt by the bankrupt register. Defendant's counsel asked the court to charge the jury, that the judgment of the ordinary was conclusive as to Mrs. Bryan's rights; that the deed of assignment to Holtzclaw conveyed only the right, title, and interest in the property which William Bryan had at the date of his application for bankruptcy, subject to, and affected by all the equities and incumbrances existing against it in the bankrupt's hands, and this rule applies to purchasers at his sale. If this property had been set apart as a homestead before said assignee's sale, the verdict should be for defendant. The court charged the jury, that the voluntary taking of the exemption by the bankrupt, under the bankrupt act, defeated the wife's right to a homestead; that the petition in bankruptcy being filed first, the ordinary had no jurisdiction in the premises, and the purchaser, at the assignee's sale, got a good title against the wife and children. The jury found for the plaintiff, for the premises in dispute, and one thousand two hundred dollars for mesne profits.

Lyon, De Graffenreid & Irving and Phil. Cook, for plaintiff in error.

Lanier & Anderson, Hunter, Jemison & Nesbit, Nesbits & Jackson, and S. Rogers, for defendant in error.

Prior petition in bankrupt court ousted ordinary's jurisdiction. Bankrupt Act 1867 (by Rice) p. 43; General Clause 34, p. 45; Clause 46; Code Ga. 1873, tit. "Homestead & Exemption," § 2013; Act 1868. All bankrupt's property passed to assignee from date of application. Rice, Manual, p. 49, cls. 63, 64. Bankrupt law paramount to homestead provisions. Const. U. S. art. 7, § 2; Const. Ga. art. 11, § 1; James, Bankr. Law, 13; Am. Law T. (Jan., 1871) 14; In re Barrow [Case No. 1,057]; In re Black [Id. 1,457]; Scofield v. Moorhead [Id. 12,510]; Phipps v. Morrow [49 Ga. 37], last term. He elected his exemption. 41 Ga. 180; In re Askew [Case No. 585]. Ordinary had no jurisdiction. [Taylor v. Carryl] 20 How. [61 U. S.] 601; James, Bankr. Law, 13; Gay. 66; 30 Ga. 69; 13 Ga. 10; 7 Ga. 362; 12 Ga. 424; [Den v. Turner] 9 Wheat. [22 U. S.] 541; 11 Ga. 453; Lumpkin v. Eason [44 Ga. 339], this term.

McCAY, District Judge. Very clearly, the rights of the bankrupt to an exemption, or rather the quantity of his property that he is permitted to hold exempt from the claims of the assignee, is to be determined by the bankrupt law and the bankrupt court. The jurisdiction of the United States over the subject of bankruptcy, is plenary. Const. U.

S. art. 1, § 8, par. 4. The only doubt there can be, on the facts of this record, is whether our law does not give the wife and family such a specific interest in and lien upon the property of the bankrupt—not for his but for their sake—as is saved by the bankrupt law itself. That law does not pretend to take, as the property of the bankrupt, anything which is not legally and equitably his; nor does it contemplate interfering with specific liens third persons may have, under the laws of the state, upon property included within the schedule.

Our constitution, on the subject of homesteads, and the act of 1868, indicates, very clearly, that something more is meant by the homestead provisions than a mere exemption of the debtor's property from levy and sale. The constitution provides that the general assembly shall enact laws for the full and complete protection and security of the same, to the sole use and benefit of the families aforesaid. Const. art. 7, § 1. And the act of 1868, to carry this provision of the constitution into effect, provides for the application, by a next friend of the wife, apart from the husband. The act, too, clearly contemplates that, after the laying off of the homestead, it shall become the property of the wife. She is authorized to sue for trespasses upon it, and, at her death, provision is made for its disposition, as though it were not the property of the husband at all. Act 1868 (Pamph.) p. 27.

But it is very clear that until it is laid off, there is no property, or right of property in the family. The right of the wife and family to a homestead does not stand on the footing of an equitable title or lien, which follows the property into the hands of a purchaser with notice. It is a right which depends for its existence upon the judgment of the court. We have held in the case of *Blivins v. Johnson* [40 Ga. 297] December term, 1870, that when the application had been made, when there was a *lis pendens*, a purchaser at sheriff's sale, under notice, bought subject to the judgment. But we have not held that any purchaser, at any time, who bought the property with the notice that the wife had no homestead, bought subject to it. It follows, from the very nature of the thing, that the wife can have no title or lien, because not only her right to it, but the number of acres, and the location of it, are dependent upon the judgment of the court. Indeed, her right depends largely upon her application. Thousands of wives and families do not apply for it. Indeed the main and only object of the law is to interfere for the protection of the family against creditors who, if they were permitted full sway, would render the family homeless, and often throw them upon the public for support. It is clear to us, therefore, that this right of the wife is no title, lien, or incumbrance upon the husband's property, until it has been appropriated by a judgment. If this be so, the

jurisdiction over it passes, in case of the bankruptcy of the husband, to the federal court. We have, in the case of *Hardeman v. White* (unreported), analogized this right of the wife to the case of a preferred or prior debt, and we have spoken of the proceedings as a mode provided by law for its recovery. Perhaps this is the correct view of it.

In my judgment, the true course for these wives is to present the claims before the bankrupt court, not as an exemption of the husband's property, but as a claim of their own against it, having, by the laws of Georgia, a preference over other claims against him. We have in this case allowed the decision made at this term, in the case of *Lumpkin v. Eason* [44 Ga. 339], to be expressly questioned, and the questions argued without reference to that decision. We abide by the decision in that case. For myself, whilst I may not put the case upon the same ground as my brethren, I abide by the written brief statement then made of the ground of my concurrence. Judgment affirmed.

Case No. 18,029.

In re WOOLFORD.

[4 Ben. 9; 1 3 N. B. R. 444 (Quarto, 113).]

District Court, S. D. New York. Jan., 1870.

EXAMINATION OF BANKRUPT'S WIFE.

A bankrupt's wife must attend before the register and submit to an examination, the same as any other witness, under section 26 of the bankruptcy act [of 1867 (14 Stat. 529)], and may be punished for contempt, under section 7, if she refuses to answer.

² [At a court of bankruptcy, held at the court-house in Catskill, in said district, on the 17th day of January, A. D. 1870, before Mr. THEODORE B. GATES, register of said court in bankruptcy:

[On the 23d day of November, A. D. 1869, Edwin H. Crandell, the assignee in the above entitled matter [of Staats D. Woolford, a bankrupt], filed with the undersigned a written application for the examination of one George Titus, and Olive Woolford, wife of the said bankrupt, which said application was filed, with other papers, in the district clerk's office, on the 2d day of December, A. D. 1869, and to which reference may be had. Such proceedings were thereupon had that an alias order was granted, returnable before me at the court-house in Catskill, on the 7th day of January, 1870, which said order is hereto attached.

[On the return day of said order, said Olive Woolford appeared by James B. Olney, her attorney, and filed the certificate and affidavit, upon which the examination of said Olive Woolford was adjourned to the 17th day of January instant, when the said Olive Woolford appeared by her said attorney for the

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

² [From 3 N. B. R. 444 (Quarto, 113).]

purpose of taking the objection, and did take the objection, that the bankrupt law does not give the register authority, nor does it vest in the court any power to require the wife of the bankrupt to appear and be examined, and that there were no sufficient grounds for such examination set out in the application for her examination. And her said attorney requested that such question might be certified to his honor the district judge, for his decision. And I do so certify it.]

BLATCHFORD, District Judge. The wife of the bankrupt must attend and submit to an examination, the same as any other witness, under section 26. If she does not attend, on being summoned, her attendance may be compelled by a warrant to the marshal, under which she may be brought before the register and detained until her examination is concluded. If, when she comes or is brought before the register, she refuses to answer, she may, under section 7, be punished for contempt.

WOOLHEIM (UNITED STATES v.). See Case No. 16,761.

Case No. 18,030.

WOOLLEN v. BANKER.

[2 Flip. 33; 17 Alb. Law J. 72; 5 Reporter, 259.]¹

Circuit Court, S. D. Ohio. May 23, 1877.

OHIO PATENT RIGHT NOTE LAW — CONSTITUTIONALITY.

By act of May 4, 1869 (state of Ohio), it is provided that "any note the consideration for which shall consist in whole or in part of the right to make, use or vend any patent invention or inventions claimed to be patented, shall have the words 'given for a patent right' prominently and legibly written or printed on the face of such note or instrument above the signature thereto, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder." Such a law impairs the value of patent right property, created by the constitution and laws of the United States, and is unconstitutional.

[Cited in brief in *Bell Tel. Co. v. Com.* (Pa. Sup.) 3 Atl. 829. Disapproved in *Herdic v. Roessler*, 109 N. Y. 131, 16 N. E. 199. Cited in *State v. Lockwood*, 43 Wis. 405.]

[Action by W. W. Woollen, administrator, against Peter P. Banker upon a promissory note. Upon a trial before Swing, J., and a jury, a verdict was rendered for the plaintiff (case unreported). A motion for a new trial was heard by Mr. Justice SWAYNE.]

James R. Challen, for plaintiff.

Armpit Bros. and Chas. F. Gunckle, for defendant.

SWAYNE, Circuit Justice. The plaintiff brought his action upon a promissory note of

\$500, containing the words "given for a patent right." The defendant set up failure of consideration, for that the patent right was void for want of novelty, and of no value, relying upon the statute of Ohio, passed May 4, 1869 (section 66, Ohio Laws, 93), which provides that "any note the consideration for which shall consist in whole or in part of the right to make, use or vend, any patent invention or inventions claimed to be patented shall have the words 'given for a patent right' prominently and legibly written or printed on the face of such note above the signature, and such note or instrument in the hands of any purchaser or holder shall be subject to the same defenses as in the hands of the original owner or holder."

The reply sets up that the plaintiff's intestate purchased said note for value, without notice, before maturity.

Upon a trial by a jury the defendant offered evidence to show that when the note fell due, and demand was made, he offered to return the patent right and cancel the obligation. The court refused to admit the evidence, and defendant's counsel excepted. An exception was also taken to the refusal of the court to admit evidence that the patent was void for want of novelty, and of no value, and also to the charge of the court, because the jury were not instructed that the defendant was entitled to the same defenses against the plaintiff, although an innocent purchaser for value before maturity, as he would have against the original payee.

These exceptions raise the question of the constitutionality of the statute of Ohio above quoted, and how much soever it may be disagreeable to this court to pronounce upon the unconstitutionality of a state statute before the supreme court of that state has done so, the merits of this case require such duty of us, and we cannot shrink from it.

A construction has been given to the statute in one of its bearings by the supreme court of Ohio in *State v. Peck*, 25 Ohio St. 29, in which the court say: "To construe the phrases 'patent right,' 'patented invention,' and 'inventions claimed to be patented' as used in the act to mean machines manufactured under letters patent by the patentee or his assigns, would give to them not only an unusual, forced and unnatural import, but would seriously interfere with and injure the manufacturing interests and commercial prosperity of the state, which cannot be presumed to have been intended by the general assembly in the passage of the act."

That the constitution of the United States has conferred upon the congress the power "to promote the progress of science and the useful arts, by securing for limited time, to authors and inventors, the exclusive right to their respective writings and discoveries," by section 8, art. 1, is no more certain than that such power has been exercised by the enactment of patent laws, and that no state can limit, control, or even exercise the power.

¹ [Reported by William Searcy Fliprin, Esq., and here reprinted by permission. 5 Reporter, 259, contains only a partial report.]

Congress has not only regulated the manner in which a patent may be obtained, but it has prescribed the manner in which such right may be sold and conveyed, and has imposed the penalties for the infringement thereof. The national government has, therefore, made a patent right, property. The patentee has paid the government for the monopoly, and it is bound to protect him and his assignee in the use and enjoyment of it. Any interference whatever by any state, that will impair the right to make, use, or vend any patented article, or the right to assign the patent or any part of it, is forbidden by the highest organic law. The statute in question is such an interference, and is unconstitutional.

We are supported in this opinion by every court that has had occasion to pass directly upon the question. Davis, J., in *Re Robinson* [Case No. 11,932], pronounced the Indiana law, similar in terms to the Ohio law, clearly unconstitutional. The supreme court of Indiana, in *Helm v. First Nat. Bank*, 43 Ind. 167, held that as the federal government has continuously, from the adoption of the constitution down to the present time, legislated on the subject of patents, and as, from the nature and subject of the power, it cannot conveniently be exercised by the state, it must necessarily be exercised by the national government exclusively, and add: "We are of the opinion that the legislature of Indiana possessed no power to pass the statute under consideration, and it must, therefore, be held unconstitutional and void." And so in *Hereth v. Merchants' Nat. Bank*, 34 Ind. 380, it was held that a maker of a promissory note in the hands of an innocent purchaser for value before due, could not be heard to plead fraud, or failure of consideration, although "given for a patent right" was in the body of the note, and that these words did not put the purchaser on his guard, or convey any notice whatever; being equivalent to "value received." And so in *Hascall v. Whitmore*, 19 Me. 102; *Smith v. Hiscock*, 14 Me. 449.

There is no error in rejecting the evidence offered, nor in refusing to charge the jury as requested. The decision of the court below is sustained, and judgment may be entered on the verdict. Leave to have the cause certified to the supreme court refused.

Case No. 18,031.

WOOLLY v. The PERUVIAN.

[3 Ware, 154; 1 21 Law Rep. 153.]

District Court, D. Massachusetts. May Term, 1858.

LIEN ON VESSEL—LABORERS AND MATERIAL MEN—
EXCAVATION OF TRENCH FOR LAUNCHING.

1. A trench excavated in front of the launching ways of a ship, for the purpose of deepening the water, does not make a part of the

launching ways, within the meaning of the act of the legislature of Massachusetts of 1855 (chapter 231).

2. And though this was necessary for the launching of the vessel, yet as the trench remains to be used for other vessels, this was not, within the meaning of the act, labor performed in launching the vessel.

3. The general objects of the act are to give to material men, mechanics and laborers, a lien for all the materials and labor which go into the ship, constitute any part of it, and make up its entire cost.

[Cited in *Young v. The Orpheus*, 119 Mass. 184.]

4. For this the law constitutes the ship a debtor, and it is what she naturally owes, and it would require the most express and unequivocal language to extend the lien beyond this natural limit.

In admiralty.

S. J. Thomas, for libellant.

J. A. Andrew, for claimants.

WARE, District Judge. This is a libel in rem against a new ship, the *Peruvian*, for labor performed in launching her. The libellant alleges that "by virtue of a contract with the builders he performed labor in the launching of said ship to the amount of \$150, according to the schedule annexed to the libel, and that this labor was indispensable to the launching of the ship;" and after deducting all credits, there remains due to him \$129, for which he claims under the law of the state a lien on the ship.

The answer of the claimants, who are purchasers of the ship, without admitting the labor and services alleged in the libel, denies "that the same, if done, was of a kind or character entitling him to any lien or privilege on the ship." The actual performance of the labor was proved at the hearing, and the amount claimed was not contested, if any thing can be recovered in this suit. The ship was built at a yard in East Boston, and the water was so shoal in front of the yard where she lay, that it was necessary to excavate the earth so as to give a greater depth of water to prevent her grounding as she left the ways. The amount of excavation or dredging charged is fifty square yards at three dollars a yard. This lien is claimed under a statute of Massachusetts of 1855 (chapter 231). The material portion of the act is the first section: "Whenever by virtue of any contract, expressed or implied, with the owners of any ship or vessel, or with the agent, contractors or sub-contractors of such owner or any of them, or with any person having been employed to contract, repair or launch any ship or vessel, or to assist them,—money shall be due to any person for labor performed and materials furnished in the construction, launching or repairs of, or for constructing the launching ways for, or for provisions or other articles furnished for, or on account of any ship or vessel in this commonwealth,—such person shall have a lien on such ship or vessel, her tackle, apparel and fur-

¹ [Reported by George F. Emery, Esq.]

niture, to secure the payment of such debt; which lien shall be preferred to all others thereon, except for mariners' wages, and shall continue until the debt be satisfied." The other parts of the act directing the measures to be taken to secure or perpetuate the lien, do not affect its nature or character.

Whether the lien can be maintained, depends on the construction of the act. The claim is set forth in the words of the law. It is for money due by virtue of a contract for labor performed in launching the ship, with an allegation that it was a service indispensable for that purpose. The statute gives the lien for labor performed in the launching, and for labor or materials in constructing the launching ways. On a strict criticism of the words of the law, this labor cannot, perhaps, with entire propriety, be said to be labor done in the launching of the vessel. It was rather a service performed preparatory to the launching, and whether it was a preparatory work of a kind that can justly be considered as contemplated by the legislature, seems to me to admit of a doubt. It is further argued by the libellants' counsel, that this dredging and excavation of the earth may be considered as labor performed on the launching ways. But it seems to me to be an unnatural and forced meaning put on the words, to consider an artificial channel made in front of the ways, where the ship is received into the water, as part of the ways themselves. The lien is given for labor and materials for the ways, apparently contemplating only the wooden frame-work or cradle in which the ship rests. There appears to me, therefore, to be some difficulty in maintaining that the service claimed in this libel was of such a character as fairly comes within the meaning of the law.

The statute is evidently drawn with care, and the manifest intention, I think, was to give to material-men and laborers, who have contributed by labor and materials to the construction of a ship, a lien for the price of every article which goes into and makes a part of her, and for every kind of labor that is performed upon or for her, until she passes into the element for which she is destined; in a word, for all, whether of labor or materials, which constitutes the proper cost of the ship. The statute creates a legal hypothecation of the thing, and makes the ship herself a debtor; and when the precautions are taken required by the other sections of the law, the lien adheres to her as a jus in re until the debt is paid, into whosoever hands she may pass. But this, I think, is generally the whole intent of the law. The debt, for which this nexus is given, is the proper debt of the res, and is a property in the ship. To that extent the lien creditor is a quasi proprietor or owner. It is his own property, which he has never parted with, whether it is due for materials or labor. But it is his property in a qualified sense. The claimant or general owner has his rights also. He may pay the debt, or tender the pay, which will have the same legal effect, and then by

operation of law, without any form of transfer, or the consent of the creditors, this special and qualified property passes to him in full and unqualified ownership. The lien does not necessarily or naturally extend to every thing furnished or done for or in reference to the ship, as for the price of tools supplied to mechanics and workmen, and used in doing the work. The legislature will not easily be supposed to have intended a lien for the price of these; because in that case the payment would operate as a transfer of these tools to the owner as appurtenant to the ship. But the ship has had only the use of them, and for this use has paid in the price of the labor. Such things, though in a loose sense they may be said to be furnished for the vessel, constitute no part of the ship, nor, like a boat or an anchor, are they a natural appurtenance to the ship. They will not, therefore, be supposed to be within the intention of the legislature, unless that intention is clearly expressed. But if such a purpose is unequivocally expressed, I do not see why courts are not bound to carry that intention into execution, whatever their own opinion may be of the utility of the law.

I should feel no difficulty in giving this interpretation as expressing the general intention of the legislature, that is, that the lien extended to all the materials and all the labor that made up the entire cost of the ship, and no farther, but for a single clause in the law. That gives a lien for labor and materials "for constructing the launching ways." Yet the launching ways constitute no part of the ship, nor are they in any way appurtenant to her after she is afloat. They are necessary, it is true, for the launching, and so, in some sense, may be said to be furnished for the ship and to make a part of her cost. But the same may be said of the tools of the workmen, and for a like reason the lien may be claimed as extending to them. The Kearsarge [Case No. 7,634]. But in each case, on the other hand, the ship has had only the temporary use of these things. The tools remain for further use, and the timbers, of which the launching ways are made, are preserved to be used for launching other vessels. The price of these does not go into the cost of the vessel. All that the ship naturally owes to the launching ways is for their temporary use and the labor of putting up the frame-work. This being for the special benefit of the ship, is a proper charge against it, and a proper subject of the lien. Yet, the words of the law are express, and in a statute drafted with such evident care, I find some difficulty in determining that the legislature did not mean what they have said.

But another question remains, whether this service comes within the descriptive words of the law in their fair and ordinary meaning. It is giving a forced and unnatural meaning to them, to call this trench a part of the launching ways. It is more easy and natural to consider the work as part of the labor of launch-

ing, and if the trench was made exclusively for this ship, if the whole use of it was consumed when this ship was launched, it might fairly be considered as part of the cost of the launching. But after it is used for this ship, the trench remains as a permanent improvement of the ship yard. If the claimant and owner pay for it, it does not become his as an appurtenance of the ship. It continues the property of the owner of the ship yard. It would require the most express and unequivocal language to extend the lien so as to include such work. This would be an infringement of the general principles of law and justice. "Quod vero contra rationem juris receptum est, non est producendum ad consequentias." Dig. 1, 3, 14.

Upon the whole, my opinion is that this trench formed in front of the ship-yard cannot be considered as part of the launching ways, nor can the making of it be considered as labor performed in the launching, within the meaning of the law.

The libel must be dismissed with costs.

WOOLMAN v. The RICHARD DOANE. See Case No. 11,765.

Case No. 18,032.

WOOLSEY v. DODGE et al.

[6 McLean, 142.]¹

Circuit Court, D. Ohio. Oct. Term, 1854.²

ILLEGAL BANK TAX—COLLECTION—INJUNCTION BY STOCKHOLDER—CONSTRUCTION OF STATE STATUTES—FOLLOWING STATE DECISIONS.

1. The tax law of 1852, against banks, incorporated under the act of 1845, having been declared to be unconstitutional, it can afford no justification to the treasurer of the county in collecting the tax.

2. A citizen of Connecticut, being a stockholder, may file his bill for an injunction against the collection of the tax, making the directors of the bank defendants, which will enable the court to give relief, the same as if the directors were plaintiffs.

3. A remedy by injunction will be given where there is no adequate relief by law.

4. A continual grievance will be enjoined.

5. An action of trespass is not an adequate remedy for the bank, when its funds are annually and unlawfully abstracted.

6. The state cannot be sued. Its officer may not be responsible.

7. The credit of the bank is impaired.

8. The courts of the Union follow the rule of construction of state statutes, established by the supreme court of the state.

[Cited in *Griffing v. Gibb*, Case No. 5,819; *Mitchell v. Lippincott*, Id. 9,665.]

9. The supreme court of the United States, under the federal constitution, give the rule of construction of that instrument.

[This was a bill by John M. Woolsey against George C. Dodge and the directors of

the Commercial Bank of Cleveland to enjoin the collection of a certain tax.]

Mr. Ewing, for complainant.

Mr. Spaulding, for defendants.

McLEAN, Circuit Justice. The complainant, a citizen of Connecticut, filed his bill, representing, substantially, that he is a stockholder in the Commercial Bank of Cleveland, to the amount of thirty shares of stock, which are worth forty per cent. above par, making an aggregate value of four thousand two hundred dollars; that an illegal and unconstitutional tax has been imposed on said bank exceeding eleven thousand dollars, and to the injury of the complainant more than five hundred dollars; and the bill alleges that the continuance of the tax will impair and substantially destroy the franchises of the bank. And the complainant alleges that orders have been given to the defendant who is treasurer of Cuyahoga county, to proceed to collect the tax, under the tax law of 1852, which authorizes the defendant, if the tax shall not be paid on demand on notice being given, to enter the vaults of the bank by force, and take therefrom the amount of the tax in gold and silver coin, etc. And the complainant avers if the tax be levied and paid over to the state, he is without remedy, as the state cannot be sued, and that his recourse on the treasurer would be inadequate, etc. He therefore prays that an injunction may be granted, there being no adequate remedy at law. There are many other averments in the bill which it is unnecessary to state.

The defendant demurs to the bill on the ground that there is no jurisdiction. Two positions are assumed in the argument against the jurisdiction of the court: (1) "That the charter of the bank contains a provision, that its affairs shall be managed by the directors." (2) That "upon any other hypothesis, than an abuse of the trust by the directors, a court of equity has no jurisdiction."

The authorities referred to in support of the above positions are undoubtedly law, but they are considered as having no application to the case before us. This is not a writ against the bank. No relief against it is prayed for in the bill. The directors are made parties, having an interest in the matter not hostile to the complainant, but in accordance with his interest, in order that, the directors being named on the record, the entire interest of the bank may be protected from the illegal exaction threatened. This is a common proceeding in chancery, which in its decree protects the rights of parties on the record, whether named as complainants or defendants. In 1 Story, Eq. Jur. 630, it is said, "In equity, it is sufficient that all parties in interest are before the court as plaintiffs or as defendants; and they need not, as at law, in such a case, be on opposite

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

² [Affirmed in 18 How. (59 U. S.) 331.]

sides of the record." And in 2 Story, Eq. Jur. 742, he says, "In courts of equity, persons having very different and even opposite interests, are often made parties defendants." And in *Boone v. Chiles*, 10 Pet. [35 U. S.] 177, the court say, "It is within the undoubted powers of a court of equity to decree between co-defendants, on evidence between plaintiffs and defendants." So in 2 Schoales & L. 712. In the case of *Platt v. Oliver* [Case No. 11,116], the complainant being a citizen of Kentucky, filed his bill against Oliver and others, praying a decree against them, and also made defendants several other persons whose interests rested on the same grounds, as the rights asserted by the complainant; and the circuit court decreed, as between the parties defendants on the record, who, being citizens of Ohio, could not be made complainants, and that case being carried to the supreme court, the decree was affirmed. 3 How. [44 U. S.] 333.

No further reference to authorities on this point can be necessary. It is sustained in the reports, and in elementary treatises. Has the complainant made a case in his bill, which gives jurisdiction to the court? He alleges that he has an interest in the bank, exceeding four thousand dollars; that an illegal tax has been laid on the bank exceeding eleven thousand dollars, and to his injury more than five hundred dollars; and that the collection of the tax will impair, if not destroy the franchise of the bank. The sixtieth section of the charter is relied on as containing a contract, that the bank should not be taxed more than six per cent. upon its dividends, which tax the bank has heretofore paid, and is now ready to pay to the treasurer of state. The complainant also alleges, if the tax demanded be paid over to the defendant he would not be responsible, and if by him paid to the state, he would be without remedy, as the state cannot be sued. It has recently been held, by the supreme court of the United States, that the law under which this tax was imposed impairs the contract made by the state in the sixtieth section of the bank charter of 1845, and that the law was passed in violation of the constitution of the United States, and is consequently void.

It has been suggested, rather than argued, by the counsel in this case, that the adoption of the new constitution, which took effect the 1st day of September, 1851, contained provisions, in regard to taxation, inconsistent with the sixtieth section of the act of 1845, and that consequently, that act was modified by the constitution. I say this was rather suggested than argued, as I would not do so great an injustice to the counsel, as to suppose that any one of his learning and ability could bring himself to the conclusion that the constitution of the state is not a law of the state. It is indeed the fundamental and paramount law of the state; but it is only a law of the state, and the

constitution of the United States declares that "no state shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts," etc., and the supreme court of the United States at its last term, having before it, by writ of error, the judgment of the supreme court of Ohio, enforcing the tax law against banks, reversed the judgment, on the ground that the tax law which imposed higher tax on the banks incorporated under the act of 1845, than six per cent. on their dividends, impaired the obligation of the contract in regard to taxation, contained in the sixtieth section of that law.

That the supreme court of the Union had jurisdiction of the case in which the above judgment was pronounced, is not controverted, and it is equally clear that the decision is final and conclusive. If indeed a state, by calling a convention, could modify or abrogate any part of the federal constitution, that great palladium of our rights would be of no value. The founders of this government were too wise and patriotic to countenance such a principle in the fundamental law of the Union. Such a power, it is believed, has never been asserted by any authority entitled to respect. In the case of *Osborn v. Bank of U. S.*, 9 Wheat. [22 U. S.] 868, which was a case in several of its aspects similar to the one before us, the supreme court say, the act of Ohio "is repugnant to a law of the United States, made in pursuance of the constitution, and therefore void. The counsel for the appellants are too intelligent, and have too much self respect, to pretend that a void act can afford any protection to the officers who execute it." There is no axiom of the law better established than this. A void law can afford no justification to any one who acts under it; and he who shall attempt to collect the illegal tax, under the law referred to, will be a trespasser. He will proceed, it is true, under the color of law, an act standing on the statute book, but a void act. If he open the vaults of the bank by force, and abstract a portion of its specie, under a pretense of collecting the tax, he, though the treasurer of the county, will stand without justification or excuse. He has no more right to do this than any other person, who can set up no pretense of authority. And this trespass is to be repeated annually. What a spectacle! What a spectacle to a law-abiding people! Is there no preventive remedy? What stronger ground than this can be imagined for an injunction? The action of trespass comes too late. The state cannot be sued. Its officer may be insolvent. At best, such a remedy is wholly inadequate. The money of the bank is annually abstracted, its credit shaken, and for years the money may not be recovered. It would be a mockery of justice as well as of law, to say to the bank, your only remedy is by an action of trespass.

It is a settled principle in chancery, that an injunction will be granted against a sin-

gle trespass, if in its nature, it would be irremediable at law. But the case before us is a trespass to be repeated so long as the act laying the tax shall remain unrepealed. And there can be no question, that a collection of the tax after the decision of the supreme court, declaring the tax law void, will be continued until the law shall be repealed. This will in effect, not only disregard the highest judicial authority, on the question involved, in the Union; but it will nullify the constitution of the United States, which is declared to be the supreme law of the Union. This remark is not only justified but called for as two applications for injunctions have been made against the collection of the illegal tax at the present term. In the bill it is stated that orders have been given to the treasurers of the counties in which these banks are situated to proceed, under the law, to collect the tax. And this is to be done, if the tax be not paid on demand, by what, in common parlance, is called the crowbar operation. In all the bills praying for injunctions in these cases, the complainants state that the banks have offered to pay the legal tax under their charter, and are ready, at any time, to pay it.

In the Case of Osborn above stated, the supreme court say, "The circuit court of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a state; and as the state itself cannot, according to the eleventh amendment of the constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the state, who are entrusted with the execution of such laws." And the court further say, "In the case at bar, the tribunal established by the constitution for the purpose of deciding ultimately, in all cases of this description, had solemnly determined that a state law imposing a tax on the Bank of the United States, was unconstitutional and void, before the wrong was committed for which the suit was brought." "We think then," the court say, "there is no error in the decree of the circuit court of the district of Ohio, so far as it directs restitution" of the money taken unlawfully from the bank. The court say in effect, as stated in the synopsis of the case, "A state cannot tax the Bank of the United States, and any attempt on the part of its agents and officers to enforce the collection of such tax against the property of the bank, may be restrained by injunction from the circuit court."

It is said that the tax on the Bank of the United States was intended to destroy its franchises. The exaction on each of the two branches of that bank, was the sum of fifty thousand dollars, while the illegal tax on the Commercial Bank of Cleveland was about eleven thousand dollars. This is a dif-

ference in degree, rather than in principle. But the court say a tax on the Bank of the United States is illegal, and may be enjoined by the circuit court. Is not the tax complained of by the Commercial Bank of Cleveland illegal, and may it not be enjoined? What higher and more conclusive authority than this can be cited in favor of this remedy by injunction.

In the case of Pennsylvania v. Wheeling Bridge Co., 13 How. [54 U. S.] 567; the court say in reference to granting injunctions, "There must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot otherwise be prevented than by an injunction." The character of the trespass threatened and complained of, is not only an annually recurring grievance, but if continued must be fatal to the bank. The tax, and the penalty for non-payment, together with the costs of collection, would impair the credit and destroy the usefulness of any bank.

It has been stated that the mode of giving jurisdiction in this case is merely colorable; or in other words, that it is a fraud upon the law. Is this so? The second section of the third article of the constitution declares, that the judicial power shall extend to controversies "between citizens of different states." The framers of the federal constitution were wise and sagacious men. They were profoundly acquainted with human nature in its individual and aggregate action. They were instructed in no ordinary school; and in nothing was their sagacity more eminently shown, than in establishing a judicial power to carry out and maintain the federal powers, and provide against the effects of local excitement. For these purposes were the courts of the United States chiefly established. An option is given to citizens of other states than those in which suits are brought, to sue in the courts of the Union. The complainant is a citizen of Connecticut. He has stock in the bank, which he apprehends will be forcibly and unlawfully seized and abstracted. And if so seized, for the reasons stated in his bill, the law will afford to him no adequate means of redress. Under such circumstances, is he guilty of a legal fraud, or of claiming a colorable right only, by suing in the circuit court? He claims the exercise of a constitutional right, to sue in this court. And if a suit thus brought, makes the directors of the bank defendants in the suit, and being parties on the record, brings the bank within the relief prayed, the fault is in the law, rather than in the complainant, and the reproach, therefore, should not be thrown on him.

This court brings into a state no novel principles. It administers the law of the state. In giving effect to the statutes of the state, where there is no conflict with the fed-

eral constitution, the courts of the Union follow implicitly the rule established by the supreme court of the state. This is done, not on the ground of authority, but of policy. It would be injurious to the citizens of a state, to have two rules of property. Such a course, by the courts of the Union, would produce unfortunate conflicts and encourage litigation. To avoid this, as a matter of policy, the courts of the United States follow the state courts, in the construction of their statutes. So far has this been carried, that the supreme court of the United States has reversed its own decision, made in accordance with the state decisions, in order to conform to a change of decision in the supreme court of the state, in the construction of its statutes; and I trust that no circumstances will ever induce the supreme court of the Union to reverse this course of decision.

There are but few cases in which, under the federal constitution, the supreme court of the Union establishes the rule of construction for the state courts. Where one such case occurs, there are more than five hundred cases where the courts of the Union follow the state courts. If individuals and courts shall disregard judicial authority, and carry out their own peculiar views of our constitution and laws, the harmony of our system of government must be destroyed, and the law of force must become the arbiter of rights. We think that there is jurisdiction in the case before us, and that the injunction has been rightfully granted, and that it should be made, so far as the illegal tax is demanded, perpetual. The demurrer is overruled.

[The above decision was affirmed by the supreme court on appeal. 18 How. (59 U. S.) 331.]

WOOLSEY (UNITED STATES v.). See Cases Nos. 16,762 and 16,763.

Case No. 18,033.

WOOLSTON v. The JOHN A. WARNER.¹
Circuit Court, E. D. Pennsylvania. Oct. 29, 1860.

ADMIRALTY JURISDICTION—CONTRACT TO CARRY PASSENGERS.

[A contract to carry passengers from Philadelphia to Cape May, and then to visit a ship at a certain point in the Atlantic Ocean, and back again to Philadelphia, is a maritime contract, and within the admiralty jurisdiction. The fact that the passenger is to be returned to the place of starting, or that the trip is called an "excursion," does not affect the admiralty jurisdiction.]

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

Appeal in admiralty.

GRIER, Circuit Justice. I see no deficiency in the statements of the libel to bring this case

within the jurisdiction of the court of admiralty. It is not disputed that a contract to carry passengers on the high seas is as much a maritime contract as that to carry freight, and that the vessel is bound by the contract of the master, as soon as the passenger has been received on board, and the voyage commenced. In *Minturn v. King*, 16 How. [57 U. S.] 469, it was taken for granted. The voyage in this case was from the port of Philadelphia to Cape May, and thence to the Great Eastern, and thence back to Philadelphia. This was not a mere contract for transportation from one place to another in the same state, or from one part of the port of Philadelphia to another. It is a contract to carry on the high seas to a town in another state, and thence to a certain point in the Atlantic Ocean. It is as much a maritime contract as one to carry a passenger to England or China. Nor is it less a maritime contract because the vessel is bound to take the passenger to a certain place and bring him back again. Nor is it material to the definition of a maritime contract to show in the libel whether the passenger was traveling for amusement or on business. On a charter party of a vessel to sail for the Banks of Newfoundland to catch mackerel, it would hardly be seriously averred that, because the ship was chartered, not only to carry out, but to fetch back again, the contract was not maritime, or that the man who went to catch fish to sell could have his remedy in admiralty, while he who went to fish for pleasure or amusement could not. Nor is there any magic in the word "excursion," which will take the contract out of this category. If a number of gentlemen were to charter a vessel to take them on an excursion to the Mediterranean Sea and back again, it would be making a distinction where there was no difference to say such a contract is not maritime, while a charter party to go to Sicily for a load of oranges would be. I am of opinion that the libel exhibited a case sufficient to give the district court in admiralty jurisdiction, and that process should be awarded as prayed for in the libel. The clerk will return the record with certificate of the decree of this court to that effect.

Case No. 18,034.

In re WOOLUMS et al.

[1 N. B. R. 496 (Quarto, 131).]¹

District Court, D. Kentucky. 1873.

BANKRUPT—APPLICATION FOR DISCHARGE.

Bankrupt may apply for a discharge within sixty days after adjudication in bankruptcy where debts have been proved, but no assets have come to the hands of the assignee.

[Cited in *Re Sloan*, Case No. 12,945.]

[In the matter of B. W. & J. H. Woolums, bankrupts.]

¹ [Not previously reported.]
30 Fed. Cas.—39

¹ [Reprinted by permission.]

BALLARD, District Judge. The register certifies that on the day fixed by the court for the "creditors and other persons in interest" to appear at a court to be held by the register, and show cause, if any they had, why the prayer of the bankrupts' petition for a discharge should not be granted, Moore, Bre-maker & Co., creditors of the bankrupts, who had proven their debt, appeared and moved that the said petition be dismissed; that this motion was based on the ground that six months had not elapsed from the time of the adjudication of bankruptcy before the filing of the petition, and that the petition did not allege that "no debts have been proven against the bankrupts," but only "that no assets have come to the hands of the assignee;" that the bankrupts resisted this motion, and that the motion was overruled by the register, and that thereupon the creditors requested that the question "thus presented" be certified to the district judge for his opinion.

I more than doubt whether "the question presented" could properly arise in the course of the proceedings before the register. The petition was pending in the district court, and it seems to me that the question here raised ought to have been made in that court, before the judge thereof, by motion or demurrer or other proper pleading, and not before the register. It is true that it is the office of the register to "assist the judge of the district court in the performance of his duties under this (the bankrupt) act;" but he can dispose of no contested matters, and the question whether the petition of a bankrupt for his discharge should be dismissed on the motion of a creditor is in its very nature so obviously a contested matter that it would seem it could be raised only in the district court itself. But, waiving this question and the irregularity of the register's overruling the motion, and thus deciding a contested matter, I have no objection, as the parties desire to have the question raised disposed of, to treat the motion as regularly made. The 29th section of the bankrupt act [of 1867 (14 Stat. 531)] provides, "that, at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee at any time after the expiration of sixty days, * * * the bankrupt may apply to the court for a discharge from his debts."

I see no difficulty in determining the meaning of this provision. It seems to me clear that it allows the bankrupt to apply for his discharge after the expiration of sixty days from the adjudication, and within six months, either when no debts have been proved, or when no assets have come to the hands of the assignee. It is only when both debts have been proved and assets have come to the hands of the assignee, that the discharge cannot be applied for until after the expiration of six months.

It is a little singular that Mr. James, in his notes, and Messrs. Avery and Hobbs, in their notes to this section, after stating correctly that the bankrupt may apply for his discharge after the expiration of sixty days if no debts are proved, or if, within that time, no assets have come to the hands of the assignee, state inadvertently, and incorrectly, that "if debts are proved or if assets are received by the assignee he cannot apply until after the expiration of six months from the date of adjudication." It is manifest that these authors have not given critical attention either to the language of the statute or to that employed by themselves.

As the petition sets forth the facts contemplated by one of the alternatives of the statute, that is, "that no assets had come to the hands of the assignee," it was properly filed within six months after the adjudication. The motion to dismiss is therefore overruled.

Case No. 18,035.

WOOSTER v. CALHOUN et al.

[11 Blatchf. 215; 6 Fish. Pat. Cas. 514; Merw. Pat. Inv. 197.]¹

Circuit Court, S. D. New York. June 30, 1873.

PATENT FOR RUFFLE—IMPROVEMENT IN MANUFACTURE.

1. A patent for a ruffle, to be made by machinery, cannot be sustained, where the ruffle is identical, in mechanical construction, with a ruffle before made, although the machinery, or the process it works, performs at one operation what before required more than one.

[Cited in *Excelsior Needle Co. v. Union Needle Co.*, 32 Fed. 224; *Blumenthal v. Burrell*, 43 Fed. 670; *Risdon Iron & L. Works v. Medart*, 158 U. S. 83, 15 Sup. Ct. 751.]

2. The product of a machine is not patentable merely because the machine makes an already known article more perfectly than it has been, or can be, made without a machine.

[Cited in *Holliday v. Pickhardt*, 29 Fed. 860.]

[This was a bill in equity by Emma C. Wooster against John C. Calhoun and others. Final hearing on pleadings and proofs. Suit brought on letters patent [No. 42,403] for "improvement in band-ruffles," granted Thomas Robjohn, April 19, 1864, and assigned to complainant. The claim of the patent is "a banded ruffle, whether crimped, fluted, ruffled, or shirred, when said ruffle is made of two thicknesses of goods, substantially as herein described."] ²

Frederic H. Betts and Clarence A. Seward, for plaintiff.

Edwin W. Stoughton, for defendants.

¹ [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 11 Blatchf. 215, and the statement is from 6 Fish. Pat. Cas. 514. Merw. Pat. Inv. 197, contains only a partial report.]

² [From 6 Fish. Pat. Cas. 514.]

WOODRUFF, Circuit Judge. My conclusion in this case is, that the bill of the complainant, upon the proofs herein, cannot be sustained.

1. Irrespective of the specific question, whether the alleged inventor, Thomas Robjohn, was the first to make the precise ruffle described in the patent, or whether, on the other hand, it was made at an earlier date by the defendants, I am of opinion, that, in the state of the art at the time when the complainant claims that Robjohn invented the ruffle in question, it was not the subject of invention. It embodied no new idea whatever. In mechanical construction, it was identical with what had been made by hand long before. If it possessed greater beauty, greater evenness and regularity of its plaits, than the ruffling made by hand, that was due to the machinery by which it was made, and not to the invention of the maker in suggesting any novelty but such as pertains to quality or degree of perfection in what was old. If it be conceded that such evenness, regularity of plaits, beauty, and finish, exceeding anything which it is possible to produce by hand, made it a patentable article of manufacture, notwithstanding it is, in other respects, like ruffling before made, still, it was not new in such sense as to be patentable. Just such even, regular, beautiful, finished plaits were made and on sale before. Just the same wavy edge of the ruffle was exhibited in all finely plaited ruffling, whether done by hand or by a machine. Ruffling with two rows of stitches along what is called the band, or substitute for a separate band, was in use before. Machine-made ruffling, with very narrow plaits, had all the regularity and evenness and the wavy edge. The point of difference most insisted upon is, that none had, at that time, the edge of the band hemmed or turned up. I cannot agree, that, if there be ruffling known and in the market, which requires to be hemmed before being used, or when put to use, one who hems it before offering it for sale has made a patentable invention, and can monopolize the business of hemming ruffles. The mistake of the complainant is, in confounding a process, or a machine for performing, at one operation, what before required more than one, with the product of the operation. The former may be patentable; the latter is not. There is no just pretence that there were not other ruffles, made by machinery, with like plaits, like double stitching, like construction generally; or that ruffles made before would not, if the edge of the band be turned up or hemmed, be, in every material respect, the same. If the complainant had invented a machine by which the whole process of plaiting, stitching, hemming, &c., could be done at a single operation, that might be secured to her. But, because the product is the result of one operation, in-

stead of two or more, is no ground for a patent for it as a product.

Nor am I prepared to assent to the proposition, that the product of a machine is patentable on the mere ground that it makes an already known article more perfectly than it has been, or can be, made without a machine. The idea being old, men strive to embody it perfectly. Human skill is exhausted in the effort. Human hands, less exact and unvarying in their movements, only approximate perfection. A machine is devised which makes it better than it has ever before been made. Another machine is invented which approaches more nearly. Still another machine is invented which performs, it may be, better, it may be, not so well. Is the product of the best human skill, in such case, patentable? Is the product of each successive machine patentable? If all the makers are not entitled to a patent for the article as a product, which of them is entitled? Surely, improvements in degrees or quality are not the subject of a patent.

2. The preponderance of the evidence is, that the alleged inventor, Robjohn, was not the first to make the ruffle claimed. Laying out of view hand-made ruffles, and, for the present, the machine-made ruffles above alluded to, the proof shows, that ruffles embracing all the features of the ruffle claimed to have been invented by Robjohn, were made at New Haven, by machine, and at the manufactory of the defendants, before Robjohn made them. If the testimony of the witness Kellogg be credited, this is most distinctly proved. If the criticisms upon his testimony be deemed to impair his credibility, I am of opinion that the testimony of the witness Robjohn, in behalf of the complainant, is, certainly, not less subject to distrust. Without the testimony of either, the defendants must be deemed to have made ruffles embodying all of the peculiarities of the ruffle in question, earlier than the complainant. If the defendants' ruffle, which has a separate strip stitched upon, or made a part of, the band, be deemed a mere addition to the ruffle claimed by the complainant, and, as such, an infringement, if the complainant were entitled to the monopoly, then, clearly, if the defendants made that ruffle before the complainant made the same, with or without such added strip, the complainant cannot become entitled to a monopoly of the ruffle without the strip, unless it be held, that, without the strip, the ruffle is a distinct manufacture. Upon all the proofs, I am constrained to find that the complainant's assignor was not the first inventor of the ruffle claimed.

Upon either or both grounds, therefore, the bill of complaint must be dismissed.

[For another case involving this patent, see *Wooster v. Blake*, 23 Fed. 49.]

Case No. 18,036.

WOOSTER v. CRANE et al.

[5 Blatchf. 282; 1 2 Fish. Pat. Cas. 583; Fent. Pat. 19.]

Circuit Court, S. D. New York. Oct. 7, 1865.

PATENT FOR REEL DESIGN—VALIDITY.

Under the eleventh section of the act of March 2, 1861 (12 Stat. 248), a patent for a design for a reel, consisting of the making of the reel in the shape of a well known mathematical figure, the reel itself, as an article of manufacture, being old, is not valid.

[Cited in Perry v. Starrett, Case No. 11,012; Western Electric Manuf'g Co. v. Odell, 18 Fed. 322; Foster v. Crossin, 44 Fed. 64.]

This was a final hearing in equity, on a bill [by Emma C. Wooster against Jason Crane and others] founded on letters patent, issued October 20, 1863, for a design for a reel to contain ruffles, ladies' dress trimmings and other goods, and consisting of two parallel discs of pasteboard connected by four bits of wood, on which the ruffle was wound between two pasteboard sides. The pasteboard was cut in the form of a rhombus with the angles rounded, and what the patentee claimed was "the design and configuration of the reel."

Thomas P. How, for plaintiff.

Samuel T. Freeman, for defendants.

BENEDICT, District Judge. The statute relied on, as giving to the plaintiff the right sought to be enforced, is the eleventh section of the act of March 2, 1861 (12 Stat. 248), which provides "that any citizen or citizens, or alien or aliens, having resided one year in the United States, and taken the oath of his or their intention to become a citizen or citizens, who, by his, her, or their own industry, genius, efforts and expense, may have invented or produced any new and original design, or a manufacture, whether of metal or other material, * * * or any new and useful pattern or print or picture, to be either worked into or worked on, or printed, or painted, or cast, or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture not known or used by others before his, her or their invention or production thereof, and prior to the time of his, her or their application for a patent therefor, and who shall desire to obtain an exclusive property or right therein to make, use and sell and vend the same, or copies of the same, to others, by them to be made, used and sold, may make application in writing to the commissioner of patents, expressing such desire, and the commissioner, on due proceedings had, may grant a patent therefor, as in the case now of application for a patent."

I am not aware that any judicial construction has been given to this section. No au-

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

thorities were cited on either side, showing any adjudication upon the question involved. There seems to me, however, little doubt as to what should be the construction to be put upon it, when sought to be applied to a case like the present. In this case, the reel itself, as an article of manufacture, is conceded to be old, and not the subject of a patent. The shape applied to it by the plaintiff is, also, an old, well-known mathematical figure. Now, although it does not appear that any person ever applied this particular shape to this particular article, I cannot think that the act was intended to secure to the plaintiff an exclusive right to use this well-known figure in the manufacture of reels. The act, although it does not require utility in order to secure the benefit of its provisions, does require that the shape produced shall be the result of industry, genius, efforts and expense, and must, also, I think, be held to require that the shape or configuration sought to be secured, shall, at least, be new and original, as applied to articles of manufacture. But here the shape is a common one in many articles of manufacture, and its application to a reel cannot be said to be the result of industry, genius, efforts and expense. No advantage whatever is pretended to be derived from the adoption of the form selected by the plaintiff, except the incidental one of using it as a trademark. Its selection can hardly be said to be the result even of effort. It was simply an arbitrary, chance selection of many well-known shapes, all equally well adapted to the purpose. To hold that such an application of a common form can be secured by letters patent, would be giving to the act of 1861 a construction broader than I am willing to give to it.

The decree must, therefore, be for the defendant.

Case No. 18,037.

WOOSTER v. HOWE MACH. CO.

[4 Ban. & A. 319; 1 16 O. G. 314.]

Circuit Court, S. D. New York. May 24, 1879.

EQUITY PRACTICE—INJUNCTION.

Where a complainant moves for an injunction, and it is denied on defects pointed out, it is too late to renew his motion, on papers designed to cure such defects, if he wait until after the defendant has closed his proofs for final hearing.

[This was a suit by George H. Wooster against the Howe Machine Company. On motion for injunction.]

Frederic H. Betts, for complainant.

Benjamin F. Lee, for defendant.

BLATCHFORD, Circuit Judge. This suit, like the suits against Thornton, Blake, and

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

Handy, is, so far as the Johnston ruffler is concerned, substantially a suit against the Johnston Ruffler Company, as the four suits are all defended by that company. The fact that since the motions for injunctions in the suits against Thornton and Blake were denied, and before the present motion in this suit was brought, the proofs for final hearing on the part of the defendants in the Thornton and Blake suits were taken and the cases made ready for final hearing, so far as the defendants are concerned, is a sufficient reason for not now granting the motion for a preliminary injunction. Where a plaintiff moves for an injunction, and it is denied on defects pointed out, it is too late for him to wait until after the defendant has closed his proofs for final hearing, before renewing his motion, on papers designed to cure such defects. This view requires that the present motion be denied, without considering the question whether such defects are now cured.

[For other cases involving this patent, see note to *Wooster v. Blake*, 8 Fed. 429.]

WOOSTER (McKAY v.). See Case No. 8, 847.

Case No. 18,038.

WOOSTER v. MARKS et al.

[17 Blatchf. 368; 1 5 Ban. & A. 56; 9 Reporter, 201.]

Circuit Court, S. D. New York. Dec. 22, 1879.

INFRINGEMENT OF PATENT.

A man worked for the defendants by the piece, in the defendants' manufactory, and there used, in the defendants' business, folding guides, his own property, which infringed the plaintiff's patent. *Held*, in a suit in equity, that the defendants had infringed the patent.

[This was a bill in equity by George H. Wooster against Marcus Marks and others to enjoin the infringement of a patent.]

Frederic H. Betts, for complainant.
William A. Coursen, for defendants.

WHEELER, District Judge. Folding guides, for which the orator has a patent, have been used in the defendants' manufactory. The only question in this case is, whether they have been so used there as that the defendants are themselves liable for the infringement. They were procured and used by a man, whom one of the defendants, in his testimony, calls "our man," and who worked for them there and was paid for his labor by the piece, furnishing his own tools of this sort. They knew of this use of the guides, but not that they were patented, and stopped the use when they were informed of that fact. Under these circumstances, he was

¹ [Reported by Hon. Samuel Blatchford, Circuit Judge, reprinted in 5 Ban. & A. 56, and here republished by permission.]

using the guides for them, in their business. The mode of payment made it none the less so; and they, at least, participated in the tort which constituted the infringement. An action at law would lie for this participation, and this bill in equity, which rests upon the same foundation, although, in some respects, for different relief, will lie also. The question is not at all as to the extent of infringement, but only as to the fact of infringement at all. Upon the evidence as to that, although it was fairly debatable, it is found that the defendants have infringed to some extent.

Let a decree be entered for an injunction and an account, according to the prayer of the bill, with costs.

Case No. 18,039.

WOOSTER v. SIDENBERG et al.

[13 Blatchf. 88; 10 O. G. 244; 2 Ban. & A. 91.]¹
Circuit Court, S. D. New York. Aug. 3, 1875.

EXTENSION OF PATENT—RIGHTS OF LICENSEE.

W., during the first term of a patent for a folding guide for sewing machines, and while he was the sole owner of such patent, and was also interested in the sale of certain sewing machines, publicly authorized all purchasers of such sewing machines to use such folding guides without compensation. S. owned and used, during such first term, 125 of such sewing machines, and owned and was using, when such first term expired, 56 of such folding guides. The patent was extended. *Held*, that S. had a right to continue to use, during the extended term, such identical 56 folding guides.

[Cited in *Black v. Hubbard*, Case No. 1,460. *American Tube Works v. Bridgewater Iron Co.*, 26 Fed. 336.]

In equity.

Frederic H. Betts and William D. Shipman, for plaintiff.

Solomon J. Gordon, for defendants.

SHIPMAN, District Judge. This is a bill in equity [by George H. Wooster] praying for an injunction and an account, and is founded upon letters patent for a folding guide for sewing machines. The patent was issued to Alexander Douglas, on October 5, 1858, and was extended for seven years from October 5, 1872. In August, 1863, said Douglas conveyed an undivided half part of said patent to Samuel S. Sherwood. Douglas and Sherwood conveyed the patent to Nathaniel Wheeler and William Whiley, partners by the name of Wheeler & Co., on May 5, 1864, and said Whiley conveyed his interest therein to said Wheeler on May 29, 1868. The assignments to Sherwood and to Wheeler & Co. were respectively for the unexpired portion of the original term of the patent. In September, 1872, Mr. Douglas, the patentee, assigned all his interest in the invention and letters patent to the complainant to

¹ [Reported by Hon. Samuel Blatchford, District Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

whom, as assignee, the patent was reissued on December 10, 1872.

The answer of the defendants admits the grant, extension and reissue of the patent, denies the novelty of the alleged invention, and further alleges, that, at the time the bill was filed, the defendants "had in use fifty binders, substantially such as are described in the reissue, and no more, all of which binders they had in lawful use at the expiration of the original term of said patent, which lawful use they acquired in three independent ways"—First, by a license, in 1863, from Douglas and Sherwood to Gustavus Sidenberg; second, by a free license from Nathaniel Wheeler to all users of Wheeler & Wilson sewing machines; third, by a dedication of the patent to the public, by Douglas, the patentee. Upon the trial, the validity of the patent was admitted, and the defendants solely relied upon the right which they had obtained by the two licenses, to continue the use of those binders which were in use at the expiration of the original term of the patent.

The defendants commenced business as manufacturers of ladies' linen collars and similar articles, about January 1, 1863. On October 5, 1863, Gustavus Sidenberg obtained a license from Douglas and Sherwood to use the folding guide for which Douglas had obtained a patent. By the provisions of this license, the licensee agreed to pay, in addition to his original payment of fifty dollars, the sum of five dollars for each guide which he should use, and, if he used, at any time, any guide without having first paid said five dollars, as an additional compensation for the right to use the same, the license should be null and void, and the licensee should also be deemed guilty of infringing said patent. Gustavus Sidenberg paid Douglas and Sherwood fifty-five dollars, on or about October 5, 1863. Nothing more was paid to them, or their assignees, by either of the defendants. On October 5, 1872, the defendants were using in their factory fifty-six Douglas guides, of which number forty-six had been made by William Pries, an employee of the Wheeler & Wilson Manufacturing Company, and ten had been made by William Brockmann, an employee of the defendants. The guides which Brockmann made were destroyed in a few days after the date of the reissue. Prior to 1864, Nathaniel Wheeler was president of the Wheeler & Wilson Manufacturing Company, a corporation for the manufacture of sewing machines, and, in May, 1864, the firm of Wheeler & Co., of which he was a member, became the owner of the Douglas patent. During his ownership of this patent, he authorized all persons who used the Wheeler & Wilson machine to use the Douglas guide, whenever they had occasion to do so, without compensation. The patent was apparently held by Wheeler & Co. for the benefit of the Wheeler & Wilson Company, and to promote its interests, and, with that object in view, Mr. Wheeler gave a parol and general authority to all users of the Wheeler & Wil-

son machines to procure, use and continue to use the Douglas attachment, if they chose so to do. The complainant urged, upon the trial, that this permission of Mr. Wheeler was limited to a permission to the owners of Wheeler & Wilson machines, to obtain, without royalty, the Douglas guide from some one of the employees of the company. It is true, that, upon cross-examination, in reply to the following question, "You say, in your direct examination, that you authorized those using the Wheeler & Wilson machine to use said patent, whenever they had occasion to do so, without compensation. Can you name any person to whom you gave such permission? If so, name all you can remember,"—Mr. Wheeler said, "I gave permission to the employees of our company to make the binders, on their own account, for such customers using our machines as might require them. I cannot call to mind the names of any such customers at this time." I do not understand from this portion of Mr. Wheeler's testimony, that he intended to say that he confined the use of the patent to those customers only who should procure the guides from the employees of the Wheeler & Wilson Company. He had previously said that all those who used the machines had authority to use the guides, and, upon being requested to give the names of all persons to whom he had given such permission, replied that he could not recall the names of the customers, but he did remember that he specifically permitted the employees of the company to make binders for all such customers as might require them. The witness did not intend to restrict the comprehensive character of the language which he had previously used. The defendants owned and were using in their business prior to October 5, 1872, about one hundred and twenty-five Wheeler & Wilson sewing machines.

The material question, which arises upon the foregoing facts, is, have the defendants a right, by virtue of the authority conferred by Mr. Wheeler, to continue the use of the guides which were in use at the expiration of the original term of the patent?

The license of Douglas and Sherwood affords the defendants no protection. By the terms of that license, they had a right to use only such guides as had been previously paid for, and, in respect to the use of all other guides, had declared themselves to be infringers. They had paid Douglas and Sherwood for one binder only, and were in the lawful use under those licensors, of no binder except the one for which they had paid. The right to use additional binders never existed. *Steam Cutter Co. v. Sheldon* [Case No. 13,331].

But, the right of the defendants which was obtained through Mr. Wheeler is of a different character. He had publicly authorized all purchasers of the sewing machines in the sale of which he was interested, to use these guides without compensation. The consideration which moved him to give this permission was one with which he was satisfied. Prior to the

date of the expiration of the original term, he would not have been allowed to prevent the defendants from the use of the binders which they had theretofore purchased. Probably all the guides which they then had in their possession were made after the assignment to Wheeler & Co., and, if a few were in existence prior to that date, the use of these few, which was originally unlawful, had become lawful by the license of Mr. Wheeler, the assignee.

But, it is said, that, admitting that Mr. Wheeler could not have stopped the use of those fifty-six binders, it does not follow that the defendants have the right to their continuing use after the expiration of the original term of the patent, for the following reasons: The statute (section 4928, Rev. St. U. S.) provides, that "the benefit of the extension of a patent shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their interest therein," and the right granted by Mr. Wheeler was a mere license, and neither an assignment nor a grant, within the meaning of this section, nor a sale of the binders, and a party seeking the protection of the act must be a purchaser of the patented article, or be protected by some agreement of sale which the owner of the original patent had a right to make, who, in this case, had not a right to license the use of the binder during the extended term.

The supreme court had occasion, in *Mitchell v. Hawley*, 16 Wall. [83 U. S.] 544, to consider this clause of the patent act, and to point out the "distinction between the grant of the right to make and vend the patented machine, and the grant of the right to use it." They say: "A patentee, when he has himself constructed a machine, and sold it, without any conditions, or authorized another to construct, sell, and deliver it, or to construct, and use, and operate it, without any conditions, and the consideration has been paid to him for the thing patented, the rule is well established, that the patentee must be understood to have parted, to that extent, with all his exclusive right; and that he ceases to have any interest whatever in the patented machine so sold and delivered, or authorized to be constructed and operated. Where such circumstances appear, the owner of the machine, whether he built it or purchased it, if he has also acquired the right to use and operate it during the lifetime of the patent, may continue to use it until it is worn out, in spite of any and every extension subsequently obtained by the patentee, or his assigns." Mr. Wheeler had authorized these defendants, being customers of the Wheeler & Wilson Company, to construct, and use, and operate, without any conditions, fifty-six binders. The consideration for this grant was paid to the owner of the patent by the purchase of Wheeler & Wilson sewing-machines. The defendants thus became owners of the guides which they used, and, by such ownership, and the right which they acquired from Mr. Wheeler, they acquired the right to use and operate

the machines until they were worn out. They were not simply licensees of the right to use a machine of which they were not the owners, but the machines had become their "private, individual property." "Complete title to the implement or machine purchased becomes vested in the vendee by the sale and purchase, but he acquires no portion of the franchise, as the machine, when it rightfully passes from the patentee to the purchaser, ceases to be within the limits of the monopoly." *Mitchell v. Hawley*, 16 Wall. [83 U. S.] 548.

I perceive no substantial difference between the case of these defendants and the case of the complainant against Gilmour, which was an application for a temporary injunction against the use of certain Douglas guides, and was decided by Judge Blatchford, April 29, 1873. Gilmour, prior to the expiration of the original term, was in the use of four Douglas guides, upon as many Wheeler & Wilson sewing-machines. It is true, that Mr. Wheeler's affidavit in the Gilmour case contained a more detailed statement of the character and extent of the license, than was given in his deposition in the present case; but the facts which he stated are the same in each case. In the Gilmour affidavit he says: "I intended that all patrons of the Wheeler & Wilson Manufacturing Company should be at liberty to make and use Douglas binders whenever and wherever they wished, without charge or liability of any kind, to anybody. * * * All parties were told to make their own binders. I permitted the employees of the company, for the convenience of parties using Wheeler & Wilson machines, to make Douglas binders for them, and retain to themselves the prices paid. Full liberty and license was given all persons using Wheeler & Wilson machines, to use, in their business, without charge, all the Douglas binders they had in use when I became an owner in the Douglas patent before named, and to procure where they pleased, and continue to use, until worn out, all additional Douglas binders that their business required." Upon these facts, Judge Blatchford held, that, "within the principle laid down in *Wyeth v. Stone* [Case No. 18,107], it is quite clear, that, as against Wheeler, who was the sole owner of the Douglas patent for more than four years before it expired, the defendant was in the lawful use, before and at the time the first term of the patent expired, of the four binders he was using when such first term expired. Wheeler could not have been heard to stop the defendant from the use of such four binders. The defendant was, within the meaning of the sixty-seventh section of the act of July 8, 1870 (16 Stat. 209), a grantee of the right to use such four binders, and, therefore, has a right to use, until they are worn out, the identical four binders which he was using when the first term of the patent expired. As to all other binders, the injunction is granted."

After the réissue, and before the filing of the bill, the defendants caused to be made, and used in their business, from fifteen to eighteen

"two-line" binders, which were supposed not to have been included in the reissue. Upon ascertaining that these binders were Douglas binders, the defendants caused them to be destroyed, in March or April, 1873. For the use of these binders the defendants are liable.

Let there be a decree, without costs, for an account of damages and profits for the use of these last named binders prior to their destruction, and an injunction against the use of binders described in the reissued patent, other than the identical forty-six binders which are now in lawful use.

[For other cases involving this patent, see note to *Wooster v. Taylor*, Case No. 18,040.]

Case No. 18,039a.

WOOSTER v. SINGER MANUF'G CO.

[15 Reporter, 524; 1 23 O. G. 2513.]

Circuit Court, S. D. New York. April 10, 1883.

PATENTS—REVOCAION OF LICENSE—SUIT FOR INFRINGEMENT—COVENANT NOT TO CONTEST.

The defendant took a license from plaintiff and agreed not to contest the validity of the patent. Subsequently plaintiff revoked the license and sued defendant as an infringer. *Held*, that the commonly expressed judicial opinion is that in such a case the defendant is at liberty to avail himself of any defence ordinarily open to any defendant who is charged with infringement.

Bill in equity founded upon infringement of letters patent. Defendant pleaded a license to make and sell the articles embodying the inventions described in the patent. In the agreement for a license defendant covenanted that it would not contest the validity of the patents. Plaintiff revoked the license on account of defendant's breach of the conditions of the agreement. Defendant since that time has sold articles which embodied the inventions described in the letters patent and has kept them in stock for sale.

F. H. Betts, for plaintiff.

B. F. Lee and J. F. Dillon, for defendant.

SHIPMAN, District Judge, in delivering the opinion of the court, said:

² [There are two corporations, each called the "Singer Manufacturing Company,"—one, a joint stock corporation, incorporated in 1863, and located in the city of New York; the other, incorporated in 1873 by the legislature of the state of New Jersey, and a citizen of that state. Mr. George Ross McKenzie, general manager of the New Jersey corporation, testifies that that company was an incorporation of the same persons who composed the New York company; that since the organization of the New Jersey company it is the one under which entirely the business of the Singer Manufacturing Company has been done; that all the property of the New York corporation has been transferred to the other

company; that the officers of each company are the same; and that the principal financial office of the New Jersey corporation is at the same place in New York City where the office of the New York corporation was before the new company was formed. The New York company has a distinct legal existence, and is apparently a legal person, and these two corporations have not become a unit; but the property which was formerly owned, and the business which was formerly done, by the old corporation have been transferred to the new organization.

[On July 2, 1875, the plaintiff, who was about to apply for the two reissues which were afterward obtained, and which are the subject of this bill, entered into two written agreements with the New Jersey corporation for licenses when the reissues should be granted. These agreements were evidently intended to be memorandum agreements, and to be the basis upon which formal licenses, "with the usual clauses, and provisions of licenses of such character," were to be subsequently drawn, and such formal licenses were to be the fulfillment of the preliminary agreements.

[On October 8, 1875, and after the reissued letters patent had been issued, a carefully drawn agreement of license (which was the completed contract contemplated by the agreements of July 2) was entered into between the plaintiff and the New Jersey corporation. The seal of the New York corporation was attached to this agreement, I presume, by inadvertence, for the testimony of Mr. McKenzie, and the fact that the agreements of July 2 were undoubtedly with the New Jersey corporation, leave, in my mind, no room for doubt that the agreement of October 8 was in fact with the same corporation.

[Great stress is laid by the defendant upon the testimony of the plaintiff, as a witness in his own behalf, that he had never granted licenses to the New Jersey corporation, and upon the change of front which the plaintiff's counsel made after the testimony had been taken. It is evident that, until Mr. McKenzie testified, the relations between the two corporations and the fact that the younger corporation alone was in active business, were not well understood by the plaintiff and Mr. Comstock, his attorney, and it may very well be that Mr. Wooster supposed that he could properly say that his contracts were with the New York corporation; but Mr. McKenzie's knowledge of the part which that company had in the business which was done under the name of the "Singer Manufacturing Company" must be much more intimate than that of any other person, and his testimony is convincing that the New Jersey corporation was the licensee.

[In the contract of October 8, 1875, the defendant admitted the "force and validity of said letters patent, and all reissues thereof," and covenanted that it would not contest,

¹ [Reprinted from 15 Reporter, 524, by permission.]

² [From 23 O. G. 2513.]

not aid, or assist, or advise others to contest, in law or equity, the validity of said patents, or any reissue thereof. It was also provided that, "upon the failure of the party of the second part at any time faithfully to carry out and perform any or either" of the conditions of the contract, the plaintiff could revoke and annul the agreement, in which case the agreement, and all right and privileges of the defendant, should cease and determine.

[On November 28, 1879, the plaintiff, on account of the defendant's breach of the conditions of this agreement, revoked and annulled the license, and gave written notice of this revocation to the defendant. Since November 28, 1879, the defendant has sold articles which embodied the inventions, and described and claimed in said letters patent, and has kept such articles in stock for sale. No examination was had in regard to the infringement, and I suppose that that fact is conceded.]²

The plea must be overruled, but an important question which has been discussed in the elaborate briefs of counsel is whether the customary permission to answer shall be granted with or without restrictions upon the contents of the answer. The defendant was a licensee of sundry patents, and by its contract of license has bound itself not to contest the validity of the named patents or of any reissue thereof, and had enjoyed the benefit of the license for a time. The plaintiff revoked the license on account of the defendant's breach of its agreements therein, and now sues the licensee as a naked infringer. The point is whether, such facts appearing on the record, the defendant is remitted to all its former rights, and, being sued as an infringer, can defend as an ordinary infringer. I have heretofore shared the doubts which are expressed by Mr. Curtis (Curt. Pat. 4th Ed.) whether the language of Justice Nelson in *Woodworth v. Cook* [Case No. 18,011] is to be understood as deciding that a defendant, who had made a definite agreement in his contract of license not to contest the validity of the patent, was, when sued as an infringer after a revocation of the license, remitted to all the rights which he enjoyed before the license, and have doubted, when the fact of a license and of a covenant not to deny the validity of the patent and of an enjoyment of the benefit of the license were found by the court to exist, whether the defendant was in a proper position to deny the validity of the patent. But the more commonly expressed and presumably therefore better judicial opinion is to the effect that when the license has been revoked by the plaintiff and the bill treats the defendant as a naked infringer, he is at liberty to avail himself of any defence ordinarily open to any defendant who is charged with infringement.

² [From 23 O. G. 2513.]

Burr v. Duryee [Id. 2,190]; *Pelham v. Edelmeyer*, 15 Fed. 262; *White v. Lee*, 14 Fed. 789. I have, therefore, contrary to the opinion expressed after the hearing, determined to draw the decretal part of the order in the ordinary form, without deciding either in favor of or against the claim of the plaintiff, that the answer ought not to contest the validity of the patent, so as to have the question of the extent of the defendant's answer to be decided upon a motion or hearing in which the question shall be directly at issue. Ordered accordingly.

Case No. 18,040.

WOOSTER v. TAYLOR et al.

[12 Blatchf. 384; 1 Ban. & A. 594; 8 O. G. 644.]¹

Circuit Court, S. D. New York. Dec. 19, 1874.

PATENT FOR INVENTION—ACCEPTANCE OF LICENSE
—ESTOPPEL TO ATTACK PATENT.

1. A patent was extended, and assigned, as extended, to W., who entered into an agreement in writing, under seal, with T., which set forth that T. was "desirous of obtaining" a license to use the improvements covered by the patent, to the extent of the use of the article necessary to his business, and that, in consideration of the performance by T. of the covenants in the agreement, W. granted to T. the license to use the improvement to said extent for one year, at a specified place, "and not longer, otherwise or elsewhere, without written permission of W., and that T. agreed to pay a specified patent fee, and to stamp each article with the dates of the patent and of the extension, and the words "Licensed to T. only," and that W. might revoke the license on the failure of T. to perform any of said conditions, in which case it should cease, and that the license was a personal privilege to T. and no right to use the article should, under it, be vested in any purchaser or user of it, other than T. After the expiration of the one year, T. continued to use 19 of the articles, claiming that he had them lawfully in use at the expiration of the first term of the patent, and that, by virtue of section 67 of the act of July 8, 1870 (16 Stat. 209), he had a right to continue the use of them so long as they remained capable of use. W., on bill filed, applied for an injunction to restrain such use. *Held*, that, as T. knew all the facts relied on, when the first term expired, and when such license was given, under the extension, he waived, by taking such license, any rights which he then had to use the 19 articles; that a mistake of the law could not avail to destroy the force of the covenants in the license; that, although the term of the license had expired, T. was bound and estopped by the recitals and covenants in it; and that the injunction must be granted.

2. As the license was granted at a nominal sum, for special reasons, it would be inequitable to allow T. to evade the force of the terms of the license, when he did not set up, at the time it was granted, any then existing right to use the article.

[This was a bill in equity by George H. Wooster against Edmund W. Taylor, Jr., and Margaret Woodbury, to enjoin the infringement of letters patent No. 21,659, granted to

¹ [Reported by Hon. Samuel Blatchford, District Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

A. Douglas October 5, 1858, and reissued December 10, 1872,—No. 5,180.]

William D. Shipman and Frederic H. Betts,
for plaintiff.

L. E. Chittenden, for defendants.

BLATCHFORD, District Judge. The plaintiff is the owner of reissued letters patent granted to him, December 10, 1872, for an "improvement in folding guides for sewing machines." The original patent was granted to Alexander Douglas, as inventor, October 5, 1858, and was extended to him for seven years from October 5, 1872. The patent, as extended, was assigned to the plaintiff, and the reissue was granted to him, as assignee. The plaintiff now applies for a preliminary injunction to restrain the defendants from using folding guides, or binders for sewing machines, in violation of the patent.

The defendants have nineteen of such guides which embody the invention covered by the patent. They claim the right to continue their use, on the alleged ground that the nineteen guides were lawfully in use when the first term of the patent expired. The lawful use set up is an alleged verbal permission or license given by Douglas, the inventor, during the first term, in pursuance of which it is claimed the nineteen guides were made and put into use. The giving of the permission is denied, and it is further claimed on the part of the plaintiff, that, at the time when the permission is alleged to have been first given, and during all the time thereafter until the expiration of the first term, the title to the patent for the first term had passed out of Douglas, and was held by one Wheeler, so as to make such permission invalid for want of power in Douglas to grant it. But, in the view I take of the case, it is not necessary to consider any questions arising out of the foregoing matters, for the reason that another aspect of the case is controlling against the defendants.

The right to use, set up by the defendants, is claimed, as matter of law, under the provision of section 67 of the act of July 8, 1870 (16 Stat. 209), which declares, that "the benefit of the extension of a patent shall extend to the assignees and grantees of the right to use the thing patented, to the extent of their interest therein." The alleged facts set up as constituting a lawful use of the nineteen guides at the time the first term of the patent expired, were known to the defendants at the time such first term expired. After the extension had been granted, and after the patent, as extended, had been assigned to the plaintiff, an agreement in writing, under seal, was entered into between the plaintiff and the defendants. This instrument, which is dated October 5, 1872, after reciting the granting of the patent, and its extension, and its assignment to the plaintiff, sets forth, that the defendants "are desirous of obtaining a license to use the improvement secured by

said letters patent, to the extent of the use of binders necessary to their business," and that the plaintiff, "for and in consideration, and in case of, the due and faithful keeping and performing of each and all of the conditions, agreements and admissions hereinafter contained to be kept and performed by the" defendants, has granted to the defendants the license "to use the said improvement to said extent, for and during the space of one year from the date hereof, at their place of business, No. 55 Hudson street, in the city of New York, and not longer, otherwise or elsewhere, without written permission of" the plaintiff. The instrument then proceeds to say, that the defendants agree to pay to the plaintiff, as a patent fee, the sum of \$100, and agree to stamp on each folding guide used, the words: "Patented October 5, 1858; extended September 24, 1872; licensed to Taylor & Woodbury only." There are agreements by the defendants not to contest the validity of the patent, and not to refuse to pay the license fee, although other parties contest the patent, and then the instrument provides, that, on the failure of the defendants to perform any of said conditions and promises, the plaintiff may revoke and annul the license, "in which case, this license, and all rights and privileges hereunder, shall forever cease and determine." The instrument further provides, that the license is "to be considered solely as a personal privilege" to the defendants, "and no folding guide licensed hereunder is to be considered as lawfully made, so as to vest any property for sale of the same in the user, or so as to permit the said guide to be transferred, so as to vest in the purchaser or user other than" the defendants "any right to use the same."

It is contended for the defendants, that the taking of this license to use an unlimited number of guides for one year was no waiver of any right which they had, because the license was taken under a mistake of law, they not having at that time been advised that they could set up, in law, the right to use which they now set up, and because the license covered more guides than the nineteen then in use; and that, when the license expired, the defendants were remitted to all rights which they had at the time the license was taken.

These views, it seems to me, are not sound. On the contrary, whatever rights the defendants had, when they took the license, in respect of the further use of the guides, they waived and surrendered by taking the license, containing the provisions it does contain. The defendants expressly show that they have never used any guides but the identical nineteen. The license sets forth that they are desirous of obtaining a license to use the invention patented, to the extent of the use necessary to their business, which includes the further use of the nineteen guides. This is inconsistent with their then having a right to use the nineteen, without

the new license. The license is not limited to guides in excess of the nineteen. Then, the license is to use the guides to the necessary extent (and which necessity is shown to have extended to the use of no greater number than the nineteen), for one year "and not longer" or otherwise, without written permission of the plaintiff, and the keeping of the agreements made by the defendants is declared to be the consideration and condition of the granting of the license by the plaintiff. Then, each one of the guides used (which includes the nineteen) is to be stamped as "licensed," and the form of stamp given means a license under the extension and a license under such written license. The further provisions of the license, as before recited, confirm this view. No mistake of fact is alleged nor any fraud on the part of the plaintiff. Mistake of law furnishes no ground for escaping the force of the covenants in the license. Although the term of the license has expired, the recitals and covenants in it bind and estop the defendants. One of those covenants is, that, in consideration of the license for one year, the guides are to be used for no longer than one year.

It appears, by an endorsement on the license, and it is shown to be the fact, that the license was granted for the sum of \$100, as a nominal sum, at the special request of Douglas, and that such sum was not to be considered as a sum to govern the price of any other license. The defendants not having set up, when the license was granted, any existing right to use the nineteen guides, and the plaintiff having licensed such nineteen guides for a nominal sum, for a special reason, it would be inequitable to allow the defendants to evade the force of the terms of the license, for the plaintiff has allowed them to enjoy for one year, without molestation and for a nominal sum, the use of the nineteen guides, when it is manifest that he would not have allowed such use under the claim now set up, without resistance.

The motion for an injunction must be granted.

[For subsequent proceedings, see Case No. 18,041. For other cases involving this patent, see *Wooster v. Seidenberger*, Case No. 18,039; *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788.]

Case No. 18,041.

WOOSTER v. TAYLOR et al.

[14 Blatchf. 403; 3 Ban. & A. 241.]¹

Circuit Court, S. D. New York. Feb. 15, 1878.

INFRINGEMENT OF PATENT—RECOVERY OF PROFITS.

Where the profits made by a defendant from the unlawful use of a patented invention amount to more than the license fees for such use would amount to, the plaintiff, although exercising his

monopoly by the granting of licenses, is entitled to recover such profits, on an accounting for profits, and is not limited to such license fees.

[This was a bill in equity by George H. Wooster against Edmund W. Taylor, Jr., and Margaret Woodbury, to enjoin the infringement of letters patent No. 21,659, granted to A. Douglas October 5, 1858, and reissued December 10, 1872,—No. 5,180. The motion for an injunction was granted (Case No. 18,040), and the cause is now heard on exceptions to the master's report.]

Frederic H. Betts, for plaintiff.

James M. Townsend, for defendants.

WHEELER, District Judge. This cause has been heard on report and supplemental report of the master filed therein, exceptions thereto and argument of counsel. The reports show that the orator does not manufacture or sell his patented articles, but relies on license fees for his income from his patent; that such license fees, for the unlicensed use made by the defendants, paid at the beginning of each year, according to his rule, would amount to fourteen hundred dollars; that they were stopped soon after the commencement of the second year, by an injunction issued in this cause, on motion of the orator; and that the profits actually realized by the defendants, from the use they had, amounted to nineteen hundred sixteen dollars and twenty-eight cents. Among other exceptions, the defendants have filed some that raise the question whether the orator is entitled to recover anything beyond the amount of what his license fees would have been; and, if not, whether those should not be apportioned to the time they were suffered to use the invention. No other exceptions, besides those raising these questions, are insisted upon.

If the defendants had yielded to the orator's claims, and taken and paid for the licenses, the profits realized would have been theirs, and the orator would have had no just claim upon them. As they did not, the use they had of the invention was not theirs, but was the orator's, and what they realized from it, by force of the law, became his, and was not their own. By the express provision of the statute on this subject, the plaintiff is "entitled to recover, in addition to the profits to be accounted for by the defendant," the damages sustained by the infringement. Rev. St. U. S. § 4921. This shows, that, in contemplation of law, the profits actually realized by the infringer belong to the patentee, and, that, when the profits would not compensate for the damages sustained, as they might not, in many cases, he is entitled to the damages beyond.

When it comes to the measure of damages, as distinguished from profits, in cases like this, the loss of the license fees might be the limit of the patentee's loss. But they are not, in any such case, the measure or limit

¹ [Reported by Hon. Samuel Blatchford, Circuit Judge, and by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission.]

of the infringer's gain. So, on many questions of damages strictly such, the license fees are evidence of damage, and, sometimes, the limit of recovery of damages, but cannot be evidence, and, much more, not a limit, of profits to be accounted for.

If the question of damages beyond profits was reached, and of any importance, it may be that the stoppage of the use of the patent by the injunction would make an apportionment of the license fees lawful and proper. But, as the profits exceed the damages, in any mode of reckoning the license fees, it is not necessary to consider the question made in that respect.

The exceptions are overruled, and the reports accepted and confirmed for the larger sum.

WOOTEN (VINING v.). See Case No. 16,949.

Case No. 18,042.

WOPE et al. v. HEMENWAY.

[1 Spr. 300; 1 18 Law Rep. 390.]

District Court, D. Massachusetts. July, 1855.²

SHIPPING ARTICLES—CONSTRUCTION—DESCRIPTION OF VOYAGE—IMPRISONMENT OF SEAMEN.

1. If a clause in shipping articles is ambiguous, or susceptible of two constructions, one favorable and the other unfavorable to the seamen, the construction favorable to the seamen shall be adopted, it not being their fault that the owners did not make the articles clear.

[Cited in Goodrich v. The Domingo, Case No. 5,543; The Quintero, Case No. 11,517; The Samuel Ober, 15 Fed. 622.]

2. In a shipping paper, the words, "voyage from Boston to Valparaiso or other parts of the Pacific Ocean, at and from thence home direct, or via ports in East Indies or Europe," do not describe a voyage with sufficient certainty within the United States statutes, for the protection of seamen, and do not bind the seamen to service after arrival at Valparaiso.

[Cited in The Gem, Case No. 5,304.]

3. If seamen, from an honest mistake of their right to a discharge, peacefully refuse labor, it will not justify their imprisonment on shore.

³ [This was a case for seamen's wages. Libellants were respectable men, natives of Sweden, were going to California, and had partly engaged a direct passage to San Francisco. A shipping master from Mr. Hemenway called at their boarding house in Boston, and offered them wages to go to Valparaiso in the ship Loo Choo, as seamen. He told them they had better earn wages to Valparaiso, and they could always easily get a passage from Valparaiso to San Francisco. Libellants went and looked at the ship and her accommodations, and after conferring together, concluded to go in her. Upon returning to the boarding house, the shipping

master produced the shipping paper for them to sign. The men hesitated, and refused to sign unless a stipulation should be put in that they should be discharged upon arrival at Valparaiso. The shipping master told them that they were green; that they would be discharged there. They replied they knew they were green, but they feared difficulty if the articles did not express the agreement. The shipping master then said he would write it in the articles if that would satisfy them, and taking a pen he wrote upon the paper, when they signed it, joined the vessel, and continued on board till her arrival at Valparaiso. In the meantime, there was mutual good feeling and satisfaction in every particular between the officers and these men. Having moored the ship, and made everything snug on board in the harbor of Valparaiso, they packed up their clothes, dressed themselves, and asked (as the chief mate said) respectfully to be discharged and paid off. The captain refused to discharge them. They reminded him that such was their agreement, and referred him to the articles. The captain produced the articles, and the seamen pointed out to him the clause (against these six seamen's names) to which they had alluded, which was discovered to read thus: "Monthly 14, and to have \$15 if he perform the voyage and return in the ship to Boston." But the captain finally decided that he would not discharge them. The seamen asked to see the consul. The captain went and brought to them the consul's clerk, the consul being absent, who read the articles to the men; and when he came to this clause he said, "Captain, I can do nothing with these men; you have got two rates of wages in the alternative on your articles." Yet, he said, the captain had power to discharge them if he would. After declining to do anything officially, he told the men they had better continue with the ship; but they refused, and the captain refused to discharge them. The clerk then asked the captain if he could be of any service to him, and what he was going to do with the men, and the captain asked the clerk to get them put in prison for him. The seamen, persisting in refusing further duty on board, were committed to prison without being allowed to take any change of clothes. They were kept in prison thirty-five days,—one day each in solitary confinement in separate cells, and thirty-four days in a prison room about thirty feet long and twenty feet wide, having two grating windows, besides a grating door, its only passage for air and light. Here they were incarcerated thirty-four days, in company with all sorts of criminals, afflicted with various and loathsome diseases, numbering never less than one hundred, and part of the time over two hundred, crowded into the same room so thickly as to be unable part of the time to lie down, and having no berths, beds, nor bedding. The food consisted of bread,

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

² [Affirmed in Case No. 13,149.]

³ [From 18 Law Rep. 390.]

and a peculiar mixture of Chili beans, peas, barley, and Chili pepper, etc., mixed up together. Once a day, each morning, each seaman was served with bread, equal to a sea biscuit in quantity, with water, and nothing else. And once a day, each evening, the pepper mixture was served out in little iron kettles, holding about a gallon each. One of these kettles full was allowed to ten prisoners, and nothing else. Nothing to eat with but their hands, nor anything else with which to scoop it out of the kettle. The Chili pepper mixture was perfectly unpalatable to the libellants, who abstained from eating it until they found the allowance of bread alone insufficient to sustain life; and as soon as they did eat the said Chili pepper mixture, all but one of libellants became sick, two of them prostrated with sickness for days, and swelled up, and unable to rise up at all. They were not able to get an interview with the consul while in prison, and no interview with the captain till a day or two before they were taken out, when the captain called for a moment at the grating and spoke to one of them, but left before the others could make their way to the grating. At the expiration of thirty-five days the libellants were taken out of prison, and put on board the vessel. They were then covered with vermin. They asked to see the consul himself, who was then at home, but were refused; and, still refusing to go in the vessel, three of them were put in irons, with arms suspended above a span around a stanchion between decks, and deprived of food about thirty-six hours, when they consented to turn to, and thence they continued faithfully at service until the vessel arrived in Boston, submitting to perform their duty to the entire satisfaction of the officers during the remainder of the voyage. As to the aforesaid clause in the articles on which the seamen relied, as providing for their discharge at Valparaiso, the defendant produced his shipping master, who swore that he wrote that clause in one set of the articles in Mr. Hemenway's office, by the special direction of Mr. Hemenway, and that this was so written on the articles over the seamen's names, after they had signed the same articles, and had gone aboard the vessel. It further appeared in evidence from the articles that the voyage therein described was in these words: "Voyage from Boston to Valparaiso and other ports in the Pacific Ocean, at and from thence home direct or via ports in the East Indies or Europe."³

C. G. Thomas, for libellants.

William Delion, for respondents.

SPRAGUE, District Judge. This is a libel for seamen's wages on a voyage from Boston to Valparaiso and back. That the services were rendered is not denied. But the defendant insists that deduction should be

made for the expenses of the imprisonment of the libellants at Valparaiso. The libellants contend that the imprisonment was unlawful, and they present three distinct grounds of illegality: (1) That by the express agreement made at the time they shipped, they were to be discharged at Valparaiso. (2) That the shipping articles do not describe the voyage as required by the laws of the United States, and the master had no right to detain them after arriving at Valparaiso. (3) That even if the master had a right to detain them, he had no right to imprison them on shore, in a foreign country.

1. What was the contract, when these men shipped at Boston? Six witnesses swear positively that the contract was, that the libellants should be discharged at Valparaiso, and that when the shipping articles were signed, they insisted that an entry of that fact should be made upon them, and that the shipping master then wrote something upon the articles, which he said would show their right to such discharge. Against this there is only one witness, the shipping master himself, who denies that there was any such agreement.

In weighing this testimony, it is to be considered that five of the witnesses for the libellants are seamen, having an interest in this question, and swearing for each other; and their testimony is to be closely scrutinized, and received with great caution; but, upon the strictest scrutiny, they have testified with great consistency, with apparent frankness, and more than ordinary intelligence for men of their class. The other witness for the libellants was a landlord, with whom they boarded at the time they shipped. He may have sympathy for the libellants, but does not appear to have any interest to bias his testimony.

The sole witness for the respondent is his agent, the shipping master. His conduct is in question, and his explanation of an entry made by him, on the shipping articles, is not satisfactory. His testimony would not outweigh that of the landlord alone. But, beside this, there are two circumstances that go to corroborate the testimony of the libellants' witnesses.

The first is, that, after having fully and faithfully performed their duty, until the arrival of the ship at Valparaiso, they at once confidently claimed their discharge, as a matter of right, which being refused, they immediately referred to the shipping articles, then in possession of the master, as showing their right to be discharged. These articles they had never seen after they were signed, and yet instantly and confidently appealed to them, as decisive in their favor.

The other circumstance is the unusual entry which is found on the articles, upon their production. These articles were prepared by the shipping master for the officers and the rest of the crew, as well as for the libellants. In the usual column, against the

³ [From 18 Law Rep. 390.]

names of the seamen, were the figures "14," as their monthly wages, and opposite to their names, in the blank space, was made this entry: "To have \$15 per month, if he performs the voyage in the ship and returns to Boston." That entry is a part of the written contract. It contains a condition, "if he shall perform," &c.

The respondent insists that the contract was absolute. If so, why was this condition written upon the articles? The entry was made by the respondent's agent, in such language as he chose to adopt. It was made for the purpose of satisfying the seamen that they would be discharged at Valparaiso, and if the shipping master did not intend that it should express that right, it was a fraud upon them. He might have made it in language clear and explicit. If he has not done so, but left it ambiguous, the seamen are not to be prejudiced by such ambiguity. Upon the whole evidence, it is satisfactorily shown that the seamen were entitled, by contract, to their discharge at Valparaiso.

2. As to the second ground, viz., the insufficiency of the articles. The description of the voyage is as follows. "From Boston to Valparaiso or other parts of the Pacific Ocean, at and from thence home direct, or via ports in East Indies or Europe."

This description is not sufficiently definite. It gives to the owner and master of the vessel, such a power over the seamen, as is inconsistent with the provisions of the statutes of the United States, intended for their protection; and, for that reason, the seamen would not have been bound by the articles to any service after arriving at Valparaiso. On both these grounds, therefore, any coercion of the master to compel the performance of duty at Valparaiso was illegal.

3. But even if the seamen had mistaken their right, and were bound to perform duty, the master had no right to send them to a prison on shore, and especially to such a prison. These men merely claimed their discharge, and refused further labor, on the ground of right. They did so peacefully and respectfully; there were no threats or intimations of force; if it was necessary to restrain or imprison them, it should have been done on board of the vessel, as it might have been, without danger, and where they would have been under the eye of their own officers. In such case, the law does not allow the master to thrust his men into a foreign jail, and there expose them to all the privations, sufferings, and hazards of disease. Upon all these grounds, the imprisonment of the libellants was unlawful, and they cannot be required to pay the expense of such imprisonment.

Decree for the libellants.

After the decision of the above libel for wages, six suits by the libellants against the master, for the unlawful imprisonment were tried, and an opinion was pronounced by the

court in favor of the libellants; and, the defendant having stated that he should take an appeal therefrom, the libellants' counsel said that, as to one of them, he would ask for a decree of only \$50, because his client was unable further to litigate, and a decree for that amount only was rendered for that libellant, and an appeal in that case refused. As to the others, the appeal was allowed.

The decree was affirmed upon appeal. See *Snow v. Wope* [Case No. 13,149]. That any ambiguity, uncertainty or obscurity in the articles, is construed most favorably to the seamen, see *Jansen v. The Theodor Heinrich* [Id. 7,215]; *The Hoghton*, 3 Hagg. Adm. 111. As to imprisonment of seamen in foreign gaols, see *The Mary* [Case No. 17,823]; *Gardner v. Bibbins* [Id. 5,222.]

WOPE (SNOW v.). See Case No. 13,149.

WORCESTER (DUNKLE v.). See Case No. 4,162.

Case No. 18,043.

WORCESTER et al. v. TRUMAN et al.

[1 McLean, 483.]¹

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

BREACH OF INJUNCTION — ENFORCEMENT OF PENALTY.

1. A rule to show cause why an attachment should not issue, for breach of an injunction, is not the mode of proceeding in this court.

[Cited in *Fanshawe v. Tracy*, Case No. 4,643; *U. S. v. Anonymous*, 21 Fed. 767.]

[Cited in *Hawkins v. State*, 126 Ind. 296, 26 N. E. 44.]

2. A motion should be made that the defendant stand committed for a breach of the injunction, and this motion is made on notice being given to the defendant.

3. No notice having been given in this case, the court overruled the motion for an attachment.

Chase & Fox, for complainants.

Wright & Vaughan, for defendants.

McLEAN, Circuit Justice. Chase & Fox, who appear for complainants, move for attachment against the defendants, on the ground that they have violated the injunction heretofore granted in this case, restraining the publication of certain school books. The allowance of the injunction at the last term is shown, and also a summons with an order indorsed, enjoining the publication of the works, which was served on the defendants. And several affidavits were read which prove that the publication of the books had been continued after notice of the injunction had been served.

Wright & Vaughan objected to the attachment, because no notice had been served on the defendants of this motion; and they insisted that a rule to show cause why an attachment should not issue is the proper mode of proceeding for a disobedience of the injunction.

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

By a rule adopted by the supreme court, to regulate proceedings in chancery, it is provided that "in all cases where the rules prescribed by that court, or by the circuit court do not apply, the practice of the circuit courts shall be regulated by the practice of the high court of chancery in England." No rule has been adopted by this court to regulate this motion, and we must look to the precedents established in the English courts. "The practice in England formerly was that upon affidavit of the service of the injunction, an attachment issued for the breach of it. If the defendant was arrested on the attachment and entered his appearance, and answered interrogatories under oath, &c., if he denied the service of the injunction, it was required to be proved, &c." Har. Ch. Prac. 552. But in *Eden on Injunctions*, 56, it is stated, that the modern practice where a contempt for a breach of the injunction is charged, is to give notice of a motion, not that the defendant should show cause why he should not be committed; but that he may stand committed for breach of the injunction, which is moved upon affidavit of the service of the injunction.

In the case of *Angerstein v. Hunt*, 6 Ves. 487, Mr. Romilly, for the plaintiff, moved that the defendant should show cause why he should not stand committed for breach of the injunction, &c. And the lord chancellor said: "It is not the practice in this court for a man to show cause why he should not stand committed. The motion ought to be, that he shall stand committed for breach of the injunction; and it ought to be made upon personal service upon him, that the court will be moved for that purpose. When the injunction is to do a thing, the course is to move for an order that he shall do it by a particular day, or stand committed. But this is not to do a thing. The proper mode therefore will be to serve him with notice, that the court will be moved, that he shall stand committed." And in the case of *Schoonmaker v. Gillett*, 3 Johns. Ch. 311, on a motion having been made for an attachment to bring up the defendant; the chancellor, on the authority of the above case, and on the due service of the affidavits and notice, ordered that an attachment issue to the sheriff to bring the defendant into court, to answer for the contempt.

On these authorities, it is clear that it is not the English practice to issue a rule to show cause why an attachment should not issue for a breach of the injunction; and it is equally clear the motion that the defendant should stand committed for the contempt is made after personal service of a notice that such motion would be made. The case in *Vesey* is on the very point, and also the authority in *Johnson*.

In the present case, this rule has not been

observed. No notice whatever has been given to the defendants that the counsel for the plaintiffs would move that they stand committed for a breach of the injunction. Verbal information was communicated to the counsel at Cincinnati, that a motion for an attachment would be made at the present term; and a motion to this effect was entered on the minutes of the court, two days before it was called up and argued. This, although in the nature of a criminal proceeding, is not in fact strictly of that character. It is instituted and carried on by the counsel for the plaintiff, and not, necessarily, by the attorney for the government. The object of the proceeding is, to enforce obedience to the process of the court, by punishing an intentional disregard of it. The mode is summary and rigorous, and the party who thus invokes the aid and power of the court, should bring himself strictly within the rule which entitles him to the redress sought, and subjects the defendant to the punishment which must follow. He must show the allowance of the injunction, that it has been issued on the terms specified and within the limitations imposed. That it has been duly served, and that notice has been given to the defendant, of the time and place of the motion, "that he stand committed for a breach of the injunction." On this motion the court will not investigate the title of the complainants. That was considered on the allowance of the injunction, and will be again investigated on a motion to dissolve, or on the final hearing. But the court will look into the case to ascertain how far the defendants are restrained, and whether the writ of injunction extends beyond the allowance. And there are other points made in the argument which it may be proper to examine, when the defendants shall be properly brought before the court. But until the notice shall be served of the usual motion, for a breach of the injunction, no other question except that of notice is before the court.

Under the circumstances of this case, the court feel bound to consider the preliminary objection of want of notice, as wholly disconnected with the facts and arguments adduced on what may be termed the merits of the motion. In requiring the defendants' counsel to argue the preliminary objections, in connection with the other branch of the case, the court subjected them to no waiver of any legal objection. The appearance of the counsel, therefore, is not a waiver of notice, and such appearance is only considered for the purpose of objecting to the want of notice.

The motion for an attachment is overruled.

WORCESTER BANK (HOLBROOK v.). See Case No. 6,597.

Case No. 18,044.

In re WORK et al.

[30 Leg. Int. 361.]¹

Circuit Court, W. D. Pennsylvania. May 12, 1873.

BANKRUPTCY PROCEEDING—REVIEW BY CIRCUIT COURT—DISSOLUTION OF FIRM—SUBSEQUENT BANKRUPTCY OF PARTNER.

1. Revisory jurisdiction of the circuit court, under the second section of the act of March 2, 1867 [14 Stat. 517], over the proceedings in bankruptcy in the district court. Within what time relief must be sought.

2. The 36th section of the same act only applies to partnerships existing at the time of petition filed. Where a partnership had dissolved, made a general assignment in trust for creditors, the members residing in different districts, and more than a year afterwards, one of the partners filed his individual petition in bankruptcy, praying an adjudication of bankruptcy, against himself and his late copartners, no partnership assets appearing upon the schedules. *Held*, that this was not a case for a joint proceeding, as though the copartnership still continued.

[In review of the action of the district court of the United States for the Western district of Pennsylvania.]

In bankruptcy. The copartnership of Work, McCouch & Co., of the city of Philadelphia, bankers and brokers, consisting of Samuel Work and William McCouch, of said city, in the Eastern district of Pennsylvania, and Allen Kramer, Florence Kramer, and Edward Rahm, of the city of Pittsburgh, in the Western district of the same state, failed in the month of May, 1866, heavily indebted; on the 9th day of June, 1866, the partners in Pittsburgh made a general assignment of their copartnership and individual property in trust for their creditors, to one Thomas Moore, and on the 14th day of the same month, the partners in Philadelphia executed a similar deed to George Sergeant, Esq. On the 25th day of July, 1867, Florence Kramer filed his petition in the district court of the United States for the Western district of Pennsylvania, in bankruptcy, praying that himself and his copartners in the firm of Work, McCouch & Co. might be adjudged bankrupts. No partnership assets appeared in the schedules annexed. His copartners appeared upon the orders to show cause, submitted to an adjudication of bankruptcy, and the matter was so proceeded in that Florence Kramer obtained a discharge from his debts on July 3, 1868, and Edward Rahm, Samuel Work and William McCouch obtained theirs on December 23d, of the same year. Allen Kramer died without having applied for a discharge. On September 5, 1870, Henry W. Hook, a creditor to the amount of \$30,200, who had unsuccessfully resisted the discharge of the said bankrupts in the district court, presented his petition under the second section of the act of March 2, 1867, to the circuit court, setting forth the foregoing facts, and praying that the discharges grant-

ed to the said bankrupts might be annulled. The court allowed said petition to be filed and ordered the bankrupts to appear and plead answer or demurrer thereto in thirty days. To this petition a special demurrer was filed, raising the question of the application being in time, and also meeting the case made by it upon its legal merits.

Nathan H. Sharpless and D. C. Watson, for petitioner. (1) That the petition was filed in time. The cases under this section holding that it need not be filed within the ten days allowed for an appeal from the district to the circuit court (In re Alexander [Case No. 160]), but that it must be filed within a reasonable time. Upon the question of what is a reasonable time in this case, the act itself furnishes an analogy in the 34th section, allowing the creditor two years in the district court to contest the validity of his debtor's discharge. (2) The proceedings in the district court were entirely irregular, and so far as Samuel Work and William McCouch were concerned, without jurisdiction. At the best they can only be supported as individual proceedings on behalf of Florence Kramer. The 36th section of the act under which they were had, only applies to partnerships existing at the time of petition filed, or at all events to those where there are partnership assets to surrender to the assignee in bankruptcy. The words of the act are, "where two or more persons who are partners in trade shall be adjudged bankrupts," &c. Here the firm had been dissolved more than a year when the petition in bankruptcy was filed. The two assignments to Messrs. Moore and Sergeant worked a dissolution of the copartnership by operation of law. *Moddewell v. Keever*, 8 Watts & S. 63; *Cochran v. Perry*, Id. 262; *Horton's Appeal*, 1 Harris [13 Pa. St.] 67.

Upon the making of the assignments all dealings of the copartnership ceased, and at the time of the petition filed in bankruptcy, there were no assets of the firm to be administered in that forum. Under the circumstances, the joint proceeding was unwarranted by the act of congress, and as to Messrs. Work and McCouch, the bankrupt court was without jurisdiction over their persons, and acquired none by reason of their relations to the subject matter of the proceedings before it on the petition of Florence Kramer. Citing *Bump, Law & Prac. Bankr.* p. 53 et seq.; In re *Crockett* [Case No. 3,402]; In re *Penn* [Id. 10,927]; In re *Winkens* [Id. 17,875].

Hopkins & Lazear (with whom were John C. Bullitt and Samuel Dickson, for Work & McCouch) contra.

Before McKENNA, Circuit Judge, and McCANDLESS, District Judge.

The court, after consideration by McKENNA, Circuit Judge, delivered a verbal opinion, and directed the entry of the following decree. "And now, May 12th, 1873, the de-

¹ [Reprinted by permission.]

murrer and bill of review having been argued by counsel pro and con, and duly considered by the court, the demurrer is overruled and the decree of the district court is reversed as to Edward Rahm, Samuel Work, and William McCouch.

WORK v. BAILEY. See Case No. 2,814.

Case No. 18,045.

The WORKMAN.

[1 Low. 504.]¹

District Court, D. Massachusetts. 1870.

DAMAGE TO TOW—LIABILITY OF TUG.

1. A tug, in towing a ship, brought her against a wharf. *Held*, that the tug was liable in damages, although the ship was rotten and unseaworthy, unless the condition of the vessel was the sole cause of the injury.

[Cited in *The M. J. Cummings*, 18 Fed. 183.]

2. The damages in such a case are the natural and necessary consequences of the collision to the vessel in her actual state of repair.

The steam tug Workman was hired to tow the bark White Wing from Fiske's wharf in Boston into the stream, and farther if required. The master of the tug made his boat fast to the port side of the ship, ordered the lines of the latter to be cast off, and steamed ahead. Presently the starboard side of the bark's stern came in contact with the wharf, but was soon cleared, and after they had proceeded a short distance it was found that the stern of the vessel had come off. The master of the tug had the control and charge of the navigation of both vessels. Several of the timbers of the stern were rotten, and a very considerable proportion of the repairs put on the vessel would not have been necessary but for this state of her works.

T. H. Russell, for libellant.
J. C. Dodge, for respondent.

LOWELL, District Judge. The libellant contends that, however rotten his ship may have been, the tug had no right to hit her against the wharf, and is justly responsible for the natural consequences of the act. On the other part, this general proposition is not denied; but it is maintained that the state of the timbers was the sole cause of the damage, and the blow only such a slight touch as every vessel is liable to receive in coming to or going from her wharf, and that no negligence, therefore, can be argued from the result, and that none has been proved. That the mere act itself had no naturally injurious consequences. The vessel was not old, and had been taken good care of, but dry rot had attacked her stern, without the knowledge of the owner. The unexpected

discovery of her actual state was said by one of the witnesses to be a very fortunate circumstance for her owner, because it may probably have saved her from a worse disaster. It seems clear that the bark was not sound, staunch, and seaworthy, as alleged by the libellant; and if this is a material and traversable averment it must be found against him. But there is no warranty of seaworthiness in a contract of towage, and the claimants cannot prevail upon this point, taken by itself, unless the evidence shall go the full length of showing that the whole damage was due to the state of the vessel. As, for instance, in any ordinary cause of collision, it would be immaterial that the injured vessel was insufficiently manned, or in any other respect unseaworthy, or even badly navigated, unless the defect caused or contributed to the disaster. Still less if a vessel were run into, would it be a defence that a stronger vessel would not have been injured. The undisputed fact that the tow was brought against the wharf with greater or less violence calls upon the tug for an explanation. The explanation given is that the motion of the vessels was very slow, and the blow very slight, such as ought not to injure a seaworthy vessel. The difficulty I have found with this defence is that it does not account for the blow itself. If it were shown that, by the usual and necessary course of navigation, a vessel must be expected to touch the ground or any other object at a certain point, a tugboat could not be held to guarantee her against touching there. And, of course, any sudden squall or other accident may be shown. But there is nothing of the sort shown here under either alternative. It is said that vessels often touch the wharf, but not that they usually strike it as this vessel did. She was swung round in such a way as to bring her stern against some part of the wharf, and, although the evidence is conflicting concerning the respective parts of vessel and wharf that were struck, and the force of the blow, I am not satisfied that it was a mere touch, to be overlooked as being one of the ordinary and necessary incidents of towage, like wear and tear. It is a hard case, undoubtedly, because it will be very difficult to draw a perfectly just and equitable line in the award of damages. I shall endeavor to do this as far as possible. My decision at present merely is that I cannot deprive the libellant entirely of damages, because I cannot be assured that the fault is wholly to be found in the defective character of his vessel.

Interlocutory decree for libellant. Damages to be assessed.

WORKMAN (DURKEE v.). See Case No. 4,195.

WORKMAN (UNITED STATES v.). See Case No. 16,764.

¹ [Reported by Hon. John Lowell, LL. D., District Judge, and here reprinted by permission.]
30 Fed. Cas.—40

Case No. 18,046.

WORKS v. JUNCTION RAILROAD.

[McLean, 425; 1 10 West. Law J. 370.]

Circuit Court, D. Ohio. April, 1853.

INJUNCTION—PUBLIC NUISANCE— OBSTRUCTION OF NAVIGATION — DRAW-BRIDGE OVER NAVIGABLE WATER—CONSENT OF SOVEREIGN POWER—CHARTER OF RAILROAD—LINES AUTHORIZED.

1. A citizen of another state owning property in this state, has a right to come into the circuit court of the United States, asking for an injunction to restrain the acts of a corporation, incorporated under the laws of Ohio, which, if consummated, would do irreparable injury to his property situated here.

2. A private person cannot apply to a court of chancery to prevent or remove a public nuisance, which does him no special injury. But he may, if the nuisance is immediately injurious to himself, although it may also affect the public. A private person owning a tannery, flour mill, saw mill, stores and warehouses, a wharf and water lots, and stock in a plank road leading from the town where they are situated, which is upon a river navigable for steamboats, schooners, and other vessels, and from which trade is carried on with other ports, in which he participates, may join a railroad company from obstructing the navigation of the bay into which that river empties, when such obstruction will materially injure the trade of that town.

[Cited in *People v. Detroit White Lead Works*, 82 Mich. 478, 46 N. W. 737; *Ballentine v. Webb*, 84 Mich. 47, 47 N. W. 488.]

3. From the nature of such an injury, its extent cannot be ascertained with precision. It is permanent; consequently suits at law for relief must be endless. To establish a wrong of this nature, it need not be measured by dollars and cents. It must be shown to exist; it must be material; but the particular amount of damages can not and need not be shown. In such cases, adequate relief can be given only by injunction.

4. Where the termini of a railroad are fixed by its charter, and an amendment is made thereto authorizing the company "to extend its line of railroad to a point on a river" named, which is beyond the original terminus and not in a direct line with the termini, the company are not authorized in departing from one terminus named, and constructing a direct line between the other terminus and the point designated on the river, which will leave the original point of termination entirely out of the line of the road. The extension of a line does not authorize a departure from it in the middle or any other part of it, except from its terminus.

5. Where a railroad company was authorized by its charter "to construct branched roads from the main route, to other towns or places in the several counties through which the road might pass," they are limited to the construction of branch roads, which leave the main route and terminate at some town or place within the same county as that in which the other terminus of the branch is situated. The construction of a line of road, commencing in one county and terminating in another, is not authorized by such a provision.

6. A railroad company was authorized to construct a railroad, making S. and P. points in the main line. They proceeded to put under construction a line from S. to P., which lies thirty-eight degrees north of a direct line from S. to P., and which, if brought down to that line, would not be half way between S. and P.

7. The court considered that this was manifestly intended to be the main line, and could not be called a branch.

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

8. A right to change a location, "either for the difficulty of construction, or of procuring a right of way at a reasonable cost, or whenever a better and cheaper route can be had," does not authorize a company to relocate, because a particular town, on the selected route, will not contribute to the road. Nor will it authorize a departure from the points named in the charter.

9. The right to cross a navigable water by a railroad bridge, must be given by the sovereign power, by a special or general act. Where this is not done, neither the board of public works, nor an acting commissioner of that board, can approve of the structure of a bridge over it. No such power is given by the twentieth section of the act of Ohio of May 1, 1852, to provide for the creation and regulation of incorporated companies. 3 Curwen's Rev. St. p. 1882.

10. By the twentieth section of that act (3 Curwen's Rev. St. 1882), either the acting commissioner of the board of public works, within whose territorial jurisdiction the work is to be erected, or the board of public works may approve of the plan or structure of a proposed bridge over a navigable water; and as the law has provided for no appeal from the decision of the acting commissioner, his favorable decision is final. A reversal of that decision by the board is a nullity, they having no jurisdiction over the subject.

11. The expression, "the acting commissioner having charge of the public works where such crossing is proposed," in the twentieth section of the act alluded to (3 Curwen's Rev. St. 1882), means nothing more than that such place shall be within the territorial jurisdiction of the commissioner. It does not mean that the water over which the bridge is proposed to be erected, should be a portion of the public works of Ohio. The words "navigable waters" are used in no such restricted sense; they embrace and were intended to embrace, all waters within the state, which are navigable by the works of art or nature.

12. Where a company is authorized to construct a railroad between two points, "over" a navigable water, a right to construct a bridge over that water is implied, as a necessary means of carrying into effect the power granted.

13. Under the power to regulate commerce, congress have power to prevent the obstruction of any navigable river, which is a means of commerce between any two or more states. The exercise of this great public right is not incompatible with the enjoyment of local rights. The public right consists in an unobstructed use of a navigable water connecting two or more states. The local right is to cross such water. The general commercial right is paramount to all state authority.

14. A public nuisance can not be tolerated on the ground that the community may realize some advantages from its existence. The doctrine on this subject, as it is stated in the *Wheeling Bridge Case*, 9 West. Law J. 535, adopted and followed.

[Cited in *People v. Detroit White Lead Works*, 82 Mich. 478, 46 N. W. 737; *Ballentine v. Webb*, 84 Mich. 47, 47 N. W. 488.]

15. A draw-bridge over navigable water, although it unavoidably occasions some delay in passing it, is not necessarily such an obstruction to the navigation as to amount to a nuisance. The delay is submitted to in consideration of the benefits conferred.

16. In considering whether a draw-bridge is an obstruction, the unskillfulness of the seamen, and the probability of men not being ready at the draw to open it, are to be laid out of consideration. The law presumes that what ought to be done will be done, and that since seamen should be skillful, they will be so.

17. When the chancellor is asked to restrain the erection of a bridge, on the ground that it will be an obstruction to the navigation, and the

testimony offered to prove it so, is so nearly balanced as not to incline the scale on either side, the extraordinary and preventive power of an injunction, which may be ruinous to one of the parties, ought not to be exercised.

In equity.

McLEAN, Circuit Justice. The complainant [Samuel Works], a citizen of New York, states that he owns a large amount of real estate at and near Fremont, on the Sandusky river, in the county of Sandusky, state of Ohio, which comprises a tannery, half of a flouring mill, saw mill, a store and warehouses, a wharf and water lots; that the Sandusky river from Fremont is navigable for steamboats, schooners and other vessels, and that a commerce is carried on from it, down the river and bay to different ports on the lakes; that he has plank-road stock which pays a profit by the transportation of produce to and from Fremont; and that shipments are made of flour and lumber from his mills, and leather from his tannery, etc. He represents that the defendants are about constructing a railroad from Sandusky City to Toledo, crossing the Sandusky Bay by a bridge on a line to Port Clinton, in Ottowa county; that the bridge, if made, will materially obstruct the commerce of the bay to his individual and irreparable injury, and he prays for an injunction to restrain the defendants from the construction of their proposed bridge.

The Junction Railroad Company answers that it is engaged in building a railroad between Cleveland and the Maumee river, connecting with Toledo, and extending from that city to the west line of the state, under various charters which authorize them to prosecute the work.

The Port Clinton Railroad Company demurs generally to the complainant's bill, and answers, denying the fraud and collusion with the Junction Railroad, as charged in the bill. It denies that it has any connection with the Junction Railroad, either to aid it or receive aid from it. The navigableness of the Sandusky Bay above the proposed bridge, and also of the Sandusky river to Fremont, is admitted by the parties and the pleadings. The general government has recognized this fact by making Fremont a port of entry, and the state of Ohio, by appropriating funds in removing certain obstructions in the Sandusky river.

Has the complainant a right to prosecute this suit? If the proposed bridge shall be an obstruction, as charged in the bill, it will be a public nuisance. No individual can complain of such a structure, unless his interests are injuriously affected by it. In such case it is a private nuisance to him, and if at common law he can obtain no adequate remedy, he may seek relief by injunction.

The complainant's citizenship gives him a right, in ordinary cases, to prosecute a suit in this court. But to maintain this suit, he must superadd a private injury which is

irremediable at common law. Has this been shown? I think it has. From the property owned by the complainant, from the different kinds of business in which he is engaged, it appears that any material obstruction to the commercial outlet from Fremont must injuriously affect his interests. The product of his mills, his wharf, his grounds on the river, are enhanced in value by an unobstructed commerce. His road stock is more or less affected by the transportation of freight to and from Fremont. The injury from the obstruction, if it be material, affects directly the articles shipped, and indirectly tends to lessen the value of the operating means through which these articles are produced or acquired. If such injury exist, no adequate remedy can be found by an action at law. From the nature of the injury, its extent can not be ascertained with precision. It is permanent; consequently the suits at law for redress must be endless. In such a case, adequate relief can be given only by injunction. It prevents the wrong. To establish this wrong, it need not be measured by dollars and cents. It must be shown to exist; it must be material; but the particular amount of damage can not and need not be shown. A mischief being proved, which can not be redressed at common law, connected with the citizenship of the plaintiff, establishes his right prima facie to prosecute this suit. The right to prosecute being shown or admitted, the nature and extent of the nuisance may be examined. The extent of the commerce obstructed may be proved, and also the dangers and probable losses to which it will be subjected.

The complainant having maintained his right to sue, the defendants are thrown upon their defense. This they have attempted to make, by giving in proof the act incorporating the Junction Railroad Company, with its various amendments, and also the incorporation of the Port Clinton Company.

The charter of the Junction Railroad Company was granted the 2d of March, 1846. The second section authorizes it to construct a railroad, "commencing at such point on the Cleveland, Columbus and Cincinnati Railroad as the directors may select, either in the county of Cuyahoga or Lorain, and within thirty miles from Cleveland; thence to Elyria, in Lorain county, unless the junction with the Cleveland and Columbus road should be made at Elyria; and from thence on the most feasible route to intersect the Mad River and Lake Erie Railroad at Bellevue, or at such other point as the directors shall choose, and thence to Lower Sandusky; and the said corporation shall have power to construct the said railroad or a branch of the same, from Elyria to Sandusky City, and from thence to Lower Sandusky." Under this provision the road has been constructed from Cleveland by Ohio City, Elyria, to Sandusky City, and is now being constructed thence nearly on a straight line to Port Clin-

ton, crossing the Sandusky Bay, and extending, on the shortest route to the Maumee. This route is alleged to be some eight or nine miles shorter than any other. By the amendatory act of the 2d of March, 1846, the Junction Railroad Company, was authorized to extend its line of railroad to some point on the Maumee river, with the privilege of transporting goods and passengers, transported on the road of said companies, across said river, by ferry or otherwise, as the directors thereof shall elect, to the city of Toledo; provided, the said company shall in no wise obstruct or hinder the navigation of said river. The sixteenth section of the original charter gave power to the corporation to locate and construct branched roads from the main line to other towns or places in the several counties through which said road may pass. And by the seventeenth section the company was authorized to commence, complete, and put in operation, any part of said road, or any branch thereof, aforesaid, at any point on the route of said railroad which the interest of the company may require to be first commenced and completed.

The point where the Junction Railroad was to commence on the Cleveland, Columbus and Cincinnati Railroad was left to the discretion of the directors, within the limitation of thirty miles from Cleveland. The road was commenced at Ohio City, near to Cleveland, and to the Columbus road, but not on it. Admitting this to be within a liberal construction of the charter, the road was extended by Elyria, Amherst, Vermillion and Huron to Sandusky City, connecting with the Mad River railroad at that point. Instead of extending the road from Sandusky City to Fremont, the last point named in the original charter, a survey has been made to cross the bay a few miles above Sandusky City, on nearly a straight line to Port Clinton and the Maumee river. And this, it is contended, can not be done under the original charter or the first amendment. That amendment "authorized the company to extend its line of railroad to some point on the Maumee river." The extension of a line does not seem to authorize a departure from the line at the middle, or any other part of it, except from its terminus. Had the extension commenced from this point, no navigable water would have been crossed by the line of the road to the Maumee, except Sandusky river. That this was the direction the legislature intended to give the road, appears by the words used, and also by the provision that in crossing the Maumee its navigation should not be obstructed—there being no such provision for crossing the Sandusky Bay.

It is supposed that the branching power from the main road, as provided in the sixteenth section, and the authority given in the seventeenth section to make and complete any part of said road, or any branch thereof, as the company may direct, authorized the di-

version of the road to Port Clinton, crossing the Sandusky Bay. The power to make branches is limited to towns or places, in the several counties through which the main road shall pass. Now, although the branches may be made before the main road, yet they must proceed from the line of the main road, and terminate at towns or places in the same county. The branch is an incident to the main road, and whether made before or after the construction of the main road, the termini of the branch is the same. By the direction given to the road from Sandusky City, it is clear it was not intended to run to Fremont, but to cross the bay in the direction to Port Clinton, leaving the direct route to Fremont several miles south. As an excuse for this departure, it is said in the answer that the people in Fremont, by subscriptions or otherwise, gave no encouragement to the company to run the road to that place; and that the route selected is better, and several miles shorter than the one by Fremont. Under such circumstances it is difficult to say that the road now in progress from Sandusky City to the Maumee, over the bay and by Port Clinton, is a branch of the original road within the charter. Neither its commencement nor termination is within the sixteenth section. It does not branch in the county of Ottawa, nor terminate at some town or place in that county. It is in fact the main road from Sandusky City to the Maumee, and was avowedly intended to be so, from the time the route was surveyed. The charter requires the company to organize in five years, and to complete twenty miles of the road in ten years from the time its structure was commenced; and under this provision it is said the company having made more than twenty miles of the road, may, at its own convenience, extend the road to Fremont from Sandusky City, and the road, if extended to the Maumee from Fremont, must pass through Ottawa county; and then the road now in course of construction may be considered as a branch or branches from it. It can not be within the purpose of the company to make the road to Fremont, and thence to the Maumee. No benefit could result to the company or the public from such an expenditure. There is now a road in progress from Fremont to Toledo, and also the Port Clinton road, running in the same direction. There is no admitted latitude of construction, it seems to me, which can bring the Port Clinton road within the charter of the Junction Railroad as amended. It would sanction a principle which would enable chartered companies to disregard the limits prescribed, and give such a direction to roads as their interests may dictate. By the tenth section, "if the corporation, after having selected a route for said railway, find any obstacle in continuing said location, either by the difficulty of construction or procuring the right of way at a reasonable cost, or whenever a better and cheaper route can be had,

it shall have authority to vary the route and change the location." This does not authorize the company to abandon and disregard the points named in the charter, but to change the route which they have selected, for the causes stated.

Upon the deliberate consideration which I have given to the Junction Railroad charter, I am brought to the conclusion that it does not authorize the route selected, and without authority it is presumed no one could contend for the right of crossing the Sandusky Bay. The amendment extending the road gives no such authority. The act of the 1st of May, 1852 (3 Curwen's Rev. St. 1877), provides, "that any number of natural persons, not less than five, may become a body corporate, with all the rights, privileges and powers conferred by, and subject to all the restrictions of that act." The second section declares, "that any number of persons as aforesaid, associating, to form a company for the purpose of constructing a railroad, shall, under their hands and seals, make a certificate which shall specify as follows: 1. The name assumed by such company, and by which it shall be known. 2. The name of the place of the termini of said road, and the county or counties through which such road shall pass. 3. The amount of capital stock necessary to construct such road. Such certificate being acknowledged before a justice of the peace, and certified by the clerk of the court of common pleas, and recorded by the secretary of state, shall confer corporate powers."

On the 6th of October, 1852, Ebenezer Lane and five others applied, under the above law, to be incorporated as the "Port Clinton Railroad Company," beginning the road at Sandusky City, and extending it by Port Clinton, over the Sandusky Bay, to Toledo; and all the requisites of the act having been complied with, they became a corporate body. This body, on the 11th of January, 1853, submitted to James B. Steadman, acting commissioner, the plan of a bridge for crossing the bay, which he approved, and which approval was notified to the company.

Two objections are made to this act of the commissioner: (1) That it was contrary to the decision of the board of public works. (2) That the acting commissioner had no jurisdiction of the matter. It appears that on the 5th of July, 1852, the Junction Railroad applied to the board of public works, "to obtain leave, if it be necessary, to construct a draw-bridge across Sandusky Bay," which was refused by the board for want of jurisdiction. The decision of the board, on the application of the Junction Railroad for leave to cross the bay by a bridge, was a very different application from that decided by Steadman. He approved of the plan of the bridge; the right to cross the bay was not submitted to him. But on the 17th of February, 1850, the board of public works did reverse the decision of Steadman in relation to the Port Clinton

bridge. And I will now consider the effect of this reversal.

The twentieth section of the above act (3 Curwen's Rev. St. 1852) gives the power to the acting commissioner, the same as to the whole board. Either may approve of the plan or structure of a proposed bridge over a navigable water; consequently, they act independently of each other, and no provision having been made for an appeal to the board from the decision of the acting commissioner, his favorable decision is final. And this power to the acting commissioner being given by law, can not be controlled or reversed by the board. The procedure of the board, therefore, in the reversal of the approval by Steadman of the plan of the bridge presented by the Port Clinton Company, was void. It was an exercise of power which did not belong to the board. If the application had been made to the board by the Port Clinton Company, for the approval of the plan of their bridge, and the board had decided against it, having jurisdiction of the matter, the acting commissioner could not in form or in effect reverse the decision. But the application was, as above stated, by the Junction Railroad, "for leave to cross the bay," and this power did not belong to the board; it, therefore, very properly held that it had no jurisdiction. But it had jurisdiction, and so had the acting commissioner, to approve the plan of the bridge. An appeal, under the statute, from the decision of the board, by the Junction Railroad, would have been ineffectual, as the board was asked to do that which the law did not authorize it to do.

The right to cross a navigable water by a railroad bridge, must be given by the sovereign power, by a special or general act. Where this is not done, neither the board of public works, nor an acting commissioner, can approve of the structure of a bridge over it. For the reasons above stated, I have been brought to the conclusion, that the charter of the Junction Railroad, original and amended, does not authorize the company to construct a railroad bridge over Sandusky Bay at the place designated.

But the act of approval by the commissioner, on the application of the Port Clinton Company, is objected to, on the ground that the Sandusky Bay was not a public work, "under his direction," within the meaning of the statute. The words of the statute are, "Whenever the line of any railroad company now existing, or which may hereafter organize under this act, shall cross any canal, or any navigable water, the said company shall file with the board of public works, or with the acting commissioner thereof, having charge of the public works where such crossing is proposed, the plan of the bridge, and other fixtures for crossing such canal or navigable water, designating the place of crossing; and if the said board, or acting commissioner thereof, shall approve of such plan, he shall notify such

company, in writing, of such approval." A corporation, formed under this general law, is vested with all the ordinary powers to accomplish the purpose intended. It may appropriate private property, and do all other things necessary in the construction of a railroad. The general act is as specific in its details of the rights and duties of the company as can be found in special acts of incorporation. The legislature of Ohio has been cautious, as all other legislatures have been, in passing special acts for bridges and railroads, to guard against obstructions on navigable waters. And this twentieth section of the general law, was intended to preserve this great public right. The plan of a bridge over any navigable water must be approved by the board of public works, or by an acting commissioner. This duty was more appropriate to the general business of the members of that board, than to any other association under state organization. To limit the application of this provision to the crossing of canals, and waters made navigable by the state, would strangely disregard the policy of the act, and the necessities of the public. The language of the section does not authorize so narrow a construction. It was known, that in every part of the state, railroads would be projected which necessarily cross navigable waters. Special provision is made for the crossing of canals. Our best rivers are navigable by nature; and on the theory stated, no provision is made in the act for crossing them. They are navigable waters, and are embraced by the terms of the act. The acting commissioner, it is said, must "have charge of the public works, where such crossing is proposed;" and that where there are no public works, his approval can not be given. "Having charge of the public works, where such crossing is proposed," means nothing more than that such place shall be within the territorial jurisdiction of the commissioner. Any other construction would involve this absurdity: However a navigable river might be improved by the public works, yet if there were not public works at the place of crossing, the commissioner can not act. The legislature can not be charged with acting so unwisely. By the law of 1852, a new system was introduced, suited to the enterprise of the age, and it was intended to cover the whole ground of ordinary legislation on the subject. The words "navigable waters," were used in no restricted sense; they embrace, and were intended to embrace, all waters within the state, which are navigable by the works of art or nature. The plan of the bridge over the Sandusky Bay having been approved by Steadman, the acting commissioner, and the place of crossing being within his jurisdiction, it is not doubted, that under the "Port Clinton Charter," a bridge may be constructed as proposed, if it cause no obstruction to commerce.

Whether we look into the ordinance of 1787,

the Acts of congress of the 13th July, 1787, of the 7th of August, 1789, of the 7th of May, 1796, or the constitution, which declares that congress shall have power to regulate commerce among the several states, we find the power to protect the commercial interests of the Union. But, as was observed by the court in the Wheeling Bridge Case, the exercise of this great public right is not incompatible with the enjoyment of local rights. The public right consists in an unobstructed use of every navigable water, connecting two or more states; the local right, in crossing such water. The general commercial right is paramount to all state authority.

The question of obstruction remains to be considered. Numerous affidavits have been read, made by persons acquainted with the navigation of the Sandusky Bay, who think the bridge with the draws proposed, in a high wind and also in a dark night, would obstruct the navigation. When the wind is strong, it is said by some, that sail-vessels require the whole width of the bay to beat against the wind, and that at such times no sail-vessels could pass the draw. The draw proposed is 144 feet, to be opened and closed on a pivot in the center. It is admitted that steam vessels could pass the draw with less difficulty than vessels with sails. This class of witnesses suppose that all vessels not propelled by steam, in a strong wind could pass the draw only by the aid of ropes, working up by the side of the piers; and that this would cause considerable delay, and some expense. Other witnesses, of equal experience, differ from the above. They think vessels can pass the draw with little or no difficulty, and that in time of wind, not so high as to force them to anchor, they could pass by working round the piers with ropes, which would take up a very short space of time. And that in good weather the boats would sail through the draw without loss of time. Several witnesses speak of draws in bridges over arms of the sea, of less width than proposed, where vessels are constantly passing without complaint or delay. The witnesses from the sea-board, when added to those from the lake, are greater in number than those who think the bridge would obstruct the navigation of the bay.

Against the bridge it is urged that considerations of public advantage can not be weighed against any appreciable obstruction. That a public nuisance can not be tolerated, on the ground that the community may realize some advantages from its existence. Such is admitted to be the general principle on this subject; and yet there can scarcely be a draw in a bridge which does not, to some extent, delay vessels; but this is submitted to from public necessity. The draws in the bridges over Charles river, which is an arm of the sea, must be subject to the winds and waves, and also to the flowing of the tides; and yet through these draws more than ten times the number of vessels

pass daily that would pass through the draw in the proposed bridge. The unskillfulness of our navigators and seamen on the lakes is referred to, as an argument against the bridge. But men who undertake the navigation of vessels are presumed to have the necessary skill, and all regulations of commerce are founded on this hypothesis. Nor is an argument admissible, that proper attention would not be paid to the draws, by necessary lights, and hands to open them. All such regulations are founded on the supposition that proper attention will be paid, as less than that would expose the bridge to damage. The commerce of the bay above the bridge, including the Sandusky river, is not large; but it is of sufficient importance to bring it under the regulation of the commercial power of the Union, and to require its protection. In the Wheeling Bridge Case the court held, if a draw should be constructed in the bridge over the western channel, so as to admit of a safe and an unobstructed passage to steam-boats that could not pass under the eastern bridge, it would be considered as removing the nuisance complained of. To pass through a draw on a river, when its banks are full and its current rapid, is attended with much more difficulty and danger than where the draw is over a water agitated only or chiefly by the winds.

Nothing is more common than for witnesses, who are called as experts, to differ in opinion. And where this difference is so nearly on a balance as not to incline, the scale on either side, however strong the testimony may be, when viewed on one side only, yet when both sides are considered, the parts neutralize each other, so as to produce no very decided effect on the mind. This is the character of the evidence in the case under consideration. In such a case the preventive and extraordinary remedy invoked ought not to be given. It is a remedy which may be ruinous to one of the parties, when the basis of the action is doubtful.

The prayer for an injunction is refused.

Case No. 18,047.

WORMELELEY et al. v. WORMELELEY et al.

[1 Brock. 330.]¹

Circuit Court, D. Virginia. Nov. Term, 1817.

VIOLATION OF TRUST—POWER OF SALE AND REINVESTMENT—BONA FIDE PURCHASERS—RIGHT TO PROFITS AND IMPROVEMENTS.

1. A deed of marriage settlement, executed on the day of the marriage, which conveys to a trustee a tract of land, and some slaves, principally for the wife and children, has in it this uncommon clause: "That whenever, in the opinion of the said T. S., the trustee, the said landed estate can be sold and conveyed, and the money arising from the sale thereof, laid out in the purchase of other lands, advantageously for those concerned or interested therein, then the said T.

S. is hereby authorized and empowered to sell and convey the same; and the lands so by him purchased, shall be in every respect subject to all the provisions, uses, trusts, and contingencies, as those were by him sold and conveyed." Per curiam: The power thus granted is great, but not unlimited. The trustee is to exercise, not his will, but his judgment. He can only sell and make a re-investment, when, in his opinion, both of these acts can be done advantageously to the parties interested.

2. If the trustee sells the land worth \$10,000, and re-invests it in land not worth \$1,000, or if there is no re-investment of the money at all, in either case, the power is not executed. The sale and purchase are part of one operation; and the operation is incomplete if either be wanting. Nor can the judgment be fairly exercised on the advantage of a sale and purchase, without comparing the tract to be sold with the tract to be purchased.

3. Therefore, where the trustee sold the trust lands to one of his own creditors (who held a mortgage on a tract of land owned by the trustee, which was foreclosed), and the creditor discounted the balance due on the mortgage, in part payment of the trust estate, although this sale was with the approbation of the husband and father of the cestuis que trust, and placed the cestuis que trust on another tract of land, which was not, however, conveyed to the same uses with the trust land, held, that this is not a correct execution of the trust; and as to the trustee himself, the whole transaction is vitiated, and if he had taken a re-conveyance of the land to himself, he would have held it subject to the trusts of the original deed, for a trustee cannot bargain with himself.

4. A purchaser of the trust property, with notice of the trust and its violation, is himself a trustee, and holds the lands subject to the claim of the cestuis que trust.

5. In this case, the trustee sold to V., his creditor. That creditor had notice of the trust, for that appeared on the face of the deed, under which his vendor held. He must be considered as having notice of the violation of the trust—First, because part of the proceeds of the sale were applied to the payment of the trustee's individual debt; and, secondly, because he had a right to see the deed by which the exchanged lands were settled to the same uses with the first, and its non-production was equivalent to its non-existence. V., therefore, held the land subject to the trust.

6. C. and M. were sub-purchasers from V. They had the same notice of the trust that V. had, and they also knew, that the trustee had not settled other lands to the same uses as the original trust deed, and that part of the proceeds of the trust lands had been applied to the trustee's individual debt. They, therefore, were purchasers with notice of the violation of the trust, and held the lands subject to the trust.

7. It is no excuse to them, that the trustee may have "given credit to the cestui que trust for all that he received from V.," for that was not all that the trustee was bound to do. He was bound to lay out the proceeds advantageously in other lands.

8. It is not sufficient for the purchasers, C. and M., to deny all fraud in themselves, and all knowledge of fraud, in V. and the trustee, unless they deny a knowledge of the facts, from which fraud is inferred by the law.

9. To constitute a purchaser without notice, it is not sufficient that the contract should be made without notice, but that the purchase-money should be paid before notice.

10. These purchasers, although they are to be held as trustees for the cestuis que trust, are not, however, to be viewed as mere squatters. They believed their title to be good. They are entitled (1) to the encumbrances from which they have relieved the land; (2) to the permanent improve-

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

ments which they have made on the land; and (3) for the advances they have made for the support of the wife and children. They are chargeable with profits. The advances are to be set off against the profits; and the encumbrances and improvements to be a charge on the land, unless absorbed by the residue of the profits.

This was a bill in chancery, exhibited by Mary Wormeley, the wife of Hugh Wallace Wormeley, and her infant children, John S., Mary W., Jane B., and Anne B. Wormeley, by their next friend, against the said Hugh Wallace Wormeley, Thomas Strode, Richard Veitch, and David Castleman, and Charles McCormick, for the purpose of enforcing the trusts of a marriage settlement (executed by the said Hugh and Mary, previous to their marriage, in which the said Strode was the trustee), for setting aside a sale, made of the trust property, by the said Strode, to the said Veitch, and by him, to Castleman and McCormick; and for obtaining an account and other relief. The bill charged the sale to have been a breach of the trusts, and that the purchasers had notice. The facts are as follows:

In contemplation of a marriage between Hugh Wallace Wormeley and Mary Strode, an indenture of three parts was executed on the 5th of August, 1807, by way of marriage settlement, to which the said husband, and intended wife, and Thomas Strode, her brother, as trustee, were parties. The indenture, after reciting the intended marriage, in case it shall take effect, and in bar of dower and jointure, conveys all the real and personal estate, held by Hugh W. Wormeley, under a certain indenture, specified in the deed, as his paternal inheritance, to Thomas Strode, in fee upon the following trusts, viz., "for the use, benefit, and emolument, of the said Mary, and her children, if any she have, until the decease of her intended husband, and then, if she should be the longest liver, until the children should, respectively, arrive at legal maturity, at which time each individual of them is to receive his equal dividend, &c., leaving, at least, one full third part of the estate, &c., in her possession, for, and during her natural life; then, on her decease, the landed part of the said one-third, to be divided among her children, and the personal property, according to the will of the said Mary, at her decease. But if the said Mary should depart this life before the decease of the said Hugh, then he is to enjoy the whole benefits, emoluments, and profits, during his natural life, then to be divided amongst said Hugh's children, as he, by will, shall see cause to direct, and then this trust, so far as relates to T. Strode, to end, &c.; and so, in like manner, should the said Mary depart this life without issue, then this trust, to end, &c. But should Wormeley depart this life before the said Mary, and leave no issue, then the said Mary to have and enjoy the whole of said estate, for, and during her natural life, and then to descend to the heirs

of the said Wormeley, or as his will, relative thereto, may provide." Then follows this clause: "And it is further covenanted, that, whenever, in the opinion of the said Thomas Strode, the said landed property can be sold and conveyed, and the money arising from the sale thereof, be laid out in the purchase of other lands advantageously for those concerned and interested therein, that then, and in that case, the said Thomas Strode is hereby authorized to sell, and, by proper deeds of writing, to convey the same; and the lands so purchased, shall be in every respect subject to all the provisions, uses, trusts, and contingencies, as those were, by him sold and conveyed. And it is further understood by the parties, that the said Hugh W., under leave of the said Thomas Strode, his heirs and assigns, shall occupy and enjoy the hereby conveyed estate, real and personal, and the issues and profits thereof, for, and during the term of his natural life, and after that, the said estate to be divided agreeably to the foregoing contingencies."

The property conveyed by the settlement consisted of about 350 acres of land, situated in Frederick county, in Virginia. The marriage took effect on the day that the deed of settlement was executed, and four children were the fruits of the marriage, who, with their mother, suing by their next friend, George F. Strother, were the parties plaintiff in this cause. For a short time after the marriage, Wormeley and his wife resided on the Frederick lands, and a negotiation was then entered into between Wormeley and Strode, the trustee, for the exchange of the Frederick lands, for lands belonging to Strode in the county of Fauquier, in Virginia. Various reasons were suggested for this exchange, the wishes of friends, the proximity to the trustee and the other relations of the wife, and the superior accommodations for the family of Wormeley. The negotiation took effect; but no deed of conveyance or covenant of agreement recognising the exchange, was ever made by Wormeley; and no conveyance of any sort, or declaration of trust, substituting the Fauquier lands for those conveyed by the marriage settlement, was ever executed by the trustee. Wormeley and his family, however, removed to the Fauquier lands, and resided on them for some time. During this residence, to wit, on the 16th of September, 1810, the trustees sold and conveyed the Frederick lands, to the defendant Veitch, for the sum of \$6,500; and to this conveyance, Wormeley, for the purpose of signifying his approbation of the sale, became a party. The circumstances of this transaction were as follows: Strode, the trustee, had become the owner of a tract of land in Culpepper county, in Virginia, subject to a mortgage to Veitch and one Thompson, upon which more than \$3,000 were then due, and a foreclosure had taken place. To discharge this debt, and relieve the Culpepper estate, was a leading object of the sale,

and so much of the trust money as was necessary for the extinguishment of this debt, was applied for this purpose. At the same time, Strode, as collateral security to Veitch for the performance of the covenant of general warranty contained in the indenture, executed a mortgage upon the Fauquier lands, then in the possession of Wormeley. In 1811, Veitch conveyed the Frederick lands, to the defendants, Castleman and McCormick, for a large pecuniary consideration, in pursuance of a previous agreement, and by the same deed, made an equitable assignment of the mortgage on the Fauquier lands. About this time, Wormeley, having become dissatisfied with the Fauquier lands, a negotiation took place for his removal to some lands of Strode, the trustee, in Kentucky; and, upon that occasion, a conditional agreement was entered into between Strode and Wormeley, for the purchase of a part of the Kentucky lands, in lieu of the Fauquier lands, at a stipulated price, if Wormeley should, after his removal there, be satisfied with them. Wormeley, accordingly, removed to Kentucky, with his family; but, becoming dissatisfied with the Kentucky lands, the agreement was never carried into effect. Afterwards, in April, 1813, Castleman and McCormick, by deed, released the mortgage on the Fauquier lands, in consideration, that Veitch would enter into a general covenant of warranty to them of the Frederick lands; and on the same day, Strode the trustee executed a deed of trust to one Daniel Lee, subjecting the Kentucky lands to a lien as security for the warranty in the conveyance of the Frederick lands, and, subject to that lien, to the trusts of the marriage settlement, if Wormeley should accept these lands, reserving, however, to himself, a right to substitute any other lands upon which to charge the trusts of the marriage settlement. At this period, the dissatisfaction of Wormeley was known to all the parties, and Wormeley was neither a party, nor assented to the deed; and Castleman and McCormick had not paid the purchase-money. In August, 1813, the trustee sold the Fauquier lands to certain persons, by the name of Grimmer and Mundell, without making any other provision for the trusts of the marriage settlement.

MARSHALL, Circuit Justice. The plaintiffs in this cause, are a wife and a mother, with her three infant children. They apply to this court for its aid, to restore them to the possession of property conveyed in contemplation of marriage, by a deed of which they are the principal objects. The defendants are the husband, the trustee (and that trustee a brother), and the purchasers of the trust estate. The defendant, Hugh Wallace Wormeley, being about to intermarry with the plaintiff, Mary, executed a deed, dated the 5th of August, 1807, the day on which the marriage took effect, by which he con-

veyed, in lieu of dower, his paternal estate, consisting of a small tract of land, in the county of Frederick, and some slaves, to Thomas Strode, the brother of his intended wife, in trust, principally for her and her children. This property is gone, the trust is totally defeated, and the first inquiry is, whether this effect has been produced by the regular execution of any power inserted in the deed. The deed contains this uncommon clause: "And it is further covenanted, bargained, and agreed, by and between the said contracting parties, that whenever, in the opinion of the said Thomas Strode, the said landed estate can be sold, and conveyed, and the money arising from the sale thereof, laid out in the purchase of other lands, advantageously, for those concerned, or interested therein; that then, in that case, he, the said Thomas Strode, is hereby authorized, and by these presents, fully empowered to sell, and by proper deeds of writing, convey the same; and the lands, so by him purchased, shall be, in every respect, subject to all the provisions, uses, trusts, and contingencies, as those were by him sold and conveyed." I term this, an uncommon clause, because it authorizes the trustee to sell on his own judgment, without consulting those who are to be benefited by the trust. The power thus granted is great, but it is not unlimited. The trustee is not to exercise his will, but his judgment. Whenever, in his opinion, the trust estate can be sold, and the money invested in other land, advantageously for the parties interested; then, and then only, may he sell and make this reinvestment. The standard by which he is to act is invisible. Yet it is an actually existing standard, and one by which the conduct of the trustee must be measured. To determine, whether he has been regulated by it or not, his actions must be examined.

In inquiring, whether a party has acted according to his best judgment or not, allowance must be made for the fallibility of the human mind, and for difference of opinion. But there are strong cases, in which all will unite in saying, that the judgment has not been fairly exercised. If, under such a power, as is in this deed, a tract of land, notoriously worth \$10,000, should be sold, and invested in a tract not worth \$1,000, it would be in vain for the trustee to say, that in his opinion, the sale and reinvestment was an advantageous operation. He could not have entertained such an opinion. The case is certainly not less strong, where he makes no reinvestment whatever. He could not be of opinion, that it was advantageous to the parties, to sell the land and get nothing for it. But further. Where there is no reinvestment of the money, the very letter of the power is disregarded. He is to sell only, when the money can be advantageously laid out in the purchase of other lands, "and the lands so purchased, are to be held in trust, for the same objects with those sold." There

must be other lands purchased, or the power is not executed. The sale and purchase are different links of the same chain; though the parts are distinct, they seem to be parts of one operation, which is incomplete, if either be wanting. These parts, too, it would seem, must be in execution at the same time. I do not well comprehend, how the judgment can be fairly exercised on the advantageousness of a sale and purchase, without comparing the tract to be sold, with the tract to be purchased. The words of the power, and the situation of the parties, are equally opposed to the idea of selling first, and then searching for other lands, on which to place the Wormeley family.

Having premised these general observations, on the nature of the power, under which the trustee acted, the court will proceed to consider more particularly, the facts of the case, in order to decide, whether the cestuis que trust have still a remedy against the land, or only against the person of the trustee or purchaser. Wormeley, with his wife, resided, for a short time, either on the trust estate, or with his mother. Their situation appears not to have been comfortable; and in little more than a year after the marriage, both the father and brother of Mrs. Wormeley expressed a strong desire to remove her into their neighbourhood; and an agreement was made between the defendants, Strode and Wormeley, with the approbation, as it appears, of the friends of Wormeley, for the exchange of the trust land, for a tract lying in the county of Fauquier. To this tract, Wormeley removed, and soon afterwards, Thomas Strode sold the land, in Frederick, to Richard Veitch, one of the defendants in this cause, and conveyed it to him by deed, dated in September, 1810, to which deed Wormeley was a party. Veitch was the holder of a mortgage on the estate of Strode, in Culpepper, which had been foreclosed, and on which something more than \$3,000 were due. This sum was discounted in part payment of the trust estate. The Fauquier lands were never conveyed to the same uses with the Frederick lands, nor have any others been substituted in their place. In about twelve months, Wormeley became dissatisfied with this estate, and some arrangements were made for furnishing him with lands in Kentucky, which are not further noticed, because they have terminated in nothing, and do not affect this part of the case. Subsequently to these arrangements, Strode sold the land in Fauquier.

Excluding from our view the rights of the purchaser, and considering the case as between the plaintiffs and the trustee, can it be doubted whether this transaction would, in any manner, affect the Frederick lands? We will not inquire into the relative value of the two tracts: we will not inquire whether the approbation, given by the friends of Wormeley to this exchange, arose from a

knowledge of this relative value, or from the hope that he would derive other advantages from living in the neighbourhood of his wife's father, which would more than compensate for any small loss in the exchange; we will not inquire, whether, at the time, Strode intended to execute the contract; we will suppose this transaction to have originated in the causes which have been assigned for it; still the policy, and the wise policy, of courts of equity, forbids trustees to bargain with themselves. In the execution of trusts, especially such as this, no unworthy ingredient, respecting self, ought to be intermingled. It is wisely held to vitiate the whole transaction. A trustee, conscious of the utmost purity and fairness of intention, who makes a contract with himself, for the trust property, performs a most perilous act. He exposes himself to every hazard which can befall the estate. It does not, in point of law, alter the case, that Wormeley assented to this exchange. He had no power to assent. The deed was executed to secure the land against him and his indiscretions. If, then, the Fauquier lands had been actually settled in trust, the title of Strode, to the Frederick land, could not be secure. But the Fauquier land has not been, nor can it be, settled on the Wormeley family. That part of the power, which respects the reinvestment of the money in other lands, remains totally unexecuted. Can it, then, be doubted, that Strode, if he now held the Frederick lands, if he had conveyed them, and taken back a re-conveyance to himself, would hold them under the trusts created by the deed of 1807?

Believing this point to be perfectly clear, the court will proceed to inquire, secondly, whether the land, in the hands of purchasers, remains liable to the same trusts? It is believed to be unquestionable, that, by conveying the land in Frederick, to his own purposes, without selling other land to the same trusts, the trustee committed a breach of trust. It is equally clear, that a purchaser of the trust property, with notice of the trust, and its violation, is himself a trustee. This principle is too familiar with the profession to require that cases should be cited in its support. Had the purchasers, in this case, notice? And, first, had Veitch notice? I do not mean to inquire, merely, whether he had notice of the trust, because, claiming title under the trust deed, he is, of course, acquainted with its contents; but, also, whether he had also notice of the breach of trust? Strode violated his duty as a trustee, probably, in bargaining with himself, or with Wormeley, whom he knew to be incapable of making a contract respecting this property; and in selling the Frederick land for his own purposes; certainly, in not immediately executing a proper deed for the Fauquier lands. He ought not to have permitted this duty to remain a day unperformed. He ought not to have exposed the Fauquier lands to the

hazard of remaining apparently his property, without any deed declaring the trusts by which he held them. Had he purchased other lands for the Wormeley family, and taken a conveyance to himself, without specifying the trusts, his conduct, certainly, would not have comported with his duty. As little did it accord with his duty to hold this land without a declaration of trust. I speak of the state of things at the time of the sale to Veitch, not of the state of things afterwards.

Were these facts known to Veitch? With the application of the purchase-money in discharge of his own decree, he was of course acquainted. That Wormeley relied on receiving the Fauquier land instead of the Frederick land, was, probably, equally well known to him. The character of the title, and the situation of the parties, Wormeley, no longer residing on the Frederick land, and having removed to Fauquier, would lead to inquiries which must explain the transaction. Wormeley's certificate, too, given a few days before the deed to Veitch was executed, shows that some specific land was substituted for that in Frederick; and shows further, that the tract so substituted was acquired by an exchange of property with the trustee. Veitch then knew from this certificate, that the land was not to be sold to him by Strode in execution of his power, but that Strode had already appropriated the trust estate to his own use, and was selling for himself. Whether he knew that the tract in Fauquier was the land alluded to or not, he knew the character of the transaction, and took upon himself the risk of its validity. But it is not to be believed, that he did not know every thing which it was material to know. The certificate itself points to the tract, for it is dated at Roseville, in Fauquier. He must, also, be considered, in this court, as having notice, that a deed was not executed, declaring the trusts on which the newly acquired land was held. He had a right to see this deed, and was bound to see it. Its non-production was proof of its non-existence. But this is not all. If he knew that the Fauquier land was substituted for the Frederick land, as we think he did, then the deed he received of those lands, as collateral security, proves his knowledge, in fact, that no conveyance of them in trust had been made. He probably relied on the certificate of Wormeley as his security, and, certainly, that certificate would go far in protecting him from any claim made by Wormeley. But he ought to have been advised, that Mrs. Wormeley and her children could not be affected by it.

There is a circumstance growing out of the deed from Strode to Veitch, not entirely unworthy of notice. That deed is apparently drawn by counsel before whom the papers were laid. We should expect it to state the transaction truly, was there nothing in the transaction which there was a wish to conceal. We should expect it to refer to the

exchange between Wormeley and Strode, if that exchange was believed to be a fair execution of the trust. Such a reference would have secured the land from many casualties. But the deed declares, that Strode sold the trust land to Veitch, "with an intention of investing the proceeds of such sale in other lands of equal or greater value." This untruth, which was known to Veitch, betrays a consciousness that the transaction required some other shape than its own. But could Veitch even have supposed, that the money was to be invested in other lands to be purchased in future; he knew that a large portion of it was directed to his own debt, and he must have known, that a trustee, whose embarrassments could induce him to seize a trust fund in order to relieve his own estate from being sold under a mortgage that was foreclosed, could not come into market without money, to purchase other lands, under very advantageous circumstances. Add to this consideration, that the power given by the deed of trust to Strode, was not to sell with the intention of investing the money in other lands at some future time, but to sell and invest when, in his opinion, it could be done to advantage. Veitch, then, had notice of all the material facts which constituted the breach of trust committed by Strode, and is, consequently, to be considered, in this court, as holding the land subject to the trusts created by the deed of August, 1807.

Are Castleman and McCormick in a different situation? The answer to this question depends on their having notice of the transactions which constitute the breach of trust. Purchasing a title depending on the deed of August, 1807, they would of course inspect that deed, and would perceive that Strode's power to sell was coupled with the duty of investing the money in other lands. They would perceive that this was not a case where a sale is the object of the trust; where it is the duty of the trustee to sell in any event, and afterwards dispose of the trust money; but a case in which the great object of the trust was the security of the estate; and the power to sell was limited to the case where, "in the opinion of Strode, the land can be sold and the money laid out in the purchase of other lands, advantageously for those interested, and that in such case, the lands so purchased were to be held for the same trusts, &c." The very deed under which they claim, then, informed them that their title originated in a trust, and that it behoved them to inquire how that trust had been executed. The parties were all within the reach of inquiry, and the difficulty of making it was inconsiderable. The deed to Veitch was dated the 16th of September, 1810, and the deed to Castleman and McCormick was certified for the purpose of being recorded on 25th of June, 1811. They say in their answer that they purchased in 1810. Previous to this time, Wormeley had become dissatisfied with the Fauquier land

and they knew it. Had they not been informed of this, they must have known that the title to those lands still remained in Strode, and, consequently, that he had not performed his duty as a trustee. With this knowledge, they enable Strode to sell the Fauquier land.

If the case rested on these facts, the court would feel much difficulty in allowing to these defendants the protection they claim as purchasers without notice. But the case does not rest on these facts. In their answer these defendants say, that they cannot doubt the fairness of the transaction, "because they are well satisfied that Strode never received more from Veitch, than he has given the cestui que trust credit for." Is it a fair execution of this trust and power, to sell the trust estate, and give the cestui que trust credit for the amount of sales? The defendants proceed to deny all fraud in themselves and all knowledge of fraud in Strode or Veitch. This is not sufficient. Fraud is an inference of law from facts, and this answer denies no fact alleged in the bill, nor does it deny a knowledge of those facts, with which knowledge they are charged, but states their opinion that no fact which has come to their knowledge, is fraudulent. The answer then, though it does not confess, does not controvert notice of the facts which prove a breach of trust. Is that notice otherwise proved?

Benjamin Barnet deposes that they were in treaty with Strode for the land before the sale to Veitch, and were to have paid a part of the purchase-money to Veitch in discharge of a debt due to him from Strode, and that they endeavoured to make an arrangement with Veitch, but failed; when afterwards this land was sold to Veitch, these defendants must have known that it was sold not for the purposes of the trust, but on Strode's own account. Their answer avers the opinion that such a sale was lawful. George Tacket proves that in May, 1811, prior to the execution of the deed from Veitch, while the Wormeley family were in Frederick on their way to Kentucky, when some doubt was expressed of continuing their journey, the defendant Castleman expressed great uneasiness, lest the journey should not be prosecuted, because he expected they would receive lands in that country, in lieu of the lands he had purchased from Veitch. Still further. It is well known that to be a purchaser without notice, not only the contract must be made, but the purchase-money paid before notice, and this should be averred in the answer. See *Garnett v. Macon* [Case No. 5,245]. Now there is no such averment, and the fact is otherwise. It is proved by Mrs. Powell, that upwards of \$3,000, part of the purchase-money was paid in the fall of 1813, and spring of 1814, not only after the full notice, acknowledged in May, 1811, but after the institution of this suit. What material fact, then, was unknown to these defendants? Not one. They were not

ignorant of the facts, but of the law arising on those facts. Either there has been no breach of trust, and the original contract is valid, or the defendants are trustees. The court is of opinion that they are trustees. But though trustees, they are not to be considered as mere squatters; the light in which they are viewed by the counsel for the plaintiffs. They believed their title to be good and acted on the conviction that it was so. They trusted to the full power of Strode. They do not appear to have placed Veitch between them and danger, but, probably, could not raise the money. While compelled to do equity, they are entitled to equity. They are entitled to the benefit of the encumbrances from which the land has been relieved, and of the permanent improvements which they have made on it, and to the advances to Wormeley for the support of his family. At the same time they are accountable for the profits. The advances are properly chargeable against the profits, but the encumbrances which have been taken up, and the improvements, if not absorbed by the profits, constitute a charge upon the land.

Decree: This cause came on to be heard on the bill, answers, exhibits, and depositions of witnesses and arguments of counsel, which being fully considered, the court is of opinion, that the exchange of land made between the defendant, Hugh Wallace Wormeley and Thomas Strode, is not valid in equity, and that the defendant, Thomas Strode, has committed a breach of trust, in selling the land conveyed to him by the deed of the 5th of August, 1807, for purposes not warranted by that deed; in misapplying the money produced by the said sale; and in failing to settle other lands to the same trusts as were created by the said deed; and that the defendants, Richard Veitch, David Castleman, and Charles McCormick, are purchasers, with notice of the facts which constitute the breach of trust committed by the said Thomas Strode, and are, therefore, in equity, considered as trustees; and that the defendants, David Castleman and Charles McCormick, do hold the land conveyed by Hugh Wallace Wormeley to Thomas Strode, by deed, bearing date the 5th day of August, 1807, charged with the trusts in the said deed mentioned, until a court of equity shall decree a conveyance thereof. The court is further of opinion, that the said defendants are severally accountable for the rents and profits arising out of the said trust property while in possession thereof, and that the said defendants, Castleman and McCormick, are entitled to the amount of the encumbrances from which the land has been relieved by any of the defendants, and of the value of the permanent improvements made thereon, and of the advances which have been made to the said Hugh Wallace Wormeley, by any of the defendants, for the support of his family; the said advances to be credited against the rents and profits, and the value of the said permanent improvements, and of the encumbrances which have been discharged, and which may

not be abated by the rents and profits, to be charged on the land itself; and it is referred to one of the commissioners of the court to take accounts according to the directions herein given, and report the same to this court in order to a final decree.

NOTE. In pursuance of the interlocutory decree above recited, the commissioner to whom the accounts were referred, made a report, which was partially confirmed; the court reserving some questions for its future decision. "And it being represented on the part of the plaintiffs, that they have removed to the state of Kentucky, and are about removing to the state of Mississippi, and that it will be highly advantageous to them to sell the trust estate, and to invest the proceeds of sale in other lands in the state of Mississippi, to the uses and trusts expressed in the deed of August 5, 1807; and it appearing, also, that there is no fund other than the trust estate, from which the sums due to the defendants, Castleman and McCormick, can be drawn, this court is further of opinion, that the said trust estate ought to be sold, and the proceeds of sale, after paying the sum due to the defendants, Castleman and McCormick, invested in other lands in the state of Mississippi, to the same uses and trusts, &c." The sale was accordingly decreed, commissioners were appointed to make it, and the proceeds directed to be first applied in satisfaction of the sums found due by the report, and the balance to be paid to the trustee, to be invested by him in Mississippi lands, "for which he shall take a conveyance to himself, in trust for the uses and trusts expressed in the deed of August 5, 1807, &c.": and the court proceeded to revoke the powers of Thomas Strode, he being an unfit person to act longer in that capacity. Other orders and decrees were subsequently made in this cause, which it is unnecessary to detail further. Finally, the court set aside so much of the decretal order of a previous term, as directed the land to be sold to the highest bidder; and until the appointment of a trustee, the marshal was directed to receive propositions for the purchase of the land, and to report the same to the court, which would give such further directions respecting the sale of the land as should then appear proper. Whereupon the defendants appealed from all the decrees pronounced in the cause.

The supreme court held (1) That the exchange of the Frederick lands for those in Fauquier, was invalid, because it was in contravention of the letter and spirit of the power of the trustee, and because the "stubborn rule of equity" which forbids a trustee from bargaining with himself, was peculiarly applicable to this case; (2) that Veitch was a purchaser with notice of the breach of trust; and that the sale was, consequently, invalid as to him, and he must be considered in a court of equity as a mere trustee; (3) that Castleman and McCormick were in no better situation, and must also be considered as purchasers with notice, and consequently, as trustees; (4) that a bona fide purchaser, without notice, must be so, not only at the time of the contract, but at the time of the payment of the purchase-money. Decrees affirmed with costs, Johnson, J., dissenting.

An objection to the jurisdiction of the court was taken in the supreme court on the ground that Wormeley, the husband, was made a defendant, and so, all the parties on each side of the cause were not citizens of different states, since he had the same citizenship as his wife and infant children. *Strawbridge v. Curtis*, 3 Cranch [7 U. S.] 267; *Corporation of New Orleans v. Winter*, 1 Wheat. [14 U. S.] 91. But the court said that Wormeley was a nominal defendant, joined for the sake of conformity in the bill, against whom no decree was

sought, that he appeared voluntarily, though perhaps, he could not have been compelled so to do; that the court would not suffer its jurisdiction to be ousted by the joinder or non-joinder of mere formal parties, but would rather proceed without them, and decide upon the merits of the case between the parties who have the real interests before it, whenever it could be done without prejudice to the rights of others. *Wormeley v. Wormeley*, 8 Wheat. [21 U. S.] 421.

WORMS (UNITED STATES v.). See Case No. 16,765.

Case No. 18,048.

WORMSER et al. v. DAHLMAN et al.

[16 Blatchf. 319; 57 How. Prac. 286; 7 Reporter, 740.]¹

Circuit Court, S. D. New York. May 14, 1879.

REMOVAL OF CAUSE — NONRESIDENT DEFENDANT — NOTICE OF APPLICATION.

1. W. brought suit in a state court of New York against D. and K. and R., as copartners, to recover on a promissory note. Process was served on D. alone. He alone appeared. W. and K. were, at the time the suit was commenced, citizens of New York. D. and R. were, at that time, citizens of California. D. took proceedings, under subdivision 2 of section 639 of the Revised Statutes, to remove the suit, so far as it concerned him, into this court, without notice to the attorney for W. The petition for removal was not signed or verified by D., but by D.'s attorney in the suit. W. moved to remand the cause to the state court. *Held*, subdivision 2 of section 639 of the Revised Statutes was not repealed by the act of March 3, 1875 (18 Stat. 470).

2. The suit was one in which there could be a final determination of the controversy, so far as concerned D., without the presence of K. and R., as parties.

3. Any rights which W. would have had as against K. and R., from serving process on D., remain to W. in this court.

4. Notice of the application for the removal was not necessary.

5. The petition was sufficiently signed and verified.

[This was a suit by Isadore Wormser and Simon Wormser against Charles Dahlman, Arthur A. Kline, and Adolph B. Roth.]

D. M. Porter, for plaintiffs.

R. S. Newcombe, for defendant Dahlman.

BLATCHFORD, Circuit Judge. This suit was commenced in the superior court of the city of New York. Process was served on the defendant Dahlman alone. He appeared in the state court in the suit, and the complaint was put in and he answered it. No other defendant has appeared or answered either in the state court or in this court. The plaintiffs and the defendant Kline were, at the time the suit was commenced, citizens of the state of New York, and the other defendants were, at that time, citizens of the state of California. The suit is one against the three defendants as copartners, to recover

¹ [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission. 7 Reporter, 740, contains only a partial report.]

on a copartnership liability, on two promissory notes, made by the defendants as copartners. Dahlman presented to the state court a petition, verified April 1, 1879, setting forth, "that there can be a final determination of the controversy, so far as it concerns your petitioner, without the presence of the other defendants as parties to the cause," and "that your petitioner is desirous, so far as concerns him, of removing the cause to the United States circuit court," and praying, "that, so far as it concerns him, the cause may be removed to the next circuit court of the United States for the Southern district of New York." The necessary bond was given, and was approved by a judge of the state court. It does not appear that the plaintiffs' attorney had notice, in the state court, of the proceedings for removal, or that any order of removal was made by the state court. The defendant Dahlman has filed in this court papers certified by the clerk of the state court, as a copy of the record in the suit, and of all process, pleadings and other proceedings in it, which consist of the summons, notice to the plaintiffs' attorneys of Dahlman's appearance, complaint, answer of Dahlman, petition for removal and bond on removal. On filing such papers in this court, the defendant Dahlman entered a rule in this court, continuing the cause therein, and noting his appearance therein by an attorney, and served on the plaintiffs' attorney a copy of such rule with notice of its entry. The plaintiffs now move to remand the cause to the state court.

It is plain that the proceedings for removal were taken not under the act of March 3, 1875 (18 Stat. 470), but under the second subdivision of section 639 of the Revised Statutes, which is a re-enactment of the provisions of the act of July 27, 1866 (14 Stat. 306). Under the act of 1875, nothing less than the whole suit can be removed into this court. Under the act of 1866 and subdivision 2 of section 639 of the Revised Statutes, the suit may be removed only as against the defendant who petitions to have it removed only as against him.

It is contended for the plaintiffs, that subdivision 2 of section 639 of the Revised Statutes, is repealed by the act of 1875, as being in conflict with the provisions of that act. I am not referred to any case in which it has been distinctly held, in a federal court, in a case involving the point, that said subdivision 2 is repealed by the act of 1875. On the contrary, in *Girardey v. Moore* [Case No. 5,462], it was held by Mr. Justice Bradley, in a case involving the point, that said subdivision 2 is not repealed by the act of 1875; and Judge Dillon (Rem. Causes, 2d Ed., p. 28), observes, that it is, probably, the better view, that, if a case is brought within the provisions of the act of 1866, it may still be removed thereunder; that cases may arise of such a nature that they would fall

within the act of 1866, and not within that of 1875; and that, in such event, the latter act should not be held to repeal, by implication, the former. This is, I think, the proper view. The act of 1875 does not expressly repeal said subdivision 2 of said section 639; and, as the act of 1875, in section 2, only relates to the removal of the whole suit, while said subdivision 2 of said section 639 relates to the removal of the suit as against one of two or more defendants, if the suit is one in which there can be a final determination of the controversy, so far as concerns such one defendant, without the presence of the other defendants as parties in the cause, I concur with Mr. Justice Bradley in the view that there is no conflict between the provisions, and no reason why both should not stand, and that said subdivision 2 of said section 639, so far as it authorizes a defendant to remove a cause as to him, is not repealed by the act of 1875.

It is also contended, for the plaintiffs, that this suit is not one in which there can be a final determination of the controversy, so far as concerns Dahlman, without the presence of the two defendants sued with him as copartners, as parties in the cause. The view urged is, that, as the three are sued as copartners, no recovery can be had against Dahlman unless the copartnership shall be established, and that, in such event, the determination must be against the three. The plaintiffs, as part of their causes of action on the two notes, set forth, in their complaint, that they signed a composition of such notes, and surrendered them, because of fraudulent representations made by the defendants, inducing such signing and surrender. The plaintiffs contend, that, as such composition was one with the defendants jointly and as copartners, the controversy cannot be determined without the presence of all of them.

The language of subdivision 2 of section 639 of the Revised Statutes is not that the suit must be one in which there can be a final determination of the whole controversy instituted by the plaintiff, as regards all the defendants, without the presence of all, but is only that the suit must be one in which there can be a final determination of the controversy so far as concerns the defendant petitioning for removal, without the presence of the other defendants as parties in the cause. I do not see why this controversy cannot be determined finally, so far as concerns Dahlman, with him alone served or appearing as defendant. He cannot now be heard to allege that the others must be served or appear in this court. The plaintiffs have the right to proceed at the same time with this suit in the state court as against the other two defendants. As this is a suit at law, and the state practice governs it, if the plaintiffs, serving process only on Dahlman, would, if the suit had all of it remained in the state court, and it had been

tried there on the present pleadings, and they had recovered judgment, have been entitled to a judgment against all the defendants as composing the copartnership which made the notes, so far as to be able to enforce such judgment against the joint property of all such defendants, and against the separate property of Dahlman, they will be entitled to a like judgment, with like effect, in this court. The words in the statute, "the presence of the other defendants as parties in the cause," means their presence by being served with process or by appearing. Any rights which the plaintiffs would have had in the suit as against the other two defendants, not served or appearing, by reason of the service on or appearance of Dahlman, still remain to the plaintiffs, and are brought into this court by the coming of the plaintiffs and of Dahlman into this court.

It is objected by the plaintiffs, that the petition for removal is not signed or verified by Dahlman, but is signed and verified by the attorney for Dahlman in the suit. I think the petition is sufficiently signed and verified.

There is no force in the objection that notice of the application for removal was not given to the plaintiffs' attorney. The motion to remand the cause is denied.

WORMSER (SEGDWICK v.). See Case No. 12,626.

Case No. 18,049.

WORMSLEY v. BEEDLE.

[2 Cranch, C. C. 331.]¹

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

EXONERATION OF BAIL—PRINCIPAL IN PENITENTIARY.

After scire facias returned, the bail will be exonerated if the principal be confined in the penitentiary of one of the states before any execution returned against him, and so continue to be confined until the return of the scire facias.

Mr. Mason, after the return of the scire facias, moved the court to exonerate the defendant, who was special bail for one J. B. Rice, on the ground that the principal is now in prison in Virginia on a sentence for an offence against the United States, and cited the following authorities: The case of the bail of Peter Vergen, 2 Strange, 1217, where a prisoner under sentence of transportation was brought up to be surrendered in discharge of his bail; Sharp v. Sheriff, 7 Term R. 226 (S. P.), and Lord Chief Justice Kenyon said, it is what the bail are entitled to ask *ex debito justitiæ*; Wood v. Mitchell, 6 Term R. 247, where the court permitted an exoneration on the bail-piece because the defendant was under sentence of transportation and actually on board ship, ready to

sail; Merrick v. Vaucher, 6 Term R. 50 (S. P.), where the principal was an alien out of the kingdom under the alien bill; Trinder v. Shirley, 1 Doug. 45 (S. P.), where the principal had become a peer, and it was no longer in the power of the bail to surrender him; Fowler v. Dunn, 4 Burrows, 2034 (S. P.), where the principal was sentenced to the state prison for life; and Cathcart v. Cannon, 1 Johns. Cas. 28, where the principle is admitted by Lord Mansfield.

THE COURT (nem. con.) ordered the exoneration to be entered, the principal being confined in the penitentiary of Virginia before any execution returned against him, and continuing therein until the present time.

WORRALL (UNITED STATES v.). See Case No. 16,766.

Case No. 18,050.

WORTENDYKE v. WHITE.

[2 Ban. & A. 25.]¹

Circuit Court, D. New Jersey. March, 1875.

OWNER OF PATENTED MACHINE—RIGHT TO USE MACHINE—INJUNCTION AGAINST INFRINGEMENT—LACHES.

1. Complainant sold to McP. a patented machine for cutting paper for paper twine, for \$225, and gave him a personal license to use it upon payment of a royalty of five cents per pound. Monthly statements were to be made, and on failure to pay the license fee for thirty days after it became due, the complainant could revoke the license. McP. died, and parts of the machine were subsequently sold at auction as scrap iron to N., who reconstructed it out of the old parts and sold it to the defendant. *Held*, that such a purchase by N. gave him no right to reconstruct and use, from these loose parts, a working machine embodying the complainant's invention.

2. The difference between the ownership of a patented machine and the right to use it, considered.

3. Where the complainant's suspicions of the infringement are allayed by the direct misrepresentations of the defendant, the court cannot give to such defendant any advantage resulting from the lapse of time before applying for injunction.

4. Where a motion for a preliminary injunction is resisted on the ground of complainant's laches, the burden of proving complainant's previous knowledge of the infringement is upon the defendant, and must be proved by him.

[This was a bill in equity by John B. Wortendyke against James White, for the infringement of letters patent No. 44,249, granted to complainant September 13, 1864; reissued November 22, 1864,—No. 1,825.]

E. Q. Keasbey, for complainant.

A. J. Todd, for defendant.

NIXON, District Judge. The bill of complaint was filed in this case February 4, 1875, alleging an infringement of reissued letters patent, No. 1,825, for "machine for cutting

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

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

paper for paper twine," and granted to the complainant November 22, 1864. The matter is now before the court on an application by the complainant for a provisional injunction. The infringement is substantially admitted by the defendant, and two questions are presented by the affidavits in the case for consideration: (1) Whether the defendant has exhibited such a satisfactory title to the machine in use by him, that he should be allowed to continue its use, as against the exclusive rights of the complainant under the patent, until the final hearing. (2) Whether there has been an acquiescence by the complainant in the infringement of the defendant to the extent that he should not now be protected by a preliminary injunction.

1. The affidavits presented by the complainant on the hearing, disclose, that a few weeks after he obtained his reissued letters patent, to wit, in the month of December, 1864, he caused to be built three machines embodying his invention, one of which he sold to Elijah Rosencrantz, and the remaining two to a Dr. McPherson, of Paterson, New Jersey; that these were delivered to McPherson, at the price of \$225 each, which was the cost of their construction; that a personal license was given to the said McPherson to use them in the manufacture of paper twine; that monthly accounts were to be rendered to the patentee of the quantity of paper twine manufactured and sold, on which he was to pay a royalty of five cents per pound, upon every pound sold during the month; that on every package of twine made, should be marked the words, "Wortendyke's Patent Manilla Twine." That on his failure to pay the said license fee, for thirty days after it became due, the complainant should be at liberty to revoke the license to manufacture and sell; that McPherson undertook the manufacture of twine with the machines, but after a few months' trial abandoned the business, as not remunerative; that he paid nothing to complainant as a royalty for their use, and upon his death in January, 1866, the complainant made a settlement with the representatives of his estate, took back one of the machines in part payment of his claim, and did not take back the other, because he was informed, that it had been broken up, and was worthless for further use.

This statement is not controverted by the defendant. He admits that he saw the machine while it was in the hands of McPherson, who told him that he had bought it of complainant. He claims, that in the month of June, 1871, he purchased it of one John Nichols for a valuable consideration, without notice of any restriction or condition annexed to the absolute ownership of the said McPherson, and that Nichols bought the machine of McPherson. But Nichols' affidavit hardly sustains the defendant's claim. He swears that he sold the machine to the defendant about the month of May, 1870, for about two hundred dollars; and that he had

never heard and had no reason to believe, that there was any condition or reservation of royalty attached to it while it was owned by McPherson, or at any other time. He does not say of whom, or under what circumstances, he purchased it. He probably meant to suggest by the cautious phraseology used, that he had something to do with McPherson in regard to it; and if so, it is feared he was suggesting what was not true. Other affidavits in the case tend to show, with reasonable certainty, that McPherson sold the machine, a short time before his death, to one John Dean, of Paterson, for \$65 or \$70; that in 1868, Hindel & Allen, auctioneers in the city of Paterson, made public sale of a lot of machinery and scrap iron, belonging to Dean, and that among the iron were parts of this dismantled machine; that they were bought, as scrap iron, by the firm of P. V. H. Van Reiper & Son, who, in the year 1869, made sale of the parts of the machine thus purchased, to John Nichols for \$25.30. Mr. Geo. P. Van Reiper, one of the members of the firm, testifies that the entry of the sale in their books is as follows: "John Nichols, Dr. To 23 lbs. (part of paper-cutting machine), \$25.30." It is hardly necessary to observe that such a purchase gave no right to Nichols to reconstruct from these loose materials a working machine, embodying the complainant's invention. Confusion on this subject, has, doubtless, arisen from not distinguishing between the ownership of a patented machine and the right to use it. The one does not always include the other. Thus, it was held by Mr. Justice McLean, in *Wilson v. Stolley* [Case No. 17,839], that where a person, licensed to run a patented machine, sold it to another, the license to run the machine did not necessarily pass to the grantee. And so, where a suit was brought against a sheriff for the infringement of the patent rights of the plaintiffs, and the proof was that he had levied upon and sold three completed patented machines, belonging to the plaintiffs, by virtue of an execution against them, Justice Story held that such sale was no violation of the patent act, which imposed a penalty upon any one for selling the thing whereof an exclusive right is secured to a patentee, without the patentee's consent, because it did not follow that the sale of the materials of which a machine was composed, carried with it the right to use the machine without a license. *Sawin v. Guild* [Id. 12,391]. The affidavits in the case tend to prove, that all McPherson got from the complainant was a personal license to use the machine, upon the payment of a certain royalty. If that were an equitable right which was assignable—which I am far from asserting—there is no proof that McPherson ever attempted to assign it.

2. But the defendant claims that the complainant has so long delayed his application as to be cut off from the right to a preliminary injunction. Courts of equity do not

look with favor upon those who slumber over their rights. *Bovill v. Crate*, reported in L. R. 1 Eq. 388, and quoted by defendant's counsel, is just in point. That was an application to restrain the defendant from the use of a patented article, by an interlocutory injunction. The bill was filed in July, 1865; and as soon as it appeared in the case that the complainant had written to the defendant in the preceding November, complaining that he had been infringing for upwards of a year, the vice chancellor stopped the proceedings by inquiring, how it was possible, after that correspondence, to ask for an interlocutory order? He subsequently remarked, in refusing the injunction, "It is very important to the practice of the court, not to have it cited as authority hereafter, that the court will grant such relief as is here asked, upon an application made in July, 1865, when it is informed that the plaintiff, certainly as early as in August, 1864, and probably in July, 1864, knew what he knows now of defendant's proceedings." But there must be satisfactory proof of knowledge, or means of knowledge, before laches can be imputed. The only evidence here, that complainant was aware of the defendant's infringement, is the affidavit of the defendant himself. He says, that about two years ago he had a conversation with complainant on the cars coming from New York, and then stated to him that he was using the McPherson machine and claimed the right to use it. On the other hand, the complainant swears that the first knowledge he ever had of the defendant's infringement was in the month of January last, when he was informed of the fact by one Terhune; that the only conversation on the subject he had with the defendant was on the cars, and was referred to in the defendant's affidavit; that he then informed the defendant that he had understood that he had constructed and was using a machine for cutting paper twine, which was an infringement of his patent; that the defendant replied that he was not, but that he was using the same machine that one Gilmore had used in making paper twine in Lee, Massachusetts; that affiant knew that Gilmore had gone out of business, some time previously, and inferred that he had bought and was using a Gilmore machine. If it be true that the suspicions of the complainant, in regard to the defendant's infringement, were allayed by the direct misrepresentations of the defendant, the court cannot give to him any advantage resulting from the lapse of time. But whether this be true or not, the allegation of the defendant in regard to knowledge is unequivocally denied by the complainant, and in such an issue the burden is on the defendant.

A preliminary injunction must issue against the defendant, until the further order of the court.

WORTH (ESSLER v.). See Case No. 4,533a.
30 Fed. Cas.—41

Case No. 18,051.

In re WORTHINGTON.

[7 Biss. 455; 16 N. B. R. 52; 1 N. W. Rep. (O. S.) 109; 9 Chi. Leg. News, 346; 4 Law & Eq. Rep. 78; 16 Alb. Law J. 63; 23 Int. Rev. Rec. 233; 2 Cin. Law Bul. 189.]¹

Circuit Court, W. D. Wisconsin. June, 1877.²

NON-JURIDICAL DAY—ENTRY OF TRANSCRIPT OF JUDGMENT.

The act of the circuit clerk in filing the docket transcript of a judgment, is a ministerial act, and not void, though done on a non-judicial day, and the judgment creditors thereby acquired a lien upon the real estate of the judgment debtor the same as if done on any other day.

[Cited in *Re Boyd*, Case No. 1,746.]

[Cited in *Whipple v. Hill* (Neb.) 55 N. W. 228.]

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

In bankruptcy.

Cottrill & Cary, for assignee.

Jenkins, Elliot & Winkler, for judgment creditors.

DRUMMOND, Circuit Judge. On the 24th of December, 1874, Charles E. Storm and Robert Hill recovered a judgment against the bankrupt [R. C. Worthington] in the circuit court of Milwaukee county, for \$3,464. On the following day a transcript of the docket was filed in the clerk's office of the circuit court in Wood county, where the bankrupt had, at the time, real estate. Several months after this, proceedings in bankruptcy were commenced, and Worthington was adjudged a bankrupt in July, 1875.

The judgment creditors made an application to the district court to direct the assignee to sell the real estate of the bankrupt, and apply the proceeds to the payment of the judgment, and to permit them to prove their claim for any balance that might be found due. This application was denied by the district court, on the ground that the act of filing the transcript by the clerk in Wood county was void, and gave the judgment creditors no lien upon the property, as it was done on Christmas day—a holiday under the laws of this state. [Case No. 18,052.]

By the law of this state, the clerk of the circuit court was required to keep a book for the entry of judgments, and immediately after entering the judgment the clerk was to file certain papers which were to constitute what was called the judgment roll, which was to contain a copy of the judgment; and after this was done he was to enter in an alphabetical docket, in books to be provided and kept by him, a statement of the judgment, and containing certain particulars as set forth in the statute, namely: the names of the parties, the amount of the debt or dam-

¹ [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 4 Law & Eq. Rep. 78, and 16 Alb. Law J. 63, contain only partial reports.]

² [Reversing Case No. 18,052.]

ages recovered, with the costs, the hour and day of entering in the docket, etc., and then the judgment became a lien upon the real estate of the debtor. And when it was sought to cause the real estate of the debtor to become bound by the judgment in any other county than that where it was rendered, it became necessary to file with the clerk of the circuit court of that county a transcript of the original docket, and from the time of filing it constituted a lien on the property of the debtor in that county.

The question then to be determined in this case, is, whether the act of the clerk in filing the transcript of the original docket in his office on Christmas day, was a nullity under the laws of this state.

The statute declares that no court shall be open, or transact any business on the 22d of February or the 4th of July, unless to instruct or discharge a jury or to receive a verdict, and the 25th day of December and the 1st day of January are declared to be holidays. If the act of the clerk was void, it was so under the common law, or these statutes.

At common law, Sunday was deemed a non-judicial day, during which no courts could transact any business or render any decree. Of course, at common law, some of the days which, under our practice, are deemed non-judicial, were unknown as such; and when they are so declared, the inference would be that the prohibition extends no farther than is named in the statute. It is hardly to be presumed that ordinary business cannot be transacted in this state, and binding contracts entered into, on the 22d day of February or the 4th of July, and the question is, whether because the 25th day of December and the 1st of January are declared to be holidays, that, therefore, no ministerial act can be performed on those days by an officer of this state. It may be conceded that on those days a clerk could not be required to perform any duty connected with his office, because the state has declared it a holiday; but that is a very different thing from asserting that every ministerial act done by the clerk voluntarily on those days is necessarily void. The statute in relation to the 22d of February and 4th of July was passed in 1861; but when there was legislation in 1862 as to the 25th of December and 1st of January there was no prohibition in relation to the courts, except what might be inferred from the fact that they were declared holidays. It was not till afterwards (1869) that it was declared that when the day for the meeting of the court should fall on a legal holiday, it should be adjourned to the following day.

While at the common law no judicial act could be done on Sunday, the authorities seem to agree that mere ministerial acts could be performed, and the service of the process was regarded as a ministerial act, and therefore valid, although performed on

Sunday, and the act of 29 Car. II. became necessary in order to render it invalid, and in the case of *Van Vechten v. Paddock*, 12 Johns. 178, which is relied upon, by the district court, the supreme court of New York, in order to decide that the issuing of process on a Sunday was void, insisted that the awarding of the process was a judicial act, done whilst the court was in actual session, being thus obliged to resort to an acknowledged fiction to sustain its opinion.

If ministerial acts performed on Sunday were not invalid at common law, for a stronger reason those performed on Christmas day would not be invalid. It is a curious fact that while the judge of the court who gave the opinion in *Van Vechten v. Paddock*, seems inclined to hold that the service of process on Sunday was illegal at common law, the judge who delivered the opinion in *Johnson v. Day*, 17 Pick. 106, declares that an arrest on civil process on Sunday was legal at common law, and that is the opinion of the judge who decided the case of *Pearce v. Atwood*, 13 Mass. 324, where the subject is thoroughly discussed. The district court relied upon the case of *Lampe v. Manning*, 38 Wis. 673, as deciding that the act of the clerk here in question was void. But in fact that case only decided that a trial and judgment rendered by a justice of the peace on the 23d day of February, and which, under the statute, as coming on Monday, was to be treated as the 22d—and, therefore, a holiday—were invalid, and should be regarded as a nullity, and the court says nothing about the effect of ministerial acts done on a holiday. The natural conclusion would seem to be, that when the state legislature in 1861, legislated in relation to the 22d of February and 4th of July, and made prohibitions, and then again legislated in 1862 as to the 25th of December and 1st of January, the prohibitions should not, by construction merely, be enlarged.

It may be admitted that the entry of a judgment by which a man's property is to be bound, or, as it is termed in the statute of this state, the docketing of the same, is a very important act. The entry of the judgment is judicial, but is the docketing of the judgment by the clerk anything more than a ministerial act? There is no exercise of discretion or of judgment, but the language of the statute to him is mandatory. He shall do certain things, and they are particularly described, and in relation to them he can have no discretion; and it would seem that they were mere ministerial acts. And while this is true of the act of the clerk who docket the judgment in the court where it is rendered, it would seem that where it is transferred to another county and docketed there, that there could be, if possible, less doubt of the character of the act to be performed by the clerk of that county; because all that the statute requires is, that a transcript of the original docket shall be filed with the clerk

of the circuit court of the county, so that all that is necessary for the clerk to do is simply to receive the transcript which is brought to him, and file it, and mark it with the date when it is filed. This certainly can be considered nothing more than a ministerial act, not void at common law, and, I think, not rendered so by any statute of this state.

There does not seem to be any statute of this state, which when fairly considered, declares that no official act shall be performed on a holiday. In referring to holidays I do not intend to include Sundays, as to which there is considerable prohibitory legislation by this state, affecting business, public and private, labor, amusements and the service of civil process.

I think, therefore, the act of the clerk of the circuit court of Wood county, in filing the docket transcript was not void, but that the judgment creditors acquired a lien on the real estate of the bankrupt in that county.

The order of the district court will therefore be reversed; but as the judgment of this court cannot be reviewed in this case, I shall authorize the district court, if it shall consider it best, to permit the judgment creditors to proceed on their judgment, and sell the real estate of the bankrupt in Wood county; and then if the other creditors of the bankrupt desire, the right of the purchaser to the property can be tested by the assignee.

Case No. 18,052.

In re WORTHINGTON.

[14 N. B. R. 388; 3 Cent. Law J. 526; 8 Chi. Leg. News, 362; 14 Alb. Law J. 153.]¹

District Court, W. D. Wisconsin. July 15, 1876.²

HOLIDAY—DOCKETING OF JUDGMENT—APPEARANCE—SUMMARY PROCEEDING.

1. The docketing of a judgment on a day that is declared a holiday by statute is void, and confers no lien, for the term holiday imports dies non juridicus.

2. When a party voluntarily appears and moves for the enforcement of a pretended lien, the district court thereby acquires jurisdiction to proceed and dispose of the whole matter in a summary way.

In bankruptcy.

Jenkins, Elliot & Winkler, for judgment creditors.

H. M. Lewis, and Cary & Cotrell, for assignee.

HOPKINS, District Judge. This is an application of Charles E. Storm and others, judgment creditors of the bankrupt, for an order directing the assignee to sell certain real estate of the bankrupt, situate in the county of Wood, and to apply the proceeds upon their judgment, and for leave to prove, as unsecured creditors, any balance that re-

mains upon the judgment after applying said proceeds thereon. They show in their petition that on the 24th of December, 1874, they recovered judgment against the bankrupt for three thousand four hundred and sixty-four dollars and eleven cents in the circuit court of Milwaukee county, and that on the 25th day of December a transcript was filed, and the judgment docketed in Wood county, and they claim that thereby it became a lien upon the real estate of the bankrupt situate in that county. They represent that the real estate in Wood county, which they want sold, is not of sufficient value to pay their judgment, and pray that the assignee may be directed to sell it free of the lien, and to pay the proceeds to them, and that they be allowed to prove up the deficiency as an unsecured debt. The assignee opposes the granting the order, on the ground that the judgment is not a lien on the bankrupt's real estate in Wood county, for the reason that it was docketed there on the 25th day of December, which is, by the statute of this state, declared to be a legal holiday. Laws 1862, c. 248.

This raises the question as to the operation of a statute declaring a certain day a holiday. The act does not in terms prohibit any act from being done on that day; it simply declares that the day shall be a holiday. Does that make the official act of the clerk in docketing the judgment on that day void? For only upon that ground can this court consider the question. If it is voidable, the party must go to the state courts for redress. The question is settled in *Lampe v. Manning*, 38 Wis. 673. It seems to me that the clerk had no authority to docket the judgment on that day, and, if not, the entry was void, and no lien was created thereby. The court there holds that the term "holiday" imports dies non juridicus, and that no authority exists on that day to do any official act, although no express prohibition is contained in the act. That a prohibition is implied in the term holiday. This is a decision of the state court upon the effect of the statute, and it may be unnecessary for this court to go further in search of authorities to support it. If declaring the 25th of December to be a legal holiday, ipso facto, made it no day in law, we are to look to the common law to see what acts, if any, could be performed on such days.

Sunday, at common law, was regarded as a dies non juridicus. In *Bedoe v. Alpe*, W. Jones, 156, the court says that Sunday was not a dies juridicus for the awarding of any process, nor for entering any judgment of record. *Van Vechten v. Paddock*, 12 Johns. 178. Lord Coke, in *Mackalley's Case*, 9 Coke, 66a, took a distinction between judicial and ministerial acts, performed on that day; but in *Hoyle v. Cornwallis*, 1 Strange, 387, that distinction was overruled, so that, at common law, both ministerial and judicial acts

¹ [Reprinted from 14 N. B. R. 388, by permission. 14 Alb. Law J. 153, contains only a partial report.]

² [Reversed in Case No. 18,051.]

were prohibited on such days. Now, by adopting the decision of the supreme court as the authoritative interpretation of the act, it follows that the entering of the judgment on that day was void, and hence no lien was created thereby. See, also, for a further discussion of this question, *Story v. Elliot*, 8 Cow. 27; *Hoghtaling v. Osborn*, 15 Johns. 119; *Butler v. Kelsey*, Id. 177.

If the judgment was a lien, it is preserved by the bankrupt law [of 1867; 14 Stat. 517], and it is the duty of this court to protect it as such. But, in determining that question, we have to look to the state statutes, and the construction placed upon them by the state courts, and if by those the judgment is a valid lien, it is our duty to give it its full force and operation. The filing of the transcript and docketing of the judgment in Wood county were necessary to give a lien on the bankrupt's real estate in that county (2 Taylor's St. p. 1509, §§ 61, 62), and such filing and docketing having been on the 25th of December, they were not legally done, and must be regarded a nullity, which leaves the petitioners, as to those lands, in no better situation than any other creditor of the bankrupt. As the entry constitutes an apparent cloud on the title they should cause a cancellation of the docket entry, so as to remove the colorable lien created thereby. The assignee is therefore ordered to sell the real estate in Wood county free of any lien of the petitioners, by virtue of the said judgment, and to hold the proceeds for distribution among all the unsecured creditors; and, in order to further protect the purchaser or purchasers thereof from the assignee, I shall direct that an injunction issue out of this court perpetually enjoining and restraining the petitioners, and their attorneys and agents, from selling or offering to sell such real estate, or any portion, by virtue of said judgments, or from enforcing, or attempting to enforce, the same upon said real estate.

The petitioners having voluntarily appeared and moved the court to enforce the pretended lien, the court thereby has acquired jurisdiction to proceed and dispose of the whole matter in this summary way, which it could not have done upon summary petition of assignee. But the authorities hold, that although a party claiming an adverse interest cannot be brought in by petition by assignee, in a summary way, to have the claim determined, that such claimant may voluntarily come in by petition, and submit his claim to the decision of the court, without resorting to the form of a plenary action. The petitioners have leave to prove for the full amount of the judgment being valid, for aught that appears to the court now, the lien on real estate in Wood county alone being void. An order and injunction will be issued in accordance with this opinion.

[This decision was reversed by the circuit court in Case No. 18,051.]

Case No. 18,053.

WORTHINGTON v. ETCHESON et ux.

[5 Cranch, C. C. 302.]¹

Circuit Court, District of Columbia. March Term, 1837.

EJECTMENT—PLEADING AND PROOF—DEATH OF PLAINTIFF'S LESSOR—EVIDENCE OF POSSESSION—NOTICE TO QUIT—DEATH OF LIFE TENANT—DISSEIZIN BY HEIR.

1. In ejectment, the death of the lessor of the plaintiff cannot be taken advantage of upon the general issue.

2. To show possession in the lessor of the plaintiff, who was a purchaser at a sale under a decree of foreclosure, it is sufficient to show that the mortgagor was in possession until his death; and a lease for life, made by the mortgagor, is evidence of his possession, although the lease be not recorded.

3. When the defendant is a disseizor and intruder, he is not entitled to notice to quit.

4. If the tenant for his own life, die, and his heir enter, the heir is a disseizor and intruder.

The plaintiff [lessee of Charles Worthington] was a purchaser of the property at a sale under a decree of foreclosure of a mortgage made by John Threlkeld, who had made a lease for life to one Riffle, but the lease was not recorded, and therefore operated only as a lease from year to year, at the will of the parties. Riffle died, and the defendant Margaret was his daughter and heir at law, and upon the death of her father, entered upon the property.

Mr. Redin, for defendants [John and Margaret Etcheson], contended that the plaintiff could not recover because his lessor, Charles Worthington, is dead.

THE COURT, however, said that the death could not be taken advantage of, upon the general issue.

THE COURT (CRANCH, Chief Judge, giving no opinion) said that in order to show possession in the lessor of the plaintiff, it was sufficient for the plaintiff to show possession in Threlkeld, and his death.

The counsel for the defendants contended that the plaintiff could not recover without showing notice to the defendants to quit; but—

THE COURT decided that the defendants were to be considered as intruders; and therefore not entitled to such notice.

Verdict for plaintiff.

Case No. 18,054.

WORTHINGTON et al. v. JEROME.

[5 Blatchf. 279.]²

Circuit Court, S. D. New York. Oct. 28, 1865.

DISCHARGE UNDER STATE INSOLVENT LAW—EFFECT—CREDITOR RESIDING IN ANOTHER STATE.

1. A discharge of a debtor, under a state insolvent law, does not discharge a debt due by him to a person who resides in another state at

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

² [Reported by Hon. Samuel Blatchford, District Judge, and here reprinted by permission.]

the time the insolvent proceedings take place, and who does not become a party to such proceedings.

2. That the debt has passed into a judgment, before the proceedings, makes no difference.

3. Nor does it make any difference, that the indebtedness rests on a contract payable at a place within the state in which the insolvent proceedings take place.

This was an action on a judgment. The defendant [Leonard W. Jerome] pleaded an insolvent's discharge, and the plaintiffs [Lew- is Worthington and others] demurred to the plea.

James K. Hill, for plaintiffs.

William H. Anthon, for defendants.

NELSON, Circuit Justice. The plaintiffs, who are citizens of Ohio, recovered a judgment against the defendant, in the superior court of the city of New York, in 1851, for the sum of \$1,147.05. In 1855, the defendant obtained the benefit of the insolvent act of the state of New York, the discharge under which is now set up as a bar to this action on the judgment. The plaintiffs were citizens and residents of Ohio at the time of the insolvent proceedings, and took no part in them. It has been repeatedly held by the supreme court of the United States, and as late as the case of Baldwin v. Hale, 1 Wall. [68 U. S.] 223, that a discharge under a state insolvent law does not affect the obligations of the debtor to foreign creditors, to which class the plaintiffs belong, they being residents of the state of Ohio, unless they make themselves parties to the insolvent proceedings. This seems to be conceded by the counsel for the defendant; but it is supposed, that the circumstance that the indebtedness had passed into a judgment before the proceedings, takes the case out of the principle. I think not. The insolvent court acquired no jurisdiction over the plaintiffs, or over any indebtedness, whether resting in judgment or in contract, due to them by the debtor. The discharge was coram non judge as to the foreign creditor, and would have been so, even if the indebtedness had rested on a contract payable at a place within the state in which the insolvent proceedings took place. Judgment for the plaintiffs.

Case No. 18,055.

WORTHINGTON v. PRESTON.

[4 Wash. C. C. 461.]¹

Circuit Court, E. D. Pennsylvania. Oct. Term, 1824.

FUGITIVE SLAVE—POWER OF MAGISTRATE—CERTIFICATE OF OWNERSHIP—COMMITMENT TO JAIL—ESCAPE—LIABILITY OF JAILER.

1. Under the act respecting fugitives from service, passed February 12, 1793 [1 Stat. 302], the judge or magistrate has no power to

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

issue a warrant to arrest the fugitive, or to commit after the examination is over, and the certificate is granted; though in practice the judge commits de die in diem, pending the examination. The whole power is to examine, decide, and grant or refuse the certificate.

2. If after the certificate is granted the owner of the slave delivers him to the gaoler, who receives him, he is not officially liable for an escape, even though the commitment were under a warrant of the examining magistrate.

3. Neither is the gaoler liable for an escape as bailee, if there was no contract to pay him a reward for safe keeping, unless gross negligence be proved.

This was an action on the case for not keeping in safety Tom, a fugitive slave, the property of the plaintiff, who was delivered to him by the plaintiff's agent and attorney, to be safely kept in the gaol at Doylestown. Upon the plea of the general issue, it was proved that the defendant was the clerk or deputy of the sheriff of Bucks county, in which the gaol was, at the time of the transaction which forms the subject of this suit. It was proved by the person who acted under a regular power of attorney from the plaintiff, that on the 19th of September, 1822, he, with the plaintiff's son, seized the said slave in Bucks county, and took him before a state judge, who, after examining witnesses as to the plaintiff's property in Tom, gave to the attorney a certificate for the removal of the slave to the state of Maryland, whence he had before escaped. That he and the son of the plaintiff carried him, the same afternoon, to the gaol at Doylestown, and delivered him to the defendant, who locked him in the gaol yard, which is surrounded by a high wall (nineteen feet high, as proved by another witness), and that the defendant at the same time undertook to keep him safely. Mr. Worthington, the son, deposed to many of the above facts, and that he went with the other witness to the gaol to deliver the slave there, which was done; but that he knows nothing of the agreement of the defendant stated by the other witness, as to the safe keeping of the slave. Two witnesses, one the turnkey of the gaol, proved that the slave was brought by the persons above mentioned, and delivered to him, and that he was conducted by them into the gaol yard. That upon the agent being informed by him that the prisoners were all locked up in the evening, he requested that the slave should not be locked up until he had eaten his supper. That the slave was then left by the turnkey and the agent in the yard, where all the other prisoners were, and the door communicating with it was locked, and so continued till after the escape, which took place, over the wall, whilst the turnkey went to the kitchen to procure the supper; and that the defendant was not present at any time whilst the persons who brought the negro to the gaol were there, nor until after the escape. No proof was given that any reward was to have been given for the safe keeping of the slave.

C. J. Ingersoll, for plaintiff, insisted that the defendant, or deputy of the sheriff, was bound to receive and safe keep the fugitive; and is liable, as in other cases of escape, by virtue of an act of the assembly of this state, passed in 1789, which directs that all sheriffs and gaolers of the state, and their deputies, to whom any person shall be sent or committed by virtue of any legal process issued under the authority of the United States, shall receive such prisoner into his custody, and keep him safely till discharged by due course of law, and shall be subject to the same penalties, and the parties aggrieved entitled to the same remedies against them, as if such prisoner had been committed by virtue of legal process, issued under the authority of the state. See 2 Smith's Laws, 513. But if the defendant be not answerable officially, he is so as a bailee, upon his promise to keep the fugitive safely.

Mr. Binney, for defendant, denied the application of the act referred to on the other side, there having been in fact no commitment by the magistrate, nor had he a power to commit, under the act of congress concerning fugitives from service. As to the other ground, he insisted that the weight of evidence proves that the undertaking, whatever it was, was made, not by the defendant, but by the turnkey, for whose acts the defendant, in a case of this kind, is not answerable. But even if it had been made by the defendant yet, as no reward was to have been given for the safe keeping, nothing but gross negligence could charge him, which, in this case, cannot be alleged. 2 Ld. Raym. 913.

WASHINGTON, Circuit Justice (charging jury). If the defendant be liable for the escape which forms the ground of this action, it must be either (1) in his official capacity, or (2) upon a contract of bailment.

1. The first is a question of law, and depends upon the construction of the act of congress respecting fugitives, and the act of assembly of this state, which has been read. The former authorises the owner of a fugitive from service, escaping from one state into another, or his agent, to seize him, and to take him before any federal or state judge, or magistrate of the county, &c., where the seizure is made, and upon proof to the satisfaction of such judge or magistrate that the person so seized doth, under the laws of the state from which he fled, owe service or labour to the person claiming him, it is made the duty of such judge or magistrate to give a certificate thereof to such claimant, or his agent, which is to be a sufficient warrant for removing the fugitive to the state from which he fled. This act confers only a limited authority upon the magistrate to examine into the claim of the alleged owner, and being satisfied on that point, to grant him a certificate to that effect. This is the commencement and termination of his duty.

He has no authority to issue a warrant to apprehend the fugitive in the first instance, or to commit him after the examination is concluded, and the certificate given. Pending the examination, whilst the fugitive is in custodia legis, the judge of this district and myself have always considered ourselves at liberty to commit, from day to day, till the examination is closed, or else the fugitive could not safely be indulged with time to get his witnesses to disprove the claim of the asserted owner, should he have any. An attempt has been made in congress to correct these glaring defects in the act, without which correction the act is found to be practically of little avail; but the attempt has not as yet succeeded. As it now stands, the magistrate had no authority to command the gaoler in this case to receive and safe keep the fugitive, and consequently, it is not a case provided for by the act of assembly of this state, which is confined to commitments under the authority of the United States. But even if the magistrate had been authorized to commit, it would be a conclusive objection to the plaintiff's demand, under this head, that no warrant of commitment was in fact granted.

2. Is the defendant liable as bailee? And the first inquiry under this head is, whether any contract of bailment is proved to have been entered into by the defendant with the plaintiff's agent? Two witnesses, one of them the turnkey, have stated, that at no period, from the time the negro was brought to the gaol to that of the departure of the agent and son of the plaintiff who brought him there, was the defendant present, and that the directions to keep him, and not to lock him up till he had received his supper, were given exclusively to the turnkey. The agent has sworn positively that the promise to keep the man safely was made by the defendant in person. The son, who was present the whole time, knows nothing of the alleged promise by the defendant. You must therefore say, upon the evidence, how this fact is. It is all important to the case of the plaintiff, and the burthen of proving it to your satisfaction lies upon him. But admit the fact to be proved, would the defendant, under all the circumstances of this case, be liable? No reward for the required service was promised, and, according to the doctrine laid down in *Coggs v. Bernard* [2 Ld. Raym. 909], the bailee is answerable in such a case, only for gross neglect. Now, when a man promises to keep safely property, either animate or inanimate, be the former a rational being or otherwise, he must be free to exercise his own judgment as to the mode, and must depend upon his own vigilance to effect the object. But if the bailor restricts him in these particulars, by prescribing the mode and degree of confinement, the bailee can not be charged with negligence of any kind, much less with gross negligence, if, notwithstanding an honest and strict fulfilment of

the special contract of bailment thus entered into, an escape should happen, or a loss be sustained. Now, in this case, the slave was left in the yard of the gaol, with the knowledge and consent of the agent, and with an order not to lock him up, until he had received his supper. The door communicating with the yard was carefully locked when they left the yard, and the only way by which an escape could be effected, was over the wall. Before the supper could be brought to the negro, he had made good his escape over the wall. How then can the bailee, admitting the defendant to have been such, be chargeable with negligence under circumstances like these? But would he have been liable, even if the order not to lock him up till after supper, had not been given? We think not. The charge of gross negligence could not have been imputed to the bailee, who kept this man in the same place, and with the same precautions, that he kept all the other prisoners under his charge.

Verdict for defendant.

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 WORTHINGTON (SMALLWOOD v.). See Case No. 12,963.

WORTHINGTON (TUNSTALL v.). See Case No. 14,239.

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 Case No. 18,056.

WORTMAN v. CONYNGHAM.

[Pet. C. C. 241.]¹

Circuit Court, D. Pennsylvania. April Term, 1815.

EXECUTION SALE—RETURN BY MARSHAL—PURCHASER'S FAILURE TO COMPLY—DISTRIBUTION OF FUND.

1. The court will not dictate to the marshal, what return he shall make to process in his hands. He must make his return at his peril, and any person injured by it, may have his legal remedy for such return.

[Cited in *The Circassian*, Case No. 2,721.]

[Cited in brief in *McMicken v. Com.*, 58 Pa. St. 218.]

2. It is not a sufficient return to a venditioni exponas, "that A. B., to whom the property was struck off at the sale, has neglected and refused to comply with the terms of sale." It is the duty of the marshal, to offer the property at sale again, if he had time to do so; and if not, by a proper return, enable the plaintiff to take out an alias venditioni exponas.

[Cited in *Dazet v. Landry* (Nev.) 30 Pac. 1067.]

3. After the marshal is commanded by the writ, to bring the money, the proceeds of a sale, into court, he may pay it to the plaintiff on the execution, on his responsibility, for the right of the plaintiff to receive it.

[Cited in brief in *Mather v. McMichael*, 13 Pa. St. 302; *Watmough v. Francis*, 7 Pa. St. 212.]

4. The court will not interfere, in a summary way, to distribute money, the proceeds of an execution, or decide on the rights of those who claim it, unless the money be paid into court.

5. Quære, if the purchaser of property, sold under a venditioni exponas, may pay the plaintiff in the execution.

This was a rule upon the marshal, to show cause, why he should not return the property to the following effect, viz. "that the property levied upon, has been sold, and the purchaser retains the money in his hands, by virtue of a prior lien."

After argument, WASHINGTON, Circuit Justice, discharged the rule; THE COURT not thinking it proper, to dictate to the marshal, what return he should make, to process put into his hands to execute. He must make his return at his peril; and if false in fact, or insufficient in law, any person injured thereby, has a legal remedy for any injury he may sustain.

After this decision, the following rule was obtained, viz.: "Rule upon the marshal, to show cause why he should not execute a deed to F. West, for the land by him purchased, at the sale of the defendant's property, under a venditioni exponas, at the suit of the plaintiff." The return made by the marshal on the venditioni exponas, was as follows: "By virtue of the annexed writ, I exposed to public sale, on the 29th day of November, at the coffee house in the city of Philadelphia, all the right, &c., of David H. Conyngham, in the hereafter described property; when the same were struck off to several persons, whose names are annexed to the description of the property, being the highest and best bidders, at the prices opposite to their names." Then followed the description of the lands, and the names of the purchasers, and amongst them F. West, a purchaser to the amount of twenty-eight thousand nine hundred and twenty-five dollars. "But the said F. West, has neglected and refused to comply with the terms of sale, and pay the purchase money aforesaid, &c." Annexed to the return, but forming no part of it, or referred to in the return, was the following paper, viz.: "Wortman vs. Conyngham. Circuit Court, Venditioni Exponas. Sir: Francis West became a purchaser at the marshal's sale, under the above venditioni exponas, to the amount of twenty-eight thousand nine hundred and twenty-five dollars. You are hereby authorised to credit said Francis West, with the amount above specified, out of the judgment in favour of the plaintiff above named; which is the earliest lien, and amounts to a sum greatly exceeding the purchase by F. West; and so far as the plaintiff's right extends, you will consider this credit, a payment by F. West. (Signed) J. R. Ingersoll, Attorney for the Plaintiff." Directed to the marshal.

In support of the rule, it was contended by Jared & Joseph R. Ingersoll that the return was tantamount to a return that the purchase money had been paid to the plaintiff, and, therefore, the marshal ought to be directed, to execute a deed to F. West, the purchaser.

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

The rule was opposed by Mr. Wallace, who contended: That even if the court ought to interfere in this summary way, still it would be improper to order a conveyance to be made to the purchaser, in the face of the return, which states that the purchase money has not been paid. The order of the plaintiff's attorney forms no part of the return, and cannot therefore be noticed by the court.

Jared & J. R. Ingersoll, for the motions.
Mr. Wallace against the rule.

WASHINGTON, Circuit Justice. The return made to this writ, taken by itself, is unquestionably an insufficient one; in as much as it amounts to saying, that the exigency of the writ has not been complied with, and yet it assigns no legal reason for the failure. If the purchasers refused to comply with the terms of sale, it was the same thing as if the land had not been struck off to them; and the marshal might, and it was his duty to offer the property again to sale. If he had not time to do so, he might have made a proper return to that effect, and an alias venditioni exponas would have issued. But all that appears by this return is, that no effectual sale has been made, and if so, how can this court order the marshal to make a conveyance? Although the writ commands the marshal to bring the money into court, and in strictness he ought to do so, yet he may pay it to the plaintiff if he chooses; and this would be a sufficient return to the writ. If he has any doubt as to the right of the plaintiff to receive the money, he may pay it into court, and discharge himself from all responsibility; or, if a third person claims a right to the money, he may obtain a rule upon the marshal, to show cause why the money should not be paid into court; and when this is ordered, such person may assert his superior right to the money or any part of it, over that of the plaintiff under whose execution the money was levied; and the court will, in its discretion, hear and determine these contested claims, upon a rule to show cause. But this court, or the court of the state, have in no instance, to my knowledge, interposed in a summary way to distribute the money or to decide the rights of the claimants to it, or in any incidental question, in relation to the money; unless it has first been brought into court; and great inconveinency, perhaps injustice, might arise, if such a practice were to be introduced.

This opinion is founded upon the marshal's return. But he has annexed to the writ, though the return has no reference to it, a paper signed by the plaintiff's attorney, addressed to the marshal; which, in substance, directs him to credit the execution with the sum bid by F. West, as if it had been paid. It is contended, in support of the rule; that this paper amounts to an acknowledgment that the plaintiff has received the purchase

money from West, and consequently that he is entitled to a conveyance. But, the short answer to this argument is, that this paper forms no part of the return, and is, in fact, at variance with it. The return is, that the purchaser has refused to comply with the terms of sale, and to pay the purchase money; and this paper states, that he has satisfied the plaintiff. But has the purchaser a right to pay the money to the plaintiff, against the will and without the consent of the officer? I am by no means clear that he ought to do so; since the marshal may pay off prior mortgages and executions, which he would have been prevented from doing, if the purchaser might pay the purchase money immediately to the plaintiff. Upon this point however I give no decided opinion, further than to state, that in a contested case, where such payment has been made, I should not feel disposed to interfere, in a summary way, to compel the marshal to make a conveyance to the purchaser. Rule discharged.

Case No. 18,057.

WORTMAN v. GRIFFITH et al.

[3 Blatchf. 528; 13 Leg. Int. 361; 19 Law Rep. 376.]

Circuit Court, S. D. New York. Sept. 24, 1856.

REPAIR OF VESSEL—LIBEL FOR SERVICES—ADMIRALTY JURISDICTION.

1. Where the owner of a ship-yard hauled up a vessel on his ways, charging for that service, and also a per diem for the time she was on the ways while being repaired by another person, *held*, that the service was one rendered in the repair of the vessel, and that the admiralty had jurisdiction of a libel in personam to recover for the service.

[Cited in *The Vidal Sala*, 12 Fed. 209.]

2. The nature of a contract or service, and not the question whether the contract is made, or the service is rendered, on the land or on the water, is the proper test in determining whether the admiralty has or has not jurisdiction.

[Cited in *The Vidal Sala*, 12 Fed. 209; *Florez v. The Scotia*, 35 Fed. 917.]

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

This was a libel in personam, filed in the district court, to recover compensation for services rendered by the libellant in repairing a steamboat. The district court decreed for the libellant [case unreported], and the respondents appealed to this court.

Erastus C. Benedict, for libellant.

Cornelius Van Santvoord, for respondents.

NELSON, Circuit Justice. The libellant is the owner of a ship-yard, together with apparatus, consisting of a railway-cradle and other fixtures and implements, used for the purpose of hauling up vessels out of the

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

water, and sustaining them while they are being repaired. Certain rates of compensation are charged, regulated by the tonnage of the vessel, for hauling her up on the ways, and a per diem charge is made for the time occupied while she is under repair, in cases where the owner of the yard and apparatus is not employed to do the work, but the repairs are made by other ship-masters, as in the present instance.

The main controversy in the court below related to the terms upon which the service was to be rendered. Judge Hall, who heard the case, settled the amount, upon his view of the evidence, at \$631.97, and I am not disposed to interfere with his conclusion. The proofs are conflicting, and not very clear either way in respect to the agreement.

The doubt I have had in the case is upon the objection raised to the jurisdiction of the court—a point not taken in the court below. It is claimed by the counsel for the respondents, that the agreement for the service rendered is to be regarded simply as a hiring of the yard and apparatus; and, certainly, if this be the true character of the transaction, there would be great difficulty in upholding the jurisdiction. On the other side, it is contended that the service rendered was a service in the repairs of the vessel, and was as much a part of them as the work of the ship-master, or the materials furnished by him.

There can be no doubt, that in cases where the ship-master owning the ship-yard and apparatus, is employed to make the repairs, the service in question enters into and becomes part of the contract, and is thus the appropriate subject of admiralty jurisdiction. And the question is, whether any well-founded distinction exists between a transaction of that character and the present one. The owner of the yard and apparatus, together with his hands, superintends and conducts the operation of raising and lowering the vessel, and also of fixing her upon the ways, preparatory to the repairs. The service requires skill and experience in the business, and is essential in the process of repair. I do not go into the question whether this is a contract made, or a service rendered, on the land or on the water. It undoubtedly partakes of both characters. But, I am free to confess, I have not much respect for this and other like distinctions that have sometimes been resorted to, for the purpose of ascertaining when the admiralty has, and when it has not, jurisdiction. The nature and character of the contract and of the service have always appeared to me to be sounder guides for determining the question.

Although a distinction may be made between this case, in the aspect presented, and the case where the ship-master is employed to make the repairs, I am inclined to think that it is not a substantial one, and that, to

adopt it, would be yielding to a refinement which I am always reluctant to incorporate into judicial proceedings. A distinction, to be practical, should be one of substance, and one which strikes the common sense as founded in reason and justice. I must, therefore, overrule the point of jurisdiction, and affirm the decree.

WOULLUISE (GRUTACAP v.). See Case No. 5,854.

Case No. 18,058.

WOVEN WIRE MATTRESS CO. v. WHITTLESEY et al.

[8 Biss. 23.]¹

Circuit Court, N. D. Illinois. July, 1876.

PATENT—SPIRAL SPRING BED—PRIOR USE OF ARTICLE—VALIDITY OF PATENT—DESCRIPTIONS IN FOREIGN PUBLICATIONS—BEDSTEAD FRAME.

1. A claim or device for making a bed bottom of spiral coils, or wire coils interlaced or interlocked, so as to form a fabric, fastened in any form to the sides of the bedstead frame, *held* not patentable, because the same device was in general use for analogous purposes prior to the application for the patent.

2. Though it is the settled law in this country that the description in foreign publications, in order to defeat a patent in this country, should be sufficiently definite for a person of ordinary skill to construct the machine from such description in the foreign publications, yet where such descriptions are fully as definite as the specifications in the application for the patent in this country, that will be sufficient to defeat the patent.

3. The Farnham patent for a new and improved bedstead frame, sustained.

[Suit by the Woven Wire Mattress Company against John E. Whittlesey and others.]

Goodwin, Offield & Towle, for complainant. Coburn & Thacher, for defendants.

BLODGETT, District Judge. This is a bill for injunction and damages upon an alleged infringement of patents owned by the complainant company. The patents are: First, a patent issued November 5, 1861 [No. 33,685], to Herman Stube, as assignee of O. A. Rouillion, for an improvement in bed bottoms, and by Stube duly assigned by legal conveyance to the complainant. The second is for a patent issued to the complainant as assignee of J. M. Farnham, dated November 30, 1869 [No. 97,375], for an improved bedstead frame.

The answer denied that Rouillion was the inventor of the improvement described in the patent of November 5, 1861, and sets forth various prior devices and prior knowledge and use of the same device, and also denies the infringement of either of the complainant's patents.

The Rouillion patent, which is the foundation of the complainant's claim, is, broadly, for making a bed bottom of spiral coils, or

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

wire coils interlocked, so as to form a fabric, fastened in any form to the sides of the bedstead frame. The patentee sets forth in his specification that he has invented a new and improved spring bed bottom. "The invention consists in constructing a bed bottom of a series of spiral springs, connected together and forming one or more layers."

The claim in the patent is "for an elastic bed bottom, constructed of a series of spiral springs interlocked or connected together to form one or more layers one over the other, and attached to a suitable frame, substantially as shown and described."

It will thus be seen that this patent is, broadly, for the device of making a bed bottom of this elastic fabric—these spiral coils interlocked or connected together so as to make a fabric. The method of fastening or adapting it to the frame forms no part of the patent, but it is, broadly, for this simple device of using this fabric for a bed bottom.

The Farnham patent is for a new and improved bedstead frame. The invention, as the inventor says, relates to a new frame for single or double bedsteads, which are provided with elastic and flexible sheets for the support of the bed, with suitable bed bottoms. The invention consists in the use of double inclined end-bars, to which the end of the fabric is clamped, and in the employment of longitudinal and adjustable standards to which the end pieces are secured. By this arrangement the fabric is securely held, and can be stretched and slackened at will.

These end pieces, it will be seen, incline so that the fabric does not rest upon the end pieces at all, but strains continuously from the point where it is fastened without binding, so to speak, across the end pieces. The end piece is beveled or sloped. The standards referred to are provided with slots, so as to permit the stretching of the fabric as occasion may require.

The patentee was allowed two claims: First. "The inclined double end-bars of the bedstead, arranged substantially as and for the purposes herein shown." Second. "The standard 'B' arranged longitudinally, and adjustable on the side-bars to the bed frame, to permit the inclined side-bars to be set a suitable distance apart, as set forth," so that by these ears or standards, as he calls them, the position of the end-bars can be changed so as to tighten the bed bottom.

It will be seen that the first patent broadly claims, as I have stated, an elastic bed bottom consisting of a series of spiral springs interlocked or connected together, and attached to a suitable frame. It does not specify any particular mode of attaching the fabric to the frame, but the idea is, a patent for using a fabric made of spiral springs interlocked or connected together for a bed bottom. The specification states that more than one thickness or layer of the fabric may be used, but that does not vary the main

feature, which is for a bed bottom formed of this elastic fabric.

The proof shows that this fabric has been known and in use in this country since 1852. In 1851 or 1852, John T. Wickersham, then of New York City, made a fabric of this kind, and used it for the bottoms and backs of chairs, and subsequently used it for the bottom or bed part of sofa beds, and that continuously, from the time this fabric was introduced by Wickersham, forward, the fabric formed by these elastic or spiral coils, interlocked so as to make a sheet or fabric, was well known in the art of wire working in this country. Mr. Wickersham, at page 25 of the defendants' testimony, says: Q. "How was this coiled wire work made?" A. "The coiled wire was wound upon a mandrel with a handle at one end of it, and four or five wires, more or less, were placed side by side and wound around the mandrel, and the mandrel turned and the wire wound around that. After the coils were completed, the coils were cut in continuous lengths, and the wires were slipped off the mandrel and separated after the coils were taken off the mandrel. After the coils were separated, the coils being in a screw shape, one coil was screwed into the other, according to the length or size of the mandrel. I experimented with machinery, but never made much progress from the hand way of making it, and gave it up as to making it with machinery."

The proof also shows that Wickersham published pamphlets or catalogues containing descriptions of his manufacture, from time to time, and also containing cuts or illustrations of chairs and sofas made of this coiled fabric, copies of which are put in evidence.

So, too, the witnesses, Thomas Robinson, and J. Armstrong, who were workmen for Wickersham, and Walker, who was subsequently a manufacturer in Philadelphia, of the same class of goods, all testify not only to the manner of the manufacture of the fabric, but also to the use of it as described by Mr. Wickersham and by Mr. Walker. So, also, Mr. Walker of Walker & Sons, Philadelphia, shows that this fabric was from 1851 or 1852 known as a fabric in the art of wire working and making of wire furniture. It had never been used exactly for a bed, but it had been used, and was used before 1861, for the making of a cot bedstead, not like complainant's exactly, because the coils were larger, but the idea was a cot bedstead, of this fabric with these coils for the bed bottom. In 1851, 1852 or 1853, Wickersham made sofa bedsteads, the back and ends of which were of this fabric. One end was so adjusted that it could be let down and form part of a bed bottom, so that when this sofa was made into a bed, part of the bottom was constructed of a series of spiral springs "interlocked and connected together." So that we have the history of the art up to the time this inventor entered the field,

showing this fabric used for many analogous purposes to that of a bed bottom—that is, it was used for chair bottoms, and it was used for chair backs; it was used for cot bedsteads, and it was used for the back, ends, and part of the bottom of a sofa bedstead. At about the same time, other inventors had been experimenting to some extent, in the same direction. In 1853, Demure & Mauratz had obtained a patent for a bed bottom constructed by a combination of longitudinal and transverse wire coils, with vertical coil springs in the manner shown in the drawing attached to their patents. In 1854, one Mereweather had obtained a patent for constructing a bed bottom of bent wire—that is, wires bent into short kinks so as to give them a certain degree of elasticity and running parallel across the bottom of the bed frame, making a bed bottom of elastic material. In 1856, one Lysander Spooner obtained a patent for a bed bottom constructed of spiral coils run transversely across the frame, parallel to each other, but not interlocked; that is, he makes his coils large enough and strong enough, and puts them close enough together to bear whatever weight is intended to be borne by the bed bottom. He does not give any specific directions as to how many coils are to be used, but his plans show that they are strung across the bed transversely, nearly touching each other, but the coils are not interlocked. We have then the use of elastic coils fabric by Wickersham and Walker for purposes analogous to that called for by the Rouillion patent; then from 1853 up to 1856, other inventors had made bed bottoms of elastic wire, used longitudinally and transversely across the bedstead frame so as to make an elastic bed. They did not use the coiled wire fabric which was used by Wickersham and Walker. It will be remembered that Wickersham states that he called his furniture French furniture, because he made it like certain French furniture which had been imported about that time into this country.

This is all the evidence we have of any French device like this for the purpose of furniture. There is no evidence taken from any of the publications of France, or any evidence of any public or notorious use there. But there is evidence taken at a late stage in the history of this case, which shows that from 1855 forward, one Spyer, doing business in Berlin, Germany, made a bed bottom, which he was at that time engaged in introducing, and advertising for use in hospitals and places where sick people were being treated, made of the same interlocked woven wire—he calls it “spiral weaving,” in his description, and the evidence from public documents, books and publications made in Germany in July and August, 1861, the same year that this patent was issued or applied for by Rouillion, shows that Mr. Spyer was exhibiting his invention, and mak-

ing it public in every method that he could by advertising throughout Germany, showing the advantages of this kind of a bed as an invalid bed. We find in the proof various cuts and drawings, exhibitions and advertisements of it taken from German publications of that date showing that this fabric was well known and in use as a bed bottom there at that time.

We then have, so far as the Rouillion patent is concerned, what I have already said in reference to the art in this country up to the time that Rouillion entered the field, and the further facts that this fabric had been made and used in Germany, and had been described in printed publications in that country prior to the time that the Rouillion invention is claimed to have been made in this country.

The proof in the case also tends strongly to show that the idea of making and patenting this fabric in this country for the purposes of a bed bottom was suggested to Rouillion by Stube, who was Rouillion's father-in-law, and that Stube had then but lately emigrated to this country from Germany, where he might have seen the Spyer bed or published descriptions of it.

I am, therefore, fully satisfied, from the testimony in the case, that the broad claim of Rouillion in this patent for the idea of making a bed bottom of elastic wire fabric made from spiral coils interlocked with each other, can not be allowed, and that this patent for the fabric must be held void for want of novelty.

It is objected by the plaintiff, that the manufacture by Wickersham and Walker of the sofa-bed and cots was only an experiment. Both these witnesses testify that they made these cots and made the sofa bedstead, but they did not sell any. I think, perhaps, the weight of testimony shows that they sold, or gave away one. They were for sale—exposed for sale in their stores; they were publicly exhibited and advertised, but no one was inclined to buy them. I think from the proof one was used by the family in Philadelphia, for a servant's bed or cot. The use, however, was not very general. It is contended, on the part of the plaintiff, that this was, therefore, only an abandoned experiment; and, were it not for the foreign testimony in regard to the foreign use, it might be possible that the court would feel compelled to sustain the Rouillion patent upon the ground that these were mere experiments approximating towards the use which Rouillion finally adopted for this fabric; but when this testimony of Wickersham, Walker and Robinson is supplemented by the testimony of Spyer, I think there can be no doubt but this was an old art at the time of the Rouillion patent.

There is one further objection that is urged to the foreign testimony which I ought to notice, and that is, that the law requires that the description in foreign publications in

order to defeat a patent in this country should be sufficiently definite so that a person of ordinary skill could construct the machine from the descriptions in the foreign publications.

That is, undoubtedly, the settled law in this country. But it will be noticed that Mr. Rouillion gives no description of how to construct the fabric. He seems to accept the fabric as old. Spyer, in his advertisements of his bed bottom in Germany, describes it as made of "spiral weaving." It seems to me as though that is about as definite a description as the description given in the Rouillion patent of spiral coils interlocked with each other. One is "spiral weaving" and the other is "spiral coils interlocked or connected." Rouillion seems to assume that the fabric was well known, or that the method of making the fabric by interlacing or interlocking spiral coils was known, and does not deem it necessary to describe how to do that, but accepts the art as already accomplished up to that point. So, that, I think, when the writer in Germany tells us to make an elastic wire bed bottom of "spiral weaving," he has given us as good a description, and given us as much information as Rouillion did in his patent obtained in 1861.

We come now for a moment only, to the consideration of the Farnham patent. There is no evidence of any prior use of the inclined end pieces in the construction of any kind of a bed bottom, nor is there any evidence of any prior use of this standard "B"; and the evidence in this case shows conclusively that the defendants do use the inclined end pieces, and have used the standard. So far, therefore, as they have used the end piece, and the standard described in the Farnham patent, they have infringed and should be so far enjoined.

The conclusion then is, that the defendants are not liable for using the coiled wire fabric for making the bed bottom, but they do infringe so far as they use the specific elements in the frame patented by Farnham.

[For other cases involving patent No. 97,375, see *Whittlesey v. Ames*, 13 Fed. 893; *Woven Wire Mattress Co. v. Wire Web Bed Co.*, 1 Fed. 222; *Id.*, 8 Fed. 87; *Woven Wire Mattress Co. v. Simmons*, 7 Fed. 723; *Woven Wire Mattress Co. v. Palmer*, 8 Fed. 812; *Hartford Woven-Wire Mattress Co. v. Peerless Wire Mattress Co.*, 23 Fed. 587.]

WRAPPE (UNITED STATES v.). See Case No. 16,767.

Case No. 18,059.

WRAY v. REILLY.

[1 Cranch, C. C. 513.]¹

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

STATE INSOLVENT ACT—DISCHARGE.

A discharge of a debtor under the Maryland insolvent act of January 3, 1800, is a bar to an

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

action for a debt contracted in Georgia, although the creditor always resided in South Carolina.

Debt upon a judgment of the circuit court of the United States for the district of Georgia, obtained in April, 1796. Among other pleas, the defendant pleaded a discharge under the insolvent law of Maryland, passed on the 3d of January, 1800, setting forth all the proceedings, and the final discharge by the chancellor. By the fifth section the debtor is to be "discharged from all debts, covenants, contracts, promises, and agreements, due from, or owing, or contracted by him before the date of his deed of assignment," upon his complying with the terms of the act: To this plea the plaintiff replied that on the 2d of December, 1793, the plaintiff dwelt in South Carolina, and the defendant in the state of Georgia, where he made his promissory note, upon which the plaintiff recovered judgment, upon which this action is brought. That the cause of action therefore arose in Georgia. That the plaintiff never resided in Maryland, and took no benefit from the surrender of the defendant's effects in that state. To this replication the plaintiff demurred.

E. J. Lee, for defendant, contended that the discharge of a debtor, upon a fair surrender of all his effects according to the laws of the country of his domicile is, by the comity of nations, good all over the world. That the act of the chancellor is the judgment of a court of competent jurisdiction, and everywhere conclusive; as in the cases of marriage and divorce. That this court ought to decide upon the validity of this discharge in the same manner as a court of Maryland would decide; and cited the following authorities: *Hunter v. Potts*, 4 Term R. 192; *Hughs v. Cornelius*, T. Raym. 473; *James v. Allen*, 1 Dall. [1 U. S.] 188; *Miller v. Hall*, Id. 229; *Thompson v. Young*, Id. 294; *Gorgerat v. McCarty*, Id. 366; *Emory v. Grenough*, 3 Dall. [3 U. S.] 370; *Cooke*, Bankr. Law, 34; *Coop. Bankr. Law*, Addenda, 10, 27, 28; *Sill v. Worswick*, 1 H. Bl. 665; *Phillips v. Hunter*, 2 H. Bl. 402; *Davis v. Marshall* [Case No. 3,641], in this court, at Washington, July term, 1804.

Mr. Swann, contra, admitted that contracts may be discharged by the laws of the country wherein they were made, but contended that they could not by the laws of any other country, and cited *Coop. Bankr. Law*, 361, tit. "Cessio Bonorum"; *Smith v. Buchanan*, 1 East, 6; [*James v. Allen*] 1 Dall. [1 U. S.] 188; [*Miller v. Hall*] Id. 229; [*Thompson v. Young*] Id. 294; [*Gorgerat v. McCarty*] Id. 366; [*McKimm v. Riddle*] 2 Dall. [2 U. S.] 100; [*Harris v. Mandeville*] Id. 256; [*Emory v. Grenough*] 3 Dall. [3 U. S.] 369; *Pedder v. McMaster*, 8 Term R. 609; *Van Raugh v. Van Arsdaln*, 3 Caines, 154; *Davis v. Marshall* [supra], in this court, July Term, 1804.

CRANCH, Chief Judge, did not sit in this cause.

FITZHUGH, Circuit Judge, delivered the opinion of the court, that the plea of discharge under the insolvent act of Maryland was a good bar to the action.

[See Case No. 18,060.]

Case No. 18,060.

WRAY v. RILEY.

[1 Cranch, C. C. 361.]¹

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

FOREIGN JUDGMENT—MOTION TO DISCHARGE—
SPECIAL BAIL.

In Virginia, special bail in an action of debt upon judgment rendered in one of the other states, cannot be required by the indorsement of an attorney.

Motion by E. J. Lee to discharge the special bail which had been required by an indorsement of the plaintiff's attorney. The action was debt on a judgment recovered in the state of Georgia.

E. J. Lee. The case of judgment is not provided for by the Virginia statute of December 12, 1792, p. 78, in which bail may be required by an indorsement of an attorney. *Ruffin v. Call*, 2 Wash. [Va.] 181; *Bidleson v. Whytel*, 3 Burrows, 1548; *Belither v. Gibbs*, 4 Burrows, 2117; *Bowen v. Barnett*, *Sayer*, 160.

Exoneretur ordered.

DUCKETT, Circuit Judge, absent.

[See Case No. 18,059.]

Case No. 18,061.

The WREATH.

[29 Leg. Int. 284; 2 9 Phila. 467.]

District Court, E. D. Pennsylvania. Aug. 30, 1872.

ADMIRALTY—COMPENSATION OF COUNSEL—ALLOWANCE OUT OF FUND.

[In cases in which a common interest has been promoted by services of counsel which a mere selfish consideration of his client's interest would not have induced him to render, a part or even the whole of his compensation may occasionally be allowed from the general fund arising from the sale of the vessel.]

Allowance of counsel fee under special circumstances.

Samuel S. Hollingsworth, Esq., for libellants.

J. Hill Martin, Esq., for owners of cargo.

BY THE COURT. The questions which are the subject of disagreement having been argued by counsel, the court unhesitatingly allows the costs, amounting to \$334.01. As to the so called charges of counsel, they are not, in this judicial district, allowable in ordinary cases. In cases in which a com-

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

² [Reprinted from 29 Leg. Int. 284, by permission.]

mon interest has been promoted by services which a mere selfish consideration of the client's interests would not have induced an advocate or proctor to render, the charge of a part or even the whole of the compensation of counsel, may, however, sometimes be proper. [The Apollon] 9 Wheat. [22 U. S.] 379. The allowance, when made, is on exceptional and extraordinary reasons. In this case the reasons exist, and are sufficient. The only doubt is, whether the whole or a part only of the amount in question should be allowed. As it is extremely moderate, and an apportionment would be difficult, I allow the whole. The proceeds of the vessel and amount of the freight not being sufficient to reach any part of the demand of S. C. Loud & Co., whose libel of intervention was filed on the 6th of July last, the validity of this demand as against any present subject of litigation has not been considered. Bills for towage, \$4; surveyor of port, \$28; hire of chronometer, \$33; H. L. Gregg, \$36.76, having been presented to the clerk, the freight appearing to have been sufficient for their discharge, they are disallowed as claims upon the fund in court, with leave, however, to the respective parties to move the court at any time before final distribution. The clerk is directed to advertise in two daily papers of general commercial circulation in Philadelphia, and one such paper in New York, that any person having claims upon the proceeds of sale of the vessel must present the same within ten days from the first publication or they will be debarred, &c., such publication to be made twice a week in each paper.

Case No. 18,062.

WREN v. SPENCER OPTICAL MANUF'G CO. et al.

[5 Ban. & A. 61; 1 18 O. G. 857.]

Circuit Court, S. D. New York. Dec., 1879.

EQUITY PRACTICE—ANSWER AS EVIDENCE—REPLICATION—NEW MATTER.

1. According to English equity practice, as adopted in the U. S. circuit courts, an answer is evidence in favor of the defendants, so far as it is responsive to the bill.

2. An answer is not evidence of special facts, alleged in it as a defence, not responsive to the allegations of the bill.

3. Where such an answer had been replied to and new matter inserted in the replication, to meet such special defence in the answer, *held*, that such new matter might be treated as surplusage, and that the replication was not thereby rendered void, as contravening the 45th rule of the supreme court, but that the excess might be treated as surplusage merely, leaving the regular part of the replication standing as a traverse.

[This was a bill in equity by William C. Wren against the Spencer Optical Manufacturing Company and others for the in-

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

fringement of letters patent No. 36,065, granted to W. P. Battice, August 5, 1862.]

B. E. Valentine, for complainant.
Blatchford, Seward, Griswold & Da Costa and Steele & Boyd, for defendants.

WHEELER, District Judge. This cause has been heard upon bill, answer, replication, proofs and argument. According to English equity practice, as adopted here, the answer was evidence in favor of the defendants so far as it was responsive to the bill. By the forty-first rule, as amended in 1871, it was provided that, if an answer under oath should be waived in the bill or an answer under oath to certain specified interrogatories only should be required, the answer, though under oath, should not be evidence in favor of the defendants, except such parts as should be directly responsive to the interrogatories.

This bill charges the defendants with infringement of certain patents of the orator, and requires an answer on oath to specific interrogatories in regard to doing the acts constituting infringement. The defendants in answer admit the acts, and set up that the orator before procuring this patent assumed to and did sell to the grantor of the defendants other patents, standing in the name of another person, covering the same invention. The answer is traversed in the usual form, and then new matter is added to meet the special defence in the answer. The proofs and the answers to the interrogatories make out a prima facie case of infringement.

The evidence on the part of the defendants shows the existence of the other patents, but does not show that the orator sold or undertook to sell them. It is argued by the defendants that the replication, being special, is contrary to the forty-fifth rule and irregular and void, so that the case in effect stands for hearing as upon bill and answer only. But the excess may be treated as surplusage merely, leaving the regular part of the replication standing as a traverse. *Dupont v. Mussy* [Case No. 4,185]. Then, under the rules which are adopted pursuant to statute, and are binding upon this court as statutes, the answer is not evidence of the special facts alleged in it not responsive to the interrogatories, and there is no evidence of the essential fact of the defence set up—viz., the assuming by the orator to sell, which would include a warranty that he had a right to sell, not only a right, but an exclusive right, to the inventions, which would probably estop him from afterward claiming that he had not such rights or draw after it in favor of his grantee his after-acquired rights. So this defence, however meritorious it might be, if it existed, must fail for want of proof.

Let there be a decree for the orator, according to the prayer of the bill, with costs.

WREN, The (UNITED STATES v.). See Case No. 16,768.

Case No. 18,063.

In re WRENTHAM MANUF'G CO.

Ex parte SOUTHWICK.

[2 Low. 119.]¹

District Court, D. Massachusetts. April, 1872.

CORPORATE TREASURER—POWERS—ACCOMMODATION
INDORSEMENTS—NONNEGOTIABLE RECEIPT.

1. The treasurer of a manufacturing company, who signs and indorses promissory notes for the company in the usual course of business, does not by such usage acquire, nor is he held out as having, the right to sign or indorse notes, for the accommodation of third persons.

2. A receipt, not negotiable, and intended as a memorandum of indebtedness by the maker thereof to the holder, does not come within the rule of law in Massachusetts, that one who indorses a note, not being a holder of it, is an original promisor.

3. Whether the indorsement of such a receipt by a third person creates any contract between him and the holder, quære?

4. Where a firm gave such a receipt to A., and at his request one of the firm, who was treasurer of a manufacturing company, indorsed the paper in the name of that company, without any consideration moving to the company, *held*, the amount was not provable against the estate of the manufacturing company in bankruptcy.

Royal Southwick offered for proof, against the estate of the Wrentham Manufacturing Company in bankruptcy, a certain instrument, of which this is a copy: "\$2,000. Boston, Jan. 21, 1870. Received of Royal Southwick, two thousand dollars, on account. Loan. J. H. Jones, Jr., & Co." Indorsed: "Waiving demand and notice. Wrentham Manufacturing Co., J. H. Jones, Jr., Treas." The evidence tended to show that Jones was the treasurer of the company, and had been accustomed to sign and indorse notes for the corporation, in the course of the business, though not for the accommodation of third persons; that the \$2,000 was borrowed by Mr. Jones, for the use of his firm, and that the petitioner asked him if he could not give him the name of the Wrentham Company, and upon this request the indorsement was made. The firm were, at the time this money was borrowed, indebted to the manufacturing company.

A. Hemmenway, for petitioner. By the law of Massachusetts, one who indorses a note before its delivery, not being the payee, is an original promisor. Jones had authority to sign notes for the bankrupts, and his signature binds them.

B. F. Bowles, for assignees. The evidence shows that the promise of the corporation, if it be one, was given for the accommodation of Jones & Co., and that the petitioner so understood it. The power to sign notes in the ordinary course of business will not extend to such a signature, excepting when third persons have been misled.

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

LOWELL, District Judge. The doctrine is firmly established in Massachusetts, that an indorsement of this sort, made by one who is not the payee of a note, and made before the note is negotiated, binds the indorser as an original promisor. The cases are reviewed in *Union Bank v. Willis*, 8 Metc. [Mass.] 504; and the court, while regretting that the law had been so settled, yet were unwilling to change it, after so many decisions had fixed it. Most of the cases are of negotiable notes; but I do not see why the rule is not equally applicable to notes which are not negotiable, because it is on the very ground that the signature on the back of a note, by one who is not payee or indorsee, is not a strict indorsement, that they give it effect as a promise. But I am not aware that any case has gone so far as the petitioner desires me to go in this case. The contract given in evidence is not a note, but a receipt, and is hardly to be understood without explanation. It might mean that Southwick was paying money to Jones & Co., which he already owed them, and taking their receipt on account of that loan. When it is proved that he did not owe them, the receipt can be understood as a memorandum, which would be evidence of money had and received by them of him, and the promise to repay it is implied by law. Now, if such a memorandum is signed by two persons, it is evidence that they have both received the money, and they may be prima facie liable to repay it jointly, or jointly and severally; but that an indorsement of such a receipt, waiving demand and notice, means that the indorser undertakes to pay as a promisor what the other party is impliedly bound to pay as having received the money, seems to be stretching the language of the parties beyond reason. Perhaps it was the intent of the parties that the manufacturing company should be either a surety or a guarantor; but they do not appear to me to have expressed any such legal intent by the indorsement of this receipt. A receipt is not intended for currency: it does not pass by delivery, nor by indorsement, but is merely a memorandum between the parties; and the indorsement of such a paper is a mere nudum pactum, or mere evidence of a right by the indorsee to sue in the name of the indorser.

Granting, however, that the analogy of the law of notes held good, the Wrentham Company would be only sureties for the accommodation of the principal debtors; and though this would be no defence for an individual who lent his name, because the very purpose of his act was to give credit to the principal, nor to a trading corporation against a purchaser of negotiable paper before due without notice, yet when we come to a contract of this kind, the lender had no right to assume that the agent had authority to pledge the credit of the corporation.

There was no by-law nor practice to sanction this proceeding; and the petitioner seems to have understood, and the form of the paper tends to prove that he must have understood, that the name of the manufacturing company was given only for the accommodation of Jones & Co. For these reasons, the proof must be limited to the undisputed note for \$1,690, and interest, rejecting the other. Order accordingly.

Case No. 18,064.

Ex parte WRIGHT.

[1 West. Law J. 143.]

District Court, D. Missouri. 1843.

BANKRUPTCY—DISCHARGE—EMBEZZLEMENT.

[One who, as register of the land office, converted to his own use money deposited with him by private parties for the purchase of public lands, and returned the names of the depositors in the schedule of his debts, held not entitled to a discharge, the same being forbidden by the clause of the act which denounces any defalcation in "any other fiduciary capacity" (Act 1841).]

One Wright had filed his petition for a discharge. Various objections were made, but the one which excited most attention, and elicited a lengthy and able opinion from WELLS, District Judge, was a charge against Wright which involved his integrity as an officer of the government. It was charged that while acting as register of the land office at Palmyra, large sums of money were deposited with him, to be used in the purchase of public lands, and that instead of fulfilling his written receipt and promise, the money was perverted to his own use and benefit,—the names of the depositors being returned in the schedule of his debts. The whole case was argued by Mr. Hickman for the petitioner, and Mr. Buckner for the objector, when an opinion of great force and length was pronounced by the judge against Wright. It was not stated by WELLS, District Judge, whether the register could be made responsible under his official bond, or that his defalcation was one which involved him in the technical sense of a "public officer," but he expressly pronounced his guilt under that clause of the act which denounces a defalcation in "any other fiduciary capacity" than those enumerated. A petitioner, the judge remarked, must come into court an honest man, and prove himself such when assailed, or fail in his application. A "fiduciary trust" was a pledge of faith, and when broken by a strictly private citizen, by the violation of a special deposit for a certain purpose, or in any other manner which would prove a dishonest purpose, would be fatal to an application. In fact, the broadest meaning was given to the term "fiduciary," and a strong moral denunciation pronounced against all violators of public and private faith.

Case No. 18,065.

In re WRIGHT.

[2 Ben. 509; 1 2 N. B. R. 142 (Quarto, 57); 36 How. Prac. 167.]

District Court, S. D. New York. Oct. 7, 1868.

EXAMINATION OF BANKRUPT—FRAUD IN CONTRACTING A DEBT—EFFECT OF DISCHARGE.

1. Where creditors had filed proof of debt in a bankruptcy proceeding, alleging that the debt was contracted by fraud, and, on the examination of the bankrupt, proposed to inquire as to the facts constituting the alleged fraud, *held*, that the inquiry was irrelevant.

2. That a debt fraudulently contracted is not discharged by a discharge in bankruptcy, and that the question whether such discharge affects a debt can only be raised and determined in a suit to collect the debt, in which the discharge shall have been set up as a bar to the recovery.

[Cited in *Re Herzberg*, 25 Fed. 700.][Cited in brief in *Fuller v. Pease* (Mass.) 11 N. E. 695; *Poillon v. Lawrence*, 77 N. Y. 215.]

3. That section 21 of the bankruptcy act [of 1867 (14 Stat. 526)] does not apply to debts which, by section 33, are excepted from the operation of a discharge.

[In the matter of John S. Wright, a bankrupt.]

By JOHN FITCHE, Register: 2 [This cause is now pending before me in this court of bankruptcy. The petitioner sets forth in his schedules an indebtedness as a member of the firm of Wright, Maxwell & Co. to Knowles & Forster, creditors. The petitioner sets out the cause of indebtedness as follows: "The said Knowles & Forster made a claim in Rio de Janeiro, as creditors of Wright, Maxwell & Co., and Maxwell, Wright & Co., on the failure of the latter firm, which claim, the petitioner believes, was admitted by the court at Rio. The petitioner believes the claim was for acceptances and advances made and given by said Knowles & Forster for said Maxwell, Wright & Co. and Wright, Maxwell & Co., but has no knowledge of the amount of said claim or how much is due thereon; all the papers and accounts relating thereto having been kept at Rio de Janeiro."

[On the 29th day of April, 1868, Knowles & Forster appeared before me at a court of bankruptcy, by attorneys Weeks & Forster, and proved their claim. On application and motion of Weeks & Forster, counsel for Knowles & Forster, I granted an order for the examination of the petitioner, who is now under examination on the part of Knowles & Forster; his examination on behalf of Knowles & Forster not having been concluded, the respective counsel submit in writing the following question pertinent to the issue:

["Counsel for Knowles & Forster, creditors, propose to examine the bankrupt to prove

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

² [From 2 N. B. R. 142 (Quarto, 57).]

the nature of the transaction out of which the indebtedness of one hundred and thirty-four thousand and thirty-four dollars and sixty-one cents and interest thereon to said creditors arose, and that the indebtedness was created by the fraud and false representations of said bankrupt and his late partnership, for the purpose of showing that this debt cannot be discharged under these proceedings. Weeks & Forster, Attorneys for Knowles & Forster."

["The bankrupt, John S. Wright, objects that such inquiry is irrelevant; that the question of fraud in the creation of the debt cannot be litigated in these proceedings; that a debt fraudulently contracted is not affected by a discharge in bankruptcy, and can be collected notwithstanding such discharge, and that such question can only arise when it is undertaken to collect such debt after discharge is granted. Chapman, Scott & Crowell, Attorneys for Bankrupt."

[It is conceded that the debt referred to was contracted in the year 1864. The action of the respective counsel places the petitioner in a singular and anomalous position. The creditors had a right to prove their claim in the manner and form they did, it being a provable claim. The petitioner has a right to controvert or contradict such proof, and show that the indebtedness was not founded upon fraud, and was free from fraud, or that the creditors have effected a settlement thereof with some member of the firm of which petitioner was a member, or that the debt was contracted in the usual course of trade in a mutual, open, current and running account, running through a series of years, and that the petitioner was not present at the making of the contract, and that his only information on the subject was subsequently derived from others, and that the petitioner, personally, was entirely free from any fraudulent act or intent, or show in any way or manner that the debt was not fraudulent. This, as yet, he has not done, and as the case now stands, the allegation of Knowles & Forster, as per their proof of debt, stands admitted: therefore, section 33 of the bankrupt act governs this case. The bankrupt cannot be discharged from the debt proven by Knowles & Forster, but is entitled to a discharge from his other debts, and brings this case within the rule laid down by Register Dayton, and affirmed by the court (In re Tallman [Case No. 13,739]), in which case the register says: "The fact that the debt was created in fraud does not therefore constitute a ground of opposition to the discharge of the bankrupt, and as the examination of the bankrupt is for the purpose of ascertaining whether or not the bankrupt is entitled to a discharge under the act, evidence of fraud in the creation of the debt is not admissible."

[A suit is now pending in one of the courts of this state between Knowles & Forster

and the petitioner and others as defendants, for the recovery of the claim proven by Knowles & Forster. The petitioner has been adjudged a bankrupt; therefore all proceedings against him in the suit in the state court must stop, if enjoined by this court, as the subject matter of the suit has been proven against the estate of the petitioner in bankruptcy. The district court has full, complete and original jurisdiction, in this action, of the bankrupt, and of the assets of the bankrupt, and can, by its injunction, restrain and control the action of Knowles & Forster in their action in the state court, or stay the issuing of an execution or any judgment therein, as this court is competent and has the legal right to relieve the bankrupt from arrest or process from a state court, and also prohibit his arrest or prosecution in any other court, provided the debt is founded upon a contract—a debt from which a discharge in bankruptcy would relieve or release him—and also to decide the question of fraud; as it was evidently the design of congress that this court should do by the passage of the bankrupt act, as the form of the discharge clearly contemplates that the discharge should be a full, complete and final discharge, free from all reservations. In order to effect this the whole question should be passed upon by the court in bankruptcy. This court must necessarily inquire into the question of fraud, and also decide it, which decision will be final and binds all the state courts.

[The committing of a fraud in the contracting of a debt is a question of fact, and should not be decided on ex parte testimony, as it must be if decided on the testimony as it now stands. In re Glasser [Cases No. 5,474 and 5,475]; In re Borst [Case No. 1,665]; In re Frear [Id. 5,074]; Id., 3 How. [44 U. S.] 245. The judgment of the court upon all the proceedings in the cause, as well as upon the testimony setting forth all the facts that make up the fraud, is conclusive, and if the bankrupt is not discharged by the decision of the court upon the question of fraud, the bankrupt cannot contest that question in any other court, as he is estopped by the record of this court as the proceedings in bankruptcy, all the testimony must be filed. Section 5, Bankrupt Act; In re Patterson [Case No. 10,817]; In re Seymour [Id. 12,684]; In re Puffer [Id. 11,459]. The injunction or order of this court operates as a stay of proceedings or a release throughout the United States, and would compel the discharge of a person arrested or imprisoned by order of a state court. Hazleton v. Valentine [Id. 6,287].

[The petitioner, at this stage of the case, in order to obtain a discharge from the debt, as proven by Knowles & Forster, may do one of two things: First, he may, by affidavit showing the pendency of the action in the state court, of the pendency of these proceedings in this court in bankruptcy, of the

adjudication of bankruptcy, of the fact that this claim is set forth in the petitioner's schedules of liabilities, and that he admits the amount claimed by Knowles & Forster in their suit to be due. The district court will, on motion ex parte, grant an injunction restraining Knowles & Forster from all further proceedings in their action against the petitioner. Knowles & Forster would then be at liberty to move to vacate the injunction on the ground that the debt was contracted by fraud, and was provided for by section 33 of the act. The issue thus raised would be referred to a register to take testimony as to the fact, and the decision of the motion upon the testimony would conclude the proceedings. The United States district court has the power and can issue an injunction to stay, prohibit or restrain proceedings in a state court. But if the debt sought to be enforced is one founded upon fraud, such injunction will be vacated on motion. In re Reed [Id. 11,637]; In re Jacoby [Id. 7,165]; In re Metcalf [Id. 9,494].

[Second. The petitioner may consent that Knowles & Forster examine him as to the way and manner in which the debt was contracted, in accordance with the request of their counsel; he may also give evidence in regard to the same subject, also controvert the proof, as given in the proof of Knowles & Forster. The petitioner may apply to your honor upon all the proceedings and testimony in the case for an injunction as above stated; but if the petitioner suffers and permits the case to be decided by the court as it now stands, the decision of the court becomes res adjudicata as between the parties and privies to the action, the proof of Knowles & Forster becomes part of the record, and can be given in evidence on the trial in a state court; the petitioner will then be estopped from controverting it. I hold that a debt created by fraud can be litigated in these proceedings, and this court is the proper forum in which such questions should be passed upon. Any other course would tend to endless litigation in the state courts. If the petitioner chooses he can contradict or disprove the proof in this case, as given by the creditors, Knowles & Forster; but as the testimony now stands, the claim of the aforesaid creditors stands proven as a debt founded on fraud which cannot be discharged or affected by any discharge granted the petitioner, as the specification on that point is fully sustained by the proof, which is a re-statement of the specifications. In re Clarke [Case No. 2,844]; In re Elliott [Id. 4,391]; sections 32, 33, Bankrupt Act.

[The questions to be propounded by the counsel for Knowles & Forster are not admissible at this stage of the proceedings, but will be as soon as the petitioner, by testimony, controverts the proof made by Knowles & Forster. It is a well settled rule of law that whenever a matter in controversy has been once litigated,

between the parties, including all who have a right to appear and contest the proceedings before any tribunal of competent authority and jurisdiction, then such adjudication, whether in form of a judgment, decree, order, report, decision or verdict, is final and conclusive as to such parties, and becomes a matter of *res adjudicata* as between the parties and privies thereunto. It works an estoppel, not only as respects the matter specifically litigated and determined thereby, but also as to all other matters fairly involved in the issues arising upon the same questions, although the subject matter of the second controversy, or the grounds upon which the second adjudication is sought may be different, and the questions passed upon may be proved by parol. *Demarest v. Darg*, 32 N. Y. 281; *Gardner v. Buckbee*, 3 Cow. 120; *Bouchaud v. Dias*, 3 Denio, 238; *Birkhead v. Brown*, 5 Sandf. 134; *Doty v. Brown*, 4 N. Y. 71; *Embury v. Conner*, 3 N. Y. 522, and cases cited; *Castle v. Noyes*, 14 N. Y. 329; *Ehle v. Bingham*, 7 Barb. 494; *Supervisors of Onondaga v. Briggs*, 2 Denio, 33; *Burt v. Sternburgh*, 4 Cow. 559; *Bangs v. Strong*, 4 N. Y. 315; *White v. Coatsworth*, 6 N. Y. 137; *Dwight v. St. John*, 25 N. Y. 203; *Foster v. Milliner*, 50 Barb. 385.

[The manner in which the creditors proved their claim (which thereupon at once became a part of the proceedings in the case, by section 5 of the bankrupt act has to be filed with and become part of the proceedings in the cause), at once created an issue of fact in the case as to whether the debt was or was not fraudulent; the creditors' proof shows it to have been a debt created in fraud. Of this proof the petitioner, by law, is bound to take notice; he cannot ignore it, as it has been duly filed and is now part of the proceedings in this case. The petitioner is now under examination as a witness, and knows the nature of the testimony given by Knowles & Forster. He may contradict it if he can; he must do it during the pendency of the trial of this cause, or the law will prohibit his doing so in any other court. In the state court the defendant, Wright, after his discharge, may plead it as a defence, and the plaintiffs reply that in the record of the defendant, Wright's, proceedings in bankruptcy this claim was proven to have been a debt fraudulently contracted and created, consequently, Wright would be estopped from showing that said debt was not fraudulently contracted. It is settled law that when a fact, appearing in the proceedings of a cause, is determined by the court, it operates, if properly pleaded, as an estoppel in any other suit between the parties. The rule holds good whether the fact arises directly from the pleadings, or collaterally in the case, as it works an estoppel as to the facts which it decides or the rights which it establishes. *Manny v. Harris*, 2 Johns. 24; *Rice v. King*, 7 Johns. 20.

[The fact that the petitioner submitted in silence to the proof given by Knowles & Forster, after he had knowledge of the fact, and he not contradicting, controverting or denying

the same, he cannot now impeach the record of this court, but is estopped by the same. This principle is fully sustained in the cases of *Jackson v. Hoffman*, 9 Cow. 271; *Etheridge v. Osborn*, 12 Wend. 399; *Stevens*, Pl. 239. In the suit in the state court, Knowles & Forster could justly allege that the district court was the proper place to have the question decided; that it had original jurisdiction of the subject matter in controversy, as well as of the petitioner and creditors named in the petitioner's schedules; that testimony was given in the cause showing the debt to have been fraudulently contracted; that the question of fraud became an issue in the cause; that Knowles & Forster took the affirmative of the issue; that the petitioner did not negative or deny the same, and by failing to do so admitted the same. All of which will have then become a matter of record in the district court, and Wright will be forever precluded from contesting that fact in any subsequent or other suit with Knowles & Forster (Com. Dig. "Estoppel," art. 1) as they will claim that this is an estoppel by matter of record. 4 Mass. 625; 10 Mass. 155; 4 Munf. 466; 3 East, 354; 2 Barn. & Ald. 662; 17 Mass. 365; 5 Esp. 58; 1 Shaw, 47; 3 East, 316. In *Mason v. Anthony*, 35 How. Prac. 477, a case where a note had been made usurious in its inception and was purchased by a third party, the fact of usury was concealed from the purchaser, and the note was represented to have been valid business paper. In an action on the note the defendants set up the defence of usury; the court of appeals held the defendant was estopped by his representations from setting up the defence of usury.

[The specifications filed by Knowles & Forster are a mere transcript of the facts alleged and set forth in their proof of claim, so far as they relate to the contracting of the debt by fraud, consequently the creditors must be governed by the rule laid down in *Re Clarke*, and in *Re Elliott* [supra], which is decisive upon the point. I hold, as a matter of law, that as the claim now stands proven (as the testimony now stands) it is a claim founded in fraud, and by section 33 of the bankrupt act cannot be affected by any discharge under the act; that it is not competent for the creditors, Knowles & Forster, now to inquire into the question of fraud in the creation of the debt; that until the petitioner in some way contradicts the proof as given by Knowles & Forster as to the fraudulent contracting of the debt the evidence sought to be given by them is inadmissible, but should the petitioner contradict, controvert or explain the testimony given by the creditors, then the creditors will be entitled to the examination asked for.]²

BLATCHEFORD, District Judge. The creditors, Knowles & Forster, cannot be allowed to examine the bankrupt, to prove the nature of the transaction out of which the indebtedness

² [From 2 N. B. R. 142 (Quarto, 57).]

due to them arose, and that such indebtedness was created by the false and fraudulent representations of the bankrupt and his late partnership, for the purpose of showing that the debt cannot be discharged under the proceedings in bankruptcy. The examination proposed is wholly irrelevant. The question of fraud in the creation of the debt cannot be litigated in these proceedings. A debt which is, by section 33 of the act, excepted from the operation of a discharge, as is a debt created by the fraud of the bankrupt, can be collected notwithstanding the discharge. The question whether the discharge affects the debt in question can only arise and be determined between the parties in a suit prosecuted to collect the debt, in which the discharge, after it shall have been granted, shall be pleaded or set up as a bar to a recovery. There is nothing in the proof of debt in this case which can in any manner conclude or prejudice either party in any suit pending in any other tribunal, so far as regards the issue of fraud in the contracting of the debt. The creditors cannot be prejudiced by proving their debt, if it was in fact a debt created by fraud, for section 33 of the act expressly saves all their rights, even though they prove their debt. Nor, e converso, can any thing in the proof of debt affect or conclude the bankrupt on any issue as to the creation of the debt by fraud. Section 21 of the act, in so far as it declares that a creditor who proves his debt shall be deemed to have waived thereby all right of action and suit against the bankrupt, and that all proceedings already commenced, or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby, cannot be held to apply to or include a debt which is by section 33 excepted from the operation of a discharge; otherwise, sections 21 and 33 would be directly repugnant to each other, and while section 33 declares that such a debt shall not be discharged under the act, even though the creditor proves it, the creditor would, by section 21, be deprived forever of bringing any suit against the bankrupt to recover the debt, and would be held to have discharged any unsatisfied judgment for it already obtained. The provision referred to in section 21 applies only to a debt which will be discharged by a discharge.

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Case No. 18,066.

In re WRIGHT et al.

[10 Ben. 14.]¹

District Court, S. D. New York. June, 1878.

LIMITATION OF LIABILITY OF SHIP-OWNER — VESSEL REPAIRED AFTER COLLISION—FREIGHT — SAILING ON SHARES.

1. A collision occurred between two schooners, the S. and the A. T. on May 6, 1878. On the 11th of June, 1878, the owners of the S. filed a libel against the A. T. to recover their

damages. The A. T. had been in the meantime repaired. On the 14th of June her owners filed a petition to limit their liability. A reference was had to fix her value, and the commissioner reported that her value after the collision was \$500, and that the interest of the owners in her pending freight was \$139.25, and the owners of the S. excepted to the report: *Held*, that the value, to which the liability of the owners of the A. T. would be limited, was the value of the vessel after the collision and before she was repaired; that, as the vessel was sailed on shares by a master who was not an owner, the interest of the owners in the freight was one-half of it after deducting port charges, which the commissioner had reported.

2. The exceptions must be overruled.

[In the matter of the petition of John G. Wright and others for limitation of liability in respect to damages alleged to have been caused by their schooner, the Adeline Townsend.]

E. L. Owen, for petitioners.
Coudert Bros., for libellants.

CHOATE, District Judge. The petitioners are the owners of the schooner Adeline Townsend. June 11, 1878, the schooner was attached and a libel brought by the owners of cargo of the schooner Sophia Wilson, for damage sustained in consequence of a collision between that vessel and the Adeline Townsend, alleged to have been caused by the fault of the Adeline Townsend. June 14, 1878, the petitioners filed their petition, to obtain the benefit of the act of 1851, limiting the liability of ship owners. Rev. St. § 4233 et seq. The collision happened on the 6th of May, 1878. The Townsend was badly injured, and afterwards and before she was so attached she was repaired by the petitioners.

A reference was ordered to ascertain and report the value of the Townsend after the collision, and the interest of her owners in her pending freight. The commissioner has reported that the value of the vessel after the collision was \$500, and the interest of the owners in her pending freight was \$139.25. To this report the libellants have excepted as to the value of the vessel, claiming that the act, limiting the liability of the owners, limits their personal liability only, and does not limit or impair the remedy which parties may have against the vessel; that therefore, if the owners repair after the collision, the lien for the damages still attaches to the vessel; and that they are entitled to have her valued as she is at the time of the attachment.

It is well settled that the value, which is the measure of the owners' liability, is the value of the vessel immediately after the collision. *Norwich Co. v. Wright*, 13 Wall. [80 U. S.] 104. Whenever, therefore, under the statute and the rules made for carrying it into effect, the owners apply in proper form to have this limit of their liability determined, it must be fixed by the measure of the

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

value of the vessel just after the collision. When this value is so determined and the amount secured in due form or paid into court, all pending actions whether in personam or in rem are to cease and be stayed. This claim of the libellants has no support either in the statute, the rules or the decisions under them.

There is also no equity in their claim. The additional value, which the owners have put upon the vessel by repairing her, constituted no part of her at the time the damage was sustained. To allow this claim would seriously embarrass owners of vessels against which a claim for damage might be made. They could not safely repair till a libel was brought, and yet they could not compel the bringing of a libel. It is obvious that this would seriously impair the value of their property and prevent the use of it. But clearly the act fixes a liability, whether the injured party seeks to enforce it in personam or in rem, measured by the value at a time certain and not a shifting and moveable value.

The libellants also except to the report of the commissioner as to the freight. The vessel was sailed by the master, who was not one of the owners, on half shares. The interest of the owners in the freight was one-half of the freight after deducting port charges, and so the commissioner has found.

Report confirmed.

Case No. 18,067.

In re WRIGHT.

[3 Biss. 359; 1 8 N. B. R. 430.]

District Court, E. D. Wisconsin. Oct. Term, 1872.

HOMESTEAD EXEMPTION.

1. An insolvent merchant, having sold his homestead for cash, cannot, by moving his family into his store, hold that as his homestead, exempt.

[Cited in *Re Boothroyd*, Case No. 1,652; *Re Lammer*, Id. 8,031; *Re Parker*, Id. 10,724; *Re McKenna*, 9 Fed. 29.]

[Cited in *Comstock v. Bechtel*, 63 Wis. 658, 24 N. W. 466.]

2. Though his right to sell his homestead is undoubted, he cannot shift it, to the prejudice of his creditors.

3. In such case the court will order a delivery of possession to the assignee.

In bankruptcy. George C. Wright had for several years been the owner and occupant of a comfortable house and lot in Fond du Lac, occupying said premises with his family until about two weeks before proceedings in bankruptcy were commenced against him. He had been doing a small business as a boot and shoe dealer and manufacturer, and a short time before being put into bankruptcy he purchased, on credit, an unusually large

amount of goods. The notes for said purchases about becoming payable, he sold his homestead and removed his family into his store. This was a two story building, constructed solely for business purposes, and occupied by him exclusively as his store and shop. Adjoining this building was a one-story frame structure, which had been under rental for some considerable time. Wright, about the time of removing his family into the store, removed the addition, for the reason, as he alleged, that the foundation wall rested on the adjacent lot, and the owner demanded the occupancy of his ground to the division line. About the same time he put up a temporary partition of boards, placed on end, and not extending to the ceiling, thereby dividing his store from the apartments occupied by his family. Wright having been adjudged a bankrupt on creditors' petition, his assignee filed this petition for a surrender of this property, Wright claiming it as exempt under the homestead exemption clause.

Jenkins & Elliot, for assignee.

Finches, Lynde & Miller, for bankrupt.

MILLER, District Judge. Wright, with full knowledge that his notes were maturing, sold his homestead, removed his family of six persons into one side of his store, and removed the one-story addition then drawing rent, within three weeks of his bankruptcy, and after he had greatly reduced his stock, without appropriating the proceeds of sales towards the payment of his debts. The homestead and the store property were unincumbered. He sold the homestead for cash, less a debt of about \$250 he owed the purchaser. And he mortgaged another lot to secure a debt of \$900, thereby giving that creditor preference over his other creditors.

I have no doubt that George C. Wright committed a fraud on his creditors and also on the bankrupt act [of 1867 (14 Stat. 517)]. He was doing business in a building constructed solely for business purposes, and not having the appearance of a dwelling, with an adjoining building under rent, open to the view of his creditors when he was purchasing their goods on credit, and occupying at the same time with his family a comfortable homestead, and at the time his notes for an unusually large increase of stock were maturing, within three days he made all these changes as to his property. His creditors no doubt gave him credit on the faith of his unincumbered lot on which his store was built, and also of his other property and his stock of goods. They had a right to be paid, if necessary, out of that property.

The adjoining structure might have been reduced in size. The removing of this building has the appearance of a plan to bring the lot and premises within the homestead exemption. I do not believe that Wright now occupies the premises as his homestead with

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

due faith to his creditors. His whole operation has the appearance of a scheme to defraud creditors by forcing a compromise from them. His answer to the petition removes all doubt on this subject. He admits that he was embarrassed in his circumstances, and was unable to pay his debts as they became due, and he hoped to be able, by the change he made in his property, to make some arrangements with his creditors which would enable him to continue his business. He did sell his homestead for cash, and he did greatly reduce his stock within a short time without paying his creditors. He delivered to the assignee about \$800, which is a small sum compared with the amount of his sales. He committed a fraud on the bankrupt act by mortgaging a lot to secure an old debt, when he knew he was insolvent. The bankrupt act prohibits preferences to creditors. It is said that the homestead had been in market through a land agent for some time, but that is not material in this issue. He had a lawful right to sell his homestead, but that did not give him the right to shift his homestead, under the circumstances, to the prejudice of his creditors and in violation of principles of fair dealing.

An order will be made that George C. Wright, the bankrupt, convey to the assignee the said premises, and surrender possession to the assignee.

Case No. 18,068.

In re WRIGHT.

[6 Biss. 317.]¹

District Court, N. D. Illinois. March, 1875.

STATUTE OF LIMITATIONS—SUSPENSION ON DEBTOR'S BANKRUPTCY—RIGHT TO RETURN OF ASSETS.

1. Where a debtor had filed a petition in bankruptcy, his only debts being apparently barred by the statute of limitations, his widow and heirs cannot procure a withdrawal of the property from the bankruptcy court, even though no debts had been proved against the estate. They may have been taken out of the statute, and if provable at the time of filing the petition they would not be barred subsequently. The statute ceases to run on the filing of the petition.

2. The heirs of the bankrupt cannot profit by delay of creditors in proving their debts; and the widow of an intestate has no possible standing in court, her dower claim not passing to the assignee.

In bankruptcy.

Van Arman & Felch, for petitioners.

J. E. Lockwood, assignee, pro se.

BLODGETT, District Judge. In this case the widow and children of the bankrupt have filed their petition, setting forth that the bankrupt filed his petition in this court and was duly adjudicated a bankrupt on the 2d day of March, 1868; that he scheduled interests in certain real estate of which

he claimed to be seized at the time of filing his said petition in bankruptcy; that an assignee was appointed to whom all his estate was duly conveyed; that no debts have been proven against said estate, and no sale or disposition of the property assigned has been made by the assignee; that the bankrupt was duly discharged from his debts pursuant to the provisions of the bankrupt law [of 1867 (14 Stat. 517)]; that said John S. Wright, died intestate in September, 1874, leaving petitioners his widow and heirs-at-law.

It is further stated in the petition that all the debts contracted by the bankrupt, and from which he sought to be discharged by this proceeding in bankruptcy, were contracted more than sixteen years ago, and are barred by the statute of limitations of this state. The petitioners then pray that the assignee may be required to reconvey the property of the estate to them as the proper representatives of the bankrupt.

On filing petition, a rule was entered, requiring assignee to show cause why the prayer should not be granted. The assignee answered stating in substance, that the extreme paucity of assets at the time said proceedings were prosecuted was such that there was no good reason to expect any dividend from said estate to creditors; that the bankrupt had at times prior to his bankruptcy, been possessed of large and varied interests in real estate in Cook county, Illinois, and elsewhere, all of which had, however, at the time of such bankruptcy, been conveyed away or mortgaged, or otherwise incumbered to their full value, and if for any reason such interest should at any time be found valuable, the benefit thereof should be given to the creditors.

It is contended on the part of the petitioners that, inasmuch as no debts have been proved, and as all the debts against the bankrupt's estate are now barred by the statute of limitations, therefore no debts can hereafter be proved, and the heirs of the bankrupt are entitled to a return of the property; in other words, that the estate stands precisely as though all the debts had been duly proved and paid, and there was a remnant or surplus of assets left in the hands of the assignee.

The argument seems to me more specious than sound. It does not follow that because sixteen years have now elapsed since the debts were contracted, they are therefore barred by the statute of limitations. Many or all of them may be in judgment, or on specialty, or a new promise to pay them, or an acknowledgment of their being unpaid, made just on the eve of bankruptcy proceedings, all which would take them out of the statute. And of existing debts to which the statute could not have been pleaded by the assignee if the creditors had sought to prove them at the time the proceedings were commenced, I apprehend they have not been

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barred by any time that has elapsed since the schedule was filed. If barred by the statute when proceedings were commenced, the assignee could probably have pleaded the bar, but if valid debts at that time, I think they must remain so as against the assignee, although I cannot find that this precise question has ever been determined. The case is analogous to a trust. Here is property placed in the hands of a trustee for the benefit of certain persons. When the assignee has converted it into money and is ready to distribute it, he is to call a creditors' meeting for the purpose of making a dividend. Until that time the beneficiaries are not required to act. They need not prove their debts until there is something to divide, and their status in regard to the right to a dividend is fixed by this right at the time the proceedings commenced.

Suppose, for instance, a bankrupt schedules a claim which is within one day of being barred by the statute, and suppose the whole term to have elapsed when the creditor comes forward to prove his claim, could the assignee be heard to allege that the bar which commenced to run before bankruptcy had ripened afterwards? I think not, but that if the claim is provable when the proceedings are commenced it must remain provable. True, creditors may forfeit their rights as against each other by their neglect; that is, those who have proven their claims may come in and share all the dividends as against those who neglect to prove. But the bankrupt or his heirs has no right to profit by the delay of the creditors in proving their claims. As long as there are creditors unpaid the bankrupt has no right to demand the property. It is true that the mere statement of a debt by a bankrupt in his schedule, does not make it provable nor take it out of the statute of limitations. If there is any defense to a claim, the assignee or another creditor can assert it, although the bankrupt has in one sense admitted it by his schedule.

So, too, no person can be recognized as a creditor, except one who has proved his claim, but this rule is only applicable to the relations of creditors to each other, and the assignee and not to the bankrupt.

Cases may readily be imagined where creditors, by waiting longer than those of this bankrupt have waited, may be paid in full from the proceeds of property which was apparently valueless at the time the schedule was made.

The bankrupt has accomplished the main purpose for which he came into the court. He has obtained his discharge, and it does not befitt his heirs to dictate what creditors shall do about proving their debts, nor when the assignee shall convert the property. That is a matter entirely between the creditors and the assignee. They can put him in motion at any time, or they can allow him in the exercise of his own judgment to await events.

The counsel for the petitioner ask how long they must wait for these debts to be proven? I answer This is not a matter in which they have any concern, and the time they must wait is of no consequence to creditors.

I do not see what standing Mrs. Wright, the widow, has in any event on this petition. Her husband died without a will. She is only entitled to dower, and that will not pass to the assignee. She is not delayed, and therefore has no right to relief here.

Case No. 18,069.

In re WRIGHT.

[1 N. B. R. 393 (Quarto 91).] ¹

District Court, D. Kentucky. 1873.

REGISTER IN BANKRUPTCY—CERTIFICATE OF QUESTION.

A question, in order to be properly certified to the judge, must arise regularly in the course of proceedings before the register, and between the parties having the legal right to raise it.

[Proceedings in the matter of J. W. Wright, a bankrupt.]

BALLARD, District Judge. I do not see how the "point or matter" certified in this case under date of January 29, 1868, could have arisen "during the proceedings before the register," or "in the course of such proceedings, or upon the result of such proceedings." If the assignee should move the court for an order requiring the bankrupt to surrender to him the yoke of cattle owned by the bankrupt at the adjudication in bankruptcy, or if the assignee should sue the bankrupt for the cattle, then it is possible the question of title might arise before the register sitting in chambers to dispose of "uncontested matters" under the fourth section of the bankrupt act [of 1867 (14 Stat. 519)] and rule 28 of this court, which it might be his duty to cause "to be stated by the opposing parties in writing," and to "adjourn the same into court for decision by the judge." But it does not appear that any such motion has been made, or that any such suit has been brought, or that the assignee is even a party to or is cognizant of this proceeding. If any one is entitled to the possession of the yoke of cattle in question against the bankrupt it is the assignee, and not the creditor. The question of title can be decided only in some direct proceeding between the assignee and the other party claiming.

I have already suggested two modes by which the question certified might properly have arisen. Section 6 of the act prescribes another, and doubtless there are still other modes. Section 6 provides that, "in any bankruptcy, or in any other proceedings within the jurisdiction of the court under this act, the parties concerned or submitting to such jurisdiction may at any stage of the proceedings, by consent, state any question

¹ Reprinted by permission.

or questions in a special case for the opinion of the court," &c. The provision contemplates a submission to the court of any question by a proceeding in the nature of an agreed case. The mode of proceeding in such a case is well understood by all lawyers, and need not be here stated. I wish to state, once for all, that it is not every question made by parties in the presence of a register that is to be certified by him for decision by the judge. It must be a question arising properly in the course of the proceedings before him,—that is, it must arise regularly in the course of the proceedings before him, and between parties who have the legal right to raise it,—otherwise, the judge might be called on to decide innumerable abstract questions, when his decision would, of course, conclude nothing and bind no one.

I decline to decide the question certified in this case, because it was not made by parties having the right to make it, and because it does not seem to have arisen in any proceeding before the register. I do not wish to be understood as saying that creditors of a bankrupt cannot, under any circumstances, nor in any way, raise such a question as is here certified. Possibly, upon their suggestion that the assignee was acting in bad faith and refused to raise such question, or upon some similar suggestion, they might be heard. But there is no such suggestion here.

Case No. 18,070.

In re WRIGHT et al.

[2 N. B. R. 41 (Quarto, 14);¹ 15 Pittsb. Leg. J. 553.]

District Court, W. D. Michigan. 1868.

BANKRUPTCY — DISCHARGE — FRAUDULENT DEBTS.

The creation of a debt by fraud is not a ground upon which to oppose the discharge of a bankrupt. Such debts may be proved, and the dividend thereon shall be payment on account of said debt. Where a bankrupt contracted a debt through fraud he continues liable notwithstanding his discharge.

In this case, on the return day of the order to show cause why the bankrupts [Wright & Peckham] should not have a final discharge, Messrs. O. P. Ramsdell & Co., creditors, of Buffalo, N. Y., by their attorneys, appeared before the register, H. E. Thompson, Esq., in opposition thereto, and filed a specification of the grounds of their opposition, substantially as follows: That immediately prior to the purchase of the goods from the said O. P. Ramsdell & Co., by the said bankrupts, the said bankrupts represented and claimed to said Ramsdell & Co., that they were then worth twenty thousand or thirty thousand dollars, and obtained credit for said goods from said Ramsdell & Co., upon such representations; and that the same

¹ [Reprinted from 2 N. B. R. 41 (Quarto, 14), by permission.]

were false and fraudulent, and were made by said bankrupts with the intent to defraud said Ramsdell & Co. This specification was excepted to by the counsel for the bankrupt, for the reason (among others) that the facts set forth in said specification constitute no ground for opposing the discharge of said bankrupts.

WITHEY, District Judge. The exception, "first," to the specification presented by creditors of grounds of opposition to the bankrupts' discharge, is sustained. The creation of a debt by fraud is not a ground upon which to oppose the discharge of a bankrupt. Section 29 [of the act of 1867 (14 Stat. 531)] declares the several things which constitute grounds of opposition. The specification filed covers no ground therein declared, and there can be no ground of opposition presented nor prescribed by section 29. The thirty-third section of the bankrupt act provides that no debt created by the fraud of the bankrupt shall be discharged under this act, but the debt may be proved and the dividend thereon shall be payment on account of said debt. Wisely was this provision made, and equally wise to exclude it from the grounds of opposition to a bankrupt's discharge. As to a debt contracted by fraud, there is and should be, no discharge; the bankrupt continues liable to the creditor on whom the fraud was committed.

Case No. 18,071.

In re WRIGHT.

[2 N. B. R. 490 (Quarto, 155).]¹

District Court, D. New Jersey. 1869.

JUDGMENT AGAINST BANKRUPT—VALIDITY—WARRANT FOR CONFESSION—NOTICE OF INSOLVENCY—KNOWLEDGE OF ATTORNEY.

1. Where a debtor, not being insolvent, borrowed money and gave bond with warrant of attorney to the creditor to confess judgment, and he took judgment with notice of subsequent bankruptcy and levy made, *held*, the judgment was good against and should be paid out of the assets in court of the proceeds of sale of bankrupt's property.

[Criticised in Re Lord, Case No. 8,503.]

2. Judgments obtained against a debtor at the time insolvent, by creditors not shown by the evidence to have had reason so to believe him, *held*, to be good against assets.

3. Semble, that knowledge of such insolvency is not necessarily to be presumed of the creditors because of such knowledge by their attorney.

[Cited in Graham v. Stark, Case No. 5,676; Singer v. Sloan, Id. 12,899.]

In bankruptcy.

FIELD, District Judge. This is a case of involuntary bankruptcy. The petition was filed on the 5th day of January, 1869. On the 30th of December, 1868, judgments were obtained against the debtor, by James Van De-

¹ [Reprinted by permission.]

venter, for two thousand six hundred and eighty-six dollars and forty-four cents, by Susan D. Brown, for two hundred and seventy-eight dollars and ninety-seven cents, and by George C. Parker & Brothers, for one hundred and ninety-nine dollars and forty-six cents. On the same day executions were sued out upon these judgments, directed to the sheriff of the county of Mercer, and a levy made upon all the property of the debtor. Upon filing the petition in bankruptcy, an injunction was granted, restraining the sheriff from selling under these executions. The property of the debtor consisted chiefly of dry-goods and groceries in a store at Princeton, where he had been carrying on business. This property being perishable and liable to deterioration in value, upon the adjudication in bankruptcy, an order was made, on the application of the petitioning creditor, and with the consent of the judgment creditors, that the marshal should sell the goods in the store, and bring the money into court. This was done, and thereupon the counsel for the judgment creditors applied for a rule to show cause why the amount of their respective judgments should not be paid out of the proceeds of the sale. The application was granted, and leave given to all parties in interest to take testimony and produce evidence before the register. This evidence and the arguments of counsel, have been submitted to me, and the motion now is to make the rule absolute. This motion is resisted by the petitioning creditor upon the ground that as to the judgment of James Van Deventer, it was a judgment on a bond with warrant of attorney to confess judgment, and that at the time when the warrant was given, and also at the time when judgment was confessed, [J. B.] Wright was insolvent, and that Van Deventer had reasonable cause to believe that such was his condition, and that a fraud upon the bankrupt act [of 1867 (14 Stat. 517)], was intended; and as to the other two judgments, which were judgments by default, upon which executions were issued and a levy made, it is insisted, that Wright thereby suffered his property to be taken on legal process, with intent to give a preference, and to defeat or delay the operations of the act, and that at the time of doing so he was insolvent, and that the judgment creditors had reasonable cause to believe that he was so.

Some question was raised by the counsel for the judgment creditors, as to whether, admitting these judgments to be liable to the objection stated, they come within the letter of the last clause of the thirty-ninth section of the act. That clause is in the following words: "And if such person shall be adjudged a bankrupt, the assignees may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act

was intended, and that the debtor was insolvent; and such creditor shall not prove his debt in bankruptcy." It is not denied, of course, that the matters charged were acts of bankruptcy on the part of the debtor, but were they payments, conveyances, or transfers made by the debtor, and could these judgment creditors be said to have received a payment or conveyance within the meaning of this section of the act? I am satisfied there is nothing in this objection. A debtor who suffers his property to be taken on legal process, and sold for the payment of a debt due to a creditor, does thereby make a transfer and conveyance of his property within the meaning of the act. Such was the opinion of Judge Blatchford, in *Re Black* [Case No. 1,457], and there can be no doubt about the correctness of that opinion. If this were not so, the provisions of the thirty-ninth section would become practically inoperative in respect to all property of the debtor levied upon or sold under a judgment and execution, no matter how obtained; and as the confession of a judgment, or the suffering of his property to be taken on legal process is a frequent and well-known mode of preferring a creditor, one of the principal objects of the bankrupt act would be defeated.

Let us now proceed to the examination of these judgments; and as that in favor of Mr. Van Deventer stands upon a different footing from the others, it will be considered separately. The bond, with a warrant of attorney to confess judgment, was given by Wright, on the 7th of March, 1868, but the judgment was not entered up until the 30th of December following. Was Wright at the time this bond was executed, or at the time when judgment was confessed, insolvent, and had Van Deventer reasonable cause to believe that such was his condition? But before looking at the evidence bearing upon this point, let us endeavor to ascertain the meaning of the word "insolvent" as used in this act; for I suspect a good deal of misapprehension exists upon this subject in the public mind, and it is very important that it should be corrected. By the bankrupt act of 1841 [5 Stat. 440], all transfers of property made by the bankrupt, in contemplation of bankruptcy, and for the purpose of giving a preference to one creditor over others, were deemed utterly void, and a fraud upon the act. What was meant by the words "in contemplation of bankruptcy," was a subject of a good deal of discussion. Different interpretations were put upon them in different circuits. By some judges they were held to mean contemplation of insolvency—of a simple inability to pay as debts should become payable. By other judges it was held that the debtor must contemplate an act of bankruptcy, or a voluntary application for the benefit of the bankrupt law. But it was decided by the supreme court, in the case of *Buckingham v. McLean*, 13 How. [54 U. S.] 150, that the words "contemplation of bank-

ruptcy," did not mean contemplation of insolvency—of a simple inability to pay as debts should become due and payable—but meant that the debtor must contemplate the commission of what was declared by the act to be an act of bankruptcy, or must have contemplated an application by himself, to be decreed a bankrupt. In short, it was held that the word "bankruptcy" meant something more than "insolvency"—something less restricted. It is a little singular that this question should have been presented to the supreme court for the first time in 1851, years after the bankrupt act had been repealed.

Having thus ascertained that "bankruptcy" means something more than "insolvency," let us see what "insolvency," as used by the act, means. The language of the thirty-fifth and thirty-ninth sections of the bankrupt act is almost identical with that of the insolvent law of Massachusetts, and the decisions of the court of that state as to what was meant by the word "insolvency" are entitled to much consideration. "By the term 'insolvency,'" says Shaw, C. J., in the case of *Thompson v. Thompson*, 4 Cush. 127, "we do not understand an absolute inability to pay one's debts at some future time, upon a settlement and winding up of a trader's concerns; but a trader may be said to be in insolvent circumstances, when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do." And in the case of *Lee v. Kilburn*, 3 Gray, 594, the supreme judicial court of Massachusetts, after speaking of the extreme difficulty of giving a definition of insolvency that would be applicable to all classes of persons who may avail themselves of the benefits of the insolvent laws, proceeded to say: "But it is clear, a trader may be insolvent, and may be known to be so, to the creditor seeking a preference, though he is not compelled to stop business. Men often continue to carry on business upon the credit they have before acquired, long after they were actually and hopelessly insolvent; sometimes with the view of better enabling themselves to make payment to preferred creditors, contracting new debts to pay old ones; sometimes with a view of living upon the property in their hands. These are among the evils which it was the policy of the insolvent laws to prevent. * * * We do not understand that an absolute inability to pay one's debts at a future time, upon the winding up of his concerns, is necessary to constitute insolvency in a trader. What is meant by the insolvency of a trader, as an abstract proposition, can be stated only in general terms. A trader may be said to be insolvent, when he is not in a condition to pay his debts in the ordinary course, as persons carrying on trade usually do. This is but a general abstract rule, modified more or less by the habits and usages of the place where the

debtor resides, and of the particular business in which he is engaged." The very same definition is given to the term "insolvency," by Judge Nelson in the case of *Merchants' Nat. Bank of Hastings v. Traux* [Case No. 9,451]. "Insolvency" within the meaning of the bankrupt act, when applied to traders, means inability to pay debts in the ordinary course of business, as persons carrying on trade usually do." And the same view is taken of it by Judge Blatchford, in *Re Black*, to which I have before referred.

In this sense of the word "insolvency" then, had Van Deventer reasonable cause to believe that Wright was insolvent, when the bond with warrant of attorney was executed? A good deal of evidence has been taken. Both Van Deventer and Wright were examined at great length. All the dealings and transactions of Wright, from the time the bond was given, up to the time when the judgment was entered up, have been minutely enquired into. I will not go into a detailed examination of this evidence. It is not necessary, as will be seen from the view which I feel constrained to take of this case. I will only state the conclusions to which I have come after a careful examination of the evidence. I do not think there is any sufficient proof, that at the time when the judgment bond was given, Wright was insolvent, or that Van Deventer had reasonable cause to believe that he was so. He had difficulty in meeting his engagements. And his object in applying to Van Deventer for a loan of money was, that he might relieve himself from these embarrassments. Van Deventer required him to make a statement of his debts and liabilities. He did so, and the statement showed a balance in his favor to a large amount. He assured Van Deventer that if he would let him have the amount required, it would relieve him from all his difficulties. I think there is no evidence that Wright was insolvent at this time, or that Van Deventer had reasonable cause to believe that he was so. But as to his condition when the judgment was entered up, the conclusion to which I have come is very different. At that time, the evidence clearly shows, that not only was Wright insolvent, in the sense in which I have explained that term, but that Van Deventer had reasonable cause to believe that such was his condition. He certainly was not able to pay his debts in the course of business, as persons carrying on trade usually do. And it is hardly possible that Van Deventer could have been ignorant of this fact. He knew enough at least to put him upon enquiry. And if he had made that enquiry, he would have been satisfied that such was Wright's condition.

These are the conclusions to which I have arrived. And now, what is the legal result? If a creditor takes a bond, with warrant of attorney to confess judgment, at a time when he has no reason to believe that the

debtor is insolvent, will the fact that the debtor was insolvent when the judgment was entered up, and that the creditor knew him to be so, vitiate that judgment, and render it a fraud under the bankrupt act? This is an interesting and important question, and one which seems to have escaped the attention of counsel. And yet it is one upon the solution of which the determination of this case very much depends.

This question came before the supreme court of the United States, in the case of *Buckingham v. McLean*, before referred to. In that case the question was, whether the giving of a power of attorney to confess judgment was an act of bankruptcy, under the act of 1841. The court held, that if the debtor did not contemplate the act of bankruptcy, at the time the power of attorney was executed, it was of no consequence what his condition was when the judgment was entered up. The court says: "It would seem that if the intent of the debtor is to give a legal quality to the transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting; and that consequently, we must enquire whether the debtor contemplated bankruptcy when he executed the power. It is true, this construction would put it in the power of creditors, by taking a bond and warrant of attorney, while the debtor was solvent and did not contemplate bankruptcy, to enter up a judgment and issue execution, and by a levy, acquire a valid lien, down to the very moment when the title of the assignee began. But this was undoubtedly so under the statute of James, which, like ours, contained no provision to meet this mischief; and it became so great that, by the one hundred and eighth section of the revising act of Geo. IV., it was enacted that no creditor, who shall sue out execution on any judgment obtained by default, confession, or nolle prosequi, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid ratably with such creditors." If the bankrupt act of 1841 had continued to exist, a similar addition to its provisions would doubtless have become necessary.

Is there any provision in our bankrupt act to meet this mischief? It is suggested, that by permitting the judgment to be entered up, Wright thereby suffered his property to be taken on legal process. But how could he have prevented the judgment from being entered up? There is nothing to show that he was aware of Van Deventer's intention to enter up the judgment at the time when he did. But it may be said, that as soon as he found himself insolvent, he ought to have prevented any judgment from being obtained against him by going into voluntary bankruptcy. But although insolvent, in the sense of not being able to pay his debts in the ordinary course as they became due, yet the evidence shows that he had

no intention of breaking up business, and fully believed that he had ample means for the payment of all his debts. This is a condition in which country traders very often find themselves, and to hold that it is their duty always under such circumstances to go into voluntary bankruptcy, would be to lay down a harsh rule, and one that might work a good deal of injustice. We must not press this doctrine too far. It is not wise to do so. It might bring discredit upon the act itself. At all events, in this case, I am not prepared to say that Van Deventer, although he knew when he entered up his judgment that Wright was insolvent in the sense in which I have explained that term, had any reasonable cause to believe that a fraud upon the act was intended. Let the judgment of Van Deventer then be paid out of the money in court.

With regard to the other two judgments, one in favor of Susan D Brown, and the other of Parker & Brother, I have already stated, as my conclusion from the evidence, that at the time they were obtained, Wright was insolvent; but there is not the slightest evidence to show that these judgment creditors were aware of his insolvency. Van Deventer's business relations with Wright were of such a character that he could not very well have been ignorant of the fact. But Mrs Brown is a retired lady, and Parker & Brother reside in New York, and there is nothing to bring home to either of them a knowledge of Wright's insolvency. It is said, however, that Mr. Hageman was their attorney, and as he was aware of the insolvency of Mr. Wright, they must be presumed to have had knowledge of it also. But although parties are, in many cases, no doubt, bound by the acts of their attorney, I am not aware of any rule of law, in virtue of which they are presumed to know all that he knows. Suppose that he does not communicate his knowledge to them. But where is the evidence that Mr. Hageman had any knowledge of Wright's insolvency? I can find none. But it is further insisted, that in the case of these two judgments, the service of process was acknowledged by Wright, and that this is evidence of a design upon the part of the plaintiffs to obtain an undue advantage over other creditors. Nothing is more common when a suit is commenced, than to have the service of the summons acknowledged by the defendant. It saves the trouble and expense of having it served by the sheriff. The sheriff is the only one who has a right to complain of it. But it is said, the object of it was to gain time, so that a judgment might be obtained sooner than if the summons had been served by the sheriff. That this was not the object of it, however, is apparent from the fact that these judgments were not obtained until some twenty days after the plaintiffs were entitled to them. Let these judgments also be paid out of the fund in court. Rule made absolute.

Case No. 18,072.

The WRIGHT.

[See Case No. 17,115.]

WRIGHT (ANDREWS v.). See Case No. 382.

WRIGHT (BAILEY v.). See Case No. 749.

WRIGHT (BANK OF COLUMBIA v.). See Case No. 883.

Case No. 18,073.

WRIGHT v. BLAKESLEE.

[13 Blatchf. 421.]¹Circuit Court, N. D. New York. June 20, 1876.²

SUCCESSION TAX.

Under section 127 of the act of June 30, 1864 (13 Stat. 287), where, under the will of a testator who died before the act was passed, a person became beneficially entitled in possession, after the act was passed, to real estate, upon the death of another person who died after the act was passed, and who had by such will a life estate in such real estate, *held*, that such beneficial interest in possession was a "succession" conferred by such will, and was subject, under section 133 of said act, to a succession tax.

This was an action of assumpsit [by B. Huntington Wright against Levi Blakeslee] to recover the amount of a succession tax, paid under protest, assessed upon the assignors of the plaintiff. It was tried by the court without jury.

Risley, Stoddard & Matteson, for plaintiff.
Richard Crowley, Dist. Atty., for defendant.

WALLACE, District Judge. Section 127 of the act of June 30, 1864 (13 Stat. 287), provides, "that every past or future disposition of real estate, by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession,' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the grantor, testator, ancestor, or other person, from whom the interest of the successor has been or shall be derived." Section 133 declares, that "there shall be levied and paid to the United States, in respect of every such succession as aforesaid, according to the value thereof, the following duties, viz.: Where the successor shall be the lineal issue, or lineal ancestor, of the predecessor, a duty at the rate of one dollar per centum upon such value." The assignors of the plaintiff were the children of Henrietta Huntington, a devisee under the will of her fa-

ther, by reason of a provision in his will substantially as follows: "In case my daughter Henrietta shall, at the time of my decease, be feme covert, I give and devise unto my executors one other of the said equal parts or shares of the residue of my estate, in trust to receive the rents and profits, and apply the same to her sole and separate use during the term of her natural life, and, at her decease, if she shall leave issue her surviving, I devise the said share to her issue, their heirs and assigns, in full and absolute possession." The testator died in 1846, said Henrietta being a feme covert. She died after the passage of the act. These being the facts, the assessor insisted upon payment of a tax of one dollar per centum on the value of the succession.

It seems very clear, that, by a past disposition of real estate by will, the assignors of the plaintiff had a vested estate in expectancy during the life of their mother, and, upon her death, after the act was passed, became "beneficially entitled in possession" to the real estate. The concurrence of these conditions conferred on the issue a succession, and made them successors, within the plain definition of section 127. The argument for the plaintiff is, that the person creating the estate, or from whom it is derived, must die after the passing of the act, to confer the succession defined. Such is not the language of the section. It suffices, if, by the death of any person dying after the passing of the act, the devisee becomes beneficially entitled in possession to the estate. By the death of the mother, the children, who theretofore had an estate in expectancy, became beneficially entitled in possession. It seems equally clear, that, if the testator had died after the passage of the act, the mother and children living, a tax as upon an estate in expectancy would have accrued against the children. In such case, under section 129, the tax would have been apportioned between the mother and children, and, if she had subsequently died, the act being still in force, a new succession tax upon the value of her interest would have been payable by the children. The act is carefully framed, and the most comprehensive terms are employed, to meet every case where a beneficial interest, either expectant or in possession, devolves upon a devisee. The language is so clear, and the conditions which constitute the definition of a "succession" and a "successor" are so plain and exact, that argument drawn from other sections of the act is unavailing. The duty of one dollar per centum was due to the United States. The assessor properly added a penalty of fifty per centum, as a penalty for refusal to make return. Such penalty is imposed by the amendment made to section 118 by the act of March 2, 1867 (14 Stat. 479), where the person who should make return wilfully neglects, or where such person refuses, to make return. A neglect to make return is not nec-

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

² [Reversed in 101 U. S. 174.]

essarily wilful; a refusal is, or, at any rate, is, by the statute, made equivalent to, a wilful neglect.

These conclusions are decisive against the plaintiff, and judgment is ordered for the defendant.

[The judgment was reversed by the supreme court. 101 U. S. 174.]

Case No. 18,074.

WRIGHT et al. v. COGSWELL.

[1 McLean, 471.]¹

Circuit Court, D. Illinois. June Term, 1839.

AFFIDAVIT TO HOLD TO BAIL—SUFFICIENCY.

1. An affidavit to hold to bail must be positive, and the indebtedment must be stated from the knowledge of the affiant.

[Cited in Postley v. Higgins, Case No. 11-304; Nelson v. Cutter, Id. 10,104.]

[Cited in Quarles v. Robinson, 2 Pin. 99.]

2. An affidavit that the affiant was informed and verily believes the defendant is indebted to the plaintiffs is insufficient.

3. The affiant must state more than the mere legal import of the instrument on which the action is brought.

At law.

Mr. Johnson, for plaintiffs.

Mr. Logan, for defendant.

McLEAN, Circuit Justice. This action is brought on a promissory note of \$4,044.44. Before the writ was issued, James H. Sanford made an affidavit that he was informed and verily believed the defendant [William R. Cogswell] was justly indebted to the plaintiffs [James Wright and others] in the just and full sum of \$4,281.71, the same being the amount, including interest, of a certain promissory note, &c., and that unless the defendant shall be held to bail, the amount of the judgment will be in danger of being lost. The statute of Illinois concerning bail provides "that in all actions to be commenced in any court of record in this state and founded upon any specialty, bill or note in writing, or on the judgment of any court, foreign or domestic, and in all actions of covenant, &c. in which the plaintiff or other credible person can ascertain the sum due or damages sustained, and that the same will be in danger of being lost, as that the benefit of whatever judgment may be obtained will be in danger unless the defendant or defendants be held to bail, and shall make affidavit thereof, the defendant shall be held to special bail," &c.

A motion is made by the defendant's counsel to quash the bail bond, on account of the insufficiency of the affidavit. The statute prescribes the terms on which a plaintiff is

entitled to special bail. An affidavit is required, though the action may be founded on a judgment, or an instrument of the highest solemnity; and this affidavit must state the amount due or the damages sustained. A very strict rule has been observed in regard to affidavits to hold to bail in the king's bench. The rule has been somewhat less strict in the common pleas. 1 Sell. Prac. 104. In the case of *Pomp v. Ludvigson*, Burrows, 655, the court held that the affidavit must be as positive as the nature of the case admits. And in 3 Term R. 575, that the affidavit of indebtedment is not good if made, "as appears by the account annexed." In *Strange*, 1226, it was decided that swearing to a belief of indebtedment is not sufficient. In the common pleas (3 Wils. 154) it was decided that an affidavit which stated the circumstances of the cause of action, without specifying the amount due, was sufficient.

The affidavit in this case was not made by the party to whom the debt was due, but by a stranger to the original transaction, who swears that "he is informed and verily believes the defendant was justly indebted," &c. This oath was, probably, made by the affiant, from an inspection of the note on which the action is founded; and, perhaps, a correspondence with the plaintiff. Now it is fair to infer that the statute, in requiring an affidavit to hold to bail, intended more than a statement which any one could make, on an inspection of the instrument on which the action is brought. And the affidavit filed in this case is nothing more than this. The affiant is informed and believes, that the defendant is indebted to the plaintiff. His information may have been acquired from the plaintiff or from reading the note; and as indebtedment is the legal inference arising from the face of the note, the affiant might well say that he believed the defendant was justly indebted, &c. If any effect be given to the statute, the affidavit must contain something more than the belief of the affiant, founded upon the legal import of the obligation. The sum due must be stated positively and by a person who can swear from his own knowledge. The bail bond is set aside, on the ground that the affidavit is insufficient.

WRIGHT (CONSOLIDATED FRUIT JAR CO. v.). See Case No. 3,135.

Case No. 18,075.

WRIGHT v. CURTIS.

[See Case No. 17,628.]

WRIGHT (DARBY v.). See Case No. 3,574.

WRIGHT (DAYTON v.). See Case No. 3,693.

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

Case No. 18,076.

WRIGHT v. DEKLYNE.

[Pet. C. C. 199.]¹

Circuit Court, D. New Jersey. April Term, 1816.

DISMISSAL OF BILL—CONCLUSIVENESS—EVIDENCE—
DECLARATIONS OF WITNESS—PAROL EVIDENCE
—CONTRADICTION OF WRITING.

1. The dismissal of a bill in chancery, is not conclusive against the complainant, in a court of law, although the bill may have been brought for the same matter.

[Explained and limited in *Smith v. Kernochan*, 7 How. (48 U. S.) 217.]

[Cited in *Cramer v. Moore*, 36 Ohio St. 350; *Tucker v. Harris*, 13 Ga. 1.]

2. The decision of a court of competent jurisdiction, directly upon the same point, is conclusive, whenever it may again come in question.

[Cited in *Sarchet v. The General Isaac Davis*, Case No. 12,357.]

[Cited in *White v. Coatsworth*, 6 N. Y. 143; *Wyman v. Campbell*, 6 Port. (Ala.) 219. Cited in brief in *Gardner v. Buckbee*, 3 Cow. 126.]

3. Declarations of a witness, cannot be given in evidence, except only, in answer to evidence of other declarations of the witness, inconsistent with what he had previously sworn to.

[Cited in *Coffin v. Anderson*, 4 Blackf. 399. Cited in brief in *Shaw v. Emery*, 42 Me. 61.]

4. Parol evidence of the declarations of an auctioneer, contrary to the written terms of sale, is not admissible; but such evidence, as to the property intended to be sold by him, is proper.

[Cited in *Chouteau v. Goddin*, 39 Mo. 249.]

This was an action of ejectment, brought to recover a moiety of certain islands and flats in the river Delaware. The property was, in the year 1752, granted to three persons, of the name of Watson, Bond and Salter; who held separate tracts of land, on the main land opposite to it. In 1765, Salter conveyed one half of his main land, containing 357 acres, and one half of his share of those islands and flats, to a man by the name of Pidgeon; and in 1768, he conveyed the other half, to Samuel Meredith. In April, 1767, Watson conveyed to his son, his share of the islands and flats; who in 1772, conveyed the same, to the aforesaid Samuel Meredith. In 1778, Meredith conveyed to the defendant the above mentioned tract of land, purchased from Salter, by the name of his plantation, by certain bounds; confining it on the side of the Delaware, by that river; also a lot, containing twelve acres, adjoining; and also, all his share of the islands and flats, purchased from Salter and Watson. In 1785, the defendant conveyed to Philip Nicklin, by way of mortgage, all the above property described, and bounded as in Meredith's deed to him. Sundry judgments having been obtained against the defendant, executions issued against him; which were returned by the sheriff, "levied on a plantation called 'Meredith's Farm,' containing 350 acres, and

three other plantations adjoining," described by certain names and quantities of land, contained in each. The sheriff advertised the plantation, called "Meredith's Farm," for sale to the highest bidder; and the same was knocked off to the aforesaid Philip Nicklin; to whom the sheriff made a deed for the same; and also for the aforesaid islands and flats. In 1792, Nicklin conveyed the said property, to the lessor of the plaintiff.

The only question as to the title was; whether the islands and flats in dispute, were levied upon, under executions, and were advertised and sold; it being admitted, by the defendant's counsel, that if they were, he had no title; and this question depended upon another, which was, whether the islands and flats, were to be considered, upon the evidence, to have been parcel of the plantation called "Meredith's Farm," when the levy was made. To prove the affirmative of this proposition, the plaintiff examined a number of witnesses, who stated; that the islands and flats were so considered, and that in one or two instances, where the defendant had offered Meredith's farm for sale, he had spoken of this property, as constituting much of its value. It was also proved, that previous to the issuing of the executions, under which this property was sold, the defendant had sent to Nicklin, to whom he was indebted, a list of his property, in order to satisfy him, that his debt was safe; in which, Meredith's farm, but not the islands, was mentioned. Other witnesses, on part of the defendant stated; that the islands and flats, were never considered as parcel of, or attached to the farm. That the farm was generally rented to one person, and the islands to another; and in no instance, were they ever leased to the same tenant. It was further proved by two witnesses, that after Meredith's farm was put up for sale, the sheriff was asked, whether the islands and flats were included; when he answered, that they were not, that he sold to low water mark; that this was publicly said, so that Nicklin might have heard it; although the witnesses could not swear that he did. It appeared by record, which was given in evidence, that the defendant had filed a bill, in the court of chancery of this state, against Nicklin and the lessor of the plaintiff; alleging that the property now in dispute, had not been taken in execution by the sheriff; that it was not sold to Nicklin; and that the deed, so far as it included the same, was procured by fraud; and praying, that it might be reconveyed. Upon a hearing of the cause, the court of chancery decreed a reconveyance of the property now in dispute; which decree, upon an appeal, was reversed, and the bill dismissed. The petition of appeal, stated amongst other reasons for a reversal, that the complainant had an adequate remedy at law, and consequently, that he was not entitled to the aid of a court of equity; and

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

that even, if that court could entertain the cause, an issue should have been directed. The court of appeals assigned no reasons for the decree of reversal, and dismissal of the bill.

It was contended by Williamson, Ewing & Wall, for the lessor of the plaintiff, that the decree of reversal was conclusive in this cause, against the title of the defendant; and that it is not now competent for him to contend, that the property in dispute was not levied upon and sold; those points having been completely in issue, in the former suit, and decided against him by the court of appeals. They cited the cases noted below.²

Stockton & Griffith on the other side, cited a number of cases.³

WASHINGTON, Circuit Justice. The decree of dismissal, is not conclusive. The rule is admitted, that the decision of a court of competent jurisdiction, directly upon the same point, is conclusive; where the same point comes again in controversy, directly or collaterally. But what is the point directly decided by dismissing a bill in equity? nothing more than this, that the case is not fit for the decision of that court; that the complainant, who must rest entirely upon the equity of his case, has not supported that claim, and therefore has not shown himself entitled to the aid of a court of equity; for which reason, he is turned out of that court. This dismissal would be a bar to a new bill; because the same question must arise, viz. whether his case is such, as to entitle him to the relief of a court of equity. But in relation to a strictly legal title, the dismissal proves nothing for or against it. If the complainant seeks in a court of equity, to enforce a strictly legal title, when his remedy at law was plain and adequate, the dismissal of his bill amounts to a declaration, that he has no equity, and the court no jurisdiction; but it casts no reflection whatever, upon his legal title; it decides nothing in relation to it, and consequently can conclude nothing against it. If this be so, in ordinary cases, the doctrine acquires additional strength, in a case like the present; where the want of jurisdiction in the court of chancery, was one of the grounds for a reversal, stated in the petition of appeal. This petition, together with the answer which was filed by the opposite party, constitutes the pleadings (if the term may be applied to such proceedings) of the appellate court; more

² Amb. 756; Peake, Ev. 34, 36; 1 Salk. 290; 3 Term R. 129; Cowp. 322; 2 Strange, 960b; 1 Johns. Cas. 492; [Croudson v. Leonard] 4 Cranch [8 U. S.] 436; 3 Hen. & M. 140; 2 Bay, 454; Coop. Eq. 270; 1 Vern. 310; 2 Munf. 162; Bull. N. P. 244; 3 Atk. 626; 2 Brown, Parl. Cas. 396, 425, 443, 445; 9 Johns. 614; 5 Johns. 430.

³ 1 Atk. 571; Park. 353; [Maley v. Shattuck] 3 Cranch [7 U. S.] 488; 11 State Tr. 261; Peake, Ev. 71; 3 Term R. 639; Phil. Ev. 236.

properly perhaps, it is the assignment of errors, and the plea to it. Now, if the court gives no reason for dismissing the bill, and the case stated in the pleadings, is to be resorted to, to ascertain what was the point directly decided by the court; how can this court say, that the title of the present defendant was decided; when another ground for a reversal was stated, which would have warranted such a decision? With a view to this principle, the sentence of a foreign prize court, which is ambiguous on the face of it, as to the ground of condemnation, is not regarded in an action on a policy of insurance, on a question of warranty of neutrality. The reason is, that if the sentence may have proceeded, on any other ground than that of enemy's property, it establishes with certainty, no fact, inconsistent with the asserted neutrality of the property insured.

In the course of the trial, the defendant offered evidence to prove declarations of the sheriff, made prior to the sale, that he did not mean to sell the property now in question; and that the same had not been levied upon. The plaintiff admitted, that he meant to offer a deposition, to contradict some circumstances stated by the sheriff, in his deposition, which occurred when the deed was executed. The particular declaration of the sheriff, now offered to be proved, was made a few days before the sale, in answer to enquiries made by a person, who intended to become a bidder, in case the islands should be offered for sale. This evidence was objected to. 1 Esp. 357; 5 Ves. 700; 5 Johns. 426; 1 Mass. 69; Phil. Ev. 212; Bull. N. P. 294; 2 Esp. N. P. 519.

WASHINGTON, Circuit Justice. Declarations of a witness, cannot be given in evidence, except in answer to evidence of other declarations of the witness, inconsistent with what he had before sworn to. The evidence, which the plaintiff intends to offer, to contradict what the sheriff has sworn to, is not of this nature. It relates to a different transaction, and does not import a contradiction of what that witness has sworn to, by declarations inconsistent with it. The declarations offered to be proved, by the defendant, relate to the sale, and the opposing evidence, proves no more, than that the two witnesses disagree as to some circumstances, which passed when the deed was executed. The evidence is therefore improper.

It was contended by the plaintiff's counsel, in summing up: First, that upon the evidence in the cause, it appeared, that the property in dispute, was parcel of Meredith's farm, and as such, was levied upon and sold; second, that the evidence of the two witnesses, in relation to the declarations of the sheriff at the sale, that the property in dispute was not to be sold, were not to be regarded, in opposition to the written terms of

the sale, which stated, that Meredith's farm was to be sold. That such parol declarations should not be admitted, to control the import of the written advertisement and terms of sale. Sugd. 21; 1 H. Bl. 289; Peake, Ev. 55; 2 Atk. 97.

WASHINGTON, Circuit Justice (charging jury). As to the second point, the general rule of law is, that parol evidence of declarations of an auctioneer, to contradict the written terms of the sale, ought not to be admitted; as it might introduce great uncertainty as to titles, derived under sales at auction. But the parol evidence given in this case, is perfectly consistent with the written notice, and the terms on which the sale was to take place. The advertisement states, that Meredith's farm was to be sold; but it does not state, that the whole tract would be cried off, at one time; and if the property in dispute be in fact, parcel of Meredith's farm, the sheriff had certainly a right, at the time of sale, to sell a part only, if he thought such part would be sufficient to satisfy the execution. If one thousand hogsheads of sugar are advertised to be sold, surely the auctioneer may sell them in such lots, as he is directed. But, if the purchaser should insist that he had purchased the whole, how can this fact be ascertained, except by evidence of persons at the sale; and in the absence of other evidence, what reason can exist why it may not be proved in that way? Such evidence, does not contradict, but is perfectly consistent with the written terms of sale. This is very different from the case where, for instance, the sale is advertised to be with warranty, and evidence offered of declarations by the auctioneer, that the sale was to be without warranty.

As to the case upon the merits, it depends upon a single fact, to be decided by the jury; which is, whether the property in dispute was parcel of what was called "Meredith's Farm," at the time the levy was made by the sheriff. There are various ways, by which one parcel of land is distinguished from another; sometimes by names given to it, or by boundaries or situation. When the distinction is once made, the parcels continue separate, whether they belong to different persons, or are owned by the same person. It is true, that the owner may destroy the distinction, and consolidate both parcels in one, under one name. By his acts, the two parcels may gain by reputation a common name, so as to pass by deed or will, consistently with the intention of the grantor or deviser. But the mere act of cultivating the two parcels by the same owner, is not sufficient of itself to make one parcel part of the other.

What then have been the acts of the differ-

ent persons, who have become successively owners of Meredith's farm, and of the property in dispute? Watson, Bond and Salter, were originally separate proprietors of a farm in this state, adjoining each other, and extending to the river Delaware. They afterwards appropriated to themselves, as tenants in common, certain islands and flats, containing about 90 acres in front of their farms, in the river, and separated by an inconsiderable flow of the river from their farms. Salter conveyed one half of his plantation to one Pidgeon, and the other half to Samuel Meredith, by certain boundaries, extending to the river, and containing a certain number of acres. In the same deeds, he also conveys one half of his share of the islands and flats to Pidgeon, and the other to Meredith; describing this property by its only appropriate names, as "islands" and "flats." Watson, afterwards, conveyed his third part of these islands and flats, to Meredith. Thus, Meredith became entitled to a tract of land, distinguished as a plantation, as containing a certain number of acres, and separated from the islands, by a line running to low water mark. He conveyed the whole to the defendant, distinguishing in like manner, the plantation and the islands. In the year 1786, the defendant mortgaged the whole of this property to Nicklin, the purchaser at the sheriff's sale, in which the same distinction is preserved. It is also to be remarked, that the defendant always kept them distinct, renting the farm to one tenant, and the islands and flats to another to be used as a fishery. The sheriff, in the year 1788, levied his execution on Meredith's farm, and the jury are to say, whether, at that or at any other time, the islands had become parcel of that farm. So far as the documentary evidence goes, there is not the slightest ground for asserting, that they had. Throughout, Meredith's farm, has been described as a plantation, bounded by certain lines, excluding the islands, and containing a precise number of acres. The property in dispute, was in like manner described, as islands and flats.

As to the parol evidence offered by the plaintiff, to prove that the islands were considered as parcel of Meredith's farm, which is contradicted by evidence of the same nature, on the other side, the court give no opinion. But they will remark, that all such evidence, when opposed to the written documents, which have been laid before the jury, should be listened to with caution; the one may be founded upon conjecture and misapprehension, the other cannot deceive.

Verdict for defendant.

WRIGHT (DUVALL v.). See Case No. 4-212.

Case No. 18,077.

WRIGHT v. FILLEY.

[1 Dill. 171; 1 4 N. B. R. 610 (Quarto, 197); 5 West. Jur. 212; 3 Leg. Gaz. 230.]

Circuit Court, E. D. Missouri. Oct. Term, 1870.

BANKRUPTCY — INTENT TO PREFER — CONSENT TO JUDGMENT AND LEVY.

Where an actual intent to give a preference is negatived, mere honest inaction on the part of an insolvent debtor who is sued on a just debt, and who allows judgment to go against him, and his property to be levied on, is not an act of bankruptcy within the thirty-ninth section of the bankrupt act [of 1867 (14 Stat. 536)].

[Cited in *Wilson v. City Bank of St. Paul*, 17 Wall. (84 U. S.) 480.]

Wright was proceeded against in the district court for the Eastern district of Missouri, by Filley, a creditor, under the thirty-ninth section of the bankrupt act. The act of bankruptcy charged was, that Wright had "suffered his property to be taken on legal process with intent to give a preference." To establish this the creditors relied on the fact that Wright was indebted to one Carr on two promissory notes, had been sued by Carr on one of them, had made default and allowed judgment to pass against him, and certain land to be seized and sold on the execution issued thereon. The testimony of Wright on the hearing in the bankruptcy court showed that he had no defence to the note. He says, *inter alia*: "I did not see Carr before he brought suit. I forgot the suit, being out of town the time it was to come off. After he got judgment I endeavored to settle the matter with Carr. He brought suit on the other note, to which I put in a defence and which is still pending. After judgment I tried to get Carr to wait on me, and to effect a compromise with him to prevent my property from being sold under his execution, but he would not consent. I had no desire or intention to give Carr any preference, or to prevent my property being distributed under the bankrupt act." The evidence fairly negatived any actual design on the part of Wright to give Carr a preference or to defeat or delay the operation of the bankrupt act. Wright was not a banker, merchant, trader, or manufacturer. The district court (Judge Krekel sitting in the place of Judge Treat) adjudged Wright to be a bankrupt. To reverse the order Wright filed the present bill in this court under the second section of the bankrupt act, and the matter was argued before MILLER, Circuit Justice, at the October term, 1870.

Dryden, Lindley & Dryden, for Wright.
Samuel S. Boyd, for Filley.

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

MILLER, Circuit Justice This is a bill in chancery filed in the circuit court for the districts of Missouri to obtain a review and reversal of the order of the district court declaring the complainant to be a bankrupt. The parties waived all question, whether this is the proper mode of obtaining a review of such an order, and desire the circuit court to pass on the merits of the case.

The complainant was declared a bankrupt at the suit of his creditors, and the only ground on which the order can be sustained is, that he suffered a judgment for a small amount to be obtained against him, on which an execution was issued and levied on some of his property.

It seems clear that the complainant was quite poor, and that it might have given him serious inconvenience to have paid a lawyer to prepare his papers for voluntary bankruptcy or to have given security for the fees in such a proceeding. The debt on which the judgment was procured was a real debt, was due and unpaid, and he had no defence against it. There is not the least reason to suppose that he desired to give the creditor who got the judgment any preference or advantage over his other creditors, or that he in any manner whatever suggested or encouraged the suit or the levy of the execution. It is therefore clear that the order of bankruptcy can only be sustained on the ground that he did not go into voluntary bankruptcy when he was sued, and that his failure to do so when he was unable to meet his debts was itself an act of bankruptcy.

I have read the opinions of several eminent district judges asserting this doctrine as essential to the due administration of the bankrupt law, and have the highest respect for these judges and especially for the one who made this order, and I have held up this case to see if I could bring my mind to its adoption. But I cannot satisfy myself that mere honest inaction in a poor man, when his creditor seeks to make by law a just debt, is itself an act of bankruptcy, and if congress means that, they must so far as I am concerned, say it in plainer terms than are to be found in the present law.

Let a decree be entered reversing the order of bankruptcy rendered in the district court. Ordered accordingly.

NOTE. In the opinion delivered by the district judge in this case, he placed his judgment upon the ground that it was the legal duty of a debtor, who knows himself to be insolvent, when sued upon a just debt, which will result in a judgment, that if enforced will give that creditor a preference, to go into voluntary bankruptcy, and that if he fails to do so and his property is seized, this is "suffering it to be taken on legal process," and the intent to give a preference, or to defeat the bankrupt act will or should be inferred from the mere failure to comply with his legal duty, or from the circumstances connected with his situation. See *Vanderhoof's Assignee v. City Bank of St. Paul* [Case No. 16,842]; *Linkman v. Wilcox* [Id. 8,374]; *Giddings v. Dodd* [Id. 5,405].

Case No. 18,078.

WRIGHT et al. v. FIRST NAT. BANK.

[8 Biss. 243; 18 N. B. R. 87; 6 N. Y. Wkly. Dig. 543; 18 Alb. Law J. 115; 2 Nat. Bank Cas. (Browne) 138; 10 Chi. Leg. News, 348; 6 Reporter, 229; 26 Pittsb. Leg. J. 11.]¹

Circuit Court, D. Indiana. July 15, 1878.

USURIOUS INTEREST — RECOVERY BY ASSIGNEE IN BANKRUPTCY.

1. An assignee in bankruptcy is the "legal representative" of the borrower within the meaning of the thirtieth section of the national banking act [13 Stat. 108], and as such can maintain an action to recover back usurious interest paid, as provided for by said act.

[Cited in brief in *Lafountain v. Burlington Sav. Bank*, 56 Vt. 334.]

2. The right of action given by said section is a "claim" or "debt" which passes to the assignee.

3. Though such action is to recover a penalty, it is distinguishable from actions for damages growing out of mere torts to the bankrupt's person.

[Action to recover the penalty for taking usurious interest, brought by Arthur L. Wright and Henry H. Woollery, assignees of Francis J. Randolph, Frank Wright, and Ebenezer Nutting, bankrupts, against the First National Bank of Greensburg.]²

Coffroth & Stewart, Baker, Hord & Hendricks, and Dye & Harris, for plaintiffs.

McDonald & Butler, for defendant.

GRESHAM, District Judge. The declaration alleges that the defendant has reserved, taken and received usurious interest from the bankrupts. The action is brought to recover double the amount of interest thus paid, and is based upon the thirtieth section of the national banking act, which reads as follows: "Every association organized under this act may take, receive, reserve and charge on any loan * * * interest, at the rate allowed by the laws of the state or territory where the bank is located, and no more; except that where by the laws of any state a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized in any such state, under this act. And when no rate is fixed by the laws of the state or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum. * * * And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same." 13 Stat. 108.

¹ [Reported by Josiah H. Bissell, Esq., and here reprinted by permission. 6 N. Y. Wkly. Dig. 543, and 26 Pittsb. Leg. J. 11, contain only partial reports.]

² [From 18 Alb. Law J. 115.]

The defendant demurs to the declaration, on the ground that the plaintiffs, as assignees in bankruptcy, have no legal capacity to prosecute the action. This is the only question presented by the demurrer.

The right of action given by this section is penal. *Tiffany v. National Bank*, 18 Wall. [85 U. S.] 409. In the absence of a statute authorizing it, a right to a penalty cannot be assigned, nor, a right of action for a tort. *Gardner v. Adams*, 12 Wend. 297. The defendant exacted and received usurious interest. Had the bankrupts remained solvent, they might have prosecuted an action for double the amount of interest paid. Unless the right of action has been barred, it yet exists, either in the bankrupts or their assignees. It is insisted that because the bankrupts could not have sold or transferred the right of action, if they had remained solvent, that, therefore, their assignees have no legal capacity to prosecute the suit. *Tiffany v. National Bank*, supra, was an action by a trustee, to recover the penalty given by the statute. The plaintiff recovered, but his capacity to maintain the action seems not to have been directly raised. In the case of *Crocker v. First Nat. Bank* [Case No. 3,397], the precise question raised by this demurrer was considered, and it was held by Dillon, J., that the assignee was the "legal representative" of the borrower within the meaning of the banking act, and as such could maintain the suit whether the right of action vested in the assignee under the bankrupt law or not.

In *Tiffany v. Boatman's Institution*, 18 Wall. [85 U. S.] 375, the assignee in bankruptcy was allowed to recover usurious interest, which had been paid by the bankrupt in violation of the statutes of Missouri.

In *Meech v. Stoner*, 19 N. Y. 26, it was held that an assignee could maintain an action to recover money lost at faro, under a statute which gave the right of action to the loser. See, also, *Carter v. Abbott*, 1 Barn. & C. 444, and *Gray v. Bennett*, 3 Metc. [Mass.] 522. In this last case, the assignee of the insolvent debtor was allowed to recover three-fold the amount of usurious interest paid to the defendant, that being the amount allowed by the Massachusetts statutes. This is a well-considered case.

In *Bromley v. Smith* [Case No. 1,922], it was held by Miller, District Judge, that the assignee could not maintain an action to recover the penalty given by the statute. And it seems to be conceded that in the case of *Barnett v. Muncie Nat. Bank* [Id. 1,026], in the circuit court of the United States for the Southern district of Ohio, a similar ruling was made by Justice Swayne, and the late Circuit Judge Emmons, in an oral, but unreported opinion. To the same effect is *Nichols v. Bellows*, 22 Vt. 581.

The bankrupt act (Rev. St. §§ 5044-5047) vests in the assignee for the creditors the

entire estate of the debtor—everything of beneficial interest passes by the deed of assignment, except certain necessary exemptions which are intended to protect the bankrupt and his family from temporary distress.

It is true that rights of action for torts to the debtor's person, such as assault and battery, false imprisonment, malicious prosecution, libel and slander, do not pass to the assignee. While it must be conceded that under the decision of the supreme court, this is an action, in part at least, to recover a penalty, yet there are reasons why claims of this kind should vest in the assignee which do not apply to rights of action for damages growing out of mere torts to the debtor's person. In the right of action given by the banking act the bank exacts and receives from the borrower more than the law allows as a fair compensation for the use of its money. In this illegal way, the bank gets into its possession part of the borrower's estate, money which should go to the creditors of the bankrupt borrower. This demand and receipt of illegal interest by the bank may have materially contributed to the bankrupt's downfall. The recovery allowed by the thirtieth section of the act is "in any action of debt."

If the assignees are not the "legal representatives" of the bankrupt within the meaning of the thirtieth section of the banking act, and the right of action never passed to them under the bankrupt act, then, unless the suit has been barred, the bankrupts may sue for and recover the money for their own benefit, when, perhaps, they have already received their full exemptions and have been discharged from all their obligations.

As between the bankrupts and their creditors, this would be unjust, and such a result is not easily reconciled with the chief object of the bankrupt law, which is the equal distribution of the insolvent debtor's entire estate amongst all his creditors.

In *Gray v. Bennett*, supra, "it is very clear," say the court, "that if a creditor of the insolvent debtor should attempt to prove a note under the commission, it would be the duty of the assignee to reduce the amount, if usurious interest had been taken on it, or was reserved in it, and in this manner the creditors would be benefited by such reduction. Why should they not have the advantage of it where the debtor was paid the usurious demand, prior to the insolvency and within the time limited by the statute for recovering it?"

I think the assignees are the "legal representatives" of the bankrupts within the meaning of the thirtieth section of the banking act; and that the right of action given by that section is a "claim" or "debt" which passed to the assignees under the provisions of the bankrupt law. Demurrer overruled.

Case No. 18,079.

• WRIGHT v. FULLERTON.

[2 Biss. 336; 1 3 Am. Law T. Rep. U. S. Cts. 124; 2 Chi. Leg. News, 301.]

Circuit Court, N. D. Illinois. June, 1870.

BOND TO CONVEY LAND — LACHES IN ENFORCEMENT.

1. A bill in equity cannot be maintained upon a bond for the conveyance of real estate executed and delivered more than twenty years previously, the obligor having soon afterwards repudiated its obligation and thenceforth treated the land as his own and the complainant having in the meantime made no effort to enforce his rights.

2. The fact that he considered the bond worthless, did not suppose that he could collect anything from the defendant, and was not aware that he had any rights under it until advised by counsel, do not form a sufficient excuse for his laches.

3. *Seymour v. Freer*, 8 Wall. [75 U. S.] 202, distinguished: in that case both parties continued their relations under the contract, whereas, in this case one of them denied the claim of the other.

This was a bill filed by the complainant to enforce his equitable rights under a bond made by the defendant to one Albert Shephard, dated October 31, 1835, in the penal sum of \$441, with a condition concerning the conveyance of three certain tracts of land therein described. The bond was assigned by Shephard to the complainant on the 4th of March, 1836. The controversy covered two tracts of land in Cook county, Illinois: The E. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of Sec. 32, T. 38, N. R. 14, E. of 3d P. M., entered by Abner Lane; and the W. $\frac{1}{2}$ of the same section, entered by Albert Shephard; the certificates for each having been assigned to the defendant in June, 1835. Also one tract of land in Milwaukee county, Wisconsin, the S. W. $\frac{1}{4}$ of Sec. 17, T. 7, N. R. 22, E. of 4th P. M., entered by Shephard, and conveyed to defendant by deed October 31, 1835. Patents were duly issued by the United States on each of these entries, the purchase money being paid by defendant. The condition of the bond was as follows: "Whereas said Shephard has executed three notes to said Fullerton, as follows, to-wit: one dated June 27, for \$100, payable one year from date, with interest at the rate of twelve per cent.; one for \$100 dated August 22, 1835, payable one year after date, with like interest; and one for \$70.50, dated July 1, 1835, payable one year from date, with like interest, it being one-half the purchase money advanced by the said Fullerton for the purchase of (the foregoing tracts of land). Now, upon the payment of said notes as aforesaid, the said Fullerton agrees to execute to said Shephard a conveyance of one undivided half of said lots of land, or in case said lots of land shall have been sold, to pay said Shephard one-half the proceeds."

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

This bond was signed and duly acknowledged by the defendant. On the 24th of June, 1836, the defendant sold one undivided half of the Milwaukee land for four drafts on New York for \$1800, each payable at four, nine, twelve and eighteen months, respectively. Only one of these drafts—the first—was ever paid. When the first note named in the bond became due, the defendant said the amount was tendered by the complainant, and refused. After the last note fell due—some time in the fall of 1836—the complainant declared that tender was made of the whole amount due, and refused. The defendant denied this. The only reasons given why the tender was refused on the part of the complainant were, because the defendant demanded twenty-five per cent. interest; on the part of the defendant, because the whole amount was not paid at maturity. The only other transaction the defendant and the complainant appear to have had with each other afterwards, was this: In 1835 they and one Royal Stewart and Grant Goodrich, for the sum of \$35,000, purchased block 1 of the original town of Chicago. They paid one-fourth of the purchase money, and gave a mortgage on the block for the balance. They then sold lots, and made considerable improvements on the property. They were unable to pay the balance, and the mortgage was foreclosed, and the property lost. Those who had purchased lots from them made reclamations for the money, etc., they had paid. Stewart and the complainant left Chicago, and the defendant and Goodrich had to compromise and settle these claims. A litigation of several years standing grew out of the failure of the parties to make titles to lots which they had sold, and this was maintained and finally settled by the defendant and Goodrich alone—Stewart and the complainant being residents of other states. In the meantime the complainant never moved in the matter of this bond, nor made any claim in relation to it until the bill was filed on the 22d of August, 1836, just twenty years from the maturity of the last note named in the bond. During all this time the defendant exercised control and ownership over the land, and paid the taxes. The reasons stated by the complainant for this long delay in prosecuting the claim set forth in his deposition as follows: He considered the bond worthless; he was told nothing could be collected from the defendant in 1840, 1841, and “along in those years;” that the defendant had put his property out of his hands; that the bond did not set out the state in which the lands were situate, and he did not know he had any rights till advised by counsel just prior to filing the bill.

Doolittle & Morris, for complainant.
Beckwith, Ayer & Kales, for defendant.

DRUMMOND, Circuit Judge. Perhaps the fair inference from the facts is, that Shephard had attended the sales of the lands, and

had made selections, or had done something else in relation to the land, or for the defendant, in consideration of which, while the latter had paid all the purchase money, he agreed that the complainant might have one-half of the land, on reimbursing him one-half of the purchase money, with a certain interest. Shephard himself, though he appears to be living, was not a witness in the case, and the proof as to the particular circumstances of the arrangement between Shephard and the defendant seems to be confined almost entirely to the documentary evidence, viz.: the bond itself, and the assignments and conveyances affecting the land.

Giving to these documents the construction most favorable to the complainant, I am of the opinion that he has slept too long upon his rights to permit him now to call upon a court of equity to enforce them. He was clothed with the equities of Shephard under the bond, on the 4th of March, 1836, more than twenty years before he filed his bill. Conceding that he stood in all respects in the place of Shephard, then upon payment of the notes as they fell due, he was entitled to a conveyance of one-half of the land, or if sold, to one-half of the proceeds. Taking either aspect of the case, as presented in the evidence, the result must be the same. If it be true that when the first note fell due payment was tendered by the complainant and refused, that was a denial of the right of the complainant pro tanto, under the contract. If, in the fall of 1836, the whole amount due on the three notes of Shephard was tendered and refused, that was a denial of the whole contract. Then, if we take the statement of the complainant, denied by the defendant, as true, in the fall of 1836 he knew that the defendant, from some cause, repudiated the obligation of the contract. Whether, on this hypothesis, the first and only payment on the sale of the undivided half—which the defendant claims was his own half—of the Milwaukee land, was at that time made, we do not know, but the complainant then had notice that the defendant repudiated his claim under the contract. Being thus met by the defendant, he submitted to that repulse without a motion to enforce it, for nearly twenty years. It is a fair inference, I think, that he acquiesced in the action of the defendant. Whatever view, therefore, we may take of the legal status of the parties under the facts, in 1836 a claim was made on one side, and refused or resisted on the other, and so, without a word further, the matter rested till Aug. 22, 1856.

The inference becomes irresistible when connected with circumstances already mentioned, and with others which may be referred to. The defendant treated the land thenceforth as his own, paid the taxes, disposed of some portion, has always retained a part of it down to the present time, and during all the time has been a resident of Cook county, Illinois, while the complainant in

1835 and 1836, and for a few years afterwards, was also a resident of Cook county, and then removed to Racine, Wisconsin, where he has ever since resided. Shortly after 1836, real estate greatly depreciated in value here, and so continued for several years. In 1856, when the bill was filed in this case, land had greatly risen in value. In addition to all this, the purchasers of block one in the original town of Chicago, of whom the complainant and defendant were two, had sold several lots of that block, and had received considerable sums of money, amounting to some thousands of dollars—a large part of which had been put in improvements on the block, and when, having lost all under the mortgage given to secure the three-fourths of the purchase money, they were called on to refund sums that had been paid them, the complainant was not here, and therefore, as years passed by, and nothing was said or even hinted by him of the bond of October 31, 1835, it is not impossible that his non-action may have been the result, in part at least, of the complications growing out of the liabilities incurred in relation to block one, and of the fear, if any claim were made under that, he might be met with a counterclaim. However this may be, the complainant rested till the statute of limitations had run against the notes to Shephard and the bond of the defendant, and having been silent so long, he cannot be heard now.

It has been said by the complainant's counsel, that this case is similar to the case of *Seymour v. Freer*, decided by this court [unreported], and afterwards affirmed by the supreme court of the United States (8 Wall. [75 U. S.] 202). In some respects this case is like that, but if it were conceded that in substance the nature of the contract was the same, it must be borne in mind that the supreme court put the decision in *Seymour v. Freer* on the ground that nothing had ever been waived or lost by Price under the original contract. The language of the opinion of a majority of the court is: "The devisees might have held the property, and denied that, under the circumstances, the trust subsisted any longer. If Price acquiesced, his rights would have been at an end. Price might also have expressly or tacitly abandoned his claim. This would have worked the same result. Both parties might have concluded to continue their existing relations. * * * Was either of the alternatives adopted, and if so, which one? This is the turning point in the case." And because the court was of opinion that both parties continued their existing relations, the original contract was held to govern their rights. If that were true here, the decision would necessarily be the same, but it is because one of the parties here signified his purpose to deny the claim under the original contract, and the other submitted thereto for nearly twenty years, that this court must treat the contract as the parties themselves treated it—as obsolete.

I have not referred to the circumstance of the case having been permitted to stand in court for so many years without action, even after the bill was filed, because this may have been with the acquiescence of the defendant or his counsel.

The bill will be dismissed.

NOTE. This case was appealed to the supreme court, and the decree below affirmed by a divided court, no opinion being filed, and the case not reported. Courts of equity will not aid in enforcing stale claims where the party has slept upon his rights. *Platt v. Vattier*, 9 Pet. [34 U. S.] 405; *Hawley v. Cramer*, 4 Cow. 717; *McKnight v. Taylor*, 1 How. [42 U. S.] 161; *Bowman v. Wathen*, Id. 189. The lapse of twenty years ordinarily operates as a bar to a suit in equity connected with the recovery of land. *Varick v. Edwards*, 1 Hoff. Ch. 382; *Pipher v. Lodge*, 4 Serg. & R. 310. As to when a vendee may bring his bill for specific performance, and what laches will stop him, consult *Peters v. Delaplaine*, 49 N. Y. 362.

Case No. 18,080.

WRIGHT v. GEORGETOWN.

[4 Cranch, C. C. 534.]¹

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

CHANGE OF STREET GRADE—ACTION FOR DAMAGES—DEFENSES—PROCEEDINGS BY INQUISITION.

A subsequent inquisition is no bar to the plaintiff's special action upon the case for a cause of action which accrued before the inquisition. The power to regulate streets, given by the act of 1805, applies only to streets opened or extended by virtue of that act. The inquest must be taken before a magistrate or officer. The justice must certify that he summoned the jurors, and that they were sworn. The jurors must certify that they made the inquest. The party to be affected by the inquest must be notified.

[Cited in *City of Topeka v. Sells*, 48 Kan. 520, 29 Pac. 609.]

This was a special action upon the case [by Matthew Wright] for damages to the plaintiff's dwelling-house, by graduating the street and raising the earth so as to obstruct the plaintiff's entrance, &c. The declaration, which was drawn by Mr. Jones, consisted of two counts; the first of which stated, in substance, that the plaintiff was seized in fee of a messuage and tenement, in Georgetown, D. C., fronting on Causeway street, which, long before the injury now complained of, had been regulated and improved, so as to admit of convenient access, ingress, egress and regress to and from the said messuage and tenement and the said street; and to leave the ground-floor of the dwelling-house on a convenient level above the level of the street; the regulation and level of which street, the defendants, at the time aforesaid, and before and always since, had no lawful right to change and alter, so as to obstruct such access, &c.; yet the defendants afterward, unlawfully and wilfully, against the will of the

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

plaintiff and without any lawful warrant, power, or authority, caused the regulation and level of the said message and tenement to be changed and altered and the said street all along the front of said message and tenement, to be raised and filled up and embanked with earth, to a great height, namely, fifteen inches above its proper level as before laid out, regulated, and levelled by public authority and the acts of said defendants, so as to impede and obstruct all access, &c., and to render the dwelling-house untenable and uninhabitable for one year and upwards, to the great nuisance, &c., of the plaintiff and his tenants; by reason whereof the plaintiff was obliged to raise the ground-floor fifteen inches above its former level, and to make other works and repairs, &c., at the expense of \$600, and lost the rents and profits, &c., to the damage of the plaintiff \$2,000, &c. The second count stated that the damage was done without compensation as required by the act of congress.

The defendants pleaded 1st. In substance, that the plaintiff is concluded by the verdict of the jury, held under the town charter, and that the sum, there awarded, was tendered to, and refused by, the plaintiff. 2d. That the plaintiff's house was built before the street was graduated, and therefore no injury. 3d. Not guilty.

Mr. Jones, for plaintiff, prayed the court to instruct the jury that the matter of the plea is no defence to this action.

Mr. Dunlop, for defendants, contra, contended that the inquisition is conclusive, and cited the Maryland charter of Georgetown (1797, chapter 6); Act Cong. March 3, 1805 (2 Stat. 332); Davis' Laws D. C. 171; Act Cong. March 3, 1809 (2 Stat. 537); Davis' Laws D. C. pp. 195-197, § 4; and the case of *Gozler v. Georgetown*, 6 Wheat. [19 U. S.] 596.

Mr. Jones, contra. The act of congress of March 3, 1809, § 4 (2 Stat. 537), authorizes the regulation only of those streets which, either under the powers given by that act or by previous acts, the corporation might thereafter open or extend. This was an old street (Water street), and had been twice regulated, and had been built upon for many years. The justice and the jury had no authority in this case under that act. It is said that if they had, this court has not. But in *Pritchard v. Georgetown* [Case No. 11,437] (December, 1819), it was decided that this court had the jurisdiction; therefore the justice and jury had not. There is no law that ousts this court of its jurisdiction. This is not taking private property for public use. The damage was done before the inquisition, and therefore the plaintiff has not lost his common-law remedy. By the fourth section of the act of 1809 (2 Stat. 537), the justice and twelve jurors are to be corporators and the authority is confined to the precise case mentioned in that section. The act of Maryland of 1797 (chapter 6) did not give the right to

open and extend streets, but only to make by-laws for the graduation and levelling of existing streets. The act of Maryland of 1789 only gives the corporation the power to survey and ascertain the streets, lanes, and alleys of the town and its additions, and they could not survey, lay out, or alter any new street except upon the application and at the expense of the proprietor through whose ground it should run; and no street was to be extended through the ground of any person without his consent. The act of congress of March 3, 1805, § 12 (2 Stat. 332), authorizes the corporation, "to open, extend, and regulate streets within the limits of the said town; provided they make to the person or persons who may be injured by such opening, extension, or regulation, just and adequate compensation, to be ascertained by the verdict of an impartial jury, to be summoned and sworn by a justice of the peace of the county of Washington, and to be formed of twenty-three men who shall proceed in like manner as has been usual in other cases where private property has been condemned for public use."

Mr. Jones contended that the acts of 1805, and 1809, are applicable to the same cases; and that the compensation was to be ascertained before the street could be regulated; and therefore that the plaintiff was not bound by the inquisition. In all cases of *ad quod damnum*, the damages are to be first ascertained; and it is usual to give notice to the party to be affected by the condemnation; and in the warrant to describe the property intended to be taken. In the present case, the warrant is not directed to anybody. The jury was sworn to ascertain what damage has been done to the property holders on Water street between Congress and Washington streets. There is no certificate of the justice that this is the inquisition. The certificate of the jurors is not sufficient.

Mr. Key, in reply. No warrant was required by law. The justice might have summoned the jury *ore tenus*. But he issued a blank summons, and the inquisition states that "We, A, B, C, &c., jurors duly summoned, as appears by the warrant hereto annexed," &c. The jury describe particularly the property to which the damage was done which they assess. It was not necessary to describe it more specifically. It was not necessary that there should be a separate warrant for each proprietor whose property was damaged. The law does not require the justice to certify anything; and his certificate would have been good for nothing if he had certified. The amount of the damage could not be as well ascertained before, as after, it was done.

THE COURT (THRUSTON, Circuit Judge, contra) was of opinion, and instructed the jury that the inquisition, and the proceedings thereon, were no bar to the plaintiff's action: (1) Because the compensation should

be ascertained before the defendants could lawfully raise the level of the street. (2) Because the power to regulate, given by the act of 1805, applies only to the streets opened or extended by virtue of that act. (3) Because the inquest was not taken before any magistrate or officer. (4) Because it is not certified by the justice that he summoned the jurors. (5) Because he has not certified that the jurors were sworn by him, nor that they made an inquest; nor that the plaintiff had notice, &c.

Verdict for the plaintiff, \$160.

WRIGHT v. GLICK. See Case No. 18,083.

Case No. 18,081.

WRIGHT v. GREEN.

[Nowhere reported; opinion not now accessible.]

WRIGHT (HARTSHORN v.). See Case No. 6,169.

WRIGHT (HEATH v.). See Case No. 6,310.

WRIGHT v. HICKEY. See Case No. 18,083.

Case No. 18,082.

WRIGHT v. JOHNSON.

[8 Blatchf. 150; 1 4 N. B. R. 626.]

Circuit Court, N. D. New York. Jan. 17. 1871.

BANKRUPTCY — SUIT BY ASSIGNEE — SUFFICIENCY OF DECLARATION.

1. Where an assignee in bankruptcy, in the declaration in an action of trover brought by him, undertakes to set out in detail the manner in which he claims to have become the owner of the property which is the subject of the suit, by alleging the proceedings in bankruptcy, he must allege an adjudication of bankruptcy, or his declaration will be held bad, in substance, on demurrer.

2. An adjudication of bankruptcy is an essential prerequisite and precedent condition of the power of the register, under section 14 of the bankruptcy act of March 2, 1867 (14 Stat. 522), to make an assignment of the estate of the bankrupt to an assignee.

[Cited in *Hampton v. Rouse*, 22 Wall. (89 U. S.) 276.]

[Cited in *Roberts v. Shroyer*, 68 Ind. 67.]

[This was an action by Isaac H. Wright, assignee in bankruptcy of Lyman K. Hitchcock and Samuel K. Place, against James Johnson.]

Starbuck & Sawyer, for plaintiff.

Bernard Bagley, for defendant.

WOODRUFF, Circuit Judge. The action herein is trover. It is brought to a hearing upon certain demurrers of the defendant to some of the plaintiff's replications to the defendant's special pleas, and upon demurrers of the plaintiff to some of the defendant's rejoinders to other replications of the plaintiff.

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

These pleadings and demurrers, and the particulars thereof, it is not necessary to notice further or to express any opinion thereon.

The plaintiff correctly insists, that, "as a settled rule of pleading, judgment on demurrer will pass against the party guilty of the first error in substance." This rule is fatal to him, in the present case. He has seen fit to set out in detail the manner in which he claims to have become the owner of the property for the conversion of which the action is brought. I express no opinion upon the question whether it was necessary that he should do so, or on the question whether, if he attempted to allege the proceedings in bankruptcy, he should have stated the contents of the petition to the district court, or of the schedule and inventory annexed thereto, with greater particularity. Not being advised to aver property in the goods generally, and rely thereon, he alleges the presentation of a petition by Hitchcock and Place, with schedule and inventory, (with so much of particularity as the pleader deemed necessary,) and then avers the issuing of a warrant by a register in bankruptcy, notice to creditors, a meeting of creditors, the choice of the plaintiff as assignee, and the execution, by the register in bankruptcy, of an assignment of the property of Hitchcock and Place to him as such assignee. It is not averred that Hitchcock and Place have been adjudged bankrupt.

I am not called upon to deny, that the jurisdiction of the district court in bankruptcy is general over that subject, so that, (when it is necessary to state and rely upon its proceedings,) after the allegation of such facts as give to that court jurisdiction of the parties, it is sufficient to allege, taliter processum fuit, as to all intermediate steps, down to the particular act of the court which it is material to aver. But, if the plaintiff undertakes to set out the proceedings to sustain the act of the register in making an assignment of the property of other persons to the plaintiff, he must state such proceedings as authorized the assignment. Here, the plaintiff makes title, not by transfer from the former owners, Hitchcock and Place, but by a transfer made to him by a register in bankruptcy, without averring that Hitchcock and Place have ever been adjudged bankrupt. Section 11 of the bankrupt law provides, that the filing of the described petition, schedule and inventory shall be an act of bankruptcy, and that the petitioner shall be adjudged a bankrupt. Then, and not until then, the warrant issues, notice to creditors is given, an assignee is chosen and qualified, and, when there is no opposing interest, the register, by section 14, is authorized, and directed to assign the estate, real and personal, of the bankrupt, to the assignee.

I am of opinion, that the adjudication that the petitioners are bankrupt, is an essential prerequisite and precedent condition of the power of the register to make any such assignment. True, the filing of the petition is an act of bankruptcy, but the adjudication is the judicial ascertainment and declaration of the fact, that

the petitioners are legally bankrupt, upon which all the subsequent proceedings are founded. It is the act by which the court takes hold of the subject-matter, applies to it its jurisdiction, and gives legal effect to what the statute declares to be an act of bankruptcy. Until that adjudication, I perceive no doubt that the petitioner may withdraw his application, and nothing further be done therein, as a voluntary application.

The plaintiff's endeavor herein to show actual ownership of the goods by setting out the proceedings on which he relies to establish title, therefore, fails. If he choose to set out the manner in which he acquired title, his declaration should show that the proceedings are such as make the transfer to him legal and valid. Judgment must, therefore, be ordered for the defendant, but with leave to the plaintiff to amend his declaration, on the usual terms.

WRIGHT (LENOX v.). See Case No. 8,249.

WRIGHT (LE ROY v.). See Case No. 8,273.

Case No. 18,083.

WRIGHT v. McMILLAN. SAME v. HICKEY. SAME v. SMITHPETER. SAME v. GLICK.

[13 O. G. 47.]

Circuit Court, W. D. Missouri. Nov., 1877.

PATENTS—FARM GATES.

[The Teel reissue, No. 2,667, for an improvement in farm gates, held invalid, the evidence failing to show that Teel was the original and first inventor.]

[This was a bill in equity by Ethan B. Wright against Roland McMillan, Lewis Hickey, William Smithpeter, and Henry Glick.]

Suit was brought in all four cases for infringement of letters patent (reissue) No. 2,667, granted to A. C. Teel, July 2, 1867, for "improvement in farm gates." [Original letters patent No. 40,777 were granted December 1, 1863.] In delivering an oral opinion, the judge stated that it did not appear from the evidence that Teel was the first and original inventor of the improvement described and claimed. It was specially ordered that the decree should go no farther than dismissing the bill with costs.

KREKEL, District Judge. This cause came on to be heard at this term, and was argued by counsel; and thereupon, on consideration thereof, it was ordered, adjudged, and decreed that the complainant's bill be dismissed, and that said defendant, Roland McMillan, recover against the complainant, Ethan B. Wright, and Isaac R. Brown, his security, for costs, his costs and charges herein expended, and have thereof execution.

Case No. 18,084.

WRIGHT v. MERCHANTS' NAT. BANK.

[1 Flip. 568; 2 N. Y. Wkly. Dig. 539; 3 Cent. Law J. 351; 1 Thomp. Nat. Bank Cas. 321; 2 Law & Eq. Rep. 638; 1 Cin. Law Bul. 198; 22 Int. Rev. Rec. 248.]¹

Circuit Court, W. D. Tennessee. May 19, 1876.

NATIONAL BANK—APPOINTMENT OF RECEIVER.

The general banking law has provisions for winding up banks under the direction of the comptroller of the currency. These are not exclusive, and were not intended to put it out of the power of the courts to appoint receivers upon a judgment-creditor's bill.

Demurrer to bill of judgment creditor. Bill alleged, in substance, that complainant had recovered a judgment for \$10,000 against defendant in the state court; that he was unable to have the same satisfied; that the bank discontinued business, and in contemplation of bankruptcy had transferred and conveyed all its property to one creditor, which was a large stockholder in defendant's corporation; and that this creditor was appropriating all the assets to its own use, etc.; and praying for an injunction and the appointment of a receiver. Demurrer went upon the ground that the comptroller of the currency alone could appoint a receiver.

Mr. Welch, T. W. Brown, and W. Y. C. Humes, for complainant.

W. D. Beard, for defendant.

BROWN, District Judge. The power and duty of a court of equity to appoint a receiver upon the application of a judgment-creditor, is too well established to admit of doubt. Edw. Rec. 396; Hadden v. Spader, 20 Johns. 554; Taylor v. Jones, 2 Atk. 600; Edgell v. Haywood, 3 Atk. 352; Candler v. Pettit, 1 Paige, 168; Weed v. Pierce, 9 Cow. 722; Lewis v. Zouche, 2 Sim. 388; Bloodgood v. Clark, 4 Paige, 574; Ogilvie v. Knox Ins. Co., 22 How. [63 U. S.] 380; Parkhurst v. Kinsman [Case No. 10,760]. There is no allegation in the bill that execution has been issued and returned unsatisfied, but as no demurrer is interposed upon that ground, and as the point was not made upon the argument, I shall notice it no further. Indeed, it was practically conceded that a case for a receiver was made out, unless the power of appointing receivers of national banks was exclusively vested in the comptroller of the currency. Title 62 of the Revised Statutes relating to the organization of banks, provides for the appointment of a receiver by the comptroller of the currency to wind up their affairs, only in the following cases: First, for not keeping good its surplus. Section 5151. Second, for not keeping stock at

¹ [Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission. 2 N. Y. Wkly. Dig. 539, and 2 Law & Eq. Rep. 638, contain only partial reports.]

minimum. Section 5141. Third, for not keeping good its reserve. Section 5191. Fourth, for not selecting a place for the redemption of its notes. Section 5195. Fifth, for holding its own stock over six months. Section 5201. Sixth, for non-payment of its circulating notes. Section 5234. Seventh, for improperly certifying a check. Section 5208. Eighth, for failing to pay up capital stock, and to allow the same to become, and to remain, impaired by losses. Section 5205.

If a judgment creditor may not invoke the aid of a court of equity he is powerless to enforce his claim, unless he can persuade the comptroller of currency to interfere in his behalf. Section 5242 provides that a "transfer of notes, bills of exchange, bonds or other evidences of debt owing to any national banking association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." No method, however, is provided of winding up a bank guilty of any of the acts mentioned in this section, nor is the power given to the comptroller of currency apparently designed to reach these cases. It is at least doubtful whether he would have power, upon the application made by this bill to interfere and appoint a receiver. That the winding-up provisions of the act were not designed to be exclusive, it seems to me, is fairly to be inferred from section 5241, which provides, that "no association shall be subject to any visitatorial powers other than such as are authorized by this title, or are vested in the courts of justice." There is certainly an implication here that the courts may exercise a visitatorial power, and as this power is usually if not always exerted through the agency of a receiver, I should regard the language of this section as justifying the appointment of one.

But even if the power had been given to the comptroller of the currency to appoint a receiver in cases like the present, in the absence of restrictive language, it is at least doubtful whether it should be regarded as forestalling the jurisdiction of the courts.

The general rule with regard to the election of remedies is stated in Sedg. St. Const. Law, pp. 93-401: "Where a right originally exists at common law, and a statute is passed giving a new remedy without any negative, express or implied, upon the old common law, the party has his election either to sue at common law or to proceed upon the

statute; the statutory remedy is merely cumulative." A clause in a railroad act authorizing the directors to exact a forfeiture of the stock and previous payments, as a penalty for non-payment of installments, does not, before forfeiture has been declared, impair the remedy of the directors to enforce payment by action at common law. *Northern R. Co. v. Miller*, 10 Barb. 260. These principles have been applied to the winding-up act of English corporations, and have uniformly been held as not exclusive of the ordinary remedies provided by law. *Lindl. Partn.* 861.

In *Jones v. Charlemont*, 16 Sim. 271, a bill was filed for the purpose of winding up the affairs of a railway company. The defendant demurred upon the ground that plaintiffs might have obtained their object under the special act of 9 and 10 Vict., to facilitate the dissolution of railway companies, and that that act had ousted the court of its jurisdiction in cases clearly within its operation. The vice-chancellor, however, declined to hear counsel for the complainant, and overruled the demurrer.

The same question again came before the court in the case of *Clements v. Bowes*, 17 Sim. 167, which was a bill by a shareholder in a company, on behalf of himself and others, praying an account of receipts and payments of defendants on behalf of the company. Defendants were members of a finance committee who were alleged to have exclusive control over the money affairs of the corporation. They demurred on the ground that the legislature having provided a method of winding up and dealing with the affairs of a railway company, the court ought to refuse a party the right of coming in to have the accounts taken. The court observes: "To oust the jurisdiction of a court of chancery in such a case, the legislature should have so declared. It is plain where a court of equity has jurisdiction in such a case, an act of giving further relief does not by that oust the title of the court of equity, without express terms being used to put an end to the jurisdiction which is inherent in the court." Similar views were expressed by the court of chancery in 1853, in the case of *Fripp v. Chard Ry. Co.*, 21 Eng. Law & Eq. 53, which was an application by a mortgagee for the appointment of a receiver. A provision in the act that any mortgagee whose interest was in arrear for twenty-one days might have a receiver appointed, upon application to two justices, was held to oust the jurisdiction of the court to appoint a receiver with the usual powers. Counsel for defendant cited to the court upon the argument the case of *Smith v. Manufacturers' Bank* [Case No. 13,076], in which Judge Blodgett, of the Northern district of Illinois, held that the bankrupt act was not intended to apply to national banks, and that the provision made by congress for their winding up, when

insolvent, was exclusive. Although the two cases are not exactly analogous, the reasoning of the court in that case undoubtedly applies to the one at bar. Having intimated an opinion upon the argument before this case was cited, that the winding-up provisions were not exclusive, I felt bound on hearing the case, in deference to the views of the learned judge, to withhold my decision until I had made a more careful examination of the law. From correspondence with him I am informed that he has modified, to some extent, the views expressed in that opinion, and that in the subsequent case of *Irons v. Manufacturers' Nat. Bank* [Case No. 7,068], he appointed a receiver of the same bank upon the application of a judgment-creditor. He there observes: "It would seem that the comptroller only has the right to appoint a receiver upon the existence of the facts which clothe him with that power, and that he rightfully declines to act in this case. I can see nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to exclude the idea that a corporation created as this is, under an act of congress for certain specified purposes, does not come within the general provision of the law regulating the remedies of creditors the same as any other corporation, except where there are specific provisions to the contrary."

It is not intended in this case to decide whether the court would be authorized to appoint a receiver upon the happening of the contingencies authorizing such appointment by the comptroller of the currency. I am clearly of the opinion, however, that when the act does not provide for the introduction of the comptroller, a judgment-creditor is entitled to the aid of a court of equity. I see nothing in the case of *Gibson v. Kennedy*, 8 Wall. [75 U. S.] 498, which conflicts with these views. Nothing was decided in that case, except that it is for the comptroller to determine when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether a whole or part, and if a part, how much shall be collected. It is true there are certain dicta in the opinion which, literally construed, would indicate that creditors must, in all cases, seek their remedy through the comptroller in the mode prescribed by statute, but I am satisfied the court did not intend that language to be of universal application, and that it should be limited to the facts of the case before it.

Nor is there any force in the objection that a receiver appointed by this court would be powerless to obtain possession of the surplus of bonds on deposit in Washington, for the redemption of its circulating notes. I cannot assume that the comptroller of the currency would refuse to comply with the order of a court having jurisdiction of the case.

On the whole, I am of the opinion that in the absence of action on the part of the comp-

troller of the currency, this court has the power to appoint a receiver upon the application of a judgment-creditor, subject, possibly, to his being superseded by the action of the comptroller.

The demurrer must be overruled.

Case No. 18,085.

WRIGHT v. MERCHANTS' NAT. BANK.
[See Case No. 18,084.]

WRIGHT (MOTT v.). See Case No. 9,883.

WRIGHT (NICHOLLS v.). See Case No. 10,236.

Case No. 18,086.

WRIGHT et al. v. NORWICH & N. Y. TRANSP. CO.

[1 Ben. 156.]¹

District Court, D. Connecticut. May, 1867.²

COLLISION—LIMITATION OF LIABILITY—PROCEEDINGS TO APPORTION LIABILITY—JURISDICTION OF DISTRICT COURT.

1. Where, in a collision between a steamer and a schooner, both vessels were sunk, and the steamer was afterwards raised and repaired, and this suit was brought by the owners of the schooner against the owners of the steamer, in which a decree was rendered for the libellants, with an order of reference to a commissioner to ascertain the damage, and his report, fixing such damage, was confirmed by the court. And where the respondents, thereupon, applied to the court on motion to reserve the final decree, that they might take "appropriate proceedings" to apportion the sum for which they might be liable among the parties entitled thereto, under the provisions of the act of congress of March 3, 1851 [9 Stat. 635], offering to the court proof of the value of their vessel and her freight, and that such value was exceeded by the amount of the claims for property destroyed in the collision. *Held*, that the liability of owners of vessels for damages done by their own to other craft in cases of collision, is limited by the third section of the act to the amount and value of their interest in the vessel at fault and her pending freight.

2. This limitation of liability is not confined to damages done to property on board the faulty vessel, but embraces all damages.

3. The respondents are, under the circumstances of this case, entitled, by the fourth section of the act, to take proceedings to have the amount for which they are liable apportioned among the parties entitled to it.

4. But that this court has no power to give them such relief in any form of proceeding. That power does not belong to its jurisdiction in admiralty, certainly not in a suit in personam, where neither the faulty ship and freight, nor their amount or value, is within the control of the court, and where the court can render no judgment that will bind parties not before it, and cannot make parties of such as reside and remain out of the district. And the court has no equity powers adequate to granting such relief.

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

² [Affirmed in Case No. 18,087. Decree of circuit court affirmed by supreme court in 13 Wall. (80 U. S.) 104.]

5. The evidence must be rejected and the motion denied; and as the value of the steamer and her freight, at the time of the collision, was greater than the amount of the report, the libellants must have a decree for that amount.

In admiralty.

SHIPMAN, District Judge. On the 18th of April, 1866, the schooner *S. Van Vliet*, owned by the libellants [W. A. Wright and others], and the steamboat *City of Norwich*, owned by the respondents, collided in Long Island Sound. The collision sunk the schooner, and both she and her cargo were lost. The steamboat was greatly damaged by the blow, and soon after took fire and sunk. She had on board a valuable cargo, which was lost. The steamer was subsequently raised and repaired at great expense.

A libel in personam against the owners of the steamboat was filed in this court, and after answer and full hearing, she was held in fault, and a decree entered against her owners, with an order of reference to a commissioner to compute the damages to the owners, both of the schooner and her cargo, and report the same to the court. The commissioner heard the parties and made a special report. Upon motion that the court confirm the report, counsel were heard upon the questions of law raised pertaining to that branch of the case. The report was confirmed upon principles set forth in the opinion of the court, and the damages of the owners of the schooner were fixed at \$19,975, and those of the owners of the cargo at \$1,921.13.

Thus far the case presented only the ordinary features of a suit for collision, and was free from all embarrassing questions. If nothing further now appeared, the libellants would be entitled to a decree against the respondents for the full amount of the above damages.

At this point, however, the respondents move the court to reserve the final decree, that they may "take appropriate proceedings," and offer evidence to this court "for the purpose of apportioning the sum for which the owners of the steamboat may be liable, among the parties entitled thereto." The object of the respondents is to avail themselves of the benefits of the provisions of the act of congress of March 3, 1851, limiting the liability of ship owners for the consequences of the torts of the master and others on board. The respondents insist that they have laid the foundation for this proceeding in their answer, by averring that the damages resulting from this collision to third parties greatly exceed the value of their boat and her freight then pending. No formal steps have been taken by way of presenting evidence to this court of the amount of the claims of those whose property was on board of the faulty boat, and was injured or destroyed by her taking fire and sinking, but, upon suggestion of the

court, and by consent of counsel, such evidence was considered as offered under this motion and objected to, and the general question of the right of the respondents to relief, and the power of the court to grant it, was argued at length.

The points discussed at bar may be condensed into the following questions: (1) How far the original liability of ship owners for the faults of their vessels in cases of collision is limited by the act of March, 1851? (2) What relief the respondents are entitled to under that act? (3) How far this court can grant such relief as the act intended to provide?

I see no reason to doubt that the liability of owners of vessels for damages done by their own to other craft in cases of collision, is limited by this act to the amount and value of their interest in the vessel at fault, and her pending freight. The third section of the act is too explicit to be explained away by any comparison of its provisions with the history of British legislation on the same general subject. The direct language of this section coincides with the plain and well known object of the whole statute, which was to encourage commercial enterprises in the building and sailing of ships, by relieving the owners from any liability for losses beyond the value of their interest in the vessel and freight pending. The argument of the libellants' counsel is that the liability limited by the act, so far as it relates to collision, is confined to damages done to property on board the faulty vessel—in other words, that the sole object of congress, was to relieve the owners whose vessel may be in fault, from the unlimited liability to which they would otherwise be held as common carriers. The attempt is made to support this construction by arguments drawn from the history of the various English acts on this subject, and by a comparison of the language of those acts with that of our own. But, as already intimated, I regard this section as too explicit to admit of any such construction. It would not be plainer if the other words were left out, and it read simply "the liability of the owner or owners of any ship or vessel * * * for any loss, damage, or injury by collision * * * without the privity of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel and her freight then pending."

The reasons for limiting the liability for injuries resulting to other vessels and their cargoes are just as weighty as those for limiting it for injuries done to the cargoes of the vessels in fault. Collisions are frequent, their hazards great, and the injuries inflicted upon other vessels and cargoes often far exceed the value of the faulty ship and her pending freight. The disaster out of which this controversy has sprung, presents an instructive lesson on this point.

Had the libellants' vessel been condemned as in the wrong, her owners, according to their present argument, would have been liable for the whole amount of damages done to the city of Norwich and her cargo, exceeding by many times over the amount or value of their interest in the Van Vliet. The owners of the latter would not only have lost their vessel and her pending freight, amounting to over \$20,000, but would have been responsible to other parties for probably \$100,000 more. It was against just such calamities, out of all proportion to the magnitude of the capital invested, that I understand this act to provide. I apprehend that this construction of the third section of this act would never have been doubted, but for the singular provisions of the fourth section. But I do not think they seriously affect the question.

This brings us to the consideration of our second point—what relief the respondents are entitled to under this act. They have alleged in their answer, and now offer to prove, that the injuries resulting from this collision, including not only those which these libellants are seeking indemnity for, but also those suffered by owners of property on board the City of Norwich, greatly exceeded in amount or value their interest in the latter boat and her freight then pending. They propose to prove her value, and the value of her freight, and the extent of the losses to the owners of the property on board, in order to enable the court to apportion the sum for which the owners of the boat are liable, among the parties entitled thereto, to wit: these libellants and the owners of goods destroyed on the respondents' boat. This, they claim, they are authorized to do by the fourth section of the act in question, which is as follows: "If any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the vessel and her freight for the voyage shall not be sufficient to make compensation to each of them, they shall receive compensation from the owners of the ship or vessel in proportion to their respective losses; and for that purpose, the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum, for which the owner or owners of the ship or vessel may be liable, among the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act on the part of such owner or owners, if he or they shall transfer his or their interests in such vessel or freight, for the benefit of such claimants, to a trustee to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who

may prove to be entitled thereto; from and after which transfer all claims and proceedings against the owner or owners shall cease."

It was undoubtedly foreseen by congress, that in cases of embezzlement and kindred torts, and in cases of collision, there would arise instances where several different parties would have claims for damages against the owners of a vessel, exceeding her value in the aggregate, and would very likely endeavor to enforce them in separate suits and in different tribunals, and in order to protect the interest of all parties, it was necessary that there should be some way provided by which the amount to which the liability of the owner is limited, should be distributed among those entitled to recover, in proportion to their respective claims. This state of things would exist, or at least might exist, whenever property on board either one or both colliding vessels, belonging to parties other than such owners, was destroyed or injured, and the whole amount of damage should exceed the value of the faulty vessel and her pending freight. Indeed, it might occur where one vessel strikes two others in the same collision, as has more than once happened, and the owners of each injured vessel should bring a separate suit. The language of this fourth section is, therefore, very broad, and extends the power of taking proceedings for an apportionment to the owner of the faulty vessel, and to the several owners or freighters of any property whatever lost or destroyed by the tortious act of those on board. Whenever, therefore, there are several claimants for damages arising out of the same tortious act, who have brought, or may be entitled to bring, separate suits, the necessity for apportioning the amount, for which the owners of the vessel in fault are liable, arises. The respondents in the present suit find themselves in that condition. In addition to the claims of these libellants, upon which large damages have been awarded against them, they are liable, assuming the judgment of this court as to the cause of the collision to be correct, to freighters or owners of goods on the City of Norwich for a much larger amount; and they aver that the whole sum for which they are thus liable exceeds the value of their interest in their boat and pending freight at the moment preceding the collision. They are entitled therefore to take proceedings to have the amount, for which they are liable, apportioned among the parties entitled thereto. This is one species of relief which the act intended to provide. The other, the transfer of the ship and freight to a trustee, they have not resorted to, and therefore nothing need be said on that subject.

Just here we enter upon the most embarrassing questions which arise under this act. The power given to parties, to protect their

rights by an apportionment of the sum for which the owners of the vessel are liable, is expressed in vague and uncertain terms, both as to the nature of the proceedings to be taken, and the court which is to administer them. We are, therefore, brought to the consideration of our last question, how far this court can grant the relief which this act intended to provide. The language of the act is, that the parties authorized, or any one of them, "may take the appropriate proceedings in any court for the purpose of apportioning the sum," &c. What is here meant by "appropriate proceedings?" It is reasonable to suppose that congress, by this language, referred to some course of legal procedure already known to the law, and administered by some distinct tribunal, according to a settled practice. As this act was framed with full knowledge of the various English acts, relating to the same subject, and was intended to accomplish substantially the same result, we may infer that the appropriate proceedings contemplated were substantially such as have been employed in the enforcement of the English act. These were equity proceedings, administered by the high court of chancery. That tribunal was empowered to entertain suits of this character, and to draw the whole controversy within its jurisdiction, by stopping actions in all other courts relating to the same subject matter. The most ample powers were conferred on that court to enable it to make a complete, effectual, and final disposition of the litigation, so as to bind all parties in interest. These powers were transferred to the high court of admiralty in 1861. (See Judge Benedict's opinion in the case of *Place v. The City of Norwich* [Case No. 11,202]. Some such powers as those exercised by the English courts must be possessed and employed by whatever tribunal effectually administers this act of congress. It must be able, by a binding decree, to settle the whole controversy, and conclude the parties in interest. Now our present inquiry is, whether this court possesses powers commensurate with such a task. Waiving now the question whether, if it had the power at all, it could proceed to exercise it in connection with, and as a part of, the present suit, I pass to the inquiry whether it can do so under any form of proceeding, unless its jurisdiction is first enlarged. It is true that this section says that the parties, or any of them, "may take the appropriate proceedings, in any court for the purpose of apportioning, &c." Of course these words, "any court," are not to be taken in their literal sense. From necessity we must restrict and qualify them at the start. A court whose jurisdiction is exclusively criminal, cannot be deemed within their meaning. No one will doubt that civil as distinguished from criminal tribunals, alone were indicated. Nor can we suppose for a moment that it was

intended by this act to authorize a resort to all civil courts. Tribunals of limited and inferior jurisdiction, like probate, surrogate, or local city courts, are not within the meaning of these words, although within their literal expression. They undoubtedly refer, as the latter clause of this section, when providing for the transfer of the vessel to a trustee, designates, to courts of competent jurisdiction,—tribunals having a range of authority and a mode of procedure adequate, or at least adapted to accomplish the purposes the act had in view. Now, the only courts of a character at all resembling this description, are courts possessing a general equity jurisdiction. Whether even such courts, as constituted in this country, are, without the aid of special legislation, adequate to this task, I do not now stop to inquire. Nor do I pause to ask the question whether the equitable jurisdiction of any other court of the United States, as the law now stands, is equal to the work. It is sufficient for me here, to determine whether this court has any such power. I answer unhesitatingly, that it has not. It does not pertain to its jurisdiction in admiralty; certainly not in a suit in personam, where neither the faulty ship and freight, nor their amount or value, are within the control of the court. In a suit in personam, it can render no judgment that would bind parties not before it. None of these freighters are parties to this suit, and it is doubtful if this court has power to make them parties. Certainly, it has no power to make parties of such as reside and remain beyond the limits of this district.

It is hardly necessary to add that this court has no equity powers adequate to the exercise of the duty supposed to be conferred upon some court by this section of the act. Its jurisdiction depends upon the acts of congress, and with the exception of a single subject matter, no equity jurisdiction has ever been conferred upon it. I presume it will hardly be contended that, because congress has authorized, in terms, appropriate proceedings to be taken in any court, it has, by implication, conferred upon every court powers adequate to the work of effectually administering this act. And if it has not, this court is without jurisdiction, without rules of practice, and without the power to make such rules, adapted to accomplish the object of the statute, and give effectual relief to the parties interested in the sum for which these respondents are liable as damages for this collision.

The conclusion is, that the court has no power to grant the relief asked for on this motion, or under any form of proceeding that could be instituted. The evidence offered is therefore rejected, and the motion denied. And as it is conceded that the value of the *City of Norwich* and her pending freight, at the time of the collision, was much greater than the damages assessed in this case, a

decree must be entered for the libellants for the sum fixed by the court on confirming the commissioner's report.

[The decree of the district court was affirmed by the circuit court, Case No. 18,087, and the decree of the latter court was affirmed by the supreme court in 13 Wall. (80 U. S.) 104. For other cases growing out of the same collision, and involving some of the same questions, see Cases Nos. 11,202 and 2,760-2,762.]

Case No. 18,087.

WRIGHT et al. v. NORWICH & N. Y.
TRANSP. CO.

[8 Blatchf. 14.]¹

Circuit Court, D. Connecticut. Sept. 20,
1870.²

COLLISION — LIMITATION OF LIABILITY OF VESSEL OWNER.

1. Where a lookout, whose duty it is to report a vessel which he sees, does not report her when he sees her, that fact leads to the belief that he was not performing his duty as a lookout in any respect.

2. The 3d section of the act of March 3, 1851 (9 Stat. 635), entitled, "An act to limit the liability of ship-owners and for other purposes," by which such liability is, in certain cases, limited to the amount or value of their interest in the ship and her freight then pending, does not limit or affect the liability of the owner of a vessel for loss, damage, or injury resulting, through the fault of such vessel, to another vessel and her cargo, from a collision between the two vessels.

3. Whether this court, as a court of admiralty, has power or jurisdiction adequate to give full effect to the limitation of liability provided by that act, quere.

[Appeal from the district court of the United States for the district of Connecticut.

[This was a libel by William A. Wright and others against the Norwich & New York Transportation Company to recover for damages resulting from a collision. From a decree of the district court in favor of the libellants (Case No. 18,086), the present appeal was taken.]

Richard H. Huntley and Charles R. Ingersoll, for libellants.

Edward H. Owen, John S. Beach, and Jeremiah Halsey, for respondents.

WOODRUFF, Circuit Judge. This suit is brought in personam against the respondents as owners of the steamboat, the City of Norwich, to recover for a loss caused by a collision between that steamboat and the schooner General S. Van Vliet, in Long Island Sound, shortly before four o'clock in the morning of the 18th of April, 1866. The injury to both vessels was such that the schooner soon sank, with all her cargo. The

steamboat took fire and also sank, with her cargo. Since this action was commenced, the steamboat has been raised. Some of the libellants were owners of the schooner, and the others were owners of her cargo; and they charge that the collision was caused by the negligence of those in the management of the steamboat. The respondents, on the other hand, deny all fault on their part, and allege that the schooner was in fault in not exhibiting at the time sufficient lights, as required by the act of congress. They further state, in their answer, that the steamboat had on board a large and valuable "freight" belonging to various parties, much larger in value than the whole amount of the interest of the respondents in the said steamboat and in her freight then pending, all of which "freight" was lost.

On the trial in the district court, an interlocutory decree was made, charging responsibility for the loss upon the respondents, and ordering a recovery by the libellants, with the usual reference to compute, upon which the amount of the loss by the owners of the schooner and the owners of her cargo respectively was ascertained and reported. Thereupon, by agreement of the parties, and as a part of the record of said cause prior to the final decree, a motion was filed and allowed or entertained by the court, wherein the respondents reiterated their statement that the City of Norwich, at the time of said collision, had on board a large and valuable cargo of merchandize, on freight, belonging to various parties, and much larger in amount than the whole amount of the value of the interest of the respondents in said steamer and her freight then pending, and alleged that the damages sustained by all of said parties by said collision, including the libellants, were much greater in amount than the value of the interest of the respondents in said steamer and her freight then pending, and, also, that proceedings had been commenced in behalf of said parties, against the said steamer, in the district court of the United States for the Eastern district of New York, for the recovery of said damages. The respondents thereupon prayed, that they might be permitted to show, by proper evidence, the whole amount of damages sustained by all of said parties, and the value of said steamer and her freight then pending, and that the decree of this court be so framed as to give to the libellants such part or proportion of the amount of damages sustained by them, as the said value of the said interest of the said respondents should bear to the whole amount of damages sustained by all parties by said collision. The district court denied the motion, and gave a final decree for the libellants, that they recover from the respondents the whole amount of the damages sustained, as fixed by the court, and their costs, without any regard to the value of the respondents' interest in the

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

² [Affirming Case No. 18,086. Decree of circuit court affirmed by supreme court in 13 Wall. (80 U. S.) 104.]

steamer and her freight, or to the amount of loss sustained by other parties by the collision. [Case No. 18,086.]

Two questions, therefore, are raised and discussed upon the appeal, the case having been heard in this court upon the same proof, and on the record as it existed in the district court: (1) Upon the proof, was the collision caused by the negligence or fault of those in the management of the City of Norwich? (2) Should the respondents have been permitted to show the whole amount of loss caused by the collision to all parties affected thereby, and the value of the interest of the respondents in the vessel found in fault and in her freight then pending, with a view to reduce the recovery of the libellants to an amount duly proportioned to such value?

Upon the question first mentioned, the testimony is very voluminous, and the discussion has been very able, and the claims of the parties respectively have been sustained by a most minute and careful analysis, comparison and criticism of the testimony, and with an ingenuity, skill and force which I have rarely seen equalled. In the testimony of the various witnesses examined on behalf of the respective parties there is very much in support of either view of the question. But, after a most painstaking study of the proof, aided by the oral argument and by the elaborate, written and printed, briefs of the counsel, I am constrained to say that the preponderance of the evidence is with the libellants upon this question. In a case of great doubt, if I were inclined to a conclusion, upon a mere question of fact, at variance with the court below, I should hesitate in reversing, where the witnesses were examined in the presence of the court. Here, however, while it must be conceded that the proof on both sides presents a serious conflict, the final conclusion, from which I cannot escape, is in concurrence with that of the district judge. I have examined the testimony in the light of the searching criticism of each witness contained in the brief of the respondents' counsel, and yet I conclude that the schooner was without fault. Those in charge of the steamer were not in the exercise of due diligence. The discussion of the evidence has been so full on both sides, that I should do nothing serviceable to either party were I to reproduce the evidence tending to the result stated. The opinion of the learned district judge presents a just and impartial review of the evidence, and, in my opinion, it gives the true solution of the question in dispute. The schooner had her proper lights. It is not possible that the lookout on the City of Norwich was in the actual exercise of diligence, or he would have sooner discovered her. Indeed, when he did see her he did not report her. This neglect of duty he seeks to excuse by his belief that the pilot had himself then discovered her. It was his duty to report;

and not to trust to his supposition or surmise; and this circumstance tends very strongly, in my mind, to the belief, founded on his own testimony, that he was not performing his duty in any respect. While on the other hand, as forcibly shown in the opinion, if the actual state of the weather just before the collision rendered it impossible to see the schooner, the steamer was in like fault in not proceeding at a speed so moderate that, when she did discover the schooner, she could better control her own motions.

Upon the second question I find no little embarrassment. The claim of the respondents arises under the third section of the act of March 3, 1851 (9 Stat. 635), which reads as follows: "The liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel and her freight then pending."

1. The manner in which the question was raised below seems to me novel. Assuming, for the moment, that the statute applies to the case, and that the respondents have, by virtue thereof, a right to reduce the libellants' recovery by proving that the whole loss by the collision exceeds the amount or value of their interest in the ship or vessel found in fault and in her freight then pending, and that the proof in reduction of damages may be given in the action brought to charge the owners, it would seem to follow that such proof should be given on the trial, or that, if the court sees fit to try the question of liability and settle the rule or measure thereof in the first instance, such proof should be offered before the commissioner to whom it is referred to take proofs of the amount of the damages for which a recovery is to be awarded. The motion made in the district court seems, however, to have been in the nature of an application to open the proofs in the cause after they were closed, and to let in testimony which, if of any avail, must have operated to modify the interlocutory decree already pronounced, which awarded to the libellants a recovery of all the damages by them sustained; and, if the motion contemplated a further hearing before the commissioner, a modification of such interlocutory decree would have been necessary. In this view, the motion was plainly addressed to the discretion of the court, and its denial, as an exercise of discretion, cannot be claimed to have been erroneous. Again, if proofs on the subject were offered in the district court and rejected, (on whatever ground and in whatever stage

of the trial or proceedings,) inasmuch as they would go not merely to a question of amount or a matter of computation, but to a rule governing the recovery when and after all the material amounts were computed and ascertained, I perceive no reason why such proofs might not be offered in the circuit court on the appeal, which has, if the appellant sees fit, many of the characteristics of a new trial. Doubtless, the issue must be made below, and the question of law should appear to have been in some form before the court below; but if, in the circuit court it appears that the testimony ought not to have been rejected, the respondents would and must be permitted to give the proof in this court. The construction of the act of congress is, however, in a degree, unsettled. The practice under it, in cases to which it applies, appears not to have been prescribed, nor is it established by any usage of the court. It can hardly be deemed a fault if counsel, under such circumstances, failed to select the most orderly mode of raising the question. Besides, I think the record shows that the course pursued had the sanction of the district court, and, although the granting of the motion would have required a modification of the interlocutory decree, and probably a further reference to take proofs of amounts, the court, no doubt, had power first to settle the question of liability, next the amount of the libellants' loss, and then, if any other fact necessary to fix the amount of recovery was wanting, to make a further reference. The precise order of proceeding in this respect which that court saw fit to pursue, would not be interfered with on an appeal, which would raise the whole question and all the questions which were raised and passed upon in the district court. Nor was the question disposed of there as a question of practice or a matter of discretion. The agreement of counsel, the allowance of the motion there, and the opinion of the court, show that it was intended as a disposition of the subject on other grounds, and it was so disposed of. And finally, on this point, I have no doubt of the power of this court on appeal, in view of the fact that the question was distinctly raised below, to entertain it here, and to deal with it as freely, according to what may be found due to the rights of the respondents, as it could if the testimony had been offered on the trial in the first instance, and been there rejected. True, on the appeal the proofs were not formally offered, but the question of their admissibility, and their influence upon the recovery, were argued at great length, and the right of the respondents to give such proof and take the benefit thereof was most earnestly insisted upon. If, therefore, such proofs were proper, and would avail to reduce the liability of the respondents in this suit, the court can give relief and ought to do so. I must, therefore, treat the question as open, and as fully as it was considered in the district court.

2. It is very strongly argued, that the act of congress has no application to the claim of

the owners of another vessel, or of the cargo of another vessel, injured by a collision with a ship which is in fault in producing it; that the claim of the libellants in this case is not within the statute; and that, therefore, the proofs proposed to be given, and the facts they would establish, are irrelevant, and cannot affect the amount of the recovery.

The special circumstances which led to an effort by ship-owners to procure an act of congress in modification of their common law liability, which resulted in the passage of the act in question, are of some significance. They were, to some extent, within my own personal knowledge. They were very notorious, and are referred to in the debates in the senate of the United States on the passage of the bill. Shortly before the subject was brought to the attention of congress, the packet ship Henry Clay, a large, costly and nearly new ship, lying at the wharf in the port of New York, having nearly completed her lading and being bound for Europe, took fire from some cause and was burned, with a cargo already laden amounting in value, according to my recollection, to half a million of dollars. Her owners, being losers to a very large amount by the burning of the ship, were proceeded against by owners of cargo, to compel payment to them of its value. In one of the actions I was myself of counsel, and it was strenuously insisted, that even without any such statutes as exist in England, the owners could not be charged upon the usual rule of the liability of common carriers at common law. No proof of actual fault or negligence, except so far as the occurrence of the fire in the ship might warrant such inference, was given or attempted. The owners were held liable. Pending that action I was aware, through the distinguished counsel for the then defendants, that an effort was being made to procure some legislation from congress to soften the rigor of the rule declared in that case.

Some years before the burning of the Henry Clay, and on the night of the 13th of January, 1840, the steamboat Lexington was burned upon Long Island Sound, and the disaster was accompanied by a painful loss of life and the destruction of a large amount of property. Litigation ensued, and the liability of the owners was declared in the case of New Jersey Steam Nav. Co. v. Merchants' Bank, in the supreme court of the United States (6 How. [47 U. S.] 344), decided in 1848.

Both of these disasters, and the alleged hardships of the law against ship-owners as common carriers, were commented upon in the debates which were had upon the act now in question. An examination of those debates shows, that it was the stringent rule of the common law which made common carriers of property liable for all losses, (except such as were caused by the act of God or the public enemy), however free from

actual fault or negligence, that was the subject of comment; and the apparent purpose, so far as it may be gathered from those debates, was to relax that rule. It is, therefore, a further significant circumstance, that, in those debates, nothing was said of injuries to other vessels, or the liability of ship-owners, as principals, for the tortious negligence of their ship-masters, officers or crews, as their servants, by which the property of persons in no wise entrusted to them receives injury. Nor was the rule of the common law which makes the master liable for the negligence of his servant in his business, the subject of review, criticism or comment. These circumstances, by no means controlling, are, nevertheless, appropriately referred to in reviewing the act, and may throw light upon its meaning, if otherwise such meaning and the intent of the legislature be doubtful.

The act itself begins with a declaration, that a ship-owner shall not be liable for loss or damage by fire to any goods or merchandise whatever, shipped, taken in, or put on board, unless such fire is caused by the design or neglect of the owner. This has no other operation than to affect his relations as a common carrier. The proviso to that section, that "nothing in this act shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners," is some indication that congress believed that they were dealing with a question of liability which might be the subject of a contract, not with a liability for tortious negligence to parties who stood, and who could stand, in no relation of contract whatever with such owners. The proviso is annexed apparently to the first section, but it is noticeable that the language is not, "nothing in this section," but "nothing in this act," indicating that the proviso was intended to apply to the whole act. The proviso was introduced as an amendment after the act was reported to the senate, and the inference that a relation which might appropriately be the subject of a prior contract was the subject of the entire act, is by no means unwarranted.

The second section appertains solely to the duty of shippers to the master and owners of the ship, in the relation of the latter to the former as carriers, and the liability affected thereby is expressly described as their liability "as carriers thereof."

The third section is in the terms already above recited. It must be conceded that it contains terms which, viewed apart from the residue of the act, are broad enough to include injury to other vessels by collision. This fact is not conclusive. In the construction of statutes as well as private instruments and contracts, general words are restricted in their meaning by the subject-matter of the statute or instrument, the context, and the apparent intent; and, in an enumeration of particulars followed by general

terms, a restriction of the latter to cases or things ejusdem generis is according to settled rule. *Moore v. American Transp. Co.*, 24 How. [65 U. S.] 1, 36; *Reg. v. Reed*, 28 Eng. Law & Eq. 133; *Reg. v. Nevill*, 8 Q. B. 452; *Sandiman v. Breach*, 7 Barn. & C. 96; *Ryegate v. Wardsboro*, 30 Vt. 746; *Simonds v. Powers*, 28 Vt. 354.

In construing any particular clause or words of a statute, it is especially necessary to examine and consider the whole statute, and gather, if possible, from the whole the intention of the legislature. Now, it has already been seen, that the first and second sections have sole reference to the relations of ship-owners as common carriers. The fourth section as clearly affects them in that relation only. Thus, it provides, "that if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandize, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation * * * in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the ship-owners, or any of them, may take the appropriate proceedings in any court, for apportioning the sum to which the ship-owners are liable; * * * and the ship-owners are authorized to transfer their interest in the vessel or freight, for the benefit of such claimants, to a trustee, to be appointed, &c., * * * from and after which transfer, all claims and proceedings against the owner or owners shall cease." Here, the terms, "goods, wares or merchandize or any property whatever," are equivalent to the words in the third section, "any property, goods or merchandize," and to the words, "goods, wares, merchandize or other property," in the sixth section, in each of which they relate solely to property of some kind put on board of the vessel. The phrase is added, "on the same voyage," to confine the participation in the apportionment to the freighters for a single voyage, and not to permit the ship-owners to bring into the compensation losses sustained on prior or other voyages. This limitation of the application of the fourth section is very important in its bearing upon the question in another aspect, but here I state it simply in order to show that such is its proper construction. It may be possible to select a portion of the words to give color to a more comprehensive meaning; but "freighters or owners of goods, wares or merchandize, or any property whatever, on the same voyage," could not include the owner of another ship pursuing a voyage in another direction, sunk by collision. And a loss suffered by several freighters or owners of property on the same voyage, is wholly inapt to include the loss sustained by the owner of another ship on another voyage. This limitation of the application of the

fourth section to property on board of the ship, or for which the ship-owners would, by the common law, be liable as common carriers, has been affirmed by Mr. Justice Grier in *Barnes v. Steamship Co.* [Case No. 1,021], and by the decision of Judge Merrick in *Walker v. Boston Ins. Co.*, 14 Gray, 288, in Massachusetts.

The fifth section places charterers in the same situation as ship-owners, when the former man, victual and navigate the ships.

The sixth excludes the idea that the act was intended to exonerate the master, officers and mariners from liability for their own fraud or negligence.

The seventh relates solely to persons shipping dangerous or inflammable articles on board of a vessel taking a cargo for various persons on freight, without giving a notice describing their nature and character, and imposes a penalty; and the last section exempts certain craft from the operation of the act.

A perusal of the entire act, and a consideration of its apparent design, its general purport being applicable to ship-owners as common carriers only, compels me to conclude that it was only their relation as such carriers which congress had in view. If it is asked, what, then, do the words, "for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred," mean? I answer, that, having the responsibility of a carrier at the common law in view, a responsibility which subjected the ship-owner to liability for every loss not caused by the act of God or the public enemy, some such words were necessary to cover all the grounds of his liability as a carrier. It was not enough to specify "embezzlement, loss, or destruction by the master, officers, mariners, passengers or any other person or persons." Collision and many other acts and things might occasion loss or injury to property entrusted to the ship-owner as a carrier, for which but for these words he would be responsible to the full amount. The collision in the case now under consideration furnishes an illustration, for, the City of Norwich having on board a very valuable cargo, that cargo was lost by the collision, and that loss would be within the terms of the section. Not only so, collision and many other acts, matters, things, losses, damage and injury might happen, and be "done, occasioned or incurred" without any fault or negligence either of the ship-owners or of their masters or mariners, and be due solely to the fault or negligence of other persons, or be an accident in such sense that faulty negligence could be imputed to no one, and yet the ship-owners would be liable. These classes of cases are, therefore, provided for, and are clearly within the design and object of the statute. There is, therefore, a large field for the operation of all the words of the third section, without

extending their meaning to an injury to another vessel or goods on board thereof.

There is, also, great force in the argument of the counsel for the libellants, founded upon the provisions of the English statute in relation to ship-owners. The statute of 53 Geo. III. c. 159, was before the congress of the United States when this act was passed. It not only so appears by the debates, but it would reasonably be so inferred. The discussion proceeded largely upon the policy of England and of this country, in their relations to other maritime nations, of encouraging the building and employment of ships, by relaxing the severe rule of the liability of carriers at the common law. The English statute in terms extended beyond that, and applied the limitation of responsibility, in very terms, to any loss or damage, which "may happen to any other ship or vessel or to any goods, wares, merchandize or other things being in or on board of any other ship or vessel;" and congress rejected this sentence altogether, and employed general expressions, almost identical with the previous English statute, which related solely to the liability of ship-owners as carriers. It is inconceivable that if this liability for injury to another ship or vessel, or to goods on board of another vessel, was intended to be embraced in the act, those clear and explicit terms employed in the English act should have been discarded. The rejection of those words cannot be otherwise accounted for, except it be upon a supposition dishonorable to the framers of the law, and which the court cannot for a moment indulge, namely, that there was a covert design to employ words which might have a similar operation, and their meaning be so concealed that the bill might be passed by congress in ignorance of the design. The words, "loss, damage or injury by collision," and the general words that follow, have, therefore, by just construction, the same meaning and effect as they would if the word "thereto" had been used in connection therewith, namely, "for any loss, damage or injury thereto by collision," &c.

Again, if I am right, or if Mr. Justice Grier and the supreme court of Massachusetts are right, in holding that the fourth section of the act applies only to freighters and owners of goods and property on board of the ship, and, therefore, applies only to the relation of the ship-owners to those whose goods and property they assume to carry, it seems to me inevitable that the whole act, the third section included, applies only to the same relation, and for this reason: Congress was in the act of limiting the responsibility of ship-owners, and, by the third section, had declared that limitation for all the cases to which it should apply. They fixed its extent, namely, "the amount or value of the interest of such owner or owners respectively in such ship or vessel and her freight then pending." To provide for carrying this limi-

tation into effect, and to make it operate equitably among all parties suffering losses within the act, they declare, first, that each shall receive in proportion to his loss, and that proceedings for apportioning the amount may be taken by either party. It is not possible that it was intended to include in the limitation of the amount to be recovered, owners of another vessel injured by a collision, and yet exclude them from the benefit of the apportionment provided in the fourth section. Again, the fourth section provides, that the ship-owners may transfer their interest in the ship and freight to a trustee, and that, after such transfer, all claims and proceedings against such owners shall cease. How, then, shall the limitation be made to operate in their favor as against the owners of another ship, (if they are included in the third section), when such owners are not to become beneficiaries under the trust created pursuant to the fourth section? A construction which makes the third section apply to an injury done to another vessel, or the goods on board of another vessel, by a collision, cannot stand with the fourth section so construed, or with any view of justice or equity, or in any consistency with the principle of the act itself, namely, the limitation of the ship-owner's liability to the amount of his interest.

I have not been unmindful that dicta are found in some cases cited by counsel, which assume that the statute in question does include a case of injury to another vessel by a collision therewith. But in none was that the point in judgment, or, if incidentally involved, was the question raised or discussed. Those dicta are chiefly in the words of the statute itself, and in truth furnish no aid to its true construction, nor do they decide the question I have considered.

Without protracting the discussion, already too prolix, I am constrained to say, that the act of congress relied upon by the counsel for the respondents has no application to the injury received by the libellants in this case, and, therefore, that the proofs proposed to be given were wholly irrelevant, and could have no influence upon the decree which it was the duty of the district court to make.

3. The conclusion which I have reached leads to an affirmance of the decree, though upon different grounds from those which led the district court to reject the evidence offered. It is, therefore, not necessary that I should express an opinion upon the question whether this court, as a court of admiralty, has powers or jurisdiction adequate to give full effect to the act of congress referred to.

If congress had declared that the respondents should not be liable for losses sustained by the collision except to the amount of their interest in the vessel in fault and her freight then pending, no court, whether of admiralty or law or equity, could properly make a decree which in terms would sub-

ject them to a larger liability and thereby practically nullify the statute. Under the similar English statute, even the courts of law have regarded this limitation as prescribing the rule or measure of damages in actions on the case when the liability to a single plaintiff was before the court, though no such case is cited where losses were sustained by other parties which were sought to be brought into the computation. *Canman v. Meaburn*, 1 Bing. 465; *Wilson v. Dickson*, 2 Barn. & Ald. 2; *Brown v. Wilkinson*, 15 Mees. & W. 391. It cannot be doubted that, in a case to which the statute applies, if several libels are filed in the court of admiralty by different claimants for losses sustained, or one bill is filed on behalf of several such claimants, that court has ample power to give full effect to the statute as against such libellants, so far at least as to refuse a decree which shall subject the respondents to a larger liability to all those libellants than the act of congress declares. *The Richmond*, 3 Hagg. Adm. 431; *The Benares*, 1 Eng. Law & Eq. 637; *The Dundee*, 1 Hagg. Adm. 109; *Gale v. Laurie*, 5 Barn. & C. 156. In England, in *Dobree v. Schroder*, 2 Mylne & C. 489, and 6 Sim. 291, after two separate actions at law had been separately prosecuted to verdicts, the court of chancery entertained a bill for the apportionment of the value of the vessel, &c., between the two plaintiffs and the limitation of the owners' responsibility to that value.

A resort to a court of equity may be necessary under this act of congress, to make such an apportionment, if the party seeking it desires to bring into view losses sustained by all; and yet a libellant in admiralty would have no ground of complaint, if, having chosen to go into that court, the respondent were permitted to prove any facts, which as matter of law, operated to reduce the amount of the recovery. As between him and the respondent, such proof might furnish a measure of the amount to which he was entitled, and an assessment made in conformity therewith might be conclusive between the parties, although no third person would be affected thereby. If, in this view, the statute could be held to warrant the application of the statute in each case and between any parties, it might not concern a particular libellant to have other parties before the court, provided he were himself willing to take the hazard of such proofs as the respondent might give of the aggregate amount of the losses, and the same might be true of the respondent, if he should prefer to try the question as to each claimant.

It must, of course, be conceded, that, whatever rights a party may have, and whether given by statute or otherwise, they are to be asserted in due and proper form and before the proper tribunal. But it cannot, I think, be true, that a defendant must be made to bear a liability to which a valid statute declares he shall not be subject, up-

on any idea that there is no court which can administer the statute. It were better to say—if there is no court which can give a judgment or decree in favor of the claimant without violating the statute, then no decree or judgment can be rendered. And, if it were clear, by reason of the number of claimants who have sustained losses and their residence in various states, that there is no tribunal which can obtain jurisdiction of all, it would be plausible, at least, to say, that the court is compelled to proceed with the parties of whom they have jurisdiction, and render justice as between them, upon all the proofs either may offer bearing on the liability according to the limitation which the statute has declared:

The decree must be affirmed.

[The decree of the circuit court was affirmed by the supreme court, 13 Wall. (80 U. S.) 104. For other cases growing out of the same collision, and involving some of the same questions, see Cases Nos. 11,202 and 2,760-2,762.]

WRIGHT v. ORIENT MUT. INS. CO. See Case No. 18,095.

Case No. 18,088.

WRIGHT et al. v. OWNERS OF THE
FRANCESCA CURRO.

[5 Wkly. Notes Cas. 104.]

District Court, E. D. Pennsylvania. Dec. 21, 1877.

SHIPPING—SIMULTANEOUS CHARTERS FOR SUCCESSIVE VOYAGES—BREACH OF FIRST—EFFECT ON SECOND.

[A vessel was, by separate charter parties, chartered to the same parties for two successive voyages. On arrival for the first voyage, the charterers refused to accept her, claiming that she had not sailed as agreed. She was thereupon let to them for the same voyage, for a less rate; and suit was brought by her owners for the difference, and a decree was obtained by them, which was paid. *Held*, that this breach, by the charterers, of the first charter party, did not release the ship from the second charter party, and she was bound to make the second voyage on the terms agreed.]

In admiralty. Libel for breach of charter party. The libellants had chartered the bark Francesca Curro, then at Genoa, to sail from Philadelphia to a port in Great Britain, it being expressly stipulated that she should sail from Genoa (for Philadelphia) during the month of December, 1876. Upon her arrival here in February, 1877, the libellants refused to receive her under the charter, alleging that she had not sailed during December. Freight having fallen, they re-chartered her for the same voyage on exactly the same terms, except at a lower rate of freight, and an action brought to recover the difference was decided by this court in favor of the vessel. [Case No. 5,029.] The decree was paid by the present libellants, and the voyage performed under the re-charter. Upon the same day that the original

charter had been made, a second one was also made, of the same vessel, by the same parties. This charter was headed "Second Voyage," and in the margin were written the following words: "It is agreed and understood that the vessel, being already chartered for a previous voyage, has after completion of same to return to Delaware break-water for orders, without delay, and in ballast, to enter upon this charter." After the completion of the voyage under the re-charter, the vessel returned to Delaware break-water, and the master telegraphed his arrival to his agents in Philadelphia, who notified the libellants, and asked for orders. The libellants thereupon ordered the master to Philadelphia, and he came and laid up at a dock. The libellants then ordered the vessel to Girard Point for loading, but the master refused to go, alleging that the libellants, having broken the first charter, were not entitled to the benefits of the second. Freights having advanced, this action was brought upon the second charter to recover the difference.

Henry Galbraith Ward, for libellants.

The contracts made in this case were to be performed or paid for. The dependence of the second on the first was merely to secure two consecutive voyages, which could only be secured by referring in the second charter to the first. The first voyage was really performed, though not under the original charter, and the respondents were bound, therefore, to perform the second; there being nothing but the rise in freights to prevent it. Only so far as the conduct of one party prevented the performance of the contract will the other be excused. *Dubois v. Canal Co.*, 4 Wend. 285. In this case the conduct of the libellants did not prevent performance, and the ship reported to the libellants on her return from the first voyage for orders. In the first suit the ship complained only of the breach of the first charter, damages were only awarded for that, and those damages have been paid.

Henry Flanders, for respondents.

The contract was, in substance, a single one, providing for two voyages. The first was never performed, through the acts of libellants; therefore the second was impossible of performance.

THE COURT dismissed the libel, with costs.

WRIGHT (PAGE v.). See Case No. 10,669.

WRIGHT (PAINE v.). See Case No. 10,676.

Case No. 18,089.

WRIGHT v. PENNSYLVANIA R. CO.

[This is a state case, reported in 3 Pittsb. R. 116, and 16 Pittsb. Leg. J. 144.]

WRIGHT (POTTER v.). See Case No. 11,343.

WRIGHT (RICKETSON v.). See Case No. 11,805.

Case No. 18,090.

WRIGHT v. ROGERS.

[3 McLean, 229.]¹

Circuit Court, D. Ohio. July Term, 1843.

BANKRUPT AS WITNESS—COMPETENCY—SET OFF.

1. A set off must be in the same right.
2. A witness may be competent to prove some facts, and incompetent to prove others.
3. The bankrupt is a competent witness where his assignee is a party, as he can have no legal interest in the decision of the case.

Mr. Wright, for plaintiff.

Mr. Jones, for defendant.

McLEAN, Circuit Justice. This action is brought by an assignee in bankruptcy, to recover a sum admitted to be due. Foster & Brothers having been once in business, and the defendant having an account against them exceeding one hundred dollars, the defendant offered to prove it, as a set off. But the court held that it could not be so received, as it was not a debt in the same right. That it might be received if Foster the plaintiff had expressly assumed to pay it; but no such evidence being offered, the account was rejected. Charles Foster, a brother of the bankrupt, who formerly was a partner in the house of Foster & Brothers, was offered as a witness. He was objected to, on the ground of interest. The court held that he was a competent witness generally; that he would not be permitted to speak of facts, in which his own interests were involved. William R. Foster, the bankrupt, was admitted as a witness, though objected to. He has no interest in this suit, as his liability can neither be increased nor lessened by any decision in the case.

The jury found for the plaintiff. Judgment.

Case No. 18,091.

WRIGHT v. SCHROEDER.

[2 Curt. 548.]²

Circuit Court, D. Rhode Island. Nov. Term, 1855.

ACTION FOR SLANDER—EVIDENCE OF PLAINTIFF'S CHARACTER.

1. In an action of slander, the plaintiff cannot offer evidence of his general good character, to disprove the truth of the words, nor to support his own character, until it is attacked by the defendant. The defendant may attack the general character of the plaintiff in respect to the sub-

ject-matter of the charge, in order to reduce the damages.

[Cited in Press Pub. Co. v. McDonald, 11 C. C. A. 160, 63 Fed. 243.]

[Cited in Clark v. Brown, 116 Mass. 509.]

2. Where the nature of the charge is such, that the evidence given by the defendant, in support of the plea of justification, though insufficient to prove that, has, if believed in part or in whole, a legitimate tendency to affect the general character of the plaintiff, on the subject of the charge, he may reply by evidence of general good character in that particular.

This was an action on the case for slanderous words spoken of the plaintiff [John Wright] in his trade as a master calico-printer and manager of print works. It was alleged in the declaration, that the plaintiff, being a master calico-printer and manager of print works, and having ever sustained a good reputation in that trade; and never having been guilty or suspected to be guilty of the vice of drunkenness, and having earned and received large compensation in his said trade, was employed by the defendant [Theodore Schroeder] as the manager of his print works; and while so employed, the defendant, speaking of him in reference to his said employment, said, "he has been drunk on the works often, and he was drunk on the day of the reference"—innuendo, that the plaintiff had been often drunk while engaged in his occupation of manager of the defendant's print works, and particularly on the day when a certain arbitration was had, &c. The defendant justified, by a plea of the truth of the words alleged.

At the trial, the defendant gave evidence tending to show, that the plaintiff had been intoxicated on many different days, while at the print works; and he offered evidence to prove, that he kept and drank ardent spirits at his lodgings and elsewhere, and also of the effects produced on him by so doing at his boarding-house and other places off the works. This last species of evidence was admitted by the court as tending to prove the charge, circumstantially.

In reply, the plaintiff offered evidence of his good general reputation for temperate habits, prior to and at the time when the words complained of were spoken. This was objected to by the defendant, but admitted by the district judge, who presided at the trial, not as bearing on the question of the truth of the words, but as having some legitimate tendency to affect the damages. The jury having found for the plaintiff, the defendant moved for a new trial, assigning as cause, the admission of this evidence of general reputation.

Jenckes & Cozzens, for the motion.

Hazard & Blake, contra.

Before CURTIS, Circuit Justice, and PITMAN, District Judge.

CURTIS, Circuit Justice. Many apparently conflicting decisions have been made, con-

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

² [Reported by Hon. B. R. Curtis, Circuit Justice.]

cerning the admissibility of evidence of general reputation in actions like this. Generally, they can be reconciled with each other and with what I conceive to be the true rules on the subject, by attending to the party by whom, and the purpose for which, the evidence was offered. Though, undoubtedly, some conflict will still remain.

1. In my opinion, this species of evidence is not admissible, when offered by the plaintiff in answer to evidence of the defendant tending to prove the truth of the words. It has not a legitimate tendency to disprove the truth of the charge made by the defendant. *Matthews v. Huntley*, 9 N. H. 146, and the cases there cited.

2. The defendant may offer such evidence to reduce the damages; because the degree of injury sustained by the plaintiff, depends upon the reputation, in respect to the matter of the charge, which he possessed, at the time the words complained of were spoken. If that was generally bad, he was not injured by the slander to the same extent as he would have been if it had been good. It is proper therefore for the jury, to take into consideration the general reputation of the plaintiff, upon the point of the charge; and if so, it is proper for them to be informed concerning that general reputation by evidence. In *Stone v. Varney*, 7 Metc. (Mass.) 86, many of the cases are reviewed, and a result, satisfactory to my mind, arrived at. The American cases are collected in 1 *Hare & W. Lead. Cas.* 198.

3. At first view, it might seem to follow, that this would warrant the introduction by the plaintiff of evidence of his previous good character in chief, before any attack on his character; and so are some of the authorities. See 1 *Hare & W. Lead. Cas.* 207; 2 *Greenl. Ev.* §§ 275, 424. But I think the better rule is, that the plaintiff must rest on the presumption of good character, which the law makes, until evidence touching it is offered by the defendant. See the cases collected in 1 *Hare & W. Lead. Cas.* 208, and cited by *Dewey, J.*, in 7 *Metc. (Mass.)* 86.

4. The remaining inquiry, upon which the decision of this motion depends is, whether the general good character of the plaintiff for temperance had been so attacked by the defendant, that he was properly allowed to support it, by evidence that before and at the time of the speaking of the words complained of, his general reputation for temperance was good. The charge was, that the plaintiff had been drunk on the works often, and that he was drunk on the day of the reference. In support of this charge, the defendant had been allowed to offer evidence, tending to prove the intoxication of the plaintiff on many days at the print works, and while engaged in his trade as their manager; that is, while on the works. And also, that before coming to and after leaving the works, on

many different days, he was intoxicated. And also, that he kept at his boarding-house ardent spirits of different kinds. And the instances spoken of by the witnesses, occurred during a period of about four months, before the words were spoken.

Now, it is apparent, the jury might come to the conclusion, that though the defendant had failed to prove that the plaintiff had been often intoxicated on the works, and so some damages must be found for the plaintiff, yet enough had been proved to satisfy them that the plaintiff's reputation, as a manager of print works, could not be good, and so, that the degree of injury inflicted on the plaintiff being small, he should be compensated by small damages. Upon this state of the evidence, I think counsel would have been warranted in so arguing to the jury.

This was a peculiar case. Ordinarily, if the evidence given in support of the plea of justification fails to prove that, it fails to prove any thing material. But here it was otherwise. And my opinion is, that though no direct evidence of general bad character be offered by the defendant, if the proof he does offer may be insufficient, in the opinion of the jury, to sustain the charge, and still have a legitimate tendency to prove the general character of the plaintiff bad in the particular in question, and so to reduce the damages, the plaintiff may encounter it by proof of good general character in that particular. It may sometimes be difficult to draw the line of distinction, and say on which side of it, a particular case falls; but the same difficulty may exist in any case, where the judge is required to determine, whether there is any evidence having a legitimate tendency to prove a matter in issue. Yet this is always a question of law. *Greenleaf v. Birth*, 9 Pet. [34 U. S.] 292; *Bank of U. S. v. Corcoran*, 2 Pet. [27 U. S.] 121.

Where evidence has been given, either on cross-examination or otherwise, which tends to impeach the general character of a witness for truth, it is allowable to support his credibility by evidence of general good character, though no witness has been called to speak to his general bad character. 1 *Greenl. Ev.* § 469; 3 *Starkie, Ev.* 1757; 4 *Phil. Ev.* 763 (*Cow. & Hill's* note). A proper qualification is made in *Russell v. Coffin*, 8 *Pick.* 154, that the evidence, on the cross-examination, must not only tend to affect the credibility of the witness in the particular case, but must touch his general character. And so in actions of slander, the evidence given by the defendant must have a legitimate tendency to affect the general character of the plaintiff, in reference to the subject-matter of the charge for which damages are demanded.

The district judge, who presided at the trial, concurs in this opinion. The motion for a new trial is overruled.

Case No. 18,092.

WRIGHT v. SCOTT (two cases).

[4 Wash. C. C. 16.]¹Circuit Court, D. New Jersey. April Term,
1820.CONSTRUCTION OF WILL—ESTATE TAIL—STATUTE
OF LIMITATIONS.

1. P. F. being seised of 1705 acres of land, devised the same as follows: "Unto my well beloved and only daughter, E. F. alias W. and her husband J. W. all the remaining part of my estate, not sold in my life time, both real and personal, to them, their heirs begotten of their bodies, or assigns, for ever; or for want of such heirs or assigns, then to the heirs begotten by, or either of them, and to their assigns for ever; all which estate is given as a portion to my dear and only daughter aforementioned." The will clearly intended to give, and does give to J. W. and wife, an estate tail; and in the event of their death without issue, then it was given to the heirs of the body of the survivor.

2. Construction of the act of limitations of New Jersey, passed in 1799 (section 10).

[Cited in Croxall v. Sherrerd, 5 Wall. (72 U. S.) 268.]

[3. Cited in Pritchard v. Spencer, 2 Ind. 486, to the point that the legislature may enact retrospective limitation laws, where they do not deprive parties of a reasonable time for prosecuting their claims before being barred.]

These causes came before the court upon the following case agreed. Peter Fretwell, being in his life time and at the time of his death, seised of a tract of land containing 1705 acres, including the premises in question, by his last will bearing date in January, 1718, devised the same as follows: "Unto my well beloved and only daughter Elizabeth Fretwell, alias Wright, and to her husband Jonathan Wright, all the remaining part of my estate, not sold in my life time, both real and personal, to them, their heirs begotten of their bodies, or assigns for ever, or for want of such heirs or assigns, then to the heirs begotten by, or of either of them, and to their assigns for ever; all which estate is given as a portion to my dear and only daughter aforementioned." After the testator's death, Wright and his wife entered upon, and were possessed of the premises so devised. They had issue, Fretwell, their eldest son, besides other children; and on the 31st of August, 1742, the said Jonathan Wright, who survived his wife, died. Fretwell Wright had several children, lawful issue, some of whom survived him; but his eldest son, Peter, died in the life time of his father, having several children, of whom Fretwell, lessor of the plaintiff, was his eldest. Fretwell, the father, died on the 29th of December, 1797. On the 5th of August, 1721, Jonathan Wright, and Elizabeth his wife, being seised and possessed, as abovementioned, of the aforesaid 1705 acres of land, conveyed the same to

Joseph Reckless in fee simple, by a deed of bargain and sale; and on the 19th of the same month and year, Reckless, by a like deed, conveyed the same land to the said Jonathan Wright in fee simple. Jonathan Wright being seised of the above estate, by deed of bargain and sale dated the 6th of May, 1741, conveyed 225 acres, part thereof, to Henry Scott, who entered on, and retained possession of the same to the time of his death. Jonathan Wright, by his will, dated the 11th of August, 1742, devised 700 acres, other part of the aforesaid 1705 acres, to his two sons Jonathan and Ebenezer in fee, as tenants in common. After his death, his said sons, the said devisees, entered upon the said 700 acres of land; made partition of the same between them, and afterwards, the said Jonathan the second, by deed of bargain and sale, bearing date the 2d of February, 1754, conveyed to the aforesaid Henry Scott, in fee simple, 125 acres of the said 700 acres, so held by him in severalty, other part of the premises in dispute in this case; and in the other ejectment against Abraham Scott, now also for judgment. On the 29th of August, 1743, the said Fretwell Wright, eldest son of the aforesaid Jonathan Wright, executed an instrument under his hand and seal, reciting that his father, in his life time, and his executors since his death, by virtue of his will, had sold lands which he had derived under the will of Peter Fretwell, for confirming the title of all such purchasers, as well as of the devisees claiming under the will of his said father, and for divers good causes and considerations, he releases unto all and every such purchaser and purchasers, and to his brothers and sisters claiming as devisees aforesaid, and to their heirs respectively, all such right, title, interest and estate, as he the said Fretwell had, or ought to have in and to the said premises so sold and conveyed. This deed was afterwards acknowledged and duly recorded.

Henry Scott being seised at the time of his death, as well as from the times when the two deeds aforesaid were made to him, of the lands therein mentioned, made his will, dated the 17th of November, 1773, whereby he devised the said lands to his two sons, Jonathan and Abraham, (defendants in these actions) in fee, equally to be divided; and died on or before the 26th of November, 1773. Abraham and Jonathan Scott entered upon the land after the death of their father, made partition of the same, and have continued to hold possession of their respective parts ever since. Fretwell, the son of Jonathan Wright the elder, was twenty-nine years of age at the death of his father, and resided in this state till his own death. He died intestate, leaving issue six children, besides Fretwell Wright his grandson, then aged twenty-one years, the lessor of the plaintiff, who was the son of Peter F. Wright, the eldest son of the said Fretwell Wright the intestate, who died in his father's life time. This ejectment

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

was commenced on the 26th of September, 1816. It is then agreed that if the opinion of the court upon the above case, should be in favour of the lessor of the plaintiff, judgment to be entered for him; if in favour of the defendant, judgment to be entered as in case of non-suit, &c.

The counsel for the lessor of the plaintiff, made the following points: (1) That by the will of Peter Fretwell, an estate tail passed to Jonathan Wright and Elizabeth his wife. (2) That that estate was not afterwards barred by the operation of the acts of New Jersey, passed in the years 1784 and 1786.² *Patt. Laws*, 54, 78. The conveyances stated in the case, passed only an estate for life. The release of Fretwell Wright was void for want of parties. (3) That the lessor of the plaintiff is not barred by the act of limitations.

1. In support of the first point, were cited *Cowp.* 410, 234; 3 *Leon.* 5; *Plow.* 541; 2 *Ld. Raym.* 1146; *Cowp.* 841; 5 *Term R.* 337.

2. To prove that the estate tail was not discontinued, was cited *Co. Litt.* § 613. And it was contended that the case was not within the operation of the acts referred to; as the tenant in tail was not in possession of the premises in dispute, at the time those acts passed.

3. The act of assembly passed in 1799

² The act of 1784 enacts: "That all land or other real estate which hath heretofore been devised in tail of any kind, and hath, agreeably to such devise or intail, passed through one descent since the death of the testator, and is now in the second, or more remote descent from the testator; all such land or other real estate shall be deemed, taken, and adjudged to be the proper estate in fee simple of the present possessor, provided the testator under whom the same is held, had an absolute estate in the same; and also provided the person in possession holdeth the same in the line of descent mentioned and directed in and by such devise in tail; and all devisees heretofore made in tail as aforesaid, which have not already passed through one descent since the death of the testator; and also all such devisees which shall hereafter be made in tail of any kind, shall be deemed, taken and adjudged to vest in, and entitle the person to whom the same may be descended, agreeably to the devise or intailment, after the decease of the first devisee, to all the estate in the devised premises, which the testator was entitled to, and might or could have devised; and that no intailment of lands, or other real estate shall continue to intail the same in any case whatever, longer than the life of the person to whom the same hath been, or shall be first given or devised by such intailments."

Supplement to the above act was passed in 1786. It enacts: "That the words 'passed through one descent since the death of the testator, and is now in the second or more remote descent from the testator,' contained in the second section of the above recited act, shall be deemed and construed to mean 'been possessed by the first devisee in tail, and is now the property of the next devisee in tail, after the decease of the first devisee, in the line mentioned in the devise in tail under which they may claim;' and that the words 'the line of descent' contained in the above section shall be construed to mean 'the line of intailment;' any matter or clause in the said recited act bearing a different construction, to the contrary notwithstanding."

(*Patt. Laws*, 353, § 10) gives twenty years from the time the title accrued to bring the ejectment in. The title of the lessor of the plaintiff did not accrue till the death of Fretwell Wright in 1797, and this action was brought in 1816. If the release of Fretwell was good to bar his right, then he could not bring an ejectment in his life time. But it could not affect the estate of his issue, whose right accrued after the death of the tenant in tail. The act of limitations did not begin to run against Fretwell Wright himself, because the possession of Scott was not adverse to his title, as he claimed under this release; and even if the time did begin to run against the said Fretwell, still it did not run on against his issue; but stopped at his death, and a new series commenced in relation to the issue.

The counsel for the defendant insisted as to the first point, that Jonathan & Eliza Wright took a fee simple estate under the devise to them, not only by virtue of the words "or assigns forever," but from other parts of the will in which the testator declares his intention to dispose of all his estate, which, together with other expressions scattered through the will, show that it was his intention to give a fee to his daughter and her husband. There is, besides, a clause in the will, which directs his debts to be paid, thus creating a charge on his real estate, which has always been considered as sufficient to enlarge the estate into a fee. [*Williamson v. Kincaid*], 4 *Dall.* [4 *U. S.*] 21; 1 *Term R.* 411; 2 *Term R.* 356, 656, 762; 3 *Wils.* 298, 302; *Ibbetson v. Beckwith*, *Cas. t. Talb.* 157; *Cowp.* 355; 1 *Wils.* 333; 3 *Burrows*, 16, 18; *Lofft*, 96; 4 *East*, 495; 5 *East*, 87; *Willes*, 140; 1 *Burrows*, 38; 2 *Burrows*, 770, 1112; 1 *Wash. (Va.)* 102. The words "all which estate is given to my daughter as a portion," are sufficient to pass a fee.

Second. To prove that if this be an estate tail, it was discontinued, and the remedy by ejectment was taken away, were cited *Co. Litt.* 325a; *Patt. Laws*, 6. A bargain and sale operates like a feoffment, to work a discontinuance. 2 *South.* [5 *N. J. Law*] 713; *Salk.* 619; 3 *Burrows*, 1703; 1 *Atk.* 3; *Runn.* 10, 11; 3 *Bl. Comm.* 206; *Patt. Laws*, 135. To show that the former one still continues, *Co. Litt.* 355; 3 *Bl. Comm.* 171. The estate tail, if it be one, was barred by the acts of assembly of 1784 and 1786. 2 *South.* [5 *N. J. Law*] 713.

Third. The act of limitations began to run against Fretwell Wright in 1742, on the death of Jonathan; and run on after his death against the issue, so that more than sixty years were out before this action was brought; and a possession for that length of time, or even for thirty years, under the circumstances stated in the second section of the act of 1787 (*Patt. Laws*, 81), all which exist in this case, not only bars the estate of him who has title, but vests an absolute estate in the possessor. 1 *Cruise, Fines*, 255;

2 Cruise, Fines, 563; Sugd. 267; Shep. Touch. 21, 27, 29, 31; 6 Mass. 328; Wheat. Dig. 233. To prove the release a valid deed, 2 Com. Dig. 170; Co. Litt. 3.

Ewing & Wall, for lessor of plaintiff.

Griffith & L. H. Stockton, for defendant.

WASHINGTON, Circuit Justice. The following objections have been made to the title of the plaintiff, and his right of recovery: (1) That the will of Peter Fretwell passed to Jonathan and Eliza Wright a fee simple estate. If so, the lessor of the plaintiff, who claims as the eldest son of Peter F. Wright, can have no title to the lands in question, which were sold and conveyed by Jonathan Wright his grandfather. (2) But if the estate was a fee tail, then it is objected, that the estate tail was converted into an estate in fee simple by force of two acts of assembly of this state, passed in the years 1784 and 1786, which operated to defeat the estate of the issue in tail. (3) That the plaintiff is barred by force of the act of limitations.

In construing the above recited clause of Peter Fretwell's will, the court will take care not to forget the maxim equally contended for by the counsel on both sides, and which all the cases upon the subject inculcate, that the intention of the testator apparent in the will, is to govern the construction, if such intention be not inconsistent with the established principles of law. We think there is no difficulty in discovering the intention of this testator, and it is quite clear to us that this intention entirely harmonizes with the rules of law. Can it admit of a doubt that the testator intended, in the first instance, to give to his daughter and to his son-in-law, a joint estate in fee tail, excluding for a moment, the words "or assigns for ever?" The words are "to his well beloved daughter, and to her husband J. W. and their heirs begotten of their bodies." The most unlettered man, however ignorant he may be of the difference between a fee simple and a fee tail, knows that the heirs of the body of the devisee, cannot include general heirs, who are not of his body. Again, can it be doubted that the testator intended, in the event of the death of his daughter, or of her husband, without issue of their bodies, to give the estate to the heirs of the body of the survivor of them? The words for this purpose are, "or for want of such heirs or assigns, then to the heirs begotten by or of either of them, and to their assigns for ever." The expressions "heirs begotten by or of either of them" have precisely the same meaning here, that they have in the devise of the particular estate. But the word "assigns," used in the first, and in the latter part of the clause, might well be construed differently, for the purpose of effectuating the intention of the testator; and that for the following reason. If they are construed in the first part to give a fee simple to the husband and wife, in violation of the obvious intention to give only a fee tail,

the rule of law would not permit the equally evident intent, in favour of those in remainder, to take effect; because it would then amount to a limitation over, after a fee simple, dependent upon an indefinite dying without issue; which the policy of the law will not tolerate, even in wills, the favoured instruments of courts of justice. But the same reason does not apply to prevent the enlargement of the estate in remainder, by force of the same expression; because if the testator meant, in both cases, to give a fee simple, yet as he still more clearly intended to limit a remainder upon the first estate in the event of a dying without issue; such intention might be gratified by construing "assigns" where they are last used, so as to enlarge the estate into a fee simple, and yet to give a different construction to the same expression in the first part of the clause. These observations are made, not with a view to decide what estate passed to the remainder-man, as that question is not involved in this cause; but are merely intended to show, that because the word "assigns" might have the effect of converting the estate in remainder into a fee simple, without violating the intention of the testator, or the rules of law, it does not follow that it should be so construed in the devise of the particular estate, when by doing so, it would defeat the manifest intention of the testator, by bringing it into collision with the rules of law. What the testator meant by the use of the words "or assigns forever;" in the devise of the particular estate, it is not easy for us to say. Possibly he might have meant to apply them exclusively to the personal estate, reddendo singula singulis; which, he may have known, could not be intailed. Or he may have used them, as they are used in deeds, when superadded to heirs, without any meaning or operation whatever. Be this as it may, they cannot admit of the construction contended for by the defendant's counsel, without defeating the manifest wishes of the testator, which is a sufficient reason for rejecting it.

Many cases were read by the defendant's counsel to show, that certain expressions in one part of a will, may be resorted to, to enlarge the particular estate given in another part; such as charging it with payment of debts, the use of the word "estate," and the like. But it will be found, upon an examination of those cases, that they apply to devises of mere freehold estates. There is not one of them which bears upon an estate of inheritance in fee tail, devised by appropriate words, and especially where an estate is limited over upon a general dying without issue. We are therefore of opinion that an estate tail passed to Jonathan Wright, and to his wife, in joint tenancy.

The next question is, whether the lessor of the plaintiff is prevented from recovering in this action, on account, either of defect of title, or want of remedy? These are the two objections urged by the defendant's counsel under the second and third heads of their argument, and which we shall combine, for reasons

which will be perceived when the objections are examined.

The plaintiff's counsel have contended that the estate tail created by the will of Peter Fretwell was not affected by the act of 1784 (Patt. Laws, 53) and the explanatory act of 1786 (Patt. Laws, 78), because Fretwell Wright, the first in descent, was not in the year 1784 in possession of the premises in controversy; that consequently he continued tenant in tail when he died; from which time, and not before, the right of the lessor of the plaintiff, his issue in tail, accrued; that the deed of Jonathan Wright to Henry Scott, and that of his son Jonathan to the same person in 1754, neither nor both of them, discontinued the estate tail, or passed an estate that could endure longer than the life of Jonathan, the first tenant in tail; or, that at most, it was a base fee; and finally that the instrument called a release, executed by Fretwell, dated in 1743, could not affect the right either of himself, or of his issue in tail, not only for the reasons assigned in respect to his father's deed, but because there was no second party to it; but even if it operated as a deed of bargain and sale, that still it could only affect the estate of the bargainor, and not that of his issue in tail, whose right did not accrue before the year 1797, within twenty years from which period, this action was commenced. It is further insisted on the same side, that since Scott held under the above deeds, he held under the grantors, and not adversely to Fretwell Wright; for which reason it is argued that the act of limitations did not begin to run against the lessor of the plaintiff till after his death; and again, that even if the act of limitations had commenced its operation against Fretwell Wright, still his heir in tail could not be affected by it, because if his title could not be defeated or impaired by his acts, neither could it be by his laches.

The court cannot agree with the counsel in many of the above propositions, and altogether dissent from the conclusions drawn from them. If the release, as it is called, by Fretwell Wright, were out of the case, there could be very little doubt as to the operation of the act of limitations. We will examine the case, then, first, as if this instrument had not been executed; and second, as it may be affected by it.

1. Before we proceed further in the investigation of these questions, it will be proper to attend to the language of the acts of limitations, and particularly to those which passed on the 5th of June, 1787 (Patt. Laws, 81), the first section of which enacts "that sixty years actual possession of any lands, &c., uninterruptedly continued by occupancy, descent, conveyance, or otherwise, in whatever way or manner such possession might have commenced, or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, and shall be a good and sufficient bar to all claims that may be made, or actions

commenced by any person or persons whatsoever for the recovery of any such lands," &c. The second section enacts "that thirty years actual possession of any lands, &c., uninterruptedly continued as aforesaid, wherever such possession commenced, or is founded upon a proprietary right, &c., or wherever it was obtained by a fair bona fide purchase of such lands of any person whatever in possession, and supposed to have a legal right and title thereto, or of the agent, &c. shall be a good and sufficient bar to all prior locations, rights, titles, conveyances or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands," &c. The first proviso in this law saves the rights of a person under the usual disabilities existing at the time the said right or title first descended or accrued, if he shall commence his action within five years after the disability removed. The second proviso is in the following words, "that any citizen of this, or any other of the United States, and his or their heirs, having right or title to any lands, &c. within this state, may, notwithstanding the aforesaid times are expired, commence his or their action for such lands, &c. at any time within five years next after the passing of this act, and not afterwards." The tenth section of the act of the 7th of February, 1799 (Patt. Laws, 352), enacts "that from and after the 1st of January, 1803, every real, possessory, ancestral, mixed, or other action, for any lands, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after." It may not be amiss to observe upon the second section of the first act, that the case shows that Henry Scott obtained possession of the land by a fair bona fide purchase from persons in possession, and supposed to have a legal right and title thereto. There can be no doubt but that the act of 1787 operates retrospectively as well as prospectively, with this difference, that where the sixty or the thirty years had entirely run out, at the time of the passage of the law, citizens of this, or any other state of the United States, claiming title to the land, were indulged with an additional five years within which to commence this action. But if the term was running when the act was passed, or began afterwards to run; in either case, the lapse of the time stated in the act constituted a complete bar, unless the plaintiff could save himself, by showing that he had been under some one of the enumerated disabilities. It will readily be admitted that the possession under this law must be adverse, so far at least, as that the possession must not be held and continued under the person claiming title; and therefore, a lessee for one hundred years, which was the case put by the plaintiff's counsel, could claim no benefit under the act, though he should re-

tain the possession during all that time, inasmuch as such possession would be the possession of his lessor. How far a possession for sixty or thirty years, under a conveyance from a tenant in tail, believed to be such, would operate to bar the issue after the death of the grantor, is a question which does not arise under this head of the inquiry, and therefore need not be mooted. For the case states, that upon the death of Jonathan Wright, in 1742, Henry Scott entered upon the 225 acres conveyed to him by Jonathan Wright in 1741, and that the two sons of the said Jonathan, Ebenezer and Jonathan, entered upon the 700 acres devised to them by their father, (part of which, as well as the 225 acres, are the premises in dispute) and that in 1754, the said Jonathan conveyed the 125 acres to the said Scott. Can it then admit of a doubt, that Scott and the two sons of Jonathan Wright, claiming under his will, entered under titles opposed to that of Fretwell Wright, and consequently adverse to his title? Scott claimed, and was entitled to a base fee, by virtue of the conveyance of Jonathan Wright the elder, defeasible by Fretwell Wright, the issue in tail; and as for the two sons, they had no title whatever. But the possession of those persons, whether with or without title, was in hostility to that of Fretwell Wright, which he claimed, not under his father, but under Peter Fretwell, the donor. From the year 1742 then, to a period exceeding even sixty years, there was, in the words of the first section of the act, an actual possession, uninterruptedly continued by occupancy or otherwise; and this, the act declares, shall not only bar all claims and actions commenced for the recovery of the land, but shall vest a complete title in the possessor. It is to be remarked that this possession is unaffected by either of the provisions in the act, so far as we are informed by the case before us.

But it is contended by the plaintiff's counsel, that the lessor of the plaintiff is not within the operation of the above act, because he claims paramount to the title of Fretwell Wright, and that he cannot be barred, unless the title had run against him after his right commenced, or accrued in 1797, upon the death of Fretwell Wright. This doctrine is altogether untenable. It is opposed as well by the words, as by the obvious meaning of the act. It has been already shown, that the right of Fretwell Wright accrued in 1742, and consequently, that the time then began to run; and it is a clear principle of law, that in such a case it continues to run on, as well against the issue in tail, as against the tenant in tail, against whom it commenced its operation. The language of the first section of the act is general, as to all estates without exception; "in whatever way or manner such possession might have commenced, or have been continued." The act then applies as well to

the claim of a tenant in tail, as to any other title. Yet the argument we are examining, if sound, would substantially exclude from its operation a title gained by length of possession, when opposed by the claim of a tenant in tail; which, particularly after the act of 1784 respecting intails, would be a construction altogether inadmissible. For if the length of time, during which the tenant in tail is bound to bring his action, does not run on, so as to affect his issue when he becomes entitled to the estate, then he, and his issue in succession ad infinitum, would be entitled to the benefit of the same length of time to make his claim, after the death of his ancestor; which would in effect do away the operation of the act altogether, as to estates tail. Supposing then the release of Fretwell Wright to be out of the case, we are of opinion that the title of the lessor of the plaintiff is barred by the act of limitations.

2. Taking the case as affected by the release, it is contended that the acts of 1784 and 1786, did not enlarge the estate of Fretwell Wright or of his alienee, but that he died tenant in tail of this estate, and having estopped himself by his release to claim or to sue for the same in her life time, the act of limitations did not begin to run until 1797, when, and not before, the title of the issue of Fretwell Wright accrued, before which time, the possession obtained by Scott under the release was not adverse. We have no doubt but that the effect of the acts of 1784 and 1786, was to unfetter estates tail from the restraints of the statute de donis, whether the tenant in tail was in possession when the act of 1784 passed, or whether the estate then existed as a base fee in possession of his alienee. *Den v. Robinson*, 2 South. [5 N. J. Law] 793, seems completely to have decided this point, and we think rightly. These acts then being clearly intended to defeat the title of the issue in tail, or in other words, to dock the intail in a case like the present, they operated like a common recovery to enlarge the estate of the alienee into a fee simple. Now we hold it to be perfectly indifferent, whether the plaintiff's or defendant's counsel is right, as to the validity of the release, so called, of Fretwell Wright. If it be valid then, by force of the above acts, it passed to Henry Scott a fee simple estate in the premises, and the lessor of the plaintiff can have no title as the heir of Fretwell Wright the grantor. If it was void, then it has been already shown that the plaintiff is barred by the act of limitations, which began to run upon the death of Jonathan Wright, in 1742.

The case in short stands thus: Upon the death of Jonathan Wright, the right to this estate vested in his eldest son Fretwell Wright, as issue in tail, notwithstanding his father's conveyance to Scott, and the devise in his will to Jonathan and Ebenezer; and Fretwell Wright might then have commen-

ced his action. If his title was unaffected by his release, and also by the acts of 1784 and 1786, then the act of limitations began to run in 1742, and an adverse possession of more than sixty years, previous to the bringing of this action, had run out against the lessor of the plaintiff. If the release was a valid instrument, and the acts of 1784 and 1786 unfettered the estate tail, then the title of the issue in tail of Fretwell Wright was defeated; the estate of the grantee was enlarged into an estate in fee simple; and the heir at law of Fretwell Wright, who must claim under the grantor, and cannot claim paramount to him from the donor, can have no title against the grant. So that take the case under any and every aspect, the lessor of the plaintiff cannot recover.

The view which we have taken of this case, renders it unnecessary to notice many of the arguments at the bar which were much pressed upon us. Judgment for the defendant in each case.

Case No. 18,093.

WRIGHT v. SHUMWAY.

[1 Biss. 23; 1 2 Am. Law Reg. 20.]

District Court, D. Wisconsin. Aug. Term, 1853.

SETTLERS ON UNSURVEYED LANDS—VALIDITY OF CONTRACT—EQUITABLE MORTGAGE—AFTER-ACQUIRED TITLE.

1. A covenant on the part of settlers on unsurveyed lands of the United States, to purchase those lands, as soon as surveyed and offered for sale by the government, and then mortgage them to a creditor, to secure a debt, is not a contract in violation of sections 4 and 5 of the act of congress approved March 31, 1830 [4 Stat. 390], for the relief of purchasers of public lands, and for the suppression of frauds at public land sales.

[Cited in *Calhoun v. Memphis & P. R. Co.*, Case No. 2,309.]

2. A mortgage given to secure a debt due and payable, no time of payment being specified, may be redeemed or foreclosed at any time.

3. An equitable mortgage springs from an agreement, express or implied, that there shall be a lien. A covenant by a debtor with his creditor, to purchase certain lands, and then mortgage them to him will be enforced in a court of equity by a decree of sale.

4. Where a settler on public lands, entitled to a pre-emption, procures a capitalist to pay the purchase money of the land into the land office of the United States, and allows him to take the receiver's receipt in his own name, or makes an assignment to him of his certificate of location as his security for such payment, receiving back the bond of said capitalist for a deed upon the repayment, on a certain day, of the purchase money with interest, this is in equity a mortgage of the land, redeemable by the settler or his alienee at or before the time of payment, according to the condition of the contract.

5. A mortgagee of lands to which the mortgagor had no present title, is entitled in equity to the benefit of an after-acquired title.

In equity. The defendants, Charles N. Shumway, John P. Shumway, Jabez N. Rog-

ers, and John S. Harris, in the year 1849, became indebted to the complainants, by several promissory notes in the sum of twelve hundred dollars. In December, 1850, Charles N. Shumway and John P. Shumway, having settled upon, and being in possession of, unsurveyed public lands, in this state, executed and delivered to complainants a deed, or instrument under seal, by which, for the consideration of one dollar, they sold, assigned, and conveyed to them all their right, title, and interest in those lands, describing them, together with all the water privileges, rights and easements, and other appurtenances, and the buildings erected on the same. The deed provided, that "the property hereby assigned, being intended to include all the claims held by us for the parties of the first part, on the lands now occupied by them, and yet unsurveyed, and not sold by the United States, to have and to hold the same to the said Edward and Augustus and their heirs forever. This grant is intended as a security for the indebtedness of the said parties of the first part to the said party of the second part, consisting of three notes, in all about twelve hundred dollars besides interest. And the said parties of the first part covenant and agree with the said parties of the second part, that they will purchase the said land of the United States whenever the same shall be surveyed and exposed for sale, and will mortgage the same with the appurtenances to the said parties of the second part, their survivors or assigns to secure the indebtedness aforesaid, or such part thereof as may be then unpaid, as soon as the land shall be exposed for sale." The deed was filed with the town clerk, as a chattel mortgage, and also recorded in the office of the register of deeds, as a mortgage of real estate, in October, 1852. In October, 1851, the defendant, Jabez N. Rogers, by his deed, duly executed and acknowledged, confirmed the aforesaid deed, and conveyed to the complainants his interest in the premises, for the purpose of securing the debt. The lands being surveyed, were offered for sale by the United States, in June, 1852. In November, 1852, John P. Shumway proved up a pre-emption right, and entered one hundred and sixty acres of the land, which included the village of Wautoma, and assigned the certificate of location to John Fitzgerald, one of the defendants, in consideration of the payment by him of the purchase money, at the land office, at the request of Shumway. And at the same time, Fitzgerald entered in his own name, one other quarter section of the land, for Charles N. Shumway, of which he claimed a right of pre-emption. Fitzgerald having purchased the two quarter sections, at the instance and request of the Shumways, gave to each of them a bond in the penalty of five hundred dollars, "conditioned that he shall make to them respectively a deed for his particular quarter

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

section described in the bond, on paying to him two hundred dollars with interest, within two years thereafter, and also paying the annual taxes." After those two quarter sections were entered at the land office by Fitzgerald, demand of a mortgage was made by complainants of the Shumways, in pursuance of their covenant. Bill taken as confessed against John S. Harris one of the defendants, and also against Rogers, he not claiming any interest in the lands. The Shumways and Fitzgerald make defense.

Winfield Smith, for complainants, cited *Barber v. Harris*, 15 Wend. 617; 2 Pow. Mortg. 522, and note; 3 Pow. Mortg. 1049; *Foster v. Foust*, 2 Serg. & R. 11; *Ex parte Wills*, 1 Ves. Jr. 162; 1 Smith, Lead. Cas. Eq. 510; 2 Smith, Lead. Cas. Eq. 302-304; *In re Howe*, 1 Paige, 125; 4 Kent, Comm. 150; *Deacon v. Smith*, 3 Atk. 323; *Mitchell v. Winslow* [Case No. 9,673]; *Gilmer v. Poin-dexter*, 10 How. [51 U. S.] 257; *Lambert v. Nanny*, 2 Munf. 196; *Patterson v. Johnston*, 7 Ham. 225; *Tompkins v. Mitchell*, 2 Rand. (Va.) 428; *Marshall v. Bush*, 1 Morris, 275; *Kizer v. Lock*, 9 Ala. 269; *Carter v. Rockett*, 8 Paige, 437; 2 Story, Eq. Jur. §§ 64, 159, 790, 1216, 1231.

Francis Randall, for defendants.

MILLER, District Judge. It is contended on the part of the defendants, that the deed of the Shumways to complainants is a contract in violation of the act of congress, approved March 31, 1830 (4 Stat. 392), entitled "An act for the relief of the purchasers of public lands, and for the suppression of fraudulent practices at the public sales of the lands of the United States," and is therefore void.

[I do not think that this is a contract prohibited by this act of congress. The plaintiffs were merchants doing business in the city of New York, and not contemplating the purchase of this land, or of any interest therein, either at a public sale by the government, or in any other manner, but merely desiring a security for their demand, accepted this deed for the purpose.]²

I do not think that this position is tenable. There is nothing in the deed tending to the formation of a combination of purchasers, or to prevent biddings for the land at a government public sale. But the improved portion of the land was not intended by the Shumways to be the subject of a public sale. As settlers and improvers, at the date of the deed, they considered that their right to pre-emption would be secured, which was afterwards perfected through Fitzgerald. The deed is not within the prohibition of the act. Private sales of pre-emption claims of settlers are recognized as valid, by the federal courts. *Bush v. Marshall*, 6 How. [47 U. S.] 284; *Thredgill v. Pintard*, 12 How. [53 U. S.] 24.

² [From 2 Am. Law Reg. 20.]

At the date of the deed, the Shumways had peaceable and undisturbed possession of the land, with the tacit or implied assent of the United States, and had erected thereon a saw-mill, dwellings, a tavern stand and other buildings; and they had an inchoate right of pre-emption. In consideration of their indebtedness to the complainants, they made the deed as a security. The debt was then payable. A conveyance, covenant, or mortgage, founded on a past consideration, is valid.

[But even if the land was to have been purchased by the Shumways at a public sale, there is nothing in this deed to prevent competition in bidding, or to stop these plaintiffs from becoming the purchasers; but on the contrary, the covenant on the part of the Shumways to purchase the land and then to mortgage it, might have induced competition, and required them to bid it off at a much higher rate than the minimum price.

[The defendants objected to this deed as void for want of consideration; and also, that if the debt was a consideration, it was then due and payable, and no time is mentioned for its payment, or for the purchase of the land, or giving the mortgage, and therefore it is vague and uncertain. A conveyance, contract, or mortgage founded on a past consideration is valid.]³

When the money is due and payable, and no time is mentioned in the mortgage for its payment or redemption, a foreclosure will be decreed at any time. And a mortgage intended to secure a certain debt is valid in equity, for that purpose, whatever form the debt may assume.

[This deed is declared to be for the security of the debt therein specified, with a covenant to purchase the land and to mortgage it whenever it should be surveyed and offered for sale by the government.]³

The consideration expressed in the deed is valuable and is sufficient to authorize the court to enforce performance of its covenants.

It is further contended, that the deed is of no validity, the premises not being legally vested in the Shumways. The deed does not purport to be a mortgage of the fee, but nevertheless it may be valid. In equity, whatever property, real or personal, is capable of an absolute sale may be the subject of a mortgage. Therefore, rights in remainder, and reversions, possibilities coupled with an interest, rents, franchises, and choses in action, are capable of being mortgaged. 2 Story, Eq. Jur. § 1021. And courts of equity support assignments of, or contracts pledging property, or contingent interests therein, and also things which have no present, actual, potential existence, but rest in mere possibility.

Mr. Justice Story, in his opinion in *Mitch-*

³ [From 2 Am. Law Reg. 20.]

ell v. Winslow [Case No. 9,673], remarks: ["It seems to me a clear result of all the authorities, that, whenever the parties, by their contract, intend to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then in esse or not, it attaches in equity, as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title there-to against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice."]⁴

If a mortgage be made of an estate, to which the mortgagor has not a good title, and then he who has the real title conveys to the mortgagor, or his representatives, a good title, the mortgagee will be entitled in equity to the benefit of it, for it will be considered as a graft into the old stock, and as arising in consideration of the former title. *Seabourne v. Powel*, 2 Vern. 10; *Best v. Meddlenurst*, 3 Atk. 376; *Goodright v. Mead*, 3 Burrows, 1703; *McGinnis v. Noble*, 7 Watts & S. 454; [*Porter v. Emery*, 1 Ch. Rep. 97; *Harmer v. Morris*, Case No. 6,076; *Id.*, 7 Pet. (32 U. S.) 544].

The deed purports to be a mortgage of all the property or interest of the Shumways then existing, with express covenants "that they will purchase the land and mortgage it to the complainants to secure their indebtedness." By this express written agreement to make a mortgage, a lien is created on the land, in equity, on the principle that what has been agreed to be performed, shall be performed. *Hankey v. Vernon*, 2 Cox, Ch. 12; 3 Pow. Mortg. 1049 a, b. An equitable mortgage springs from an agreement, express or implied, that there shall be a lien. The agreement in this case to purchase the land, and then to mortgage it, is express, and is a specific lien, which will be enforced in equity. *Finch v. The Earl of Winchelsea*, 1 P. Wms. 277; *Freemoult v. Dedire*, *Id.* 429; *Deacon v. Smith*, 3 Atk. 323; *Tooke v. Hastings*, 2 Vern. 97; *Lyde v. Mynn*, 4 Sim. 505; *Laundell v. Berry*, *Id.* 481; *Metcalfe v. Archbishop of York*, 6 Sim. 224; *Burn v. Burn*, 3 Ves. 573; *Legard v. Hodges*, 1 Ves. Jr. 477. The same principle also seems to be well settled in the courts of this country. *In re Howe*, 1 Paige, 131; *Delaire v. Keenan*, 3 Desaus. Eq. 74; *Menude v. Delaire*, 2 Desaus. Eq. 564; *Dow v. Ker*, *Speer*, Eq. 413; *Campbell v. Moseby*, 6 Litt. (Ky.) 358; *Fleming v. Harrison*, 2 Bibb. 171; *Richter v. Selin*, 8 Serg. & R. 425; *Tyson v. Passmore*, 2 Barr [2 Pa. St.] 122; *Longworth v. Taylor* [Case No. 8,490]. I do not deem it necessary to enter into a minute statement of these cases, and also of many others, as I consider the principle to be settled beyond all controversy. The deed is an equitable mortgage, to be enforced by a bill in equity.

⁴ [From 2 Am. Law Reg. 20.]

The legal title to half the land is in Fitzgerald, subject to the equity of the Shumways, to redeem on or before the day of payment specified in the bonds of Fitzgerald for conveyance. On or before the day of payment, Fitzgerald is obligated to convey to the Shumways, or to their assigns, or to the purchaser under a decree in this case, upon the payment to him of the amount he advanced for the land to the government, with interest, according to the conditions of the bonds. The Shumways continue to hold actual possession of the land. The bonds of Fitzgerald for deeds, are not conveyances of the land, but obligations, whereupon the Shumways, or their representatives or assigns, may compel, by bills in equity, conveyances of the fee, upon the payment of the purchase money, according to the conditions. The purchase of the land by Fitzgerald, at the instance of the Shumways, the settlers and improvers in possession, and their acceptance of bonds for conveyances, are the same in equity as if they had made the purchases in their own names, with money borrowed of Fitzgerald, secured by mortgage of the land.

It is not necessary to determine the question of priority of lien, as the complainants consent to a decree of sale of the two quarter sections entered by Fitzgerald, subject to his lien, according to the conditions of his bonds to the Shumways, the lands being considered quite valuable, and abundant for the payment of both liens.

A decree of sale is ordered, according to the prayer of the bill.

[The plaintiffs might have come into court with a bill praying specific performance of the contract to mortgage, but such a useless proceeding is not required. The deed under consideration is an equitable mortgage of the premises, and is considered in this court, as to these parties, the same as a mortgage executed and delivered in legal form.]⁵

WRIGHT v. SMITHPETER. See Case No. 18,083.

Case No. 18,094.

WRIGHT et al. v. STANARD.

[2 Brock. 311.]¹

Circuit Court, D. Virginia. May 22, 1828.

FRAUDULENT CONVEYANCE—HUSBAND TO WIFE—
INADEQUATE CONSIDERATION—SALE UNDER
DECREE—TITLE OF PURCHASER.

1. The statute of frauds, avoids all covinous conveyances, made with intent to delay, hinder, or defraud creditors, but does not extend to conveyances made on valuable consideration, and in good faith: therefore, where husband and wife, made a conveyance of land to trustees, for the use and benefit of the wife, in consideration

⁵ [From 2 Am. Law Reg. 20.]

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

of the wife's relinquishing her right of dower in other lands, for the payment of her husband's debts, although the value of the right of dower, is only about a third of the value of the land conveyed for her benefit, yet such conveyance is not absolutely void, but, in a court of law, must be adjudged to be valid.

[Cited in *Robinson v. Boyd*, 17 Mich. 134.]

2. Mere inadequacy of price may be so great, as to be evidence of fraud, proper to be submitted to a jury; but is not in itself a fraud, on which a court of law will pronounce a deed to be absolutely void.

[Cited in *Briscoe v. Bronaugh*, 1 Tex. 326.]

3. Although a court of equity would consider the deed before described, as being held in trust for the wife, only to the value of the dower she has released, and for the creditor, as to the residue: yet in a court of law, the deed cannot be sustained in part, and avoided in part, but will be considered as entirely good.

[Cited in *Phelps v. Curts*, 80 Ill. 115.]

4. *W. & C.*, obtained a judgment at law against *K.*, in December, 1824, and sued out an elegit in November, 1825: meanwhile, that is, in March, 1825, *M., R. & G.*, other creditors of *K.*, obtained a decree from the court of chancery, directing a sale of land which had been conveyed by *K.* to trustees, for the benefit of his wife, (made bona fide, and for valuable, though inadequate, consideration,) and that out of the proceeds of the sale, the trustees for the wife, should first be paid the amount of the consideration which had actually passed from the wife, and then the residue to be applied to the extinguishment of the debt of the said *M., R. & G.* *Held*, that the judgment-creditors, *W. & C.*, (who had their elegit executed whilst the sale was being made under the decree,) cannot recover the land in ejectment against the purchaser under the decree.

At law.

MARSHALL, Circuit Justice. This cause comes upon a special verdict, found in an ejectment brought to obtain possession of a lot in the city of Richmond, which was taken by virtue of a writ of elegit issued on a judgment of this court. The ejectment being the prescribed mode for obtaining actual possession in such a case, the question is, was this lot subject to the writ when it was executed? The judgment was rendered in favor of the plaintiffs [*Wright and Cooke*] against John King, on the 18th day of December, in the year 1824. The writ of elegit, issued on the 14th of November, 1825. The special verdict finds, that John King was seised in fee of the lot on which the inquisition was taken, on the 30th of September, 1819, on which day he conveyed a part of the premises to John Gibson and John M'Crea, in trust for the security of a debt in the deed mentioned. On the 9th of October, he conveyed the residue of the premises to the same trustees also, for the benefit of a creditor in that deed mentioned. The debt secured by the deed of September, 1819, was payable by instalments, the last of which fell due on the 16th day of January, 1822, and the deed stipulated that the said King, should retain the possession and receive the profits, until default should be made in the last payment. The debt secured by the deed of October, was also payable by instalments,

the last of which fell due on the 24th day of January, 1825, and the trustees were to sell, if on that day any part of the debt should remain unpaid. The interest of the said John King, so far as it was a present interest, was unquestionably subject to an elegit. It remains, then, to inquire, whether this interest has been so transferred, as to be placed out of the reach of that writ. On the 22d of March, 1820, John King, and Helen S. King, his wife, in pursuance of an agreement to make a reasonable provision of the dower of the said Helen S., which is recited in the deeds, conveyed the dower-right of the said Helen S. to certain real estate, which had been previously conveyed by the said John King, in trust for certain creditors in the said deeds mentioned. On the 30th of March, 1820, John King, conveyed certain real property, including the premises in the declaration mentioned, to Peter V. Daniel and James Rawlings, in trust for his said wife. This deed professes to be made in consideration of the agreement recited in the deed of the 22d of the same month, and after its execution, the trustees received the rents of the said tenement for the benefit of the said Helen S. The jury find, that at the date of this deed, John King was greatly embarrassed in his circumstances, and had conveyed a great part of his property in trust for his creditors. They also find, that the dower-right conveyed in the deed of the 22d of March, was worth \$1,016.67, and that the dower-right of the said Helen S., in other property conveyed by her husband, but not by herself, was worth \$1,777; and that the property conveyed by the deed of the 30th of March, in satisfaction of dower released by the deed of the 22d of March, was worth \$3,040.

The defendant claims under a sale made in pursuance of an interlocutory decree of the court of chancery for the state, which was pronounced on the 26th day of March, 1825, in a suit brought by *Mollin, Rankin, & Gallop*, creditors of the said King, to set aside the deed of the 30th of March, 1820, as being fraudulent as to creditors. The plaintiffs were not parties to this suit, and, consequently, are not bound by the decree. They have therefore a right to re-examine the validity of the deed, which was the subject of that decree. Having obtained their judgment before the decree was pronounced, and having issued their writ of elegit while that judgment was in force, the decree, however correct in its principles, must leave the property subject to the lien, if any, which was created by the judgment. If the deed of the 30th of March, 1820, was absolutely void, then the interest which the deed of the 22d of the same month left in John King, was liable to his creditors, and was bound by the plaintiff's judgment. If that deed was valid, no interest remained in John King, other than an equity of redemption. The dower relinquished by Mrs. King con-

stituted, certainly, a valid consideration for a deed which should settle on her a fair equivalent for that right. But the dower which she relinquished was worth but little more than one-third of the property conveyed to her as that equivalent. A court of chancery may, very properly, and does consider such a deed, as being held in trust for the wife, to the value of the dower she has released, and for the creditors as to the residue. But how is such a deed treated in a court of common law? At law, the deed cannot be sustained in part only, but must be entirely good or entirely void. The statute of frauds avoids all covinous conveyances made with the intent to delay, hinder, or defraud creditors, but does not extend to conveyances which are made on good consideration and in good faith. It has been already said, that the dower released by Mrs. King under an agreement to make an adequate settlement on her, was a good consideration, in the sense in which those words are used in the act, and I can find no case in which a court of law has ever held a deed of settlement on a wife to be absolutely void, because the estate conveyed was worth more than the price for which it was conveyed. Mere inadequacy of price may be so great as to be evidence of fraud, to be submitted to a jury, but has never been determined to be, in itself, a fraud for which a court will pronounce a deed to be absolutely void. In this case, the jury have not found fraud. There is no secret trust for the benefit of the husband. On the contrary, the trustees were put in possession of the property, and received the profits for the separate use of the wife.

The plaintiffs contend, that though the jury have not found fraud, they have found facts which amount to fraud, and have submitted the question to the court, whether upon those facts the law be for the plaintiffs?

Without affirming or denying, that a verdict may present a case to the court which, though it does not contain a specific finding, that the deed is covinous or fraudulent, or made to deceive or delay creditors, may contain such equivalent matter as will, in point of law, show the deed to be void, I will hazard the opinion, that mere evidence of fraud, circumstances which may or may not accompany covin, do not constitute such a case. The court will consider those circumstances on which the plaintiffs rely, as amounting, in themselves, to a fraud.

1. The first is, the difference between the value of the dower which has been relinquished, and the property which has been settled in compensation for that dower. The court has already said, that this difference, if the conveyance be made with a real intent to pass the property, does not, of itself, vitiate the deed in a court of law. If the value of the dower had been a few dollars or cents less than the value of the property conveyed in satisfaction of it, no person would suppose the deed to be a nullity on that account.

And if a small difference of value would not avoid it, what is the difference that will? Where does the law stop? The difference may be so great as to satisfy the conscience of the jury, that the conveyance is intended to cover the property from the just claims of creditors; but as a mere question of law, I can find nothing in the books which will justify a court in saying, that a deed, otherwise unexceptionable, is void, because the consideration is of less value than the property conveyed.

2. The other circumstance on which the plaintiffs rely is, that the deed of the 30th of March, conveys all the property of John King, which property still remained in his possession. The verdict finds the deed; but does not find that it comprehended all his property. On this subject the jury say: "We find that at the date of the deed last mentioned, the said King was greatly embarrassed in his circumstances; and the greater part of his property was conveyed by deeds of trust, to secure the debts in those deeds specified." This finding, certainly does not show that the whole of his property was comprehended in the deed of the 30th of March, 1820. The jury find a subsequent deed, dated on the 24th of May, in the same year, which purports to convey other property to trustees for his creditors. The deed of the 30th of March, certainly stipulates for the surplus money arising from his property, which was conveyed in trust; but only the greater part of his property was so conveyed. Neither does the verdict show that King retained possession of the property. The deed itself does not stipulate for his retaining possession, and it authorizes the trustees to receive the rents for the separate use of his wife. It authorizes her residence in any tenement which she might elect, which was not rented out, but this is not a stipulation for the possession even of that tenement, much less of the whole property by the husband. The verdict does not show that this privilege was ever exercised, or could have been exercised. It appears to me, that the deed of the 30th of March, 1820, was valid at law, and conveyed the interest which was left in the said John King, by the deed of the 30th of September, 1819.

It remains to inquire, how far the proceedings in chancery can affect this cause. The court of chancery sustained the deed to the extent of the consideration which moved from Mrs. King, but no farther; and directed the property to be sold and the residue of the money to be paid to the creditor, at whose suit the sale was decreed. The plaintiffs in this cause, were not parties to that suit, and were, consequently, not bound by the decree; but if they would avail themselves of it, they must admit its validity. They cannot take a part, and reject a part of it. The decree ascertains the value of the dower-right of Mrs. King, and limits her claim under the deed to that value, which

amount was received before the service of the elegit. The sale under the decree was made while the marshal of this court was taking the inquisition for the extent of the lot, and the chancellor has directed a conveyance to be made to the purchaser.

The counsel for the plaintiffs has taken several exceptions to the proceedings in chancery, which would be considered, if the verdict showed a title at law in the plaintiffs, independent of the decree of the court of chancery. But the verdict, I think, does not show such a title, and I do not think that this is a case in which the decree can be taken in part, and rejected in part. I am therefore of opinion, that the law on this special verdict is for the defendant.

Case No. 18,095.

WRIGHT v. SUN MUT. INS. CO.

SAME v. ORIENT MUT. INS. CO.

[6 Am. Law Reg. 485.]

Circuit Court, D. Maryland. April 21, 1853.
MARINE INSURANCE — FOREIGN COMPANY — LOCUS
CONTRACTUS — ADDITIONAL PREMIUM.

1. Where an insurance company incorporated by the state of New York, having their principal office in New York, and there executing policies of insurance which were transmitted to agents in Baltimore, who had authority to receive applications for policies, and to receive and transmit notes for the premiums, and through whom the company paid losses to parties in Baltimore, underwrote a policy, and sent it to parties residing at Baltimore, it was held that the contract of insurance was a New York, and not a Maryland, contract.

2. Where the policy contained this clause, "to add an additional premium if by vessels rating lower than A2," and the cargo was shipped in a schooner rating lower than A2, and no fixed sum as additional premium agreed upon, held that the assured, in case of loss, could recover the value agreed in the policy, less such additional premium beyond the agreed per cent. as in the opinion of the underwriters might be deemed adequate for the increased risk of a cargo shipped in a vessel rating below A2.

[These were actions by John S. Wright against the Sun Mutual Insurance Company of New York and the Orient Mutual Insurance Company of New York, respectively.]

Henry May, Robert J. Brent, and Vivian Brent, for plaintiff.

John Nelson, Brown & Brune, F. B. Cutting, and Alexander Hamilton, Jr., for defendants.

The suits were begun by attachment, issued in the superior court for the city of Baltimore, and were removed into the circuit court of the United States for this district, under the act of congress. The two cases were tried together, and were commenced on Thursday, 16th April, and terminated on Wednesday, the 21st April, by a verdict in each case for the plaintiff for the sum of \$17,365 13—under the direction and instruction of the court.

The opinion of the court (GILES, District Judge), which was not in writing, embraced the following points: The judge remarked in the commencement of his opinion, that the principal point in these cases was one deeply interesting to the commercial community, among whom these running policies were so frequently used. The defendants were insurance companies incorporated by the state of New York, and their offices were located in the city of New York. They had agents residing in this city, who received and forwarded them all applications for insurance; and received and transmitted to them the notes given for the premiums from time to time, and through whom the said defendants made payments for losses on policies held by parties residing here. The policies on which these attachments were issued, had been executed by the defendants in the city of New York, and transmitted to their agents in this city, by whom they were delivered to the plaintiff. The plaintiff, in both cases, had given to the said agents his promissory notes for the premium mentioned in said policies, and in the case of the Sun Mutual Ins. Co. the notes had been paid by plaintiff; and in the case of the Orient Mutual Ins. Co. the money had been placed by him in the Union Bank of this city, (where said notes were payable,) to meet them, but that company had so far, declined to receive it. The first question in these cases is, are these policies of insurance to be considered as contracts made in the city of New York, or as made in the city of Baltimore? For, when you have ascertained at which place the contract is to be considered as made, it is to be construed and interpreted by the law and the usages of that place, except where a contract is made in one place, and, by its terms, it is positively to be performed in another. The learned counsel for the plaintiff has contended that these policies were to be considered as Maryland contracts, and to be construed in reference to the usages and customs of underwriters in this city. Now this became an important question in the cases, because on the books of the insurance companies in New York, the schooner *Mary W.* (whose loss had given rise to this controversy) was rated below A2, while on the books of underwriters and mercantile records in this city she was rated A2. The authorities referred to by plaintiff's counsel did not, in the opinion of the court, sustain the position he sought to maintain. In the case of *Bank of Augusta v. Earles*, 13 Pet. [38 U. S.] 519, the principal point decided was, that a bank chartered in Georgia could purchase a bill of exchange in Mobile.

In the case of *Cox v. U. S.*, 6 Pet. [31 U. S.] 172, the point decided was, that the official bond of the navy agent, although signed at New Orleans, was for his faithfully accounting at the proper department at Washington, and that therefore the liabilities of the sureties were to be governed by the principles of

¹ [Reversed in 23 How. (64 U. S.) 401, 412.]

the common law, and not by the civil law of Louisiana. The case of *Boyle v. Zacharie*, Id. 635, was one of a payment made in Louisiana by plaintiffs for Boyle, and by his sanction, to release his property there attached, and created a debt due there, and was not released by the subsequent discharge of Boyle under the insolvent laws of Maryland.

In the case of *Hazard's Adm'rs v. New England Marine Ins. Co.*, 8 Pet. [33 U. S.] 557, the point decided was that the letter, on application for insurance, written in New York, where Hazard resided, although addressed to the defendants, a company incorporated in Massachusetts, and having their office in Boston, was to be tested as to the truth of its representations by the custom as to the extent of coppering vessels in New York and not by the custom in Boston. Judge Story in his great work on "The Conflict of Laws" (section 278) says: "A policy of insurance executed in England on a French ship for the French owner, on a voyage from one French port to another, would be treated as an English contract, and in case of loss, the debt would be treated as an English debt." So in section 289, the same learned author says: "A merchant, resident in Ireland, sends to England certain bills of exchange, with blanks for the dates, the sums, the times of payment and the names of the drawees. These bills are signed by the merchant in Ireland, endorsed with his own name, and dated from a place in Ireland, and are transmitted to a correspondent in England, with authority to him to fill up the remaining parts of the instrument. The correspondent in England accordingly fills them up, dated at a place in Ireland. Are the bills, when thus filled up and issued, to be deemed English or Irish contracts? It has been held, that under such circumstances, they are to be deemed Irish contracts, and of course to be governed as to stamps and other legal requisitions by the law of Ireland;" and analogous principles have been recognized in the following cases: *Woolsey v. Bailey*, 7 Fost. (N. H.) 217; *Smith v. Smith*, Id. 244; *Davis v. Coleman*, 11 Ired. 303. But this very question has been settled in two cases by the court of appeals of New York; and in one by the superior court in the same state, in the cases of *Hyde v. Goodnow*, 3 Comst. [3 N. Y.] 264; *Western v. Genesee Mut. Ins. Co.*, 2 Kernan [12 N. Y.] 258; and *St. John v. American Mut. Life Ins. Co.*, 2 Duer, 419. In this last case the policy was issued from the office of an agency of the company in New York, although the company was incorporated in Connecticut; and it was held that the construction and effect of this policy were to be governed by the law of Connecticut.

The case of *Hyde v. Goodnow* was an action to recover the amount of two premium notes given on a policy of insurance. A mutual insurance company of New York had an

agent residing in Ohio, authorized to receive applications for insurance. This agent received from a party residing in Ohio, the application with the premium notes, and transmitted them to the office of the company in New York, where they were received and approved, and where the policy was executed and transmitted to the applicant by mail. It was held by the court that the contract was made in New York at the office of the company, and not in Ohio.

In the case of *Western v. Genesee Mut. Ins. Co.*—a mutual insurance company incorporated and located in New York—had an agent residing in Canada, who received the application for insurance, and sent it to the company in New York, who there signed the policy of insurance and forwarded it to their agent to be delivered to the applicant—it was held to be a New York contract, and its validity to depend upon the laws of that state. The judge therefore held upon principle and upon authority that the policies of insurance in these cases now being tried, were to be considered New York contracts, and to be construed and interpreted as such, for by section 263 of "The Conflict of Laws," the rule is laid down, "that the law of the place of the contract is to govern, as to the nature, the obligation and the interpretation of the contract." In this case, therefore, as the evidence showed that the schooner *Mary W.* was rated below A2, in New York, what is the true construction of these policies, in that view, and assuming that fact to be proved? These policies, although differing slightly in phraseology, are substantially the same, and the court treated of them together. Now, what are the principal provisions of the "Sun" policy? "The Sun Mutual Insurance Company do make insurance, and cause Jno. S. Wright to be insured, lost or not lost, at and from Rio de Janeiro to a port in the United States, one half of 5,000 bags of coffee, laden, or to be laden, on board the good vessel or vessels, &c. Beginning the adventure upon the said goods from and immediately following the loading thereof on board the said vessel, and shall so continue and endure until the goods shall be safely landed at —, aforesaid. The said goods hereby insured, are valued at \$18 *per bag, as interest may appear*," and the policy admits "that the company have been paid for this insurance by the assured, at and after the rate of *one and one-half per cent. To return one quarter of one per cent. if direct to an Atlantic port. To add an additional premium if by vessels rating lower than A2, or by foreign vessels*; subject to such addition or deduction as shall make the premiums conform to the established rate at the time the return is made to the company." The words italicised are in writing, and not printed, as are the other provisions of the policy.

The other clauses of the policy are not

material to this inquiry. On the back of this policy there was this endorsement, made by the defendant's agent in this city:—"1856, August 27. Schooner 'Mary W.,' Rio de Janeiro to New Orleans, on half cargo, 1,830 bags coffee, valued at \$18 per bag, not to attach if vessel be proved unseaworthy."—\$16,470. Now, the counsel for the defendants contended that this coffee never was covered by the said policy, because it was loaded on board a vessel rating below A2, and the correspondence showed that no additional premium had been agreed upon between the parties, and that, by the true construction of the policy, the defendants had the right to fix the additional premium. Now, what are the rules for the construction of policies of insurance, as recognized and acted upon by courts of justice? The first one is common to the construction of all contracts; that you must from the written paper, ascertain, if possible, what was the true meaning and understanding of the parties in the language they have used, and to carry that into effect, if it violates no principle of law. The second rule is, that policies of insurance are always to be construed liberally, so as to insure the indemnity sought for, and that if there be any ambiguity in the words of an exception, they are to be construed most strongly against the party for whose benefit they are introduced. Another rule is, where the written and printed clauses of a policy are in conflict, the written ones are to be sustained and carried into effect. For these rules the court referred to the cases of *Palmer v. Warren Ins. Co.* [Case No. 10,698]; *Yeaton v. Frey*, 5 Cranch [9 U. S.] 335; *Grant v. Lexington Ins. Co.*, 5 Ind. 23; *Mobile Marine Dock, & Ins. Co. v. McMillan*, 27 Ala. 77; *Sayles v. Northwestern Ins. Co.* [Case No. 12,422]; and *Breasted v. Farmers' Loan & Trust Co.*, 2 Seld. [6 N. Y.] 299. This last case was peculiar. It was decided by the court of appeals of New York, that in a life policy insurance, a provision "that it should be void if the assured should die by his own hand" had reference to an act of criminal self-destruction, and not to one committed "while the party was insane." By these rules let this policy be construed. And can it be successfully contended for one moment, that when the assured procured this policy, he had no intention of covering any of his coffee that might be sent to him in vessels rating below A2, until he and the company should agree upon the additional premium to be charged in such cases? What were the reasons for his procuring this policy, and paying the premium on so large amount in advance? Because he did not know at what time and by what vessels his correspondents in Rio might send him the 5,000 bags of coffee he had directed them to purchase on his account, and he therefore wished his property to be thus covered by insurance whenever it was afloat on the ocean, for it might well be, that he might never hear of

the shipment of his coffee until its safe arrival or loss. This necessity of the mercantile world has given rise to these running policies, which cover annually property to the value of millions of dollars. But if the view of these insurance companies is to prevail, that the property is not covered until the additional premium is fixed by them, or agreed upon between the parties, then a very speedy termination would be put to this kind of policy, and the defendants might as well close their agencies in this city. But such the court held not to be the true construction of this policy. The policy meant this, and nothing more: that the defendants would insure the coffee of plaintiff, in its transit from Rio to a port in the United States, at 1½ per cent. premium by whatever vessel carried, but if carried in a vessel rating below A2, or by a foreign vessel, an additional premium should be paid them. Additional to what? Why, to the 1½ per cent. already paid, and such additional premium as, in the opinion of underwriters, would be equal to the increased risk to such a cargo in vessels rating below A2, or in foreign vessels. And this seems to have been the view taken by the Sun Mutual Insurance Company itself in its correspondence with its agent in this city; for although, in their letter of August 25th, 1856, they take the ground "that the assured had no right to have this risk on the Mary W. covered on this policy," they subsequently recede from this position, and in their letter of the 30th August, "they admit he had the right, but that the fixing of the premium rested solely with them." The court thought the latter position as untenable as the former. As something had been said in the course of the argument, in reference to the endorsement on the policy of the 27th August, the court remarked that they considered this endorsement fully warranted by the defendants' letter to their agent, of that date; and that, indeed, the agent, with that letter in his hand, could have made no other endorsement. The plaintiff presented the two prayers, and the defendants presented three prayers. The court remarked that they agreed with the propositions of law contained in defendants' first and second prayers, and plaintiff's second prayer, and only rejected them because they were substantially embraced in the instruction which the court would give to the jury, but they rejected the plaintiff's first prayer and the defendants' third prayer as in conflict with their view of the law of the case; and the court then gave to the jury the following instruction: "If the jury shall find from the evidence, that the defendants executed the policy of the 27th July, 1855, and received from the plaintiff the premium therein mentioned; and that their duly authorized agent in this city made the endorsements on the said policy, which have been offered in evidence, and shall further find that 1,830 bags of coffee, belonging

to plaintiff, were shipped on the 12th of July, 1856, at Rio, on board the schooner Mary W., to be carried to New Orleans, and that when said schooner left Rio she was seaworthy and in good condition; and shall further find, that the said vessel and cargo were subsequently on said voyage totally lost by one of the perils insured against; and that said schooner was rated lower in New York than A2, then the plaintiff is entitled to recover for one half the value of said coffee so lost, at \$18 per bag, less such additional premium beyond the 1½ per cent., as in the opinion of the underwriters may be deemed adequate for the increased risk to a cargo of coffee shipped in a vessel rating below A2, with interest from thirty days after such time as the jury may find the defendants were furnished by plaintiff with the preliminary proofs of his said loss; and there is no evidence in this case that the said schooner at any period during the running of this policy rated as high as A2 in any of the insurance offices in New York."

[The judgments in these two cases were afterwards reversed by the supreme court. See 23 How. (64 U. S.) 412.]

WRIGHT (SWAN v.). See Case No. 13,670.

Case No. 18,096.

WRIGHT v. TAYLOR.

[St. Louis Law News, Oct. 11, 1872; 2 Dill. 23.]¹

Circuit Court, D. Missouri. Oct. Term, 1871.

EJECTMENT—MILITARY BOUNTY LANDS—SPECIAL LEGISLATION—CURATIVE STATUTES—DEEDS DEFECTIVELY ACKNOWLEDGED—CONSTRUCTION OF MISSOURI STATUTES.

1. In bestowing the bounty of the government upon its soldiers, congress had an undoubted right to shape that bounty as it deemed best, either by prescribing conditions or limiting the tenure and quality of the grant.

2. The act of congress of April 16, 1816 [3 Stat. 284], authorizing the designation of lands for military bounties, prohibited the alienation of said lands until after the issue of the patent therefor. *Held*, that a deed made in 1820 by the attorney of a patentee, under a power of attorney executed in February, 1816, the patent not having issued till 1819, is void ab initio, as being within the prohibition of the act.

3. The federal courts will follow the decision of the state supreme courts as to the admissibility in evidence of certified copies of deeds, without accounting for the absence of the originals, and as to the various curative acts concerning deeds improperly or defectively acknowledged, and as to the force and effect of the recording acts, whether those decisions are in accord with what are deemed sound rules of interpretation, or otherwise.

4. The inhibition of the Missouri constitution of 1865, forbidding the enactment of special laws giving effect to informal or invalid wills or deeds, &c., does not prevent the enactment of general curative statutes upon the subjects named, nor upon any of the other classes of subjects enumerated in that clause of the constitution. Such acts being general in the consti-

tutional sense, since they apply to a class, and not to individual cases; hence, the exceptional legislation as to military bounty lands in Missouri is not within the inhibition of the Missouri constitution.

5. Section 38, c. 109, Rev. St. Mo., pertaining to the admissibility in evidence of certified copies of deeds for military bounty lands, is not repealed by the act of February 27, 1868 (Sess. Acts 1868, p. 51), nor is the common-law mode of proving the execution of deeds thereby abrogated. Hence, a deed for such lands can be received in evidence where its execution is proved according to the common-law mode, in the same manner as any other deed not acknowledged or recorded properly, and it will be valid between the parties and those having actual notice and mere trespassers.

6. A certified copy from the recorder's office of such deed, when the original has been recorded and acknowledged, under section 35, c. 109, Rev. St. Mo. 1865, must be received in evidence upon proof of the loss or destruction of the original; and, if duly acknowledged according to the laws of Missouri, a certified copy is to be received on the same terms as other deeds with valid acknowledgments.

7. A deed improperly acknowledged in New York in 1820, according to the laws both of New York and Missouri at that time, and recorded in Missouri in 1822, is not such a deed as section 35 et seq. of chapter 109 of the Revised Statutes of 1865 affects; and a curative act passed in New York in 1824, to operate on such imperfect acknowledgments in that state, cannot act extraterritorially, and work curatively upon a deed to Missouri lands.

Ejectment, military bounty lands, &c. This was an action of ejectment [by David C. Wright against Samuel E. Taylor] to recover possession of certain land in Chariton county, Missouri, forming part of the track appropriated for military bounties. Plaintiff claimed under a patent for the land, granted to Nicholas Columbey, dated January 4, 1819, and on the trial offered in evidence said patent, together with a power of attorney by Columbey to William Russell, dated February 23, 1816, a deed from Columbey by said Russell, his attorney, to Moses Russell, dated June 1, 1819, and also subsequent deeds making a chain of title to plaintiff. Defendant objected to the admission of said power of attorney and the deed made thereunder, as being in violation of the acts of congress granting bounty lands, and therefore void under them. Objections were also taken to other deeds, offered in evidence, upon the ground that some of them were imperfectly acknowledged, and that others, being copies, could not be admitted; the statutory requirements governing the admission of copies not having been complied with. The court sustained the objections as to the power of attorney and the deed made thereunder, and rendered judgment for defendant.

Jewett & Bigger, for plaintiff.

Krum & Decker, for defendant.

Before TREAT and KREKEL, District Judges.

TREAT, District Judge. This and other cases concerning military bounty lands in Missouri, under the acts of congress granting

¹ [2 Dill. 23, contains only a partial report.]

lands to soldiers in the war of 1812, require an interpretation of said acts of congress, and of the statutes of Missouri with reference thereto.

By the act of May 6, 1812, c. 77, § 4 (2 Stat. 729), it was provided: "That no claim for the military land bounties aforesaid, shall be assignable or transferable in any manner whatever, until after a patent shall have been granted in the manner aforesaid. All sales, mortgages, contracts or agreements of any nature whatever, made prior thereto, for the purpose or with the intent of alienating, pledging or mortgaging any such claim, are hereby declared, and shall be held null and void; nor shall any tract of land granted, as aforesaid, be liable to be taken in execution, or sold, on account of any such sale, mortgage, contract or agreement, or on account of any debt contracted prior to the date of the patent, either by the person, originally entitled to the land or by his heirs or legal representatives, or by virtue of any process or suit at law, or judgment of the court against a person entitled to receive his patent aforesaid." Thus congress, in providing for the land bounties, annexed to them the qualities of inalienability for any of the enumerated causes, existing prior to the emanation of the patent. It had the power to grant the land on such terms as it might prescribe, and it prescribed such terms as it deemed important for the protection of its beneficiaries.

The second section of the act provided for the issue of warrants, and "that such warrants shall be issued only in the names of the persons thus entitled, and be by them or their representatives applied for within five years after the said persons shall have become entitled thereto; and the said warrants shall not be assignable or transferable in any manner whatever." This act referred to the prior act of December 24, 1811, c. 10 (2 Stat. 669), which contemplated a grant of 160 acres to each noncommissioned officer and soldier enlisted for the term of five years, said right to the grant to accrue when said person should be discharged with a certificate of faithful performance of duty,—the land "to be designated, surveyed and laid off at the public expense in such manner and upon such terms and conditions as may be provided by law." The act of January 11, 1812, c. 24, § 11 (2 Stat. 672) contains like provisions. Thus, at the honorable discharge of any one of those persons enlisted for five years, he was to be "allowed and paid," in addition to the money named, 160 acres of land, to be designated, &c., as above stated. The act of May 6, 1812, above quoted, requires the persons entitled thereto to apply within five years from their honorable discharge for the prescribed land warrant, and annexed the condition in section 2, that said warrant should not be transferable; and in section 4 that no claim should be transferable in any manner whatever until after the

patent issued, &c. It must also be carefully noted that as, by the prior acts, congress was thereafter to designate and prescribe the terms and conditions, those terms and conditions were in part fixed by the act of May 6, 1812,—one of which was inalienability, as already mentioned. That act of 1812 (section 1) designated the lands to be surveyed for those military bounty purposes, and no lands in that part of Missouri where the premises in dispute lie were among those so designated.

In aid of the foregoing acts, and in enlargement of the previous bounty system, congress passed the act of April 16, 1816, c. 55 (3 Stat. 286), whereby the president was to designate 2,000,000 acres of land in addition to those named in the act of 1811, subject to the conditions and terms of the last named act. Then, in section 5, as if to prevent all possible contrivances for alienating the county before the patent issued, congress provided: "That no transfer of land, granted in virtue of this or any other law, giving bounties of lands, &c., shall be valued, unless the contract or agreement therefor, or letter of attorney, giving power to sell or convey, shall have been executed after the patents shall be issued, and delivered to the persons entitled thereto." The prohibition was complete, under the act of 1812, against the transfer of the claim or of the warrant. But it is contended that a "letter of attorney," is not included within the terms used therein, viz. "sales, mortgages, contracts, or agreements." Whether that view be correct when the language and intent of the whole act is considered, it is not necessary to decide; for the lands included in that act, and designated for military bounties do not embrace the lands in controversy, and consequently the premises in question could not have been located or granted under it and the preceding acts. This tract of land, if the patent therefor issued under any act, must have been granted under the act of 1816.

The plaintiff claims under a deed executed in 1820, by William Russell, acting by virtue of a power of attorney from Columbey, the patentee. The power of attorney was executed in February, 1816, the land patent issued in 1819, the deed under the power of attorney was made by Russell in 1820, and by Russell's grantee back to Russell a few years thereafter. There could hardly be a plainer violation of the conditions prescribed by the act of congress under which this land must be claimed, if at all. It is apparent that the original letter of attorney was a mere contrivance to evade the act of 1812; but the act of 1816, taking effect two months subsequently, declared that any transfer of land to be granted thereafter should be void, if attempted to be transferred by such means. The land was then a part of the public domain, and had not been in any manner previously designated for bounties. The original act, promising a land bounty, provided that the boun-

ty grants should be on such terms and conditions as congress might thereafter prescribe; and congress, knowing what contrivances might be used to defeat the objects of the county, prescribed the needed conditions to save to the soldiers the benefits intended: First, that the warrant should not be transferred; second, the claim should not be transferred; third, no sale, mortgage, contract or agreement for the purpose or with the intent of alienating, or pledging, or mortgaging any such claim should be valid; fourth, no tract of land granted under the county acts should be liable to be taken in execution or sold on account of any such sale, mortgage or agreement, etc.; and then, by the act of 1816, that all transfers of such land by means of any of such instruments or agreements or powers given before the patent issued, should be void. In the case before the court such a transfer was attempted, and it was void, ab initio. The plaintiff, claiming through and under that void act, takes nothing. Even if the acts prior to 1816 had not been passed, the plaintiff would be in no better position, although his power of attorney antedated the last named act; for the land in question was not appropriated for bounty purposes by any previous law. The grant, being under the act of 1816, was subject to its terms. If Russell had taken under the previous acts, the location of the land would have been elsewhere. In bestowing the bounty of the government upon its soldiers, congress had an undoubted right to shape that bounty as it deemed best, either by prescribing conditions or limiting the tenure and quality of the grant.

Many objections have been raised under the Missouri statutes as to the admissibility in evidence of certified copies of deeds, without accounting for the absence of the originals, and as to the various curative acts concerning deeds improperly or defectively acknowledged, and as to the force and effect of the recording acts. This court follows the decisions of the state supreme court upon such questions, whether those decisions are in accordance with what are deemed sound rules of interpretation or otherwise. The leading objects of the statutes concerning conveyances of land are to secure certainty, publicity, and good faith. As lands pass by deeds duly executed and delivered, it is desirable that there should be prescribed formalities observed, so as to insure due care and deliberation, and that they should be formally acknowledged before a competent officer, or duly proved. His certificate that the prescribed acts have been performed is designed to accompany the deed as authenticating its execution according to law. After execution and acknowledgment, it is to be recorded, so as to give notice to all concerned of the exact condition of the title, and thus close the avenues to fraud. But as the officers entrusted with those grave duties were often incompetent, and thereby the just

rights of grantees became jeopardized, the general assembly, in furtherance of justice, has, from time to time, passed curative acts, the effect of many of which has been to create confusion and uncertainty. Indeed the mischief of such legislation eventually became so great that the new constitution of the state inhibited it to some extent in these words: "The general assembly shall not pass special laws * * * giving effect to informal or invalid wills or deeds * * * but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated." That inhibition does not go so far as to prevent the enactment of general curative statutes, upon the subjects named, nor upon any of the other classes of subjects enumerated in that clause of the constitution. Thus the exceptional legislation as to military bounty lands in this state, not only as to defective acknowledgments, but as to limitations, is held not to be unconstitutional.

The statutory limitation for military bounty lands granted under the early acts of congress is two years; for other lands ten years. So the act validating deeds for military bounty lands defectively acknowledged, and giving to the recording of the same greater effect than is given generally to deeds for other lands, are not within the constitutional prohibitions. If the limitation as to military bounty lands is unconstitutional because a special, and not a general, law, then the curative acts as to those lands would fall within the same rule, and the plaintiff be without the desired muniments of title. Those various acts are general in the constitutional sense; for they apply to a class, and not to individual cases. The fact that the district or county in which those lands are situated is not co-extensive with the state does not alter the rule.

Inasmuch as the general assembly had, by a series of acts during the last twenty years, given special and peculiar advantages to that class of claimants, validating their invalid acknowledgments, and changing for their benefit the ordinary rules of proving their titles; and inasmuch as by so doing the doors had been opened to increased litigation, and it may be to speculative dealings in such claims; and inasmuch as from failure to record conveyances, the lands could not be properly assessed, or, if assessed, the taxes due thereon were not paid, it was not improper to limit the time within which such special and unwonted favor should continue. The General Statutes of Missouri contemplate that all deeds shall be duly acknowledged, or proved, and certificates thereof be attached; that they shall then be recorded; and that, when so acknowledged or proved and duly certified, the original shall be read in evidence. Thus the certificate of acknowledgment, or of proof by the proper officer, is to be received as proving, prima facie, the due execution of the deed. The statutes contemplate the production of the original, in order that the prima facie case made by the certificate may in proper cases be rebutted.

This is important for protection against fraud. The officer recording deeds does not necessarily know either the handwriting of the grantor or of the witness, nor of the magistrate giving the certificate. He records what purports to be genuine; and if a certified copy from his office is to be conclusive evidence, or even prima facie, then the power to rebut is of no avail. But it may be that the original is lost, or "not within the power of the party wishing to use the same;" and hence the statute provides that in such cases certified copies may be read in evidence, where the party, or some one knowing the fact, makes oath to the loss, &c.

This provision would seem to require such oath to be made in every instance where a certified copy is to be used. But the supreme court of Missouri, in *Barton v. Murrain*, 27 Mo. 235, held that: (1) The exemption of the patent certified by the commissioner of the general land office may properly be received in evidence without proof of the loss of the original (5 Sept. 242). (2) A certified copy of the deed may generally be read without the preliminary oath, if the original is presumed to be in the hands of a third person; and that such presumption, in the absence of suspicious circumstances, arises when a party claims under a warranty deed (for he is supposed not to hold deeds anterior to his own), also when he claims under a sheriff's deed, for the deeds anterior thereto are likely to remain with the execution debtor. The other cases referred to in the opinion seem not to dispense with the preliminary oath; but merely when the facts sworn to amount to sufficient proof of the deeds being beyond the power of the party to produce, viz.; that the grantee presumed to have the original is out of the state; or that the deed is in the hands of some one beyond the process of the court, or who cannot be compelled lawfully to produce it. The dicta in that opinion are far from giving a clear and authoritative exposition of the statute on all of the various points referred to. In *Christy v. Kavanagh*, 45 Mo. 376, and in *Boyce's Trustees v. Mooney*, 40 Mo. 105, the court seems inclined to narrow the rule dispensing with the oath; and, therefore, considering the plain language of the statute, parties should be held to the preliminary oath, except in the two cases of deeds anterior to a warranty and to a sheriff's deed. Certainly there is no hardship imposed upon a party claiming title through a series of conveyances, in compelling him to produce the original, or to make proper efforts to procure them, especially if his oath that they are lost, or beyond his power, as when in the hands of a non-resident, &c., who is not his own agent, servant, or bailee, is sufficient to let in a certified copy.

This court is not inclined to interpret away the statute further than the supreme court of the state has done; particularly, in consideration of the mischief to be guarded against. Hence, the rule must be held to be, that the preliminary oath is required in all cases ex-

cept the two named, and also in those to be considered in connection with military bounty lands.

As to conveyances of military bounty lands, the statutes have for a long period of time permitted them to be recorded, though not acknowledged or proved, according to the laws of this state in force at the time whenever they were acknowledged or proved according to the laws of the place where executed, and such place was out of this state, and within the United States, and have validated such acknowledgments. The statutes also gave to the recording of such defectively acknowledged deeds the same force as if properly acknowledged, viz. such recording imparts notice. Copies of such instruments, duly certified by the recorder of the proper county, were made evidence on the same conditions as the original, upon proof of the loss or destruction of the original. Rev. St. 1865, p. 448, § 38. But the act of February 27, 1868 (Sess. Acts, p. 51), provides: "That section 36 of chapter 143 of the General Statutes of 1865, be, and the same is hereby amended so as to read as follows:—Section 36. Certified copies, or any other copies of such records as are contemplated in the next preceding section shall not be received in evidence until the execution of the original instrument or instruments from which the records were made shall have been duly proved according to law, unless the said records were made thirty years before the first day of January, 1867; in which case the certified copies may be read in evidence without proof of the execution of the originals." But the thirty-eighth section of chapter 109 of the General Statutes of 1865 pertains to military bounty lands, and section 36 of chapter 143 to lands generally; hence the 38th section of chapter 109 was not repealed by the act of 1868.

The supreme court of Missouri has held (*Bishop v. Schneider*, 46 Mo. 480) that generally, the recording of a deed imperfectly acknowledged does not impart notice to any one, unless recorded prior to the Revised Code of 1855. The exceptional cases as to military bounty lands, if said section 38 in the Code of 1865 is to be considered as repealed, would fall under the general rules concerning proof of deeds—would cease to be exceptional. As the amendatory act, however, is expressly confined to section 36 of chapter 143, what effect is to be given to section 38 of chapter 109, unrepealed, which permits certified copies from the record to be read upon proof of the loss or destruction of the original? The amendatory act requires the execution of the original instrument in the cases to which it refers to be proved according to law, before certified copies are received in evidence. But if the execution of the original is to be proved according to law, what law is meant? The common-law mode, as tolerated under certain early decisions in this state, permits the parties to produce the original and prove the signature of the grantor, and, in some

instances, of the witnesses to the deed, if there were any; and if such is the mode of proof contemplated, why say that after such proof is made of the original before the court, certified copies may be received in evidence? If, on the other hand, proof of the execution of the original is to be made before a competent officer under the statute, and his certificate is to be annexed, then such deeds can be received in evidence only when such course has been pursued, and copies thereof only when the deed with said certificate has been duly recorded. Hence the grave question: does that amendatory act abrogate the common-law mode of proof as recognized in *Clardy v. Richardson*, 24 Mo. 295? In that case it does not distinctly appear whether the deed in question was between the parties to the suit, or other parties, through whom plaintiff claimed title? If, between the parties to the suit, or those having actual notice, then that mode of proof was legitimate; for, by the Missouri statutes, a deed not acknowledged or recorded is valid between the parties thereto and those having actual notice thereof, according to the several decisions of the Missouri supreme court. 17 Mo. 561; 11 Mo. 642. Such seems to have been the uniform ruling of that court under the state statutes; and, if the act of 1868 was designed to work so radical a change, its language would have been more explicit. That court has held a deed unacknowledged and unrecorded not only valid between the parties and those having actual notice, but also against a naked trespasser, (14 Mo. 166); also, that the necessity of acknowledgment and registry, being unknown to the common law, arises only from such statutes in some states as make such requisites essential to the validity of deeds; of which states Missouri is not one. 17 Mo. 561. If, then, the act of 1868, does not exact acknowledgment or proof, according to the statutory requirements for registry, the question still recurs: Why, if the execution of the original is proved by the common-law mode, did the general assembly enact that only when such proof was made a certified copy should be received in evidence? It is evident that the common-law mode or statutory mode may be followed; and, if the latter, then the certified copy may be used. It may be that the framer of the act of 1868 intended also to furnish a substitute for section 38 of chapter 109, in the act of 1865, as well as of section 36 of chapter 143; and thus, as to all deeds, require formal statutory proofs, before a proper officer, with his certificate attached and the subsequent recording thereof, except where the deed, informally acknowledged, had been recorded the prescribed thirty years. If such were his purpose, the act fails to accomplish it. Section 38 of chapter 109, is still the law, and leaves the true rules as follows: A deed for military bounty lands can be received in evidence, where the execution

of the original is proved according to the common-law modes, just as is the case with any other deed when not acknowledged or recorded properly, and it will be valid between the parties, and those having actual notice, and mere trespassers. A certified copy from the recorder's office, where the deed has been recorded and acknowledged under section 35, must be received in evidence upon proof of the loss or destruction of the original. If duly acknowledged according to the Missouri laws, a certified copy is to be received on the same terms as other deeds with valid acknowledgments.

In 46 Mo. 480, it is held generally that a deed recorded with a defective acknowledgment does not impart notice to any one, and that the act of 1865, re-enacting the act of 1855, as to recorded deeds not proved or acknowledged, or imperfectly proved or acknowledged, has no reference to any other deeds than those recorded prior to the taking effect of said act of 1855; consequently no such recording of imperfectly acknowledged deeds after that date imparts any notice whatever. Rev. Code 1865, p. 582, §§ 35, 36. The last cited sections have reference to deeds recorded under the act of 1855, other than deeds for military bounty lands; consequently section 38 of chapter 109 stands unaffected by the act of 1868. In 27 Mo. 235, the court holds that proof of loss or destruction of the original deeds to military bounty lands need not go to the extent of showing the actual destruction, but it will be sufficient to raise the presumption of loss that search was made in the proper place, and by the proper person, and that the deed cannot be found after due diligence in the search. And in 45 Mo. 376, it was held that the party should show that he has in good faith exhausted all the probable sources of information and means of discovery which the facts and circumstances are calculated to suggest, and which are at the same time within his reach. Each case, depending on its own circumstances, should show the extent and thoroughness of the search which the circumstances suggest. Thus that court has gradually restricted the rule, so that the mischief of letting in copies as indicated by the case in 27 Mo. 235, is reduced within narrow and safe limits, and accords with the views intimated by this court before said last decision was rendered.

The general provisions in sections 46 and 47, p. 731, in the Revised Code of 1855, concerning the recording of deeds not acknowledged, &c., certainly do not apply to deeds for military bounty lands, recorded after 1855, and consequently sections 35 and 36 of chapter 143 of the Revised Code of 1865 (page 582), which copy the sections in the act of 1855, do not apply to such deeds. Sections 35 and 36 of chapter 143 (1865) have reference only to deeds recorded before the act of 1855, while sections 35-38 of chapter 109 (1865) have reference to deeds recorded at

any time which fall within the description therein given. As by section 35, c. 109 (1865), deeds acknowledged or proved according to the laws of the state where executed (if for military bounty lands), are admitted to record and validated, it must, if they are not in conformity with Missouri laws at the time, be shown to have conformed to the laws of the place where executed at the time they were so acknowledged, in order to give to the certificate the force of proof. Hence a deed imperfectly acknowledged in New York in 1820, according to the laws both of New York and Missouri at that time, and recorded in Missouri in 1822, is not such a deed as sections 35 et seq. of chapter 109 of 1865 affects. A curative act passed in New York in 1824 to operate on such imperfect acknowledgments in that state cannot act extraterritorially and work curatively upon a deed to Missouri lands. The Missouri curative statutes alone apply to deeds for lands in Missouri. Under the territorial laws of Missouri, a notary public in Maryland was not at that time such an officer as could take acknowledgments of deeds for Missouri.

For a full elucidation of the Missouri Statutes as to imperfectly acknowledged deeds, reference must be had to the two classes of cases. Section 46 of chapter 62 (1855), page 731, and section 47 of the same chapter, reproduced in 1865 as sections 35 and 36 of chapter 143, page 581, refer to deeds not acknowledged or proved at all; also to those acknowledged and proved, but not according to the law in force at the time the same was done, which said deeds had been recorded prior to the act of 1855. Under the general law, the recording of such imperfectly acknowledged instruments would not impart notice to any one; so the general assembly enacted that the recording theretofore of such instruments should be taken out of the general rule, and be held to impart notice. Inasmuch as such effect was to be given to that class of instruments previously recorded, viz. imparting notice, it did not follow that copies of the record should be received in evidence on the same terms as copies of deeds previously recorded according to law. Hence copies of the defective instruments so recorded were not to be received in evidence until the execution of the original instrument was proved according to law. The same rule, as amended by the act of 1868, simply excepts from that stringent rule such of those deeds as were recorded prior to 1837. But the act concerning military bounty lands permits deeds therefor, which, though not acknowledged according to the Missouri law, were yet acknowledged according to the laws of the state where made, to be recorded, and gives to such acknowledgment the same effect as if rightly done originally. Hence, when the original of such a deed is produced, it stands on the same footing as other deeds validly acknowledged; but, if a certified copy of the record is offered, instead of its

being admissible upon the preliminary oath of the loss of the original, or of its being beyond the power of the party to produce it, as other valid deeds, the party offering it must first prove the loss or destruction of the original, or that it is beyond the power of the party to produce it. But in military bounty cases, there must be proof of the loss or destruction of the original, and not merely that it is beyond the power of the party, etc. But if deeds to military bounty lands were put on record prior to 1855, when they were not acknowledged according to the laws of Missouri, or of the state where made, then they fall under the provision of section 36, c. 143 (1865), and the amendatory act of 1868, and the execution of the original must be proved, unless recorded before 1837. Hence the only exception to military bounty deeds is, that when they were acknowledged according to the laws of the state where made, though not according to the Missouri laws at the time in force, the originals can be received in evidence, or certified copies, upon proof of the loss or destruction of the original, unless they were recorded prior to 1837.

All imperfectly acknowledged deeds recorded prior to the act of 1855 may be proved according to the common-law mode in open court; or, if proved according to the statutory mode, before a competent officer, with his certified proof attached, and then duly recorded, a certified copy can be used. Either course is admissible. If the latter be taken, then the properly proved deed according to the statutory mode would place it on the same footing as any other deed properly acknowledged and proved and recorded, with this advantage only, that the recording of the deed originally would have imparted notice from that time, instead of only from the time of recording the properly proved instrument. Those imperfectly acknowledged deeds, in other words, though recorded, and thereby notice of their existence was given, remained to be proved just if they never had been recorded; if military bounty lands, falling under sections 35-38 of chapter 109 (1865); if not military bounty lands, under the general provisions of the statute. Notice imparted by the curative act of 1855 affected notice alone, and not the rules of evidence or proof of execution. The deeds remained to be proved, and could not be proved by producing a certified copy of a record, which, on itself, contained nothing even purporting to be proof of the execution of the original.

It appears that the supreme court of Missouri holds that a husband, by virtue of his life estate, may maintain or defend in ejectment for the possession of his wife's realty. 4 Mo. 106; 22 Mo. 22; 38 Mo. 439.

² [As to curative acts and defective certificates of acknowledgment of deeds, see *Randall v. Kreiger*, Case No. 11,554; *Morton v. Smith*, Id. 9,867.]

² [From 2 Dill. 23.]

Case No. 18,097.

WRIGHT v. UNITED STATES.

[1 Hayw. & H. 201.]¹Circuit Court, District of Columbia. June 4,
1844.

FALSE PRETENSES—EVIDENCE OF SIMILAR CRIMES.

It is not error in the court to allow evidence to go to the jury in a trial for obtaining money under false pretenses that the prisoner made false representations to other persons for the purpose of obtaining money; but it is error to allow evidence to go to the jury that the prisoner had obtained money by means of said representations.

At law. In error from the criminal court. [William S. Wright] indicted for obtaining money under false pretenses.

James Hoban, for prisoner.
Philip R. Fendall, for the United States.

The prisoner was convicted and sentenced to suffer imprisonment and labor in the penitentiary of the District of Columbia for the period of two years. Exceptions were made to the admissibility of the following evidence: The testimony of Mr. Hawley: That the prisoner borrowed ten dollars from him about seven years ago upon statements of the prisoner that he had shipped large quantities of cotton to the North; that he was a son of the collector of the port of St. Johns, Nova Scotia; that he was very intimate with a number of clergymen and spoke familiarly of them, and concerning them, and that he knew several bishops, among them—the bishops of Nova Scotia, of Massachusetts, and of South Carolina—with all of whom Mr. Hawley, the witness, was acquainted; on the strength of which asserted acquaintance of the prisoner the witness lent the money; that the money never was repaid him; that he does not know whether these statements were true or false. And further testimony of J. M. Cutts: That the prisoner called on him to borrow money some two years ago and said that he had certain papers and deeds of Mr. Madison which he had lost, and that he was out of money; that he does not know whether those statements were true or false; that he called himself Scott; that witness gave him no money.

After argument by counsel and on consideration by the court, the following opinion was rendered: That the criminal court did not err in allowing evidence to go to the jury that the prisoner had represented himself to Mr. Hawley, a witness in this cause, as a son of the collector of the port of St. Johns, in Nova Scotia, or that the prisoner represented himself to J. M. Cutts, another witness in the cause, as being named Scott; that the said criminal court erred in allowing evidence to go to the jury that the prisoner had obtained money from the said Mr. Hawley by means of the representations set

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

out in the bill of exceptions, and it is ordered and adjudged by this court that the judgment of the said criminal court in this cause be reversed and that this cause be remanded, with directions to award a venire facias de novo.

Case No. 18,098.

WRIGHT v. UNITED STATES.

[1 Hayw. & H. 211.]¹

Circuit Court, District of Columbia. Jan., 1845.

OBTAINING GOODS UNDER FALSE PRETENCES—INDICTMENT.

In an indictment under the act of congress of March 2, 1831 [4 Stat. 448], for obtaining goods, etc., by false pretences, it is error to aver "that by reason of which false pretence the prisoner did then and there unlawfully obtain," etc.

James Hoban, for prisoner.
P. R. Fendall, for the United States.

The court on petition of the plaintiff issued two writs of error. The defendant in the criminal court was found guilty of obtaining money under false pretences on two indictments each for separate and distinct acts. One of them that Wm. S. Wright, etc., unlawfully did falsely pretend to one, John P. Van Ness that he the said Wm. S. Wright was a brother of one Silas Wright Jr., a senator of the United States, etc., by reason of which said false pretence the said Wm. S. Wright did then and there unlawfully obtain from the said John P. Van Ness two bank notes each for the payment of money to the amount of ten dollars. The other that Wm. S. Wright, etc., unlawfully did falsely pretend to one Edward Dyer that he was a brother to Silas Wright, a senator of the United States by reason of which false pretence the said Wm. S. Wright did then and there unlawfully obtain from the said Edward Dyer a certain instrument in writing for the payment of money. There were other counts in this latter indictment. The prisoner was found guilty on both indictments.

The error assigned by the defendant was: Because it is apparent on the face of the record in these cases that the prisoner is charged with obtaining money by a false pretence, whereas the act of congress² only applies to obtaining money by false pretences, and for other reasons and errors.

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

² Section 1: "That from and after the passage of this act, every person who shall be convicted in any court of this District of Columbia of any of the following offenses, to wit: Obtaining by false pretenses any goods or chattels, money, bank note, promissory note, or any other instrument in writing for the payment or delivery of money or other valuable thing, shall be sentenced to suffer punishment by imprisonment and labor."

Sec. 12: "That every person duly convicted of obtaining by false pretences, any," etc. Approved March 2, 1831 (4 Stat. 448).

The criminal court (Judge Dunlap presiding) overruled the objection.

The following points were raised in the arguments by the several counsels: (1) Is the offense such as is punishable under the statute? (2) Is the want of venue of the pretence fatal? (3) Is there a venue? (4) Is one pretence only punishable under the statute against false pretences? The latter point was the only one pressed.

Mr. Hoban, for plaintiff, contended that in the first Van Ness case the indictment charges the prisoner with obtaining two bank notes from General Van Ness by the false pretence of representing himself as the brother of Silas Wright, a member of the United States senate. The language of the penitentiary act applies to persons duly convicted of obtaining goods, money, bank-notes, etc., by false pretences, here only one false pretence is charged. Penal statutes must be construed strictly, stealing horses does not apply to stealing a horse. 1 Bl. Comm. 88. To meet this a declaratory act was required, and the act of 2 & 3 Edw. VI. c. 33, that took away the benefit of clergy from the case of stealing horses; before that act clergy was allowed in the case of stealing a horse by statute. In Hassel's Case, 1 Leach, 1, stealing a bank note was held to be included under the act punishing the larceny or stealing "any bank-notes" upon the like principle burning a house was held punishable under the act for burning any houses.

The argument of the attorney general in the case in Leach, shows that case to turn upon other portions and the peculiar phraseology of other portions of the same law. These cases are not in point. The question here is not to what a plain law applies but what that law is, whether the obtaining goods, etc., must be by one or more pretence. The English acts of false pretences use this language: "Any pretence or pretences." Our penitentiary act speaks only "of false pretences." *Rex v. Goodhall*, 11 Ryan, 343 [Russ. & R. 461]: this was a case of obtaining meat upon a promise, at the same time, to send the money, which was not done. The twelve judges held the conviction wrong, saying: "It was merely a promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it." In the case of *Jones v. U. S.* [Case No. 7,499], April 9, 1840 (Cranch, C. J.), the court say that they are to judge whether the averment contains a false pretence within the contemplation of the law. 4 Pick. 177 (per curiam): "A mere naked lie (is this case any mere?) may not be sufficient to sustain an indictment on this statute, for it is not the policy of the government to punish criminally every wrong which is committed. It is difficult, no doubt, to draw the line."

Mr. Fendall in his notes, says: In the notes handed to the court by the prisoner's

counsel, he refers to the facts of the case. There would be no difficulty in meeting the arguments suggested, if such a course were admissible, but it is not so. The proceedings in the Van Ness case before the court on a writ of error to the criminal court for its refusal to correct the judgment. Of course no question can come before the appellate court, except such as arises on the face of the indictment. As to the nature of the offence, Mr. Fendall referred to the case of *People v. Stone*, 9 Wend. 182, under 1 Rev. St. N. Y. pp. 410, 616, and *People v. Genung*, 11 Wend. 18, under 2 Rev. St. N. Y. pp. 677, 653; the opinion of Cranch, C. J., in the case of *Jones v. U. S.* [supra], April 9, 1840. As to the simple pretence, Mr. Fendall cited, 1 Bl. Comm. (Christian's notes) 88; Archb. Cr. Prac. & Pl. (8th Ed.) 239; Hassel's Case, 1 Leach, 1-5; and *U. S. v. Wiltberger*, 5 Wheat. [18 U. S.] 76.

The judgment of the criminal court was reversed.

Case No. 18,099.

WRIGHT et al. v. UNITED STATES.

[2 Paine, 184.]¹

Circuit Court, S. D. New York.²

CUSTOMS DUTIES—FORFEITURE OF GOODS.

Under section 14, of the act of congress of July 14, 1832 [4 Stat. 593], it is not a distinct and substantive ground of forfeiture that on the opening, &c., of a package of imported goods, &c., the same are not found to correspond with the entry at the custom-house.

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

In admiralty.

THOMPSON, Circuit Justice. This case comes up on a writ of error from the district court for the Southern district of New York. An information was filed in the district court against five cases of merchandise, alleging the same to have become forfeited. The information alleges the forfeiture incurred in various ways; but the question upon which the cause turned arises upon the 14th section of the act of congress of July 14, 1832, entitled "An act to alter and amend the several acts imposing duties on imports." That section is as follows: "That whenever, upon the opening and examination of any package or packages of imported goods, composed wholly or in part of wool or cotton, in the manner provided by the fourth section of the act for the more effectual collection of the import duties, approved on twenty-eighth day of May, one thousand eight hundred and thirty, the said goods shall be found not to

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

² [Date not given. 2 Paine includes cases decided between 1827 and 1840.]

correspond with the entry thereof at the custom-house, and if any package shall be found to contain any article not entered, such article shall be forfeited," &c.³

Upon the trial, the court decided that the construction to be given to this section was, that if the goods found in the package do not correspond with the entry, they are subject to forfeiture; that is, that the want of correspondence between the entry and the goods found in the package, was a distinct offence and a substantive ground of forfeiture, under this section of the law; and whether it be so or not, is the only question to be decided here. This section of the law is certainly very inartificially drawn, and its interpretation may admit of doubt; but I think the construction adopted in the district court cannot be sustained. If this want of correspondence is considered a separate, distinct and substantive ground of forfeiture, there is an entire omission of any express words declaring a forfeiture as the penalty for such want of correspondence. It must arise by implication, and this would violate the rules of construction applicable to penal statutes. If this is to be considered a distinct offence, it is difficult to say what circumstances shall constitute it. Any disagreement is a want of correspondence, and the clause is too vague and indefinite in the description of the offence. The forfeiture, if incurred under this clause in the section, must be a forfeiture of the whole package in which the goods shall

³ Where a seizure of merchandise is made on suspicion of its having been illegally imported, it is the duty of the officer making the seizure to institute proceedings in rem in the district court, or if the suspicion should prove to be unfounded, to return the goods to the owner. By the act of 24th September, 1789 [1 Stat. 73], exclusive original jurisdiction is given to the district courts in all civil causes of admiralty and maritime jurisdiction, including seizures under laws of import, &c. And if the officer making the seizure shall refuse to institute the proper proceedings, on application of the aggrieved party, the court will compel him to proceed to adjudication, or to abandon the seizure. *The Ann*, 9 Cranch [13 U. S.] 289. In the case of *Galston v. Hoyt*, 3 Wheat. [16 U. S.] 246, the court remark: "The pendency of the suit in rem would be a good plea in abatement, or a temporary bar of the action, for it would establish that no good cause of action then existed. If the action be commenced after a decree of condemnation, or after an acquittal, and there be a certificate of reasonable cause of seizure, then in the former case by the general law, and in the latter case by the special enactment of the statute of the 25th April, 1810, c. 64, § 1, the decree and certificate are each good bars to the action. But if there be a decree of acquittal, and a denial of such certificate, then the seizure is established conclusively to be tortious; and the party is entitled to his full damages for the injury." That the certificate of condemnation, as also the certificate of acquittal, is equally conclusive as to the character of the seizure, is clearly established by the authorities. *Wilkins v. Despard*, 5 Term R. 112, 117; *Scott v. Shearman*, 2 W. Bl. 977; *Henshaw v. Pleasance*, Id. 1174; *Geyer v. Aquilar*, 7 Term R. 631; *Slocum v. Mayberry*, 2 Wheat. [15 U. S.] 1; *The Apollon*, 9 Wheat. [22 U. S.] 362.

be found not to correspond with the entry, and the words "shall be forfeited," contained in the next clause, cannot be construed as applying to the antecedent clause; it provides for a distinct case: "And if any package shall be found to contain any article not entered, such article shall be forfeited." The forfeiture here is expressly limited to the article not entered, and cannot, by any construction, be extended to the whole package, which it must be if applied to the antecedent clause. The last clause in this section, which repeals a part of the 4th section of the act of 1830 [4 Stat. 410], would seem to afford some countenance to the construction that this want of correspondence was a distinct ground of forfeiture: "And so much of the said section as prescribes a forfeiture of goods found not to correspond with the invoice thereof, be and the same is hereby repealed." But this is evidently a mistaken construction or description of the effect and operation of that section of the act of 1830. It gives no forfeiture for such want of correspondence. It directs the collector to cause one or more packages of every invoice to be opened and examined, and if the same shall be found not to correspond with the invoice, or to be falsely charged in such invoice, the collector shall forthwith order all the goods contained in the same entry to be inspected, &c.; and if any package shall be found to contain any article not described in the invoice, or if such package or invoice be made up with intent, by a false valuation or extension or otherwise, to evade or defraud the revenue, the same shall be forfeited. The want of correspondence between the package and the invoice is not here made the ground of forfeiture; but its discovery is to lead to further examination, and the forfeiture grows out of other circumstances developed by such examination, viz.: that the package is found to contain any article not described in the invoice, or that the package or invoice was made up with intent to defraud the revenue. We find, also, in the act of the 1st of March, 1823 (*Pamph.* p. 23, § 15 [3 Stat. 735]), the same language made use of with respect to the want of correspondence. The collector is required to examine one or more packages, and if the same be found not to correspond with the invoice thereof, or to be falsely charged in such invoice, a full inspection of all the goods contained in the same entry shall be made, and, if subject to an ad valorem duty, an additional duty of fifty per cent. on the appraised value is to be demanded; and, whether subject to an ad valorem or specific duty, if any package be found to contain any article not described in the invoice, the whole package shall be forfeited. The ground of forfeiture here is not the want of correspondence between the package and invoice, but the forfeiture grows out of the discovery that the package contains some articles not described

in the invoice; and when we find in the acts of 1823 and 1830 the same language employed as in the act of 1832, and as in the two former there can be no pretence for the construction that a want of correspondence between the package and invoice works a forfeiture, so the latter ought not to receive a different construction. These laws being in pari materia, may be taken together for the purpose of discovering the true interpretation. In none of them is this want of correspondence made a distinct and substantive ground of forfeiture; but only imposes upon the collector the duty of further examination, and the forfeiture depends upon other discoveries. The consequence of finding in the package articles not described in the invoice was different, under the acts of 1823 and 1830, from that provided by the act of 1832. In the two former, such discovery worked a forfeiture of the whole package; in the latter, the article not entered is only forfeited. The judgment of the district court must, accordingly, be reversed.

WRIGHT (UNITED STATES v.). See Cases Nos. 16,769-16,778.

WRIGHT (UNITED STATES ex rel. HENDERSON v.). See Case No. 16,777.

WRIGHT (UNITED STATES ex rel. TURNER v.). See Case No. 16,778.

Case No. 18,100.

WRIGHT v. WATERS.

[2 Cranch, C. C. 342.]¹

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

DISTRESS FOR RENT.

Costs do not accrue, upon levying a distress for rent, unless the goods are sold.

Replevin of goods distrained for rent.

Mr. Dermott for defendant, moved the court to allow the constable's poundage fees for levying the distress, to be taxed as costs in replevin, the defendant having obtained a verdict for the rent arrear.

Mr. Redin, contra, contended that those fees did not accrue in this action, but, if they accrued at all, they accrued before the suit was commenced. But they did not accrue at all, for Act Md. 1779, c. 25, gives them only in case of sale; but here the goods were replevied, and not sold.

THE COURT (THRUSTON, Circuit Justice, absent) said that the poundage fees had not accrued, as no sale had been made.

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

Case No. 18,101.

WRIGHT v. WELLS.

[Pet. C. C. 220.]¹

Circuit Court, D. Pennsylvania. April Term, 1816.

REMOVAL FROM STATE COURT—JURISDICTIONAL AMOUNT—RELEASE OF PART OF CLAIM.

If a cause be removed from a state court by the defendant, and the plaintiff declares in the circuit court of the United States for more than five hundred dollars, the plaintiff cannot, by a release of part of his debt, so as to reduce it to less than five hundred dollars, take away the jurisdiction of the circuit court.

[Cited in Ladd v. Tudor, Case No. 7,975.]

Rule to show cause why this suit, which had been removed from the state court, should not be remanded, on a suggestion that the sum demanded is less than five hundred dollars. After this suit was entered in the state court, and before a declaration was filed, the defendant filed his petition, praying that the cause might be removed into this court, which was directed accordingly. On an appearance being entered in this court, the plaintiff filed a declaration, and laid his damages at one thousand dollars.

Mr. Rawle showed cause, and relied upon the damages in the declaration, as being sufficient to maintain the jurisdiction of this court. It was answered by Mr. Lewis, for the plaintiff, that the sum really demanded is less than five hundred dollars, as is admitted by the plaintiff on the record.

BY THE COURT. The state court was not bound to grant the petition for removal, unless it was satisfied, that the sum in dispute amounted to five hundred dollars. Having done so, it follows, that that court was so satisfied. In this court the plaintiff has laid his damages at five hundred dollars, which is sufficient for the jurisdiction of this court, and it cannot be ousted by the plaintiff's releasing so much of his demand, as to reduce it below that sum. Rule discharged.

WRIGHT (WELLS v.). See Case No. 17,405.

Case No. 18,102.

WRIGHT v. WEST.

[1 Cranch, C. C. 303.]²

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

WILL—CHARGE ON LAND—CERTIFICATE OF OFFICER.

1. A devise of lands, "after payment of debts," subjects the land to the payment of the debts.

2. Where a clerk certifies the mayor, it is not necessary that the mayor should certify the clerk.

[Cited in Addison v. Duckett, Case No. 77.]

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

² [Reported by Hon. William Cranch, Chief Judge.]

Bill in equity for the sale of real estate to pay debts. The words of the will were, "I give the whole of what I may be possessed of, at my decease, and after my debts are paid, to Mrs. West." The plaintiff's claim was for a balance due for work and labor.

E. J. Lee, for defendant, demurred to the bill, because it did not state that the plaintiff could not establish his debt at law, nor that he could not prove the amount of assets at law. If the will makes the real estate assets, the executrix is bound to return them in the inventory.

Demurrer overruled.

The defendant then offered an answer, sworn before an alderman of Richmond, who was ex officio a justice of the peace. Rev. Code, 72. The alderman was certified by the mayor of Richmond, who was certified by the clerk of the court of hustings.

Mr. Taylor, for plaintiff, objected to the answer, because the mayor had not certified the clerk of the court of hustings.

But THE COURT overruled the objection, upon consideration of the case of Potts v. Ghequiere, in this court in March, 1805 [Case No. 11,346].

WRIGHT (WILKINS v.). See Case No. 17,666.

WRIGHT, The CAPT. GEO. W. See Case No. 2,393.

WRIGHT, The FRANCIS. See Case No. 5,044.

WRIGHT, The GEORGE S. See Case No. 5,340.

WRIGHT, The JAMES A. See Cases Nos. 7,190 and 7,191.

WRIGHT, The M. W. See Case No. 9,983.

Case No. 18,103.

In re WRISLEY et al.

[17 N. B. R. 259.]¹

District Court, S. D. New York. Feb. 22, 1877.

BANKRUPTCY—LEVY OF EXECUTION—PROCEEDS OF MORTGAGE SALE.

The bankrupts having made default in the payment of a chattel mortgage, the mortgagees, pursuant to the terms thereof, took possession of the mortgaged property. Before the sale a creditor issued execution to the sheriff. One hour thereafter the petition was filed. There was a surplus on the sale of the property. *Held*, that at the time the execution was issued the bankrupts had no leviable interest in the property, and that the creditor had no lien on the surplus to the exclusion of the assignee.

Claim of Beinicke & Co. to the surplus arising on the sale of certain mortgaged property of the bankrupts [Frank Wrisley and John L. Wrisley], on the ground that

they held a lien thereon by virtue of an execution issued prior to the filing of the petition.

W. S. Palmer, for assignee in bankruptcy.
C. Goeller, for Beinecke & Co.

BLATCHFORD, District Judge. The chattel mortgage executed by the bankrupts to Field and others, August 31, 1875, grants, bargains, and sells to the mortgagees all the household furniture, etc., then on the premises and mentioned in the schedule, to have and to hold the same to the mortgagees forever, on condition that if the payments of money specified shall be made as they shall become due, and if the covenants of the lease shall be kept, the mortgage shall be void. The instrument further provides, that until default be made, the mortgaged property shall remain where it is, and that, if default be made in the payment of rent, or in the performance of the conditions of the lease by the lessee, the mortgagees may take possession of the mortgaged property and sell it at public auction and receive the proceeds, and apply them, first to the expenses of sale, and next to paying claims arising under the lease, and the surplus to go to the mortgagors.

It is shown that prior to the issuing to the sheriff of the execution on the judgment of Beinicke & Co., there had been default in the payment of the rent on the lease, and the mortgagees had lawfully, and in accordance with the terms of the mortgage, taken possession of the mortgaged property. Under the law of New York, no leviable interest in the property remained in the mortgagors at the time the execution was issued. *Hall v. Sampson*, 35 N. Y. 274. The legal title, the right of possession, and possession in fact, were then out of the mortgagors and in the mortgagees. The petition in bankruptcy was filed one hour after the execution was issued, and its operation was such that the right of the assignee in bankruptcy subsequently appointed attached to the property, in priority to any right of Beinecke & Co. Nor, although there was a surplus of the proceeds of the mortgaged property, which would have returned to the mortgagors, if there had been no bankruptcy, can the issuing of the execution operate as a lien on such surplus in exclusion of the right which the general creditors, represented by the assignee in bankruptcy, have to it.

I do not think it is satisfactorily established by the evidence, that there was any property levied on, or capable of being levied on, or attempted to be levied on, or in possession of the mortgagees, when the execution was issued, that was not covered by the mortgage, or that any property not covered by the mortgage was sold by the mortgagees. It results that the claim of Beinecke & Co. must be wholly rejected, with costs of the proceedings, to be paid by them.

¹ [Reprinted by permission.]

Case No. 18,104.

WRITER v. The RICHMOND.

[2 Pet. Adm. 263.]¹

District Court, D. Pennsylvania. 1807.

INVALID SEAMAN—RIGHT TO WAGES.

A mariner affected with a severe pulmonic disease, shipped as an able-bodied seaman, to perform a voyage to the East Indies. He died of this complaint soon after the vessel left the port. The claim of his administrator to wages for the voyage was rejected by the court.

[Cited in *The Mary Sanford*, 58 Fed. 926.]

The mariner Sheffer had shipped on board the *Richmond* to perform a voyage to the East Indies, and back to Philadelphia. He died on the outward passage; and now Writer, his administrator, claimed wages for the whole voyage. The decisions of the court in the case of the administrators of *Walton v. The Neptune* [Case No. 17,135], were relied on by the counsel for the claimant. The surgeon of the *Richmond* was examined, who stated, that Sheffer was affected with a severe pulmonic disease at the commencement of the voyage, and fell a victim to that complaint soon after the *Richmond* left the port of Philadelphia. It was stated, that at the time he shipped, the master of the *Richmond* objected to him as not being able from sickness to perform the intended voyage, but he insisted on his being an able-bodied seaman, and as such was received on board.

THE JUDGE said he could not consider the claim of the administrator as well-founded. The principles established in former cases could not be applied to this. The mariner was not competent to perform the voyage for which he had shipped as an able-bodied seaman, and it was a fraud on his part to have represented himself as such. Merchants were not to be thus imposed on by mariners being placed on board their vessels to die, and thus to give a foundation to claims of this nature.

WROE (MAYNADIER v.). See Case No. 9,351.

Case No. 18,105.

In re WRONKOW et al.

[15 Blatchf. 38; ² 18 N. B. R. 81; 26 Pittsb. Leg. J. 2.]

Circuit Court, S. D. New York. July 2, 1878.

COMPROMISE BY BANKRUPTS—APPROVAL BY COURT
—COMPOSITION PROCEEDINGS—ATTENDANCE OF BANKRUPT.

1. The jurisdiction of the district court, as to the composition proceedings, in this case, in bankruptcy, sustained.

2. A composition of 20 per cent., payable in money, on time, secured by notes, leaving certain real estate which had passed to the assignee in bankruptcy, to be converted into money, and

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

² [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

paid to the creditors, in addition, is a lawful composition.

3. A bankrupt is not required, by the statute, to attend any other meeting, in composition proceedings, than the first one.

[Approved in *Re Wilson*, Case No. 17,781.]

4. A decision of the creditors excusing the bankrupt from attendance, ought not to be disturbed by the district court, unless it appears that wrong has been done to the minority creditors; and, after the district court has affirmed the action of the majority, the circuit court, on review, ought not to interfere, except in a very clear case.

[Approved in *Re Wilson*, Case No. 17,781.]

5. If the creditors interested in composition proceedings fail to attend to their interests in time, they must not expect the courts to relieve them from the consequences of their neglect, unless they make a clear case for equitable interference in their behalf.

6. Where the creditors, and the register, and the district court have approved a composition, the circuit court ought not to interfere, unless specific errors in the action of the creditors or of the district court are pointed out, which, if sustained, would change the judgment.

[Cited in *Re Joseph*, 24 Fed. 138.]

[Proceedings in the matter of Herman Wronkowitz and Thomas G. Hogan, bankrupts.]

Cephas Brainerd and James S. Stearns, for creditors.

Melville H. Regensburger, for bankrupts.

WAITE, Circuit Justice. This is a petition, under the supervisory jurisdiction of this court, in bankruptcy, to set aside an order of the district court directing that a resolution of creditors, accepting a proposition of compromise made by the bankrupts, be recorded. The objections are: (1) That the court had no jurisdiction; (2) that the compromise was not payable in money; (3) that Hogan, one of the bankrupts, was excused from attendance at the meetings of the creditors, without sufficient cause; (4) that the composition was not for the best interest of all concerned.

There can be no doubt of the jurisdiction of the district court. Composition proceedings must be had in the court where the suit in bankruptcy is pending. A petition in involuntary bankruptcy was filed against these bankrupts in the district court, and it alleged facts sufficient to show jurisdiction. Upon this petition an adjudication in bankruptcy was had, and an assignee was appointed and qualified. Wronkowitz, one of the partners, was a resident of the district, and Hogan, the other, appears by attorney in the composition proceedings.

The offer was of payment in money, but on time, secured by notes. This was the substance of the proposition. By reason of the bankruptcy proceedings, the creditors had already acquired an interest in the real estate which had passed to the assignee by the conveyance of the register. It does not invalidate the proposition that, in addition to the money to be paid, this real estate was to remain with the assignee, to be converted into money, for the use of the creditors, to whom, in reality, it then belonged. The offer, in effect, was,

that the creditors should retain the real estate which they already had, and that the twenty per cent., in money, should be paid in addition. There is nothing wrong in this.

The debtors are not, by law, required to attend any meeting of the creditors but the first, and that is to be considered as continuing until the vote is taken upon the resolution to accept. If, being summoned to attend a future meeting, they fail to appear, that fact may, with great propriety, be taken into consideration by the court, in determining whether the resolution of acceptance should be admitted to record. As the composition proceedings are part of the bankruptcy suit, it would, undoubtedly, be in the power of the court, upon proper showing made, to compel an attendance; but the law itself does not make it obligatory upon the bankrupt to be present, except at the first meeting.

He is to be present then, unless prevented by sickness, or other cause satisfactory to the meeting. Of the sufficiency of the cause the creditors themselves are to decide, in the first instance, and their decision should not be disturbed by the court, except for good cause shown. It must, in some form, appear that wrong has been done to the minority creditors, by reason of the vote which was given. After the district court has affirmed the action of the majority, this court, in the exercise of its supervisory jurisdiction, ought not to interfere, except on a very clear case. While the rights of the minority creditors should be carefully watched and protected against all unreasonable acts of the majority, the judgment of the requisite majority should always be allowed to prevail, unless obtained without sufficient consideration, or by some unfairness or undue influence.

In this case, the excuse presented for one of the debtors was his absence in California, where he resided. This was fairly submitted to the meeting. It seems to have been fairly considered. The meeting was well attended. All the objections made were fully presented and duly deliberated upon. The result was a vote in favor of the sufficiency of the excuse. The petitioners were not present at this meeting. For some cause satisfactory to themselves they stayed away. At the second meeting called by the court to inquire whether the resolution of acceptance had been properly passed, and whether it was for the best interest of all concerned that the resolution should be recorded, the petitioners appeared for the first time. They then complained of the absence of the one debtor at the first meeting, and insisted that he ought not to have been excused. At their request, the resident debtor submitted to a further examination from them, but, notwithstanding all this, a report in favor of the acceptance was again secured, both from the register and the creditors. This being done, the petitioners appeared before the court, and still further urged their opposition to the composition. They were again unsuccessful, and now are here. Apparently, every

other creditor is satisfied but themselves. If they had availed themselves of their privileges under the law, and had attended the first meeting, to urge their views upon the consideration of the creditors there assembled, the result might have been different, and, certainly, they would have occupied a much more favorable position for inviting the attention of this court to their complaints now. If creditors interested in composition proceedings fail to attend to their interests in time, they must not expect the courts to relieve them from the consequences of their neglect, except they make a clear case for equitable interference in their behalf. That has not been done here.

It is next insisted, that the compromise is not for the best interest of all concerned. The requisite majority of the creditors, at the first meeting, thought it was. The same thing occurred at the second meeting, called specially to consider that very question. The register coincided in the opinion of the creditors, and so reported. The district court, upon full argument, has decided in the same way. This court ought not to interfere, under such circumstances, unless specific errors in the action of the creditors or the court below can be pointed out, which, if sustained, would change the judgment. Mere general questions of expediency must, ordinarily, be considered as settled, when the requisite majority of the creditors, the register, and the district court all agree. Nothing short of fraud or gross error in judgment should call into exercise the jurisdiction of this court in such a case. That does not appear here. This court is simply called upon to decide, upon the whole case, whether the creditors and the district court have come to a wrong conclusion as to what is for the best interest of all concerned.

The order of the district court is affirmed.

WURTS, The JOHN. See Case No. 7,434.

WURTZ (JOY v.). See Case No. 7,555.

WYANDOT COUNTY (COLER v.). See Case No. 2,987.

WYANDOTTE CITY (EIDEMILLER v.). See Case No. 4,313.

Case No. 18,106.

In re WYATT.

[2 N. B. R. 288 (Quarto, 94); 1 Chi. Leg. News, 107.]¹

District Court, D. Kentucky. 1868.

DISCHARGE OF BANKRUPT—OPPOSITION.

Where a specification in opposition to the discharge of a bankrupt is that the bankrupt has concealed his effects, or that he has sworn falsely in his affidavit annexed to his inventory of debts, it must be shown that the acts were intentional in order to preclude a discharge.

[Cited in Re Boynton, 10 Fed. 279; Re Warne, Id. 379.]

¹ [Reprinted from 2 N. B. R. 288 (Quarto, 94), by permission. 1 Chi. Leg. News, 107, contains only a partial report.]

On an application for a discharge by the bankrupt [W. Wyatt], certain creditors, Morton, Galt & Co., bankers, opposed the same on two grounds, viz.: First. That he concealed an interest of three thousand dollars (which they allege he had in a lot of land and four cottages thereon), with the intent to defraud his creditors. Second. That he wilfully swore falsely in the affidavits annexed to his petition and schedules, in wilfully and intentionally omitting from the schedules of his estate the above-mentioned interest.

The following is substantially the evidence in the case: On the 2d of October, 1866, the bankrupt gave his wife four notes of one thousand dollars each, which he had received in part payment for his undertaking establishment on the corner of Seventh and Jefferson streets, Louisville. He had sold it to L. D. Pearson. Said notes were due respectively in one, two, three, and four years. In January following he took back two of these notes and gave them to George W. Morris as collateral security for the balance of the purchase-money then owing by the bankrupt to Morris. The wife of the bankrupt owns a lot of ground of one hundred and two feet front, the legal title of which has been held by her trustee for about eleven years. On this ground she erected four cottage houses. It does not distinctly appear whether they were built in the fall of 1866 or in the spring of 1867. The other two notes she used in the construction of these cottages. It does not appear at what exact time the notes were so used. The estate of the bankrupt, in October, 1866, amounted to twenty-four thousand five hundred dollars, over and above all his debts, which at that time amounted to about two thousand or two thousand five hundred dollars. The bankrupt was possessed of the above estate for six or eight months after the date of the gift to his wife. In July, 1867, the bankrupt, who was then in Memphis, sent his wife by express one thousand dollars. Of this she paid two hundred and fifty dollars for taxes and family expenses. It does not appear what became of the balance. The counsel for the creditors contended that the bankrupt was invested with an interest of three thousand dollars in his wife's property; that he failed to mention it, and that he concealed the same. By a statute of Kentucky "all conveyances, gifts, &c., made without valuable consideration, are void as to existing liabilities." Under this statute it has been held that it makes no difference how much the assets of the grantor may be in excess of his liabilities.

The counsel for the bankrupt contended that the bankrupt had no interest whatever in his wife's property, for these reasons: First. Whether the gift was fraudulent or not, or void or not, the gift as between Wyatt and his wife was conclusive, as to Wyatt, that he had no further interest, as he had conveyed it to his wife. Whether the

creditors have, is another question. Second. Because a husband cannot encumber the separate estate of his wife, it having been decided in the case of Fetter v. Wilson, 12 B. Mon. 90, that a husband cannot even create a mechanic's lien on his wife's property. Third. That the gift was not, even under the statute of Kentucky, constructively fraudulent or void, as there is a difference between gifts under such circumstances made to strangers and those made where love and natural affection is the consideration (9 B. Mon. 514; 1 Metc. [Ky.] 351); and that, having no interest in his wife's property, it was impossible for him to conceal that which he did not have. If these positions and views of law were not correct, the bankrupt, who is a business man, could not have known that under the law he was vested with an interest in his wife's property; that whether he had an interest or not, was an abstruse and recondite question of law, which the bankrupt did not know and could not be expected to know; that, if it should be decided that he has an interest, he has merely failed to put it in his lists of assets, because he did not know he had it, by reason of his ignorance of the law; and that a mere omission to mention an interest is not made a good ground of opposition by the bankrupt act [of 1867 (14 Stat. 517)], and that such an omission is no concealment; that a concealment must be wilful, intentional, and deliberate, and that it was irrational to say that a man concealed that which he neither had nor knew he had.

J. G. Wilson and Wm. Mix, for Morton, Galt & Co.

P. A. Gaertner, for bankrupt.

BALLARD, District Judge. This case is now heard on specifications of grounds of opposition to the bankrupt's discharge. Two grounds of opposition are specified: First. That the bankrupt, knowing his interest to the extent of three thousand dollars in a lot and four cottage houses (particularly described), did conceal his aforesaid interest with intent to defraud his creditors. Second. That the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition and schedules, in that he has wilfully and intentionally omitted from the schedule of his estate an interest of three thousand dollars in and to four cottage houses erected on a lot of land (particularly described), whereof the legal title was held for his wife, &c.

The proof shows that the bankrupt, in the fall of 1866, or in the spring of 1867, allowed his wife to expend the proceeds of two notes^f belonging to him, each amounting to one thousand dollars, and perhaps other of his money, amounting to a few hundred dollars. In erecting four cottage houses on a lot of land, the legal title of which was in Wm. Hatzell, for her use. The bankrupt filed his original petition on the 6th of February,

1868, and in his schedules discloses debts amounting to between eight and ten thousand dollars, and assets of little or no value. The bankrupt did not, in his schedules, disclose his interest, if he has any, in said cottage houses; nor did he in any manner disclose the same until his examination, which took place on the 20th of April, 1868. It does not appear from the papers before me, at whose instance the examination took place, but, so far as the papers show, this examination gave the first information to the opposing creditors of the supposed interest of the bankrupt in the cottage houses mentioned.

The twenty-ninth section of the bankrupt act specifies all the grounds of opposition to a bankrupt discharge. Among other things it is therein provided that "no discharge shall be granted * * * if the bankrupt * * * has concealed any part of his estate or effects." The term "concealed" implies something wilful, intentional. One cannot be said to conceal property, unless he not only knows that he owns it, but unless he also intentionally, not inadvertently, conceals the same from his assignee or creditors. The failure of a bankrupt, though wilful, to disclose in his schedule all his property, is not by the bankrupt act made a specific ground for withholding his discharge. It is not therefore clear to me that should a bankrupt immediately on the election of his assignee disclose to him all the property owned by him at the time of the filing his petition, and promptly deliver to the assignee all the property belonging to him, he could be refused his discharge—if no other ground of opposition were specified than that he had concealed his estate or effects, even although it should appear that he had wilfully omitted to disclose such property in his schedule annexed to his petition. This possibly might be regarded in law as a meditated concealment, though not an actual concealment. It is not necessary, however, to decide the question here suggested, and it is not decided. But whether the specification be that the bankrupt has concealed his effects or that he has wilfully sworn falsely in his affidavit annexed to his inventory, it is equally required that the act should be shown to be intentional to preclude a discharge.

The evidence in the case is exceedingly limited. It consists entirely of the statements made by the bankrupt in his examination, and of the deposition of L. D. Pearson and P. A. Gaertner. The latter deposition, I think, discloses nothing material, and that of Pearson only discloses that he gave the bankrupt, on the 2d or 3d of October, 1866, four notes of one thousand dollars each, payable in one, two, three, and four years from date; that he paid one of the notes to Geo. W. Morris; that Messrs. Henning & Speed, and A. D. Hunt hold two of the notes, and that one note is in suit. When the two notes were passed to Henning & Speed, and A. D. Hunt, does not appear, but it is probable, from the testimony of the bankrupt, that they were so assigned

between the 2d of October, 1866, and the following summer; and it appears from the same testimony that two of the notes were assigned to George W. Morris, in January, 1867. Pearson proves nothing that had not been already proven by the bankrupt himself.

As the grounds of opposition were not filed until after the bankrupt had disclosed in his examination all that is now known respecting his supposed interest in the cottage houses in question, it follows that the opposing creditors seek to convict the bankrupt of concealing his effects by his own disclosures. I am not sure that this may not be done, but it would seem that in such case it should appear that the disclosures were extorted from the bankrupt and not voluntarily made. I have already said it does not appear from the papers before me at whose instance the examination of the bankrupt took place, nor that it was ordered by either the district court or register. But the questions remain: Has the bankrupt any interest in the "cottage houses" which passed to his assignee? and if he has, did he conceal this interest within the meaning of the bankrupt act?

The money invested by the bankrupt in building the four cottage houses on his wife's land must undoubtedly be regarded as a gift by him to his wife. But every gift by a husband to his wife is not per se fraudulent. If the husband, free from debt or serious embarrassment, give to his wife a small portion of his estate, leaving an ample amount to pay all his debts and liabilities, such gift is not fraudulent; although it is, in this state, by virtue of a statute, void as to all debts existing at the time of the making of the gift. Whether the gift in this case was made in October, 1866, or in the spring of 1867, the bankrupt owed at the time some debts, though, if the gift was made in October, 1866, the debts then existing bore but a small proportion to the value of his whole estate. But whether the amount of the debts owing at the time of the gift was large or small, in proportion to the estate of the giver, the gift, as before stated, was, under the statute of this state, void as to existing debts. Whether such a gift, not fraudulent, but void as to existing debts, under the statute of Kentucky, would pass to an assignee in bankruptcy, is an interesting question; and assuming that it would pass, how the assignee should administer the proceeds, whether for the benefit of all the creditors of the bankrupt, or only of the creditors existing at the date of the gift, would be a still more difficult question. I am at some loss to know how either the assignee of the bankrupt can reduce to possession or in any manner subject the money which the bankrupt invested in improvements on his wife's lands, or how the value of the improvements so made, with the means of the bankrupt, can be made available to his creditors. And I think it plain, if it could not be so subjected or made available, there was no concealment in law, even

though the bankrupt intentionally omitted to mention the fact in his schedule or otherwise.

There can in law be no concealment except in respect to assets or effects liable to the bankrupt's creditors.

I do not mean to decide that the money of the bankrupt, or the value of it, invested in improvements on his wife's land, cannot by some process be subjected for the benefit of his creditors. But the learned counsel of the opposing creditors have not suggested any process by which it can be done; and if they have not and cannot suggest how it may be reached, surely the bankrupt, who is not learned in law, may be excused for being ignorant.

It may be that upon the authority of the case of *Athey v. Knotts*, 6 B. Mon. 29, to which case the court called the attention of counsel, during the argument, the cottage houses erected with the money of the bankrupt on his wife's land, may in some way be subjected by his assignee for the benefit of his creditors, if it should turn out that the money was so applied by the husband in either actual or constructive fraud of his creditors, or even without such fraud.

But I am not entirely satisfied with the authority of *Athey v. Knotts*; and the subsequent cases of *Fetter v. Wilson*, 12 B. Mon. 90, and *Robinson v. Huffman*, 15 B. Mon. 80, seriously shake, if they do not overrule it. I shall, however, not decide this question, until it shall be presented in a suit in which the cottage houses shall be sought to be subjected.

I mean to say only that it is so doubtful whether said houses can be subjected by the assignee, that the question of law involved is so nice and difficult, that the bankrupt is not to be convicted of concealment upon the single ground that he omitted to state in his schedules that the houses in question were built wholly or in part with his money. He may well be excused if neither the learned counsel nor the court can now positively say that the bankrupt has any interest in said houses which can be subjected or which could be the subject of concealment. It is therefore ordered that the discharge be granted.

Case No. 18,106a.

WYATT v. HARDEN.

[Hempst. 17.]¹

Superior Court, Territory of Arkansas. Aug., 1822.

AMENDMENT OF DECLARATION—TIME TO PLEAD—EVIDENCE.

1. When a substantial amendment is made in a declaration, the defendant should be allowed until the next succeeding term to plead.

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

2. It is improper to allow evidence to go to the jury which would constitute the ground of a separate action.

[Appeal by John Wyatt from a judgment in favor of Jacob Harden.]

Before JOHNSON, SCOTT, and SELDEN, JJ.

OPINION OF THE COURT. The judgment in this case must be reversed upon two grounds: (1) The court erred in not allowing the appellant, the defendant in the court below, until the next term to plead, after a substantial amendment of the declaration had been made. (2) The court erred in permitting any evidence to go to the jury in relation to a ferry, as a disturbance of or injury done thereto would constitute the ground of a separate action. Reversed.

WYCHE (VIESCA v.). See Case No. 16,940.

Case No. 18,106b.

WYCKOFF v. PAGE.

[11 Reporter, 526.]¹

Circuit Court, S. D. New York. March 8, 1881.

ESTOPPEL—NECESSITY OF FRAUD—MISSTATEMENT BY AGENT.

1. To constitute an estoppel there must be some intended deception of the party to be estopped, or such gross negligence on his part as to amount to a constructive fraud, by which another has been misled to his injury.

2. A principal may be estopped by the intentional, wilful misstatement of an agent.

On motion for a new trial.

SHIPMAN, District Judge. The general principle of estoppel in pais is laid down in *Pickard v. Sears*, 6 Adol. & E. 469, as follows: "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In general there must be "some intended deception in the conduct or declaration of the party to be estopped, or such gross negligence on his part as to amount to a constructive fraud by which another has been misled to his injury." *Brant v. Coal Co.*, 93 U. S. 326; *Morgan v. Railway Co.*, 96 U. S. 716. The court charged the jury that if the bankrupt, whom the defendant as assignee represents, either by himself or his general agent, fully authorized and empowered to get the note discounted, and clothed with all the powers of the owner in respect to the note, induced Van Horn to take it upon the intentional misrepresentation and wilfully untrue assertion that it

¹ [Reprinted by permission.]

was a business note, then the defendant was estopped to assert the truth in regard to its origin. To this part of the charge the defendant excepted. He does not now object to the proposition that a principal may be estopped by the intentional, wilful misstatement of the agent, who was the principal's other self. The authorities which are cited are upon the effect of the declaration of the agent, who was not clothed, and was not apparently clothed, with general powers, and the defendant's position is that the jury should have been charged that the defendant was not estopped unless the agent was authorized to make the representations, and that the court assumed that Smith was a general agent. It is not to be supposed that either of the parties understood at the time when the charge was given that the court was assuming that the agency had been established. That question was plainly enough left to the jury. Upon all the material questions in the case there was sufficient evidence to justify the verdict of the jury. Motion denied.

WYER (DAVIS v.). See Case No. 3,660.

Case No. 18,107.

WYETH et al. v. STONE et al.

[1 Story, 273; 4 Law Rep. 54; 2 Robb, Pat. Cas. 23; Merw. Pat. Inv. 85.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1840.

PATENTS FOR INVENTIONS—ICE CUTTING MACHINE—SURRENDER TO PUBLIC USE—EFFECT—SPECIFICATIONS—SEPARATE MACHINES—ASSIGNMENT OF PATENT.

1. In a bill in equity for a perpetual injunction of the defendants, on account of an asserted violation of a patent right for an invention, it is a good defence, that prior to the granting of the patent, the inventor had allowed the invention to go into public use, without objection. But it should be clearly established by proof, that such public use was with the knowledge and consent of the inventor. The mere user by the inventor of his invention, in trying experiments, or by his neighbours, with his consent, as an act of kindness for temporary and occasional purposes only, will not destroy his right to a patent therefor.

[Cited in Blackinton v. Douglass, Case No. 1,470; Jones v. Sewall, Id. 7,495.]

[Cited in brief in Schillinger v. Cranford, 4 Mackey, 456.]

2. If the defendants use a substantial part of the invention patented, although with some modifications of form or apparatus, it is a violation of the patent right. So, if the patent be of two machines, and each is a new invention, and the defendant use only one of the machines.

3. If the patentee, after obtaining his patent, dedicates or surrenders it to public use, or acquiesces for a long period in the public use thereof, without objection, he is not entitled to the aid of a court of equity to protect his patent; and such acquiescence may amount to complete

¹ [Reported by William W. Story, Esq. Merw. Pat. Inv. 85, contains only a partial report.]

proof of a dedication or surrender thereof to the public.

[Cited in Taylor v. Carpenter, Case No. 13,785; Bartlette v. Crittenden, Id. 1,082; Teese v. Phelps, Id. 13,819; Magic Ruffle Co. v. Elm City Co., Id. 8,950; Kelleher v. Darling, Id. 7,653; Johnson v. Onion, Id. 7,401; Hoffheins v. Brandt, Id. 6,575; Jones v. Sewall, Id. 7,495; McLean v. Fleming, 96 U. S. 245; Bates v. Coe, 98 U. S. 46; McLaughlin v. People's Ry. Co., 21 Fed. 575; Kittle v. Hall, 29 Fed. 511; Blair v. Lipincott Glass Co., 52 Fed. 227.]

4. But to entitle the defendants to the benefit of such a defence, the facts must be explicitly relied on, and put in issue by their answer; otherwise the court cannot notice it.

5. In the present case, the patent and specification claimed for the patentee, as his invention, the cutting of ice of a uniform size by means of an apparatus worked by any other power than human. It claimed, also, not only the invention of this art, but also the particular method of the application of the principle, stated in the specification, which was by two machines described therein, called the saw and the cutter. It was held by the court, that the specification, so far as it claimed the art of cutting ice by means of an apparatus worked by any other power than human, was the claim of an abstract principle, and void.

[Cited in Hovey v. Stevens, Case No. 6,746; Smith v. Downing, Id. 13,036; Rapid Service Store Ry. Co. v. Taylor, 43 Fed. 250.]

6. But so far as it claimed the two machines described in the specification, it might be good, if a disclaimer were made of the other parts, according to the patent act of 1837, c. 45, §§ 7, 9 [5 Stat. 193, 194], within a reasonable time, and before the suit were brought. But a disclaimer, after the suit brought, would not be sufficient to entitle the party to a perpetual injunction in equity, whatever might be his right to maintain a suit at law on the patent.

[Disapproved in Tuck v. Bramhill, Case No. 14,213. Cited in Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 802.]

[Cited in brief in Schillinger v. Cranford, 4 Mackey, 456.]

7. If the patentee has assigned his patent in part, and a joint suit is brought in equity for a perpetual injunction, a disclaimer by the patentee alone, without the assignee's uniting in it, will not entitle the parties to the benefit of the 7th and 9th sections of the act of 1837, c. 45.

[Cited in Loudon v. Birt, 4 Ind. 568.]

8. A single patent may be taken for several improvements on one and the same machine, or for two machines, which are invented by the patentee, and conduce to the same common purpose and object, although they are each capable of a distinct use and application, without being united together. But a single patent cannot be taken for two distinct machines, not conducing to the same common purpose or object, but designed for totally different and independent objects.

[Cited in Pitts v. Whitman, Case No. 11,196; Emerson v. Hogg, Id. 4,440; s. c. 6 How. (47 U. S.) 483; Sessions v. Romadka, 21 Fed. 131.]

[Cited in Burke v. Partridge, 58 N. H. 352.]

9. An inventor is bound to describe in his specification, in what his invention consists, and what his particular claim is. But he is not bound to any precise form of words, provided their import can be clearly ascertained by fair interpretation, even though the expressions may be inaccurate.

[Cited in Davoll v. Brown, Case No. 3,662; Hovey v. Stevens, Id. 6,746; Smith v. Downing, Id. 13,036.]

[Cited in Burke v. Partridge, 58 N. H. 351.]

10. The assignee of a patent right, in part or in whole, cannot maintain any suit at law, or in equity, either as sole or as joint plaintiff thereon, at least as against third persons, until his patent has been recorded in the proper department, according to the requisitions of the patent acts.

Bill in equity for a perpetual injunction, and for other relief, founded upon allegations of the violation, by the defendants, of a patent right, granted originally to the plaintiff [Nathaniel J.] Wyeth, as the inventor, by letters patent, dated the 18th of March, A. D. 1829, "for a new and useful improvement in the manner of cutting ice, together with the machinery and apparatus therefor," as set forth in the schedule to the letters patent; and afterwards with a small reservation assigned to the other plaintiff [Frederick] Tudor, on the 9th of February, 1832, by a deed of assignment of that date, but which had never been recorded. The schedule set forth two different apparatus or machines for cutting the ice, the one called the saw, the other the cutter, which are capable of being used separately or in combination, and described their structure, and the mode of applying them, as follows:

(1) Two bars of iron, or other material, secured to each other by cross bars: the two first mentioned to be of such distance apart as the dimension of the ice is required to be. (2) On each outside bar is bolted a plate of iron as long as the bar, and at right angles with the cross bars. These plates to be so bolted to the bars as to project three inches each on one side of the bars to which they are bolted, and one of them to project on the other side of the bar two inches; the other, one inch. These projections may be varied, according to the desired depth of the cut. (3) These plates, both on the upper side and on the under side of the bars, are to be cut at four equi-distant points each, at an angle of forty-five degrees, or thereabouts, to the bar, thereby forming a cutting point of forty-five degrees, or thereabouts; to this point is welded a piece of steel, to form the chisel. The rear end of the plates to be of the before specified width from the bar, but to diminish toward the front end one fourth of an inch at each point, thereby giving each succeeding point a clear cut of one fourth of an inch deeper than its precursor. (4) The mouths, by which the chips cut from the ice by the chisels are discharged, are made similar to that of a carpenter's plough. (5) To the middle of the front cross-bar is fixed a ring, for the purpose of attaching a draught chain, to which the horse that draws the cutter is to be harnessed. (6) This first part of the apparatus for cutting ice is called the cutter, and is used as follows: The cutter is laid on the ice, with the three-inch side of the plates downward, and drawn forward in a straight line as far as is required, thus making two grooves of an inch deep. The horse is then turned about, and the cutter turned over, so that the two-inch side of the

plate shall be in one of the first grooves cut, and the one-inch side on the ice; and as the cutter is drawn forward, the two-inch side makes one of the first grooves an inch deeper, and the one-inch side forms a new groove of an inch deep. Proceed in this manner until as many grooves are cut as are wanted; then turn the cutter over upon the three-inch side, go over the whole again with this side, and they are finished. Repeat the same process at right angles with the first grooves, and the operation with this part of the apparatus is finished.

Part Second of Apparatus for Cutting Ice. (1) Two spur-wheels, about three feet six inches, more or less, in diameter, connected together by an axletree of iron, or other material, from the centre of each to the other, fixed immovable in each. (2) A pair of fills, proceeding from the axletree, and secured to it by a pair of composition boxes, admitting the axletree to turn in them. (3) A cog wheel, about three feet two inches in diameter, more or less, fixed in the centre of the axletree, so as to be incapable of turning, except with the axletree. (4) A pair of handles attached to the axletree, in the same manner as the fills, so as to admit of the motion of the axletree in them; these handles to be placed one on each side of the cog wheel in the centre of the axletree, and to be connected together by a permanent bar, at a suitable distance from the axletree. (5) Two cog wheels, about four inches diameter, more or less, one of which to work on the large cog wheel, and the other to work on the one so working, and both to be secured by pintles passing through the handles: the small cog wheel not working on the large cog wheel to have secured beside it a circular saw, about two and a half feet diameter, more or less. (6) The proportion between the large and small cog wheels is varied, to obtain greater or less velocity for the saw, as may be wanted. This part of the apparatus for cutting ice is called the saw, and is used as follows: Put the saw into one of the outside grooves made by the cutter; drive the horse forward, following the groove made by the cutter; at the same time a man who manages the handles presses them down as much as the strength of the horse will admit of. This operation is followed back and forth, until the ice is cut through. The same is done with the outer parallel groove on the opposite side of the work, and also on one of the end grooves, running at right angles with these. By this process the ice on the three sides of the plat, or work marked by the cutter, is cut through. When this is done, take an iron bar (one end of which is wide and fitted to the groove, and the other end of which is sharpened as a chisel,) and insert the end which is fitted to the groove into the groove next to and parallel with the end groove which is cut through; pry lightly in several places, then more strongly, until the ice is broken off; then

strike lightly with the chisel end of the bar into the cross grooves of the piece split off, and it easily separates into square pieces. Thus proceed with the whole plat marked out by the cutter. It is claimed as new, to cut ice of a uniform size, by means of an apparatus worked by any other power than human. The invention of this art, as well as of the particular method of the application of the principle, is claimed by the subscriber.

The answer insisted upon various grounds of defence, which are fully stated in the argument and in the opinion of the court.

W. H. Gardiner, for plaintiffs, contended: That the right acquired by the patent had not been lost by any act of the plaintiffs, the evidence not disclosing any abandonment, or dedication to the public. *Pennock v. Dialogue*, 2 Pet. [27 U. S.] 16; *Shaw v. Cooper*, 7 Pet. [32 U. S.] 292; *Mellus v. Silsbee* [Case No. 9,404]; *Goodyear v. Mathews* [Id. 5,576]; *Phil. Pat. 184, 186*. That the specification was sufficient on its face; and if not, that the fault was cured by the disclaimer. *Ames v. Howard* [Case No. 326]; *Phil. Pat. 93*; *Whittemore v. Cutter* [Case No. 17,600]; *Lowell v. Lewis* [Id. 8,568]. That superfluous matter in the specification did not vitiate it. *Lewis v. Marling*, 1 Lloyd & W. 28; *Moody v. Fiske* [Case No. 9,745]; *Phil. Pat. 286*. And that the several matters were well embraced in it; *Evans v. Eaton*, 3 Wheat. [16 U. S.] 454; *Stearns v. Barrett*, 1 Pick. 448; *Barrett v. Hall* [Case No. 1,047]; *Phil. Pat. 216, 219, 229, 246, 274*.

S. Greenleaf and G. T. Bigelow, for defendants, contended: That the invention was not new and original, being merely the common carpenter's plough. That the specification was bad, as it contained not only more than the plaintiff, Wyeth, invented, but also, as it included two distinct machines, and a combination of different machines. *Barrett v. Hall* [supra]; *Moody v. Fiske* [Case No. 9,745]; *Evans v. Eaton*, 3 Wheat. [16 U. S.] 454, 506; 4 Barn. & Ald. 540; *Whittemore v. Cutter* [supra]; *Cochrane v. Smethurst*, 1 Starkie, 205; *Phil. Pat. 102, 104, 275*. That if it could be upheld at all, it was only for cutting two grooves by one operation, which the defendants had not invaded. That the case was not within the relief of the patent act of 1837, §§ 7, 9. That the invention had been published previous to the issuing of the patent. *Phil. Pat. 184*. And that after the patent was issued, the plaintiffs abandoned the use to the public, and thereby betrayed the defendants into the use of the machine; which, in equity, was a good bar to the claim of damages, and entitled the defendants to costs. *Walcot v. Walker*, 7 Ves. 1; *Platt v. Button*, 19 Ves. 447.

STORY, Circuit Justice. I have considered this cause upon the various points, sug-

gested at the argument by the counsel on both sides, with as much care as I could, in the short time, which I have been able to command, since it was argued; and I will now state the results, with as much brevity, as the importance of the cause will permit.

The first point is, whether the invention claimed by the patentee is new, that is, substantially new. The patent is dated on the 18th of March, 1829, and is for "a new and useful improvement in the manner of cutting ice, together with the machinery and apparatus therefor." Assuming the patent to be for the machinery described in the specification, and the description of the invention in the specification to be, in point of law, certain and correctly summed up, (points, which will be hereafter considered,) I am of opinion, that the invention is substantially new. No such machinery is, in my judgment, established, by the evidence, to have been known or used before. The argument is, that the principal machine, described as the cutter, is well known, and has been often used before for other purposes, and that this is but an application of an old invention to a new purpose; and it is not, therefore, patentable. It is said, that it is in substance identical with the common carpenter's plough. I do not think so. In the common carpenter's plough there is no series of chisels fixed in one plane, and the guide is below the level, and the plough is a movable chisel. In the present machine, there are a series of chisels, and they are all fixed. The successive chisels are each below the other, and this is essential to their operation. Such a combination is not shown ever to have been known or used before. It is not, therefore, a new use or application of an old machine. This opinion does not rest upon my own skill and comparison of the machine with the carpenter's plough; but it is fortified and sustained by the testimony of witnesses of great skill, experience, and knowledge in this department of science, viz., by Mr. Treadwell, Mr. Darracott, and Mr. Borden, who all speak most positively and conclusively on the point.

The next point is, whether the ice machine used by the defendants is an infringement of the patent; or, in other words, does it incorporate in its structure and operation the substance of Wyeth's invention? I am of opinion, that it does include the substance of Wyeth's invention of the ice cutter. It is substantially, in its mode of operation, the same as Wyeth's machine; and it copies his entire cutter. The only important difference seems to be, that Wyeth's machine has a double series of cutters, on parallel planes; and the machine of the defendants has a single series of chisels in one plane. Both machines have a succession of chisels, each of which is progressively below the other, with a proper guide placed at such distance, as the party may choose to regulate the move-

ment; and in this succession of chisels, one below the other, on one plate or frame, consists the substance of Wyeth's invention. The guide in Wyeth's machine is the duplicate of his chisel plate or frame; the guide in the defendants' machine is simply a smooth iron, on a level with the cutting single chisel frame or plate. Each performs the same service, substantially in the same way.

In the next place, as to the supposed public use of Wyeth's machine before his application for a patent. To defeat his right to a patent, under such circumstances, it is essential, that there should have been a public use of his machine, substantially as it was patented, with his consent. If it was merely used occasionally by himself in trying experiments, or if he allowed only a temporary use thereof by a few persons, as an act of personal accommodation or neighbourly kindness, for a short and limited period, that would not take away his right to a patent. To produce such an effect, the public use must be either generally allowed or acquiesced in, or at least be unlimited in time, or extent, or object. On the other hand, if the user were without Wyeth's consent, and adverse to his patent, it was a clear violation of his rights, and could not deprive him of his patent.

Now, I gather from the evidence (which, however, is somewhat indeterminate on this point) that Wyeth's machine, as originally invented by him, was not exactly like that, for which he afterwards procured the patent. On the contrary, he seems to have made alterations and improvements therein. Pratt (the witness) says, that he made the iron part of the first machine of Wyeth, which was partly of wood and partly of iron, in December, 1825, or in January, 1826; and that he afterwards, in December, 1827, made the machine, which was patented for Wyeth; and it was not patented until March, 1829. So that the latter seems to have been more perfect than the former. But, at all events, I cannot but think, that the evidence of the user, as a public user, of the invention before the patent was granted, is far too loose and general to found any just conclusion, that Wyeth meant to dedicate it to the public, or had abandoned it to the public before the patent. It appears to me, that the circumstances ought to be very clear and cogent, before the court would be justified in adopting any conclusion so subversive of private rights, when the party has subsequently taken out a patent.

In the next place, as to Wyeth's supposed abandonment of his invention to the public, since he obtained his patent. I agree, that it is quite competent for a patentee at any time, by overt acts or by express dedication, to abandon or surrender to the public, for their use, all the rights secured by his patent, if such is his pleasure, clearly and deliberately expressed. So, if for a series of years the patentee acquiesces without objection in

the known public use by others of his invention, or stands by and encourages such use, such conduct will afford a very strong presumption of such an actual abandonment or surrender. A fortiori, the doctrine will apply to a case, where the patentee has openly encouraged or silently acquiesced in such use by the very defendants, whom he afterwards seeks to prohibit by injunction from any further use; for, in this way, he may not only mislead them into expenses, or acts, or contracts, against which they might otherwise have guarded themselves; but his conduct operates as a surprise, if not as a fraud upon them. At all events, if such a defence were not a complete defence at law, in a suit for any infringement of the patent, it would certainly furnish a clear and satisfactory ground, why a court of equity should not interfere either to grant an injunction, or to protect the patentee, or to give any other relief. This doctrine is fully recognized in *Rundell v. Murray*, Jac. 311, 316, and *Saunders v. Smith*, 3 Mylne & C. 711, 728, 730, 735. But if there were no authority on the point, I should not have the slightest difficulty in asserting the doctrine, as found in the very nature and character of the jurisdiction exercised by courts of equity on this and other analogous subjects.

There is certainly very strong evidence in the present case, affirmative of such an abandonment or surrender, or at least of a deliberate acquiescence by the patentee in the public use of his invention by some or all of the defendants, without objection, for several years. The patent was obtained in 1829; and no objection was made, and no suit was brought against the defendants, for any infringement until 1839, although their use of the invention was, during a very considerable portion of the intermediate period, notorious and constant, and brought home directly to the knowledge of the patentee. Upon this point, I need hardly do more than to refer to the testimony of Stedman and Barker, who assert such knowledge and acquiescence for a long period, on the part of the patentee, in the use of these ice cutters by different persons (and among others by the defendants), on Fresh Pond, where the patentee himself cut his own ice. It is no just answer to the facts so stated, that until 1839, the business of Wyeth, or rather of his assignee, the plaintiff, Tudor, was altogether limited to shipments in the foreign ice trade, and that the defendants' business, being confined to the domestic ice trade, did not interfere practically with his interest under the patent. The violation of the patent was the same, and the acquiescence the same, when the ice was cut by Wyeth's invention, whether the ice was afterwards sold abroad, or sold at home. Nor does it appear, that the defendants have as yet engaged at all in the foreign ice trade. It is the acquiescence in the known user by the public without objection or qualification, and not the extent

of the actual user, which constitutes the ground, upon which courts of equity refuse an injunction in cases of this sort. The acquiescence in the public use, for the domestic trade, of the plaintiff's invention for cutting ice, admits, that the plaintiff no longer claims or insists upon an exclusive right in the domestic trade under the patent; and then he has no right to ask a court of equity to restrain the public from extending the use to foreign trade, or for foreign purposes. If he means to surrender his exclusive right in a qualified manner, or for a qualified trade, he should at the very time give public notice of the nature and extent of his allowance of the public use, so that all persons may be put upon their guard, and not expose themselves to losses or perils, which they have no means of knowing or averting during his general silence and acquiescence.

The cases, which have been already cited, fully establish the doctrine, that courts of equity constantly refuse injunctions, even where the legal right and title of the party are acknowledged, when his own conduct has led to the very act or application of the defendants, of which he complains, and for which he seeks redress. And this doctrine is applied, not only to the case of the particular conduct of the party towards the persons, with whom the controversy now exists, but also to cases, where his conduct with others may influence the court in the exercise of its equitable jurisdiction. *Rundell v. Murray*, Jac. 311, 316; *Saunders v. Smith*, 3 Mylne & C. 711, 728, 730, 735. Under such circumstances, the court will leave the party to assert his rights, and to get what redress he may at law, without giving him any extraordinary aid or assistance of its own.

But the difficulty in the present case arises, not so much from the doctrine considered in itself, as from the utter impracticability of applying it on account of the state of the pleadings. The point is not raised, or even suggested in the answer, in any manner whatsoever, as a matter of defence; and, of course, it is not in issue between the parties; and the whole evidence, taken on the point, is irrelevant and cannot be looked to, as a matter in judgment. This defect in the pleadings, therefore, puts the question entirely beyond the reach of the court.

In the next place, as to the objections taken to the specification. The question here necessarily arises, for what is the patent granted? Is it for the combination of the two machines described in the specification (the cutter and the saw) to cut ice? Or for the two machines separately? Or for the two machines, as well separately, as in combination? Or for any mode whatsoever of cutting ice by means of an apparatus, worked by power, not human, in the abstract, whatever it may be? If it be the latter, it is plain, that the patent is void, as it is for an abstract principle, and broader than the

invention, which is only cutting ice by one particular mode, or by a particular apparatus or machinery. In order to ascertain the true construction of the specification in this respect, we must look to the summing up of the invention, and the claim therefor, asserted in the specification; for it is the duty of the patentee to sum up his invention in clear and determinate terms; and his summing up is conclusive upon his right and title. This was the doctrine maintained in *Moody v. Fiske* [Case No. 9,745]; (see, also, *Hill v. Thompson*, 8 Taunt. 375); and I see no reason to doubt it, or to depart from it.

Now, what is the language, in which the patentee has summed up his claim and invention? The specification states: "It is claimed, as new, to cut ice of a uniform size, by means of an apparatus worked by any other power than human. The invention of this art, as well as the particular method of the application of the principle, are claimed by the subscriber" (*Wyeth*). It is plain, then, that here the patentee claims an exclusive title to the art of cutting ice by means of any power, other than human power. Such a claim is utterly unobtainable in point of law. It is a claim for an art or principle in the abstract, and not for any particular method or machinery, by which ice is to be cut. No man can have a right to cut ice by all means or methods, or by all or any sort of apparatus, although he is not the inventor of any or all of such means, methods, or apparatus. A claim broader than the actual invention of the patentee is, for that very reason, upon the principles of the common law, utterly void, and the patent is a nullity. *Moody v. Fiske* [supra]; *Brunton v. Hawkes*, 4 Barn. & Ald. 541; *Hill v. Thompson*, 8 Taunt. 375, 399, 400; *Evans v. Eaton*, 7 Wheat. [20 U. S.] 356; *Phil. Pat.* pp. 268-282, c. 11, § 7. Unless, then, the case is saved by the provisions of the patent act of 1836, c. 357 [5 Stat. 117], or of the act of 1837, c. 45 [Id. 191], which will hereafter be considered, the present suit cannot be sustained.

But, besides this general claim, there is another claim in the specification for the particular apparatus and machinery to cut ice, described in the specification. The language of the specification here is: "The invention of this art," (the general claim already considered,) "as well as the particular method of the application of the principle," (omitting the words of reference, as above described,) "are claimed by the subscriber." Now, assuming the former objection, that the claim for a general or abstract principle is not a fatal objection in the present case, it has been argued that the specification is too ambiguous to be maintainable in point of law; for it does not assert, what is claimed as the patentee's invention; whether it be the two machines separately and distinctly, as several inventions, or the combination of them, or both the one and the other.

It appears to me, that the language of the

summary may be, and indeed ought to be construed, *ut res magis valeat, quam pereat*, to mean by the words "the particular method of the application," the particular apparatus and machinery described in the specification to effect the purpose of cutting ice. I agree, that the patentee is bound to describe, with reasonable certainty, in what his invention consists, and what his particular claim is. But it does not seem to me, that he is to be bound down to any precise form of words; and that it is sufficient, if the court can clearly ascertain, by fair interpretation, what he intends to claim, and what his language truly imports, even though the expressions are inaccurately or imperfectly drawn.

Is the patent, then, a patent for the combination of the two machines, viz.: the saw and the cutter? If it be, then the defendants clearly have not violated the patent right; for they use the cutter only; and the saw-machine has been abandoned in practice by the patentee himself, as useless, or unnecessary. It appears to me, that the patent is not for the combination of the machines, but for each machine separately and distinctly, as adapted to further and produce the same general result, and capable of a separate and independent use. In short, the one may be auxiliary, but is not indispensable to the use of the other. I deduce this conclusion from the descriptive words of the specification, which show, that each machine is independent of the other in its operations, and from the silence of the patentee as to any claim for a combination. This claim, then, for "the particular method of the application of the principle," although inartificial, may be reasonably interpreted, as used distributively, and as expressive of a distinct claim of each particular method set forth in the specification. I deem the patent, then, to be a claim for each distinct machine, as a separate invention, but conducing to the same common end. Of course, if either machine is new, and is the invention of Wyeth, and it has been actually pirated by the defendants, the plaintiff is entitled to maintain a suit therefor, under the acts of 1836 and 1837, although not at the common law. *A fortiori*, the same doctrine will apply, if both machines are new, upon the principles of the common law.

But it has been said, that if each of the machines patented is independent of the other, then separate patents should have been taken out for each; and that they cannot both be joined in one and the same patent; and so there is a fatal defect in the plaintiff's title. And for this position the doctrine stated in *Barrett v. Hall* [Case No. 1,047], and *Evans v. Eaton*, 3 Wheat [16 U. S.] 454, 506 (see, also, *Phil. Pat.* pp. 214-216), is relied on. I agree, that under the general patent acts, if two machines are patented, which are wholly independent of each other, and distinct inventions, for unconnect-

ed objects, then the objection will lie in its full force, and be fatal. The same rule would apply to a patent for several distinct improvements upon different machines, having no common object or connected operation. For, if different inventions might be joined in the same patent for entirely different purposes and objects, the patentee would be at liberty to join as many, as he might choose, at his own mere pleasure, in one patent, which seems to be inconsistent with the language of the patent acts, which speak of the thing patented, and not of the things patented, and of a patent for an invention, and not of a patent for inventions; and they direct a specific sum to be paid for each patent. Besides; there would arise great difficulty in applying the doctrines of the common law to such cases. Suppose one or more of the supposed inventions was not new, would the patent at the common law be void in toto, or only as to that invention, and good for the rest? Take the case of a patent for ten different machines, each applicable to an entirely different object, one to saw wood, another to spin cotton, another to print goods, another to make paper, and so on; if any one of these machines were not the invention of the patentee, or were in public use, or were dedicated to the public, before the patent was granted, upon the doctrines of the common law the patent would be broader than the invention, and then the consideration therefor would fail, and the patent be void for the whole. But if such distinct inventions could be lawfully united in one patent, the doctrine would lead to consequences most perilous and injurious to the patentee; for, if any one of them were known before, or the patent as to one was void, by innocent mistake or by priority of invention, that would take away from him the title to all the others, which were unquestionably his own exclusive inventions. On the other hand, if the doctrine were relaxed, great inconvenience and even confusion might arise to the public, not only from the difficulty of distinguishing between the different inventions stated in the patent and specification, but also of guarding themselves against fraud and imposition by the patentee, in including doubtful claims under cover of others, which were entirely well founded. In construing statutes upon such a subject, these considerations are entitled to no small weight. At least, they show, that there is no ground, founded in public policy, or in private right, which calls for any expanded meaning of the very words of the statute; and that to construe them literally is to construe them wisely. It is plain, also, that the act of 1837, c. 45, in the ninth section, contemplated the rule of the common law as being then in full force; and, therefore, it seeks to mitigate it, and provides, "that whenever, by mistake, accident, or inadvertence, and without any intent to defraud or mislead the public, any patentee shall have,

in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing invented" (not of different things invented) "of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be good and valid for so much of the invention or discovery" (not inventions or discoveries) "as shall be truly and bona fide his own; provided it shall be a material and substantial part of the thing patented, and be definitely distinguishable from the other parts, so claimed without right as aforesaid." This language manifestly points throughout to a definite and single invention, as the "thing patented," and does not even suppose, that one patent could lawfully include divers distinct and independent inventions, having no common connexion with each other, nor any common purpose. It may, therefore, fairly be deemed a legislative recognition and adoption of the general rule of law in cases, not within the exceptive provision of the act of 1837. And this is what I understand to have been intended by the court in the language used in *Barrett v. Hall* [supra]. It was there said, that "a patent under the general patent act cannot embrace various distinct improvements and inventions; but in such a case the party must take out separate patents. If the patentee has invented certain improved machines, which are capable of a distinct operation, and has also invented a combination of these machines to produce a connected result, the same patent cannot at once be for the combination, and for each of the improved machines; for the inventions are as distinct, as if the subjects were entirely different." And again: "If the patent could be construed as a patent for each of the machines severally, as well as for the combination, then it would be void, because two separate inventions cannot be patented in one patent." It is obvious, construing this language with reference to the case actually before the court, that the court were treating of a case, where each of the patented machines might singly have a distinct and appropriate use and purpose, unconnected with any common purpose, and therefore each was a different invention. In *Moody v. Fiske* [Case No. 9,745], the judge alluded still more closely to the distinction, and said: "I wish it to be understood, in this opinion, that though several distinct improvements in one machine may be united in one patent; (yet) it does not follow, that several improvements in two different machines, having distinct and independent operations, can be so included; much less, that the same patent may be for a combination of different machines, and for distinct improvements in each." It is perhaps impossible to use any general language in cases of this sort, standing almost upon the metaphysics of the law,

without some danger of its being found susceptible of an interpretation beyond that, which was then in the mind of the court. The case intended to be put in each of these cases was of two different machines, each applicable to a distinct object and purpose, and not connected together for any common object or purpose. And, understood in this way, it seems to me, that no reasonable objection lies against the doctrine.

Construing, then, the present patent to be a patent for each machine, as a distinct and independent invention, but for the same common purpose and auxiliary to the same common end, I do not perceive any just foundation for the objection made to it. If one patent may be taken for different and distinct improvements made in a single machine, which cannot well be doubted or denied, (see *Moody v. Fiske* [supra]), how is that case distinguishable in principle from the present? Here, there are two machines, each of which is or may be justly auxiliary to produce the same general result, and each is applied to the same common purpose. Why then may not each be deemed a part or improvement of the same invention? Suppose, the patentee had invented two distinct and different machines, each of which would accomplish the same end, why may he not unite both in one patent, and say, I deem each equally useful and equally new, but, under certain circumstances, the one may, in a given case, be preferable to the other? There is a clause in the patent acts, which requires, that the inventor, in his specification or description of his invention, should "fully explain the principle and the several modes, in which he has contemplated the application of that principle or character, by which it may be distinguished from other inventions." Now, this would seem clearly to show, that he might lawfully unite in one patent all the modes, in which he contemplated the application of his invention, and all the different sorts of machinery, or modifications of machinery, by which or to which it might be applied; and if each were new, there would seem to be no just ground of objection to his patent, reaching them all. Act 1793, c. 55, § 3 [1 Stat. 321]; Act 1836, c. 357. A fortiori, this rule would seem to be applicable, where each of the machines is but an improvement or invention conducing to the accomplishment of one and the same general end.

But let us take the case in another view, (of which it is certainly susceptible,) and consider the patent as a patent, not for each machine separately, but for them conjointly, or in the aggregate, as conducing to the same common end; if each machine is new, why may they not both be united in one patent, as distinct improvements? I profess not to see any good reason to the contrary. If they may be so united, and were both new, then, upon the principles established in *Moody v.*

Fiske, it is not necessary, in order to maintain a suit, that there should be a violation of the patent throughout. It is sufficient, if any one of the invented machines or improvements is wrongfully used; for that, pro tanto, violates the patent. In this view, therefore, the use of the cutter of the inventor, without any use of the saw, would be a sufficient ground to support the present bill, if it were not otherwise open to objection.

We come, then, to the remaining point, whether, although under the patent act of 1793, c. 55, the patent is absolutely void, because the claim includes an abstract principle, and is broader than the invention; or, whether that objection is cured by the disclaimer made by the patentee (Wyeth), under the act of 1837, c. 45. The seventh section of that act provides: "That whenever any patentee shall have, through inadvertence, accident, or mistake, made his specification too broad, claiming more than that, of which he was the original or first inventor, some material and substantial part of the thing patented being truly or justly his own, any such patentee, his administrators, executors, or assigns, whether of the whole or a sectional part thereof, may make disclaimer of such parts of the thing patented, as the disclaimant shall not claim to hold by virtue of the patent or assignment, &c., &c. And such disclaimer shall be thereafter taken and considered as a part of the original specification, to the extent of the interest, which shall be possessed in the patent or right secured thereby by the disclaimant, &c." Then follows a proviso, that "no such disclaimer shall affect any action pending at the time of its being filed, except so far as may relate to the question of unreasonable neglect or delay in filing the same." The ninth section provides, "That whenever, by mistake, accident, or inadvertence, and without any wilful default or intent to defraud or mislead the public, any patentee shall have, in his specification, claimed to be the first and original inventor or discoverer of any material or substantial part of the thing patented, of which he was not the first and original inventor, and shall have no legal or just right to claim the same, in every such case the patent shall be deemed good and valid for so much of the invention or discovery, as shall be truly and bona fide his own; provided it shall be a material and substantial part of the thing patented, and shall be definitely distinguishable from the other parts so claimed without right as aforesaid." Then follows a clause, that in every such case, if the plaintiff recovers in any suit, he shall not be entitled to costs, "unless he shall have entered at the patent office, prior to the commencement of the suit, a disclaimer of all that part of the thing patented, which was so claimed without right; with a proviso, "That no person bringing any such suit shall be entitled to the benefits of the provi-

sions contained in this section, who shall have unreasonably neglected or delayed to enter at the patent office a disclaimer as aforesaid."

Now, it seems to me, that upon the true construction of this statute, the disclaimer mentioned in the seventh section must be interpreted to apply solely to suits pending, when the disclaimer is filed in the patent office; and the disclaimer mentioned in the ninth section to apply solely to suits brought after the disclaimer is so filed. In this way, the provisions harmonize with each other; upon any other construction they would seem, to some extent, to clash with each other, so far as the legal effect and operation of the disclaimer is concerned.

In the present case, the suit was brought on the first of January, 1840, and the disclaimer was not filed until the twenty-fourth of October, of the same year. The proviso, then, of the seventh section would seem to prevent the disclaimer from affecting the present suit in any manner whatsoever. The disclaimer, for another reason, is also utterly without effect in the present case; for it is not a joint disclaimer by the patentee and his assignee, Tudor, who are both plaintiffs in this suit; but by Wyeth alone. The disclaimer cannot, therefore, operate in favor of Tudor, without his having joined in it, in any suit, either at law, or in equity. The case, then, must stand upon the other clauses of the ninth section, independent of the disclaimer.

This leads me to say, that I cannot but consider, that the claim made in the patent for the abstract principle or art of cutting ice by means of an apparatus worked by any other power than human, is a claim founded in inadvertence and mistake of the law, and without any wilful default or intent to defraud or mislead the public, within the proviso of the ninth section. That section, it appears to me, was intended to cover inadvertences and mistakes of the law, as well as inadvertences and mistakes of fact; and, therefore, without any disclaimer, the plaintiffs might avail themselves of this part of the section to the extent of maintaining the present suit for the other parts of the invention claimed, that is, for the saw and for the cutter, and thereby protect themselves against any violation of their rights, unless there has been an unreasonable neglect or delay to file the disclaimer in the office. Still, however, it does not seem to me, that a court of equity ought to interfere to grant a perpetual injunction in a case of this sort, whatever might be the right and remedy at law, unless a disclaimer has been in fact filed at the patent office before the suit is brought. The granting of such an injunction is a matter resting in the sound discretion of the court; and if the court should grant a perpetual injunction before any disclaimer is filed, it may be, that the patentee may never

afterwards, within a reasonable time, file any disclaimer, although the act certainly contemplates the neglect or delay to do so to be a good defence both at law and in equity, in every suit, brought upon the patent, to secure the rights granted thereby. However, it is not indispensable in this case to dispose of this point, or of the question of unreasonable neglect or delay, as there is another objection, which in my judgment is fatal, in every view, to the maintenance of the suit in its present form.

The objection, which I deem fatal, is, that the bill states and admits, that the assignment to the plaintiff, Tudor (made in February, 1832), has never yet been recorded in the state department, according to the provisions of the patent act of 1793, c. 55, § 4. That act provides, "That it shall be lawful for any inventor, his executor or administrator, to assign the title and interest in the said invention at any time; and the assignee, having recorded the said assignment in the office of the secretary of state, shall thereafter stand in the place of the original inventor, both as to right and responsibility." It seems a necessary, or, at least, a just inference, from this language, that until the assignee has so recorded the assignment, he is not substituted to the right and responsibility of the patentee, so as to maintain any suit at law, or in equity, founded thereon. It is true, that no objection is taken in the pleadings on account of this defect; but it is spread upon the face of the bill, and therefore the court is bound to take notice of it. It is not the case of a title defectively set forth, but of a title defective in itself, and brought before the court with a fatal infirmity, acknowledged to be attached to it. As between the plaintiffs and the defendants, standing upon adverse titles and rights, (whatever might be the case between privies in title and right,) Tudor has shown no joint interest sufficient to maintain the present bill; and therefore it must be dismissed, with costs.

Case No. 18,108.

Ex parte WYLIE.

[The case reported under the above title in 1 Gaz. 123, is the same as Case No. 18,109.]

Case No. 18,109.

In re WYLIE.

[2 N. B. R. 137 (Quarto, 53); Bankr. Ct. Rep. 123; 1 Chi. Leg. News, 30; 1 Gaz. 123.]¹

District Court, D. Maryland. 1868.

ASSIGNEE IN BANKRUPTCY—CONVEYANCE BY REGISTER.

A register has the right to convey the estate to the assignee when there is "no opposing in-

terest," although the title to the property is in dispute.

[Cited in Re Vogel, Case No. 16,983.]

By B. F. M. HURLEY, Register:

I, the undersigned, having been designated by the court as the register in bankruptcy before whom the proceedings in the above matter of the bankruptcy of William H. Wylie are to be had, do hereby certify that in the due course of such proceedings the following question, pertinent to the same, arose, and was stated: "Has a register the right to assign and convey to the assignee all the estate, real and personal, of the bankrupt, when the title of the property is in dispute, under the fourteenth section of the bankrupt act [14 Stat. 522]?" The facts in the case are these: The bankrupt, on the 12th day of January, 1867, conveyed all his personal property by mortgage to Miss Phoebe J. Thomas, and on the 21st day of October, 1867, he gave a bill of sale of the same property to Grafton Duvall and Wm. H. Crantz. On the 14th day of November, 1867, he executed to Grafton Duvall a deed of trust of all the property heretofore conveyed, for the benefit of his creditors. On the 28th of November, 1867, he commenced proceedings in bankruptcy, and on the 30th of November Duvall took possession of the property by a writ of replevin. On the 4th day of January, 1868, the creditors met and proved their debts, and made choice of an assignee. Among the number of creditors who met and proved their claims was Miss Phoebe J. Thomas, by her duly constituted agent, thereby releasing her claim to the property named in the mortgage under section twenty of the bankrupt act. Your honor refused to confirm the assignee chosen by the creditors, and appointed Frank B. Carlin assignee of the estate. After being duly qualified, I assigned and conveyed to him all the estates, real and personal, under the fourteenth section. Charles W. Ross, Esq., attorney for the assignee, raised the question above stated.

Opinion of the register:

I am of the opinion that the register has the right to assign to the assignee all the estate, both real and personal, where there is no opposition to the assignment. Duvall & Crantz not having proved their claims are not known in the proceedings before me, and in my opinion there is no opposing interest. And the said party requested that the same should be certified to your honor for your opinion thereon.

GILES, District Judge. The register in this case certifies into court the following: "Has the register a right to assign and convey the estate, real and personal, of the bankrupt, when the title of the property is in dispute, under the fourteenth section of the bankrupt act?" I am of the opinion that he has, if there be (in the language of the law) "no opposing interest;" that is, if there be no one before the register contesting the

¹ [Reprinted from 2 N. B. R. 137 (Quarto, 53), by permission. 1 Chi. Leg. News, 30, contains only a partial report.]

appointment of the assignee, or for any other cause, opposing the execution of said assignment. The assignment is general. Rice, Manual, form 66. The section then (presuming the assignment to be made) goes on to say what rights under it vest in the assignee, etc., and says that a copy of said assignment, duly certified by the clerk of the court under the seal thereof, shall be conclusive evidence of his title as such assignee, to take, hold, sue for and recover the property of the bankrupt, etc. On the facts stated by the register, he should make the general assignment to the assignee, who should appear in the case in the Frederick county circuit court, and claim the property, in which suit the validity of the deed to Grafton Duvall can be tested.

Case No. 18,110.

WYLIE v. SMITH et al.

[2 Woods, 673.]¹

Circuit Court, S. D. Mississippi. May Term, 1875.

BANKRUPTCY PROCEEDINGS—CLAIM FOR RENT.

1. Rent accruing after bankruptcy cannot be brought in question in the bankrupt court.

2. Where rent had accrued before the bankruptcy, and was secured by a lien upon the crop grown on the demised premises, and the bankrupts had collected such rent from their under-tenant, the district court properly entertained jurisdiction of a petition filed by the landlord against the bankrupts and their assignees, for the purpose of following the fund bound for the satisfaction of the rent, in order to prevent the claim for rent from coming against the general estate of the bankrupts.

Petition to review decree of the district court sitting in bankruptcy.

Robert C. Smith and F. B. Pratt, for petitioner.

George L. Potter, contra.

BRADLEY, Circuit Justice. Smith & Brother became bankrupts, March 25, 1871, being decreed such, April 7, 1871. They were lessees of a plantation for the year 1871, from Wylie, at a rent of \$500, payable on the 1st of November, secured by a lien on all the crops. The assignee refused to accept the lease, and Smith & Brother remained in possession by their under-tenants from whom they collected \$396 rent, which they did not pay to their landlord, [W. G.] Wylie. The rent accruing after bankruptcy, it is conceded, cannot be brought in question in the bankrupt court. The rent which accrued before bankruptcy was a provable debt under the bankruptcy proceedings. The act says expressly (section 5071, Rev. St.; section 19 of the original act [14 Stat. 525]): "Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a propor-

tionate part thereof up to the time of bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods." Being so provable, the debt was discharged pro tanto. Section 5119, Rev. St., or section 34 of the original act. Hence the landlord could not maintain an action therefor. And being secured by a lien on the crops, he could not prove the debt in bankruptcy without surrendering his lien. As this lien secured not only the rent in question, but the rent for the balance of the year, a surrender of it would involve complications and expense desirable to avoid, if possible. Besides, the crops belong to the under-tenants, and they have paid to Smith & Brother, \$396, and have an equity against the latter, to be relieved from the lien to that extent. Under these circumstances, Wylie filed a petition in the bankrupt court against Smith & Brother and their assignee [William Breck], praying that they might severally be decreed to pay him whatever they had severally received on account of said rents, and that the assignee might be decreed to make up the deficiency of the rent out of the general estate, and for general relief. As before observed, the bankrupt court has nothing to do with rent which accrued after the bankruptcy. For that which accrued before, which is a provable debt and secured by lien as aforesaid, it seems proper that the court should entertain jurisdiction for the purpose of following the fund bound for the satisfaction of the debt, in order to prevent its coming against the general estate of the bankrupts. To this extent the district court has made a decree against Smith & Brother, who possessed themselves of this fund pending proceedings in bankruptcy, by collections from their under-tenants. I think the decree was right and should be affirmed.

The amount of rent accrued prior to the bankruptcy should be slightly modified, and made up to the 25th of March, instead of the 7th of April; in other words, to the commencement of proceedings in bankruptcy instead of the decree. The general rule, as established in section 5067 (or section 19 of the original act), is that "all debts due and payable from the bankrupt at the time of the commencement of proceedings in bankruptcy * * * may be proved against the estate of the bankrupt." The commencement of proceedings in this case was the 25th of March. The defendants also supposed that the lease commenced on the 30th of January; but this is incorrect, for though dated on that day, the term leased is the whole year 1871. The number of days, therefore, for which rent is to be allowed is 84; and the amount is \$115.07, instead of \$134.40, as allowed in the decree of the district court. The decree, therefore, will be corrected accordingly, allowing interest from the 1st of November, 1871. The reference to a master for the purpose of taking an account of setoffs claimed by the

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

defendants is correct. The decree is affirmed in all things, except as to the amount thereof, which is reduced from \$134.40 to \$115.07, with interest from the 1st of November, 1871, and subject to all just setoffs of Smith & Brother against the petitioner, not more properly applicable to the rent which fell due after the bankruptcy.

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Case No. 18,111.

WYLLIE v. The SUNLIGHT.

[See Case No. 2,368.]

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Case No. 18,112.

In re WYLLIE.

[2 Hughes, 449; 1 5 Am. Law T. Rep. U. S. Cts. 330.]

District Court, W. D. Virginia. Sept., 1872.

AMENDATORY BANKRUPT ACT — CONSTRUCTION —
HOMESTEAD AND EXEMPTIONS.

1. The amendatory bankrupt act of June 8th, 1872 [17 Stat. 334], does not purport to embrace the homestead in the terms employed by the constitution, so as to make it good against debts "heretofore contracted," which it is conceded congress might have done if it had chosen.

2. The reference to "state exemption laws" confines the inquiry under this act to exemptions under state laws as interpreted and settled by the adjudication of its highest court, and precludes the court of bankruptcy from contravening that adjudication whenever made.

3. The homestead exemption exists only against debts contracted after the constitution took effect, and is by its terms subject to mortgages, deeds of trust, pledge or other security (including liens) thereon, notwithstanding the saving in the second section of the eleventh article.

[Cited in Re Vogler, Case No. 16,986; Re Kean, Id. 7,630; Re Smith, Id. 12,986.]

4. The act of June 8th, 1872, is not retroactive, but as a remedial act its benefits should be extended to all pending cases where the effects of the bankrupt are undisputed and it can be done without prejudice to vested interests.

5. The paramount duty of the court of bankruptcy to provide for the liquidation of liens forbids it to turn over the subject to another tribunal for litigation or adjustment, but requires it to abstract from the homestead provision the amount of liens rightfully attaching thereto.

In bankruptcy. This case was heard in conjunction with several others, involving the question of homestead.

E. Barksdale, C. E. Dabney, T. S. Flournoy, E. Barksdale, Jr., and Robert Johnson, for petitioners.

H. Robertson, B. Green, J. M. Whittle, William Daniel, N. Green, and W. W. Henry, for defendants.

RIVES, District Judge. These cases are now heard on the petition of bankrupts to be allowed the homestead exemption of the state

under act of congress of June 8th, 1872. The first of these petitioners was adjudicated a bankrupt on the 29th day of June last; had listed real estate valued at \$3000, unincumbered, except by a judgment of about \$300, but no personal property of which he could claim a homestead. His debts are mostly anterior to July, 1868, and it is admitted that those before that date are more than sufficient to absorb the assets. His estate is about to be sold, and he asks to be allowed this \$2000 exemption out of the proceeds of sale in the hands of his assignees, and claims that it should be free of the lien of the judgments aforesaid. The second petitioner, Jerre White, was adjudicated a bankrupt on 26th August, 1871. He alleges in his petition that, before filing his petition in bankruptcy he filed his "homestead deed," in compliance with the act of assembly, but that the same was held to be void by the state court; that his lands have been sold by his assignee, and he became the purchaser of the "home tract," but has not paid for the same. He therefore prays that he may be allowed out of the money to be received by his assignee \$2000 as and for a homestead provision, to be settled on his wife and children. It is admitted that his debts were contracted previously to July, 1869. [As the questions involved in these cases concerned many other suitors in this court besides the immediate parties, I deemed it proper to invite discussion from the members of the bar, who might be pleased to assist and enlighten me by their arguments, though they might not be directly interested in these particular cases. My invitation was courteously acceded to, and for two days I have been closely occupied by able and discursive arguments, presenting the questions I am to decide in every aspect ingenuity could lend them. I should be loth to decide these cases amid the pressure of other business at this court if my studies had not given me some familiarity with the topics discussed, and if I did not feel the pressing necessity of composing the public anxiety on this subject.]²

I am called for the first time to give my opinion on the subject of these petitions. To determine the question thus raised it is necessary to ascertain the effect of the amendatory act of June 8th, 1872. It is brief. It merely substitutes one date for another in the first proviso, in section 14 of the general act, so that this proviso now reads as follows: "And such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution, or other process, or order of any court, by the laws of the state in which the bankrupt had his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year 1871." The date prescribed for these state exemption

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

² [From 5 Am. Law T. Rep. U. S. Cts. 330.]

laws in the original act was the year 1864, and, of course, deprived bankrupts in this state of the homestead provisions of our constitution adopted in 1869. I presume that constitution went into operation July 6th, 1869. I can find nothing in the constitution itself, nor in the schedule and election ordinance appended to it, fixing the time at which it should take effect. Nor do I suppose that the terms prescribed by congress, upon the readmission of the state into the Union and to representation in congress, at all suspended or delayed the birth of the constitution. Hence I revert to the proclamation of the president, under date of 14th May, 1869, submitting the constitution to the people on the 6th July, 1869, for ratification or rejection, and accept the date of the actual ratification as the date of its birth. The adoption of the fourteenth and fifteenth amendments, which was made a condition precedent to the restoration of the state to the Union, and which occurred on the 8th of October, 1869, and the approval by congress of our constitution as republican, and its consent to our admission to congressional representation, which was declared by act of congress of January 26th, 1870 [16 Stat. 62], are facts extraneous, according to my idea, to the question when the constitution became the fundamental law of this commonwealth, and are such as affect only its external relations, and not its interior organization or autonomy.

The impression exists that our court of appeals, in the case of Griffin's Ex'r v. Cunningham, 20 Grat. 31, assumed January 26th, 1870, as the date when the constitution took effect. This seems to me a mistake. They properly took this date as the end of military rule under the reconstruction acts, and the end of official tenures under the same, and as the period of complete governmental organization under the constitution, declared as republican, and the admission to congressional representation ordained by the act of January 26th, 1870. But this plainly does not touch the present question, from what period that instrument as establishing new rights or rules of property, shall be deemed operative. It certainly existed for some purpose before that date, otherwise there was no constitutional assembly in October, 1869; and its ratification at that time of the constitutional amendment was void. While it may be said that the assembly was called into existence under the reconstruction acts of congress, it must be conceded that congress could by no act of its own alter or affect the mode prescribed by the constitution for the ratification of amendments thereto. Though it be admitted that the constitution was only provisional until its acceptance by congress, in the sense and under the theory of the reconstruction acts, still, in legal contemplation, its operation, upon the event of its complete authority, should relate back to its ratification, and this latter date, when the seal of public approval was given to it at the polls,

be assumed as the rightful one by which rights accruing thereunder, and contracts regulated thereby, should be governed. It will scarcely be contended that this article did not confer clear rights of property, independent of legislative action, and that the reference therein to the assembly was merely for auxiliary details, under an express prohibition "to defeat or impair the benefits intended to be conferred by the provisions of this article." No neglect of the legislature to pass a law on the subject could at all abrogate the rights conferred by this article; it was operative of itself, and did not depend on a law of the assembly. I find nothing decisive of this point in the late case of Tackett v. Stone, 22 Grat. 266. It did not become necessary to ascertain in that case when the homestead took effect, nor does the court seem to have fixed a precise date therefor, though I concede there are incidental remarks in the opinion of the court to the effect that until the constitution was approved, and senators and representatives elected under it admitted, it did not become the organic law of the state, and as such binding upon the citizens thereof. The acts of assembly to which I have been referred for a legislative recognition of the date from which the constitution takes effect, purport only to fix the limit of the provisional military government, and the complete restoration of the state to the Union, which I do not doubt is properly fixed as January 26th, 1870. But it is not necessary to decide this question in these cases. The present inclination of my mind is, for the reason I have assigned, to take the date of the ratification of the constitution as the period from which the homestead provision became operative. As I find nothing decisive on the subject in the decisions of the court of appeals of this state, according to my view of them, I throw out this suggestion for the consideration of that bench and the learned bar of this state. Whatever, however, may be assumed as the period of the commencement of the homestead, whether 6th July, 1869, or 26th January, 1870, it is clear that the amendatory act of congress of 8th June, 1872, adopting as a part of the bankrupt exemption the additional benefit of the state exemption laws in the year 1871, embraces the homestead provisions of our constitution. This act was introduced by a senator from this state, and was designed to include our homestead provision. It clearly does so.

The question now arises, what is the nature, extent, and operation of that exemption, and how shall these be determined? The orderly examination of this question leads first to an inquiry into the scheme and theory of the bankrupt law on this subject of exemption. The establishment of a uniform system of bankruptcy is supposed to involve the idea of a discharge, greater or less, from precedent obligations. So far, confessedly, congress has the right to impair the

obligations of contracts. In the Legal-Tender Cases (*Knox v. Lee* and *Parker v. Davis*) 11 Wall. [78 U. S.] 459, this is incidentally conceded in the opinions both of the majority of the court and of the dissenting justices. The only difference was whether this power over contracts extended to the incidental or implied powers as well as the express powers, the dissenting justices admitting its application to the latter, but denying it as to the former, while Justice Strong, of the majority, declared with emphasis: "There was no ground for any such distinction. It has no warrant in the constitution or in any of the decisions of this court. We are accustomed to speak, for mere convenience, of the express and implied powers conferred upon congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers simply described, are as expressly given as is the power to declare war or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last clause of section 8 of the first article, and granted in the same words in which all other powers are granted to congress. And this court has recognized no such distinction as is now attempted." It may, therefore, be admitted that it is clearly within the competency of congress to grant a retrospective exemption so as to discharge antecedent obligations. Congress, in such a bankrupt law, might, if it chose, insert such a homestead provision as we have, making it good against any debts heretofore contracted, although its inevitable effect would be to impair the obligation of contracts; and for this simple reason, that the power to such an end is expressly given by the United States constitution. In the same way the power to regulate commerce, declare war, etc., may not be exerted without impairment of contracts, and yet it cannot be disputed because of this resulting injury from its exercise. I therefore concede the power of congress in the enactment of a bankrupt law to make exemptions in the very terms of our homestead provision, embracing past as well as future debts. But the question here is not what congress may do, but what congress has done; nor what the authors of this late act may have designed, but what they have accomplished.

To facilitate our inquiry in this direction, I submit a cursory analysis of the 14th section of the bankrupt law [of 1867 (14 Stat. 522)]. The exemptions are twofold: First, such as are made in the first instance by congress, and secondly, such as have been made by the states. The first comprise four particulars: 1, necessary household and kitchen furniture, and other articles and necessaries, not to exceed in value the sum of five hundred dollars; 2, wearing apparel; 3, uniform, arms, and equipments of a soldier in the militia or federal army; and 4, such other property as is now, or hereafter

shall be, exempted by the laws of the United States. The second class has one comprehensive designation, which it is well here to repeat in the language of the act now amended: "And such other property not included in the foregoing exceptions as is exempted from levy and sale, upon execution or other process or order of court, by the laws of the state in which the bankrupt has his domicile at the time of the commencement of proceedings in bankruptcy, to an amount not exceeding that allowed by such state exemption laws in force in the year eighteen hundred and seventy-one." Our concern is now exclusively with this second class of state exemptions, recognized and validated by the act of congress. It is but a part of the policy which led to the act of May 19th, 1828 [4 Stat. 278], and the practice of the federal courts under it. That statute provides that the proceeding upon execution in the courts of the United States shall be the same as were then used in the courts of each state, and empowers the courts of the United States, by rules of practice, to make such proceedings conformable to any changes thereafter adopted by any legislature of the respective states. Through this act, and subsequent rules of practice adopted as authorized by it, the practice in the federal and state courts was, in 1864, generally the same as to the exemption of the property of debtors under execution. This provision of the bankrupt law, therefore, only entitles the bankrupt to the same exemption as he would have had in the federal courts, if pursued by executions issued therefrom. An objection has been made to the constitutionality of this provision, for its lack of uniformity, because of the variety of these state exemptions. But it has been held that the law itself is uniform in its principles, but diverse only in its application or operation within the states, owing to the respect which congress pays to state laws. It has been generally acquiesced in. The policy of the legislature, and the practice of the judicial departments of the United States government, and the principles upon which the bankrupt law is framed and depends, do, therefore, alike support the idea that, upon questions of state exemptions, we must consult and be governed by the state codes alone. The judiciary act of 1789 [1 Stat. 92] embraces the same principle in its 34th section, that "the laws of the several states, except when the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States where they apply." It has been well held that this provision is a mere legislative recognition of the principles of universal jurisprudence as to the operation of *lex loci*. *Wayman v. Southard*, 10 Wheat. [23 U. S.] 1. Indeed, I do not see how, upon any other principle, our judicial system, state and federal, could consist and act in their separate

and well-defined provinces without injurious clashing and serious interruptions to the harmony of both governments. Hence I recognize it as an elementary principle at the foundation of the department to which I belong, that when called upon to decide upon rights of property in my district under the local laws of the state, I am bound thereby as the same are expounded by the state tribunals. A statute consists not merely of its terms, but of the judicial exposition thereof, so that if a law of the state has been construed by the highest court of the state, I am bound by that construction, and relieved of all necessity of examining the same, and forming my opinion of what is already authoritatively settled for me. And this follows from the fact that I, like the state judge, administer the laws of Virginia where they settle the question submitted to me; and if I depart from them, I am depriving the citizen of the benefit of the laws under which he lives. The further and qualifying principle, that upon [questions of general jurisprudence independent of local laws, and upon] ² such as affect the constitution, treaties, and statutes of the United States, I am free to form my own judgment, and am not bound by the decisions of the state courts, admirably serves to show how our different sets of courts may move on harmoniously, and vie with each other in raising upon the foundation our fathers have laid for us a structure of enlightened jurisprudence, suitable to the wonderful progress of our country and the new dispensation of science, which is removing from the intercourse and trade of nations the obstacles of space and time.

These general considerations, growing out of the nature of our complex government, and the relation of our state and federal judiciaries, prepare us to determine what is now to be regarded as our homestead exemption. It is declared by our state constitution in these words: "Every householder or head of a family shall be entitled, in addition to the articles now exempt from levy and distress, to hold, exempt from levy, seizure, garnisheeing, or sale, under any execution, order, or other process, issued on any demand, for any debt heretofore or hereafter contracted, his real and personal property or either, including money or debts due him, whether heretofore or hereafter acquired or contracted, to the value of not exceeding two thousand dollars, to be selected by him." It is needless, for the purpose of the present inquiry, to quote more of this article 11. I refer, besides, to the second section thereof, which I understand as making this homestead superior to the lien of execution where the property has been restored; and to the lien of "judgment rendered or docketed on and after the 17th day of April, 1861, and before the 2d

day of March, 1867, for any debt previous to the 4th day of April, 1865, excepted," etc. The feature of this provision, which challenged general inquiry, was its retroactive effect upon anterior debts and judicial liens in the two instances I have cited. The general provision in the third section subordinated this claim to "any mortgage, deed of trust, pledge, or other security thereon." Hence, by the terms of this section, this exemption could not stand against any voluntary incumbrance, such as "mortgage, deed of trust, or pledge," nor involuntary incumbrances, such as execution or judgment liens, which I take to be covered by the concluding phrase, "other security thereon." It may not be inapt to state here that this constitutional provision clearly comes under the designation of the 14th section of "state exemption laws," the constitution being the highest fundamental law of the state. So far as the allowance of this exemption against debts subsequent to the time when it took effect is concerned, there has been no doubt or difficulty. But the question naturally arose, whether it could affect or impair anterior obligations, and if so, whether it was not obnoxious to the constitutional inhibition upon the states to pass any law impairing the obligation of contracts. This question was differently decided in the circuits by able and learned judges. It has, however, been finally settled by the supreme court of appeals with entire unanimity. That decision settled the law for the state. Its effect is literally to expunge from the 1st section of the homestead clause the word "heretofore," so as to leave it applicable only to debts hereafter contracted, and also in my view to render nugatory the 2d section in relation to anterior liens of certain specified executions and judgments. This clause of the constitution is now to be read as if it were virtually altered in the text, so as to conform literally to the construction placed upon it by the highest judicial tribunal of the state. I can go no further to ascertain its meaning and its effect. I am not free to form an opinion of it judicially; and it would be supererogatory if not impertinent to express one. I must take and administer this law of the state as I find it settled by the highest and final court of the state. Any other course on my part would offend against the theory I entertain of the functions of our separate judiciaries, state and federal, and would render me culpable in my own eyes for having attempted to mar the symmetry and disturb the harmony of that wisely constructed system of courts for administering the law of both governments.

It must not be forgotten that I am now disposing of a question of "state exemptions" under the fourteenth section of the bankrupt law. That of the congressional direct exemption to the bankrupt is upon a

² [From 5 Am. Law T. Rep. U. S. Cts. 330.]

different footing, and is necessarily a matter for the exclusive cognizance and decision of this court, but when congress chooses to add to its own list of exemptions further exemptions under "state laws," it refers this court in its action thereupon to those state laws, and the discussion must turn upon the construction of those statutes. I do not doubt it would have been in the power of congress to have given to bankrupts a homestead in the retrospective terms of our clause. The only obstacle in the way would be the direct enactments of variant exemptions in the different states. But this congress has not attempted to do. The alteration of the date in the fourteenth section only availed to extend the benefits of exemptions to such additional ones as the state had made between 1864 and 1872. This is the whole effect of the amendatory act of June 8th, 1872. I do not doubt that the projectors and authors of this law, without due consideration, supposed it would give validity and operation to the homestead exemption as expressed in the eleventh article of our constitution. But I feel confident upon further reflection and examination, they will see that they have not accomplished that object but have only extended the relief under it so far as the court of appeals has allowed it, namely, as against debts contracted subsequently to the operation of the constitution, which, in my view, dates from the ratification, the 6th July, 1869.

To this conclusion I have been conducted by general reasoning upon the principles of our judicial systems, and the interpretations of the fourteenth section of the bankrupt law. I now turn to authorities for this opinion. They are elementary and abundant. A leading case is that of *Elmendorf v. Taylor*, 10 Wheat. [23 U. S.] 162, in which Chief Justice Marshall says: "The court has uniformly expressed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the states have given to those laws. This course is founded on the principle supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no court in the universe which professes to be governed by principles would, we presume, undertake to say that the courts of Great Britain, or France, or of any other nation, had misunderstood its own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction as given by the courts of the nation, as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle the construction given by this court to the constitution of the United States is received by all as the

true construction, and on the same principle the construction given by the courts of the several states to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws, or treaties of the United States." So again in *Polk's Lessee v. Windell*, 9 Cranch [13 U. S.] 87, it is held, "In cases depending on the statutes of a state, and more especially those relating to titles to land, the federal court adopt the construction of the state where that construction is settled and can be ascertained." In *Gardner v. Collins*, 2 Pet. [27 U. S.] 58; *Inglis v. Trustees of the Sailors' Snug Harbor*, 3 Pet. [28 U. S.] 127; *U. S. v. Morrison*, 4 Pet. [29 U. S.] 129; and *Hinde v. Vattier*, 5 Pet. [30 U. S.] 398,—the same controlling principle is announced variously as follows: "Where the question of the construction of the statutes of a state has been settled by judicial decision in the state where the land lies, the supreme court of the United States, upon the uniform principles adopted by it, would recognize that decision as part of the local law." "The uniform rule of this court with respect to titles to real property is to apply the same rule which is applied in state tribunals in like cases." "The supreme court, according to its uniform course, adopts the construction of the act which is made by the highest court of the state." This principle is carried so far that the supreme court abnegates its own judgment, and surrenders its own opinion when not in accordance with the construction settled in the state courts. *McKeen v. Delancy*, 5 Cranch [9 U. S.] 22. It recedes from its opinion, though in accordance with two decisions of the state, when satisfied that the law was finally settled otherwise by the highest court of the state. This was the noteworthy case of *Green v. Neal*, 6 Pet. [31 U. S.] 298. The language of this case is most pertinent to our present discussion, and I must be pardoned for making copious quotations from it. Judge McLean delivering the opinion of the court made this comment on the peculiar feature of the case: "But the question is now raised whether the court will adhere to its own decision made under the circumstances stated, or yield to that of the judicial tribunals of Tennessee. This point has never before been decided by this court on a question of general importance. The cases are numerous where the court has adopted the construction given to a statute of the state by its supreme judicial tribunal, but it has never been decided that this court will overrule their own adjudication establishing an important rule of property when it has been founded on the construction of a statute made in conformity to the decision of the state at the time, so as to conform to a different construction adopted afterwards. In a great majority of causes brought before the federal tribunals they are called in to enforce the laws of the states. The rights of parties are determined under

these laws, and it would be a strange perversion of principle if the judicial exposition of these laws by the state tribunals should be disregarded. These expositions constitute the law and fix the rule of property. Rights are acquired under this rule, and it regulates all the transactions which come within its scope. On all questions arising under the constitution and laws of the Union, this court may exercise a revising power, and its decisions are final and obligatory on all other judicial tribunals, state as well as federal. A state tribunal has a right to examine any such questions and to determine thereon, but its decision must conform to that of the supreme court, or the corrective power may be exercised. But the case is very different when the question arises under a local law. The decision of the question by the highest tribunal of a state should be considered as final by this court, not because the state tribunal in such a case has any power to bind this court, but because in the language of the court in the case of *Shelby v. Guy*, 11 Wheat. [24 U. S.] 361, a fixed and received construction by a state in its own courts, makes a part of the law. If the construction of the highest tribunal of a state forms a part of the statute law as much as an enactment of the legislature, how can this court make a distinction between them? The inquiry is, what is settled law of the state at the time the decision is made? This constitutes the rule of property within the state, by which the rights of litigant parties must be determined. And the construction of a state law having been settled by a series of decisions of the highest state court, differently from a former decision of the supreme court, the latter construction of such law will be adopted in the federal courts."

It was from this course of reasoning the court felt constrained in this case to overrule its former decision and conform to the later decisions in Tennessee. The language of Justice McLean, in depicting the consequences of a different course, bears with great emphasis on the question I am now deciding. "Here," says he, "is a judicial conflict arising from two rules of property in the same state, and the consequences are not only deeply injurious to the citizens of the state, but calculated to engender the most lasting discontents. It is therefore essential to the interests of the country and to the harmony of the judicial action of the federal and state governments, that there should be but one rule of property in the state." It would hardly be presumed that a different rule would obtain as to the interpretation of a state constitution from that already indicated for state laws. To preclude any such distinction, I cite the cases of *East Hartford v. Hartford Bridge Co.*, 10 How. [51 U. S.] 511; *Webster v. Cooper*, 14 How. [55 U. S.] 489; and *Randall v. Bingham*, 7 Wall. [74 U. S.] 513,—for the

position that the decision of the highest court of a state upon a question arising under the state constitution as binding on the federal courts, and that the construction given by such state court to a provision of its state constitution, not called into question by any conflicting opinion of that court, is in like manner conclusive. I have not exhausted the authorities on this head. I have not sought to do so. I have not inquired into the limitations and exceptions to this doctrine, as they do not affect the questions under consideration. Abbott gives a summary of the cases in these words: "The courts of the United States look to the several states as the appropriate and authoritative expounders of the legislation of their respective governments, and whenever the courts of a state judicially settle the construction of a state statute, the courts of the United States are bound thereby, and will give effect to such statutes accordingly, saving, however, vested interests from being prejudiced by changes of construction. But in cases of conflict or fluctuations in the opinions of the state courts, the supreme court will interpret the statutes by their own judgment." *Abb. U. S. Treatise*, 240; *Pease v. Peck*, 18 How. [59 U. S.] 595. The citations, however, with which I have contended myself suffice to settle in a clear light, and place in an impregnable position the grand harmonizing principle in the structure and action of our two sets of courts, namely, that in the domain of state laws they are construed for both by the state judiciary; that cases arising under the constitution, laws, and treaties of the United States, pertain to the supreme court, whose decisions thereon are binding on the state judiciary and upon the vast middle field of general jurisdiction, not at all dependent upon local statutes or local usages, embracing the doctrine of contracts and general commercial law. Each judiciary is left free for itself to explore all sources of legal science, and ascertain upon general reason and legal analogies the principles by which it shall be governed, subject to the deference and respect which educated and honest jurists will always gladly and emulously pay to the opinion of collaborators in the same exalted calling.

It only remains for me to illustrate, in the cases now under consideration, the practical operation of the principles which I have deduced from reasoning and authorities. The nature and extent of the homestead exemption is now finally settled in this state by its highest court. The supreme court of appeals has established a fixed rule by which the claims of creditors and the exemptions of the debtor shall be adjusted under creditors' bills or otherwise in the general liquidation which is now going on among our impoverished people. If this rule prevail, as I have undertaken to show it should prevail in the bankrupt court, then the citi-

zen, whether creditor or debtor, would be entitled to and receive in both forums the same treatment and relief under an equal administration of the same laws. But if it be otherwise, and this court be at liberty to establish a different rule, a deplorable contention would ensue between the courts, and there would be neither repose nor certainty for the prosperous development of business or the encouragement of commercial enterprise and activity. This antagonism and clashing of the courts would extend to their respective suitors, and breed strifes and discontents, destroying public confidence in our courts, and estranging the affections of the people from their governments. If the federal courts fail of the deference they owe to the state courts, how shall the latter be expected to submit to the authority of the former in the rightful jurisdiction of all cases arising under the constitution, the laws, and treaties of the United States? These consequences are not urged as conclusive, but as most persuasive, to show that we cannot entertain the belief that our judicial systems were so viciously contrived by their wise founders as to involve such pernicious collisions of judicial authority and action. But where the rule is such as to allow of my revising the judgments of the court of appeals, and dissenting from its construction of the homestead provision, the inquiry would pertinently arise whether or not I concurred in that decision. But as the case now stands, I am warranted in referring the inquirer, if any such there be, to sundry opinions which I delivered while on that bench, expressive of my sense of the judicial obligations to enforce contracts, and vindicative of their sanctity against the plausible excuses of revolutionary changes and losses, so that business should flow on in accustomed legal channels and honesty be maintained in all private transactions, notwithstanding the demoralization and disturbances incident to a devastating war, which the indiscretion, the incompetency, the wickedness of rulers had been allowed by an inscrutable Providence for its just ends to bring down on a misled people. I choose, however, that my decision shall rest on the well-established principle that I cannot sit in judgment on the court of appeals in its construction of the constitution of the state, and that my whole duty is discharged in ascertaining what that decision is, and what are its effect and operation on the cases in hand. It might be replied to this reasoning that inasmuch as the decision of the court of appeals was upon a clause of the constitution of the United States, it came within the very exception that I have already mentioned. This would have been so had the decision of the court been otherwise and against the rights claimed under the United States constitution; but it will be recollected that under the venerable 23th section of the judiciary

act [1 Stat. 85], as modified by act of February 5th, 1867 [14 Stat. 385], there is no right of appeal where the decision is against the validity of a statute assailed on the ground of its repugnance to the constitution of the United States. In such case the corrective power of the federal judiciary ceases. But in case of a contrary decision, a writ of error would lie to the supreme court of the United States, so that no one can lose his rights as asserted under the constitution of the United States without the sentence of the supreme court; but he can have no appeal there when such constitutional claims are not denied by the state tribunals. This is a logical consequence from the nature of our two governments, and necessary to maintain the supremacy of the general government within its sphere.

I have thus endeavored to present a connected view of my reasoning on this subject without turning aside to reply to the various arguments that have been addressed to me. Perhaps I have already incidentally indicated my leading reply to these arguments, but it may be well to notice especially a few objections to the view I have taken. The first and leading one is an argument *ab inconvenienti*. It is said that to follow the decision of our court of appeals is to create a distinction in debts at war with the fundamental principle of the bankrupt law, namely, equality of distribution after the satisfaction of liens; that this distinction would operate to the unequal satisfaction of creditors of the two classes into which they would be arrayed by this decision, and that the prescribed action of this court would be deranged by conforming to it. Concede that this consequence flows, where is its foundation? Certainly not in the act of congress, which merely adopts the state exemption, but rather in the state exemption itself. The vice is found in the homestead provision, and consists in the innovation thereby attempted of applying it to contracts "heretofore" made. To the honor of the state it may be said that in all her previous legislation having any bearing on contracts, the laws were always prospective, and the assembly instinctively revolted against the idea of turning back to affect past contracts. This inconvenience, then, is the product of reckless innovation, and cannot be traced to a faulty construction of the late act of congress. The effort is to construe it as adopting our homestead provision *in totidem verbis*, whereas it has no special reference to it, but includes it only under the generic phrase of "state exemption laws."

Another view is also based upon the fact of the act of congress preceding the decision of the court of appeals. It is inferred from this that congress gave the homestead exemption literally as it stood in our constitution. Had this decision been a new law out of the limits of time prescribed, there might have been some semblance of plausibility in it;

but it makes no law, it merely construes the exemption and ascertains what it amounts to. Hence, it does not matter when the decision was pronounced; its effect, whenever rendered, is to establish the true reading of this clause. If it had not been made at this time I should have been left free to construe it for myself, but, whenever made, it becomes a part of the law which I have to administer, and I must implicitly follow it.

Another question is made as to the application and operation of this amendatory act to pending cases of bankruptcy. It is clearly prospective; but, as a remedial act, it may be availed of in all pending cases where assets are undistributed, and the enlarged exemption can be granted without prejudice to the interests already vested before the passage of the act. When congress chooses to increase this bounty it would be hard to discriminate between the applicant before and the applicant after the act, when the case of each was such as to put it in the power of the court, without the invasion of vested interests, to give both alike the benefit of the enlarged exemption. The contrary view is based upon the idea that the deed of assignment vests the title to the assignee in behalf of creditors, and divests to that extent the title of the bankrupt to his exemptions, but the direct opposite is plainly declared in the 14th section of the bankrupt law by the proviso, "that the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees. And in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act."

It has also been contended in these cases that inasmuch as the exempted property is held independently of the deed of assignment, the claimant takes cum onere, and the lienor must follow it elsewhere for his satisfaction. This pretension rests upon the authority of a case from the district court of California. In *re Hunt* [Case No. 6,883]. I do not know enough of the nature and provisions of the California homestead, nor of their local laws and judicial proceedings, to weigh the considerations that may have induced this decision, but in this state I should feel, if I followed this authority, and should turn away the judgment creditor, when the assets liable to his demand are in my hands, to a state court, I should be derelict in my duty and should abnegate my rightful authority to provide for the liquidation of liens in this court.

2 [Many arguments and considerations, derived from the war and its results in the loss of property and the impoverishment of our people, have been pressed on me with fervor and eloquence, as incentives to earnest and careful investigation of the important ques-

tions at issue; they have been felt and weighed by me; but as appeals or motives for relief they belong to a wholly different forum from that which administers the laws, but has no power to modify them to meet the public wants or wishes. I am not insensible of the disappointment which this decision will give to a number of suitors in the courts of my district. An impression has been widely disseminated that the late act of congress would have the effect of giving validity to the homestead provision in the form and language in which it stands in the constitution. This was a vague and loose impression, arising from a cursory examination of the question, rather than from a close legal scrutiny which it demands for a satisfactory solution. Unfortunately, the press of the state has given currency to this impression. Without exerting its influence to prepare the public mind to await with serenity the judicial decision that, in the nature of things, could not long be delayed, some, without thought or inquiry, have hastened to predicate, on wholly insufficient data, their confident prophecies of a decision favorable to their views or interests; while another paper at the seat of government, with metropolitan influence and circulation, has not hesitated to seize with impatience these unauthorized rumors and speculations, and, in spite of all precedent and all decency, in the spirit of depraved journalism, and through a prurient taste for partisan detraction, has made them the occasion and the means of misleading and irritating the public mind, by falsely assuming what would be the decision of this court, and thus contemptuously arraigning and discrediting it in advance before the public. As but little credit is given now-a-days to newspaper editorials or correspondence, so that the sensitive man incurs the risk of being laughed at for his folly in seeking to correct them, nevertheless I used every precaution through proper channels to correct false ideas, to secure for myself time for deliberation, and stay the public judgment till it might receive with candor the formal adjudication, under the sanction of legal proceedings and observances. If the public mind is no longer in that state of equanimity which is desirable for the calm consideration of this question, I am in nowise responsible for its disturbance, and so far as I am personally concerned by these strictures of the press, I may be pardoned for indulging the humble hope that I may be able to live above them and be unaffected by them, in the opinion of capable and impartial men, whose judgment alone is of value to me. I do not suppose this is an occasion where one is likely to be betrayed by his feelings. It is a mistake to suppose, as a general thing, that our people can be divided into two distinctive classes of creditors and debtors. It was well said, by one of the counsel for defendants to these motions, that these attributes were usually

2 [From 5 Am. Law T. Rep. U. S. Cts. 330.]

interchangeably combined in the same individual, so that the embarrassed debtor, upon getting his legal dues, might either emerge from his class into the other, or else might at least escape the necessity of becoming a petitioner in bankruptcy. But were it otherwise, and were the case a clearer one for the sway of private sympathies and inclinations, all must feel and admit that they cannot intrude on this bench, and must yield here to the convictions of reason and judgment, matured by anxious reflections and able arguments. But the claimant of the homestead must remember he now obtains all that the constitution of the United States allows him, and even that may be jeopardized if the opposite doctrine should prevail, so that the state in some future convention might enact a retrospective repeal of it, with the same propriety with which it sought to interpret the original enactment as retrospective. In this way present losses are often compensated in the view of considerate sufferers by the greater and pervading good of adhering to the laws as interpreted by their constitutional expounders upon enduring principles, sanctioned by the wisdom and fortified by the experience of mankind in all ages and nations. There still remains the right of homestead—prospective in character, and good against all debts contracted after knowledge and upon the faith of it; but no homestead under the sting and reproach of vacating contracts made without notice of it. In the responsibility I bear and feel upon this occasion, I felicitate myself in the fact, that if I have erred in my judgment, the error admits, in a summary way, and with inconsiderable costs, of speedy correction by a superior tribunal. The counsel in these cases will be pleased to hand me sketches of decrees in conformity with this opinion.]³

Case No. 18,113.

WYMAN v. BABCOCK.

[2 Curt. 386.]¹

Circuit Court, D. Massachusetts. May Term, 1855.²

ABSOLUTE DEED AS MORTGAGE—ORAL EVIDENCE—DENIALS IN ANSWER—EQUITY OF REDEMPTION—PRESUMPTION OF RELEASE—LAPSE OF TIME—CONSTRUCTIVE TRUST.

1. A deed, absolute in form, may be shown to have been really a mortgage, by the oral testimony of two witnesses, against the denials of the answer, where those denials are not satisfactory in themselves, and are accompanied with admissions that some confidential relations existed between the parties, not consistent with the terms of the deed. The stat-

utes of Massachusetts, as to the foreclosure of mortgages, apply only to legal mortgages.

[Cited in *Andrews v. Hyde*, Case No. 377; *Amory v. Lawrence*, Id. 336.]

[Cited in *Newton v. Fay*, 10 Allen, 509; *Campbell v. Dearborn*, 109 Mass. 139.]

2. The presumption that an equity of redemption is released after twenty years' possession by a mortgagee, does not apply to a case where the mortgagee was in possession under an absolute deed, with an agreement that the mortgagor might redeem when he found it convenient, no specific time being fixed, and the mortgagee had no notice or request to redeem. And if, in such case, the mortgagee sells the land to a bona fide purchaser, and so destroys the equity of redemption, a court of equity treats him as a constructive trustee, so the trust is not barred till the expiration of six years from the discovery of the right to an account.

[Cited in *Amory v. Lawrence*, Case No. 336.]

[Cited in brief in *Walker's Adm'r v. Farmers' Bank*, 6 Del. Ch. 81, 10 Atl. 96. Cited in *Linnell v. Lyford*, 72 Me. 284; *Hinckley v. Hinckley*, 9 Atl. 898, 79 Me. 323.]

In equity.

S. Bartlett and S. Ames, for complainant.
C. G. Loring and Wm. Dean, contra.

CURTIS, Circuit Justice. This is a suit in equity by Edward Wyman, a citizen of the state of Missouri, as assignee of Nehemiah Wyman, his father, against Archibald Babcock, a citizen of the state of Massachusetts. The bill states that, on the 20th day of November, 1828, Nehemiah Wyman was seized of a tract of land in Charlestown, containing about eleven acres and a half; that about one acre of this land had been sold and conveyed by him to James Foster, who, having mortgaged it back to secure the payment of the consideration money, Nehemiah Wyman had entered for breach of condition, and to foreclose the mortgage; that all but the Foster one was incumbered by two mortgages, both held by the defendant; the first being a mortgage from Nehemiah to Francis Wyman, on which there was then due for principal and interest the sum of \$1,487³²/₁₀₀, the defendant, being the executor and trustee under the will of Francis Wyman, in that right holding this mortgage; and the second being a mortgage from Nehemiah to the defendant, nominally to secure the sum of \$1,200 and interest, but really to secure the repayment of such sums as might be advanced by the defendant to Nehemiah; and that on this last-mentioned mortgage there was then due, for such advances, the sum of four hundred dollars. The bill further states, that at the same time, Nehemiah also owed to the defendant, personally, eight dollars ¹⁰/₁₀₀, and to him, as agent for the heirs of Nehemiah Wyman, senior, the sum of one hundred and thirty-six dollars ⁷¹/₁₀₀; that Nehemiah was much embarrassed in his affairs, and at the pressing solicitation of the defendant, who was his brother-in-law, and of William Wyman, his brother, he consented to make a deed of the said land, excepting the Foster acre, to the defendant, abso-

³ [From 5 Am. Law T. Rep. U. S. Cts. 330.]

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

² [Affirmed in 19 How. (60 U. S.) 289.]

lute in form, but intended to stand as security for what Nehemiah thus owed; that the conveyance was made for that purpose only, and the defendant went into possession; that none of the notes held by the defendant were surrendered or cancelled, the same being retained because the land was taken as security only; that the defendant was to have the management of the land and receive the rents and profits, and apply them towards the accruing interest; and if there should be any excess, towards the principal, and that Nehemiah was to have the right to redeem at any time when he should be able to do so. The bill further states, that in 1844 the defendant, without any notice to Nehemiah, of his intention to sell, or to the purchasers, of the nature of his title, sold the land by an absolute title, to bona fide purchasers, without notice; and it prays for an account of the rents and profits while held by the defendant, and of the value of the land when sold, and that after deducting the amount for which the land stood as security, the residue may be paid to the complainant, who alleges himself to be the assignee, by deed, for a valuable consideration, of all Nehemiah's equity in the premises.

Upon this case, an outline of which, as stated in the bill, has thus been given, several questions have been made, and elaborately argued by counsel. The first question which arises is, whether the complainant has made out, in point of fact, that the land was conveyed by way of security as is stated in the bill. The answer denies that it was so conveyed. Two witnesses, Nehemiah Wyman, and his brother William Wyman, testify, directly and positively, in support of the statements made in the bill. Ordinarily, this would be sufficient to control the answer. But there are facts in this case, which require me to examine the credibility of these witnesses, to compare their weight with that due to the answer, and to test both the answer and the proofs by their consistency with facts admitted or clearly proved, and to see how far the one or the other best accords with the surrounding circumstances. Nehemiah Wyman was, until a short time before the bill was filed, the owner of the equity asserted by this suit. He sold and conveyed his interest to his son; this purchase, the son was advised by counsel to make, in order that the father might be a witness. I see no sufficient reason to doubt that it was an actual sale, for a valuable consideration, which divested him of all interest. Nehemiah Wyman says he was not made to enable him to testify. As it appears, the son had communication with the counsel, and the father, who lived in a distant state, does not appear to have done so, perhaps the just conclusion is, that he did not know that was the inducement which led to the purchase by the son. But at all events, his relation to the cause is not that of an unexceptionable witness. William Wyman has

acted as the agent of his brother, while he held the claim, and of his nephew since. He has had some difficulty with the defendant, who is the husband of his sister, about an account. It is apparent that his feelings are enlisted in favor of the claim.

Some supposed contradictions and inconsistencies in the testimony of the two witnesses were mentioned at the argument, and have been examined. My judgment is, that considering the lapse of time since the events testified to, and considering the relations of these two witnesses to the controversy, without imputing to either of them any intentional unfairness, I ought not to rest a decree, upon the unaided force of their testimony, against a satisfactory answer directly responsive to the bill. And therefore I must examine the answer, ascertain what are its claims to credence, and see whether it, or the evidence of these witnesses, is most credible in itself, and best consists with the known facts.

The account given in the answer of the purpose and consideration of the deed in question, is as follows:—"That this defendant at the urgent solicitation of the said Nehemiah, consented to accept said conveyance in payment of the sums of money due to him personally, and upon the agreement that if he should be able to realize therefrom in addition enough to pay the sums due to him as executor and trustee, he would pay the same, and upon no other agreement, trust, or confidence whatsoever. This defendant further says, that upon the delivery to him of the said deed, he cancelled the notes of said Nehemiah Wyman, held in his own right, and either surrendered them to him or destroyed them, but that he did not cancel or surrender the notes held by him as executor and trustee, because he was not satisfied that he should realize enough of the said land to pay the same, and that in order to prevent any presumption that he had so agreed absolutely, he made a minute thereon to the effect that he did not guarantee payment thereof; it being the understanding and agreement between him and the said Nehemiah, that if enough was not realized out of said land to pay the whole of said debts, the said Nehemiah should be personally liable therefor, and that this defendant should, if possible, realize enough to pay the same, and should not be under any liability to account with the said Nehemiah for his doings relating thereto."

The first observation which occurs on reading this statement is, that it is not consistent with the deed itself. That declares the consideration to be the sum of two thousand and thirty-three dollars and eighty-seven cents. The answer, in another place, admits that, "the consideration money expressed in the deed was the amount then due to the defendant in his own right and as executor and trustee, and of the further sums of

eight dollars ¹⁰/₁₀₀ owed to this defendant, and fifty dollars owed to him as agent for the heirs;" and there is no doubt whatever how the amount expressed in the deed was arrived at, and that it was by a careful computation of the principal and interest due, at the date of the deed, to the defendant in his own right as executor and trustee, for the children of Francis Wyman, and as agent of the heirs of Nehemiah Wyman. If the above statement in the answer is correct, it is difficult to perceive how the debt due to the defendant as executor and trustee, for which the land was already mortgaged, formed any part of the consideration of this deed, or why it was said by the deed to do so; and still less why the amount due to the defendant as agent for the heirs of Nehemiah Wyman, senior, was included in the consideration; for according to the answer, there was no agreement at all concerning the application of the land, or its proceeds, to that debt.

It was suggested by the defendant's counsel that there was a mistake made in drawing the answer, and that instead of speaking of what was due to the defendant as executor and trustee, it should have said as agent. But I must take the answer as it stands. If there was any such mistake, there is an established mode of obtaining leave to correct it, and proper guards and securities are thrown round such applications. *Smith v. Babcock* [Case No. 13,008]; *2 Daniell, Ch. Prac. 911*. But it cannot be done at the hearing; and requires more than a suggestion of counsel to obtain it, however probably correct that suggestion may be. Besides, if the proposed change were made, it would only increase the difficulty above adverted to; for then it would stand that there was no agreement concerning the greater amount, due to the defendant as executor and trustee, and yet it formed part of the consideration expressed in the deed.

The next circumstance which has attracted my attention is, that this part of the answer declares that the defendant took the land in payment of what was due to himself personally, "and upon the agreement that if he should be able to realize therefrom enough to pay the sums due to him as executor and trustee, he would pay the same." If this were so, then the heirs of Francis Wyman, whom the defendant represented as executor and trustee, acquired an interest in the land, which by the agreement, was to stand as security for the debt due to the defendant as executor and trustee, after enough should be received therefrom to pay his own debt. Yet when the defendant afterwards answered further, in consequence of exceptions to his original answer, in speaking of the proceeds of the sales of the land, he says, that he paid the two thousand dollars received of Hall, (one of the purchasers,) to said heirs, (of Francis Wyman,) on account of his liability to said heirs as

their trustee, and not on account of any right they had to the said land or to the proceeds thereof, and that he used all the said money paid to him, as aforesaid, as his own money, as he had a right to do. As the proceeds of these sales very greatly exceeded what was due to the defendant personally, it is difficult to reconcile this, with the admission in the original answer, that he did agree to appropriate what he should be able to realize from the land, in addition to his own claim, to the payment of the sums due to him as executor and trustee; or to see how he could consider that his own money, to be used as he saw fit, which he had agreed to appropriate to pay notes on which Nehemiah Wyman was personally responsible.

There are also some singular incongruities in the defendant's statement of the agreement, in the passage above quoted from the answer. It is, in substance, that the defendant took the land in payment for what was due to him personally, and agreed that if he should be able to realize from the land enough to pay the sums due to him as executor and trustee he would thus pay the same; that Nehemiah was to remain personally liable if the whole of what was due to the defendant as executor and trustee was not paid out of the land; and that the defendant was, if possible, to realize enough to pay the same; but he adds that he was not to be under any liability to account to Nehemiah for his doings relating thereto. How it was to be ascertained, without a sale, whether the defendant could possibly realize from the land more than enough to pay his own debt, and how much more he could so realize; how the obligation to sell and apply the proceeds as stated, can consist with his absolute acquisition of the title in payment of his own debt, and how the agreement to realize enough, if possible, to pay the debt due to him as executor and trustee, could have any efficacy whatever, if, as he declares, he was not to be under any liability to account with Nehemiah for his doings relating thereto, I am not able to perceive.

These particulars in the answer are not matters drawn from collateral statements; they grow out of that part of it which undertakes to set forth the agreement which is in controversy. They affect the substance of the transaction; and I am obliged to conclude that the account which the defendant has given in his answer, of the purpose and consideration of this deed, is not probable in itself, and is scarcely reconcilable with what men of ordinary knowledge of affairs would agree to; for its substance and effect, as stated in the answer, would be, that Nehemiah Wyman conveyed to the defendant, land worth, as the answer admits, \$1,900, in payment of a debt of about \$400; and though the defendant agreed he would, if possible, pay, out of the land, a debt of upwards of \$1,400, for which Nehemiah stood personally liable upon his promissory note,

yet the defendant was never to be called to account, and might keep this agreement or not, at his own pleasure.

Such a transaction is not only improbable in itself, but, considering the relations of the parties to it, would be so inequitable, that a court of equity could not allow it to stand. It must be remembered that this land was mortgaged by Nehemiah Wyman by two mortgages; the first held by the defendant as executor and trustee, and the second in his own right; and that both were then payable, and the defendant had power to bring suits on the notes and to enter for condition broken, and to foreclose. Now, according to the answer, the equity of redemption was released for no real consideration whatever; for if we take the debts due to the defendant personally to have been extinguished by this conveyance, while the much larger debt due on the first mortgage was kept alive, what did Nehemiah gain? He parted with land, admitted to be worth \$1,900, to pay a debt of \$400, leaving himself personally liable for the debt of \$1,400, which the defendant might pay out of the land, or not, as he should elect. In *Russell v. Southard*, 12 How. [53 U. S.] 154, the court had occasion to consider the subject of a release of an equity of redemption by a mortgagor to a mortgagee, and set aside such a release, under circumstances certainly not so inequitable as this answer discloses. For there, the mortgagor simply got nothing for his release; here, according to this answer, he was subjected to a loss of \$1,500, at the pleasure of the mortgagee.

Looking further at these statements in the answer, we find the defendant declaring that he did not surrender or cancel the notes held by him as executor and trustee, because Nehemiah was to continue personally liable thereon, but that he did cancel or surrender the notes held by him personally; if so, it would have been consistent with the agreement on which the conveyance was made, as he states it; but the fact does not appear to be so; all the notes remained in his possession, and uncanceled. This is a very significant fact. It is not consistent with the agreement to receive the deed in payment of some of these notes. According to the usual course of dealing among men of common prudence the retention of all these notes is consistent only with the hypothesis that the land was taken as security.

I attach some importance also to the dates of some of these notes. One of them, \$486⁷⁰/₁₀₀, is dated November 7th, 1828; and two others, one for eight dollars ¹⁰/₁₀₀, and the other for fifty dollars, are dated November 11, 1828, and all bear interest. It is testified by William Wyman, and there is no evidence to the contrary, and it is in itself probable, that this conveyance was under negotiation for some time. The deed bears date on the 20th of November, 1828. If it was intended it should stand as a security,

there was reason for reducing the debts to the permanent form of notes bearing interest, which the defendant could retain, as he in fact did retain them; if it was intended to receive the deed in payment of these debts, it is not probable they would have been put into this form, pending the negotiation.

The defendant's counsel has very forcibly urged the improbability that the defendant, who had security on the land by a second mortgage for his own debt, and also by a first mortgage for the debt due to him as trustee, should have been willing to enter into an arrangement by which payment was so long, and almost indefinitely, postponed. There is much apparent weight in this argument; but it is lessened, on further examination of all the circumstances. Francis Wyman's will was such that, the principal debt was to remain invested, until 1842, and if this was a secure investment, as it is evident it was, its permanence was very desirable. Moreover, as the defendant himself states the transaction, he actually did agree to postpone the payment of that debt to the payment of his own, and to make its payment dependent on what he might realize from the land, at some indefinite time, when he might think it proper to sell. As to his own debt, as well as the debt due to him as a trustee, it must not be forgotten that this was a family arrangement, and that Nehemiah Wyman was poor and embarrassed, and had a large family. The same considerations of a rigid self-interest, which might be safe guides in considering the conduct of mere strangers, may not be so applicable to this case. It is testified by William Wyman that it was understood between the parties that as the defendant was to have the title, and consequently the power to sell, he would not do so without first appraising Nehemiah. This duty would undoubtedly be implied by law if the bill states the contract truly. But in considering whether the defendant would be likely to make the agreement stated in the bill, it should be remembered that it gave him the absolute control over the property, which he probably anticipated he could exert, if it should become necessary for his own protection.

The most material circumstance, in my judgment, in opposition to the testimony of the plaintiff's witnesses, is the lapse of time. Apart from all technical considerations drawn from statutes of limitation, or rules of law framed for the repose of titles, the lapse of time predisposes every judicial mind to look with disfavor on claims, and on evidence in support of them. I am sensible of having approached this case with such a predisposition. Yet, except when some rule of positive law interposes, or the principles of equity concerning acquiescence afford a bar to a claim, it is necessary to examine carefully the reasons for the delay, and the circumstances under which it has occurred.

I shall have occasion to state some of my views on this subject in speaking hereafter of the statute of limitations. But I may say here, that the witnesses themselves declare that Nehemiah Wyman removed in 1835 to a distant state; that he returned but once to this part of the country, in 1840, four years before the land was sold; that he had no knowledge of the sale of the land till 1851; that though the witness William Wyman knew of the sale of the land soon after it was made, when he spoke to the defendant concerning his brother's rights, the defendant informed him the right was barred by the statute of limitations, and he credited the assertion. These statements are not improbable in themselves, and they go far to explain the silence of these persons. Though I cannot say it is perfectly satisfactory, it is so far sufficient that in considering their evidence upon the main points of the case, I do not think much is to be detracted from its weight, by reason of Nehemiah's having omitted to make earlier claim.

It is further urged that William Wyman, who acted as scrivener in this transaction, was well acquainted with the forms of such business, and that Nehemiah Wyman having executed mortgages previously, must also be supposed to have known that a written defeasance ought to be given, and it is asked, why was it omitted if a mortgage was really intended. The defendant put this same question to Nehemiah Wyman on his cross-examination. He was asked "If there was understood between you and said Babcock any defeasance to the deed of November 20, 1828, why was not said defeasance reduced to writing." His answer is: "It was a confidential transaction between three brothers, and we all well understood the same, and for what intent the deed was made. The deed was intended and understood by us three, to operate as a mortgage, but being a transaction between brothers, we did not think it necessary to be so particular in setting forth the rights of the respective parties, never anticipating that there would be any difficulty in a settlement between Mr. Babcock and myself." There is a fact in the case which strongly corroborates this statement, that a defeasance was omitted upon a mutual confidence then subsisting between these parties. In April, 1826, Nehemiah Wyman executed a mortgage to the defendant to secure a negotiable note for twelve hundred dollars, payable in one year from its date, with interest. The real object was to secure future advances. These papers having been prepared by Mr. Tufts, a lawyer, he drew up a memorandum, declaring the object of the mortgage, and the defendant signed it, yet it appears never to have been delivered to the mortgagor and was found by William Wyman, who produced it, in the possession of the defendant.

In respect to the value of the land at the time of the conveyance, I do not perceive how I can avoid the conclusion, that it exceeded considerably, the consideration alleged by the defendant to have been paid for it. It had been purchased by Nehemiah, at an auction sale of his deceased father's estate, eight years before, for \$2,272 ⁵⁰/₁₀₀, and the fences had been in part built anew. Three years previous, (in 1825,) one acre had been sold to Foster for \$600. There is some evidence tending to show, that in 1830, the defendant, with the concurrence of William Wyman, offered to sell the land at \$200 per acre; but this was when real property was much depressed in value. Both the plaintiff's witnesses testify that they believed the land of much greater value than the consideration mentioned in the deed. This is matter of opinion, but the defendant produces no witness who expresses a different opinion.

I have stated, in some detail, the views I have taken of the principal points involved in this question of fact, because I think it due to the parties that I should do so. The results at which I have arrived are, that the account given of the transaction in the answer, is so unsatisfactory, and the positive evidence of two competent witnesses is so far corroborated by circumstances, that I consider the answer overborne by their testimony, and that the allegation of the bill, that the conveyance of November, 1828, was made only as security, and not as an absolute sale of the land, is made out in proof.

The next question is, whether this oral evidence is admissible for the purpose of showing that a deed absolute on its face, was intended as a mortgage, and that the defeasance was omitted from mutual confidence between the parties. This question has been elaborately and learnedly argued by the defendant's counsel. I consider it to be settled by authority, which in this court is decisive. In *Taylor v. Luther* [Case No. 13,796] the precise question arose. It was a bill to have a deed absolute on its face, declared to be a mortgage by force of a defeasance, which the bill alleges was by parol. The defendant denied that the conveyance was intended as a mortgage, and set up the statute of frauds. The complainant relied by the bill, solely on a parol agreement for his right of redemption. Mr. Justice Story, after stating the rule, laid down by numerous authorities, that parol evidence is admissible to show that an absolute deed was intended as a mortgage, and that the defeasance had been omitted, or destroyed, by fraud or mistake, adds: "It is the same, if omitted by design, upon mutual confidence between the parties,"—and he proceeds to state the reasons, and made a decree resting on parol evidence only. In *Jenkins v. Eldredge* [Id. 7,266], he reaffirmed the same position. The cases of *Conway v. Alexan-*

der, 7 Cranch [11 U. S.] 238; Spriggs v. Bank of Mount Pleasant, 14 Pet. [39 U. S.] 201; Morris v. Nixon, 1 How. [42 U. S.] 126; and Russell v. Southard, 12 How. [53 U. S.] 139, fully support the doctrine upon which Mr. Justice Story decided Taylor v. Luther [supra]. In Russell v. Southard this question was elaborately argued, and the authorities were examined, and carefully considered by the supreme court. It is true a memorandum in writing was given in that case; but the memorandum disproved the allegation that the conveyance was a mortgage; parol evidence was admitted to control that memorandum, and to prove that it did not show the actual transaction; and a decree was made, declaring the conveyance to be a mortgage, by force of the parol evidence only. It was there stated to be the doctrine of the court "that when it is alleged and proved that a loan on security was intended, and the defendant sets up the loan as a payment of purchase-money, and the conveyance as a sale, both fraud and device in the consideration are sufficiently averred and proved to require a court of equity to hold the transaction to be a mortgage." My opinion is, that the statute of frauds does not afford a bar to the admission of the parol evidence in this case.

The remaining questions respect the effect of the statute of limitations, and the foreclosure of the mortgage. The statutes of Massachusetts concerning the foreclosure of mortgages can have no direct operation on the case, because they include only legal mortgages; and no indirect effect by affording an analogy to be followed by a court of equity, if for no other reason, because there was no entry by this mortgage after condition broken, and no entry before, and holding after condition broken, with notice of an intention to foreclose, as is required by the law of this state. The case must be considered, therefore, under the rules which equity has prescribed, concerning the duration of an equity of redemption, and also for limiting the other peculiar rights which belong to the complainant. In Hughes v. Edwards, 9 Wheat. [22 U. S.] 497, the rule is thus laid down: "In the case of a mortgagor coming to redeem, the courts of equity have, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff after twenty years adverse possession, fixed upon that as the period after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favored." And this rule is amply supported by authority. † Kent, Comm. 291, and cases there referred to; Dexter v. Arnold [Case No. 3,859], and cases in the notes. This bar is founded on the presumption of a release by the mortgagor, drawn from his neglect to redeem after forfeiture. It is plain that it can have no ap-

plication to a case where there has been no breach of condition, and nothing which can be attributed to the mortgagor as neglect.

In the case at bar no time was fixed by the parties, after which the condition could be considered broken, and the right to have the foreclosure by lapse of time begin. The agreement charged and proved is, that the mortgagee was to take possession, apply the rents and profits to keep down the interest, and the residue towards the payment of the principal, and that the mortgagor might redeem at any time. Whether upon an application by the mortgagees to a court of equity upon a bill to foreclose the mortgage, this right to redeem at any time, would not have been construed to mean at any reasonable time, and whether after the lapse of such time, the court would not have lent its aid to foreclose, need not be determined, though I should apprehend there could be little doubt respecting it. But mere lapse of time, unaided by any request to the mortgagor to redeem, or any notice to him that the mortgagee considered him in default, and was holding to foreclose, cannot, in this case, bar the right. I should have no difficulty in so holding upon principle, but I consider the position supported by authority. White v. Pigion, Toth. 135; Palmer v. Jackson, 5 Brown, Parl. Cas. 281; Orde v. Heming, 1 Vern. 418; Yates v. Hambly, 2 Atk. 359. It was argued that these authorities are not applicable because, in this case, the debts secured by the mortgage were all payable, and an action might have been brought at any time against the mortgagor and he forced to pay, and that the right thus to sue him personally, is not even alleged by the bill to have been waived or suspended. This does not make a distinction satisfactory to my mind. Every mortgagor who signs a bond or promissory note, and secures its payment by a mortgage, is liable to an action upon it in personam, the moment it becomes payable; and so far as the process of the law may be effectual for that purpose, may be forced at once to pay the debt, and thus to redeem the land. But all this stands with an ordinary equity of redemption. Why not with this equity? On the other hand, the personal claim of the mortgagee may be barred by the statute of limitations, for six years, while his right as mortgagee remains good fourteen years longer. I think the correct doctrine was stated in Coggswell v. Warren [Case No. 2,958].

There is another point of view in which I think it is not possible to sustain the bar, and which I consider presents the case in its true light. The mortgagee entered in 1828, and he sold the land in 1844, to bona fide purchasers without notice, who undoubtedly acquired an absolute title to the lands. In other words, the mortgagor's right of redemption was effectually destroyed by the mortgagee, when he had held only sixteen years. and while that right of redemption was, consequently, still subsisting. This act of the

mortgagee was done without notice to the mortgagor, as is admitted in the answer. Such a sale was a constructive fraud on the rights of the mortgagor, and turned his right to redeem into a claim against the mortgagee personally, for an account of the value of the land, and of the rents and profits. Now the limitation of such claims in equity is, six years after the discovery of the fraud by the aggrieved party. Here the bill charges a studious concealment of the sale by this mortgagee, and that the mortgagor had no notice of the sale, and that he was in a distant state. The answer admits, that the defendant dealt with the land as his own; and though it denies intentional concealment, says, no notice of the sale was given to the mortgagee. The proof shows that the mortgagee first discovered the sale in 1851, and accounts reasonably for his ignorance, and for the discovery. It may be, that if the possession of the mortgagee and those claiming under him, and the neglect of the mortgagor was such as to bar a claim to redeem, it would also bar a claim for an account for a constructive fraud, in destroying his right of redemption. But as the circumstances of this case would not, in my judgment, allow the mortgagee to set up his possession, if it had lasted more than twenty years, as a bar to a claim for redemption, and as six years have not elapsed since the discovery of the claim for an account on the ground of a constructive fraud, I do not consider the statute of limitations, or any analogy drawn from it by courts of equity, affords a bar to this bill.

My attention has been attracted to a point not insisted on at the bar, concerning the right of the complainant to maintain this bill. If it were not for the relation subsisting between the parties to the sale of the right in question, there might be some difficulty in maintaining it. Though the doctrine held by Mr. Justice Story on this subject would seem to be broad enough to cover such a purchase by a mere stranger. *Gordon v. Lewis* [Case No. 5,613]; *Baker v. Whiting* [Id. 787]. But the case of father and son has always afforded an exception to the general rules concerning champerty, and there seems to be nothing in the nature of the interest sold, which would on any other ground, preclude a court of equity from recognizing the title of the assignee. 2 Story, Eq. Jur. § 1049.

Let a decree be entered declaring the conveyance of November, 1828, to have been a mortgage to secure the debts, the amount whereof is named in the consideration of the deed, and that at the times of the sales of the land by the defendant, the complainant's assignor had right to redeem the same,—that the absolute sales and conveyances of the land to bona fide purchasers for valuable considerations, without notice, was a constructive fraud upon the rights of the complainant's assignor,—that thereupon he became entitled, as against the defendant personally, to an account of the then value of the land, and of

the rents and profits, and (after deducting the amount due to the defendant for principal and interest) to the payment of the balance, and that the complainant, as assignee, has succeeded to those rights; and let the cause be referred to a master to take the necessary accounts.

[On appeal to the supreme court, the above decree was affirmed. 19 How. (60 U. S.) 289.]

Case No. 18,114.

WYMAN et al. v. FOWLER.

[3 McLean, 467.]¹

Circuit Court, D. Michigan. Oct. Term, 1844.

DECLARATION IN ASSUMPSIT—SURPLUSAGE.

1. If a count in a declaration contains sufficient averments, surplusage will not vitiate it.

2. Goods received, which are to be sold at certain prices, or the goods returned on demand; if sold, and the money received, no special demand need be alleged.

3. If the action were for a failure to return the goods, a special demand necessary.

At law.

Mr. Howard, for plaintiffs.

Mr. Frazer, for defendant.

McLEAN, Circuit Justice. This is an action of assumpsit. The defendant demurs to the seventh and eighth counts in the declaration. The seventh count charges that the plaintiffs agreed to deliver to the defendant, "a certain quantity of goods and merchandise, described in certain invoices, amounting to the sum of nine hundred and twenty dollars and forty-seven cents, on consignment, on terms that the defendant should account for all articles sold at prices named in said invoices, or to return and redeliver said goods to the plaintiffs, when demanded by the plaintiffs, without commissions." The goods were delivered to the defendant, and the declaration avers, that they were sold on the 1st of August, 1842, at the prices named in the invoices, and that the sum of nine hundred and twenty dollars and forty-seven cents, was received by the defendant. The breach alleges, that the money has not been paid nor the goods returned.

The following grounds of demurrer are assigned:

1. "No averment that the defendant had made collections from the sale of the goods." The declaration states, that the goods had been sold for the prices stated in the invoices, and the money received; consequently, there was no necessity for the above averment.

2. "That no special demand or request was made to account with plaintiffs for said goods or their avails." Had the goods not been sold, and the action were brought for a

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

failure to return them, a special demand must have been averred, as by the contract the goods were to be returned on demand being made. But the sale of the goods, as averred, rendered this demand unnecessary. The goods having been sold, could not be returned. The general request is sufficient for the money received.

3. "No substantial cause of action, promise or undertaking, set forth in this count on the part of the defendant; and the breach in the declaration is insufficient, and not coextensive with the alleged agreement." There is a cause of action in the delivery of the goods for sale, and an allegation of their sale, at the prices agreed upon, and the receipt of the money. The breach alleges the non-payment of the money, or the return of the goods. As the goods were sold, it was not necessary to allege in the declaration that they were not returned. And this part of the breach may be considered as surplusage, and be disregarded. The other breach covered the contract, by averring that the defendant had not done that which, by the contract, he was bound to do.

4. That the bills referred to in the count are not set forth, nor the particular goods sold. In this respect, the count is not defective. A general description is sufficient. There is unnecessary verbiage in the count, but there is enough in it to sustain the action.

The eighth count is for an invoice of goods sold, amounting to the sum of four hundred and seventy-one dollars and thirty-four cents, delivered to the defendant on the same terms as stated in the seventh count. And as the eighth count is similar to the seventh, and the grounds of demurrer substantially the same as the above, they will not be further examined. The demurrer to both counts is overruled.

Case No. 18,115.

WYMAN et al. v. RUSSELL et al.

[4 Biss. 307.]¹

Circuit Court, D. Indiana. Feb., 1869.

FORECLOSURE—LIMITATION—SALE UNDER ATTACHMENT—RECORDING MORTGAGE—EFFECT OF EXTENSION ON NOTE—PARTIES—BURDEN OF PROOF.

1. As a general rule, mortgages cannot be foreclosed after the lapse of twenty years from the date when the cause of action accrued.

2. Under the statutes of Indiana of 1838, in a proceeding in foreign attachment where there was only constructive notice to the defendant, and where he did not appear to the action, no personal judgment could be rendered against him. In such a case, the judgment should have been simply for a sale of the property attached. And the only writ that could issue on such a judgment was a venditioni exponas. A sale on a fieri facias issued on such a judgment is void.

3. Under the Indiana Code of 1838, a neglect to record a mortgage within the prescribed time did not invalidate it, except as to a subsequent bona fide purchaser or mortgagee whose deed or mortgage was first recorded.

4. A mortgage was made in 1838, to secure notes which on their face all fell due in nine months thereafter. A suit to foreclose this mortgage was commenced in 1860. On each note the mortgagees indorsed an agreement to delay the collection of the notes for three years from the date of the mortgage. But these indorsements were not referred to in the mortgage, nor recorded. Quære, did this engagement thus indorsed on the notes, as between the mortgagee and innocent purchaser, take the case out of the operation of the Indiana statute of limitation of twenty years?

5. In a proceeding to foreclose a mortgage, all persons holding the equity of redemption of the lands or any part thereof must be made parties.

6. In a suit by assignees of a note and mortgage, if the assignment is denied it must be proved.

In equity.

Porter, Harrison & Fishback, for complainants.

M. M. Milford and McDonald & Roach, for defendants.

MCDONALD, District Judge. On the 11th of September, 1860, the complainants, [Leander] Wyman and [Ephraim] Mariner, filed their bill in this case against the defendants, Samuel J. Russell and Lucy his wife, Erastus Bond and Mary his wife, Charles W. Thomas and Elizabeth his wife, Benjamin Loboek and Mary Ann his wife, Samuel Finny and Elizabeth his wife, Joseph Pool and Rachel his wife, Samuel Haller and Sarah his wife, David Neal and Lucinda his wife, Isaac Coleman and Rachel his wife, Jonathan Shideler and Sarah C. his wife, and Othniel Williams. The bill charges that in 1838, the defendants, Russell and Gilbert, partners, executed to Rayner and Pond of New York three notes, payable respectively in five, seven, and nine months, in the aggregate sum of two thousand seven hundred and fifty-three dollars and sixty-five cents, which have never been paid; that to secure the payment of these notes at the end of three years, Russell and wife, on the 13th of April, 1838, executed a mortgage to Rayner and Pond on divers designated tracts of land in Fountain county, Indiana, and on certain lots in the city of Milwaukee, which was recorded in Fountain county, Indiana, in 1841; that afterwards Rayner and Pond assigned the notes and mortgage to one Eldred, who, on the 11th of July, 1860, assigned them to the complainants; that no proceedings have ever before been instituted to collect them; that the defendants, Bond and wife, Thomas and wife, Finny and wife, Loboek and wife, Pool and wife, Haller and wife, Neal and wife, Coleman and wife, and Shideler and wife, "have, or claim to have, some interest in said mortgaged premises, as purchasers, incumbrancers, or otherwise; but such interest, if any, is subsequent to the mortgage."

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

The bill prays a foreclosure of the mortgage.

Bond and wife, and Thomas and wife, Finny and wife, Loboek and wife, and Shideler and wife have filed a joint answer to the bill. It substantially denies the material allegations of the bill. These defendants, in this answer claim title to separate portions of the land in Fountain county. And they aver that, on the 28th of April, 1838, in the Fountain circuit court, Isaac Coleman and Samuel Coleman commenced a proceeding in foreign attachment against said Samuel Russell, and one John F. Russell, William E. Russell, Henry Russell, Othniel Gilbert, James B. Stewart, John Pierson, James Smith, Joseph Wright, and David K. Knight; that the writ of foreign attachment in that case was on the same day levied on said lands in said county; that in September, 1839, said court rendered judgment in favor of the plaintiffs in that proceeding for one hundred and twenty dollars and twelve cents, and costs; that thereupon an execution on that judgment was issued to the proper sheriff, commanding him to sell the attached lands; and on the 14th of December, 1839, the sheriff sold the same on that execution to said Isaac Coleman and Samuel Coleman for one hundred dollars; that on the 3d of September, 1844, the sheriff made to the purchasers the proper deed on said sale, who on the 12th of May, 1845, conveyed the same lands to one William Baldwin, Elias Butler, and Lewis C. Wilson for one thousand six hundred and forty-eight dollars, "under whom these defendants hold, and claim title, to said lands as innocent purchasers for valuable consideration"; that the notes in question, as they appear in the record of the mortgage, were due more than twenty years before the commencement of this suit, and therefore these defendants plead the statute of limitations; and that all the persons under whom these respondents hold said lands were, equally with the defendants, innocent purchasers, and together with them have, ever since the 14th of December, 1839, been in the quiet possession of these lands, and have made valuable improvements on them, without the assertion of any claim to them under the mortgage, and therefore the defendants insist that the complainants' claim is stale and inequitable, and should not be allowed. To this answer there is a general replication. The defendant, Russell, has filed an answer admitting the facts stated in the bill.

The cause is now submitted for final decree on the bill, answers, exhibits, and evidence. The mortgage and notes are in evidence; and in all respects the bill describes them correctly. The mortgage appears to have been acknowledged December 9, 1838, and recorded in Fountain county, April 5, 1841. On the back of each of the notes, there is the following indorsement: "For value received, we hereby agree to defer the payment of the within note three years from

this date, interest being paid annually. Dated April 13, 1838. Rayner & Bond." But these indorsements, though of the same date as the mortgage, are not referred to in it, nor recorded. The defendants produce in evidence an authenticated transcript of the attachment proceedings referred to in their answer. And it proves substantially the averments in the answer relating to those proceedings. By this transcript it appears that the Fountain circuit court ordered a sale of the attached lands. But neither the writ under which the sale was effected, nor the sheriff's return thereto, appears in the transcript. The clerk who made the transcript, however, certifies thus: "Which said execution and return appear to have been lost—which said execution by the records of the court was issued for said sum of one hundred dollars and twelve cents, and fifteen dollars and ninety-eight cents, costs accrued." The sheriff's deed to the purchasers under his said sale is also in evidence. It is dated September 3, 1844. After reciting the judgment in attachment, as above stated, this deed says that a writ on said judgment was issued to the sheriff commanding him that, "of the goods and chattels, lands and tenements of the" defendants in the attachment suit, "found in his bailiwick he should cause to be made the judgment," &c. Thus the deed describes a *feri facias*, and not a *venditioni exponas*. Indeed, this conveyance and the transcript taken together plainly indicate that the writ was a common *feri facias*. Moreover, this deed makes no reference to the writ of foreign attachment; and by its terms it would seem that the lands were sold in *solido*, and not in parcels.

The respondents, by divers deeds of conveyance, unnecessary to be here particularly noted, prove a chain of title from the purchasers at the sheriff's sale down to them. And I see no defect in this chain of title if the first link in it—the sheriff's deed—is valid. Still, allowing for the present that it is, the question would remain, which lien should prevail, that of the attachment proceeding or that of the mortgage? The mortgage was executed on the 13th of April, 1838; and the suit in foreign attachment was commenced April 28, 1838. The mortgage lien was therefore the older.

But was this older lien defeated by the failure to record the mortgage till April 5, 1841? At that time, the Indiana statute provided that mortgages should be "recorded within ninety days after the execution thereof;" and, if not so recorded, that they should "be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration" unless such mortgage should "be recorded before the proving and recording of the deed under which such subsequent purchaser or mortgagee may claim." Code 1838, 312. Now, the mortgage in question was recorded before the sheriff's deed was executed.

It is plain, therefore, that the omission to record the mortgage till 1841 would not, under this statute, defeat its priority over a sheriff's deed which was executed in 1841. Therefore the neglect to record the mortgage in time is of no avail to the defendants.

But, even if the sheriff's deed had been recorded before the mortgage was, it could not defeat the mortgage, unless it was a valid deed. To make it such, it must be supported by a valid judgment and a valid execution. *Armstrong v. Jackson*, 1 Blackf. 210.

In this case, there was a valid judgment. The transcript, indeed, shows that there was a personal judgment for one hundred and twenty dollars and twelve cents; and this was undoubtedly void; because it was rendered in a proceeding in foreign attachment, by default on a mere newspaper notice, against defendants who were not residents of the state, and who never appeared to the action. But another portion of that judgment is valid, namely, so much of it as ordered a sale of the lands which were attached. On this order a proper writ might undoubtedly have been issued. But what was the proper writ? certainly not a fieri facias. Beyond question, the only proper writ was a venditioni exponas. Was the writ on which the sheriff made the sale in question a venditioni exponas? Unfortunately the writ is lost. But the sheriff's deed describes no such a writ. As we have already seen, both it and the transcript describe a fieri facias. And an agreement between the parties on file admits that "said writ and sheriff's return thereof are substantially in accordance with the facts recited in the deed." According to this the sale was made under a fieri facias; and it was therefore void; and the deed was and is consequently void.

But, though the respondents are not entitled to claim anything under the sheriff's deed, still is not the staleness of the complainants' demand such that a court of equity ought not to decree in their favor?

The mortgage was executed April 13, 1838. On its face, it purports to have been made to secure three notes then existing, and falling due respectively in five, seven, and nine months. On the face of the mortgage, therefore, it would seem that all these notes were due on the 13th of January, 1839. The bill was filed September 11, 1860, more than twenty-one years after the debt was due. To meet this difficulty, the complainants insist that, by the indorsements on the notes already referred to, they really did not fall due till the end of three years after the execution of the mortgage; and therefore the statute of limitations did not begin to run against their claim till January 13, 1842. Possibly this fact saves the case from the operation of the statute of limitations; though I doubt it. Perhaps it might as between the holders of the mortgage and the makers of it; but it is more questionable as between the holders and the respondents, who were ignorant of the agreement to extend

the time of the payment of the notes, and who appear by the evidence to have purchased the land in good faith, and to have been long in quiet possession of it and made valuable improvements on it. However, in 1860, under my predecessor in office, so much of the answer as sets up as a defense the lapse of time was excepted to by the complainants as being an improper way of setting up the bar of the statute of limitations. The judge then sustained the exception and ordered the part of the answer thus excepted to be stricken out. It has not indeed been expunged; but I think I must not regard it as a part of the answer. But this is not very important in view of other points hereafter to be considered.

It is in evidence that the lands in question, since the mortgage was made and before the commencement of this suit, have passed through many hands, been subdivided into small lots, and sold to divers purchasers, who for many years past have occupied them as their own and improved them; and that several of these purchasers, though within the jurisdiction of this court, have not been made parties to this suit. Certainly they are necessary parties. And till they are made parties the complainants cannot have a decree of foreclosure. In such a case, the court might indeed order the case to stand over till all the necessary parties are brought in. But, as no motion to that effect has been made, and as there is a fatal objection to a decree for the complainants resting on the insufficiency of the evidence, I will not of my own motion make such an order.

The complainants sue as assignees of the notes and mortgage in question. The answer denies the assignments of them. Under these circumstances the burden devolved on the complainants to prove the assignments as alleged in the bill. On this point there is no evidence whatever. And this circumstance is fatal to a recovery by the complainants. The bill is dismissed without prejudice at the complainants' costs.

NOTE. Where creditors have allowed the statute to run against their debts, it runs also against the security for the debt; and where the creditors for whose benefit an assignment was made delay asserting any claim to the trust funds until the debts intended to be secured are barred by the statute, it becomes the duty of the trustee, after such lapse of time, to refuse to pay the debts, and a court of equity will refuse to enforce the trust. *Gibson v. Rees*, 50 Ill. 384.

For the general statement of the doctrines of limitations to mortgages, consult 2 Washb. Real Prop. (3d Ed.) 174. The purchaser from a mortgagor may avail himself of the statute in the same manner as the mortgagor might have done. *McCarthy v. White*, 21 Cal. 495; *Coster v. Brown*, 23 Cal. 142; *Lord v. Morris*, 18 Cal. 482. The period from which the statute begins to run is the breach of the condition of the mortgage. *Rodman v. Hedden*, 10 Wend. 498; *Powell v. Smith*, 8 Johns. 249; *Odlin v. Greenleaf*, 3 N. H. 270.

In case of judgment by default, only constructive notice being had on the defendant, the property attached is alone liable. *Conn v. Caldwell*, 1 Gilman, 531; *Boswell v. Dickerson* [Case

No. 1,683]. And a special execution will, in Illinois, issue for the sale of the attached property. But if the defendant appear or is served, the judgment is in personam, and the plaintiff can have an execution generally and also a special one for the sale of the property. *Conn v. Caldwell*, supra. The general rule is that all persons interested in the mortgaged property, are necessary parties to a suit of foreclosure, and this includes all entitled to redeem. 1 *Daniell*, Ch. Pl. & Prac. 212 et seq.

At common law an indorsee of a promissory note is bound to prove the indorsement in the ordinary mode like any other handwriting, and that it was made by the person by whom it purports to have been made, and when the indorsement is special, that the indorsee is the person described in it. 3 *Phil. Ev.* 189. And in Illinois, where by statute the assignee in an action upon an assignable instrument is not bound to prove the assignment or signature unless they are put in issue by a verified plea, the statute is held to apply only to cases where the declaration is upon the instrument. When it is offered in evidence under the common counts the common law rule still obtains. *Hall v. Freeman*, 59 Ill. 54.

WYMAN (STINSON v.). See Case No. 13,460.

WYNCOOP, The MARTIN. See Case No. 9,177.

WYNKOOP (SAGE v.). See Case No. 12,215.

Case No. 18,116.

WYNN v. WILSON et al.

[Hempst. 698.]¹

Circuit Court, D. Arkansas. March 26, 1855.

APPLICATION FOR INJUNCTION—NOTICE—DEFENCES AT LAW—ENJOINING JUDGMENT AT LAW—NEGLIGENCE OF ATTORNEY.

1. Notice should be given to the adverse party or his attorney, of the time and place for moving for an injunction.

2. If a defendant omits to make his defence at law, equity will not afford him relief on the same grounds.

3. Mere negligence in an attorney, unaccompanied by fraudulent combination or connivance, is not sufficient to arrest a judgment at law.

[Cited in *Rogers v. Parker*, Case No. 12,018; *Downs v. Allen*, 22 Fed. 810.]

Application for injunction on bill in chancery, to the Hon. PETER V. DANIEL, Associate Justice of the Supreme Court of the United States, at chambers, in Washington City. The bill alleged, that on the 22d April, 1854, Samuel S. Wilson, son of James H. Wilson, recovered judgment for two thousand nine hundred eighty dollars and forty-six cents; that on 10th of June, 1854, execution issued on the judgment, that the marshal levied on certain slaves; that the complainant [William Wynn] gave a delivery bond, which had been forfeited, and that execution was about to be issued thereon, unless prevented; that the judgment was rendered on two notes, assigned by James H. Wilson to his son, Samuel S. Wilson; that these notes, in an arrangement and compro-

mise between the complainant and said James H. Wilson, had been paid and satisfied before the assignment, but were not delivered up; that complainant employed counsel to defend the suit, but such counsel failed to make defence, and judgment was rendered against him by default; that at the time of the rendition of said judgment and suing out process thereon, the plaintiff was dead, and the process of the court thus abused, and praying for injunction and general relief. No notice was given of the intended application for an injunction. The bill was duly verified.

A. Pike and E. Cummins, for complainant.

George C. Watkins and George A. Gallagher, for defendants.

DANIEL, Circuit Justice. 1. By the act of congress of 1793, § 5 (1 Stat. 334), it is declared that no writ of injunction shall be granted in any case, without notice to the adverse party or to his attorney, of the time and place of suing for the same. And this provision has been sanctioned as long since as the case of *New York v. Connecticut*, 4 Dall. [4 U. S.] 1, and applied to injunctions granted by the supreme court, as well as to those that may be granted by a single judge.

2. Again, it is a rule perhaps without an exception, that whenever a defendant, in a suit at law, is possessed of a defence of which he may avail himself in the action, he cannot, after waiving or omitting that defence, invoke the aid of a court of equity for relief, upon the same ground, nor upon any others which he might have asserted at law.

3. It is believed that mere negligence of an attorney, unaccompanied by fraudulent combination or connivance, has never been deemed a sufficient reason for equitable interposition to arrest a judgment at law. If the judgment in question was in truth obtained in behalf of a man who was dead at the time, that judgment is merely void, and may be quashed by summary proceedings, upon notice and proofs, by which all acts in virtue of a judgment ipso facto void, would fall to the ground. If the death of the plaintiff at law was known to his attorney, or the officer of the court when entering that judgment, or when suing out process therefor, such acts would constitute an abuse of the authority of the court such as should be strongly disapproved and promptly set aside. They could create no rights in the plaintiff's representative, nor in any person pretending to claim under the judgment.

Upon the principles herein stated, the injunction prayed for in this case, as made by the bill, must be denied.

The application was renewed at the April term of the circuit court, 1855, before the same judge. RINGO, District Judge, having been of counsel did not sit, and notice of the application was waived. It was now

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

stated and shown in the bill that the assignment of the notes to the plaintiff, in the suit at law, was fraudulent, and done to enable the said James H. Wilson to cheat and defraud complainant; and the particular facts constituting the fraud were set out and specified. Upon the second application the injunction was granted, bond and security given and approved, and a writ of injunction ordered to issue, which was done accordingly.

Case No. 18,117.

In re WYNNE.

[Chase, 227; ¹ 9 Am. Law Reg. (N. S.) 627; 4 N. B. R. 23 (Quarto, 5); ² Am. Law T. Rep. Bankr. 116.]

Circuit Court, D. Virginia. May, 1868.

BANKRUPT PROCEEDING—DEED OF TRUST—VALIDITY—CHANGE OF SECURITIES—KNOWLEDGE OF INSOLVENCY ACT OF 1867—TIME OF TAKING EFFECT—LANDLORD'S LIEN.

1. A mortgage or other conveyance made as a security for a debt evidenced by a note or word, will operate as a security for the same continuing debt, though the evidence of it be changed by renewal or otherwise.

2. But if one deed of trust be executed as a substitute for a preceding one, the former will at once cease to have any validity or effect.

3. An assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed, subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place; but the assignee represents the rights of creditors as well as the rights of the bankrupt; and any lien or incumbrance which would be void for fraud as against creditors, if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee.

[Cited in Harvey v. Crane, Case No. 6,178; Re Lake, Id. 7,992; Phelps v. Sellick, Id. 11,079; Re Smith, Id. 12,990; Edmondson v. Hyde, Id. 4,285; Re Duncan, Id. 4,131; St. Helen Mill Co., Id. 12,222; Re Baker, Id. 762; Curry v. M'Cauley, 11 Fed. 368; Taylor v. Irwin, 20 Fed. 617.]

[Cited in brief in Edwards v. Entwisle, 2 Mackey, 47. Cited in Southard v. Benner, 72 N. Y. 428.]

4. When the question is as to the effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into.

[Cited in Salmon v. Burgess, Case No. 12,262; American Wood Paper Co. v. Glen's Falls Paper Co., Id. 321a; Maine v. Gilman, 11 Fed. 216.]

5. Though the bankrupt act purports to have been approved March 2, 1867, yet, as that day was Saturday, and it did in fact embrace Sunday and Monday, the bankrupt act did not become a law until the latter day.

6. Consequently, a deed of trust which was recorded on March 2, 1867, is not avoided by the bankrupt act [of 1867 (14 Stat. 517)].

7. Nothing in the thirty-fifth section of the bankrupt act affecting a deed, it may well be doubted whether, if the bankrupt act have been

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

approved before the recording of it, its effect would have been altered.

8. It seems that as the Virginia statute against fraudulent conveyances avoids all deeds of trust as to creditors until and except from the time they are duly admitted to record, the assignee in bankruptcy would receive the benefit of that statute, and would take the property free from all claims under such deeds.

[Cited in Curry v. M'Cauley, 11 Fed. 368; Johnson v. Patterson, Case No. 7,403.]

9. It cannot be held that all mortgages or other securities not expressly included in the first clause of the second general proviso in the fourteenth section of the bankrupt act are invalidated by that act. To hold such to be the law would give to the act an ex post facto operation.

10. A deed of trust is made on December 8, 1866, and is recorded March 2, 1867. The recording of the deed can not be held to be an act of bankruptcy, that being altogether the act of the party. So far as the grantor is concerned, whatever consequences flow from his act, must attach to the act of making the deed on December 8, 1866.

[Cited in Cragin v. Carmichael, Case No. 3,319; Pattee v. Coggeshall, Id. 11,322; Harris v. Exchange Nat. Bank, Id. 6,119; Re Oliver, Id. 10,492; Clark v. Hezekiah, 24 Fed. 667; Laughlin v. Calumet & C. C. & D. Co., 13 C. C. A. 6, 65 Fed. 445.]

[Cited in brief in Gilbert v. Vail, 60 Vt. 263, 14 Atl. 543.]

11. Nor is it to be regarded as a deed executed on the day of its recordation, and therefore as a deed creating a preference on that day, as against creditors.

12. It is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid.

[Cited in Darby v. Boatman's Sav. Ins., Case No. 3,571.]

13. It seems that knowledge that a party is embarrassed in carrying out his business for want of means, is not sufficient to fix on a grantee in a trust deed knowledge of his insolvency, if he fully believed that his property is more than sufficient to pay all his debts.

[Cited in Goldsworthy v. Roger Williams Nat. Bank, 15 R. I. 591, 10 Atl. 635.]

14. No lien can be acquired or enforced by any proceeding in a state court commenced after petition is filed in bankruptcy, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon property, such jurisdiction will not be divested.

[Cited in The Raleigh, Case No. 11,539. Followed in Re Bowne, Id. 1,741. Cited in Markson v. Heaney, Id. 9,098; Olney v. Tanner, 10 Fed. 108.]

15. A lien is given to a landlord, of a high and peculiar character, by section 12, c. 128, Code Va. (Ed. 1868).

[Followed in Re Bowne, Case No. 1,741.]

16. The landlord's lien under that statute, is given by the statute, independently of proceedings by distress warrant, or attachment, which are remedies, in case of a bankrupt, superseded by the effect and operation of the bankrupt act.

[Cited in Re Trim, Case No. 14,174; Re Butter, Id. 2,236; Bailey v. Loeb, Id. 739. Followed in Re Bowne, Id. 1,741.]

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

Wynne executed a deed of trust in August, 1866, to secure certain debts due to Enders, Paine & Williams, and this deed was at the time of its execution delivered to the latter,

but never recorded by them. Afterwards, in December, 1866, Wynne made another deed for the benefit of the same parties to secure the same debts as were secured by the unrecorded deed of August, which deed was likewise delivered to the qui trusts and held by them until Saturday, March 2, 1867, when it was recorded at their instance at four o'clock p. m. The congress had during the preceding session been considering the bill entitled "An act to provide a uniform system of bankruptcy," and its sittings terminated by law on Monday, March 4, 1867, at noon. It appears from the statutes at large, that the bankrupt bill became a law by approval of the president on Saturday, March 2, 1867, while the official records of the congress shows that the sitting of March 2 extended through Sunday, March 3, until Monday, March 4, at noon, and that the fact of the president's approval of the bill was communicated to the senate after nine forty a. m. Monday. In this state of doubt as to when the law went into operation, Wynne was adjudicated a bankrupt on the petition of Wheelwright, Mudge & Co., on June 8, 1867, and June 10, ten days after, Haxall, the landlord of Wynne, levied a distress by warrant for rent in arrear on the goods on the premises, and on July 18, of the same year, he levied another distress by warrant on the same goods for rent which would become due on January 1, 1868, the law of Virginia allowing distraint for rent whenever due during the current year of the tenancy, under certain circumstances. Whereupon the contention arose between the general creditors who claimed that the Enders, Paine & Williams trust deed was void, being contrary to the provisions of the bankrupt law, and that Haxall could acquire no lien by virtue of a distraint made after the adjudication of bankruptcy, and consequently, as they asserted, there being no liens on Wynne's property, it must all be divided equally. The trust deed creditors claimed that they held a lien dating from August, 1866, or at least from December, 1866, and that it could in no wise be affected by the bankruptcy law, for the reason that the deed was valid in itself, and the law was not in fact passed until Monday, March 4, 1867, notwithstanding the official statute book stated that it had passed on Saturday, March 2, and the landlord asserted that his lien for rent by the law of Virginia was prior to all other liens, and that it was as perfect and complete without distraint as with it, and therefore he was entitled to be first paid, even if his distraint was void because made after the adjudication of bankruptcy.

On this state of the case, Johns, the assignee of Wynne, filed his petition in the district court for instructions as to the distribution of the funds in his hands, from whence the cause came up to be heard in this court.

Ould & Carrington, for deed of trust creditors.

Page & Murrey, for landlord.

John Howard, for general creditors.

Ould & Carrington, for deed of trust creditors.

This case comes before the court on the application of John Johns, Jr., assignee of Charles H. Wynne. In view of the conflicting claims upon the property of the bankrupt, the assignee asks for instructions from the court as to the priorities of the litigating parties. The indebtedness of Wynne, by the deed of the deed of trust creditors, existed as early as August, 1866. In that month a deed of trust was made to secure them, though that deed was never recorded. A subsequent deed was made on December 8, 1866, which was recorded on March 2, 1867. The deed of August, 1866, as well as that of December, 1866, was a preference in favor of certain creditors, which it was competent for Wynne to make, under the well-settled law of Virginia. This is not disputed by the other side. It could not be under the repeated decisions of the courts. Even if the grantor was in failing circumstances or insolvent, such a preference could have been made. But at the time of the deed of August, 1866, no one pretends that Wynne was in failing circumstances or insolvent. His difficulties came upon him after that time. Under the well-settled law of Virginia, the renewal of a note is only an extension of credit for the former debt, and if the first note is secured by a deed of trust, the renewal note is also secured by the same deed, even if there is no express provision as to renewals. See *Farmers' Bank v. Mutual Assur. Soc.*, 4 Leigh, 69. The real date, therefore, of the preference in this case in favor of Enders, Paine & Williams is August, 1866, and not December, 1866. And if the circumstances of the party making the conveyance become a material inquiry in this case, his condition in August would be the test. So if the knowledge of the preferred creditors is a material point, then the information they had in August when they accepted the preference, would be the real subject of inquiry. In other words, the preference in this case was not given in December, 1866, but in the August preceding, and the deed of trust of December was but a continuation and renewal of the preceding preference. The reason why the deed of August was not recorded, and why another deed was prepared and subsequently recorded, is fully explained in the answers of Enders and Paine, and not substantially controverted. According to our view of the case, it is not material whether the preference was made in August or December, as we hold that in either case it was valid. But in some of the aspects presented by the other side, it may become material to determine the true date of the preference,

and in that view we insist that the true date is August, 1866. We trust we will subsequently show that a preference does not depend upon an act of recordation, and that it is as fully made without recordation as with it. The answers of the several deed of trust creditors set forth under oath that they had the most perfect faith and confidence in the ability and solvency of said Wynne at the time of execution of the said deeds, and at the time that the deed of December 8 was recorded, and that they were at liberty at any time to record the said deeds. The reasons why the deed was not recorded are set forth. We submit that there is nothing in the proofs in this case to controvert these answers. But we hold that even if this is not the fact, their creditors are entitled to the lien of the conveyance in their favor. If the facts are in accordance with these answers, of course the case is with these deed of trust creditors. The first material inquiry is, whether the deed of December, 1866, is avoided by any provision of the bankrupt act.

We admit that there is one class of conveyances which are avoided by the provisions of the bankrupt law, whether they are made before or after the passage of the bankrupt act. They are those conveyances named in the fourteenth section of that act: "All the property, conveyed by the bankrupt in fraud of his creditors * * * shall in virtue of the adjudication in bankruptcy, and the appointment of his assignee, be at once vested in such assignee." Judge McDonald, in the case of *Bradshaw v. Klein* [Case No. 1,790], thus accurately states the law: "On the whole, I conclude that an assignee in bankruptcy may maintain an action to set aside fraudulent conveyances made by the debtor before he is adjudged a bankrupt, and even before the bankrupt act was passed, provided the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration." But in order to bring the case within this fourteenth section, the conveyance must be fraudulent in fact. A mere preference by an insolvent debtor is not a fraud. It has never been so held. After the passage of the bankrupt act, all such preferences are made illegal and void, it is true, but they have never been held to be fraudulent in fact. Hence Judge McDonald makes it as an essential ingredient of fraudulent conveyances, that there should not only be a fraudulent purpose on the part of the grantor, but that the person to whom the transfer was made was a party to the fraudulent intent, or received the transfer without valuable consideration." Now, there is no pretense that *Enders & Co.* were parties to any fraudulent intent, or that they received the transfer without valuable consideration. The transaction was the same that at that time was occurring daily in every county in the state to wit, a

bona fide indebtedness, and a deed of trust to secure the creditors.

Nor was this deed of trust obnoxious to any other provision of the bankrupt act. The thirty-fifth section only reaches frauds on the bankrupt law, and therefore can only refer to preferences made after the passage of the act. Judge McDonald, in the case already cited, so expressly decides. He says that while the fourteenth section refers to conveyances which are fraudulent under state statutes, and which may therefore extend to acts done before the passage of the bankrupt law, the thirty-fifth section only relates to acts which that section denounces, and that therefore it can only refer to preferences made after the passage of the act. The most cursory reading of the section, must satisfy any one that such is its meaning. The acts denounced are those "made in fraud of the provisions of this act," or done "with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act." How could such phraseology possibly apply to an act done or a conveyance made before the passage of the law? How could a conveyance be made "with a view to prevent his property from coming to his assignee," before any law was passed authorizing an assignee? How could a conveyance be "made in fraud of the provisions of an act," before that act was passed? How could a conveyance be made "with a view to prevent his property from being distributed under this act," before there were any provisions of law enacted, regulating distribution? Moreover, this thirty-fifth section only makes preferences void, where the creditor has reasonable cause to believe the debtor insolvent. This is utterly denied by the creditors, and is, we submit, not proved by the testimony. But even if this is not so, the case would not be altered. But it is contended that as the deed of trust was recorded on March 2, that being the day of the approval of the bankrupt act, such recordation is within the meaning and scope of the thirty-fifth section. It is alleged that as the act was approved on March 2, 1867, it brings within its scope any and every act done on that day. We will examine this position hereafter in the argument, and at present confine ourselves to the discussion of the very narrow question, whether the recordation on March 2 of a deed previously made, is denounced by the thirty-fifth or any other section of the bankrupt act. The statement of such a position, shows its utter absurdity. The only acts denounced by the thirty-fifth section are attachments, payments, pledges, assignments, transfers, and conveyances. Does the recordation of a security come under either one of these heads? Is it an attachment, or a payment, or a pledge, or an assignment, or a transfer, or a conveyance? Is it even a preference? Certainly not. The preference, the assignment, the transfer, the conveyance, was made in December previous, and as we have before

shown, is not within the scope of the thirty-fifth section. In other words, this thirty-fifth section does not impose any penalty upon the recordation of a conveyance, but does impose a penalty upon the making of the conveyance under a given state of facts. Its purpose and intent were to prevent the debtor from making assignments under certain circumstances, from and after the passage of the act. The deed of trust was no more of an assignment or conveyance after it was recorded, than it was before. It was just as much a preference or conveyance on December 3, 1866, as it was on March 3, 1867, after its record. Recording neither makes nor unmakes an instrument. It only renders void certain acts of the debtor, and does not relate to any act to be done by the creditor. If it had been the purpose of congress to render void an act already done—if it had been its intent to prevent a creditor from recording a deed already executed, there would have been some explicit mention of such purpose and intent on the face of the act.

The force of the argument that the thirty-fifth section only refers to the acts of preference on the part of the debtor is so keenly felt, that the opposing counsel have been compelled to take the position that the recording of the deed by the creditor is an act of the debtor. The extraordinary ground is taken that a creditor records a deed given in his favor, by virtue of a verbal irrevocable power of attorney. If this position was correct, it would not meet the case, for the thirty-fifth section not only relates to some acts of the debtor, but particularly specifies what they are. It must be a payment, pledge, assignment, transfer, or conveyance. If the recording of a deed by a creditor is in law and fact the act of the debtor, is it such a particular act as is named in the section? Is it a payment, pledge, assignment, transfer, or conveyance? Certainly and clearly not. So that if the opposing counsel were to succeed in maintaining their point, it would amount to nothing, unless they further showed that the act of recording a deed was either a payment, pledge, assignment, transfer, or conveyance. But it is not true that the act of recording a deed by a creditor is the act of the debtor. The theory of the power of attorney is altogether fanciful. We might with just as much reason and propriety hold that a customer who pays to a merchant ten dollars for a barrel of flour, gives him an irrevocable power of attorney to buy a coat with the money, and that the investment of such sum in that way by the merchant to cover his own back, was the act of the customer. If the gravity of the case will allow the expression, we say that the position is ridiculous. The creditor in such a case is not the agent or attorney of the debtor. The interests of the two parties are adverse, which can never be the case in an agency or attorneyship. If a creditor has not the right to record a deed for his benefit, it is because he has contracted not to do so, and

not because he has no such power as the agent or attorney of the grantor. In the present case, the evidence is plenary that the deed of trust creditors had the right to record the deed at any time, and that when they did record it, it was done as their act and not as that of Wynne. In the discussion of this matter we have assumed, for the sake of the argument, that the recordation was after the bankrupt act went into operation. But is such the fact? It is in evidence that the deed was recorded about four o'clock on the afternoon of March 2, 1867. The congressional term expired by limitation of law at high noon on Monday, March 4, 1867. The 3rd was Sunday, dies non. It is well known that under such a state of facts, the president attends the night session of Saturday for the purpose of approving the laws then enacted. We understand that the bankrupt act of 1867, after having been made the subject of conference, passed late on Saturday, and was approved many hours after the time of the recording of Wynne's deed. Nay, it is well known that all laws approved by the president bear date one day before they are announced as approved to the house in which they originated, except in the special case to which we have referred, when the president attends the night session of congress. It is the well-known practice of the presidents to examine ordinary legislation of congress on the night of the day on which the bills are delivered to him, and if they meet his approval to endorse that approval on them, as of the date of that day. They are then regularly on the following day reported to congress, but bear date the preceding day. Probably not one act in a thousand has been endorsed with an approval before four o'clock in the afternoon of the day on which it appears to have been approved. In the light of these facts, we call your honor's attention to *In re Richardson* [Case No. 11,777]. Mr. Justice Story there held that the time of the day at which an act was approved might be inquired into, and if the fact appeared that a transaction took place before that hour, though on the same day, it was not affected by the act. He further held that if the matter was in doubt, and if it did not affirmatively appear whether the act was approved before the transaction occurred, the actors in the transaction should have the benefit of the doubt.

We now propose to examine this case in the worst possible light for the deed of trust creditors, and will take it as an admission, for the sake of the argument (although the proofs show otherwise), that Wynne was in failing or insolvent circumstances in August and December, 1866—that he knew that fact—that the deed of trust creditors knew that fact, that Wynne was insolvent when the deed of trust was recorded, that the deed of trust creditors knew that fact also as well as Wynne, and that the date of the record of the deed of trust was subsequent to the approval of the bankrupt

act. We propose to show by the clearest and most abundant authority that even under such a state of facts, the deed of trust creditors are entitled to have the lien of their deed enforced.

Nothing is more clearly settled as law in all the states, than that an unrecorded conveyance or assignment is good as between the parties to the instrument and their representatives. It is so by virtue of the contract between the parties. To use the language of the books, "it results from contract." This is a fundamental principle of the law, growing out of the expressed written stipulations of the parties, and upon which the very statutes which provided otherwise as to creditors and purchasers without notice, are based. Hence, the statute of Virginia recognizes this doctrine in providing for the protection of creditors and purchasers. "Every deed of trust, conveying real estate or goods and chattels, shall be void, as to creditors and subsequent purchasers for a valuable consideration without notice, until and except from the time that it is duly admitted to record." Without such a provision in the law, by virtue of the contract between the parties to the deed, the conveyance would be good as against creditors and purchasers, even before or without being recorded. If there was any doubt about this elsewhere, it is well settled in Virginia, by repeated decisions and by the concessions in reported cases, that as between the parties to a conveyance and their representatives, it is perfectly valid and effectual. *Glazebrook's Adm'rs v. Ragland's Adm'rs*, 8 Grat. 332; *McClure v. Thistle's Ex'rs*, 2 Grat. 182. Even the recitals in an unrecorded deed are evidence against the grantor and all claiming under him. *Wiley v. Givens*, 6 Grat. 277. In *Johnston v. Slater*, 11 Grat. 321, the court of appeals says: "Registration is not necessary between the parties to a deed; that it is not necessary as against volunteers or purchasers with notice."

If the doctrine of the opposite side be true, we are thrown into singular absurdities. On their theory, if Wynne had made a conveyance between December 8 and March 2 to another party having notice of the deed of December 8, and before March 2 had recorded it, such conveyance would have been valid against the assignee. But yet such conveyance would not be valid against the grantees in the deed of December, because of the notice. On the theory of the opposite side, we would then have this absurd state of affairs—to wit, *Enders & Co.* would have a valid deed as against the subsequent purchaser with notice, but not valid as against the assignee; while on the other hand the deed to the subsequent purchaser with notice would be valid against the assignee. When a doctrine leads to such absurd conclusions as these, we may rest very sure that the reasoning upon which it

is based is vicious. We therefore take it as a matter beyond respectable controversy, that the beneficiaries of an unrecorded deed have a lien as against the grantor and his representatives, which will be enforced in any court of equity.

We now proceed to discuss the character and quality of the estate which vests in the assignee by virtue of the bankrupt law, and especially to consider what are his rights, where a deed of trust was made before the passage of the bankrupt act, but not recorded until after such passage. The fourteenth section of the bankrupt act defines the rights of the assignee. He has "all rights in equity, choses in action, and all the bankrupt's rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person, arising from contract, and all his rights of redeeming such property or estate, with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had, if no assignment had been made." The rights of the assignee, and the quantum of his interest in the estate of the bankrupt are learnedly discussed in the leading case of *Winsor v. McLellan* [Case No. 17,887]. That was the case of an unrecorded mortgage of a vessel. The vessel was sold by the assignees, and the question was, whether the funds should be paid to the general creditors or to the mortgagees. Judge Story, in his opinion, uses the following language: "Now the principle has been long established, that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand. The assignee in bankruptcy takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities which exist against the same in the hands of the bankrupt." In the same case, he says, when referring to the legal effect of the unrecorded mortgage: "In the view which I take of the matter, the bill of sale took effect as a mortgage, at the time of the execution and delivery thereof to the trustees on December 9, 1841." In *Parker v. Muggridge* [Id. 10,743] Judge Story uses the following strong language in reference to mere equitable liens, arising from contract, to wit: "The plaintiffs have an equitable lien and a superior title to the property over the assignee and the general creditors; and the assignee must take the property of the bankrupts for the general creditors, subject to this lien and superior title. The case of *Dale v. Smithwick*, 2 Vern. 151, is strongly in point, as to the nature and obligation of a contract of this sort to create an equitable lien or trust in property. In *Legard v. Hodges*, 1 Ves. Jr. 477, Lord Thurlow said, that it was an universal maxim, that wherever persons agree concerning a particular

subject, in a court of equity, as against the party himself, and any claiming under him, voluntarily, or with notice, it raises a trust. The cases of *Ex parte Copeland*, 3 Deac. & C. 199, *Ex parte Prescott*, 1 Mont. & A. 316, and *Ex parte Flower*, 2 Mont. & A. 224, established that the same rule prevails in bankruptcy; and that the property will be followed and affected with the trust in the hands of the assignees, in the same manner and to the same extent, as it would be in the hands of the bankrupt. We all know that in bankruptcy, the assignee takes only such rights as the bankrupt himself had, and is subject to the like equities."

In *Fletcher v. Morey* [Case No. 4,864], which was the case of an equitable lien against certain shipments, Judge Story says: "Now, before proceeding to the points more directly in judgment, it is proper to remark, that it is a perfectly well settled principle in equity, that the assignee in bankruptcy takes the property and rights of the bankrupt in the same plight and condition, and with all the equities attached thereto, in the same manner as the bankrupt himself held them. I recollect at present but one exception to the doctrine, and that is in the case of fraud. The general rule was laid down by Lord Hardwicke in *Brown v. Heathcote*, 1 Atk. 160, and it has constantly been adhered to ever since. I need not cite the authorities at large. Many of them will be found referred to in a recent opinion, which I had occasion to deliver in the case of *Mitchell v. Winslow* [Case No. 9,673], at the last October term of the circuit court at Portland."

This, then, being the established principle, the first question which arises in the case is, whether there is any equitable lien, or right, or claim, under the agreement, which ought to be enforced specifically in equity against the shipments made to and for Messrs. Read & Co., or the proceeds thereof, so far as they can be distinctly traced in the hands of the assignee; and upon this point I entertain no doubt whatever. In equity, there is no difficulty in enforcing a lien or any other equitable claim, constituting a charge in rem, not only upon real estate, but also upon personal estate, or upon money in the hands of a third person, whenever the lien or other claim is a matter of agreement, against the party himself, and his personal representatives, and against any persons claiming under him voluntarily, or with notice, and against assignees in bankruptcy, who are treated as volunteers; for every such agreement for a lien or charge in rem, constitutes a trust, and is accordingly governed by the general doctrine applicable to trusts.

After enforcing this view by a citation of authorities, Judge Story proceeds: "Assuming that the state courts have no power, to enforce the lien or equitable claim or charge, arising under the present agreement, it is

still capable of being specifically enforced in this court under its general equity jurisdiction, as well as under its particular jurisdiction conferred by the bankrupt acts. It is a valid agreement between the parties, and not prohibited by the laws of Massachusetts." Further in the same case, he says: "But I take it to be clear, that not only liens, but mortgages of personal property are perfectly good and supportable between the parties, and against creditors, where there is no fraudulent intent, and the possession remains in the owner or mortgagor of the property, and is consistent with the deed and the arrangements made between parties. There is a strong line of authorities, that in cases of sales of personal property, conditional or absolute, the transfer or conveyance is not void, even though the possession remains with the vendor, if that possession is consistent with, and a part of the arrangement intended by the parties in the transfer or conveyance. So that the possession of the property by Messrs. Read & Co., in the present case, is not, in my judgment, a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of their creditors; and therefore the agreement is binding and valid to give a lien or equitable charge upon the property in the hands of the assignee, fit to be enforced in the present suit."

In *Mitchell v. Winslow* [supra] Judge Story says as follows: "The present is a question between the assignee of a bankrupt, acting for the benefit of all the creditors, and the mortgagee, claiming title under his mortgage; and it arises upon a petition, partaking of the character of a summary proceeding in equity, and not in a suit at the common law, or governed by its principles. Now, it is most material to bear in mind, under this aspect of the case, that is a well-established doctrine, that (except in cases of fraud) assignees in bankruptcy take only such rights and interests as the bankrupt himself had, and could himself claim and assert at the time of his bankruptcy; and consequently, they are affected with all the equities which would affect the bankrupt himself, if he were asserting those rights and interests." This was expressly laid down by Lord Hardwicke in *Brown v. Heathcote*, 1 Atk. 160, where he said: "The ground that the court goes upon is this, that assignees of bankrupts, though they are trustees for the creditors, yet stand in the place of the bankrupt, and they can take in no better manner than he could. Therefore, assignments of choses in action for a valuable consideration, have been held good against such assignees." The same doctrine was recognized by his lordship in *Jewson v. Moulson*, 2 Atk. 417. Sir William Grant, in *Mitford v. Mitford*, 9 Ves. 87, said: "I have always understood assignments from the commissioners, like any other assignment by operation of law, passed his (the bankrupt's) rights, precisely in the same

plight and condition as he possessed them. Even where a complete title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to. This shows they are not considered purchasers for a valuable consideration, in the proper sense of the words. Indeed a distinction has been constantly taken between them and a particular assignee for a valuable consideration; and the former are placed in the same class, as voluntary assignees and personal representatives." The same doctrine was held by Lord Thurlow in *Worrall v. Marlur*, reported in Mr. Cox's note to 1 P. Wms. 459. It has ever since been firmly adhered to, and has been fully recognized at law, in cases of bankruptcy.

We might multiply authorities upon this point indefinitely. We, however, do not deem it necessary, after so distinguished an authority as Judge Story has pronounced the doctrine to be "well established." Now, if the assignee "can take only such rights and interests as the bankrupt himself had," and which the bankrupt "himself could claim and assert at the time of his bankruptcy," it becomes material specially to inquire what rights and interests Wynne himself could have claimed against the deed of trust creditors, at the time he was declared a bankrupt. We have already shown by the highest authority in the state, that the deed even when unrecorded was valid and effectual as between the parties, and that Wynne could assert nothing against the legal effect of its provisions. Judge Story holds that even the equitable liens of third parties will be enforced by a bankrupt court under its equity powers, against an assignee. Surely, if this is so, a regular and formal assignment, recognized by the statute law, will be respected and enforced. The same eminent jurist, in one of the cases to which we have referred, declares that a bankrupt court would enforce liens, even if there was no specific provision in the act requiring it. Be that as it may, it is very certain that it is the well-established practice of the bankrupt courts to enforce all liens that exist by virtue of state laws. The bankrupt act adopts the liens that are known to the laws of the states respectively. If a lien is known to the law of Virginia, which is not recognized in New York, your honor will enforce it. For that reason we have specially referred to the decisions of the court of appeals, to sustain the position that an unrecorded deed does establish a lien as between the parties to the instrument. If the deed of trust had never been recorded, it would be a lien as against the grantor and those claiming under him. Nay, more, it would be good as against the whole world, excepting creditors who had themselves acquired a lien, or purchasers without notice. No creditor either before or since the date of the recordation has acquired an adverse lien, nor has there been any purchase with or

without notice. We submit, therefore, in every aspect of the case, that Enders, Paine & Williams can rightly claim their lien, and that the assignee should be instructed to pay first out of the proceeds of sale now in his hands, the claims secured by the deed of trust.

We have not deemed it necessary to refer to the thirty-ninth section of the bankrupt act, as it relates to acts of bankruptcy, and only touches incidentally the matter of assignments and conveyances. Moreover in that portion which refers to conveyances and assignments, the provisions are identical with those of the thirty-fifth section and what we have said in relation to the latter, will apply with equal force to the former. Nor have we discussed whether Wynne was insolvent or contemplated bankruptcy, or whether the creditors knew that he was insolvent. We have thought that our case was sufficiently strong in its legal bearings for us to admit, for the sake of argument, anything that might be claimed in those respects by our adversaries.

Since the foregoing was written, we have been informed that your honor has already decided that a vendor's lien will be respected and enforced in your court. We do not know the name of the case, but a brief mention of the facts will doubtless bring it to your honor's recollection. In May, 1867, A sold land to B and executed a conveyance to him. B executed his promissory notes for the unpaid purchase money, and stipulated that he would secure them by a deed of trust. He, however, neglected or refused to do so, and in February, 1868, went into bankruptcy. Your honor held in that case that the vendor had a lien for the unpaid purchase money, which you would respect and enforce. Judge Story held to the same doctrine in *Fletcher v. Morey* [Case No. 4,864]. Such a case is surely not as strong as the present one in favor of the creditors. In that there was no deed at all, and of course no record.

We also call your honor's attention to the well-considered opinion of Chief Justice Ames of Rhode Island, in the recent case of *Stone v. King*, 7 R. I. 358, in which he held that a trust deed, which was given without consideration even, and which the grantor delivered to the trustee, who at the grantor's request communicated the fact of that delivery to the cestui que trust, and promised him to record it, could be enforced against the grantor, although the trustee afterwards refused to accept the trust, and returned the deed to the grantor, to be cancelled, and although the deed itself was destroyed by the grantor. The court in its opinion said: "The party who makes a voluntary deed, whether of real or personal estate, without reserving a power to alter or revoke it, has no right to disturb it; and as against himself, it is valid and binding, both in law and equity." If this is so as to voluntary conveyances, how much more is it so, in regard to conveyances

for a valuable consideration, as in the present case? And how does the fanciful theory of a power of attorney, raised by the opposite side, comport with such principles as these? As to the doctrine that a voluntary settlement even, can not be revoked, without an express power of revocation reserved, see *Villers v. Beaumont*, 1 Vern. 100, and *Bale v. Newton*, Id. 464. *Hare & Wallace*, in their notes to the case of *Ellison v. Ellison*, 1 White & T. Lead. Cas. Eq. marg. p. 192, say: "When once an instrument creating a valid and complete trust is duly sealed and delivered, the obligation is complete; the detention of the instrument by the grantor does not render it inoperative." These annotators refer to many cases, where the deed was not only never recorded, but where the grantor kept possession of the instrument; yet as against the grantor and all parties claiming under him, the deeds were enforced. In the present case, the deed was actually delivered to the creditors. Of course it will be borne in mind that the deed was executed prior to the passage of the bankrupt law, and that under the law as it then existed, would have been enforced by the law of Virginia. All such instruments have been since declared (if made after the passage of the bankrupt act by an insolvent) to be in fraud of the bankrupt law. It would be more proper phraseology to say "in violation" of the bankrupt law, because the act expressly makes such a preference by an insolvent, an act of bankruptcy. If not made by an insolvent, such preferences still hold. Even if made by an insolvent, they are not avoided unless the grantee or beneficiary had reason to believe the grantor insolvent. The true conclusion from all this is, that only conveyances made since the passage of the bankrupt act by an insolvent are in fraud or in violation of such act, and are not then avoided, unless the beneficiary has reason to know the insolvent condition of the grantor. A preference made since the passage of the act, may be an act of bankruptcy, without at the same time being void. We only mean to insist that when the judges in interpreting the bankrupt law, speak of conveyances or preferences in fraud of the law, they mean only to apply such phraseology to conveyances made since the bankrupt act was adopted. They never have meant to say that a conveyance or preference made before the act, even by an insolvent, was either fraud in fact, or fraud in law. So far from any actual or constructive fraud attaching to such preferences, they were, we believe, in every state in the Union, certainly in Virginia, enforced not only against the grantor and those claiming under him, whether the preferences were recorded or not, but even against creditors and purchasers without notice, unless they acquired a lien or possession before record. See 13 Grat. 615, that an unrecorded deed will prevail

against general creditors, even after the death of the grantor.

CHASE, Circuit Justice. The question in this case arises upon a petition of John Johns, Jr., assignee of Charles H. Wynne, an involuntary bankrupt, who asks for instructions as to the order of payment of claims against the bankrupt estate. Wynne was adjudicated a bankrupt on the petition of Wheelwright, Mudge & Co., filed in the district court of the United States for the district of Virginia on June 8, 1867. Ender, Paine & Williams claimed to be preferred in payment under a deed of trust dated August, 1866, which was never recorded; or if that claim be disallowed, then under a deed of trust dated December 8, 1866, recorded March 2, 1867.

Haxall & Co. also insist on preference upon the ground that Wynne was tenant under them of the warehouse which he occupied, and that under the law of Virginia, they as landlords had a lien for the rent due at the date of the petition; to enforce which on June 10, 1867, they sued out a distress warrant for two thousand one hundred and twenty dollars, the amount of rent then due, and caused the same to be levied on the goods then on the premises, and subsequently, on July 18, 1867, sued out an attachment, which was levied the same day upon the same goods, for one thousand five hundred dollars, the amount of rent to become due on December 1, 1867. We will consider the claim to preference on payment advanced on behalf of Ender, Paine & Williams, and we must say at once that so far as this claim is founded on the deed of August, 1866, it can not be admitted. It is doubtless true that a mortgage or other conveyance made as security for a debt evinced by a note or bond will operate as security for the same continuing debt, though the evidence of it be changed by renewal or otherwise. [*Farmers' Bank v. Mutual Ins. Soc.*, 4 Leigh, 69.] *Winsor v. McLellan* [Case No. 17,887].² But in this case it is the security itself which has been changed, and not the evidence of the debt. The deed of December 8, 1866, was executed, as it seems, in substitution for that of August, which thereupon ceased to have any validity or effect.

The only question now to be determined is, therefore, whether or not the deed of December created a lien upon the property described in it, which the assignee of the bankrupt must satisfy before applying any of its proceeds to the claims of the general creditors. And it is to be observed that the deed is not condemned by the thirty-fifth section of the bankrupt act, which avoids all assignments and other modes of preference made or attempted by insolvents, or persons in contemplation of insolvency,

² [From 9 Am. Law Reg. (N. S.) 627.]

within four months before the filing of the petition in bankruptcy, or in case the person to be benefited has notice of the intent within six months before such filing. The deed in question was not made within either limit of time. It need not, therefore, be here considered whether either period could begin to run till after the passage of the act. If the deed is to be treated as void or inoperative as against the assignee by operation of the act, it must be because of effect of that clause of the fourteenth section, which provides that "all the property conveyed by the bankrupt in fraud of his creditors," "shall in virtue of the adjudication of bankruptcy and the appointment of the assignee be at once vested in such assignee." We do not doubt that the assignee takes the property in the same plight in which it was held by the bankrupt when his petition was filed (*Winsor v. McLellan*, supra);² *Bradshaw v. Klein* [Case No. 1,790], subject to such liens or incumbrances as would affect it if no adjudication in bankruptcy had taken place; but it is to be remembered that the assignee represents the rights of creditors as well as the right of the bankrupt, and that any lien or incumbrance which would be void for fraud as against creditors, if no petition had been filed or assignee appointed, will be equally void as against the general creditors represented by the assignee. In *re Richardson* [Id. 11,777]; *Carr v. Hilton*, 1 Curt. 230 [Case No. 2,436].

This is what the act means when it vests in the assignee, "all property conveyed in fraud of creditors." It does not make any conveyance or incumbrance fraudulent. It simply clothes the assignee with the entire title, notwithstanding such conveyance or incumbrance, and makes it his duty to invoke the proper jurisdiction to annul the fraudulent proceedings. And it may be remarked further that, except to this extent, the bankrupt act has no influence upon this case, so far as the deed of trust is concerned.

Much was said in argument concerning the effect of the record of this deed upon March 2, 1867; and it was strenuously urged that the deed was avoided by the effect of the act which purports to have been approved on that day. But we entirely concur with Mr. Justice Story, in thinking that where the question is as to effect of a proceeding instituted on the same day on which an act affecting the validity of such proceeding was passed, the precise time at which the act became a law may be properly inquired into. See *Winsor v. Kendall* [Case No. 17,886]. And in this we think ourselves warranted also by the reasoning of the supreme court. *Gardner v. Collector*, 6 Wall. [73 U. S.] 511.

Now, it is in proof that the deed of trust was recorded about 4 p. m. March 2, 1867; and it appears from the senate journal of the session during which the act was passed

that the day denominated March 2, in the journal, and in the approval of the statute by the president, consisted in fact of Saturday, March 2, of Sunday the third, and of Monday the fourth, until noon; and it appears further that the bill which afterwards became the bankrupt law was not enrolled and delivered to the proper committee, to be presented to the president for his signature, until after the recess, which ended at 7.30, p. m. on Sunday, and was not reported to the senate as actually signed by the president until after 9.40, a. m. on Monday. *Senate Journal*, 2d Sess. 39 Cong. 1866-67, pp. 432, 458; *Rev. Code*, 1860, p. 566, § 5. It can not be doubted, then, that the deed of trust was in fact recorded nearly two days before the bankrupt bill became a law; and we think ourselves not only warranted, on general principles, but bound by the constitution, to notice the fact thus appearing upon the public records. It may well be questioned, indeed, whether, if the act had been approved before the recording of the deed, the effect of the latter would have been altered. Nothing in the thirty-fifth section touches the deed; and nothing in any other except the fourteenth. It may be, and we think it is, true that if the deed had remained unrecorded when the petition in bankruptcy was filed the title of the assignee would have prevailed against any claim under the deed, for the assignee represents the creditors, and the statute of Virginia expressly declares "any deed of trust void as to creditors," until and except from the time it is duly admitted to record. It is not an unreasonable construction of the bankrupt act, as we think, which regards it as vesting in the assignee, for the benefit of creditors in general, the estate of the bankrupt, discharged of liens or trusts which at the time of the petition are valid *inter partes* under the statute of the state in which they are claimed to exist. But we do not see how the mere enactment of the law could affect a deed previously executed.

It is not, however, necessary to consider these points here. The important question in the case is whether under the fourteenth section of the bankrupt act this deed must be regarded as inoperative against the assignee. The counsel for the assignee has argued with much earnestness that the deed can not be sustained without disregarding the implied effect of the first clause of the second general proviso of that section: "That no mortgage of any vessel or of any other goods and chattels made as security for any debt or debts in good faith and for consideration, and otherwise valid and duly recorded pursuant to any statute of the United States, or of any state, shall be invalidated or affected hereby."

The argument is that all mortgages not expressly saved from the operation of the act by this clause must be held invalid; and, therefore, that all deeds of trust and other conveyances intended as security for debts,

² [From 9 Am. Law Reg. (N. S.) 627.]

and not within the description of the mortgages expressly saved, must also be invalid.

But we can not adopt this reasoning. It would be going too far, we think, to hold all mortgages not included by the terms of the description to be invalidated by the act. The clause expressly saves certain mortgages, but it says nothing as to the others. Much less does it say anything as to deeds of trust or conveyances of analogous character. It leaves all deeds and instruments of writing not expressly saved to the general principles of jurisprudence. To hold otherwise would, we think, be to give to the act an *ex post facto* operation contrary the intent of congress. And it would be quite gratuitous so to hold; for the rights of creditors as against all instruments not described in this clause are fully protected by that which stands next in the section and vests in the assignee, for their benefit, all the property conveyed by the bankrupt in fraud of his creditors.

The next question in this case, therefore, is whether the deed of trust by which the several liabilities of Enders, Paine & Williams, for Wynne, were secured, was made in fraud of the creditors of Wynne. It has been argued that the deed of trust took effect as against creditors only on March 2, 1867, and that the recording of the deed on that day was itself an act of bankruptcy. To maintain this proposition it is necessary to show that the recording of the deed was the act of Wynne. But clearly it was no act of his. The deed as against him was operative from its date. It was then that all his interest in the property described in it became vested by way of security in the trustee. It was then that he delivered the deed and parted with all control of it. If the beneficiaries were satisfied with the security afforded by the deed unrecorded, there was neither necessity nor obligation to record it. To record it was only necessary to make it a valid security against other creditors; and it was not for Wynne, but for the creditors secured by the deed, to determine whether it should be recorded or not. The delivery of it for record was in no sense his act, but theirs. In no sense, therefore, can it be regarded as an act of bankruptcy. But it has been argued that as against creditors, it must be regarded as a deed executed at the date of the record, and, therefore, as a deed creating a preference on that day, which was within four months of the filing of the petition. There is ingenuity and apparent force in this argument. But we think there are decisive answers to it. In the first place, the preference which the law condemns is a preference made within the limited time by the bankrupt, not a priority lawfully gained by creditors; and we have just shown that the preference gained by the record was not a preference made by the bankrupt. And, in the second place, the law which makes deeds of trusts void "until and except from" the time of record, clearly makes them valid at and

from that time. And it is as much the policy of the bankrupt act to uphold liens and trusts when valid, as it is to set them aside when invalid.

It is hardly necessary to add that this must be especially true of a trust deed created and recorded before the approval of the bankrupt act. Was there any actual fraud in giving or taking the security created by the deed of trust? There has been no attempt to maintain this.

It has been said that Enders, Paine & Williams, on December 8, 1866, knew that Wynne was insolvent, but it is not denied that they had a right to obtain if they could preference in payment under the laws of Virginia. They could obtain it by direct transfer of property by deed of trust, by judgment and execution. Until after the passage of the bankrupt act, nothing but fraud in obtaining the preference could invalidate it in whatever mode obtained. It is not necessary to insist on this in the case before us, for we do not think that the evidence establishes as matter of fact that at the date of the deed, or at the date of the record, Enders, Paine & Williams were aware of the actual insolvency of Wynne. They knew, indeed, that he was embarrassed in carrying on his printing and publishing business, but they seem to have fully believed that his property was more than sufficient to pay all his debts.

On the whole, we are of the opinion that the deed of trust must be supported as a valid deed, and that the creditors named in it are entitled to be paid out of the proceeds of the property embraced in it.

The remaining question to be considered is, whether at the time of the filing of the petition in bankruptcy Haxall & Co. had any lien for rent upon the property of the bankrupt. This is the same property which was conveyed by the deed of trust, and the solution of the question just stated may be affected in some measure by the conclusion to which we have come in respect to the validity of lien created by that deed. And in considering the question now to be disposed of, we lay out of view the proceeding by distress warrant and also the proceeding by attachment. As we understand the bankrupt act, all the rights and all the duties of the bankrupt in respect to whatever property, not expressly excluded from the operation of the act, he may hold under whatever title, whether legal or equitable, and however incumbered, pass to and devolve upon the assignee at the date of filing of the petition in bankruptcy. And all rights thus acquired are to be enforced by process, and all duties thus imposed are to be performed under the superintendence of the national courts. No lien can be acquired or enforced by any proceeding in a state court commenced after petition is filed, though in cases where jurisdiction has been previously acquired by state courts of a suit brought in good faith to enforce a valid lien upon

property, such jurisdiction will not be divested. *Peck v. Tennessee*, 7 How. [48 U. S.] 612. Whether, therefore, the distress warrant or the attachment be regarded as a proceeding for obtaining or enforcing a lien, each was equally unwarranted. *Buckey v. Snouffer*, 10 Md. 149. If a lien for rent existed, it was a lien to be discharged by the assignee, and enforced in the United States court of bankruptcy. If it did not exist, it could not be brought into existence by any proceeding whatever.

The real question is, Were the goods on the premises demised to the bankrupt subject to a lien for rent under the state law when the petition was filed, independently of any proceeding by distress or attachment? Liens are various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given by the 12th section of title 41, chapter 128, of the Revised Code of Virginia, adopted in 1860. It expressly prohibits any person having, by deed of trust, mortgage, or otherwise, a lien upon goods of a tenant on demised premises from removing such goods without paying to the landlord the rent due, and securing the rent becoming due, not exceeding one year's rent, and it further requires any officer who may take such goods under legal process to pay out of the process the rent in arrear, and deliver to the landlord sufficient purchasers' bonds for the payment of that becoming due.

We can not doubt that this statute creates a lien in favor of the landlord, and a lien of a high and peculiar character. We have no concern with the policy of this legislation; it is upon the statute book, and the lien it creates must be respected and enforced.

The validity of the deed of trust in this case seems to us clear, and it is not doubted by anyone that in the absence of the special circumstances supposed to affect it with invalidity, the lien of the creditors secured by it would be perfect. But these creditors, by no process whatever, could appropriate these goods to the satisfaction of their debts without paying or securing the year's rent; and so of process under execution. The officer of the law, at his peril, must pay the rent out of the proceeds. Would it not be trifling with the plain sense of words to say that there is a lien under the trust deed and a lien under the execution, but the claim which by law is made superior to either as a charge upon the goods is no lien?

We hold in this case that the creditors in the trust have a lien. How can we hold that the landlord, whose claim under the law is superior to theirs, has no lien? It seems to

us, therefore, that Haxall & Co. had a valid lien for the arrears of rent due and for so much rent to become due under the lease as will make the whole amount secured equal to a year's rent. And we think that this lien is given by the statute independently of proceedings by distress warrant or attachment, which we regard as remedies superseded by the effect and operation of the bankrupt act [*Burket v. Bonde*, 3 Dana, 209; *Henchett v. Kimpson*, 2 Wils. 140]; In re Pulver [Case No. 11,466].²

In this case we do not pass upon the claims of Haxall & Co. upon the assignee for rent beyond the year during which the lien for the rent is given. We are inclined to think that he was entitled to the occupancy during the unexpired term; and that for the rent becoming due during that period Haxall & Co. would be entitled to prove their claim against the bankrupts as general creditors.

The decree of the district court will be reversed, and a decree entered in conformity with the principles of this opinion.

WYOMING, The (ADAMS v.). See Case No. 71.

WYOMING, The (NEW YORK HARBOR TUG-BOAT CO. v.). See Case No. 10,205.

WYSSMAN (SLOMAN v.). See Case No. 12,955a.

WYTHE v. COOK. See Case No. 18,118.

Case No. 18,118.

WYTHE v. HASKELL.

WYTHE v. COOK.

[3 Sawy. 574.]¹

Circuit Court, D. Oregon. March 27, 1876.

DONATION ACT—TITLE OF SETTLER—PARTITION BETWEEN HUSBAND AND WIFE—PATENT TO FOLLOW CERTIFICATE—CONSTRUCTION—LOCATION OF DONATION.

1. A settler under the donation act of Oregon acquires title to his donation from the passage of the act or the date of his settlement; and the patent which issues to him upon the performance of the conditions upon which the grant was made, is only record evidence of the existence of such title, or of the facts out of which it arose.

2. Under said act the surveyor-general had authority to partition the donation of a married settler, in equal parts as to quantity, between him and his wife, at any point of the compass he might deem expedient; but his action in this particular, under section 1 of the act of July 4, 1836 (5 Stat. 107), was subject to the supervision of the commissioner of the general land office.

3. When the surveyor issued a certificate to a settler under the donation act, the commissioner of the general land office was required to issue a patent thereon and in conformity therewith, unless he found some valid objection thereto; and if said objection was found, it could not be

²[From 9 Am. Law Reg. (N. S.) 627.]

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

disposed of by issuing a patent so far contrary to the certificate, but the certificate should have been returned to the local office for correction, and the patent issued upon such corrected certificate.

4. A certificate and patent thereon, issued under said act, are parts of the same transaction or procedure, and may be read together for the purpose of correcting or explaining the patent, and where there is an absolute contradiction between them, the certificate must prevail.

5. On July 28, 1853, the surveyor-general issued a certificate to William H. Willson and Chloe A., his wife, for donation 44, including the site of the town of Salem, assigning therein "the north half, parallel with the south line of the claim, to Chloe A. Willson, and the south half to William H. Willson," upon which certificate, on February 4, 1862, a patent was issued, giving to said William H., "the south half" of said donation, and to said Chloe A., "the north half" thereof: *Held*, that the certificate and patent, taken together, showed that the partition line of the donation was a line running south, 70 degrees 21 minutes east, and parallel with the southern boundary of the tract, and not a due east and west one.

At law.

Addison C. Gibbs, P. C. Sullivan, and Ellis Hughes, for plaintiff.

J. Quinn Thornton and Joseph N. Dolph, for defendants.

DEADY, District Judge. These actions are brought by the plaintiff [W. T. Wythe], a citizen of the state of California, to recover possession of lots 8 in block 64, and 6 in block 46, situated in the town of Salem. He alleges that he is the owner in fee simple of said lot 8, and that the defendant [Jared] Haskell, unlawfully withholds the possession of it; and, also, that he is the like owner of the undivided two-thirds of said lot 6, and that the defendant, Cook, unlawfully withholds the possession of the same. On March 11, it was stipulated by the parties that an agreed state of facts theretofore filed should stand as the special verdict of a jury in each case, and that the court should give such judgment thereon as the law of the cases requires.

By these special verdicts it is substantially found that on July 28, 1853, there was issued by John B. Preston, the surveyor-general of Oregon, a certificate numbered 20, under the donation act of September 27, 1850, from which it appears that William H. Willson claimed a donation under said act, numbered 44, of a tract of public land, containing 615.02 acres, known and designated on the surveys and plats of the United States and particularly bounded and described as in said certificate specified: "The north half parallel with the south line of the claim, to Chloe A. Willson, wife of said William H. Willson, and the south half to William H. Willson." That said William H. had proved "to the satisfaction of the surveyor-general," that his settlement on such land was commenced in November, 1844, and he had resided upon and cultivated the same as required by section 4 of said act; and that

said facts and the evidence thereof were thereby certified to the commissioner of the general land office, "in order that a patent may be issued to said claimant for said tract of land, as required by the seventh section of the act aforesaid; provided, the said commissioner shall find no valid objection thereto."

That afterwards, on February 4, 1862, a patent was issued upon said certificate which recites substantially, that said certificate "has been deposited in the general land office," and that it appears therefrom "that the claim of William H. Willson, and his wife, Chloe A. Willson, * * * has been established to a donation of 640 acres of land, and that the same had been surveyed and designated as claim No. 44," being parts of certain sections and bounded and described as stated in said certificate, containing 615.02 acres; and then declares that the "United States, in consideration of the premises and in conformity with the provisions of the act aforesaid, have given and granted, and by these presents do give and grant unto the said William H. Willson the south half, and to his wife, Chloe A. Willson, the north half of the tract of land above described; to have and to hold the said tract with the appurtenances unto the said William H. Willson, and his wife, Chloe A. Willson, and to their heirs and assigns forever, the respective portions as aforesaid."

That the premises in controversy are within the limits of the town of Salem, and the exterior lines of said donation claim; that said claim is in compact form, as appears from a plat made a part of the verdict, but none of its exterior lines run with the cardinal points of the compass; that the southern boundary runs south 70 degrees 21 minutes east, while none of the other three sides of the claim are bounded by continuous straight lines; that at and before the issuing of said certificate said surveyor-general duly designated the portions of said donation accruing to the husband and the wife as therein mentioned; and that thereafter the said Willson and wife, during their lives,—the former having died in 1856 and the latter in 1874,—treated said designation and partition as the true one. That as to the premises in controversy, the plaintiff is the successor in interest of said Chloe A., and the defendants of said William H., and that the same are situated to the south of the dividing line described in the certificate, but to the north of a line running due east and west, and dividing the donation in two equal parts.

Upon these findings the question arises, which is the lawful line between the husband's and wife's share of the donation, a line running due east and west, or one running parallel with the southern boundary of the claim? If a due east and west line is the correct one, the premises are upon the wife's part, and the plaintiff is entitled to re-

cover the possession; but, in the other case, they are upon the husband's half, and the defendants are rightfully in possession. On behalf of the plaintiff it is argued that the action of the surveyor-general in dividing the donation between the husband and wife was subject to the supervision and control of the commissioner of the general land office; and that the designation in the patent of the husband's and wife's part was an exercise of that supervisory power, and the final action and judgment of the highest authority over the subject, and therefore so far as the patent differs from the certificate in this respect, the latter is superseded and set aside.

The defendants maintain that the action of the surveyor-general in making the division between the husband and the wife is not subject to review, and, therefore, so far as the patent differs from the certificate in this respect it is void; and also, that the patent and certificate are parts of the same transaction, the former being based upon and referring to the latter, and therefore they must be read together.

Section 4 of the donation act, of September 27, 1850 [9 Stat. 497], under which this donation was obtained, gave, by words of present grant, to a settler on the public lands in Oregon, before December 1, 1850, who had resided upon and cultivated the same for four successive years, if a married man, six hundred and forty acres thereof, one-half to himself, the other half to his wife, to be held by her in her own right, and provided that the "surveyor-general shall designate the part inuring to the husband and that to the wife, and enter the same upon the records of his office." The act also provided (sections 6 and 7), that the settler should give notice of the precise tract claimed by him, and make proof of compliance with the act before the surveyor-general, who should thereupon issue a certificate, setting forth the facts in the case, and return the proof so taken to the commissioner of the general land office, when, if he "find no valid objection thereto, a patent shall issue for the land according to the certificate." Section 15 declares that "all questions arising under the act shall be adjudged by the surveyor-general, as preliminary to a final decision according to law."

The title of a settler under the donation act vested in him upon the passage of the act or the making of his settlement, if the former was prior to the latter, subject to the performance of the conditions upon which the grant was made. *Chapman v. School Dist.* [Case No. 2,607]; *Fields v. Squires* [Id. 4,776]; *Lamb v. Starr* [Id. 8,022]; *Lamb v. Davenport* [Id. 8,015]; *Mizner v. Vaughn* [Id. 9,678]; *Adams v. Burke* [Id. 49].

The patent did not pass the title to Willson and wife, but is only record evidence of the existence of their title, and the facts out of which it arose. The words of release and transfer contained in the patent are part of

an established formula, and are only intended to operate in cases where the government has some interest in the premises. They could be of no effect in this case, because the instrument shows upon its face that the title of the government was before vested in Willson and wife under the donation act. Therefore the patent is in law only a record of the previously existing rights of their donees. *Langdeau v. Hanes*, 21 Wall. [88 U. S.] 529.

Until the partition was made, the husband and wife were tenants in common of the whole donation. The power to make this partition was vested by the act in the surveyor-general, without qualification, and the parties had no control over it. It follows that he might divide it, so that an equal number of acres was assigned to each, by a line running to any point of the compass or parallel to any exterior line of the claim. But I think his action in this particular was subject to review. It is not declared in the act to be final; and by the act of July 4, 1836 (5 Stat. 107), re-organizing the general land office, "all the executive duties," then or afterwards prescribed, by any law, touching the disposition of the public lands or any private claim thereto, were made subject to the supervision and control of the commissioner of said office. The making of this partition was such a duty, and the action of the surveyor-general in discharging it was subject to the supervision and control of the commissioner. If he exceeded his power or abused his discretion, it would be the duty of the commissioner to interfere and correct his action. *Barnard's Heirs v. Ashley's Heirs*, 18 How. [59 U. S.] 44; *Castro v. Hendricks*, 23 How. [64 U. S.] 443; *Leroy v. Jamison* [Case No. 8,271].

Besides, section 13 of the act, as above quoted, having declared that the decisions of questions arising under the act by the surveyor-general should be only preliminary, and section 7 having provided in effect that patents should not issue according to the certificates of the surveyor-general, when it appeared to the commissioner that there was any valid objection thereto, both go to show that it was the intention of congress to subject the action of the former to the supervision and control of the latter, particularly in the allowing of certificates for donations, which, in the case of married persons, practically included the partition thereof. Although the language in the certificate and patent, describing or indicating the partition is not the same, they are not necessarily contradictory, and therefore it does not follow that it was intended to correct or change the former by means of the latter. For, if the commissioner had found an objection to the certificate upon this point, instead of undertaking to correct or change it directly, he would, as the practice is understood to have been, returned it to the surveyor-general, with directions to change the partition; as,

for instance, to make it by an east and west line instead of one parallel to the southern boundary of the claim, and then have issued a patent upon such corrected certificate. Indeed, it is very questionable whether the commissioner was authorized to alter or modify the effect of a certificate as to the partition or otherwise, by means of the patent or in any way, except by returning the certificate to the local office and directing the desired alteration to be made in it. The commissioner had no power to issue a patent except in pursuance of law, and in this case the act expressly provides that "patents shall issue for the land according to the certificate aforesaid;" that is, in conformity with a certificate to which he had found no valid objection. The act does not contemplate that there shall be any difference in the scope and operation of the certificate and the patent, but that the latter is based upon and conforms to the former.

In the case at bar, taking the patent and applying it to the plat or survey of the donation—which was also a part of the facts or proceedings upon which the patent is founded, and with which it was required to conform—the question arises at once whether it was intended to divide the donation by a due east and west line or a line parallel to its exterior north and south lines.

The southern and northern boundaries not being parallel and the southern one being the only one that is a continuous straight line, the most reasonable, if not the necessary conclusion is, that if the donation is to be divided by a line parallel to any of its exterior boundaries, it must be the southern one. This line runs so near east and west that a partition upon a line parallel to it, might be said to give the north half to one party and the south half to the other. In addition to this the proposition is plausible, that a grant of the north or south half of a tract of land, lying in a compact form and bounded on one side—the south side—by a continuous straight line, running within nineteen degrees and thirty-nine minutes of a due east and west course, ought in the absence of anything showing a contrary intent, to be understood and construed as applying to the half lying to the north or south of a line parallel with such south boundary. But it must be admitted that according to the primary and natural sense of the terms used in the patent describing the division of the land the partition line is a due east and west one. The expression—the north half of a tract of land—would ordinarily be understood as the moiety which lies to the north of a due east and west line, and the south half, is the remainder or what lies to the south of that line. This proposition is self-evident and cannot be made plainer by argument. But if the description in the patent of the two halves of the claim be read in conjunction with that in the certificate, the uncertainty in the patent is dispelled,

and it becomes apparent that the donation was divided by a line running parallel to the southern boundary of the tract.

The plaintiff insists that this cannot be done because the patent does not refer to the certificate in this particular, and for the reason, that all which preceded the patent is merged in it, and cannot now be used to control or affect it. The defendants insist that the patent refers to the certificate and thereby adopts it, and therefore the two must be read together. As has been stated, the patent mentions the certificate and purports in a general way to be issued upon it. Not only this, but it substantially recites it, except as to the division of the claim. Upon this point it is silent. Neither does it otherwise specially adopt or refer to the certificate.

True the grant in the patent of the south and north half of the donation to Willson and wife, respectively, purports to be made "in consideration of the premises," but the "premises" are the preamble to the patent, which does not specially refer to the certificate, or recite that portion of it which designates the part inuring to the husband and the wife. The rule of law relied upon by the defendants, which declares that where a deed refers to a description of the premises contained in another writing, such description is thereby made a part of the deed, is admitted. *Allen v. Bates*, 6 Pick. 460; *Foss v. Crisp*, 20 Pick. 121. But it does not appear that there is any safe ground upon which to rest a conclusion, that this patent refers to the description or designation of the partition given in the certificate.

But I do not think it necessary that the patent should specially refer to or adopt the description in the certificate, to make it a part of it. The former is based upon the latter, and must conform to it. If it is uncertain or insufficient in its descriptive clause, reference may be made to the certificate. They are parts of one transaction or procedure, successive but dependent and related steps in the progress of ascertaining and making an official record of a pre-existing fact or matter, to wit: the settlement, residence and cultivation of the settler, Willson, upon the public lands, whereby he and his wife each became the owner in fee of a designated half of a compact of six hundred and forty acres thereof. This being so, the designation of the partition in the patent may be read and construed in conjunction with that in the certificate. 3 Op. Atty. Gen. U. S. 111. If they are contradictory and irreconcilable, in my judgment, the latter must prevail. The patent cannot lawfully issue, otherwise than in accordance with the certificate. The former is only intended to be an amplification and confirmation of the latter, and if it varies from it in any material particular, it is probably so far void.

For the same reasons, if the description in the certificate should materially vary from

the plat or recorded survey of the donation, the former being based upon the latter and necessarily required to conform to it, the description in the plat would prevail.

Taking then this certificate and patent together and reading them as parts of the same record, it appears first, that the surveyor-general partitioned this donation between the husband and wife by a line running parallel with the south line of the claim, and designated the half north of this line as the part inuring to the latter, and that to the south of it as the part inuring to the former. So far there is no difficulty in the matter. The certificate being deposited in the general land office, and the commissioner, finding no valid objection thereto, caused this patent to issue upon and in confirmation of the same. In describing the parts inuring to the husband and wife respectively, instead of giving the course of the partition line, the patent simply says the south half to William H., and the north half to Chloe A., his wife. It may be admitted that, strictly speaking, there can be but one north half of a donation, and that must be bounded on the south by a line running due east and west. But the patent is not speaking in the abstract, but the concrete, of the halves into which this tract had already been divided by the surveyor-general, as appeared by the certificate from which it was drawn. The patent did not initiate the partition; it only confirmed and recorded one already made. Under the circumstances, therefore, it was natural, proper and convenient that the patent should describe the part inuring to the husband as the south half, meaning thereby the half lying to the south of the partition line described in the certificate. Relatively, the parts of the donation assigned by the patent to the husband and wife are the north and south halves of it. They are the north and south halves, because they are not the east and west ones.

Reading the certificate and patent together, there is no other reasonable or even possible conclusion, but that the partition line is one running parallel with the south line of the claim. The patent is not in conflict with the certificate, but is only obscure where the other is plain. But if this were otherwise, it would not affect the result. Upon both reason and authority, I am satisfied that so far as a patent varies from the certificate, upon which it issues, it is without authority of law and therefore void. A patent can only issue upon a certificate to which no valid objection is found, and therefore must, in the nature of things as well as by the express words of the act, issue in accordance with it. If objection is found to the certificate it cannot be corrected by the patent, but the certificate must be corrected and the patent issue upon it, and in conformity with it. Therefore, there can be no presumption that the commissioner objected to this partition by the surveyor-general, and undertook

to correct it by the patent, but the contrary; that he found it without objection, and the patent issued in confirmation of it.

It appearing from the special verdict that the premises in controversy are, upon the part of the donation, assigned to William H. Willson, the defendants must have judgments in bar of the actions and for costs. As to the statement in the special verdict concerning the acquiescence of Willson and wife in the partition line named in the certificate, I have not found it necessary to consider what, if any, effect ought to be given to it.

Case No. 18,119.

WYTHE v. MYERS.

[3 Savy. 595; 8 Chi. Leg. News, 280.]¹

Circuit Court, D. Oregon. April 10, 1876.

ACTION FOR POSSESSION OF LAND—FRIVOLOUS DEFENSES—COUNTERCLAIM FOR IMPROVEMENTS—WITHHOLDING POSSESSION—DAMAGES—STATUTE OF LIMITATIONS—CITIZENSHIP OF PARTIES.

1. In an action to recover the possession of real property, a statement in the answer of the grounds upon or means by which the defendant claims to be the owner of the property is irrelevant, and may be stricken out on motion.

[Cited in Raymond v. Morrison (Wash.) 37 Pac. 320.]

2. An allegation in the answer to the effect that the defendant derives title to the premises from the administrators of W. H. Willson, it not appearing that said Willson was ever seised or possessed of the property, is frivolous, and may be stricken out on motion.

3. An allegation that the administrators of said Willson conveyed the premises to the defendant's grantors on March 30, 1859, "in obedience to an order of the probate court of Marion county," of March 29, 1859, may be stricken out as frivolous and irrelevant; it not appearing therefrom that said order was duly or lawfully made, or that such court had authority to make the same.

4. The defendant may allege in his answer that he is the owner of the premises in controversy, but if he couples such allegation with a statement of the grounds of his title from which it does not appear that he is such owner, the matter may be stricken out as sham.

5. A counterclaim for permanent improvements should not be pleaded to the whole complaint, but only to so much thereof as to which it is an answer or defense; and it should allege the present value of said improvements, and that they better the condition of the property for the ordinary purposes for which it is used.

6. The right to damages for withholding the possession of real property given by the Oregon Code (sections 313, 318) is equivalent to the action of trespass for mesne profits given by the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises, as well for waste committed or suffered by the occupant as the value of the use and occupation; such right is a distinct cause of action, and if joined with a claim for possession, should be separately stated.

[Cited in Pengra v. Munz, 29 Fed. 837.]

¹ [Reported by L. S. B. Sawyer, Esq., and here reprinted by permission. 8 Chi. Leg. News, 280, contains only a partial report.]

7. Lapse of time short of twenty years is not a bar to an action to recover possession of real property where the defendant claims under a sale by an administrator, except where the sale was made under section 42 of chapter 5 of the Code of 1854, to pay the decedent's debts, and the plaintiff claims under such decedent.

8. If a defendant wishes to contest the citizenship of the parties to an action in the national courts, he must do so by plea in abatement; and such a plea, if joined to one to the merits, may be stricken out, but is not liable to a demurrer.

[This was an action by W. T. Wythe against A. Myers.] Motion to strike out defenses.

Addison C. Gibbs and Ellis Hughes, for plaintiff.

J. Quinn Thornton and W. F. Trimble, for defendant.

DEADY, District Judge. This is an action to recover the possession of lots three and four and a portion of two in block nine, in the town of Salem, together with damages for withholding the same. The complaint alleges that the plaintiff is a citizen of California, and the defendant of Oregon. The answer denies that the defendant is a citizen of Oregon, and in connection with such denial alleges that he is a citizen of California. The answer also contains a denial of the ownership of the plaintiff and his right to the possession. It also contains the following pleas or defenses: (1) That the defendant is the owner of the premises and entitled to the possession of the same; and that he derives title thereto by sundry mesne conveyances from E. M. Barnum and Jesse M. Shepherd, to whom J. G. Willson and C. A. Willson, as administrators of the estate of William H. Willson, conveyed the same on March 30, 1859, "in obedience to an order of the probate court" of the proper county made on March 29 of said year; (2) that permanent improvements of the value of one thousand dollars have been made upon the premises by those under whom the defendant claims "holding the same by the title thus derived adversely to the claim of the plaintiff, in good faith;" (3) that "more than five years had elapsed between the commencement of this action and the time of making the sale by the administrators aforesaid on March 29, 1859," and the making of the conveyances by said administrators to said Barnum and Shepherd "in obedience to an order of the probate court of said Marion county."

The plaintiff moves to strike out each of these three defenses as sham, frivolous and irrelevant. The motion must be allowed. All of the first defense, except the allegation of ownership, is at best a mere statement of the evidence upon which the defendant relies to sustain his claim of ownership, and is therefore irrelevant. But so far as appears, it is also frivolous. How a convey-

ance of the premises by the administrators of William H. Willson, deceased, could vest or pass the title to any one is not apparent. It is nowhere alleged that said William H. ever owned or had any interest in the property, and it might as well be alleged that the defendant derived title from the man in the moon. But admitting that he died seised of it, the plea does not show that the probate court of Marion county ever acquired jurisdiction to direct the administrators to make a conveyance. It is not even alleged that the order was "duly" or "lawfully" made. At the date of this alleged transaction the probate court had authority to order the sale of a decedent's lands to pay his debts, and also to order his administrator to make a conveyance of any part thereof which in his lifetime he had become "bound by contract in writing to convey." Code Or. 1854, cc. 5, 7.

But this defense of ownership in the defendant does not state under which of these provisions this order was made, nor in any way allege or show that the court had authority to make it. Standing by itself, the simple allegation of ownership in the defendant is sufficient and proper; but being coupled with what follows, it must be understood to be only such ownership as such a conveyance would transmit. Thus qualified, it amounts to nothing, and is a sham.

The second defense is frivolous and irrelevant, because it does not appear that such improvements are now of any value, or that they better the condition of the property for the ordinary purposes for which it is owned and used. *Neff v. Pennoyer* [Case No. 10,085]. It simply alleges that these improvements cost one thousand dollars. What is their present value, of what they consist, and when they were made does not appear. A counterclaim for permanent improvements is confined to their value at the time of trial, and this value ought to be alleged in the pleading. Civ. Code Or. § 318. Besides this defense, although separately stated, does not refer to the cause of action to which it was intended as an answer. *Id.* § 72. I suppose it is intended as an answer to the claim for damages for withholding the possession, but it professes to be in answer to the complaint generally. The only excuse for this is, that the claim for damages is stated in the complaint as if it was only an incident of the right to recover the possession. But this is an error. The right to recover the possession of the property and damages for withholding such possession are separate causes of action, which, for convenience and economy may be joined in one complaint. *Id.* §§ 91, 313, 318. The complaint also alleges that the defendant has unlawfully withheld the possession of the premises for six years, and that the value of the rents, issues and profits during that period is one thousand dollars, which he seeks to recover as something other and dif-

ferent than the five hundred dollars claimed as damages for withholding the possession. The right to damages for withholding the possession of real property given by Civ. Code Or. §§ 313, 318, is equivalent to the action of trespass for mesne profits given by the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the property as well for waste committed or suffered by the occupant as the value of the use or occupation. Such right is a distinct cause of action, and while it may be joined with a claim for possession, it should be separately stated.

The third defense assumes that in any action to recover premises held under a sale by an administrator, the lapse of five years from the date of such sale, or a less period than twenty years is a bar to a recovery. But I am not advised that any such act was ever in force in this state. Under the Code of 1854 (section 42, c. 5) property sold by an administrator on the order of a probate court to pay the debts of the decedents, could not be recovered by any one claiming under such decedent after a period of three years. But it does not appear that this plaintiff claims under William H. Willson, whose administrators are alleged to have made this sale. As this statute of limitation applies only to particular cases, the defendant cannot claim the protection of it unless he brings himself within it.

But this defense does not really allege that the defendants are holding under a sale by an administrator. The matter is characterized as "the sale by the administrators aforesaid on March 29, 1859," meaning the transaction mentioned in the first defense, which is not therein alleged to be a sale at all, but simply a conveyance. Now this conveyance, if made by the administrators under any statute of Oregon, must have been made in performance of a contract of sale by the decedent in his lifetime, as provided in chapter 7 of the Oregon Code aforesaid. But as to this class of cases, there never was any special limitation short of twenty years in this state, that I am aware of, and none has been pointed out. The plaintiff also demurs to so much of such answer as denies that the defendant is a citizen of Oregon, and avers that he is a citizen of California, because this is a plea in abatement, and cannot be pleaded in conjunction with a plea to the merits.

At common law a party could not plead at the same time, in abatement and bar, to the same matter. 1 Chit. 491. It has been long held in the national courts that if the defendant disputes the allegation of citizenship in the complaint, he must do so by a plea in abatement, and that this must be done in the order of pleading required by the common law. *Jones v. League*, 18 How. [59 U. S.] 81. A plea in abatement cannot be filed with other defenses. *Spencer v.*

Lapsey, 20 How. [61 U. S.] 267. But as these decisions are anterior to the enactment of section 914 of the Revised Statutes, adopting the practice in the state courts, it may be said that the question turns upon whether the pleading is allowed by the law of the state or not. The Oregon Civil Code (section 72) provides that a party may plead as many defenses as he may have, but does not prescribe the order in which they shall be pleaded. The most reasonable inference from this silence is that it was intended that the matter should be left as at common law; or, on account of such silence, the court being at liberty to construe the statute, may adopt the rule of the common law if deemed most convenient and promotive of justice. In *Hopwood v. Patterson*, 2 Or. 50, the supreme court held that a plea in abatement could not be joined with a plea to the merits.

In *Sweet v. Tuttle*, 14 N. Y. 468, it was held that the nonjoinder of a defendant could be pleaded with other defenses; and I am not aware that this decision has since been departed from in that state. I think the rule laid down by the supreme court of this state the better one, and I suppose under section 914, supra, it furnishes the rule for the practice in this court.

This defense of the citizenship of the parties is one peculiar to the national courts and upon the question of whether it should be made by a plea in abatement, or a simple denial of the allegation in the complaint, the practice in the state courts furnishes no guide. Under these circumstances it is proper to follow the rule laid down by the supreme court, prior to the enactment of section 914, supra, in *Jones v. League*, supra, and require the objection to be made by a plea in abatement, instead of a mere denial of the allegation in the complaint. Indeed, since the passage of the act of March 3, 1875 (18 Stat. 470), concerning the jurisdiction of the courts of the United States, a mere denial that the defendant is a citizen of Oregon would be immaterial; because by section 1 of that act, this court has jurisdiction, if the controversy is between citizens of different states. It is no longer necessary that one of the parties should be a citizen of the state where the action is brought.

But a demurrer is not the proper proceeding in this case. Matter pleaded in abatement with matter to the merits is deemed waived, and if not withdrawn, may be stricken from the files of the case. The pleading of matter to the merits admits the jurisdiction, and is therefore an implied retraction or withdrawal of matter already or at the same time pleaded in abatement. There is, then, nothing left to demur to. The matter in abatement is not demurrable, because the objection does not appear upon its face, but arises de hors the plea, by reason of the pleading of other defenses which are deemed to supersede it. If not actually

withdrawn, the convenient mode of eliminating it from the case is a motion to strike out. The demurrer is overruled.

WYTHE (NICKLIN v.). See Case No. 10,253.

Case No. 18,120.

WYTHE et al. v. PALMER.

[3 Sawy. 412.]¹

Circuit Court, D. Oregon. Aug. 20, 1875.

CONVEYANCE BY ADMINISTRATOR—AUTHORITY OF COURT—DONATION ACT—TITLE OF SETTLER—EQUITY PLEADING.

1. The probate court of Marion county, in 1856, had no power to authorize an administrator, generally, to convey lands in performance of his intestate's obligations; but only to convey specific premises upon the petition of the person claiming to be entitled thereto.

2. Where a married settler under section 4 of the donation act [9 Stat. 497], has completed the residence and cultivation required by the act, and made proof thereof, he is entitled to a patent for his donation, and may convey the same in fee simple. Per Field, Circuit Justice.

3. Plea to bill in equity may be good in part and bad in part.

In equity.

C. Gardner and Addison C. Gibbs, for complainants.

W. W. Thayer, for defendant.

Before FIELD, Circuit Justice, and DEADY, District Judge.

DEADY, District Judge. This is a suit for the partition of lots 3, 4, 5, 6, 7, and 8, in block 44, in the town of Salem, Marion county. The complainants are citizens of California, and the defendant is a citizen of Oregon.

The bill alleges, in substance, that the premises are a part of the donation claim of William H. Willson, a married settler on the public lands of Oregon, under section 4 of the donation act of September 27, 1850, who died intestate on April 17, 1856, after having "complied with all the requirements of said act," and before the issue of a patent therefor, leaving his wife, Chloe A. Willson, and three children, including the complainant, Laura B. Wythe, surviving him. That upon the death of said Willson, the south half of said donation claim, comprising three hundred and eight acres, which had before been duly set apart to him, was, by virtue of said act and the facts aforesaid, duly vested in said widow and children in equal and undivided parts; and that the complainants, by reason of the premises, are now seised of an undivided one-fourth of the lots aforesaid, and entitled to a partition of them. That the defendant is seised of an undivided three-fourths of said lots derived from the widow and two of the children aforesaid, and has received the rents

and profits of the premises for ten years, for which they pray an account. The defendant not answering the bill, pleads in bar of it, that he is seised in severalty of an estate in fee simple in the premises. That as to 3, 4, 5, 6 and 7 of said lots he derives title thereto by a sufficient conveyance of the date of March 11, 1858, from the Wallamet University to whom said Willson and wife, for a valuable consideration, duly conveyed the same on December 2, 1854, after said Willson had complied with the requirements of said donation act. That as to said lot 8, he derives his title as follows: On March 31, 1855, said Willson and wife, for the sum of one hundred dollars, executed a sealed instrument whereby they bound themselves to make Henry B. Worden a good and sufficient title to said lot 8 within a reasonable time after they should obtain a title from the United States to said donation claim; and that after sundry assignments said instrument was assigned on June 13, 1857, to George K. Shiel. That on May 28, 1856, the probate court of Marion county, duly empowered J. G. Willson and Chloe A. Willson aforesaid, the administrator and administratrix of said William H. Willson, "to convey and transfer lands which the said Willson in his lifetime had obligated himself to convey"; and that in pursuance of said authority, said administrator and administratrix duly conveyed said lot 8 to said Shiel, who afterwards on April 26, 1860, duly conveyed the same to the defendant. That the defendant entered into the possession of said premises in pursuance of said conveyances respectively, and has ever since held the same exclusively and adversely to his sole and separate use.

The plea was argued and taken under advisement by the court. The plea of title in the defendant is bad as to lot 8. The probate court of Marion county had no power to authorize generally the administrators of William A. Willson "to convey and transfer lands which the said Willson in his lifetime had obligated himself to convey," but only to convey specific premises upon the petition of the person claiming to be entitled to such conveyance. See Code Or. 1854, p. 338. Upon any construction, then, of the fourth section of the donation act, the legal title of lot 8 vested in the children and widow upon the decease of the settler, Willson. Whether the defendant is entitled to a conveyance of this title on account of the instrument given by the deceased in his lifetime to Worden, and the subsequent assignment thereof, it is not necessary now to inquire.

As to lots 3, 4, 5, 6 and 7, the question arises, whether, upon the death of a married settler, under section 4 of the donation act, who has completed the residence and cultivation required by the act and made proof thereof, but dies intestate and before a patent issues, his interest in the donation terminates, and the title to the same is vested, by said section, in equal parts in his surviving wife and children, unaffected by any sales or convey-

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

ances thereof made by him in his lifetime; or, whether said settler, being entitled to a patent upon the completion and proof of his residence and cultivation aforesaid, is not thereafter to be held and considered as a settler who could convey a fee simple in the donation, although he might die before the issue of a patent.

Upon these questions the court being divided; for the purpose of a decision of the case, the Circuit Justice is of the opinion that Willson being entitled to a patent when he conveyed to the Wallamet University, under whom the defendant holds, a decree should be entered dismissing the bill as to those lots, unless the complainant puts the plea in issue and contests the facts stated therein, within a time to be fixed by the court, and in the meantime the point of this disagreement will be stated and certified to by the judges, and entered of record. Rev. St. § 652.

The plea is sustained as to lots 3, 4, 5, 6 and 7, and overruled as to lot 8. A plea to a bill in equity may be good in part and bad in part. Story, Eq. Pl. § 692; French v. Shotwell, 5 Johns. Ch. 562; Kirkpatrick v. White [Case No. 7,850].

Case No. 18,121.

WYTHE v. SALEM.

[4 Sawy. 88.]¹

Circuit Court, D. Oregon. Sept. 18, 1876.

ESTOPPEL—PLEA STRICKEN OUT—PLEA OF FORMER JUDGMENT.

1. A plea of estoppel by conduct, not showing that the defendant was ignorant of the truth of the matter or could not have conveniently ascertained the same; nor that the defendant had acted upon the matter claimed as an estoppel, stricken out on motion of plaintiff.

[Cited in Coos Bay Wagon Co. v. Crocker, 4 Fed. 581.]

2. In a plea of a former judgment in an action at law, it is a sufficient description of the cause of action in the first action to allege that it was identical with that stated in the complaint in the action pending.

Addison C. Gibbs and Ellis Hughes, for plaintiff.

N. B. Knight, for defendant.

DEADY, District Judge. This is an action to recover possession of a block of land in the town of Salem, known as Marion square.

The defendant, by its amended answer, filed January 21, 1876, admits that the plaintiff [W. T. Wythe] is the owner of the fee in the premises, but denies that he is entitled to the possession of them. Besides the denials, the answer contains three separate defenses, namely: (1) A former adjudication; (2) A dedication of the premises by Chloe A. Willson, the grantor of the plaintiff, to the use of the inhabitants of said town, forever; and (3) an estoppel.

The plaintiff demurs to the first and second plea, and moves to strike out the third one. The motion to strike out is allowed. The plea of estoppel is founded upon the alleged public declarations of Chloe A. Willson, in 1857, to the effect that she had set apart said square for the use of the defendant forever, and alleges that the defendant, relying upon said declarations, improved said square in 1867 at a cost of \$500. But it does not appear but that the defendant knew, as well as said Chloe, whether such dedication had been made or not, or that it could not conveniently have ascertained how the fact was, if it had desired to. The plea also states that the defendant was in possession of the premises at the date of such declarations, and has been ever since; so that, upon its own showing, it has not changed its position in regard to the property since the making of the same, or incurred any liability or expense on the faith of them, save the expenditure of this \$500 for improvements, which is probably much less than the value of the use and occupation of the premises for over twenty years. Under the plea of dedication, any admissions of a prior dedication by Chloe A. Willson can be considered and have such weight as under the circumstances they are entitled to.

The second plea is sufficient, except that it contains no allegation that Chloe A. Willson had any interest in the premises to dedicate. This was stated on the argument to have been an oversight on the part of the pleader, and may be amended.

The first plea alleges that on June 25, 1868, in an action brought by Chloe A. Willson against this defendant, in the circuit court for the county of Marion, "for the same identical cause of action as that set forth in the complaint herein, the defendant had judgment against said Chloe A., for the perpetual possession of said square for the use of the inhabitants of said defendant, as a public square," which judgment is still in full force; and that plaintiff claims under said Chloe A. since the date of said judgment.

On the argument of the demurrer, counsel for the plaintiff insisted that a plea of former adjudication must state particularly what the cause of action was in the prior suit, so that the court can see that it is identical with that of the present one; and that therefore it is not sufficient to aver, as is done in this case, that the cause of action is the same or identical, but that the facts must be stated in detail. In support of this position counsel cited *Heatherly v. Hadley*, 2 Or. 273, in which it is said that "in pleading a former suit or action in bar, it is necessary to state facts showing what was the matter determined in the former suit," and the mere conclusion that they are the same is insufficient.

In support of this opinion the court cites *Fowler v. Hait*, 10 Johns. 111, and *Logan v. Tallmadge*, 14 Johns. 511. The first case was an action before a justice, and upon certiorari it was held that the defendant, having omit-

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

ted to plead or give notice of a former trial and judgment concerning the same matter, was therefore precluded from giving evidence of it at the trial of the action. But this ruling only goes to the point that a former adjudication must be pleaded, and is silent upon the question of what is a sufficient plea of such adjudication.

The second case was a suit in equity wherein the chancellor had permitted a former decree between the same parties to be read at the hearing, without the same having been pleaded or relied on in the answer as a bar (2 Johns. Ch. 56); and this, Spencer, J., delivering the prevailing opinion in the court of errors, held to be erroneous, saying: "It is a well established rule in equity that a plea in bar of a former decree must state so much of the former bill and answer as to show that the same point was then in issue." The case itself is authority for the rule, which is undoubted, that a former decree, to be available in bar of a subsequent suit, must be pleaded or relied on in the answer, but how or with what particularity it must be pleaded or stated in the answer it does not decide. In Story, Eq. Pl. § 791, it is said that, "upon a plea of a former decree, so much of the former bill and answer must be set forth as is necessary to show that the same point was in issue." But this is so on account of the numerous matters, involving many points and questions, often contained in a suit in equity and determined by its decree. In such a case it may be insufficient, as was held in *Heatherly v. Hadley*, supra, to simply aver "that all the matters and things alleged in this suit" have been adjudicated in a former suit between the same parties.

But in an action at law, a specified definite object is sought to be obtained on account of some particular wrong or neglect of duty, or failure to comply with an obligation on the part of the defendant, and the scope and operation of the judgment which is given therein is limited accordingly. Therefore, in pleading a former adjudication at law, it is convenient and sufficient to say that the cause of action was the same or identical with that set forth in the complaint in the new action, or with some branch or feature of the case made in the bill if it be a suit in equity and the plea is only to a part of the bill, as often happens. In Story, Eq. Pl. § 780a, it is stated that a plea of prior judgment in the lord mayor's court on the same subject-matter on which the bill sought relief was held good. The plea itself is given in the note three to the same section, and while it contains some folios of introductory matter, the essential allegation as to the identity of the matter adjudged and that set up in the bill is contained in the statement that the demands of the defendant, which are controverted by the complainant's now bill, and the demands of the defendant, which were established by said adjudication, "are the same and not otherwise or different." In 3 Chit.

Pl. 928, a precedent is given of a plea of a former judgment, in which it is simply stated that the plaintiff impleaded the defendant in a certain term, before a certain court, in a certain plea of trespass on the case on promises "for the not performing the very same identical promises and undertakings in the said declaration mentioned," upon which the plaintiff had judgment. The plea in this case is substantially in the same form. It avers that the action brought by Chloe A. against the defendant was "for the same identical cause of action as that set forth in the complaint herein," and that judgment was given upon the merits in favor of the defendant's right of possession, as above stated.

In 2 Estes, Pl. 702, 715, a precedent is given of a plea of "another action pending," and also a "former judgment," in both of which the allegation as to the identity of the cause of action is a simple averment that the pending or former action is or was "for the same cause of action as that set forth in the complaint herein."

The plea is sufficient, and the demurrer thereto is disallowed.

Case No. 18,122.

WYTHE v. SMITH.

[4 Sawy. 17.]¹

Circuit Court, D. Oregon. June 14, 1876.

DONATION ACT—HUSBAND'S AND WIFE'S INTERESTS
—EQUITABLE ESTOPPEL—RUNNING OF
LIMITATIONS—COVERTURE.

1. The wife's share of the donation made by the act of September 27, 1850 (9 Stat. 496), was not her separate estate; and the act of January 20, 1852, which undertook to declare it so, so far as prior settlements are concerned, was void.

[Cited in *Elliott v. Teal*, Case No. 4,396.]

2. By virtue of the marriage the husband took an estate for the life of himself and wife in the latter's half of the donation claim, and it was not in the power of the territorial legislature to divest him of this estate, although it might exempt it from execution.

[Cited in *Manning v. Hayden*, Case No. 9,043; *Alexander v. Knox*, Id. 170; *Stubblefield v. Menzies*, 11 Fed. 272, 274.]

3. What constitutes an estoppel in pais?

4. Equitable estoppels in pais cannot be set up as a defense to an action at law to recover the possession of real property.

5. The Oregon statute of limitations upon actions to recover real property does not run against a woman to whom the right to sue accrues during coverture, until the removal of such disability; and this, whether the action concerns her separate property or otherwise.

[Cited in *Stubblefield v. Menzies*, 11 Fed. 271.]

At law.

Addison C. Gibbs and Ellis Hughes, for plaintiff.

J. Quinn Thornton and W. F. Trimble, for defendant.

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

DEADY, District Judge. This action is brought to recover the possession of lot four, in block five, in the town of Salem. The complaint alleges that the plaintiff [W. T. Wythe] is a citizen of California, and the defendant [Jannette Smith] of Oregon; that the plaintiff is the owner in fee-simple of the premises and entitled to the possession thereof, and that the defendant unlawfully withholds the same from him, to his damage \$600.

The answer of the defendant denies all the material allegations of the complaint, except the citizenship of the parties, and alleges that she is the owner in fee of a certain described part of the premises, for which alone she defends.

The answer also contains a plea of estoppel, to the effect that the plaintiff ought to be precluded from alleging that he is the owner of, and entitled to the possession of the premises, because (1) that whatever claim of title the plaintiff has to the premises is derived through certain mesne conveyances from Chloe A. Willson, who, on May 7, 1852, with a knowledge that the premises were a part of a donation claim, one-half of which belonged to her in her own right, made no objection to the sale of said lot four to Joseph Smith by the trustee of Nancy M. Thornton, who then claimed to be the owner of the same by virtue of a conveyance thereof by William H. Willson, the husband of said Chloe A., to said Nancy M., the consideration of which inured to the benefit of said Chloe A.; (2) that in 1852 said Smith sold said lot four to Joseph Holman, and "said Chloe A., having a knowledge of her rights and of the sale," made no objection thereto, but acquiesced in the same; (3) that in 1853 said Chloe A., with a like knowledge of her rights in the premises, represented to L. F. Grover that said Holman was the owner of said lot, and advised and encouraged said Grover to purchase the same from said Holman as a suitable place for a law-office, and that said Grover was thereby induced to make said purchase, and afterwards, relying upon such representations, expended a large sum of money in building a law-office on the part of said lot claimed by defendant; (4) that in May, 1856, when said Chloe A. had knowledge of the fact that said lot was within her half of said donation, said Smith conveyed the same to said Holman with the knowledge of said Chloe and without objection on her part, and that, under like circumstances, said Holman, on December 5, 1856, conveyed the same to said Grover; (5) that on July 2, 1861, the defendant purchased from said Grover, for the sum of \$1,600, the part of said lot for which she now defends, with the knowledge of said Chloe A., and without objection on her part, and that she acquiesced in all said transactions concerning said lot up to the time of her death in 1875.

The answer concludes with a plea of the statute of limitations; that the plaintiff, nor those under whom he claims, has not been seised or possessed of the premises in contro-

versy within twenty years from the commencement of the action, January 3, 1876. The plaintiff demurs to the whole answer, to the plea of estoppel and to the statute of limitations conjunctively, and to the latter separately.

In support of the plea of estoppel, counsel for the defendant insists that the wife of a settler under the donation act of 1850 had a legal and separate estate in the portion of the donation inuring to her, and that therefore she could convey it, or by her acts in pais estop herself to assert her title to it, as if she were a feme sole. That the wife's interest in the donation is a legal one, there can be no doubt. It is granted to her by the act directly and unqualifiedly, to be held by her in her own right. No trust is declared concerning it, and no trustee or third person is interposed between her and the ownership of the property.

By the common law which was in force in Oregon at the passage of the donation act, real property, however acquired by the wife, was transferred to her husband during their joint lives, leaving only the reversion in her. But in cases where the instrument or act by which the property was conveyed to the wife provided that it should be for her sole or separate use and benefit, equity interfered, and, while admitting that, by virtue of the marriage, the present ownership of the property passed to the husband notwithstanding the words of exclusive use to her in the deed, treated and held him as a trustee of the estate thus vested in himself for the use and benefit of the wife. This constituted what was called a separate estate in the wife. It was the creation of equity, and the expression "separate estate of a married woman" always referred to an equitable estate held by the husband or a third person in trust for her. Bish. Mar. Wom. § 794 et seq.

As has been stated, the wife's share of the donation was a legal estate granted to her by apt and ordinary words of conveyance, in which the husband, by virtue of the marriage, immediately took a freehold estate. It is not claimed that the donation act imposed any trust upon this estate in the hands of the husband, or charged his conscience with the duty of administering it for the separate benefit of the wife, so as to make it in equity her separate estate, unless such is the effect of the words, "to be held by her in her own right." As I understand the argument of the learned counsel for the defendant, it is not contended that these words make the property her separate estate in equity as above described, or that any trust was imposed upon it in favor of the wife by this or any other provision of the donation act. But it is maintained that this property was in fact some sort of a "separate estate" of the wife's, because the grant to her provided that it was "to be held by her in her own right."

Is such the natural or possible effect of this phrase, or does the use of it in this connection manifest any intention upon the part of con-

gress to keep this grant to the wife out of the ordinary rule which gave the husband a present freehold in the wife's real property, however acquired?

A woman is said to hold property in her own right when she does not derive it from her husband; and a man is said to hold property in the right of his wife when his interest in it arises out of his marriage with her. The expression is an untechnical and vague one, and no instance has been shown in which it has been used to exclude or limit in any degree the marital rights of the husband in the real property of the wife. It is not clear why the words were used in the donation act, and the probability is that, like other expressions contained in it, they were inserted without much consideration. My impression is that they were placed in the act upon some vague apprehension that, as the whole section was first granted to the settler (the husband), and on account of his services upon the land, without them it might be claimed that the wife, instead of taking directly from the United States, derived title through the husband as his wife,—held in his right by virtue of the marriage, instead of her own, and that therefore the property might be in some way liable for his prior debts, contracts and obligations. To exclude this conclusion,—to avoid this possible doubt or danger,—it seems probable that these words were inserted immediately after the clause qualifying the grant so that the wife's half of the donation, instead of passing through the husband, went from the United States to her directly. It being provided that the wife should be considered as holding in her own right, and not in that of her husband, this would preclude the conclusion that she claimed through or under him, and therefore the property would be possessed by her, and descend, upon her death, the same as if inherited from her father or other ancestor. To hold or be seised of property in your own right is not incompatible with the use being in another. Seisin and use are not identical; and the seisin may be in one person and the use in another. A feoffee to use held or was seised in his own right, but to the use of another. The seisin or holding relates to the acquiring of the estate, and the use to the purposes for which it shall be held. Here the wife held or was seised in her own right, but not to her own separate or sole use and benefit, and therefore she had no separate estate in the property. As soon as she became seised, by reason of the marriage, the law cast upon the husband an estate in the premises for their joint lives. Bish. Mar. Wom. § 529.

But it is also claimed that this property became the separate estate of the wife by operation of the act of the territorial legislature of January 20, 1852, entitled "An act to exempt the wife's portion of lands, donated in Oregon territory by act of congress, approved September 27, 1850, from the debts and liabilities of her husband." This act provided "that all right and interest of the

wife, both legal and equitable, in and to the land donated to settlers in Oregon territory, by an act of congress approved September 27, 1850, both now and hereafter, be and hereby is secured to the sole and separate use and control of the wife; and such interests in said lands, both legal and equitable, of the wife, and the rents and profits thereof, shall in no wise be made subject or liable for the debts or liabilities of her husband, whether contracted before or after the passage of this act." This act was repealed January 30, 1854, by the general repealing act of the Code of that year. As appears from the title, the intention of the act was to exempt the wife's portion of the donation "from the debts and liabilities of her husband," and this, doubtless, was the leading idea in its enactment. The language used is not accurate, but the purpose is apparent. It was not intended to exempt the reversion—the interest which remained in the wife notwithstanding the marriage—from the husband's debts and liabilities, but only the husband's present interest in the property. This interest or marital right of the husband was a freehold, and liable to be taken on execution and sold to satisfy his debts. Bish. Mar. Wom. § 585; *Starr v. Hamilton* [Case No. 13,314]. But to exempt the husband's interest in the wife's donation from execution did not divest him of such interest or reinvest the wife with it in any way. But the body of the act, in addition to exempting the husband's interest in the wife's donation from execution, did declare that "the right and interest of the wife" in such donation "is hereby secured to the sole and separate use and control of the wife."

At the date of this act all the right and interest of Chloe A. Willson in her share of her husband's donation was simply the reversion upon his death, he being already, by virtue of the marriage, seised of an estate in the premises for their joint lives. Strictly speaking, then, there was nothing in this case, in this respect, for the act to apply to. It did not in terms include the present ownership, for that being in the husband, was not "the right or interest of the wife," and the reversion was already hers beyond a question.

But assuming, what is probable, that it was intended by the phrase, "right and interest of the wife in the land," to include all the interest which came to her from congress under the donation act, then the act, as to settlements already made, was so far void.

Although it does not distinctly appear from the plea of estoppel when this settlement was commenced, it is well known to the court, from its records, to have been made long before the passage of the donation act, September 27, 1850; while in the defendant's brief it is admitted that it was made at least as early as that date. This being so, the husband was seised of a life estate in the wife's

share before the passage of the act of January 20, 1852. This was a vested interest which the legislature could not deprive him of. They might exempt it from execution, in the interest of the family, or otherwise, but they could not dispossess him of that which had become his by the existing law of marriage. *Starr v. Hamilton* [supra]; *White v. White*, 5 Barb. 474; *Westervelt v. Gregg*, 2 Kern. [12 N. Y.] 202.

At common law a married woman could not pass her freehold except by fine and recovery. Her deed was absolutely void. *Bish. Mar. Wom.* § 586. But by the statutes in force in this state, at least since September 29, 1849, a married woman could convey any interest of hers in lands by joining with her husband in a deed thereof, and not otherwise. See Act Sept. 29, 1849, adopting the Iowa act "to regulate conveyances;" *Sess. Laws 1849*, p. 138; "An act relating to alienation by deed," etc., *Code 1854*, p. 476; same act, *Code 1874*, p. 515.

The donation act, not containing any provision touching the interest of the husband in the wife's share of the donation, or the alienation of the same, except to forbid all contracts for the sale of the same prior to the completion of the residence and cultivation required by the act, both subjects were governed by the local law,—the common law,—except as modified by the above cited statutes. It follows that the wife during coverture could do no act in pais which would estop her from asserting her right to her land, and that the only way she could divest herself of her interest in her donation was by fine or recovery, or joining with her husband in a conveyance thereof. An estoppel in pais can never be more effectual than by deed. And as *Chloe A.* could not have affected her interest in this property by her separate deed, of course she could not by an estoppel in pais. 2 Washb. *Real Prop.* p. 459.

The plea of estoppel is bad. But admitting that the wife's share of the donation was her separate estate, and that she could, by her acts in pais, estop herself from asserting her title thereto, the same as if she were a feme sole, the facts stated in the plea do not constitute an estoppel. They lack utterly the necessary and essential ingredients of intention to deceive on the part of *Chloe A.*, and the want of knowledge, or all convenient means of acquiring it, on the part of *Smith, Holman, Grover et al.*, concerning the true state of the title. The alleged sales of the property commenced in 1852 and ended in 1861. *Chloe A.* is not charged with anything more than simple acquiescence in relation to any of them except the one from *Holman* to *Grover*, which took place in 1853. As to this one, she is alleged to have advised the purchase, saying that *Holman* was the owner of the lot. Incidentally it appears from the plea that up to this time the donation had not been partitioned between the husband and wife. In what part of it her

share would be assigned, she could not say or direct. The power of partition was vested in the surveyor-general, absolutely. *Wythe v. Haskell* [Case No. 18,118].

She may have thought he would so divide it as to bring this lot within the share of her husband and co-tenant, who, it appears, had sold the same, probably upon the same impression or expectation, before 1852. But if so, she was mistaken. The donation was divided so that the premises were included in her share, and thus it turned out that *Holman* was not the owner of the lot, and *Grover* acquired nothing by his purchase from him, nor even by his erection of a law-office thereon. Nor can anything be more improbable than that *Mr. Grover*, a distinguished lawyer, was misled by this casual opinion or expression of this unlearned feme covert, as to the true state of the title, or that he did not know, and had no better means of knowing than she, what was the legal effect of her husband's prior deed to this lot.

There was a time, commencing probably with *Wendell v. Van Rensselaer* (1815) 1 Johns. Ch. 353; when this doctrine of equitable estoppel, upon the seductive plea of promoting justice in particular cases, threatened to sweep away the statute of frauds and leave the right to real property to rest upon the precarious tenure of the uncertain and prejudiced testimony of ignorant and interested witnesses to the casual, stale and parol acts and declarations of parties no longer in existence or interested to maintain the title.

But since the announcement of the salutary rule contained in *Hill v. Epley*, 31 Pa. St. 334, and *Boggs v. Merced Min. Co.*, 14 Cal. 367, this dangerous and indefinite doctrine has been brought within reasonable and safe limits again. As was said by this court, in *McGuire v. Neff* [unreported], December, 1875: "If such facts constitute an estoppel, then was the statute of frauds passed in vain, and paper titles are not worth the material upon which they are written. * * * Before a court of equity will estop a party from asserting his title to real property, it must be shown that there is some degree of turpitude in his conduct. To constitute an estoppel in pais in such a case, it must appear that the party sought to be estopped, with a knowledge of his rights in the premises, made some admission or declaration by word or deed, with an intention to deceive the party claiming the estoppel, or those under whom he claims, or with such carelessness or negligence as amounts to fraud; that the party alleged to have been misled was not only destitute of all knowledge of the true state of the title in question, but of all convenient means of acquiring such knowledge; and that he directly relied upon such admission or declaration, and will be injured by allowing its truth to be disproved." *Boggs v. Merced Min. Co.*, 14 Cal. 367; *Carpentier v. Thirston*, 24 Cal. 268;

Davis v. Davis, 26 Cal. 38; Story, Eq. Jur. § 391; Fields v. Squires [Case No. 4,776].

At the date of this alleged declaration to Grover he had at least the same means of knowing as Mrs. Willson, that the husband's deed could not convey the wife's interest in the land, and that she herself could not convey it unless her husband joined in the deed for that purpose; that the surveyor-general had the absolute power to partition the donation between the husband and wife as he saw proper, and that then and since September 27, 1850, both Chloe A. and her husband were forbidden by the donation act to make any sale of the premises, and were therefore incapable of so doing, jointly or otherwise. She could not have intended to deceive him, and he could not have been misled by what she said—which at best was a mere expression of opinion about a matter of which he presumably was better informed than she. The facts stated do not constitute an estoppel, even if Chloe A. had then been a feme sole.

But if these facts constituted a sufficient equitable estoppel, it would not be a good defense to this action at law. In Adams v. Burke [Id. 49],—1875,—this court decided, after thorough argument and careful consideration of the question, that what is known as an equitable estoppel could not be pleaded in this state, and therefore not in this court, as a defense to an action of ejectment. At common law an estoppel in pais could only arise in the case of those solemn and peculiar acts to which the law gave the power of creating a right or passing an estate. Among these were feoffment and attornment. The instances given by Lord Coke are livery, entry, acceptance of rent, partition and acceptance of an estate. Subsequently, estoppels in pais were extended by courts of equity, until there grew up a class of estoppels called equitable estoppels in pais. Except in cases concerning the title to lands, in time these were recognized and allowed by courts of law; and in some

of the United States without this exception. But I know of no act or decision in this state authorizing such practice, and it is to be hoped there never will be.

The plea of the statute of limitations appears to be sufficient on its face; but on the argument it was admitted and assumed that Chloe A. Willson was a feme covert, since prior to 1852 and down to a period less than twenty years before the commencement of this action. Admitting this fact, counsel for defendant maintained that this being her separate property the statute ran against her as if she was a feme sole. However this may be, the conclusion having been reached that this was not the wife's separate property, the argument based upon the contrary assumption falls with it.

But the statutes of limitations in force in this state since May 1, 1854, expressly provide that in the case of married woman to whom a cause of action accrues for the recovery of real property, the time of such disability or marriage shall not be counted as a part of the limitation. Code 1854, p. 172; Code 1876, p. 108. It is not apparent why these statutes do not apply to all married women, whether the property be her separate property or not. True, she might have sued alone for her separate property; but the exemption proceeds upon the theory that while she is under the disability of coverture, she is not in fact at liberty to sue without her husband's assent, even if the law will permit it. Now the husband may be a party to the disseisin and interested in having the bar of the statute established, and to prevent this possible wrong the law has provided without exception or qualification that the limitation upon a woman's right to sue for the recovery of her real property shall not run during coverture.

The demurrer is sustained as to the plea of estoppel and overruled as to the rest of the answer. If the plaintiff wishes to avail himself of the disability of Chloe A., during her husband's life-time, he must reply to the plea of the statute and set up the coverture.

Y.

- YAEGER (VOCKE v.). See Case No. 16,980.
 YAHOOOLA MIN. CO. (HAND v.). See Case No. 6,016.
 YAHOOOLA RIVER MIN. CO. (HALL v.). See Case No. 5,955.
 YALE (WILKINSON v.). See Case No. 17,678.

 Case No. 18,123.

YALE & G. MANUF'G CO. et al. v. NORTH.

[5 Blatchf. 455; 3 Fish. Pat. Cas. 279.]¹

Circuit Court, D. Connecticut. Sept. 17, 1867.

PATENTS FOR INVENTIONS—COMBINATION LOCKS—
CONSTRUCTION OF CLAIMS.

1. The two different classes of combination locks, explained.

2. In the reissued patent granted to Linus Yale, Jr., April 28th, 1863, for an "improvement in locks," the second claim, which is: "In combination with a pack or series of tumblers set separately and in succession, I claim a vibrating fence and a bolt, and a proper stop against which the fence may abut, the whole being and operating substantially as set forth," is applicable only to the class of locks in which the tumblers are set separately and in succession, under the exclusive control of the operator, and subject to his discretion, as distinguished from the class of locks in which the tumblers are all set at one time, by fixed mechanism.

3. The nature of the invention covered by said second claim, defined.

4. Such invention was new with the patentee, and the said reissued patent is valid.

[Cited in brief in Locomotive Engine Safety Truck Co. v. Pennsylvania R. Co., Case No. 8,453.]

5. The combination covered by said second claim is a combination of the bolt, the vibrating fence, the stop and the tumblers.

6. Such claim is not invalidated by the prior existence of a combination in which the tumblers were set at the same time, by fixed mechanism.

7. Where a defendant, in a suit in equity, was held to have infringed one claim of a patent, and another claim of the patent was held not to have been new, no costs were allowed to either party.

8. A reference being made to a master to take an account, an injunction was withheld until the coming in of his report.

² [This was a bill in equity filed to restrain defendant [Frederick H. North] from infringing letters patent [No. 32,331] for "improvement in locks," granted to Linus Yale, Jr., May 14, 1861, and reissued to him April 28, 1863 [No. 1,470], the sole and exclusive right to the use of which was granted to

¹ [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 5 Blatchf. 455, and the statement is from 3 Fish. Pat. Cas. 279.]

² [From 3 Fish. Pat. Cas. 279.]

the Yale and Greenleaf Manufacturing Company, September 21, 1861.

[The claims of the original patent were as follows: "1. The piece E (key) or its equivalent used in the manner, or an equivalent manner, and for the purpose substantially as described. 2. The parts D, D, D, D (tumblers), or their equivalents, receiving motion in the manner substantially as described. 3. The piece C (fence) or its equivalent, with its arm g, for the purpose and object described."

[The specification of the reissued patent was as follows: "Be it known, that I, Linus Yale, Jr., formerly of Philadelphia, but now residing at Shelburne Falls, Massachusetts, have invented certain new and useful improvements in that class of locks in which each tumbler is set separately to its proper position by a key, or its equivalent, or by hand as in alphabetical or index locks, as distinguished from or contrasted with that class of locks in which all the tumblers are set at one time, or nearly so, by the action of a key or bit, and I declare the following to be a full, clear, and exact description of my improvements, reference being had to the drawings, in which: Figure 1 is an elevation of the lock, one side of the case being removed. Figure 2 is a section through the lock on the line x y of figure 1. Figure 3 is a section through the key curb. Figure 4 is a detail view of the bolt and bolt-lever or keeper. Figure 5 is a plan of one of the washers. In this lock I have introduced several improvements, the principal ones relating first to the method of operating the tumblers, and, secondly to the method of preventing picking. In this class of locks difficulty is often experienced in setting the tumblers; imperfect sight of the operator, or want of light, or a wrong position of the eye, preventing the indices usually employed from being brought to the exact spot which they must assume before the tumblers are adjusted, and the lock can be unlocked. In order to obviate this defect I have combined a tumbler with a revolving tooth on a separate shaft, the combination being such that a whole revolution of a tooth moves the tumbler only through the angular distance between two of its consecutive notches. Locks of this class have also been picked by new processes impossible to describe fully except in a specification of inordinate length, but depending for their success upon distinguishing one tumbler from the others, and the difference between false and true notches, or either of them, by forcing the stump against the tumblers, and noting the position of an index attached to the instrument, whatever it may be, that retracts or tends to retract the bolt, and I

have remedied this defect in this class of locks, by combining with tumblers, set or adjusted separately and in succession, a bolt and vibrating stump or fence attached thereto, said fence acting to stop the motion of the bolt at one and the same point irrespective of the precise tumbler or precise notch of a tumbler against which the stump is forced. In this lock the bolt is shown at B, and is guided as usual by the gate in the rim, and, by two pins a1, a2. In the bolt is an aperture, b, permitting it to slide past the post a. The post a is strongly secured to, or made in one piece with the lock-plate A, and is a cylinder with one side flattened; this flattening is merely to prevent the washers 1, 2, 3, 4 from revolving. Upon the post are packed the tumblers D, D, D, free to revolve thereon, and between the tumblers are the washers, the whole pack of washers and tumblers being held in place by a stout washer H, secured by a spring ring I taking into a groove on top of the post. These tumblers are gated or deeply notched as at d, for the entrance of the stump, and have also false notches surrounding them as at 1', 2', 3', etc. Such notches also serving as cog-teeth, by means of which each tumbler can be revolved. These notches extend all around the tumblers, except at one spot, as at d'', where their original rim is left uncut, so as to secure a point of departure from which to count the position of the stump notch when the tumblers are revolved. The bolt has pivoted to it at b4 an ordinary guard tumbler G, held in abutment against the pin a2, which serves as a stop for this tumbler. Upon the bolt B and b2 is the vibrating safety fence C—part of this fence at c serves as an ordinary stump, and inserted in the bolt is a spring-pin b5, which bears against the stump and holds its end g out of contact with the top a': if the lock is put on the door with the side at x upward this pin is unnecessary, as the force of gravity will then keep the end g depressed. Near the tumblers is secured in the lock the key curb F, free to revolve and bored out and slotted from end to end, for the passage of the revolving tooth which sets the tumblers and also serves as a bolt mover; the shape of this tooth and its shaft are clearly shown in the drawings, and on its shaft are turned a series of grooves whose distance from center to center is the same with that of the tumblers, and into these grooves takes a spring-pin attached to the curb, and clearly shown in fig. 3. This pin permits the key to be shoved out and in within the case of the lock, and serves to determine the position of the tooth, so that the tumbler upon which it is acting may be known. The distances between the true notches or gates into which the bolt stump must enter before the lock can be unlocked, and the blank spot on the periphery of the tumblers, varying in each tumbler, and the number of tumblers may vary from two

upward. In order to unlock the lock, one of the tumblers is to be turned by the revolving tooth operated by the crank until the blank is felt; when the tooth strikes the blank, further revolution in the same direction is impossible. The key is then to be shoved in or pulled out and another tumbler set in the same way until all the blanks lie over each other, then by acting on each tumbler separately, each one is to be revolved by the crank and tooth until the gate or true notch comes opposite the stump on the bolt; the necessary amount of revolution being known and depending upon the construction of each tumbler, or, in other words, the number of notches between the blank spot and the true gate. The key is then shoved in and turned so as to lift the guard tumblers; hold it lifted; take into the talons b3 and retract the bolt; in so doing the stump c will enter the true notches. Now, it will be noted that each tumbler is moved separately, and when adjusted remains in the position for the stump to enter without being held in place by the key, thus differing from that class of locks in which the tumblers are lifted all at once and held in position by a key or bits while the lock bolt is being retracted. It will also be observed that a whole revolution of the crank and tooth only turns each tumbler one notch, no index on the crank is therefore needed, all that is necessary being to count the turns of the crank, and it makes no difference whether the crank commences to turn from a precise spot or finishes its revolution at a precise spot, so long as it moves through such a portion of a revolution as will turn the tumbler upon which it is acting through the angular distance between two notches.

["This arrangement therefore dispenses with indices, permits opening of the door in the dark as well as in the light, and obviates the difficulties arising from imperfect vision, or false position of the eye of the operator. In case a lock is attempted to be opened by a person not knowing the true set of the tumblers and the relative angular position between the blanks d'' and the true notches, he must endeavor to set the tumblers experimentally, and then ascertain whether their arrangement is correct by forcing the bolt backward; when he does so, the stump as soon as it touches any tumbler will compress the spring and locate its long end (the fence) against the stop a', thus preventing the bolt from retracting further, and always bringing it up against the stop a' and at exactly the same point of retraction, no matter what tumbler or part of a tumbler it touches. This peculiarity of the sameness of range of motion of the bolt when forced back effectually prevents a lockpicker from distinguishing between the different tumblers, or discovering their true set, or that arrangement of the gates which will alone permit the bolt to be retracted.

In locking, the bolt is to be shot, and the tumblers are then, by means of the tooth, to be moved so that their true notches are no longer opposite the stump. I claim as of my own invention:

["First. The combination of a revolving tumbler with a revolving tooth; the two being relatively arranged so that a revolution of the latter moves the former only through the angular distance from one of its teeth to the next in succession, the combination being substantially such as described.

["Second. In combination with a pack or series of tumblers set separately and in succession, I claim a vibrating fence and a bolt, and a proper stop against which the fence may abut, the whole being and operating substantially as set forth; and, lastly, I claim in combination a revolving tooth, a pack or series of tumblers, a vibrating fence and a bolt, the whole operating substantially as herein before specified.

["In testimony whereof, I have hereunto subscribed my name on this seventeenth day of March, A. D. 1863. Linus Yale, Jr."]³

C. M. Keller and E. W. Stoughton, for complainants.

George Gifford, for defendant.

SHIPMAN, District Judge. [This is a bill for an injunction to restrain the respondent from infringing certain alleged rights of the complainants, and is founded upon a reissued patent numbered 1,470, granted to one of the complainants, Linus Yale, Jr., and dated April 28, 1863. The other complainants, the Yale & Greenleaf Manufacturing Company, are the sole and exclusive licensees of Linus Yale, Jr., under this patent. The patent is for an alleged new and useful improvement in locks, and embraces three claims.]³

Of the three claims in this patent only two are involved in the present controversy, and the main struggle between the parties relates to the second. The object of the alleged invention, embraced in this second claim, is declared, in the body of the specification, to be, to prevent the picking of the lock. This claim is stated in the following language: "In combination with a pack or series of tumblers, set separately and in succession, I claim a vibrating fence and a bolt, and a proper stop against which the fence may abut, the whole being and operating substantially as set forth."

The specification, in describing the state of the art at the date of the invention, and the alleged improvements made by the patentee, distinguishes combination locks as capable of being separated into two classes—the first class embracing those "locks in which each tumbler is set separately, in its proper position, by a key or its equivalent, or by hand, as in alphabetical or index locks;" and the second class embracing those "locks in which

all the tumblers are set at one time, or nearly so, by the action of a key or bit." It is to the first class only that the alleged improvements of the patentee are declared to be applicable. This distinction between these two classes of locks has an important bearing on the main question to be determined in this case. It is set forth in the specification, and was insisted on by the plaintiffs, at the hearing, for the purpose of marking the line of separation between what is alleged to be a new combination and what is admitted to be old. The novelty of the invention embraced in the second claim depends, therefore, upon the verity and validity of this distinction, as will be seen hereafter. Whether the combination described in the second claim is patentable, when considered apart from this question of novelty, is another and different matter, and will be discussed when we consider that point as separately presented by the defendant.

Locks, in their ordinary construction and use, are susceptible of being plainly separated into two classes. One class, which, for convenience, we will continue to denominate the first, is that in which the tumblers are so constructed and arranged that they are set separately and in succession, by bringing the gates of the tumblers, one by one, from different points, into a line, for the fence to enter, so that the bolt may be retracted. This setting of the tumblers separately, for the retraction of the bolt, presupposes, of course, that the tumblers have been disarranged after locking, upon a combination fixed by, and known to, the locker. Having thrown forward the bolt and disarranged the tumblers to a selected combination, the locking is complete, and, whatever security the mechanism affords against illicit opening is attained. By reversing the motion of the tumblers exactly according to the same combination, the gates are all brought again in a line with the fence, and the bolt can be retracted. In this class of locks the key-hole is dispensed with. No aperture is left in the case, through which the lock can be picked with an instrument, or into which explosive substances for blowing it open, or coloring matter for taking an impression of its internal structure, can be passed. There is no key to be lost or duplicated. In this class of locks, the tumblers may be said to be passive, and move through a wide range of motion, operated by a locking instrument, or the human hand, uncontrolled by springs or catches. The operator disarranges and sets or rearranges them, according to a combination formed in his own mind, and by his own discretion.

The second class of locks is operated by a key or bit passed through a key-hole in the lock case. This key takes up the tumblers simultaneously, or nearly so, in a mass, and carries them forward to a common point, where the fence can enter the gates, and the bolt be thrown forward or retracted, when the key is withdrawn from pressing against

³ [From 3 Fish. Pat. Cas. 279.]

the tumblers, and the latter, by force of gravity or springs, are carried back to their original positions. The tumblers are carried forward to one fixed point by force of the operating hand, and return to the other fixed point by force of gravity or springs. All this is done, not in accordance with a rule originating and resting in the mind of the operator alone, but in accordance with a fixed rule resting in and limited by the mechanism. By this rigid mechanical law, the tumblers are both set and disarranged. The discretion or intelligence of the operator cannot vary the operation of the lock, except by changing the wards of the locking instrument to a different combination. The lock is more or less accessible through the hole in the case or door. Through this aperture, picking instruments can be introduced by the thief, or explosive materials for blowing it off, or coloring or plastic matter for the purpose of obtaining an impression of its internal construction or condition.

In the first class of locks, all these means of illicit access and information are cut off, by dispensing with the key-hole, and setting the tumblers separately, each one by itself, and distributing the gates upon a combination resting wholly in the knowledge and discretion of the operator, and not in the mechanism of the lock or key. Tumblers of this character are different mechanical devices or instruments from those of the second class, and accomplish very different and more complete results. They are flexible and obedient servants of secrecy and intelligence, upon which the security of locks greatly depends. These tumblers, combined with various other parts of locks, are old and well known. Their introduction formed an important era in this branch of invention. But, while they dispensed with the key-hole and removable key, and thus got rid of several means through which the bolt could be illicitly reached and controlled, it is said that they did not always baffle the thief, and that he could still communicate with, and draw information from, the interior of the lock, by the sense of feeling applied directly to the tumblers, or indirectly through the parts of the lock which communicated with the bolt and tumblers. Even where the hand of the burglar, however practised and sensitive, applied to the instrument for retracting the bolt, could detect no variations in the tumblers, and, therefore, could not bring the gates into line and present them to the fence, it is said that a delicate instrument, capable of measuring minute variations, could be attached to the part where the force was to be applied for moving the bolt, and thus the position of each notch or gate could be made known, and brought to the place necessary in order to free the bolt, and enable the operator to throw it back. It is obvious that, to overcome this defect, the tumblers, when any attempt is made to feel out their positions,

must be isolated from all those parts of the locks which have any connection, either directly or indirectly, with the hand of the thief, or to which a measuring instrument can be applied. The parts, or connection of parts, through which intelligence of the position of the notches in the tumblers is communicated to the operator outside, must be cut somewhere. To accomplish this was the object of the combination described in the second claim of the patent in question. The patentee combined this class of tumblers with a vibrating fence, a bolt, and a stop against which one arm of the fence strikes when an attempt is made to retract the bolt. After the bolt is thrown forward, and the tumblers are disarranged, and the locking is thus completed, an attempt to retract the bolt brings one arm of the fence against the edge of the tumblers, and throws the other arm in a line with and against the stop, always at the same point of retraction. This retracting pressure on the bolt, by which one end of the vibrating fence is brought against the stop, relieves the pressure of the other end of the vibrating fence on the edge of the tumblers. The absence of pressure, and the uniformity of the range of motion of the bolt each time it is attempted to be thrown back, prevents the operator from distinguishing one tumbler from another, or discovering their set, or the relation of one gate to the other. He has, therefore, nothing left to guide his efforts to bring the gates in line, so that the fence will enter and the bolt pass back to its unlocked position. After the bolt is thrown forward, and the tumblers are disarranged to a combination existing only in the mind of the locker, every effort of a stranger must result only in retracting the bolt through uniform motions fixed by the stop, against which one arm of the fence abuts. No pressure can aid him in his attempts to distinguish the tumblers, for the fence conveys no information either to the hand or to a measuring instrument, as to the position of any one tumbler, or its relations to the rest, or the relative positions of any one or of the whole to the point to which all must come, in order to effectually throw back the bolt.

The proofs do not show that this combination of the vibrating fence, bolt, and stop with this class of tumblers was ever made until it was done by this patentee. Locks with this class of tumblers, having various combinations and devices intended to baffle the thief, are numerous. To describe and discuss these would prolong this opinion and shed no light on the vital point of this controversy, for, in none of them is found this simple combination of the tumblers, fence, bolt and stop, so arranged as to check the backward motion of the bolt and isolate the tumblers at the same time, and thus protect the tumblers from any adjustment by a stranger that would enable him to pick the lock.

On the question of the discrimination of tumblers into two classes, as set forth in the patent, proof was introduced by the defendant, which he claimed was evidence that no such classification could be properly made. By an ingeniously constructed key, for locking and unlocking tumblers of the second class, these tumblers were picked up separately, one by one, and carried to the point where the bolt could be thrown forward and retracted, and held there by the key. It was insisted, that the success of this experiment demonstrated that the tumblers of these locks could be set separately and in succession, and therefore, that the distinction which was attempted to be made in the different classes of tumblers, in this particular, was purely imaginary. The true answer to this is to be found in the fact, that the terms "set separately and in succession," as used in the second claim of the patent, as well as similar words in the body of the specification, refer not merely to their separate and successive movement, but to their separate movement and adjustment under the exclusive control of the operator—to combinations resting entirely in his own discretion. The tumblers that are distinguished from these, in the specification, are those which are controlled in their movements, not by the mere discretion of the locker, but by the law of their mechanism.

Experiments were also performed to show that the tumblers on the plaintiffs' lock, could, from a certain point, be thrown forward and set simultaneously. But they had to be picked up first separately and carried to a given point, before the mass could be operated upon simultaneously. In practical use, one class have always been set simultaneously, and the other separately, and the descriptive terms of the patent followed the language which naturally had grown out of that use. The ingenious experiments here referred to do not change the nature or functions of the different species of tumblers, or obliterate the distinctions which legitimately pertain to them.

It was insisted, on the hearing, that the reissued patent was false and fraudulent and improperly issued. But, no such issue is raised by the pleadings, nor is there anything in the proofs that would warrant the court in sustaining such an objection.

A more important point urged by the defence, and one directly involved, is that which relates to the construction of the second claim of this patent. It is insisted, that this claim purports to be for a combination of mechanism for preventing the picking of a lock, with the fact, or act, or means of setting the tumblers. If the claim were to receive this construction, it would fail, for it would be an absurdity. The manner of setting the tumblers can form no part of the combination. A combination in mechanism

must consist of distinct mechanical parts, having some relation to each other, and each having some function in the organism. The combination embraced in this claim consists of the bolt, vibrating fence, stop and tumblers. These four distinct parts are brought together and into proper relation to each other, for the purpose of attaining more perfect security against any illicit opening of the lock.

But, it is claimed that this construction destroys the patent, because this combination was made in the Edwards and Stephenson locks, long before the alleged date of Yale's invention. This would be a conclusive answer to the suit were not the tumblers in the Edwards and Stephenson locks a different mechanical device from those in the locks of the patentee and of the defendant. The defendant insists, that the only difference is in the mere fact, that in one they are all set at the same time, or nearly the same time, and in the other they are set one by one. But, as already intimated, these two classes of tumblers are constructed and operate upon different principles, and reach very different results. One is constructed to, and does, operate only upon fixed mechanical laws, limited and controlled by mechanical devices. The other is made to operate at the discretion of the locker, and thus become the secret instrument of his intelligence, controlled alone by his will and purpose. The latter are, therefore, sufficiently unlike the former to form a novel element in a combination, where they are introduced into that combination for the first time.

The proofs show that Yale was the first to combine such a pack of tumblers with a bolt, vibrating fence, and stop for the fence to abut against, substantially as set forth in his patent. This combination is found in the defendant's lock. It has these four elements in the same combination. It has, also, a different and much more perfect mechanism for setting the tumblers and throwing the bolt. Indeed, the lock of the defendant is, in every way, a much superior piece of mechanism to that of the plaintiffs, but, as it embraces the precise combination first introduced by Yale, it is an infringement of his second claim.

As to the first claim of the plaintiffs' patent, it cannot be sustained, in its present form at least, for the same combination is found in the prior patent of Isham. A decree must, therefore, be rendered for the defendant on this issue.

As there is to be a decree in favor of each party on one issue, no costs will be allowed to either party. An account being prayed for, there will be a reference to a master to take proofs and report the amount which the plaintiffs are entitled to recover. The decree for an injunction will be withheld till the coming in of the master's report.

YALE LOCK MANUF'G CO. (GREEN-LEAF v.). See Case No. 5,783.

YALE LOCK MANUF'G CO. (SARGENT v.). See Cases Nos. 12,366 and 12,367.

YANCY (SHELBY v.). See Case No. 12,746.

Case No. 18,124.

The YANKEE et al. v. GALLAGHER.

[McAll. 467.]¹

Circuit Court, N. D. California. Jan. Term, 1859.²

MARINE TORT—WHAT CONSTITUTES—ABDUCTION AND DEPORTATION—ADMIRALTY JURISDICTION.

1. Where a tort is a continued act and not separable, and a portion is committed on land and the remainder on the high seas, the jurisdiction of it attaches to the common-law courts.

2. But if the tortious act originates in port, and is not a perfected wrong until the vessel leaves the port, it is a continuous act and travels with the tort-feasor and the injured party during the whole voyage, and comes within the jurisdiction of the admiralty upon the principle enunciated in certain cases, that if a thing be taken on the high seas and brought to land, it is appropriate to a court of admiralty to decide the question as a marine tort.

[Cited in *The Florence*, Case No. 4,880.]

3. The torts in this case having been committed by different persons, and in different places, are separable.

4. The action for the trespasses committed by the parties on land is cognizable in the courts of common-law.

5. That committed by the party now sued, is within the jurisdiction of admiralty as a marine tort.

6. It originated on waters within the ebb and flow of the tide within the admiralty jurisdiction, and was continued on the high seas. Such locality gives the jurisdiction.

7. The law implies a corrupt motive in the perpetration of a tort by one who commits it in the departure from a known duty and in wanton violation of law.

8. In cases of contract the motive of defendant is not inquired into, to increase the compensation to be made by him.

9. In torts the malicious intention may be said to increase the injury.

[Cited in *The Albany*, 48 Fed. 565.]

Appeal from the district court of the United States for the Northern district of California.

A libel was filed in the said court in rem and in personam, and objections filed to the jurisdiction of the court. The exception to the jurisdiction in rem was sustained; and the jurisdiction as to the proceeding in personam was maintained, and the exception to it overruled. The court rendered a decision on the merits, against the respondent, for the sum of three thousand dollars [Case No. 5,196], from which the present appeal has been prosecuted.

Delos Lake, for appellants.

J. B. Manchester, for defendant.

McALLISTER, District Judge. The two questions which arise are—(1) As to the juris-

diction of this court of the present proceeding in personam. (2) As to the amount of damages.

The libel propounds that on the 25th May, 1856, in the city of San Francisco, while engaged in the discharge of his duties as night watchman, in the service of the government of the United States, at about 8 o'clock p. m., libelant was seized upon by armed men; that he represented to them that he was in the discharge of his duties as a watchman in the employment of the United States; that, notwithstanding, he was compelled to accompany his captors; that they carried him to a place in the city of San Francisco known as the "Vigilance Committee-Rooms," where he was delivered to another body of armed men, and by them confined in a cell. After remaining there several days, without being informed of any charge of any specific offense; without having been confronted with any accuser or witness; a document was read to him which he was told was his sentence, in the following words: "You, Martin Gallagher, are a rioter, or disturber of the public peace, a promoter of quarrels at the polls on days of election. You are a bad man, and you are banished from the state of California, never to return under the severest penalties." That, about midnight on the 5th June, 1856, a party of armed men came to the cell where libelant was confined, put irons upon him, took him to the rear of the building, where they were joined by a larger party of armed men, who directed that no noise or speech should take place, marched him with other prisoners to California-street wharf, and put them on board a small tug called the *Hercules*, with a guard of armed men. The tug ran alongside the ship *Carrier Dove*, towed her to sea, returned and "lay to" on the bar; that when the *Yankee*, standing out to sea, came opposite the *Hercules*, she "hove to," and the armed men on board the *Hercules* compelled libelant to get with others into a small boat, in which they were conveyed on board the *Yankee*, of which the respondent was at the time master. The small boat remained so short a time alongside the *Yankee*, that, in the language of one of the respondent's witnesses, "there was not time to speak half a dozen words from the time they came on board until I left in the boat." The *Yankee* went immediately to sea, and the libelant was carried off, and landed on a foreign shore in the Sandwich Islands.

Of the truth of the foregoing facts there can be little doubt. Several witnesses who had been members of the vigilance committee, among them George R. Ward, who is stated in the libel to have been the person who announced to the libelant, in his cell, the so-called sentence, were sworn, and still no material fact of the foregoing is denied by any one of them. That sentence is ascertained to have been issued by a body of men authorized by no law, and who substituted their private judgments for the action of those judicial tribunals to which the constitution and

¹ [Reported by Cutler McAllister, Esq.]

² [Affirming Case No. 5,196.]

laws of their country had confided solely the distribution of justice. With the motives of those who thus acted, this court has nothing to do. With their acts, so far as they bear upon this case, it is its duty to deal. It is, therefore, constrained to attribute to those acts, and to the conduct of the respondent so far as it is connected with them, the character which the law annexes to them and to it. It is for the transportation and abduction of the libelant from his country to a foreign shore, with a view to carry out the proceedings of that unauthorized body, that he has appealed for the vindication of his rights to the laws of his country.

The first ground taken in defense to this appeal, is want of jurisdiction in this court. Under this ground, the first proposition presented by the argument for the defense is, "that all these statements cannot be set forth as matters of aggravation nor be treated as surplusage, and the court be thus enabled to confine its action to that part of the case which has reference to the injuries committed on the high seas; or in other words, it is asked, what is the gravamen of this action?" "How can it be said that the imprisonment at sea constitutes the gist of the action, and not the seizure and imprisonment on land? If it were possible to separate them, one would as clearly appear to be the ground of action as the other; and where it is impossible to separate them, for the reason that there is one continued trespass and false imprisonment, it is not quite as clear that the one is as much the gravamen of the action as the other." Again, "can the libelant maintain two separate actions, one for the injuries suffered on land, and the other for the injuries suffered on the high seas?" Lastly, to sustain this last point, and also that a single tort will maintain but one action, various common-law authorities from New York, and one from Massachusetts, have been cited. The court disposes of this point and the authorities with the remark, that it admits the legal proposition they are cited to support, but does not, for the reasons it will give, consider the law enunciated by it applicable to this case.

The last ground taken to which we shall advert is, that the acts of defendant Smith constitute but one cause of action; and that part of such cause being exclusively of common-law jurisdiction, this court cannot act on any part of it as a court of admiralty. It will be perceived that the argument of defendant's proctor is in the form of interrogatories. A response to an argument thus propounded, must be replied to by stating the views entertained of this case by the court in one condensed answer.

1. The court does not propose to treat the acts set forth in the libel as done by third parties on the land as surplusage, nor as part of the tort charged upon the respondent; but to consider and to retain them as matters of inducement, as facts going to aggravate the character of the offense committed

by the present party, and as serving to show the animus with which he acted in the commission of the marine tort for which only he is sued. It is difficult to perceive why the court cannot so consider them. To illustrate, suppose a libel filed against a master for maltreatment and cruelty towards a passenger, would not the previous condition of the passenger on shore, his protracted sufferings and illness, and the knowledge of all this by the master, and his advice to the patient to go with him to sea for the improvement of his health be matters proper to be alleged and proved to qualify the character of the tort and the motives of the perpetrator? The respondent is called to answer for his own acts, not for those of third parties on the land prior to the time at which he began to violate the rights of the libelant. It is urged that the cause of action in this case cannot be separated, because there is one continued trespass and false imprisonment. The court cannot perceive against the present respondent but one cause of action, the abduction of the libelant against his will, and the transfer of him to a foreign land. There are cases where the perpetrator of the tort is the author and architect of the whole, in which the tort is regarded as a unit, as a continued act. They have no application to this case. Thus, in *Plummer v. Webb* [Case No. 11,233], where the tort was the abduction by a master of a vessel of a minor, and damages were sought, Judge Story says: "Here, it is true, the tortious act, or cause of damage, might be properly deemed to arise in port; but it was a continuing act and cause of damage. * * * It was in no just sense a complete and perfected wrong, until the departure of the vessel from the port; and it traveled along with the parties as a continuing injury through the whole voyage." In *Rolle*, Abr. 533, cited in the last case, it is said: "If a man take a thing upon the sea, and bring it to land, the suit for that may be in the admiralty court; for it is a continued act." Continued by whom? Certainly by the original tort-feasor. In *Dean v. Angus* [Case No. 3,702] it is decided of a single tort, if such act be partly of common law, and partly of admiralty jurisdiction, the common-law courts are to be preferred. But no one of these cases, nor the common-law cases cited from New York, touches the case at bar. Here, the respondent is sued for transportation of the libelant to a foreign shore against his consent. The act from its locality, is clearly within the jurisdiction of this court. It commenced on waters within the ebb and flow of the tide, and was continued on the high seas. In *Waring v. Clarke*, 5 How. [46 U. S.] 441, the supreme court decided that in cases where admiralty jurisdiction depends on locality, it extends to all torts committed on the high seas, or within the ebb and flow of the tide as far up a river as the tide ebbs and flows, although the place be *infra comitatus*. In this case,

the tort originated and was carried out by the respondent at a locality which brings it within the jurisdiction of admiralty as a marine tort. The decision of the district judge on the exception to the jurisdiction of the court, must be affirmed.

2. We now come to the question of damages. In its adjustment, some embarrassment arises out of the difficulty which exists in keeping distinct from the great wrongs done to libelant by other parties, those committed on him by the present party. Testimony was given in the district court as to the character of libelant, without any objection. In the view the court entertains of this case, the consideration of the libelant's character should not influence to any extent the determination of the question of damages on the trial of this issue. In fact the district judge has repudiated the loss of character in his estimate of damages; for he states in his opinion, that the same "cannot be properly said to be the consequence of that portion of the torts committed upon him, of which a maritime court can take cognizance."

After a consideration of the testimony, the district judge says: "It is but just to say, that the charge that the reputation of the libelant was notoriously bad, that he was always engaged in election rows, and ballot-box stuffing, is not only unsustained by the evidence as to what his character was, but unsupported by any testimony as to particular facts which might have justly given him that character." But suppose the reputation of libelant to have been good, it was not blasted by his abduction, or any alleged wrong done on the high seas, but by the action of third parties. It was the sentence of the vigilance committee which branded him with the mark of Cain. The mere fact of transportation by the respondent could not have wrought the moral ruin on the libelant, he therefore should not be made responsible for it. If on the contrary, the reputation of libelant was bad, and he was a bad man, an evil doer, such fact could not justify or legalize the action of his self-constituted judges. The law does not even regard malefactors in such a light. A distinguished writer has well said: "The law withdraws its protection from a malefactor while actually engaged in illegal acts; but at any other moment, it protects his person and property as impartially as those of others. If a burglar breaks into my house, or a pick-pocket thrusts his hands into my pocket, I may on the instant knock him down. But, if I break into a notorious felon's house, and rob him, I am just as great a felon in the law's eye as if I so robbed an honest citizen; and so, if I attack a burglar's or a pickpocket's person and life at any moment when he is not feloniously engaged, I am none the less a villain in the law's clear eye because my villainy is aimed at a habitual villain. And here the law is not only just

but expedient; for were such fatal partialities admitted, we would soon advance from doing acts of villainy upon villains to calling any one a villain and then wronging him."

With the motives of those, as before stated, who pronounced the sentence which was carried into execution by the respondent, this court has nothing to do; but it is its duty to apply to these acts in connection with the issue of damages in this case, the consequences which the law annexes to them. In order to do so, it is necessary to ascertain whether the respondent knew what had been done to the libelant, and that he willingly lent himself to the execution of the so-called sentence. That he was aware of what he was doing; that he acted with his eyes open; that he knew an illegally condemned man was in his possession to be transported from his country, the evidence satisfies me, has been proved. The existence of the vigilance committee was open, public, notorious; the results of their action were at the time known to every man, woman, and child in San Francisco. If the respondent knew nothing of it, he was the only human being in the city who did not. But the fact that the steamer Hercules lay to, with the libelant on board, in the harbor; that the respondent, master of the Yankee, went within one hundred and fifty yards of the steamer, made a tack, came right close up to her and threw the main-yard aback, and remained until a boat came to her from the Hercules with the prisoner on board; the presence of armed men in time of profound peace; the precipitation with which the delivery on board was made (one of the witnesses for the respondent—Abbott—stated that "there was not time enough to speak half a dozen words from the time they came on board until I left in the boat"); the instant filling away the sails and departure of the ship,—are all facts to prove that respondent's action was voluntary. But if there could be any doubt of the complete understanding by the respondent that he was carrying out the behests of the vigilance committee, it is removed by the fact that he received money for the act he was about to commit. Geo. R. Ward states he did not engage the passage himself, but he knows that the passage was paid. Another witness swears that respondent said, "that arrangements had been made for our passage." There can be little doubt that the act of the respondent was voluntary, in full knowledge of the position in which the libelant stood at the time of his being brought on board, and that he also had a foreknowledge of what was to be done by him. What effect this will have on the subject of damages must be considered hereafter. In the assessment of damages a marked distinction exists between cases of contract and tort. In the former, the motive of the defendant is not inquired into in order to

augment the remuneration to be made by him. In the latter, the absence of evil motive cannot be set up as an excuse so as to bar the action. I "had learned," said Lord Kenyon, "from Bacon's Maxims, that there is a distinction between answering civiliter and criminaliter for acts injurious to others: in the latter case, the maxim applied, 'actus non facit reum, nisi mens sit rea,' but it is otherwise in civil actions where the intent is immaterial if the act be injurious to another." *Haycraft v. Creasy*, 2 East, 104. If, therefore, the transportation were a mere trespass, unaccompanied by no evil motive, the absence of such motive would be no bar to the action. But where the law imputes a corrupt intention to the party, then the question of exemplary damages arises in addition to damages merely actual.

Sedgwick, in his treatise on Damages, says: "The malicious intention may be said to increase, in fact, the injury; and the doctrine of exemplary damages might be reconciled with the strict notion of compensation." The author then proceeds to cite cases to prove that the idea of compensatory damages was abandoned, and that of punitive introduced. Sedg. Dam. 456. But a preliminary inquiry arises: does the law impute malice or a corrupt motive to the respondent in the tort he has committed? When the libellant stood before the respondent on the deck of an American ship, of which he, the respondent, was master, under the circumstances heretofore detailed, he (the respondent) must have known that to carry the libellant off, against his consent, and land him on a foreign strand, was "a willful departure from a known duty." There can be no doubt of this; and, if so, it was proof of malice and an evil motive. In the case of *U. S. v. Cutler* [Case No. 14,910], speaking of the term "malice," as used in the act of March 3, 1835 [4 Stat. 775], which punishes the offense of a master inflicting cruel and unusual punishment upon a seaman, the court say, that the word "malice" means "a willful departure from a known duty." But again, if the respondent knew the act was unlawful and did it intending to take the consequences, such wanton violation of law fixes upon him a malicious and corrupt motive. This principle is enunciated and was applied to the defendant in that case, who had resorted to a mode of punishment inhibited by law. If, in such a case, the violation of law is deemed per se proof of malice, a fortiori it should be annexed to the act of the present respondent, who availed himself of the protection of his country's flag, his character as an American citizen, and his position as a master of an American bottom, to violate in the person of an American citizen (however humble he may be), the constitution and laws of his country. This "willful departure from a known duty," "this wanton violation of law," authorize the

assessment of exemplary damages. In *Huckle v. Money*, 2 Wils. 205, the action was for trespass, assault, and imprisonment; the act complained of being the arrest of the plaintiff under a general warrant. No actual ill treatment was alleged. A verdict for £300 damages was rendered; and a new trial was moved on the ground of excessive damages. Lord Justice Pratt made the following decision: "I know not what damages I should have given, if I had been upon the jury; but I directed and told them, that they were not bound to any certain damages. The personal injury done to the plaintiff was very small, so that if the jury had been confined to consider the mere personal injury, why, perhaps, £20 would have been thought sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his life and station, did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them on the trial; they saw a magistrate over all the king's subjects exercising arbitrary power, violating magna charta by destroying the liberty of the subject by insisting upon the validity of this general warrant before them; they saw the king's counsel and the solicitor of the treasury endeavoring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages." If under the British monarchy a willful violation of law in the person of a British subject, is regarded by the judiciary as a case for exemplary damages, this court cannot consider that a much grosser violation of law in the person of an American citizen should be deemed by the courts of this country as fully recompensed by an amount in dollars and cents which may cover the actual loss of time and expenses of the injured man. In the case referred to, the amount of personal injury was small, an arrest of a few days, to be compensated for sufficiently by £20. The plaintiff acted under the color of legal process issued under the sanction of constituted authorities; and yet the gross violation of law was visited by exemplary damages to an amount nearly fifteen times the value of the actual damages.

There is another consideration which must receive the attention of this court, which controls its action in the exercise of its appellate jurisdiction. On this point, in the case of *McGuire v. The Golden Gate* [Case No. 8,815], decided at the July term, 1856, it was said "that ordinarily this court does not interfere with the amount of damages decreed by the court below. The district judge has the witnesses before him, and, therefore, has an opportunity of arriving at the truth, not within the grasp of this court, where the testimony is in writing. When, therefore, no additional testimony is taken,

I do not feel inclined hastily to disturb a decree on the point of damages." Certainly, in a case where it appeared that manifest injustice had been done in the assessment of damages, or error in law had been committed, it would be the duty of this court to interpose. I can see none such in this case. The libellant was carried off against his consent from home and country, and was by that act divested of his means of support, deprived of an office under the government which gave him a monthly income of \$130, was held falsely imprisoned for upwards of a month. All these wrongs traveled with him and the tortfeasor during the voyage, and were consummated by landing him some thousands of miles from home, amid strangers, in a foreign country, with his indorsement, that he was a man unfit to live in a civilized country,—an *hostis humani generis*. And all this was done by respondent in violation "of a known duty," and in wanton contempt and violation of law. I, therefore, cannot say that injustice has been done in the assessment of damages by the district court. A decree will be drafted affirming the decree of the district court, and handed to the judge for signature.

YANKEE, The (GALLAGHER v.). See Case No. 5,196.

YANKEE BLADE, The (VANDEWATER v.). See Case No. 16,847.

YARDLEY (EASTBURN v.). See Case No. 4,252.

Case No. 18,125.

YARDLEY v. NEW YORK GUARANTY & INDEMNITY CO. et al.

KILGOUR v. SAME.

GOODMAN et al. v. SAME.

[1 Flip. 551.]¹

Circuit Court, W. D. Tennessee. May 15, 1876.

USURY AS DEFENSE—RIGHT TO SET UP—AFFIRMATIVE RELIEF—RULE IN EQUITY.

1. The general rule is, that a stranger cannot set up usury as a defense, and that the transaction can only be impeached by the borrower or those in privity with him.

2. The case in 4 Pet. [29 U. S.] 205, is the later adjudication of the supreme court, and apparently strikes at the root of the general rule above stated.

3. The rule in equity is well established that affirmative relief against a usurious contract will be granted only upon condition that the plaintiff pay the defendant the amount of money advanced, or at least allow a decree therefor.

The original bill was filed on the 20th day of May, 1875, in the chancery court of Shelby county, Tennessee, by T. W. Yardley as owner of three bonds for \$1,000 each, of an issue of 600 bonds for \$1,000 each, made by the

Memphis Water Company, and secured by a trust deed or mortgage of the franchises and property of the company made to F. S. Davis and T. R. Farnsworth, trustees. The complaint alleged that the defendant, the New York Guaranty and Indemnity Company, held two hundred and sixty-seven of said bonds as collateral for a loan made at New York City to the Water Company, for which interest was charged at the rate of seventeen per cent. per annum, ten per cent. of which was under cover of pretended commissions, fraudulently resorted to to conceal usury, and in violation of the charter of said Guaranty and Indemnity Company, and of the law of the state of New York. The prayer of the bill is for an injunction restraining the trustees named in the trust deed or mortgage aforesaid from selling the trust property, as they proposed to do; the Water Company having made default of payment of interest on said bonds. An answer and cross bill was filed by Charles H. Kilgour, as owner of nine of said bonds, joining in the complainant's prayer for an injunction. A temporary restraining order was granted; but meantime the property described in the trust deed had been bid off by the defendant, the New York Guaranty and Indemnity Company. On the 24th of May, 1875, the sale was set aside, and by consent it was ordered by the chancellor that all holders of bonds and of liens file answers asserting their claims.

The Guaranty and Indemnity Company, and the State Loan and Trust Company, filed separate answers, and incorporated therein demurrers to the bill and the two cross bills. The demurrers to the bill and to the cross bill of Kilgour were heard and overruled by the state court.

From the answers of the New York companies, it appears that the Guaranty and Indemnity Company loaned the Water Works Company \$98,000, and received as security for payment one hundred and sixty-four bonds of the Water Company for \$1,000 each; and the State Loan and Trust Company loaned the Water Works Company \$62,000, which was secured by the pledge of one hundred and three bonds for \$1,000 each. These loans were made at New York City, and evidenced by notes at ninety days, which were renewed from time to time. The nominal rate of interest was seven per cent. per annum; but two and one-half per cent. for each ninety days was charged as a "commission" for the care and custody of the bonds pledged, and "for supervising the disbursement of the money advanced," all of which was used in the construction of the works of the Water Company.

The answer and cross bill of [William A. Goodman, T. G. Gaylord, and Matthew Addy] the trustees of the Gaylord Iron and Pipe Company sets up their ownership of two hundred and forty-four bonds of the Water Company, issued to the Gaylord Iron and Pipe Company prior to the loans by the New York

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission.]

companies, alleges that the mortgage made by the Water Company is a scanty security for the bonds issued, and attacks for usury the bonds held by the New York companies, alleging that no services were rendered, or intended to be rendered, for the pretended commissions charged by those companies, but that they were mere devices fraudulently resorted to to evade the usury laws of New York, and the prohibitions of their charters. The cause having been removed to the circuit court of the United States, came on to be heard before the court upon the demurrer by the New York companies to the answer and cross bill of the Gaylord trustees. The points of the demurrer sufficiently appear in the argument.

Sage & Hinkle and George Gantt, for the Gaylord Iron and Pipe Company.

Patterson & Lowe, for the Memphis Water Company.

Wm. M. Randolph, for the New York Guaranty and Indemnity Company, and the State Loan and Trust Company of New York.

BROWN, District Judge. While the general rule is recognized by all the authorities that a stranger cannot set up usury as a defense, and that the transaction can only be impeached by the borrower or those in privity with him, the application of this doctrine has occasioned a vast amount of litigation, and the authorities are far from harmonious. These questions of privity have arisen most frequently in the state of New York, where the penalty for usury is most severe, and usurious loans most frequent. The following rules are deduced from the authorities of that state:

1. That, notwithstanding the statute declares the usurious contract absolutely void, it is in reality only voidable, and the borrower may affirm it. (a) He may do this, if a mortgagee, by selling the mortgaged property subject to the usurious mortgage. *Sands v. Church*, 6 N. Y. 347; *Chamberlain v. Dempsey*, 36 N. Y. 144; *Mechanics' Bank v. Edwards*, 1 Barb. 271; *Post v. Bank of Utica*, 7 Hill, 406; *Hartley v. Harrison*, 24 N. Y. 170. (b) By appropriating property for the payment of a usurious debt, or assigning property to a trustee for that purpose. In such case the assignment is valid, and neither the assignee nor other person can attach the secured debt for usury. *Murray v. Judson*, 9 N. Y. 73; *Green v. Morse*, 4 Barb. 332; *French v. Shotwell*, 5 Johns. Ch. 555; s. c. 20 Johns. 668; *Denn v. Dodds*, 1 Johns. Cas. 158.

2. The borrower may disaffirm the contract and not only personally impeach it for usury, but may grant to another the right to do so. He may do this: (a) If a mortgagee, by selling his entire interest in the mortgaged property, including his right to impeach the usurious transaction. *Shufelt v. Shufelt*, 9 Paige, 137; *Brooks v. Avery*, 4 N. Y. 225. (b) A creditor who seizes the entire mortgaged

property on execution, also succeeds to the right of his debtor in this regard, and may sell the property free from the usurious loan. *Mason v. Lord*, 40 N. Y. 476; *Post v. Dart*, 8 Paige, 639; *Dix v. Van Wyck*, 2 Hill, 528; *Jackson v. Tuttle*, 9 Cow. 233; *Carow v. Kelly*, 59 Barb. 239; *Thompson v. Van Vechten*, 27 N. Y. 568; *Schroepel v. Corning*, 5 Denio, 236. The authorities in other states are not entirely harmonious; most of them, however, hold that where a party takes subject to a usurious mortgage, he cannot impeach the security. *Green v. Kemp*, 13 Mass. 515; *Town of Reading v. Town of Weston*, 7 Conn. 409; *Loomis v. Eaton*, 32 Conn. 550; *Baskins v. Calhoun*, 45 Ala. 582; *Fielder v. Varner*, Id. 429; *Stephens v. Muir*, 8 Ind. 352; *Henderson v. Bellew*, 45 Ill. 322; *Huston v. Stringham*, 21 Iowa, 36; *Farmers' & Mechanics' Bank v. Kimmel*, 1 Mich. 84.

Unfortunately, the only two decisions of the supreme court of the United States are in direct conflict upon this point. The first is that of *De Wolf v. Johnson*, 10 Wheat. [23 U. S.] 367. This was a bill to foreclose a mortgage which the assignee of the equity of redemption attempted to defeat by proof of usury between the mortgagee and mortgagor. The terms of sale of the property were expressly subject "to the incumbrances of my previous mortgage or deed of trust, particularly a mortgage deed to De Wolf from Prentis, dated," etc. In disposing of the case the court observed: "Again it is perfectly established that the plea of usury, at least as far as to landed security is personal and peculiar; and however a third person, having an interest in the land may be affected, incidentally, by a usurious contract, he cannot take advantage of the usury. Here, then, the case presents a third person, the assignee of an equity of redemption, setting up a defense, which, in one aspect, Prentis himself cannot set up; but, on the contrary, under the state of the pleadings must be supposed to have refused to set up, or have abandoned. * * * But had they purchased from Prentis in the most absolute and general manner, and altogether without notice, actual or constructive, they still could have acquired no more than an equity of redemption, and that would not have transferred to them the right of availing themselves of the plea of usury. It would indeed be astonishing, were it otherwise, for the contrary rule would hold out no relief to the borrower; it would only be transferring his money from the pocket of the lender to the pocket of the holder of the equity of redemption."

The case of *Lloyd v. Scott*, 4 Pet. [29 U. S.] 205, involves the same principle. One Scholfield, the owner of certain real estate in Alexandria, in consideration of five thousand dollars, granted to one Moore, his heirs and assigns forever, an annuity of five hundred dollars payable in half-yearly installments, with power to distrain for non-payment. Scholfield subsequently conveyed to the plaintiff, Lloyd, the property in question, subject to

this charge. Upon distress afterwards made for rent, Lloyd brought replevin, claiming the annuity or rent charge was a mere device to cover a usurious loan. The court held that he could defend upon this ground, and disposed of the case of DeWolf v. Johnson [supra], by saying that "the question whether the purchaser of an equity of redemption can show usury in the mortgage, to defeat a foreclosure, was not involved in the case." It is true that the case was disposed of upon two grounds, one of which was that the contract was not in fact usurious, and the other that the defendant could not take advantage of usury if any had existed, but there is nothing to indicate it was not decided as much upon one ground as the other.

This opinion in Lloyd v. Scott [supra] though contrary to a great weight of authority and of the prior decision of the court which announced it, I am bound to respect as the later adjudication of the court, and it apparently strikes at the root of the general rule stated in the opening of this opinion, that the defense of usury is personal to the borrower. I think the principle there announced covers the case under consideration. It is true, as argued by the defendants, that the plaintiff, and every purchaser of bonds acquired the bonds they hold with the understanding and upon the condition that the deed of trust securing them, secured alike the whole issue of six hundred bonds and that the contract between all the parties was, that each of the bonds was secured by one six-hundredth part of the property conveyed; at the same time, every purchaser of these bonds had a right to assume that they were negotiated at a legal rate of interest and were interested in their realizing for the company as much as possible. Every dollar received by the company from the sale of these bonds and subsequently put upon the water works added to the security of every other bondholder. If bonds were sold at but fifty cents on the dollar, but half the money would be realized that there would have been had the bonds been sold at par. By one-half the amount of these bonds, therefore, the security of each bondholder would be lessened.

But there is a defect in the case made by the cross bill, which seems to me fatal to the relief sought. The parties to these suits are contestants for priority of payment. The cross bill sets forth the usury in the contracts under which the defendants held these bonds; prays that the trustees named in the mortgage may be enjoined from selling the property, and that the bonds issued to the defendants may be surrendered and cancelled. The rule in equity is well established that affirmative relief against a usurious contract will be granted only upon condition that the plaintiff pay the defendant the amount of money advanced, or at least allow a decree therefor. This rule has been repeatedly recognized by the supreme court of the United States. See *Brown v. Swan*, 10 Pet. [35 U. S.] 497; *Tif-*

fany v. Boatmen's Ass'n, 18 Wall. [85 U. S.] 385.

In the case of *Spain v. Hamilton's Adm'rs*, 1 Wall. [68 U. S.] 604, it was held that the complainant who was contesting his claim to priority upon a fund in the treasury could only have relief for the excess over the real debt. I see no reason why that rule is not applicable here. While it would not be necessary for the complainant in a bill of this kind to offer to pay the defendants the amount of money advanced to them, with legal interest, I think they should consent, as a condition of the relief sought that the defendants have decrees for the amount so advanced. This, however, was evidently not the purpose of this bill. It seeks no less than the entire cancellation of the bonds held by the defendants, and the entire exclusion of their claim from the fund to be realized from the sale of the property.

Without undertaking to decide whether a bill might not be filed after the sale of the property, praying for a reduction of this claim to the amount actually advanced, with legal interest; or whether this bill may not be amended so as to accomplish, practically, the same purpose, it seems to me that in its present shape the case made by the cross bill of complainant cannot be sustained.

The demurrer to the cross bill must therefore be sustained.

YARRINGTON (HOFFMAN v.). See Case No. 6,580.

Case No. 18,126.

YATES et al. v. ARDEN et al.

[5 Cranch, C. C. 526.]¹

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

CONFUSION OF GOODS — PRINCIPAL AND AGENT —
BILL IN BEHALF OF ALL CREDITORS—
AMENDMENT BY COMPLAINANT.

1. If an agent, whose duty it is to keep the goods and effects of his employer separate, mix them with his own, it lies upon him to distinguish them; and if he cannot, the whole is to be considered as belonging to the other; and every sort of profit derived by an agent from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for.

[Cited in *Gantt v. American Cent. Ins. Co.*, 68 Mo. 515. Cited in brief in *Judevine v. Town of Hardwick*, 49 Vt. 182.]

2. If the bill be originally filed by the complainants "for themselves and such other creditors as shall choose to come in and contribute to the expenses of the suit," the complainants, before answer, have a right to amend their bill by striking out those words, although some of the other creditors shall have filed their petitions to be let in as complainants; but the complainants must pay the petitioners their costs.

Bill in equity, having a double aspect [by Yates and McIntire against the heirs at law

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

and administrator of D. D. Arden, deceased]: (1) To charge the real estate of D. D. Arden, deceased, with payment of debts due to the plaintiffs, "and such other creditors of D. D. Arden as shall come in and contribute to the expenses of the suit;" and (2), to obtain the exclusive benefit of such of the real estate as was purchased by the deceased, with the plaintiffs' funds, and as their agent; and to obtain a decree for the sale of the whole of the real estate. The plaintiffs claimed to be creditors to the amount of \$35,301.51, and averred that the personal estate was insufficient to pay the debts of the intestate.

The heirs at law, without having answered the bill, filed a cross-bill against Yates & McIntire, and the administrator of D. D. Arden's estate, averring that the intestate carried on an extensive and profitable business in Washington upon his own account. That the defendant, John M. Maury, was appointed his administrator, and returned an inventory by which it would seem that the personal estate would be insufficient to pay the debts, but they have no means of ascertaining the correctness of the same. That Maury, the administrator, is the agent of the plaintiffs, and, as such, is in the possession of all the books and papers of the deceased; and represents that the intestate, in all his transactions, acted exclusively for the plaintiffs. These complainants are unable to answer the bill of the plaintiffs, Yates & McIntire, with any degree of accuracy, and pray that Yates & McIntire may specify all the transactions of the deceased in which they were interested; and that the defendant Maury may produce the books and papers of the deceased, and that the defendants may account for all the property which came to their hands.

Before any answer had been filed to either of those bills, the Bank of the United States and M. & H. Carey, respectively filed their petitions as creditors of the intestate, stating that his personal estate is insufficient to pay his debts. That Yates & McIntire, claiming to be creditors, and professing to act in behalf of all the creditors, &c., have filed their bill to subject the real estate to the payment of the debts of the deceased; but claim that the real estate, or a great part of it, was purchased with their funds, and therefore they claim a priority of payment, &c. That these petitioners deny the facts to be as averred by Yates & McIntire in their said bill; and, if true, deny their right to priority of payment; and suggest the inconsistency of thus professing to act for all the creditors, and at the same time claiming priority of payment; and they pray the court to compel them to elect upon which ground they will proceed; or to carry on the litigation, so far as their claim for preference is concerned, at their own expense, and that the petitioners may be admitted as

parties to so much of the said bill as seeks to promote the common interest of all the creditors; and to resist so much as is at variance with their rights as creditors; and for general relief.

Before any answer was filed to the bill of Yates & McIntire, but after the Bank of the United States and the Messrs. Carey had filed their petitions, Yates & McIntire amended their bill by striking out the words "in behalf of themselves and such other creditors as shall choose to come in," &c., and by charging that the defendants, the heirs of the intestate, had entered upon the real estate, and were in receipt of the rents and profits, greatly exceeding \$1,500 a year, which ought to be subject to the payment of the debt due by the intestate to the plaintiffs, the said real estate having been purchased with their funds improperly applied by him as agent, whereby he became a trustee for their benefit, and the defendants must take the same, subject to all the plaintiffs' legal and equitable claims thereon; and praying that a receiver may be appointed. Yates & McIntire, and Mr. Maury answered the cross-bill; and it was agreed that the cross-bill of the heirs should be received as their answer to the bill of Yates & McIntire, and that the answer of Mr. Maury should be read as his deposition in the same suit; that general replications should be filed to the respective answers, and that the causes should be set for hearing, and submitted upon the respective bills, answers, and general replications, and the deposition of Mr. Maury.

CRANCH, Chief Judge. The facts which it is incumbent on Yates & McIntire to prove in order to justify a decree in their favor, to the extent of their prayer for relief, are: (1) That the intestate, D. D. Arden, was their agent for the sale of their lottery tickets, upon commission. (2) That, as such agent he received a large number of tickets which he sold for their account, and that he was indebted to them in a large amount at the time of his death, and that, on the 1st of June, 1836, there remained due to them, the sum of \$31,074.10. (3) That D. D. Arden died seized or possessed of real estate, as alleged in their bill, the whole, or a large part of which, was purchased by the deceased, with the funds of the plaintiffs, Yates & McIntire. That if any part thereof was purchased and paid for with the separate and individual funds of the deceased, it is so mingled with the part purchased with the funds of the plaintiffs, Yates & McIntire, that it cannot be discriminated by the plaintiffs. (4) That so far as the plaintiffs, Yates & McIntire, seek to charge the real estate, if any, which was purchased with the separate funds of the deceased, they must show that his personal estate was insufficient to pay his debts.

None of these facts were denied in the cross-bill of the heirs which is received as their answer to this bill; and they are all proved by the answer of Mr. Maury, which is received by consent as his deposition in this suit.

Theobald, in his treatise on Principal and Agent (page 369), says: "And this principle will be found to be established, by many authorities, as a settled rule in equity, that if an agent, whose duty it is to keep the property of his employer separate, mix it with his own, it lies upon him to distinguish them; and if he cannot distinguish what is his own, the whole is to be considered as belonging to the other." And in page 371, he says: "Every sort of profit or advantage, clandestinely derived by an agent, from dealing or speculating with his principal's effects, is the property of the latter, and must be accounted for." Malynes, 154. See Lord Chadworth v. Edwards, 8 Ves. 48; Lupton v. White, 15 Ves. 436; and Panton v. Panton [supra]. These plaintiffs, therefore, have a right to consider the whole real estate of the deceased in this district as belonging to them, and either to have it specifically conveyed, they paying any balances of the purchase-money which may be due; or, to have it sold, and the proceeds of the sales, after paying such balances, if any there are, to be appropriated to the extinguishment of their claim against the deceased.

It has been suggested, that after the Bank of the United States, and M. and H. C. Carey, other creditors of the deceased, had come in, according to the invitation of the bill, the plaintiffs had no right to amend it so as to exclude those creditors who had come in under the invitation of the original plaintiffs, Yates and McIntire. The Bank of the United States, and the Messrs. Carey, had by their petition prayed to come in, not to aid the original plaintiffs, but to controvert the plaintiff's claim to the property purchased by their agent with their funds, and to be admitted to the benefit of so much of the bill as seeks to promote the common interest; at the same time averring the bill to be incongruous, and liable to be defeated upon demurrer. In order to avoid this objection, the original plaintiffs amended their bill, by striking out the invitation, and leaving the bank and the Messrs. Carey to pursue their own course; and the question now is, whether they had a right so to do.

We think they had; but they must pay the petitioners their costs.

The plaintiffs having shown that a large part of the real estate was purchased by the deceased with their funds, and the defendants having failed to show what part, if any, was purchased with the separate funds of the deceased, the court will order the whole to be sold, and the proceeds to be brought into court to be disposed of as the court shall direct.

YATES (BAGLEY v.). See Case No. 725.

YATES (BULLEN v.). See Case No. 2,123.

Case No. 18,127.

YATES et al. v. CURTIS.

[5 Mason, 80.]¹

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

FOLLOWING TRUST PROPERTY — PRINCIPAL AND AGENT.

Wherever the principal can trace his property in the hands of his factor or agent, and distinguish it from the mass of the property of the latter, he is entitled to recover it from the agent, or in case of his failure, from his assignees.

Assumpsit for money had and received. Plea, the general issue. At the trial it appeared, that J. B. Wood had been employed by the plaintiffs to sell and dispose of large numbers of lottery tickets in different lotteries on their own account, he receiving a commission therefor. The accounts kept by the parties debited Wood with all the tickets received, and credited him with all tickets returned to the plaintiffs [Yates & McIntire], and credited them with the balance struck, deducting commissions. Some alterations were latterly made by the parties in their form of keeping the accounts for their own convenience; but the substance of the contract between them remained unaltered. Wood failed in business on the 8th of May, 1828, and assigned his property to the defendant [George Curtis] for the benefit of his creditors. Considerable sums were outstanding, due from third persons for the lottery tickets so sold, at the time of the failure, some part of which had been since received by the assignee; and for the money so received, the present suit was brought. It appeared that on the face of some of the tickets Wood's name was used in connexion with that of the plaintiffs, but any partnership concern was negated by the testimony. A clerk of Wood, on the trial stated, that all the tickets received from the plaintiffs, and all the sums now outstanding on the sales thereof, were perfectly capable of designation and separation from the other property of Wood.

Upon this evidence coming out, the counsel for the parties submitted the question to the court, whether the plaintiffs were entitled to recover. If they were, then a verdict was to be taken for the plaintiffs, for a nominal sum, and the verdict was to be enlarged and altered, as the accounts, hereafter stated, should show that the plaintiffs were entitled to recover.

Mr. Whipple, for plaintiffs.

Mr. Searle, for defendant.

STORY, Circuit Justice. Upon the facts, there does not seem any room for controversy.

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

The case of *Thompson v. Perkins* [Case No. 13,972], following *Scott v. Surman, Willes, 400*, settles the principle of law, that where a party can trace his property in the hands of his agent, and distinguish it from the mass of the property of the latter, he is entitled to recover it. Here, it is capable of designation; and the outstanding dues on the sale of the lottery tickets belong to the plaintiffs, and the sums received by the defendant since the insolvency of Wood, are the property of the plaintiffs, and recoverable by them.

Verdict for plaintiffs according to agreement of the parties.

Case No. 18,128.

YATES et al. v. LITTLE et ux.

[6 McLean, 508.]¹

Circuit Court, D. Michigan. June Term, 1855.

EQUITABLE JURISDICTION—RELIEF FROM MISTAKE
—APPRAISEMENT FOR PARTITION.

Three persons having an interest in fifty lots in Saginaw city, they selected certain persons to appraise lots, and on this appraisement they made partition and executed quit claims. To the complainants were assigned lots one and two, with the warehouses and wharf, valued at seven thousand dollars. To the defendants was assigned lot three, with the wharf, at two hundred dollars. The warehouse, after the papers were all executed, was found to extend twenty feet on lot three, which adjoined lot numbered two. The warehouse was worth six thousand and five or six hundred dollars, it being divided into stores of thirty-three feet. The defendants claim twenty feet of the warehouse on the lot three, from which the plaintiffs gave a quit claim, not supposing that any part of the warehouse was on it. A bill was filed to correct the mistake, to which the defendants demurred. The court overruled the demurrer, holding that, under the circumstances stated in the bill, the mistake was a matter for equitable jurisdiction and relief.

[Cited in brief in *Ashmead v. McCarthur, 67 Pa. St. 328.*]

In equity.

Mr. Holbrook, for complainants.

Mr. Campbell, for defendants.

McLEAN, Circuit Justice. This is a bill in chancery, which represents that the complainants [Yates and Woodruff] owned three equal undivided fourth parts, and the defendant, William L. P. Little, was seized and possessed of one undivided fourth part of all the real estate in the city of Saginaw, known and commonly called the improved fifty lots. That the complainant Yates was entitled to two-fourths, and the complainant Woodruff to one-fourth; and to make an equitable partition of the lots in value, it was agreed between them that they should be appraised by Eleazer Jewett, Gardner D. Williams, and Charles L. Richmond, in regard to the above lots and other property, which embraced the interest of other parties. And on the 14th of September, 1848, the ap-

praisers met at Saginaw city, and after viewing the premises and duly deliberating thereon, did determine on their report, in regard to the fifty lots as follows: Lots one and two in block thirty, with the warehouse and wharf were worth seven thousand dollars; that lot number three, in the same block, with the wharf, was worth two hundred dollars; that lot number one in block thirty-five, vacant, was worth seventy-five dollars; that lot eleven, in block thirty-four, with dwelling house, was worth three hundred and fifty dollars; that lot seven, in block twenty-eight, and Richmond's store, were worth five hundred dollars; that lot eight, vacant, was worth sixty dollars; that lot nine, same block, with Cushway's house, was worth five hundred and sixty dollars; that lot ten, vacant, was worth sixty dollars; that lot six, in block eighteen, with the shoe shop on it, was worth one hundred and sixty dollars; that lots one, two, seven and eight, in block twenty-seven, with Webster's house and barn, were worth four thousand dollars; that lots three, four, five and six, vacant, were worth forty dollars each, one hundred and sixty dollars; that lots nine, ten and eleven, were worth two hundred and twenty-five dollars; that lot twelve, in the same block, with joiner's shop, was worth three hundred dollars; that lot seven, block thirty-two, with Little's office was worth one hundred and ninety dollars; that lots eight and nine, with Little's house, were worth thirteen hundred and eighty dollars; that lots one, two and three, in block one hundred and twenty-one, vacant, were worth seventy-five dollars; that twelve lots in block one hundred and sixty-six, were worth five hundred and thirty dollars; that south of Cape street, lots one, two, three and four, vacant, in block ten, were worth one hundred and ten dollars; that lots five, six, seven and eight, same block, were worth one hundred and sixty dollars; that lots three and four, in block seventeen, were worth sixty dollars.

After the partition, it was agreed that the fifty lots, so called, owned by the parties, have been partitioned, and it was further agreed that Messrs. Yates and Woodruff shall take, as their portion of the property, block numbered twenty-seven, entire, with all the buildings, improvements and appurtenances; also lots numbered one and two, in block numbered thirty, and lots numbered seven and eight, in block numbered twenty-eight, with the buildings and improvements thereon. And W. L. P. Little agreed to quit claim unto the said Yates and Woodruff, all his right and interest above allotted to them as above. And the bill states that the above agreement was consummated, with a slight exception of a modification agreed to, as to the property which was to be released to the complainants, but not as to the appraisal, which remained the basis of the partition. On the 1st of May, 1849, the defendant exe-

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

cuted a quit claim deed from the above property to the complainants; and they executed a like deed to the defendant for lot three, on block thirty, north of Cape street, together with other lots.

The complainants allege that the appraisal of lots one and two was made and accepted, under the belief that the warehouse stood wholly on those lots, and that lot numbered three was a vacant lot, with a wharf in front thereof, which was released by the complainant to the defendant at the valuation thereof; and the bill charges that such was the belief of the defendant. But the complainants allege they have since discovered that lots one and two extended only one hundred feet in front on the Saginaw river, and that the warehouse, which is a very commodious one, fronts on the river one hundred and twenty feet, being twenty feet on lot number three. And the complainants say that until after the agreements were all executed, the above discovery was not made; and since it has been made the complainants have tendered to the defendant the full value of the ground occupied by the warehouse on number three. That the warehouse, being divided into stores of thirty feet front, will be irreparably injured by cutting off twenty feet. That lot three was valued and conveyed to the defendant as a vacant lot, with a wharf in front. And the complainants pray, that relief may be given, and the mistake corrected, &c. To the bill the defendant, files a demurrer. And for cause of demurrer states, that complainants have made no case for relief; that they have not set out the deeds and writings, that the charges are not made specifically, and that the complainants have not offered to do equity, &c.

The case made in the bill is one of flagrant injustice, though it occurred, not by the contrivance of the defendant, but through the mistake of the appraisers and of the parties. Lots one and two, with warehouse and wharf, were valued at seven thousand dollars. Can any one suppose that one hundred feet only, of the warehouse was valued? Can any one doubt, that the entire warehouse and the ground on which it stood, with the wharf, were included in the valuation? The facts are so clear, looking at the face of the bill, in this respect, that no proof could be more satisfactory. By this mistake the defendant has got more than he was justly entitled to, and the question is whether he can conscientiously retain this advantage. Twenty feet of the warehouse, at the rate at which it was valued, not including the ground, could not be less than ten or eleven hundred dollars. And although the defendant has been applied to, he has refused to correct the mistake. His lot adjoining with the wharf, was appraised at two hundred dollars, and the defendant received it at that price. And he has refused three hundred and fifty dollars for the twenty feet of lot, which would be within twenty-

five dollars of the sum charged him for the entire lot. This does not present a very favorable aspect of the defendant's case; and yet he refuses to do justice, or, in other words, is determined to hold twenty feet of the warehouse, which is on his lot. And the question is, can he do so conscientiously. The counsel for the defendant insist that he can, and that the complainants, by reason of their negligence are not entitled to relief.

It is insisted that the relief prayed cannot be given, as the appraisers were appointed by the parties, being judges of their own choosing, and that their decision cannot be set aside. The bill does not specially pray to have the award set aside, but for general relief, from the mistake in the partition, by the parties themselves, and the consequent injustice to the complainants. A mistake of the arbitrators is a ground to set aside an award, and no mistake could be more palpable than the one committed in this case. Lots one and two, including the warehouse and wharf, were valued at seven thousand dollars, which, in the partition, were assigned to the plaintiff. Now these lots were not specifically valued, but as connected with the warehouse; and in this view, the appraisers estimated the value of twenty feet more ground than the lots one and two contained. And when to this ground is added, the twenty feet of the warehouse, both of which the defendant claims, instead of the vacant lot, as described and valued, it makes a clear case of injustice, that any court, having the power, would, in some mode correct. To refuse this, on the ground that the plaintiffs had been negligent of their rights, under the circumstances, would be a mockery of justice. The injustice is so clear that it is matter of surprise, how the defendant should consent to take advantage of the mistake. And it is hoped for his own sake, that the allegations of the bill are not accurate. If the conveyance had been executed for the ground in front occupied by the warehouse, which would have taken twenty feet from lot numbered three; it would have given no more, in all probability, than was in the mind of the appraisers. And yet, under such circumstances, chancery would have corrected the error, by making the proper deduction from lot number three.

The parties were misled and very naturally, by the report of the appraisers. In making partition and executing conveyances, they were governed by that report. They failed to do what the plaintiffs and defendant intended to do, and it is most unjust and inequitable for the defendant to claim the advantage, in the partition, which the mistake has given him. The mistake has chiefly arisen from the parties themselves, and although the mistake of the appraisers led to the thing that was done, the case is not more the error of the arbitrators, than the error of the parties. Suppose a party had agreed to purchase a certain tract of land, and through mistake a different tract was conveyed to him, would not this be

corrected? Such a mistake often occurs in the conveyance of town lots. No honest man would hesitate to correct such an error, and a refusal to do so, would authorize a court of chancery to correct it. Where an individual has been grossly negligent of his own rights, in some peculiar cases, chancery will not relieve him; as where an individual fails to procure evidence in a trial at law which he might have procured, equity will not relieve him. But the case before us is not one of mere negligence within the meaning of the books. The plaintiffs were non-residents, as appears from the declaration, and this may account for the mistake in the partition, unless the contrary be shown.

Acts done through mistake, by principal or agent, are not binding. *Harmer v. Morris* [Case No. 6,076]. Mistakes and fraud are equally relievable in equity. *Dunlap v. Stetson* [Id. 4,164]. A mistake of facts, going to the essence of the contract, avoids it. *Hammond v. Allen* [Id. 6,000]. A bargain, founded upon material misrepresentations of matters of fact, even though they were inadvertently made through the mutual mistake of the parties, or by mistake of the grantors alone, will be annulled in equity. *Daniell v. Mitchell* [Id. 3,562]. A mistake in the description of lands intended to be mortgaged, may be corrected in equity. *Bank of U. S. v. Piatt*, 5 Ohio, 540; *Hunt v. Freeman*, 1 Ohio, 490.

In 1 Story, Eq. Jur. § 150, it is said: "In like manner, where the fact is equally unknown to both parties, or where each has equal or adequate means of information, or where the fact is doubtful from its own nature, in every such case, if the parties have acted with entire good faith, a court of equity will not interpose; for, in such cases, the equity is deemed equal between the parties; and when it is so, a court of equity is generally passive, and rarely exerts a jurisdiction. Thus, where there was a contract by A to sell to B for twenty pounds, such an allotment, as the commissioners under an inclosure act should make for him; and neither party, at the time, knew what the allotment would be, and were equally in the dark as to the value; the contract was held obligatory, although it turned out, upon the allotment, to be worth two hundred pounds." This turned upon the uncertainty of what the value of the allotment would be, and whether it was more or less, the contract was valid. In section 151, it is said: "The general ground, upon which these distinctions proceed, is, that mistake or ignorance of facts in parties is a proper subject of relief, only when it constitutes a material ingredient in the contract of the parties, and disappoints their intentions by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations, which are imposed by law upon the conscience of either party." And again, in section 152, the author says: "One of the most common classes of cases, in which relief is sought in equity, on account of a mistake of

facts, is that of written agreements, either executory or executed. Sometimes, by mistake, the written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent, by expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties." *Durant v. Durant* [1 Cox, Ch. 58]. In *Calverly v. Williams*, 1 Ves. Jr. 210, Lord Thurlow said: "No doubt, if one party thought he had purchased, bona fide, and the other party thought he had not sold, that is a ground to set aside the contract, that neither party may be damaged; as it is impossible to say, one shall be forced to give that price for part only, which he intended to give for the whole; or that the other shall be obliged to sell the whole for what he intended to be the price of part only. Upon the other hand, if both understood the whole was to be conveyed, it must be conveyed. But again, if neither understood so, if the buyer did not imagine he was buying any more than the seller imagined he was selling this part, then this pretence to have the whole conveyed, is as contrary to good faith upon his side, as the refusal to sell would be in the other case. The question is, does it appear to have been the common purpose of both to have conveyed this part?"

The argument is, that relief cannot be given, as the court cannot say what the appraisement would have been without the twenty feet. The answer to this is, that the partition was intended to be made on the estimated value of the parcels of property made by the appraisers, so that this objection is not insuperable. Lapse of time, and change of value in the property, is alleged in the argument; but this does not arise on the demurrer. If it be admitted that no decree can be made against the wife of the defendant, on the final hearing, or before it, the court can protect her interests.

Upon the above view of the case, the demurrer must be overruled.

YATES (PHILIPS v.). See Cases Nos. 11,081 and 11,082.

YATES (PRICE v.). See Case No. 11,418.

YATES (ROBERTS v.). See Case No. 11,919.

YATES (SMITH v.). See Case No. 13,131.

Case No. 18,129.

YAW v. MEAD et al.

[5 McLean, 272.]¹

Circuit Court, D. Michigan. June Term, 1851.

PRACTICE—FOLLOWING STATE LAW.

A law of the state regulating the practice of the state courts, does not apply to the courts of

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

the United States, unless adopted by act of congress, or by the courts of the United States.

Mr. Terry, for complainant.
Mr. Davidson, for defendant.

MCLEAN, Circuit Justice. This is a bill to foreclose a mortgage; and a question is made whether the decree for the sale of the land must be made subject to the 11th section of the general chancery act of the states, which provides, that whenever a bill shall be filed for the foreclosure and satisfaction of a mortgage, the court shall have power to decree a sale of the mortgaged premises, &c., but the judge shall not, by such decree, order any such lands to be sold within one year after the filing of the bill for foreclosure. In the case of Bronson v. Kinny [unreported] the supreme court of the state has held this statute to be binding upon the state courts. The above act has been passed by the legislature of Michigan, since the act of congress adopting the practice of the state courts, consequently the statute cannot apply to the courts of the United States, unless specially adopted by them. No such rule has been adopted. The court ordered the sale of the premises, by giving the usual notice, if the money should not be paid in 6 months.

Case No. 18,130.

YEADON et al. v. PLANTERS' & MECHANICS' BANK et al.

[Betts, Scr. Bk. 125.]

District Court, E. D. South Carolina. June 24, 1843.

BANKRUPTCY—JURISDICTION OF DISTRICT COURT—MORTGAGED PROPERTY—STATE COURTS.

[1. Under the act of 1841, §§ 2, 11 [5 Stat. 442, 447], the bankruptcy court has no jurisdiction to dispose of the security of a creditor whose mortgage is valid by the state law, and not inconsistent with the provisions of the second and fifth sections of the bankruptcy law, unless the mortgagee claims as a creditor under the bankrupt law. But, when the creditor does come into the bankruptcy proceedings, the court has full jurisdiction to order a sale of the property, and to make good title thereto.]

[2. A suit brought by the assignee under the second section of the act, to recover property fraudulently mortgaged or conveyed, is a "proceeding in bankruptcy," within the meaning of the sixth section of the act, and hence, under that section, as well as under section eight, the district court has jurisdiction of such a suit. But, as there is no language in the act indicating that this jurisdiction is exclusive, it must be considered as concurrent with the state courts, and the court which first obtains jurisdiction will have the right to decide the matter.]

[3. The filing of a petition in voluntary bankruptcy does not confer upon the district court jurisdiction in respect to a mortgage, who does not come in and prove his debt, but relies solely upon his security; and, if he commences suit in a state court to foreclose the same, before the assignee files a suit to set it aside as a fraud upon the law, the state court will then have the right to decide the matter, to the exclusion of the federal courts.]

[This was a suit in equity by Richard Yeadon, Sandiford Holmes, and James M. Wilson, assignee of Andrew M'Dowall and William G. Mood, bankrupts, against the Planters' & Mechanics' Bank, the Bank of South Carolina, and others, to procure a sale of certain property mortgaged by the bankrupt to the defendants, for an account of rents and profits thereof, and for an injunction to restrain defendants from prosecuting a suit in the state courts, etc.]

GILCHRIST, District Judge. It appears in this case that the firm of M'Dowall, Hayne & Co., being indebted to the Planters' & Mechanics' Bank, the Bank of South Carolina, and certain other banks in the city of Charleston, in various sums of money, amounting to upwards of \$57,000, as drawers of certain notes, Andrew M'Dowall, one of the said firm, for the purpose of better securing the payment of the several sums of money due to the said banks, according to the true intent and meaning of the notes, on the 15th of August, 1842, executed a mortgage to them in fee simple, with a defeasance, of real estate in the city of Charleston, and of a lot of land, with the buildings thereon, situated in the village of Moultrieville, Sullivan's Island, estimated to be worth together at least 75 per cent. of the amount of their claims. It further appears that on the 31st of December, 1842, the said Andrew M'Dowall and William G. Mood, another member of the said firm of M'Dowall, Hayne & Co., filed their petitions in this court to be declared bankrupts, the said Andrew M'Dowall inserting in his schedule annexed to his petition the property mortgaged by him to the banks; and that on the 30th January, 1843, they were severally declared bankrupts by this court, and the complainants appointed assignees of their respective estates, in conformity with the provisions of the act of congress "to establish a uniform system of bankruptcy throughout the United States," passed August 19, 1841. On the 23d day of February, 1843, the said Planters' & Mechanics' Bank filed their bill in the court of equity of this state, for the Charleston district, against the present complainants, the other banks, and others, as defendants, for a foreclosure of the aforesaid mortgage, and sale of the mortgaged premises for the payment of the amounts due the said banks, in preference to all creditors of the bankrupts, and for other relief; and this case now comes before me on a bill filed on the equity side of the court by the assignees of the bankrupts against the Planters' & Mechanics' Bank, the Bank of South Carolina, and others, for an account of the rents and profits of the mortgaged premises, which the banks have received, for an injunction to restrain the said Planters' & Mechanics' Bank, their agents and officers, from further prosecuting their suit in equity in the state court against

the present complainants, for a sale of the mortgaged premises by a decree of this court; and the application by this court of the proceeds of such sale, according to law, duly respecting all legal preferences and liens, and for other relief; the present complainants alleging in their bill that the said mortgage is null and void under the bankrupt act of 1841, as having been made and given "in contemplation of bankruptcy," and in violation of the provisions of that act.

The suit now before the court is certainly an important case, whether it be considered with reference to the amount of property which may be affected by the present decision, or as regards the various questions in relation to the jurisdiction of this court which have been brought into discussion. The zeal and ability displayed by the counsel engaged in the cause, and which have materially aided this court in forming its judgment, evince their sense of the importance of the case. Questions which affect the jurisdiction of courts of justice are always deserving of the most serious consideration, for, while no judge should willingly usurp jurisdiction, the judge who regards his official obligations will be careful not to decline the exercise of any powers with which he is legitimately invested, and, if in the discharge of his duties, the jurisdiction of his court should unfortunately clash with the jurisdiction of another tribunal, however much he might regret the circumstance, it should not form in his mind any good cause for a relinquishment of his authority. Whenever, therefore, such questions arise, the judgment of the court should be framed and pronounced without regard to any results that may occur from it. Taking this as the proper view of my official duty, I shall now proceed to express my opinion on the points involved in the consideration of the case submitted to me, and the first subject of inquiry is as to the jurisdiction of this court, under the bankrupt act of the United States of 1841, in relation to the claims of a bankrupt's mortgage creditors. The last proviso of the second section of the act declares that nothing therein "contained shall be construed to annul, destroy or impair any lawful rights of married women, or minors, or any liens, mortgages, or other securities on property, real or personal, which may be valid, by the laws of the states respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." Under this proviso all mortgages which are valid by laws of the states, respectively, and which are not inconsistent with the provisions of the second and fifth sections of the act, are protected from the operations of the act. In declaring that nothing contained in the act "shall be construed to annul, destroy or impair" any such mortgage, it was evidently the intention of the law makers that such mortgages should be protected

as privileged liens; and, such mortgages being excepted from the general provisions of the act, the rights acquired thereby are not held under the act, but independently of it. This view of the subject receives confirmation from the 11th section of the act, which declares "that the assignee shall have full authority, by and under the order and direction of the proper court in bankruptcy, to redeem and discharge any mortgage or other pledge, or deposit, or lien upon any property, real or personal, whether payable on presentation or at a future day, and to tender a due performance of the conditions thereof." This section points out the mode by which a valid and existing lien on the property of the bankrupt is to be removed, and, taking it in connection with the proviso of the second section, I understand the law to be that the court in bankruptcy cannot dispose of such security of a creditor without his consent, but that the assignee may, under the direction of the proper court in bankruptcy, redeem and discharge the same. There must be some act done on the part of the creditor holding such security to bring his case within the jurisdiction of the court in bankruptcy, and, in accordance with this view, it was held in *Ex parte Jackson*, 5 Ves. 357, that the lord chancellor has no authority in bankruptcy to compel a second mortgagee, not claiming under the commission, but resting on his security, to join in a sale obtained by a prior mortgagee, the sale not producing enough for both mortgages. In that case the second mortgagee, not having attempted to prove his debt, chose to rest on his security, and refused to join in the sale, and the lord chancellor, while admitting that he could not make a title unless the second mortgage, as well as the first, was paid, held this language: "If the second mortgagee claims anything as a creditor, I have a hold upon him no doubt." Now let these principles be applied to the claims of the mortgagees of the case now before this court, and it is unnecessary here to inquire whether the mortgage executed by Andrew M'Dovall is such a mortgage as is contemplated by the proviso of the second section of the act of 1841, referred to above. It is sufficient, for the purposes of this argument, to suppose that it may be such a mortgage. If it be, I am of opinion that the mortgagees, not claiming as creditors under the bankrupt act, but choosing to rest on their security, they are not compelled to submit their rights to the adjudication of this court. But I am at the same time well satisfied that this court can entertain jurisdiction of any mortgage given by a bankrupt, upon the petition of the mortgagee, and that, under that part of the 6th section of the act of 1841 which gives to the district court in every district "jurisdiction in all matters and proceedings in bankruptcy arising under" the act, the court can order a sale of mortgaged

premises, where the creditor applies to the court for that purpose, and that, under the decree ordering such sale, a good, valid, and sufficient legal title to the premises may be made to pass to the purchaser. It is the practice in England, under the bankrupt law of that country, for the courts to direct a sale of collateral securities upon the application of the creditors, and the right of this court to order such sale in the cases stated is recognised by Mr. Justice Story in *Re Grant* [Case No. 5,690], where he says that "there can be no doubt that the creditor holding securities is enabled to prove his debt upon his offer to surrender, and actually surrendering, those securities, to be disposed of according to the order and direction of the court, and that he is entitled to prove his debt, deducting the true value of the securities therefrom; that true value, when ascertained, being paid or applied by the court for the exclusive benefit of such creditor"; and that "the court shall have full authority to ascertain the true value by a sale, or by an appraisal, or in any other mode which it shall deem best for all concerned in the estate."

But, supposing that the mortgage of the bankrupt shall not come within the proviso of the second section of the act, that it is not one of those mortgages "on property, real or personal, which may be valid by the laws of the states, respectively, and which are not inconsistent with the provisions of the second and fifth sections of that act," the question now arises whether this court has jurisdiction of proceedings instituted by the assignee of the bankrupt to set aside such mortgage. The second section provides "that all future payments, securities, conveyances or transfers of property, or agreements made or given by a bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, endorser, surety, or other person any preference or priority over the general creditors of such bankrupts," and all other payments, securities, &c., in contemplation of bankruptcy made or given to any person, not being a bona fide creditor or purchaser for a valuable consideration, without notice, "shall be deemed utterly void and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover and receive the same as part of the assets of the bankruptcy." There is here an express authority given to the assignee to "sue for" property conveyed in violation of the provisions of this section, though it is true that the district court of the United States is not specially designated in this section as the court in which such suit shall be brought; but the authority of the court to entertain jurisdiction of such suit, I apprehend, is to be found in the 6th and 8th sections of the act. The 6th section declares "that the district courts in every district shall have juris-

diction in all matters and proceedings in bankruptcy, arising under this act, and any other act which may hereafter be passed on the subject of bankruptcy; the said jurisdiction to be exercised summarily in the nature of summary proceedings in equity;" and afterwards specifies certain cases of controversy to which the jurisdiction of the court shall extend, which, on the authority of the case of *Ex parte Martin* [Case No. 9,149], I consider as affirmative, and not restrictive of the preceding clause. If then, as I have stated, the clauses of this section, enumerating particular cases of controversy to which the jurisdiction of the court shall extend, are not to be regarded as restrictive of the general powers conferred by the first clause of the section, the language used in the first clause is sufficiently comprehensive to embrace every matter and proceeding in bankruptcy arising under the act; and a suit brought by the assignee of a bankrupt to have a mortgage cancelled, which is declared by the act to be utterly void, and a fraud upon it, is, I conceive, a matter and proceeding in bankruptcy, arising under the act. The 8th section, too, as I have already remarked, confers jurisdiction, in my opinion, on the district court of the United States, of all suits brought by the assignee of the bankrupt to cancel a mortgage, void by the law. The first clause of this section declares "that the circuit court within and for the district where the decree of bankruptcy is passed, shall have concurrent jurisdiction with the district court of the same district, of all suits at law and in equity, which may and shall be brought by any assignee of the bankrupt against any person or persons claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt, transferable to, or invested in such assignee." Under this section, the person against whom the assignee of the bankrupt shall bring his suit must claim an adverse interest to that of the assignee for the United States court to entertain jurisdiction of the case. It is therefore necessary to ascertain the extent of the interest of the assignee of the bankrupt in the property mortgaged, before we can determine whether the interest of the mortgagee is adverse to his. "All property of the bankrupt, mortgaged or pledged to others by the bankrupt before his bankruptcy, vests in the assignees, subject to the claim or lien the mortgagee or pawnee has upon it, or, in other words, the equity of redemption in the case of a mortgagee, and the right to redeem, and the right of property when redeemed, in the case of a pledge, vests in the assignees by their appointment." *Archb. Bankr.* p. 223. But in the case of a mortgage adjudged fraudulent and void, the property remained in the bankrupt, and by the bankrupt law became vested in his assignee (per *Spencer, J.*, in the case of *Sands v. Codwise*, 4 Johns. 536). The person, then, claiming under a mortgage void by law, claims an interest adverse to the assignee of the

bankrupt, who, by virtue of his appointment, takes all the property and rights of property of the bankrupt, subject only to valid and existing liens thereon; and the assignee of a bankrupt may therefore well be considered as authorized, under this section, to bring suit in the circuit court or district court of the United States, to try the validity of a mortgage against the mortgagee who in such suit will claim an interest directly adverse to the interest of the assignee.

Such being the jurisdiction of this court, according to my views of the subject, it is proper now to enquire whether this jurisdiction is exclusive or concurrent with the state courts. There is certainly no language used in the bankrupt act of 1841 expressly granting an exclusive jurisdiction to the courts of the United States in the cases above stated; and the absence of any record conveying such a grant should raise the presumption that it was not the intention of congress to confer it. In the judiciary act of 1789 (1 Story's Laws, 50) [1 Stat. 73], the extent of the jurisdiction of the federal courts is not left to implication, and, whether the same is to be exclusive or concurrent, the powers conferred by congress are so clearly designated that there can be no mistake on the subject; "showing that, in the opinion of that body, it was not sufficient to vest an exclusive jurisdiction where it was deemed proper merely by a grant of jurisdiction generally." *Houston v. Moore*, 5 Wheat. [18 U. S.] 26. I do not mean to be understood as saying that to give exclusive jurisdiction to the federal courts it is necessary that it should be expressly stated in the act conferring the authority, but I do mean to say that the grant of jurisdiction generally to the district and circuit courts of the United States, contained in the 6th and 8th sections of the act of 1841, already quoted and commented upon, is not sufficient to vest in these courts an exclusive jurisdiction in all matters and proceedings in bankruptcy, arising under this act, or in the cases therein specially enumerated. To vest exclusive jurisdiction in the district court, the grant should be expressed in language, the fair and reasonable interpretation of which will bear that meaning; such, for instance, as in the 7th section of the act of 1841, designating the district court for the district in which the bankrupt shall reside or have his place of business as the court in which all petitions for the benefit of the act shall be had, and in which proofs of debts and other claims against the bankrupt's estate shall be open to contestation; as in the 9th section, directs "that all sales, transfers and other conveyances of property shall be made at such times and in such manner as shall be ordered and appointed by the court in bankruptcy," and that "all assets received by the assignee in money, shall within sixty days afterwards be paid into the court, subject to its order, respecting its future safe keeping and disposition;" as in the 10th section of the act, making it the duty of the court to order

and direct a collection of assets, and a dividend of the same among the creditors who have proved their debts; and as, also, in the 11th section of the act, authorizing "the assignee, under the order and direction of the proper court in bankruptcy, to redeem and discharge" any liens on the property of the bankrupt, and to compound debts, &c., due or belonging to the estate of the bankrupt. In these cases, and in others, which can be pointed out on a reference to the provisions of the law, the jurisdiction vested in the federal courts is necessarily exclusive, and there would be a direct incompatibility in the exercise of similar powers by the state courts. I am aware that in the opinion which I have expressed as to the jurisdiction of the district court in matters and proceedings in bankruptcy, arising under the act, I may be considered as coming in conflict with the judgment pronounced by Mr. Justice M'Kinley in the circuit court of the United States for the Eastern district of Louisiana, in the case of *Walden's Assignee v. City Bank* [unreported], relied on in the argument of this case at the bar; but, however great may be my respect for that judgment, I am bound to decide the case submitted to my consideration according to the deliberate convictions of my own mind; and, without presuming to comment on that decision, I will remark that, even in that case, authority may be found for the position taken in this that the jurisdiction of the district court is not exclusive in all matters in bankruptcy, as the learned judge states in one part of his decision that the jurisdiction of the district court of this state (Louisiana) over the subject upon a proper case is not doubted."

The jurisdiction, then, of this court of the case made by the pleadings being concurrent with the state court, the next question is as to the court which should have the decision of the matter, and the rule laid down in the case of *Smith v. McIver*, 9 Wheat. [22 U. S.] 535, is the correct and sound rule on this point. "In all cases of concurrent jurisdiction, the court which first has possession of the subject must decide it." But here the question arises as to which court first took possession of the subject. On the part of the present complainants it is contended that the petition of the bankrupt for a decree of bankruptcy is a suit for the benefit of all the creditors, and that the filing of his petition is the commencement of such suit; but I apprehend it is not regarded as a commencement of the suit for the creditors who hold securities excepted from the provisions of the act, but only for those creditors who must come in and prove their debts, "under such bankruptcy," in the manner prescribed by the act, before they will be entitled to share in the bankrupt property and effects. Viewing the subject in this aspect, the state court of chancery first had possession of the matter now before this court, the bill to foreclose the mortgage in question having been filed in that court, before the bill of the pres-

ent complainants, to set aside that mortgage, was filed in this court; but I think it is a matter of very little consequence in which court the validity of the mortgage shall be tried. The state, as well as the federal, tribunals are bound to administer the bankrupt law according to its provisions, as a law passed in conformity to the powers delegated to congress by the constitution of the United States. The act of August 19, 1841, is the supreme law of the land, and equally binding upon the courts of the federal and state governments. Any argument, therefore, upon which the present complainants might rely in this court, to cancel the mortgage, could be urged with equal force in the proceedings now pending in the state court, to which they have been made parties, as assignees of the bankrupt; and if, in that case, it should be decided that the mortgage is void, and a fraud upon the bankrupt act, the mortgaged property would pass into the hands of the assignees of the bankrupt, to be held by them subject to the order and direction of this court.

I might here close this opinion, and would do so, but for the position assumed by the counsel for the mortgage creditors as to the powers and authorities of this court in granting injunctions. To pass over in silence the question presented by them might be construed into an acquiescence in their views, and, to avoid such result, it is proper that I should make a few remarks on the subject. The right of this court to issue injunctions under its chancery powers was not disputed, but it was contended in the argument at the bar that this court has no authority to order injunctions against suitors in a state court, and the counsel rested their argument on the 5th section of the judiciary act of congress of March 2, 1793 ([1 Stat. 333], 1 Story's Laws, 311), which directs that no writs of injunction shall be granted to stay proceedings in any court of a state; quoting, in support of their view of the subject, the decision in the case of *Diggs v. Wolcott*, 4 Cranch [8 U. S.] 179, to the effect that a court of the United States cannot enjoin proceedings in a state court. Without disputing this law, or the authority of the decision referred to, I think it may well be questioned whether an injunction to restrain an individual suitor is an injunction against the proceedings of a court; and such a distinction between the two injunctions is drawn in the case of *Bushby v. Munday*, 5 Madd. 305, where the vice-chancellor of the court of chancery in England held that "if a defendant who is ordered by this court to discontinue a proceeding which he has commenced against the plaintiff in some other court of justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceeding, this court does not pretend to any interference with the other court; it acts upon the defendant by punishment for his contempt in his disobedience to the order of

the court," that the injunction in no manner breaks in upon the absolute independence of the court, and touches only the party affected by it. But the jurisdiction of this court, in cases of application for injunction, does not rest on the act of March 2, 1793, or on that of the 13th of February, 1807 (2 Story's Laws, 1043 [2 Stat. 418]). In the case *Ex parte Foster* [Case No. 4,960], Mr. Justice Story held this language: "I lay it down as a general principle that the district court is possessed of the full jurisdiction of a court of equity over the whole subject matters which may arise in bankruptcy, and is authorized by summary proceedings to administer all that relief which a court of equity could administer, under the like circumstances, upon a regular bill and regular proceedings, instituted by competent parties. In this respect the act of congress, for wise purposes, has conferred a more wide and liberal jurisdiction upon the courts of the United States than the lord chancellor, sitting in bankruptcy, was authorized to exercise. In short, whatever he might properly do, sitting in bankruptcy, or sitting in the court of chancery, under his general equity jurisdiction, the courts of the United States are, by the act of 1841, competent to do." And in a later case, that of *Carlton* [Case No. 2,415], the same learned judge states that "there is no statute of the United States which imposes the slightest limitation upon the exercise of the power to issue injunctions, or requires notice thereof, unless in cases provided for by the act of congress of the 2d of March, 1793 (chapters 22, 66, par. 5), and the act of congress of the 13th of February, 1807 (chapters 58, 68). But neither of these statutes has any application to cases in bankruptcy in the district court, nor, indeed, to any cases except those which are pending in the circuit court, in the exercise of its ordinary jurisdiction. The former act requires reasonable notice of the application for an injunction to be given to the adverse party before the injunction is granted in causes pending in the circuit court. The latter act confers authority on the district judges to grant injunctions in like manner, upon notice, in all cases pending in the circuit court. These acts, therefore, do not touch the jurisdiction of the district court in the administration of equity in bankrupt cases, and, as they do not contemplate the classes of cases created by the bankrupt act of 1841, it is obvious that their provisions are inapplicable to it, and leave the jurisdiction to grant injunctions upon the general practice and principles which govern courts of equity. I am willing to take this exposition of the law as my guide on this subject, more particularly, too, as, within the possession of the right by the district court to issue injunctions against any persons who may interfere with the due administration of the assets of the bankrupt's estates, subject to the order of the court, under the bankrupt act of

1841, the provisions of that law might be defeated.

Various other questions have been raised by the present complainants in the matter now before this court which I do not deem proper subjects for inquiry on their motion for an injunction; and, in accordance with the views taken by me of the questions considered, I refuse the motion.

YEAGER (JONES v.). See Case No. 7,510.

Case No. 18,131.

YEARSLEY v. BROOKFIELD et al.

[1 McA. Pat. Cas. 193.]

Circuit Court, District of Columbia. March, 1853.

PATENTS—INTERFERENCE PROCEEDINGS—COMPETENCY OF WITNESSES—EVIDENCE OF PRIORITY AND NOVELTY—JURISDICTION ON APPEAL—JOINT INVENTORS—LACHES—POVERTY.

[1. A party to an interference may, from necessity, be allowed by his own oath to prove the loss out of his own custody of a paper, as a foundation for proving by other testimony the contents thereof; and, in the case of a joint invention, the deposition of one of the inventors alone may be received to show the loss of a drawing which he had made, although, as the other may be presumed to have had access to it, the proof would be more satisfactory if he too had joined in the deposition.]

[2. A party who, pending an interference proceeding, assigns all his interest in the subject-matter, and remains merely a nominal party, is nevertheless incompetent to testify therein. *Scott v. Lloyd*, 12 Pet. (37 U. S.) 149, followed.]

[3. Declarations of a party to an interference, at any time before the contest arose, describing his invention, are admissible, from necessity, and as part of the *res gestæ*, for the purpose of showing what he had invented at the date of such declarations.]

[4. The objection that one of two parties who claim as joint inventors is not shown by the evidence to have been in fact a joint inventor with the other is not available to the unsuccessful party in an interference proceeding, for his claim must fail if both or either of the joint applicants are shown to have been the first and original inventors.]

[5. Upon an appeal in an interference proceeding, the judge is not confined to the mere question of priority, but has jurisdiction to determine the question of the patentability of the alleged invention. *Pomeroy v. Connison*, Case No. 11,259, distinguished. *Bain v. Morse*, Id. 754, followed.]

[6. The American authorities differ from the English in holding that the result alone, even when shown to be more economical, useful, and beneficial to the public, in the manufacture of a better article, is not sufficient evidence of novelty and invention, and that it must appear, in addition, by other evidence, that the result was produced by some new process, device, contrivance, mode, or means, or by some new machinery. Where, however, such improved result is shown, but slight evidence of novelty will be required.]

[7. The fact that the first inventor of a new and useful improvement has not in his specifications described the same with the clearness and particularity required by the statute as a condition of obtaining a patent (Act 1836, §

6; 5 Stat. 119) will not aid a subsequent inventor, upon an interference between them; for, if the latter is shown not to be the first inventor, his claim fails, even if a patent cannot issue to his opponent.]

[8. The deposition of one not a party to the interference, tending to show that he was a joint inventor with one of two parties who are claiming as joint inventors, and that the other had no part in it, though not admissible to establish the deponent's claim, may yet be considered as affecting the rights of the joint applicants.]

[9. Loss of means by one of two joint inventors, rendering him unable to prosecute his plans in respect to the invention, combined with the assurance of his co-inventor that when the latter should move in the matter of procuring a patent the former should have an equal interest therein, *held* to excuse laches.]

[This was an appeal by Pascal Yearsley from a decision of the commissioner of patents, in interference proceedings, awarding priority to James M. Brookfield and Ephraim V. White in respect to an alleged invention of a new and useful improvement in the art of making glass.]

John S. McCulsche and James Wm. McCulsche, for appellant.

MORSELL, Circuit Judge. The original application of Yearsley appears to have been filed on the 18th of September, 1850, stating his claim, with specifications, &c., but which, being supposed defective, he was allowed to amend according to the application as stated in the report filed on the 7th of August, 1851, in which he says: "What I claim as my invention, and desire to secure by letters-patent as a new and useful improvement in the art of making glass, is the employment of anthracite coal in a glass furnace, substantially in the manner and for the purposes set forth in my specification." He then describes particularly the methods which had been formerly used and the difficulties met with in the ordinary process, and says the improvements and advantages attending his invention and discovery are—First, anthracite coal may be used, giving a flame which plays upon the vessels containing the fluxing materials; second, a great economy in fuel is effected and a much shorter time is required for fluxing, the flame being of a more uniform and higher temperature and under greater control than in the ordinary methods; third, the glass is of a superior quality and the scum sandiver or salts escape very freely; fourth, the great heat renders the sulphate of soda as useful a flux as soda ash and carbonate of soda; fifth, the fluxing-pots can be separated some distance from the burning fuel for the convenience of working, and freed from the cracks called fangs and feins, and they can be used without covers; sixth, colored glass may readily be made, and the labor of testing it much reduced; seventh, and finally, the manufacture of glass by this means will not be a nuisance in densely-populated cities. To en-

able persons skilled in the art of glass-making to understand and use his invention and discovery, he describes particularly its nature and operations, which specifications are supposed to comprehend, as the applicant's claim of invention, the combination of anthracite, blast, steam or vapor, and preparatory heating.

To this application the report states that there was found to interfere, in the recent archives of the office, a caveat, of which notice was given, and on the 31st of July, 1851, the caveators (James M. Brookfield and Ephraim V. White) filed their application, and claimed the application of a blast to an ordinary glass furnace, by which they are enabled to use anthracite coal in the manufacture of glass, substantially as herein set forth. This caveat appears to bear date the 31st of January, 1851, and to have been filed in the office the 4th of February, 1851; and their claim is stated in substantially the same way as the claim of Yearsley, above recited, as by reference to the specification and accompanying draft will appear. In the specification alluded to they say they have invented and discovered a new and improved mode of manufacturing glass by the use of anthracite coal as a fuel; and referring to the accompanying drawing, and to the letters of reference marked thereon, they state that the nature of the invention or discovery consists in burning coal instead of wood, the heat being generated by the application of a blast to the burning coal. They then describe the furnace. They say the construction consists of an air-chamber, a fire-chamber and furnace, or place in which the materials to be melted are deposited; in the drawing it is a chamber to receive the pots for the manufacture of glass, &c. The report then states: "The interference was declared on the 5th of August, 1851, and a hearing appointed for the first Monday of October, 1851, which hearing was postponed from time to time until Monday, July 5th, 1852, when it was fixed for final hearing, and on the 11th of August, after weighing the testimony, priority of invention was awarded by the office to Brookfield and White, and from this decision the appeal was taken and sundry reasons filed." Those relating to preliminary objections will be first considered, viz., that E. V. White's depositions are incompetent and inadmissible, and that the testimony of the witness, stating his declarations, is also inadmissible; second, that the joint invention, as alleged, of Brookfield and White ought to have been proved.

The commissioner, in his report, says that White, by assigning all his interest to Anderson R. Hay on the 26th of March, 1852, divested himself of every interest in the pending application that could, under any rule of evidence, have excluded his testimony, taken in the month of September, after the assignment.

First, as to White's deposition to show the loss of the draft made by him in the year 1847, for the purpose of introducing secondary evidence, in accordance with the rule that the nonproduction of the original must be accounted for. From a principle of necessity the party is allowed by his own oath, addressed to the court, to prove the fact of a lost paper if lost out of his own custody and not destroyed by fraud, the existence and details of such paper being proved by other testimony. In this case, although the evidence is not sufficient to show that it was destroyed by fraud, as Brookfield, by reason of his relationship to White in interest, may be reasonably supposed to have access to it, it would have been more satisfactory if he had been joined with White in the deposition. In the absence of proof, however, of his having the custody of it, the objection must be overruled.

With respect to the deposition of White, taken in the examination of him as a witness generally, I do not think that the objection can be sustained on the ground of his liability over to the assignee. There appears to be no warranty, either express or implied, of indemnity. But the objection on the ground of his being a party to the proceeding by his application for the patent at the time of the examination, and still so, though perhaps nominally—and, technically speaking, that proceeding cannot be called a record—yet the case appears to be within the reason of the rule which makes a party incompetent, and therefore the deposition cannot be considered as legal evidence. The rule and its reason will be found laid down by the supreme court in [Scott v. Lloyd] 12 Pet. [37 U. S.] 149. The court say: "The decision in Willings v. Consequa [Case No. 17,767], where the court held that a party named on the record might be released so as to constitute him a competent witness, has been cited and relied on in the argument. Such a rule would hold out to the parties a strong temptation to perjury, and we think it is not sustained either by principle or authority."

The next objection is to the admissibility of the evidence as to the declarations of Mr. White. The rule, as stated by the counsel of Brookfield and White, is—"If in 1834, 1847, or any other period, he (White) described, orally or by drawings, a mode of using anthracite coal for the purpose of making glass, those statements are acts or part of the res gesta, and show what he knew or had invented at the time when made." This position is correct, with this qualification, that the same were made before this contest arose. The case decided by the supreme court, Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448, fully sustains the proposition. No better evidence from the nature of the subject could be expected or required. That objection is also overruled. With respect to an objection that the evidence does

not prove Brookfield a joint inventor with White, I do not think it can be considered material in this issue, for if both, or either, is shown by the testimony to have been the first and original inventors or inventor, the appellant must be considered as having failed in his claim.

This disposes of the reasons Nos. 1, 2, 3, 5, 6, 19, 36, and 38. The reasons Nos. 13, 18, 31, and 38, which involve the consideration of the effect which must be given to a supposed variance between the caveat now produced and the specification of the 18th of July, 1851, and from the plan actually experimented with, will be hereafter considered, when the principles of law shall have been considered and stated upon which the question of interference must be governed; and so also as to Nos. 8, 9, 10, 12, 20, 24, 26, 35, 32, 38, 27, and 23. Nos. 14, 15, 16, 17, 21 present the question whether the claim of Brookfield and White for anthracite and a blast in an ordinary glass furnace is patentable, being devoid of novelty as a combination, and that it is but an analogous use. The counsel for the appellees contends that the judge in the present case of appeal is confined to the refusal by the patent office to grant letters-patent, and that his jurisdiction does not extend beyond this; by which I understand that he supposes Judge Cranch to have decided in the case of *Pomeroy v. Connison* [Case No. 11,259], that the judge has no jurisdiction to inquire into and decide the question of patentability. That was the case of an appeal by a patentee against whom the commissioner had decided, and the point determined by the judge was as to the character of the person; the judge held that he could take jurisdiction only in the cases of applicants for a patent on refusal, &c. In the case of *Bain v. Morse* [Id. 754] the judge says that, "upon the hearing, he is to decide, and from that decision, if either shall be dissatisfied with it on the question of priority, including that of interference, he may appeal, and upon such appeal, as I understand the law, the judge, in case of real interference, may determine which, or whether either, of two applicants is entitled to receive a patent as prayed for." The question, therefore, as to jurisdiction is settled against the objection.

I have already stated the specifications of the parties, and what they respectively claim a patent for, together with the description of each, embodying the principle of the invention. The sixth section of the act of congress of 1836 provides that if any person or persons have discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter not known or used by others before his or their discovery thereof, and not at the time of his application in public use and sale, on application, the commissioner may grant a patent.

Each of the parties show, as essential to their improvement, the use of anthracite coal with a blast, instead of wood, in the manufacture of glass in a glass furnace. Both show the result produced to be very highly useful, a better article, and much cheaper; but it is objected on the part of the appellants that the improvement, as claimed by Brookfield and White, is for anthracite and a blast in an ordinary glass furnace, and is therefore devoid of novelty as a combination, and but an analogous use. In support of his proposition, he states as an instance of analogous use the Case of Crane, where anthracite coal is used to melt iron from ores with a hot blast instead of a cold, by which latter means (a cold blast) it had been used before for the same purpose. He also claims that it had been used in the mint of the United States to melt metals, &c.; that White used it in the year 1834 to forge axes; that it had been in use to forge other edge-tools; and that it had been used for upwards of thirty years to raise steam for boats and furnaces, &c.; that it has long been known also to be cheaper than wood for various purposes, and than charcoal and bituminous coal where the means and the effect are the same but the occasion new. He cites as his authorities *Curt. Pat. 23, 76-78*; *Folsom v. Marsh* [Case No. 4,901]. The passage referred to in *Curtis* (page 23, 1st Ed., 1849) rests upon the authority of the law as laid down by Judge Story in *Bean v. Smallwood* [Case No. 1,173]. That was the case of a patent for a machine in which it appeared that the same apparatus stated in the claim had been long in use, and applied, if not to chairs, at least, in other machines, to purposes of a similar nature. The judge says the machine was old and well known, and applied only to a new purpose. That does not make it patentable. The thing itself which is patented must be new, and not the mere application of it to a new purpose or object. The next reference on this part of the subject is to *Curt. Pat. pp. 76, 77*. The principle of law stated here is upon the authority of *Losh v. Hague, 1 Webst. Pat. Cas. 207*, in which case Losh had taken out his patent to use his wheels on railways. The case shows that a patent cannot be granted for the application of an old contrivance to a new object; or, in other words, that you cannot have a patent for applying a well-known thing, which might be applied to fifty thousand different purposes, to an operation which is exactly analogous to what was done before. *Curtis* states one principle to be this: "When the principle is well known, or the application consists in the use of a known thing to produce a particular effect, the question will arise whether the effect is of itself entirely new, or whether the occasion only upon which the particular effect is produced is new." *Hove v. Abbot* [Case No. 6,766] is the next reference. This was the case of a patent for a new and useful in-

provement in the application of a material called palm-leaf or brub-grass to the stuffing of beds, mattresses, sofas, cushions, and all other uses for which hair, feather, moss, or other soft and elastic substances are used. "The application of an old process to manufacture an article to which it had never before been applied is not a patentable invention. There must be some new process or some new machinery used to produce the result." Again (page 194): "He who produces an old result by a new mode or process is entitled to a patent for that mode or process. But he cannot have a patent for a result merely, without using some new mode or process to produce it."

The counsel for the appellants adds to these authorities the principles as declared to be law in the letter of Commissioner Ewbank of the 12th of November, 1850, to Yearsley, in which he says in the last clause of the letter: "The remark may be made for your guidance in the prosecution of your application, that any feature common in furnaces for other purposes is not patentable in its new application to a glass furnace." The commissioner in his report says: "As shown by the claims of both parties, the inventions are substantially the same, for the important feature is manufacturing glass by the use of anthracite coal as a fuel, with a blast, and the details of neither invention are absolutely necessary to the attainment of the result desired. The invention was deemed new in its particular application to this precise manufacture, and therefore patentable. The specifications, drawings, and models were sufficiently clear to enable the office to form a correct opinion of the invention, and the decision implied that the materials and mechanism, as set forth by both parties, were adequate to the result claimed. The office decided that the invention was patentable because anthracite coal and a blast had not been used in the manufacture of glass, and it was therefore a new application of known substances to produce a particular result, and that result was useful; the result, from the testimony, was an important gain to the public." Lord Dudley's Case (1 Webst. Pat. Cas. p. 14), Neilson's Case [Id. 278], and Crane's Case [Id. 393], were relied on by the office. To the same effect the counsel for Brookfield and White rely upon the following authorities: Curt. Pat. 379; Lund, Pat. 6; Hill v. Thompson, 3 Mer. 622; Boulton v. Bull, 2 Black [67 U. S.] 487; 2 March, 211; 4 E. C. L. 357; Hind. Pat. 76, 124; Crane v. Price, 1 Webst. Pat. Cas. 393; 4 Man. & G. 680. Lord Dudley's patent was at a very early period—1622. It was for a discovery for making iron with sea or pit coal. So far as appears in the letters-patent, the invention was simply the substitution of pit coal for wood or charcoal. This was the general feature of the invention. The means are not stated, the com-

mon law only requiring the inventor to be in possession of such means. The enrollment of a specification has since been declared an essential motive in granting a patent, and by statutory provision, both in England and this country, must form a part of the patent. Our statutes provide "that before any inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, and using the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same," &c. Neilson's patent was for the improved application of air to produce heat in fires, forges, and furnaces where bellows or other apparatus is required. The specification states distinctly his claim and the modes by which his object was to be attained. Objections were raised that his invention was the same with many others, as stated in the case. The case is too long to make even an extract from. I will therefore state the notice of it to be found in Webster: He says: "The object of these two inventions, or the ends to be attained by the inventions, are clearly distinct. That air had been applied in a heated as well as in its natural atmospheric state to different kinds of fires and furnaces, under certain circumstances and conditions, before the date of Neilson's patent, is undeniable, but no practical success had attended the application; and the ends proposed and nature of the inventions are quite distinct from Neilson's. The real question would appear to be, what is the principle of the invention as disclosed in and by the specification? For to suppose that the doing or using a thing with one object will deprive the doing or using the same thing with a different object of the character of invention, is unreasonable. The omission of one of several processes, or a change in the order of a series of processes, may give a new character to the thing produced, notwithstanding all that was done was done before."

In the case of Crane v. Price (supra) several of the cases are reviewed which have been referred to on this occasion. That was the case of a patent for an improvement in the manufacture of iron, in which case it is stated that "the plaintiff describes the object of his invention to be the application of anthracite or stone coal combined with hot-air blast in the smelting or manufacture of iron from iron stone, mine, or ore, and states distinctly and unequivocally at the end of his specification that he does not claim the use of a hot-air blast separately as of his invention, when uncombined with the application of anthracite or stone coal, nor does he claim the application of anthracite or stone coal

when uncombined with the using of a hot-air blast; but what he claims as his invention is, the application of anthracite or stone coal and culm combined with the using of a hot-air blast in the smelting and manufacture of iron from iron stone, mine, or ore" (page 408). As to the result, the evidence showed that the yield of the furnace was more, the nature, properties, and qualities of the iron were better, and the expense of making the iron was less, than under the former process by means of the combination of the hot-air blast with the bituminous coal. At page 411 the judge says: "Upon the fourth issue, which raised no more than the usual inquiry whether the nature of the invention was sufficiently described in the specifications, the usual evidence was given that persons of competent skill and experience could, by following the directions, produce the manufacture described with success, and the evidence was entirely unopposed."

It appears from the reasoning of the court upon the issue raised by the fifth plea, that the allegation in the plea would have been fatal to the plaintiff's recovery but for the fact of the hot-air blast being used in combination with anthracite coal for the first time for the purpose stated in the pleadings. The court say: "Undoubtedly, if the second patent claims as a part of the invention described in it that which had been the subject-matter of a patent still in force, it would be void on the double ground that it claimed that which was not new (which, indeed, would equally be the case if the former patent had expired), and also that it would be an infringement." Page 412. The principles in the case of *Rex v. Wheeler*, 2 Barn. & Ald. 349, referred to as authority in the foregoing case, will be found to support the view I have expressed as to the proper understanding of that case. It was a patent for a new or improved method of drying and preparing malt. The judge in the first part of the case assumes, for the sake of argument, that the novelty and utility of the invention might have been established by proof. He gives what he considers the meaning of manufactures within the terms of the statute. 21 Jac. I. c. 3. First, as to machines or engines, &c., he says: "Or it may, perhaps, extend also to a new process to be carried on by known implements or elements acting upon known substances, and ultimately producing some other known effect, but producing it in a cheaper or more expeditious manner, or of a better or more useful kind." In applying his general principles, he says: "This is a patent for the invention of a method, that is, of an engine, instrument, or organ, to be used for the accomplishment of some purpose, or at least of a process to be so used. The patentee does not profess to be the inventor of any engine, instrument, or organ. He says that a coffee roaster or a kiln, or anything by

which the grains may be kept in motion during their exposure to a requisite degree of heat, may be used." The judge proceeds to state the rule that the particular means, manner, or method by which the object was to be effected ought to be clearly and fully stated, so that any one skilled in the art might, without the necessity of experimenting, be enabled to accomplish the same end by the same means. Among other things which he ought to have stated in his specification, he says: "He does not say what heat beyond four hundred degrees of Fahrenheit may be used—a specification which casts upon the public the expense and labor of experiment, and that is undoubtedly bad."

In the Case of *Crane*, 1 Webst. Pat. Cas. 409, is to be found dicta to the effect that "there are numerous instances of patents which have been granted where the invention, consisted in no more than the use of things already known, producing effects already known, but producing those effects so as to be more economically or beneficially enjoyed by the public." At page 410 of this case the judge says: "The only question, therefore, that ought to be considered on the evidence is, was the iron produced by the combination of the hot-air blast and the anthracite a better or a cheaper article than was before produced from the combination of the hot-air blast and the bituminous coal, and was the combination described in the specification new as to the public use thereof in England." Our statute requires that it should be new and original with the inventor. So in the same case as quoted in *Curt. Pat. p. 8*: "The court of common pleas said: 'We are of opinion that if the result produced by such a combination be either a new article or a better article or a cheaper article to the public than that produced before by the old method, that such a combination is an invention or manufacture intended by the statute, and may well become the subject of a patent.'" I have before said that the proper understanding of the decision in this case must be by confining it to the case itself. I deem it unnecessary to take particular notice of the other cases cited by the counsel for the appellees to this point.

These authorities have been referred to on the question involved in the reasons of appeal, Nos. 14, 15, 16, 17, and 21, and by which it becomes my duty to decide the very difficult question, what is or is not an analogous use, or, as it is called, a double use. It will be observed that the principal matters of difference between the English and the American cases on the subject of novelty and invention relate to the kind and degree of evidence by which it may be shown. The English cases are supposed to go to the extent of deciding that the result alone, when the effects produced are shown to be more economical, useful, and beneficial to the public in the manufacture of a better article, is of

itself a conclusive test of invention and novelty. On the other hand, the American authorities show that the result alone will not be sufficient for that purpose, but that it must also appear by some other evidence that the effect was produced by some new process, device, contrivance, mode, or manner or means, or by some new machinery; also that a patent can in no case be granted for an effect only. When, however, the applicant shows such a result, slight evidence only of the existence of the novelty and invention will be required. All, however, agree that as a previous condition to the granting or issuing of every patent the applicant must set forth in his specification a true, full, and clear account and description of his invention, showing the contrivance, mode, method, manner, or means by which the result is to be produced; that in that specification he should state what his invention is, what he claims to be new and useful, and what he admits to be old. By the sixth section of our statute of 1836, also, it is provided that before any inventor shall receive a patent for any new invention he shall deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of any machine he shall fully explain the principle and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions, and it shall particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery.

And now to apply the law to the facts of this case. Is there a new and important mode of manufacturing glass by the use of anthracite coal as a fuel invented by the applicants, Brookfield and White, duly set forth in their specifications? They say "it is well known that anthracite coal has heretofore failed to produce suitable heat on account of the small amount of flame produced thereby, thus not enabling the heat to be readily conveyed to the pots. The objection is obviated in our improved mode by the application of the blast, properly regulated, through the aforesaid pipe 9, whence it passes up through the grates c q through the burning coal into the orchard chamber A, and surrounds the pots, when it escapes through the working holes a a or by chimneys. By this means the great amount of heat engendered by the burning coal is quickly conveyed to the melting pots as desired. We are aware that anthracite coal has been used with a blast in other processes of the arts; but the application and objects attained in our improved mode of manufacturing glass being

peculiar, we claim our invention to be new and useful." In the argument on the part of Brookfield and White, it is said: "The blast has been before applied to other furnaces when a diffused heat was not necessary, but when, on the contrary, the greatest possible heat in a confined space, as for welding, smelting, &c., was the object. The invention is the combination of the blast to an ordinary glass furnace." If this peculiar mode were clearly and sufficiently stated in the specification, i. e., properly regulating the blast in an ordinary glass furnace so as to produce by the use of anthracite coal a sufficiently increased amount of flame and a suitably diffused instead of the confined concentrated heat, I should certainly think the improvement would unquestionably be new and more than an analogous use, and, of course, patentable, in view of the fact that it is clearly shown by the evidence in this case that an important result is obtained in the manufacture of glass of equal, if not superior, quality to that where wood is used as a fuel, and with a great saving of expense, and therefore greatly to the public benefit. But I feel obliged to say that I do not think the specification in this case amounts to such a statement, and that it is entirely too vague on that subject to warrant the issuing of a patent for the application of the blast to the ordinary glass furnace, by which anthracite coal may be used as a fuel in the manufacture of glass. It is true it is stated that the strength of the blast is regulated by the sliding valves h h or their equivalents; still there is nothing particular to show any new mode of using the blast for the diffusion of the proper degree of heat. Suppose, however, this to be the case, it is not perceived how the appellant can derive to himself any material benefit. It still remains necessary that he should appear to be the original and first inventor of a new and useful improvement in the art of manufacturing glass by the use of flame from an anthracite coal fire, as claimed by him in his specification. The reasons of appeal embracing this part of the subject will next be considered.

It is apparent from the specification of the parties that the main principle of the improvement contended for by each of the parties is the manufacture of glass by the agency of anthracite coal with a blast, instead of other kinds of coal more expensive, to effect which, they have adopted combinations of elements, as I have stated, in some respects different, but in the great essential principle they are the same, and that must be the test by which the interference is determined. To which effect, see *Treadwell v. Bladen* [Case No. 14,154], in which case it is said: "It seems to me that the safest guide to accuracy in making the distinction is, first, to ascertain what is the result to be obtained by the discovery; and whatever is essential to that object, independent of the mere form and proportions of the thing used for the pur-

pose, may generally, if not universally, be considered as the principle of the invention." In Curt. 266, it is said: "It is in relation to this question of substantial identity that the doctrine of mechanical equivalents becomes practically applicable. This doctrine depends upon the truth that the identity of purpose, and not of form or name, is the true criterion in judging of the similarity or dissimilarity of two pieces of mechanism." At 270 also: "Where the subject-matter of the patent is a manufacture, the same test of substantial identity is to be applied. * * * The question will be whether in reality and in substance the defendant has availed himself of the invention of the patentee in order to make the fabric or article which he has made." And to the same effect, also, in Curt. 273: "Whenever the real subject covered by the patent is the application of a principle in arts or manufacture, the question on an infringement will be as to the substantial identity of the principle and of the application of the principle." It is believed that these authorities support the position as laid down by me.

The evidence on the part of Brookfield and White shows that they have succeeded in manufacturing glass by producing a good article, equal, if not superior, to that from the use of wood, by the use of anthracite coal with a blast, with a much greater saving of expense and resulting beneficially to the public, as they have stated in their specification, proving also, I think, that their invention was prior to that of Yearsley's. Upon which grounds, I think, and so decide, that the said Yearsley was not the original and first inventor of said improvement mentioned in his said specification, and therefore that he is not entitled to a patent as prayed for in his petition to the commissioner of patents.

The fourteenth and fifteenth reasons of appeal make it necessary that I should consider the claim of Jacob Faatz as an original inventor of the improvement mentioned in the specification of Brookfield and White. The commissioner states that in the question before the office Faatz could only be known as a witness upon the question of priority between Yearsley and Brookfield. This is certainly correct in one sense, but I suppose it ought to form a material subject of consideration in deciding on Brookfield and White's application for a patent. In Curtis on Patents (page 101) the law is thus stated: "It is necessary, therefore, in all cases that the subject-matter should be claimed as the sole invention of one party if such is the fact, or as the joint invention of two or more parties if it was invented by more than one." And so I understand the act of congress to be. The commissioner says: "And the testimony does not show that he (Faatz) had formed any opinion on the subject of the invention before White." And in another part of the report he says "that White had formed the opinion in the year 1834." As to the subject which I am now considering, that can-

not be deemed very important, as like imperfect and impracticable opinions were formed long before, in the year 1816, by a glass company in Baltimore, and several others, as appears from the testimony in this case.

From the most careful examination of the testimony, it appears to me that the earliest period at which any regularly practicable opinions or principles were arrived at was when White and Faatz contributed an equal part, and that it was not until after that time that the drafts alluded to in the testimony were made, in accordance with which joint understanding the furnace was erected at Hornsdale. I shall state parts of the testimony relating to this point as the grounds of my opinion. I shall only state the material parts of the depositions, from which I shall extract them, and refer to the pages of the book in which the whole may be seen and read. Record of Evidence (page 105) shows the account which Faatz himself gives of it. This would not be competent evidence in an application for a patent by Faatz for him in support of his right; but under the circumstances of its being taken and forming part of the evidence in that record, although an objection to the credit may be valid, if he is sufficiently corroborated, I can see no reason why it may not be used for the present purpose. He states in substance that he had formed the idea previously to the year 1846 that he could make good glass profitably by using anthracite coal for fuel, with the aid of a blast, and that the plan of the first melting furnace which he built in the glass factory now in the possession of James M. Brookfield was devised and adopted by him so as to enable him to melt glass therein by the use of anthracite coal as a fuel, with the aid of a blast. This answer was made to an interrogatory of Yearsley's counsel. The witness then states and describes particularly how it was so adapted. He proceeds to state unfortunate circumstances, which so reduced him to poverty that he was unable to proceed with his plan. This, I think, will be found to be the earliest effort to bring the idea, which afterwards in a more complete form succeeded so well, into practice. (Quotations from the testimony are omitted.) Faatz may be charged with laches because he has not prosecuted the plan; but the loss of means brought on him by the misfortunes which it is stated in the evidence he sustained, and the reason he had to believe, from the assurance of Mr. White, that when he moved in the business he should be a joint sharer, I think a sufficient excuse and save his rights. My conclusion from the evidence is that he must be considered as a joint inventor with Mr. White, and that the commissioner, in acting upon his (White's) application must be governed by the rule of law which I have before stated on this branch of the subject. And for the reasons before stated, I am of opinion, and I do so decide, that neither of the said parties—Pascal Years-

ley nor the said Brookfield and White—are entitled to the patents for said invention as prayed by them.

The patent was subsequently issued to Hay and Brookfield, No. 9,789, as the assignee of Faatz and White, in accordance with decision of Morsell that Faatz was joint inventor with White, June 14, 1853.

Case No. 18,132.

YEATMAN et al. v. HENDERSON et al.

[1 Pittsb. Leg. J. 9; 1 Pittsb. Rep. 20.]

Circuit Court, W. D. Pennsylvania. 1853.

PLEA IN BAR—WITHDRAWAL—DISCONTINUANCE—ENTRY WITHOUT LEAVE.

1. A plea in bar cannot be withdrawn, after the case has been prepared for trial, in order to file a plea in abatement.

2. A discontinuance, though required to be by leave of court, is generally entered without such leave, which is presumed, unless the defendant interfere, and ask the court to withhold leave, on account of the discontinuance being oppressive.

On motion to withdraw plea in bar, and file plea in abatement.

IRWIN, District Judge. This motion has been argued as if the only question before the court was the power of the court of common pleas of Lawrence county to strike off the discontinuance of the suit before them, and of the right of the plaintiff to discontinue his suit there without leave of court. This was arguing the validity of the plea before it was filed, while the only question was the right of the defendant to enter such a plea at this time. A plea in abatement, not being to the merits, is considered a dilatory plea, and receives no favor from the court. It is a stringent and unbending rule of law, with regard to these pleas, that they must be pleaded in a preliminary stage of the suit, and must be put in within four days after the declaration has been filed. It cannot be put in after a general imparlance. A court has refused to permit the general issue to be withdrawn to let in a plea in abatement, where the defendant swore that the general issue was pleaded, without his knowledge, and by a person whom he never meant to retain as attorney. Anon., 3 Caines, 102. In that case, too, the plea was delivered in time. But in the present case, the time for pleading a dilatory plea is not only gone by, but the defendant has pleaded in bar, the cause is at issue, parties have taken their depositions, and prepared for trial at this, the second term. No instance can be found where a court has permitted a plea in bar to be withdrawn when the cause is down for trial, in order to permit a defendant to plead in abatement; nor is there any sufficient reason for the exercise of such a discretionary power, if the court possessed it.

The defendant desires to plead the pendency of another action in Lawrence county,

while the fact that such action is pending has been brought about by the defendant himself, since the time for pleading in abatement in this suit has passed, and a plea in bar pleaded. The action in Lawrence county has been discontinued by plaintiff, and costs paid, before this suit was brought. A discontinuance, though required to be by leave of court, is, in practice, ninety-nine cases out of a hundred, entered without such leave, which is presumed, unless the defendant interfere, and ask the court to withhold leave, on account of the discontinuance being oppressive. When process of court is by arrest of the person and demand of bail, a discontinuance followed by another arrest is oppressive, and ought not to be permitted. In the present case, it is a mere contest as to which party shall have his choice of a tribunal. The revival of the action in Lawrence county is the act of the defendant, to trip up the plaintiff in his suit in this court, and that, too, at the second term, after issue and preparation made for trial. No precedent can be found for the use, or rather the abuse, of the discretion of the court (if they have such a discretion), by granting leave to a defendant, under such circumstances, to withdraw his issue, and commence a game of sharps or special dilatory pleas, at this stage of the pleadings, and we are not willing to make the first.

YEATMAN (McDERMOTT v.). See Case No. 8,749.

Case No. 18,133.

In re YEATON.

[1 Lowell, 420.]¹

District Court, D. Massachusetts. Feb., 1870.

MORTGAGE FOR RENT—BANKRUPTCY OF LESSEE—EFFECT.

1. The lessor of a shop took a mortgage on the fixtures as security for the rent and the performance of the covenants of the lease. The lessee was to pay a certain rent monthly, and taxes. The lease provided that it should terminate if the lessee should be declared bankrupt, or any assignment of his property should be made for the benefit of creditors, unless within ten days from the date of the petition or assignment some sufficient person should become surety for the rent. The lessee became bankrupt November 1, 1869, an assignee was chosen November 23, and the keys were returned to the lessor January 1, 1870. *Held*, the mortgage was a valid security for the rent up to January 1.

2. It seems, that an assignee in bankruptcy will not become responsible for rent of a store merely by leaving some goods there mingled with other goods, which were mortgaged to the lessor.

Petition by an assignee in bankruptcy to redeem a mortgage given by the bankrupt. The bankrupt [R. F. Yeaton] took a lease from the respondent of a building on Washington street, in Boston, for five years from

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

the first of April, 1868, at a yearly rent of three thousand five hundred dollars, payable monthly, and the taxes; and simultaneously with the execution of the lease, gave the respondent a mortgage upon the fixtures and some chattels as security for the payment of the rent and the performance of the other covenants of the lease. Among other provisos of the lease was the following: "Or if the lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made, or attempted to be made, of his property for the benefit of creditors, and some sufficient person shall not, within ten days from the date of the petition or assignment, become surety for the payment of the rent due and to become due for the premises, then, and in either of said cases, this lease shall terminate by its own limitation, and said lessee, and those claiming under him, shall be considered, to all intents and purposes, as holding possession of the premises unlawfully, so as to entitle said lessor, or those having his estate therein, to any existing or future remedies under the laws of this commonwealth for recovering summary possession thereof." The parties agreed to the following facts: Rent was paid up to September 1, 1869. On the first day of November, 1869, the lessee petitioned to be adjudged a bankrupt; the assignee was chosen on the 23d of November, and the assignment bore date of that day. The taxes for 1869 were assessed before the bankruptcy, and were paid by the lessor, and have not been repaid; and the rent has not been paid since the first of September. On or about the first of January, 1870, the keys were given by the bankrupt to the lessor, and the latter has relet a part of the premises; but upon receiving the keys he notified the assignee in writing that he did not accept a surrender, but should hold the lessee and his estate liable for damages.

C. S. Lincoln, for assignee.
A. A. Ranney, for mortgagee.

LOWELL, District Judge. There is no evidence that the assignee has done any act looking to an acceptance of the premises, excepting that a part of the bankrupt's goods not included in the mortgage remained, and still remain, in the building. This circumstance alone does not prove an acceptance, especially when the keys were sent back to the lessor, which was an unequivocal act of renunciation. See *Wheeler v. Bramah*, 3 Camp. 340; *Hoyt v. Stoddard*, 2 Allen, 442. It cannot be contended, therefore, that the assignee is personally bound for the rent; and the question argued now has been, to what extent and for what sum is the mortgage a valid security in the hands of the lessor? He appears, to have acted upon the theory that the lessee remains liable on his covenants notwithstanding the bankruptcy. This was the law of England under the older

statutes; but it may well be doubted whether by our bankrupt act, which authorizes all demands arising out of contract to be liquidated and proved, the lessor will not be bound by the certificate. I understand that this question is likely to be litigated in some other cases, and as it is not essential to pass upon it here, I merely advert to it. Under this lease and mortgage it would seem that the lessor may hold the chattels to secure the payment of all rent and taxes which were due him when the assignee had elected not to take the term. That election ought to have been made in ten days after the assignment, but was not in fact made until January 1, some weeks later. I say ten days from the assignment, because that is the fair construction of the proviso, which, taken literally, might give only ten days from the petition. It must be assumed that the parties to the lease knew that a petition in bankruptcy may never be followed by an adjudication, or not within ten days, and that even after adjudication there is no one to act for the estate until the assignment, and as the purpose of the proviso is to give an election to continue the lease, and not to forfeit it by relation to a past time, the more liberal construction should be adopted. But even if the lessor might have treated the estate as ended on the 11th of November, he could waive his extreme rights for the benefit of the assignee.

Neither party having acted or made known his election until the first of January, the lessor ought to have his rent up to that day, for he may have expected the assignee to take the lease, as he undoubtedly would have done if he had found a purchaser, or in any way could have made it profitable for the creditors. Assignee to redeem by paying the rent to January 1, 1870, and the taxes for 1869.

YEATON (FRY v.). See Case No. 5,142.
YEATON (LYNN v.). See Case No. 8,642.
YEATON (SMEDLEY v.). See Case No. 12,965.
YEATON (UNITED STATES v.). See Case No. 16,779.
YELLOW HEAD (PORTSMOUTH SAV. BANK v.). See Case No. 11,296.

Case No. 18,134.

YELLOW JACKET SILVER MIN. CO. v. GAGE.

[1 Sawy. 494; 13 Int. Rev. Rec. 116.]

Circuit Court, D. Nevada. March 1, 1871.

INTERNAL REVENUE—MINING COMPANY—LIABILITY AS ASSAYER.

A mining company not assaying for others, but assaying its own ores, on its own account only, and not assaying any bullion or amalgam.

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

is required to pay a special tax as assayer, under subdivision forty-eight of section seventy-nine of the internal revenue act of June 30, 1864 [13 Stat. 223], as amended in 1866 [14 Stat. 98].

The defendant [Stephen T. Gage], as collector of internal revenue for the district of Nevada, collected of plaintiff a special tax levied upon it as an assayer. The tax was paid under protest, and this action brought to recover the tax so collected. Plaintiff claimed, that it was not an assayer, under the act of congress, and not liable to the tax.

T. H. Williams, for plaintiff.

Jonas Seely, U. S. Dist. Atty., for defendant.

Before SAWYER, Circuit Judge, and HILL-YER, District Judge.

SAWYER, Circuit Judge. The question to be determined in this case is, whether a mining corporation assaying its own ores, simply, and assaying for itself and not for others, and not assaying any bullion or amalgam, is required to pay a special tax as assayer under subdivision forty-eight of section seventy-nine of the act of June 30, 1864, as amended in 1866.

The provision of the statute is as follows: "Assayers, assaying gold and silver, or either, of a value not exceeding in one year two hundred and fifty thousand dollars, shall pay one hundred dollars, and two hundred dollars when the value exceeds two hundred and fifty thousand dollars and does not exceed five hundred thousand dollars, and five hundred dollars when the value exceeds five hundred thousand dollars. Any person or persons or corporation, whose business or occupation it is to separate gold and silver from other metals or mineral substances with which such gold or silver, or both, are alloyed, combined or united, or to ascertain or determine the quantity of gold or silver in any alloy or combination with other metals, shall be deemed an assayer." 14 Stat. 121.

It will be observed, that the statute, in the latter clause of this provision, defines the term "assayer," as used in the act, and it is necessary to ascertain what is intended to be embraced by this definition. The statute says nothing about separating gold and silver from other metals for fee or reward, or for parties other than the party engaged in assaying. There is, then, no such express limitation to assaying for others, or for fee or reward; and if it was intended to so limit the term, the limitation must be derived, as a necessary inference, from some other provision of the statute, or from the whole statute, reading the different parts in connection with each other. After a careful examination of the numerous sections of the act, we find nothing to afford a reasonable inference that such limitation was intended. It seems evident that congress designed to tax most of the ordinary occupations of the people, whether pursued

by the respective parties on their own account, or for others for fee, or reward. When the occupation taxed is intended to be limited to acts performed for others, or for a fee, or reward, congress has so expressed it in language not to be misunderstood. In some cases both are mentioned; thus, in the eighth subdivision, the definition of a livery stable keeper includes both those who "keep horses for hire," and who "keep, feed, or board horses for others." The ninth includes in the definition of brokers, those who negotiate sales and purchases for "themselves or others." Those who do business on their own account are clearly taxed in many cases. See subdivisions 12, 16, 17, 30, 31, 33, et seq. Under subdivision 30, auctioneers are taxed, and declared to be persons "whose business it is to offer property at public sale to the highest and best bidder." There can be no doubt that this would include those whose business is to regularly sell, in the mode indicated, their own, as well as others', property. Subdivision forty-three expressly limits the definition of lawyers to those "who for fee, or reward, shall prosecute," etc. So subdivisions forty-four and fifty, and others, contain similar limitations; and section eighty-one is adopted, apparently, for the express purpose of limiting the meaning of the definition given in other sections, so that parties embraced in the general language of such sections shall not be held liable to a tax for certain specified matters pertaining to their own business. Thus, it is manifest, that, when the tax is intended to be imposed only on those who perform the act indicated for others, for hire, fee, or reward, congress has had no difficulty in finding apt words to express that intention. And section seventy-six provides, "that in every case where more than one of the pursuits, employments or occupations hereinafter described shall be carried on in the same place by the same person at the same time, except as hereinafter provided, the tax shall be paid for each according to the rate prescribed," etc. So the fact that the plaintiff is subject to pay a miner's tax under subdivision forty-nine, does not militate against the idea that it can, also, be subject to a tax, as assayer, under subdivision forty-eight. Indeed, it seems to contemplate this very case, of a party engaged in both occupations as a part of his business.

These two provisions relating to assayers and miners are closely connected in the same section, and in consecutive subdivisions, so that congress, necessarily, had its attention called to both occupations at the same time, and, if it had intended to exclude from the tax, assaying for himself, when performed by the miner, as a branch of his business of mining, congress could scarcely have failed to express that intent in terms, when the two branches of the business were, necessarily, brought to its notice in such intimate relations. When the plaintiff as a part of its business is engaged in "assaying its own ore," it

is separating the "gold and silver from other metals or mineral substances with which such gold or silver is alloyed, combined or united," etc., and this is within the express terms of the statutory definition of an assayer.

We think the plaintiff is an assayer, within the meaning of the statute, and subject to the tax imposed therein, and that the defendant must have judgment; and it is so ordered.

YELLOW SUN (UNITED STATES v.). See Case No. 16,780.

Case No. 18,135.

YENAGA v. REDFIELD.

[The case reported under above title in 17 Leg. Int. 357, is the same as Case No. 18,197.]

YONTZER (FULLER v.). See Case No. 5-151.

Case No. 18,136.

YEOMANS v. GIRARD FIRE & MARINE INS. CO.

[5 Ins. Law J. 858.]¹

Circuit Court, D. New Jersey. Nov., 1876.

ARBITRATION CLAUSE—INSURANCE POLICY—RIGHT TO SUE.

1. The policy provided that, in case of differences arising touching any loss or damage, the matter may, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties to the amount of such loss or damage, "but shall not decide the liability of the company under this policy;" also, "it is furthermore hereby provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, until an award shall have been obtained fixing the amount of such claim in the manner herein above provided." *Held*, that whilst a mere collateral agreement to refer to arbitration all differences arising upon a policy is not binding, and does not preclude a suit without such reference, it is not unlawful for parties to agree that no action shall be sustainable at law or equity until arbitration shall have determined what amount is due, and that in such a case a reference and ascertainment of the amount due are conditions precedent to the right of bringing an action.

[Cited in brief in Schollenberger v. Phoenix Ins. Co., Case No. 12,476.]

2. No suit could be sustained against the objection of the company until after an award had been made, although neither party had, previous to the suit, requested arbitration.

NIXON, District Judge. This is a motion to strike out the last plea filed by the defendants in the above-stated case. In reply to the suggestion, so strongly urged by the counsel of the defendants, that the question involved was of too great importance to be summarily disposed of on a motion to strike out, and that the defendants ought to have

the benefit of solemn argument on demurrer, it is only necessary to observe that the remediless consequences which formerly followed the exercise of the power of striking out pleadings on motion, and which made courts so reluctant to act, do not now result from such action. Section 132 of the Practice Act of New Jersey (Rev. St. 624), which authorizes the court, or a judge, in vacation, on four days' notice, "to strike out any pleading, that is irregular or defective, or is so framed as to prejudice, embarrass, or delay a fair trial on action," contains the additional provision that "the order striking out such pleadings shall be entered on the record, if required by the party against whom the same is made, and error may be assigned thereon." This provision is made applicable to the courts of the United States, by the express terms of section 914 of the Revised Statutes of the United States, and it saves to the defendants all the rights which they would have on demurrer.

The counsel for the plaintiff maintains that the plea is bad—(1) for want of proper averments; (2) because it seeks to set up an illegal defense. The plea is *actio non*, etc., because the defendants say that in the policy of insurance it is stipulated and agreed that in case difference should arise touching any loss or damage, after proof thereon should have been received in due form, "the matter might, at the written request of either party, be submitted to impartial arbitrators, whose award in writing should be binding on the parties to the amount of such loss or damage;" and it was further, in and by said policy of insurance, expressly provided and mutually agreed "that no suit or action against the defendants, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until an award shall have been obtained from the said arbitrators, fixing the amount of such claim in the manner provided by the said condition hereinbefore set forth, and in said policy contained." And defendants say that differences did arise touching the loss or damage sustained by the said plaintiff, after proof of such loss had been received in due form by these defendants; and that the matter was not, at the written request of either party, submitted to impartial arbitrators, and no award has ever been obtained, fixing the amount of said plaintiff's claim, in the manner provided for in the said condition; and that said action was commenced by the said plaintiff against these defendants before an award was obtained, fixing the amount of said plaintiff's claim by the said arbitrators, in the manner provided in the said condition, etc., concluding a verification.

It will be observed that the plea sets up, in substance, two certain conditions in the policy, subject to which the policy was issued to the plaintiff. One of these is the following paragraph in the ninth condition: "In case differences shall arise touching any loss or

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damage, after proof thereon has been received in due form, the matter may, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties to the amount of such loss or damage, but shall not decide the liability of the company under this policy." The other is on the thirteenth condition: "It is furthermore hereby provided and mutually agreed that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, until an award shall have been obtained fixing the amount of such claim, in the manner hereinabove provided." There is no question but that these conditions are a part of the contract between the parties. The controversy turns upon their interpretation, and whether they are enforceable.

The counsel for the plaintiff insists that the adjustment of differences by arbitration is only to be observed upon the written request of one party or the other; and, when no such request is made, it is presumed to have been waived; and, further, that all agreements between parties to refer the settlement of their disputes to arbitrators are void, for the reason that persons are not permitted to contract to oust the courts of their ordinary jurisdiction.

The counsel for the defendants, on the other hand, claim that their method of settlement is compulsory upon the respective parties as a preliminary step, and that no suit is sustainable by either party against the other until after an award has been made. It is conceded that the plea is bad if the effect of these clauses in the policy on which it is founded, is to prevent the party suffering loss from going into the courts for redress. They are so jealous of their jurisdiction that they do not allow parties to oust it by agreement. Although there was a long struggle against the doctrine in the courts of Westminster Hall, it has now become so well established that no attempt is made there, or in the courts of this country, to set up a contrary doctrine. *Huger, Ins.* 351; *Ang. Ins.* § 354; *Fland. Ins.* 632; *Thompson v. Charnock*, 8 Term R. 139; *Mitchell v. Harris*, 2 Ves. Jr. 136; *Scott v. Avery*, 20 Eng. Law & Eq. 327; s. c. on appeal, 36 Eng. Law & Eq. 1; *Roper v. Lendon*, 128 E. C. L. 825; *Hagert v. Mun.*, 40 R. 515; *Snodgrass v. Gavit*, 28 Pa. St. 224. But in my judgment such is not the effect of these clauses. The differences arising between the parties to the contract touching only the amount of loss or damage is to be referred, and not the liability of the company on the policy; and the agreement is that no suit shall be instituted until the amount has been fixed by the judgment of arbitrators mutually chosen. There is no restriction after that preliminary step has been taken. It is in the nature of a condition precedent, and there is a large class of cases which determine that, where the contract is so framed as to make

the reference of differences a condition precedent to the right of bringing a suit, the declaration must allege a reference, or give excuse for the want of it. *Smith v. Railway Co.*, 36 N. H. 458; *Worsley v. Wood*, 6 Term R. 710; *Milner v. Field*, 1 Eng. Law & Eq. 531; *Grafton v. Railway Co.*, 22 Eng. Law & Eq. 557; *Davies v. Mayor, etc.*, 20 Eng. Law & Eq. 529; *Adams v. Willoughby*, 6 Johns. 67; *U. S. v. Robeson*, 9 Pet. [34 U. S.] 319; *Scott v. Avery*, 36 Eng. Law & Eq. 1. This last case was an appeal to the house of lords from the decision of the court of exchequer chamber, and the matter was examined and discussed with great learning and care. Mr. Justice Coleridge, who had delivered the opinion of the court of exchequer chamber reversing the court of exchequer, in giving his reasons to the lords for sustaining the last decision, said: "If two parties enter into a contract, for the breach of which, in any particular, an action lies, they cannot make it a binding term that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rest on a satisfactory principle or not may well be questioned, but it has been so long settled that it cannot be disturbed. The courts will not enforce or sanction an agreement which deprives a subject of that recourse to their jurisdiction which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting, as they please, the cause of action, which is to become the subject-matter of decision by the courts. Covenantee parties may agree that, in case of an illegal breach, the damages to be recovered shall be a sum fixed or a sum to be ascertained by A. B., or by arbitrators to be chosen in such a manner, and, until this be done, or the nonfeasance be satisfactorily accounted for, that no action shall be maintainable for the breach."

This position had not been questioned in the argument before the house, nor was it, I think, in the court below.

To the same effect was the opinion of Lord Chancellor Cranforth. The only material plea, he said, "was the fifth, setting forth one of the rules of the association, which was, that if any difference should arise among the members, the member so dissatisfied should select an arbitrator, and, if the committee were not satisfied with the person appointed, they should select another arbitrator, and these two select a third, who were to determine the matters in dispute and the sum to be awarded, and that no action should be brought until such arbitration had taken place. The court of exchequer decided that the plea was bad, and no answer to the action. That decision was reversed by the court of exchequer chamber, and the latter judgment was never brought before your lordships' house. It appears to me merely a matter as to the construction to be put upon

the policy itself, for there was no doubt that persons could not by contract oust the court of its ordinary jurisdiction. That point has been decided in many cases, but there was no principle of law which prevented parties from entering into any contract that no right of action should accrue until after a reference had been made to an arbitrator. If I covenant with A. not to do a particular act, and it is agreed between us that any question which might arise should be decided by an arbitrator, without bringing an action, then a plea to that effect would be no bar to an action; but if we agreed that J. S. was to award the amount of damages to be recoverable at law, then, if such arbitration did not take place, no action could be brought."

Adams v. Willoughby, supra, was a suit brought inter alia for unliquidated demands and accounts, and there was a general demurrer to the declaration. It appears that there was a contract between the parties that all unliquidated demands and accounts should be referred to three arbitrators, to be liquidated and ascertained, and the defendant was to pay such sum as they should adjudge to be due. The court sustained the declaration so far as it relates to one sum of \$102, which the plaintiff alleged was due to him in a supplement made with the defendant; but in regard to the claim for the unliquidated accounts it said that, "as no reference had been made to arbitrators to liquidate and ascertain the amount due, nor any effort on the part of the plaintiff to procure it,—for none is shown or averred,—the plaintiff is not entitled to his action for any such demand."

In U. S. v. Robeson, supra, the supreme court sanctioned the same principle. Mr. Justice McLean, in delivering the opinion of the court, said: "Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that, by time or accident, he is unable to do so; and, as this was not done by the defendant in the district court, no evidence to prove the service other than the certificates should have been admitted by the court."

I think it clear from these cases that, whilst a mere collateral agreement to refer to arbitration all differences arising upon a policy of insurance is not binding and does not preclude a suit without such reference, it is not unlawful for parties to agree that no action shall be sustainable either at law

or equity, until arbitration shall have determined what amount is due, and that, in such a case, a reference and ascertainment of the amount are conditions precedent to the right of bringing an action.

The motion to strike out must therefore be refused.

YEOMANS (MERRILL v.). See Case No. 9-472.

Case No. 18,137.

YERRINGTON v. PUTNAM.

[2 Ban. & A. 601.]¹

Circuit Court, D. New Jersey. April, 1877.

BILL OF REVIEW—RULE TO SHOW CAUSE.

Where a bill of review is filed to set aside a decree of the court, made in a suit between the parties, the court will grant a rule to show cause why the former decree should not be reversed, and the injunction granted should not be suspended, only: (1) When the original decree shows upon its face that it is contrary to law; or (2) upon the allegation and prima facie proof of the existence of material facts, which, if known, would have hindered the decree, and which the complainant in the bill of review did not know at the former trial, and could not have discovered by the exercise of reasonable diligence.

[Bill of review by Henry A. Yerrington against Henry W. Putnam.]

T. C. Nye, for complainant.

P. E. Havens, for defendant.

NIXON, District Judge. The bill is filed in this case to set aside a decree of this court, heretofore made in a suit between the parties. The defendant being in court, an application is now made for a rule to show cause why the former decree should not be reversed, and the injunction granted should not be suspended until the further order of the court.

There are two grounds only on which the court will grant a rule in such cases: (1) When the original decree shows upon its face that it is contrary to law; (2) upon the allegation and prima facie proof of the existence of material facts which, if known, would have hindered the decree, and which the complainant in the bill of review did not know at the former trial, and could not have discovered by the exercise of reasonable diligence.

I have examined the bill, and do not find any reason therein alleged, which would authorize the court to grant the rule asked for.

YERRINGTON (PUTNAM v.). See Case No. 11,486.

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

Case No. 18,138.

In re YORK et al.

[3 N. B. R. 661 (Quarto, 163).] ¹

District Court, D. Louisiana. Jan. 11, 1870.

MORTGAGE FOR ADVANCES—SUPPLIES FOR PLANTATION—DATE OF MORTGAGE.

1. Where a valid mortgage of a plantation was made in Louisiana to secure advances of cash and supplies, to be made from time to time, for the purpose of working it, not to exceed in amount twenty-five thousand dollars, to be reimbursed out of its products; and advances were made to exceed fifty thousand dollars, and reimbursements to an amount that, however, left a balance due exceeding twenty-five thousand dollars, *held*, the mortgage is good as security to its full amount, on any balance remaining on advances and reimbursements under it, and is not extinguished by the reimbursement of the first twenty-five thousand dollars.

2. A mortgage given to secure the payment of four promissory notes, made to raise means to work a plantation, is valid, and, upon the negotiation of the notes, relates back to the date of execution.

DURELL, District Judge. In the month of February, 1869, two plantations, surrendered by the bankrupts, and designated as "White Hall" and "Home Place," were sold free of incumbrances, under the order of this court. In March, 1869, a rule was taken by the assignee calling upon the creditors of the bankrupts to show cause why said sales should not be confirmed, and the proceeds thereof distributed in accordance with the priority and rank of the mortgages, privileges, and liens existing at the date of the surrender. Upon the return of this rule, W. A. Ober, the purchaser at the sales, demanded a confirmation of the same; and the commercial firm of Ober, Atwater & Co. asserted themselves to be creditors of the bankrupts, secured by mortgage, first, in priority and rank, upon the property sold. The claims of Ober, Atwater & Co. were disputed by others of the creditors of the bankrupts, and the whole matter was referred to a commissioner, with instructions to inquire into the regularity of the sales, which certain creditors also impugned, and to determine the order and rank of the mortgages resting upon the respective plantations. In June last the commissioner made a voluminous report upon the law and facts of the case, confirming the sales, and sustaining the validity and priority in rank of the mortgages held by Ober, Atwater & Co. To the confirmation of this report exceptions were taken, and, subsequently, fully argued by counsel representing all parties in interest. The sales having been adjudged to be valid at a previous day of this term, it only remains for the court to determine the relative rank of the respective mortgages.

The mortgages on the respective plantations being distinct, will be separately considered.

First. As to the mortgages upon "White Hall." On the 17th of January, 1866, York

& Hoover made an authentic act of mortgage, in which it is recited "that being in want of cash and supplies to carry on the cultivation of that certain plantation, known as 'White Hall,' and also the 'Home Place,' belonging to them, they have applied to Ober, Atwater & Co. for such advances of cash and supplies, who have agreed to advance the same, at such times, and in such manner as the same may be needed, to an amount not to exceed twenty-five thousand dollars, on the terms and conditions hereafter expressed." The conditions on the part of York & Hoover to be performed, were, to cultivate the plantations with diligence; to apply the advances to the use of the plantations; and upon the crops being gathered, to consign the same to the mortgagees for sale, who, out of the proceeds thereof, were to repay to themselves "all such advances as they shall at such time have made," together with commissions, costs of sale, interest, etc. Ober, Atwater & Co. agreed to make the advances, and, to represent the same, received from York & Hoover a negotiable note in the sum of twenty-five thousand dollars, payable on the 1st day of January, 1867. After these recitals, the act proceeds to declare "that to secure payment of all said advances which the said Ober, Atwater & Co. may make as aforesaid, and such sums of money as may be due to them as aforesaid, under this contract, the said York & Hoover specially mortgage the 'White Hall' plantation." The act finally declares that all accounts accruing under it shall be due and mature on the 1st January, 1867. This mortgage was executed and inscribed before the execution and inscription of the mortgage given to Wright & Allen, under which last mortgage the opposing creditors claim.

The only question to be determined, then, is, whether Ober, Atwater & Co. have, within the terms of this mortgage, produced a valid, operative, and existing obligation. The testimony shows that during the year 1866, advances were made to the two plantations to an amount exceeding fifty-three thousand dollars; that during the year, payments were made exceeding twenty-five thousand dollars; and that in January, 1867, a balance existed, including commissions, of over twenty-seven thousand dollars. The opponents contend that the contract of Ober, Atwater & Co. was fulfilled when advances had been made to the amount of twenty-five thousand dollars; and that this mortgage was extinguished when they had received a like sum from the crops of the plantation. Ober, Atwater & Co. maintain, on the contrary, that their mortgage secured whatever might remain in January, 1867, as a balance on the account of advances made to them. The language of the act of mortgage, the character of the instrument, the conduct of the parties to the contract, and the judicial decisions, support this conclusion of the mortgagees. The mortgage was executed to secure advances to be made during the year; the settlement of accounts

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was postponed until the expiration of the year; and whatever advances were made the mortgage was designed to stand as a security for to the extent of twenty-five thousand dollars.

The case of *Lawrence v. Tucker*, 23 How. [64 U. S.] 15, is strictly analogous to the one now before the court. In that case a note was given for the sum of five thousand five hundred dollars, contemporaneous with the mortgage as a debit; but in truth, as a collateral security for advances made. The mortgage was given to secure such advances of money as had been, or might be made, within two years, to the mortgagors, not to exceed six thousand dollars in addition to the note, making a sum total of eleven thousand five hundred dollars. It appears from the report, that within the two years, from fifty thousand to one hundred thousand dollars were advanced; and that, at the expiration of the term, nearly ten thousand dollars were due on said advances from the mortgagors to the mortgagee. The objections having been made in that case, as in the one now before the court, that the mortgage was not given to secure a balance on the settlement of accounts to the amount stipulated in the mortgage, but only to secure first advances to the amount of the note, and six thousand dollars—to wit, eleven thousand five hundred dollars; and that the payment of that sum by the mortgagors to the mortgagee, in the course of their transactions during the term of the two years, was a ratification of the mortgage; the supreme court said: "Our object has been to show that the parties to the original transaction understood it alike, and acted upon it accordingly; that there never was a difference of opinion between them as to the character of the mortgage and its purposes; and that it was intended to be a security for, and a lien upon, the property mortgaged, for future advances to the extent of the sum provided for in it. * * * We consider it to be a mortgage for future advances; that they were subsequently made in conformity with its provisions; and that the proofs that they were so, were rightfully received by the court below to substantiate them."

In the case now before the court, similar proofs were submitted. The accounts current, the act of liquidation, the testimony of the parties to these accounts, all show an intent corresponding to that which the mortgage itself suggests.

The case of *Lawrence v. Tucker* [supra], in the supreme court of the United States, is supported by other decisions of that court, cited in the opinion delivered in the case, and also by the decision of the supreme court of Louisiana in *Pickersgill v. Brown*, 7 La. Ann. 298, decided under the regime of the Code of the state. Therein it was determined that a mortgage for advances to be made from time to time, during a definite period, for a specific amount, is a security for the eventual balance in account. That it is not affected by the

fluctuations in the account at different periods in the time limited; and that the inscribed mortgage, declaring the nature of the transactions, the time within which they are to accrue, and the limit to which the mortgage debit may reach, afford a sufficient notice to all parties, so as to place them on their guard. These doctrines have been maintained in the French courts under the regime of the Code Napoleon, many of whose decisions are cited in the very able and learned report of the commissioner; and they are fully recognized in the highest courts of other states of the Union. Vide 5 Metc. (Mass.) 268.

Second. As to the mortgages upon the "Home Place." The mortgages upon the "Home Place" plantation bear date of the same day—to wit, January 20, 1866. One was made in favor of Alexander Allen, acknowledging a debit for supplies furnished the plantation; and to put said debit in a negotiable form, four notes were drawn in the sum of five thousand dollars each; payable to the makers, York & Hoover, indorsed in blank, bearing interest from date, and maturing in the following fall and winter. These notes are recited in the mortgage, and, thus secured, are payable to any future holder thereof. Another or second mortgage, bearing even date with the first, but inscribed one day later, was given to Messrs. Wright & Allen, factors and merchants, who had become liable for the mortgagors in large sums, as securities, as indorsers, and otherwise; which sums the mortgagors wished to discharge. For that purpose they made numerous notes, recited in the mortgage and negotiable in form, which were put into the hands of Wright & Allen, to be used solely in the discharge of their said liabilities, incurred by indorsements or otherwise. Wright & Allen, the factors and merchants of York & Hoover, had been consulted by them, in reference to their mutual business relations; and it was by the advice of Wright & Allen that York & Hoover made the mortgage first above described, and first inscribed. It was made to enable York & Hoover to raise money to work their plantations, "White Hall" and "Home Place." The notes were made to be negotiated in the market, and the mortgage was made to give additional credit to the notes. They were all negotiated for value before maturity, two of them in March, and two in August of 1866.

The opposing creditors contend that these notes are not protected by the mortgage. That at the date of the inscription there had been no negotiation of the notes, and that, therefore, there was no debt due; and that none was created until several months subsequent thereto. But the mortgagors' purpose was to raise money by a loan, and, preparatory thereto, these notes were made, a mortgage declaring the existence of a debt executed and inscribed, and both mortgage and notes placed in the hands of an agent for negotiation. It may be true that the mortgage and the notes were inchoate secu-

rities, framed to accomplish a particular object, and that a negotiation by the mortgagor or his agent was necessary to their complete validity. It may be that, until then, there was no creditor, no debtor, no right of action, nor perfect obligation; but the agent, from the date of the inscription, was in possession of all the means to the making of a perfect contract, by the delivery of the securities to a bona fide holder. These securities, by such a delivery, became operative from their date, and are binding, *ab initio*, upon the mortgagor. The Civil Code of Louisiana (article 3259) provides "that a mortgage may be given for an obligation which has not yet risen into existence;" and cites as an illustration, "as when a man grants a mortgage by way of security for indorsements which another promises to make for him." *Id.* A more apt illustration, and one that arises more frequently in practice is, "as where a man makes notes negotiable by delivery, and secures them by an inscribed mortgage, and places them in the hands of a broker for sale for his account." If the debtor may grant a mortgage to secure notes that have not been negotiated, but which he contemplates negotiating, with a friend's indorsement, why may he not, in the same manner, provide for the credit and payment of his own notes, prepared for negotiation, when the principle is admitted that a mortgage can be given for an obligation which is only proposed, or which has not risen into existence? The intrinsic validity of the mortgage under consideration is admitted. Article 3260, of the Code, declares the operative force of such a mortgage. "The right of mortgage shall only be realized in so far as the promise shall be carried into effect, by the person making the promise to indorse, or, as in the case supposed, by the actual and bona fide transfer of the notes. But the fulfillment of the promise to indorse," continues the article quoted, or, as in the case supposed, the negotiation of the notes of the mortgagors, "shall impart to the mortgage an effect relating back to the date of the mortgage."

The French authorities support the conclusion that the mortgage takes effect from the date of the inscription, and not from the date of the realization of the loan. The French judicial decisions show a clearer and deeper knowledge of the necessities of a commercial age and people than do the theories of the late illustrious president of the court of cassation, and of others of their great commentators, which they overrule.

In *Telemetz v. Bonifay*, Sir. & Vill. (1842) pt. 2, p. 520, the court of cassation say: "L'hypothèque stipulée pour sûreté d'un crédit ouvert prend rang du jour de son inscription pour toutes les sommes fournies en vertu de ce crédit, et même pour celles qui n'ont été fournies que postérieurement aux inscriptions prises par d'autres créan-

ciers. Il y a, dès le jour même du contrat, obligation réciproque: obligation de la part de celui qui ouvre le crédit, de faire les avances promises; de la part du crédité, de restituer les sommes qu'il prendra en vertu du crédit. Si cette obligation est conditionnelle, elle n'en est pas moins une obligation à laquelle peut se rattacher une hypothèque. La condition accomplie a un effet rétroactif au jour auquel l'engagement a été contracté, et cette hypothèque prise en vertu du crédit ouvert prend rang du jour de son inscription, et non du jour de la réalisation du crédit, et prime en conséquence les hypothèques inscrites intermédiairement entre le jour du contrat portant ouverture du crédit et hypothèque, et celui où le crédit a pu se réaliser. Il n'y a aucun préjudice des droits des tiers, puisque par l'inscription les créanciers sont suffisamment avertis que si la condition s'accomplit, c'est-à-dire si le crédit se réalise, l'hypothèque prendra rang du jour de son inscription." The same doctrine is again declared by the same court in the same volume (pt. 2, p. 541) in *Hutte v. Seignan*. See, also, *Hilderbrand v. Courcelles*, Sir. & Vill. (1848) pt. 2, p. 729, and note, in which it is stated that this decision is in accordance with uniform jurisprudence, and the opinion of the majority of the authors, though the contrary had been maintained by Merlin, Toullier, and Troplong. The supreme court of Louisiana also shows a decided preference for this doctrine. 7 La. Ann. 297; 16 La. 370; 18 La. Ann. 235. And a corresponding disposition is exhibited in the American chancery reports. 7 Conn. 337; 24 Conn. 290; 4 Johns. Ch. 65, 74; 2 Cow. 246. That the mortgage for the four notes, the mortgage first inscribed, is not a nullity, but a valid security for the notes in the hands of holders for value, has been shown. It is to be inferred that *Wright & Allen*, the persons named as mortgagees in the mortgage of the same date, bearing upon the same property, but last inscribed, had notice of the mortgage for the four notes and consented to its prior inscription in order to give to it the priority of lien thence arising.

There is no evidence showing at what time the holders of the notes described in the mortgage last inscribed became parties in interest; and we find no evidence that any party attempted to restrain the negotiation of the four notes secured by the first. During the year 1867, *Ober, Atwater & Co.* continued to furnish supplies and to make advances to *York & Hoover*. Upon the accounts as stated, it appears that there is due to them more than the amount of the notes embraced in the mortgage. The payments, from whatever source derived, do not cover the balances due. The sum bid for the "Home Place" was nineteen thousand eight hundred dollars, and for "White Hall" the proceeds amount to twenty-two thousand dollars. The expenses and costs of the sales must be deducted from these

funds, together with such expenses of the estate as are commonly chargeable against it.

Decretal order: This cause came on to be heard on the pleadings and proofs and arguments of counsel for the various creditors, and thereupon it is declared by the court—First, that the commercial firm of Ober, Atwater & Co. have established their right to the mortgages and mortgage debts specified in the two mortgages filed by them, one on the "White Hall" plantation, dated 17th of January, 1866, and inscribed the 9th of February, 1866, for the security of advances for twenty-five thousand dollars, to be due 1st of January, 1867, and which sum was advanced. And one upon the "Home Place" plantation, executed the 20th of January, 1866, and inscribed the 16th of February, 1866, to secure the payment of four notes therein described. And that these mortgages have a prior lien upon the proceeds of the sales of the said plantations, and must be paid in preference to any of the mortgages which have been set up in the oppositions of the creditors of York & Hoover. Second. It is further ordered, decreed, and adjudged, that the moneys arising from the sales of the said "White Hall" and "Home Place" plantations be paid to the said Ober, Atwater & Co. upon their several mortgages as aforesaid, to the extent of the moneys applicable, and that each mortgage be credited with the money derived from the property declared in it. Third. The assignee is directed to charge the said funds in his hands with the costs and expenses of the sale, and orders relative thereto, and their proportion of the general expenses of the estate. Fourth. That the costs of the litigation upon the regularity of the sale, and upon the oppositions to the rule by the assignee, be paid by the opposing creditors.

[For hearing on a petition to review the above proceedings, see Case No. 18,139. See, also, *Id.* 6,441.]

Case No. 18,139.

YORK'S CASE.

[1 Abb. U. S. 503; ¹ 4 N. B. R. 479 (Quarto, 156); 10 Am. Law Reg. (N. S.) 36.]

Circuit Court, D. Louisiana. May, 1870.

BANKRUPTCY—APPEALS—SUPERVISORY POWERS OF CIRCUIT COURT.

1. In computing the time within which an appeal in bankruptcy must be taken, Sunday is to be counted, except that when the last day would fall on Sunday, that Sunday is to be excluded.

[Cited in *Shefer v. Magone*, 47 Fed. 873.]

2. The decision of a district court, sitting in bankruptcy, upon an application to confirm a sale made of a bankrupt's estate, is not a matter within the general supervisory jurisdiction

conferred by section 2 of the bankrupt law of 1867 (14 Stat. 518) upon the circuit courts.

3. A proceeding in bankruptcy, from the filing of the petition to the distribution of the bankrupt's estate and his discharge, is a single statutory proceeding.

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

4. When it occurs, pending this proceeding, that the assignee or creditor is driven to file a bill in equity or bring an action at law, the circuit court has no supervisory jurisdiction of the proceedings had therein, nor has it when the claim of a supposed creditor has been rejected in whole or in part,—nor where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal.

5. Other questions, however, arising in the district court in the progress of a case in bankruptcy, whether of legal or equitable cognizance, fall within the supervisory jurisdiction of the court, and may, upon bill, petition, or other proper process of any party aggrieved, be heard and determined in the circuit court as a court of equity.

² [This was a petition to review certain proceedings in bankruptcy in the district court of Louisiana. Ober, Atwater & Co. claimed first mortgages on two plantations surrendered by the bankrupts, York & Hoover. They obtained an order for the sale of them, and purchased both at the assignee's sale. They applied for a rule to confirm the sale, and asked that the proceeds of sale be applied to the extinguishment of their mortgages. The Citizens' Bank and other creditors answered the rule, and alleged that the mortgage of Ober, Atwater & Co. on one of the plantations had been extinguished, and on the other it was only second in rank. They further alleged that Ober, Atwater & Co. had influenced a competitor not to bid for one of the plantations, and had also made overtures to the solicitor of the assignee, calculated to give them an unjust preference over other creditors with respect to both. The district court made the rule absolute (Case No. 18,138), and the Citizens' Bank appealed, and also joined the other creditors in a petition of review to the circuit court.

[*Hyams & Jones and Randolph, Singleton & Browne*, for appellants, cited *Judd v. Fulton*, 10 Barb. 117; *Snyder v. Warren*, 2 Cow. 518; 6 Cow. 605; *Broom, Leg. Max.* 22; *Wathen v. Beaumont*, 11 East, 271; *Story v. Elliott*, 8 Cow. 28; *McGill v. Bank of U. S.*, 12 Wheat. [25 U. S.] 511; 2 Hill, 375; *Long v. Hughes*, 1 Duv. 387; *Fowler v. Smith*, 1 Rob. (La.) 448; *Johns v. Boyle*, 14 La. 268; *Gorham v. De Armas*, 7 Mart. (La.) 359; *State v. Boyle*, 9 La. Ann. 371.

[*R. & H. Marr*, for appellees.] ²

Before BRADLEY, Circuit Justice, and WOODS, Circuit Judge.

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

² [From 10 Am. Law Reg. (N. S.) 36.]

WOODS, Circuit Judge. York & Hoover having been declared bankrupts by the adjudication of the district court, E. E. Norton, their assignee, filed a petition in said district court sitting as a court of bankruptcy, praying for an order to sell two plantations, the property of bankrupts. An order of sale was made, and under it a sale of the plantations, called respectively "White Hall" and "Home," was made on the sixteenth day of February, 1869, and Ober, one of the creditors, became the purchaser. On a later day in February, 1869, C. H. Slocomb, one of the creditors of York & Hoover, filed his petition in the district court, setting forth the fact of the sale to Ober, that no deed had, at the time of filing his petition, been made by Norton, the assignee, to Ober, charging that the sale was fraudulent, and therefore illegal and void, and praying, on behalf of himself and other creditors of York & Hoover, that Ober, Norton, the assignee, and others show cause, on Saturday, March 6, 1869, at eleven o'clock a. m., why the sale should not be set aside; and in the mean time that they, and each of them, might be enjoined from taking any steps towards perfecting said sale, or conveying said plantations to the purchaser.

Pursuant to the prayer of this petition, an order was made, and the parties named were cited to show cause why the prayer of the petition should not be granted. The minutes of the district court of the date of March 19, 1869, shows the following entry: "No. 603. Matter of York & Hoover. On motion of H. D. Stone, attorney of E. E. Norton, and upon showing to the court that a sale was made of two plantations surrendered herein,—namely, the 'Home' and 'White Hall' plantations, situated in the parish of Concordia (here follows a description of the two plantations), on the 16th of February, 1869, and upon further showing to the court that the following parties appear to have had mortgages, privileges, claims, and liens upon said plantations (here follow the names of some fifty creditors), it is ordered that the parties above named, and the bankrupts, and all persons interested herein, show cause on the 1st day of May, 1869, at 11 o'clock a. m., why said sale should not be confirmed; and at the same time the priority and rank of said mortgages, privileges, liens, and claims be fixed and adjudicated; that, as so adjudicated, the same be directed to be paid; that notice thereof be given by publication in the New Orleans Republican for three days, the last publication to be at least ten days before such hearing."

After this order to show cause was made by the court, precisely when we are unable to ascertain from the papers submitted to us, the Citizens' Bank of Louisiana and a large number of other creditors of York & Hoover filed an exception, in which they set out various grounds why the sale should not be confirmed, and conclude by praying that the

application of the assignee for the confirmation of the sale be refused and rejected, and that said sale be set aside and annulled.

On the day fixed for the hearing of this rule, the matter of the rule and exceptions thereto were referred by the district court sitting in bankruptcy to a commissioner, with instructions to ascertain and report upon the validity of the sale, and the priority of the claims; and subsequently the commissioner reported that there was no fraud or collusion in making the sale, and that certain mortgages held by Ober, Atwater & Co. on said "White Hall" and "Home" plantations were the first and best liens on those places respectively, and that the amount due on them was more than the proceeds of the sale. Thereupon it was ordered by the court, on motion, that the report of the commissioner, if not opposed within three days, be approved and homologated.

Exceptions were filed to the report of commissioner, and afterwards,—to wit, on January 11, 1870,—the district court confirmed the sale, but reserved the question of priority of mortgages and liens for further argument. On March 31, 1870, the district court declared that the mortgages of Ober, Atwater & Co. were the first lien on said plantations, and on the proceeds of the sale thereof, and directed them to be paid in preference to any of the other mortgages set up in the oppositions of the creditors of York & Hoover, and directed the money arising from the sale to be paid to Ober, Atwater & Co. On April 5, 1870, an application was made for a rehearing on the matters embraced in this decision of the court, and on April 27 a rehearing was refused.

The Citizens' Bank and other creditors of York & Hoover, on May 9 took an appeal from the order of the court of March 31. which in effect dates from the refusal for rehearing on April 27. And on the same May 9 said Citizens' Bank and other creditors filed in this court a petition invoking its supervisory jurisdiction, under section 2 of the bankrupt act, and praying that the orders and decrees of the district court above recited be set aside, the sales of said plantations declared null and void, and the same ordered to be resold, and that their mortgages be decreed to have priority.

The case is heard upon two questions: (1) Whether the appeal was taken within the time limited by law; and (2) whether the case presented by the petitions of the Citizens' Bank and others, was a case for the supervisory jurisdiction of the court, and whether this court has jurisdiction thereof.

I. As intimated during the argument, we are of opinion that if this were a proper case for appeal, the appeal was taken too late. If Sundays are counted, the delay of ten days allowed for the appeal had expired before the appeal was taken. Unless Sundays are expressly excepted in the statute, they are to be counted. The language

of section 8 of the bankrupt act is: "No appeal shall be allowed from the district to the circuit court, unless it is claimed and notice thereof given to the clerk * * * within ten days after the entry of the decree or decision appealed from." The rule for computing the number of days within which an appeal is allowed is expressly declared by section 48 of the bankrupt act as follows: "In all cases in which any particular number of days is prescribed by this act * * * for the doing of any act, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first and inclusive of the last day, unless the last day shall fall on Sunday, in which case the time shall be reckoned exclusive of that day also." The fair, and, as it seems to us, unavoidable inference, is that when Sunday is not the last day, it is not to be excluded. Applying this rule, excluding April 27, the day on which the decree was signed, the time for appeal in this case expired with May 7. The appeal not having been taken till the ninth, it was two days too late.

II. The other question presented is, whether this is a proper case for the supervisory jurisdiction of this court. By section 2 of the bankrupt act, it is provided that "the circuit courts in the districts where proceedings in bankruptcy are pending shall have a general superintendence and jurisdiction of all cases and questions arising under this act, and except where special provision is otherwise made may, upon bill, petition, or other proper process of any party aggrieved, hear and determine the case as a court of equity." "The only construction which gives due effect to all parts of this section is that which, on the one hand, excludes from the category of general superintendence and jurisdiction of the circuit court, the appellate jurisdiction defined by section 8, and on the other brings within that category all decisions of the district court or district judge at chambers which cannot be reviewed upon appeal or writ of error under the provisions of that section." Chief Justice Chase, in *Re Alexander* [Case No. 160]. By section 8 of the act it is provided that appeals may be taken from the district to the circuit court in all cases in equity, and writs of error may be allowed to the circuit court from the district court in cases at law under the jurisdiction created by the bankrupt act when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim may appeal. Now, according to the decision of Chief Justice Chase, just quoted, unless this case falls under one of the classes provided for in this section, it is a proper case for the supervisory jurisdiction of the court.

1. It is not the case of an assignee who is dissatisfied with the allowance of a claim.

2. It is not the case of a supposed creditor, whose claim has been wholly or in part re-

jected. The claims of these petitioning creditors, so far as the record shows, have all been allowed in full. It is true the court has decided that their claims are not entitled to priority, and that other creditors are; but this is not a rejection of their claims. A creditor's claim is the debt due from the bankrupt to him, and the question of priority of payment is one totally distinct from the question of the allowance or rejection of the claim or debt. We think this is clear from section 1 of the act, which extends the jurisdiction of the court to all cases and controversies between the bankrupt and any creditor who shall claim any debt or demand under the bankruptcy; to the collection of the assets; to the ascertainment and liquidation of liens, &c.; to the adjustment of the various priorities and conflicting interests of all parties.

Here is an evident distinction made between the claim of a debt or demand against the bankrupt, and priority as to other creditors. A claim of priority is not a claim asserted against the bankrupt, but a right asserted against other creditors.

3. The matter decided by the district court on March 31 is not a case at law in which a writ of error would lie. This is clear, and is not disputed. It remains, then, to consider whether it was a case in equity in which an appeal might be taken. The phrase "case in equity" in section 8, in our view means a suit in equity. It would seem hardly necessary to cite authority to show what a case or suit in equity is. Blackstone says: "The first commencement of a suit in chancery is by preferring a bill to the lord chancellor in the style of a petition; 'humbly complaining, sheweth to your lordship, your orator,' &c. This is in the nature of a declaration at common law, or a libel and allegation in the spiritual courts, setting forth the circumstances of the case at length; 'and for that your orator is wholly without remedy at the common law,' relief is therefore prayed at the chancellor's hands, and also process of subpoena against the defendant, to compel him to answer under oath all the matters charged in the bill. The bill must call all the necessary parties, however remotely concerned in interest, before the court, and must be signed by counsel."

The seventh equity rule, as prescribed by the supreme court of the United States, provides that the process of subpoena shall constitute the proper mesne process in all suits in equity, to require the defendant to appear and answer the exigency of the bill. Rule 12 provides that whenever a bill is filed the clerk shall issue process of subpoena thereon, which shall be returnable into the clerk's office the next rule day, or the next rule day but one, at the election of the plaintiff, occurring after twenty days from the issuing thereof.

It is further provided in the equity rules that the appearance day shall be the rule day

to which the subpoena is made returnable, provided the defendant has been served with process twenty days before that day; otherwise his appearance day shall be the next rule day succeeding the rule day when the process is returnable. And it is made the duty of defendant to file his plea, answer, or demurrer to the bill on the rule day next succeeding his appearance.

From what has preceded, it will be seen what is a case in equity, how it is instituted, and how the parties are brought into court, and when they are required to answer. If we decide that the case before the court is not one for its revisory jurisdiction, we in effect decide that the matter which was passed on by the district court on March 31 was a case in equity. In other words, that a mere motion entered upon the minutes of the court without a prayer for relief, without a prayer for process, is a bill in equity; that a notice published three times in a newspaper is service of process, and brings parties into court as if served with a subpoena in chancery; and that a decree rendered upon such rule when only a portion of the parties referred to in the rule make any appearance whatever; when only a part of them file any response to the motion, and that in the way of an exception, and not sworn to; when no decrees *pro confesso* are taken against those who do not appear, is a final decree in a case in equity, from which, under the judiciary act, an appeal lies to the circuit court. The mere statement of the proposition is its own refutation. Nor do we think the case made by the petition of Slocomb, even if it was held to give character to the proceeding and decision which petitioning creditors seek to review, is any more of a case in equity than the motion of the assignee Norton by his solicitor Stone. There is scarcely anything in the petition which assimilates it to a bill in equity. It is, in fact, nothing more than a motion in writing. It simply prays that "said Ober, the said assignee, and said Girardy & Co., show cause, on a certain day, why the said sales should not be set aside as void, and until the hearing that the parties named be enjoined from taking any steps towards perfecting said sales. Only three or four of the persons interested in the question are named in the petition—the great mass of them are left out entirely; no prayer of process; no demand for answer under oath; no service of process, and, in fact, scarcely any of the common incidents of a bill in equity are to be found in this petition. To call it a bill in equity, or the proceeding a case in equity, it seems to us is an entire misapprehension of the meaning of the terms.

But it is insisted that the setting aside a sale for fraud and determining the priorities of liens are matters of purely equitable cognizance, and therefore the proceeding sought to be reviewed is a case in equity from which appeal lies.

Courts of law frequently pass upon ques-
30 Fed. Cas.—52

tions purely equitable, on motion or rule; but the nature of the question has never been held to make such motion or rule a case in equity. It is a very common practice for courts of law, on motion, to set aside sales made by a sheriff on execution on account of some fraud or unfairness on the part of the sheriff or purchaser; yet he would be a bold man who would insist that such a motion was a case in equity. When money is brought into court, the proceeds of a sale on execution, courts of law do not hesitate, on motion, to direct how the money shall be distributed, assuming to pass upon the priorities of claimants to the fund; yet it has never been supposed that by so doing they were rendering a decree in chancery, or that the motion to distribute the fund according to the rights of the parties made a case in equity. These two things, passing upon the validity of a sale, and directing the distribution of the fund arising therefrom, on motion or rule to show cause, are precisely what the district court did, and we do not think the motion was a case in equity, or the ruling of the court a decree in equity. It was the simple exercise of a power incident to courts of law as well as equity, to regulate the proceedings in a case pending before it, to control its own process, and to distribute funds brought into court.

Our general view of the whole subject is this: The proceeding in bankruptcy, from the filing of the petition to the discharge of the bankrupt and the final dividend, is a single statutory case or proceeding. In the conduct of the case a large number of questions may arise. Before the assets of the bankrupt can be collected and distributed, it will frequently occur that the assignee or a creditor is driven to a regular bill in equity or an action at law. In these cases the circuit court has no supervisory jurisdiction, nor has it where the claim of a supposed creditor has been rejected in whole or in part, or where the assignee is dissatisfied with the allowance of a claim. These classes of cases may be taken up on writ of error or appeal. But all other cases, and questions arising in the progress of a case of bankruptcy through the bankruptcy court, whether the matter is of legal or equitable cognizance, and when the matter is not the subject of a regular suit in equity or at law, or is the allowance or disallowance of a claim, fall within the supervisory jurisdiction of the court, and may upon bill, petition, or other proper process of any party aggrieved, be heard and determined in the circuit court as a court of equity.

We think the motion to dismiss the petition of review in this case not well taken. It is, therefore, overruled.

The appeal, we think, is not well taken, both because not taken in time, and because the matter decided was not the subject of appeal. The appeal is therefore dismissed.

[See Case No. 6,441.]

Case No. 18,140.

The YORK.

[3 Adm. Rec. 321.]

Superior Court, S. D. Florida. March 23, 1846.

SALVAGE COMPENSATION—PROFESSIONAL WRECKERS ON FLORIDA COAST—MISCONDUCT OF CREW.

[1. \$13,000 upon a valuation of \$95,000 awarded to professional wreckers for getting a ship off of Florida Reef in a condition to proceed on her voyage, the vessel having been in considerable danger, though not thumping on the bottom, and the weather being fair, the services occupying about 14 hours, and consisting in transferring 363 bales of cotton to the wrecking vessels, and thus floating the ship.]

[2. The conduct of the crew of a stranded vessel in refusing to assist in getting her off after wreckers were employed, unless promised extra compensation out of the salvage, is deserving of the severest reprobation, and, although such a promise is given, the court will prohibit the payment of any part of the salvage to them.]

[Proceeding by William Pent and others against the York and her cargo for salvage.]

S. R. Mallory, for libellants.

Wm. R. Hackley, for respondent.

MARVIN, District Judge. The ship York, Dixon, master, while on a voyage from New Orleans to Liverpool, in the early part of the night of the 17th instant, struck upon the Florida Reef, where she remained until she was relieved and got off by the wreckers. The cargo consisted of 2,186 bales of cotton, 3,140 barrels of flour, and a small quantity of staves. The ship and cargo may be fairly estimated as worth \$95,000. Soon after the ship struck, the master got out a boat, sounded the depth of the water around her, carried out a small anchor, and endeavored to heave the ship off. He also removed during the night some fifty or more bales of cotton, from the after to the forward part of the ship, with the view to bringing her on a more even keel. He continued his efforts during the night to get the ship off, but did not succeed. About nine o'clock the next morning, the libellants, regular wreckers on this coast, came to his assistance. They commenced discharging the ship's cargo on board their vessels, and continued at this employment, and heaving at the windlass, during the day, and until about eleven o'clock at night, when, having discharged three hundred and sixty-three bales of cotton, the ship came off the reef. After the employment of the wreckers, the ship's crew, except the officers and boys, refused duty, being excited to this refusal by one of their number, under the pretence that the ship was now a wreck, and that they were not bound to work, unless paid a part of the salvage. They remained disobedient and insubordinate until, at last, the master was induced to request the wreckers to promise them two dollars each a day for their services. This promise being made, they returned to their duty.

The ship and cargo were safely brought into

this port, and, it being ascertained by the report of expert divers, that the ship had not been so much injured on the reef as to render her unfit to perform the voyage, and did not require to be discharged and hove out, the wreckers, at the request of the master, delivered the cotton that had been taken out of her again on board, and the ship is now in a condition to proceed again on her voyage. Such are the principal facts in this case, and it is impossible that they should not impress the mind of the court favorably as to the merit and good conduct of the salvors. The ship was ashore upon a hard and rocky bottom, and upon one of the outer reefs. She was surrounded by shoals. She had been driven more than a foot out of water by the force with which she struck. She did not thump or rise or fall with the tide, but remained the most of the time apparently still and fast. She could be got off only by being lightened. This could have been accomplished by the master with an obedient crew in time. He must have thrown overboard as many bales of cotton as were taken out of her by the wreckers, before he could have got her off. But this he could not do in the same time in which the wreckers discharged the cotton. The cotton was difficult to break out, and a strong force was necessary to dispatch. The wreckers brought twenty-nine men, besides thirteen men from the sloop Texas, into the enterprise. To these were added the ship's company. They all labored energetically, and yet they were able to discharge only 363 bales of cotton in about ten hours. It is idle to suppose that the master, if he had had an obedient crew could have got this ship off the first or second day, without other assistance. It is possible that the ship might have remained several days on the reef without sustaining material injury. It is agreed on all sides that the weather was moderate, and that the ship did not thump, except at the time she came off the reef. But is it probable that she would have remained there several days, or even until the next high water without serious and material injury? Although the ship did not rise and fall with the sea, or thump, yet she chafed and ground upon the bottom, and had sufficient motion to have chafed a hole through her bilge in no very long period of time. Had the master got the ship off without assistance, she would still have been surrounded with reefs and shoals, of which he was totally ignorant. But it is to my mind doubtful whether he would have succeeded in extricating his ship from her difficulties without other assistance than his crew, even if they had been obedient; and, when we consider that his crew was in an insubordinate and almost mutinous state, the doubt in regard to his success is very much increased.

It is natural enough to suspect that the refusal of the crew to do duty after the wreckers came on board was owing to the improper

tampering with them by the wreckers, and, although none of the wreckers are charged by the master with any such misconduct, yet I felt it my duty to investigate this matter fully on the trial. The result of the investigation was to exonerate any of the salvors from any such charge. I am glad that it is so, for, had they, or any of them, been implicated in bringing about the refusal of the ship's company to do duty, I should have forfeited their salvage. Such an offense will never be permitted to pass unpunished in this court. But I am satisfied, from the testimony, that the ship's crew were influenced in determining not to do duty, without being promised pay by the salvors, by one of their number, whose character is fully indicated and known among seamen by the term "Sea Lawyer"; and from all the circumstances of the case, and the fact that this man had once been a wrecker on this coast, and instigated the crew, after their arrival in this port, to insist upon a discharge of the ship's cargo and heaving the ship out, before they would consent to proceed on the voyage, I am quite satisfied of the probability, at least, that the crew would have very soon refused to do duty, when the ship was on the reef, whether any wreckers had come to their assistance or not. The conduct of this man deserves punishment.

Under all these circumstances, it appears to me that it would be folly to say that this ship and cargo were not in very considerable peril, and that the services of the wreckers have not been of very considerable value to them. The fact that they got the ship off in the short period of about twelve or fourteen hours ought not to be considered as lessening the merit of their services, but the contrary. The fact that she is but little injured too ought not to be regarded as evidence that she was in but little danger, and that therefore the salvage ought to be less. The fact that the ship was in danger is evident from her position on the reef, the winds, the tide, or want of tide, and the state of the crew. And the fact that the ship was in a short period of time rescued from danger comparatively uninjured, by the prompt, active, and persevering efforts of the wreckers, adds greatly to the value of their services. Had the ship remained on the reef until the next high water, no one can say that she would not have been so badly injured as to require her discharge and repairs in this port, several weeks interruption in her voyage, the incurring of heavy expenses for wharfage, storage, repairs, &c. The fact, then, that these wreckers rescued this property in the shortest possible period of time is one of much merit, and should enhance their compensation. Their labors, so promptly and so actively rendered, have resulted in saving the ship in a sound and fit condition to proceed on her voyage, and, had this promptness and activity been wanting, it is probable that the ship would have been

so injured as to require her discharge and repairs.

The wreckers are not transient voyagers, falling in accidentally with this ship while ashore, and rendering her assistance. Had this been the case, a very small proportion of the value of the ship and cargo might be deemed an adequate compensation to the salvors. But they are regularly and solely employed, under the license of this court, in the business of cruising along the reef, and rendering assistance to vessels situated as this was. The salvage decreed them by this court constitute their sole means of livelihood, and enable them to defray the expenses of their vessels, and to keep them well manned, equipped, and fitted to the business in which they are engaged. The dangers of the navigation and the liability to shipwreck on this coast have made their steady and regular employment in this business necessary to the interests of general commerce and the cause of humanity. Sound policy requires their encouragement within proper limitations.

Before deciding upon the compensation which ought to be decreed the wreckers in the present case, it may be useful to advert to a few cases analogous to the present, decided in this court by my predecessor. The case of *The Hector* [unreported] was decreed in 1833. This ship got ashore upon Conch Reef. The weather was calm, and continued so for several days after the ship was got off. The wreckers, after loading two of their vessels, succeeded in heaving the ship off. The master insisted at the trial that his ship was in no immediate danger; that he accepted the assistance of the wreckers as a matter of prudence and precaution, and not because he supposed their services were necessary to the safety of the ship and cargo; that, as the weather continued favorable, he might have removed the cargo, and got at and thrown overboard his ballast, and in this way lightened and hove his ship off without the assistance of wreckers. The judge did not regard the ship, under the circumstances, in great danger, yet he thought the prompt and active exertions of the wreckers entitled them to a reasonable compensation, and that \$10,000 was not an unreasonable recompense, the ship and cargo being valued at \$70,000. The case of *The Austerlitz* [unreported] was decided in 1837. This ship got ashore in the night, and remained ashore three days before the master would take assistance. During this time he carried out his anchors, and used all his exertions to get his ship off, but without success. He then employed the wreckers to lighten and get the ship off. They transhipped on board their vessels 400 bales of cotton, when she came off. The weather continued calm for several days after the ship was relieved. The cargo consisted of 1,567 bales of cotton, valued at \$61,740. The judge decreed \$11,800 salvage. In the case

of The Ella Hand [Case No. 4,369], the weather was calm, and continued so for several days after the vessel was relieved. The wreckers lightened her by loading two of their vessels, and hove her off. The ship and cargo were valued at \$33,200. The master contended at the trial that he might have saved his ship and the greater part of his cargo by throwing overboard a portion of it, of little value. The judge agreed that the master might have saved his ship and the greater part of his cargo by a jettison of a part of it, but he said "that experience has taught him that masters generally delay this operation until it is too late to be available to them." He decreed the wreckers \$7,000 salvage.

The case now under consideration will compare with any of these just cited from decisions made by Judge Webb in point of merit, and in several important particulars far surpassed them. In each of the cases cited the ship was more or less damaged on the reef, and required to be hove out and repaired before she could proceed on her voyage, and thus other heavy expenses besides salvage were incurred. In the present case the promptness, activity, and energy of the wreckers saved the ship in an almost uninjured condition, when she was in equally as perilous a situation as any of the vessels in the cases cited. Such promptness and energy is positive merit in the wreckers, and is to be encouraged among them, on this coast, by liberal rewards. Their conduct, too, throughout, in the present case, has been fair, honorable, and praiseworthy. They have not attempted to enhance the value of their services in the mind of the court by any misrepresentations or unfair means, but have presented the case to the consideration of the court upon its fair merits. The value of the ship and cargo, as I have remarked, may be fairly estimated at \$95,000, and, when I consider that the services of the wreckers have greatly contributed (if they have not been the sole means) to save this large amount of property, under all these circumstances of promptness, energy, and good conduct,—qualities which it is highly proper to encourage among the wreckers on this coast,—I cannot think that the sum of \$13,500 is too high a reward to decree to them for their services. In my judgment this is a liberal compensation, as I intend it to be. Their vessels are of the larger class of wrecking vessels, and are well fitted and manned to do good service on this coast. The number of the salvors is not so great but that, upon a division of the salvage, the share of each will be considerable, nor is their number so small as to make the share, upon a proper division, exorbitant or extravagant. I deem this sum a liberal and sufficient compensation, although I do not expect it will equal the hopes and expectations of the salvors. These are often unreasonable and extravagant. It seems to grow out of the nature and character of their business and pur-

suits to entertain fanciful and extravagant ideas and hopes of the acquisition of sudden wealth by receiving large rewards for their services. But, although they may, now and then, receive a large remuneration for a few hours of labor and exertion, it will be found by experience that a continued and steady employment in the business of wrecking will, in the end, leave the wrecker in no better circumstances in life than he would have been in any other pursuit. The business is, and has long been, fully open to competition, and no increased rate of salvage compensation, no degree of liberality in rewarding salvage services, can possibly, in the end, result to the pecuniary advantage of the wrecker. Increased compensation must and will inevitably induce an increased number of persons to engage in the business, and their numbers must and will increase, until, by competition, and the additions made to the numbers to divide its profits, it is brought to the condition of being no more profitable than the ordinary business of life. As a permanent class, these engaged steadily in the business of wrecking on this coast, their true and lasting interests will be best promoted by withholding any extraordinary and extravagant rewards, and thus prevent an unreasonable and immoderate number from engaging in it; and by moderate and reasonable compensations, measured out to them with a steady and even hand, avoiding extravagance on the one hand, and illiberality on the other. The true and permanent interest of the wrecker is entirely in harmony with the general interests of commerce. The interests of the former require that no extravagant hopes of sudden wealth should be realized, and thus by a had example, tempt too many to engage in their business; and the interests of the latter require that the wrecker should be fairly and reasonably compensated, so that too many will not abandon the business, and thus deprive the commerce of these seas of their timely aid in moments of distress and danger. I am satisfied that the sum named is a fair and reasonable compensation in the present case.

In regard to permitting the salvors to pay the ship's crew the two dollars a day promised them for their services, while the ship was on the reef, I have come to the determination of positively interdicting it. The conduct of this crew was insubordinate and almost mutinous, and, instead of being paid an extra reward for their labor, they deserve punishment. There is not the slightest ground upon which to justify their pretence that they were not bound to work because the ship was a wreck, and wreckers had been employed. They were bound by their articles, by their duty, by every consideration of moral honesty, by their pride and ambition as seamen, if they had any, to stand by their commander in this trying moment of danger and distress, and not abandon their duty, prove traitorous to their plighted en-

gagements, and recreant to every principle of honor. They ought to have done their duty and stood by their commander as long as two planks of the ship remained together to stand upon, and then, if, having behaved well, the ship were at last lost, they might perhaps be entitled to some compensation for extraordinary services, rendered in saving any portion of the materials and cargo. But their conduct in the present case is without excuse. I cannot censure the salvors, or blame the master, for yielding in this moment of anxiety, peril, and distress to the unlawful demands of the ship's crew, though so cruel and unreasonable; but I shall take it upon myself to see that they do not receive the rewards of their bold, faithless, and dishonorable conduct. The conduct of the master of the ship throughout seems to have been highly commendable and praiseworthy.

Therefore it is ordered, adjudged, and decreed that the libellants have, recover, and receive the sum of thirteen thousand five hundred dollars, in full compensation as salvage for their services rendered to the said ship York and cargo, while ashore upon the Florida Reef in manner and form as fully set forth in the libel in this case; and that, upon the payment of said sum and the costs and expenses of this suit, the marshal restore said ship and cargo to the master thereof, for and on account of whom it may concern. And it appearing to the court that the crew of said ship, except the officers and boys, did, while the said ship was ashore upon the Florida Reef, wrongfully and unlawfully refuse to do duty on board said ship, and did behave in an insubordinate and highly improper manner, and were only induced to return to duty again by promises of reward and compensation to be made them by the libellants herein, and it being considered by this court wrong, and of evil example, that they should receive a reward for their misconduct and insubordination, it is therefore ordered that the libellants refrain and do not pay to any of said crew any sum of money whatever for their services on board said ship, under the penalties that shall come for a violation hereof.

YORK (GRAY v.). See Case No. 5,731.

YORK (SCHELTER v.). See Case No. 12,446.

YORK (STEINKUHL v.). See Case No. 13,356.

Case No. 18,141.

YORK et al. v. WISTAR.

[16 Haz. Reg. (Pa.) 153.]

Circuit Court, E. D. Pennsylvania. Oct. Term, 1834.

MUTUAL ACCOUNTS — SETTLEMENT — PROMISE TO PAY BALANCE — PRESUMPTION — CONFLICT OF LAWS.

[1. Where the contract was that the purchasers should pay the sellers in England, and the

uniform mode of payment was to remit bills of exchange on England, the contract was to be governed by the laws of that country.]

[2. In order that a usage of trade shall control the method of stating accounts between two persons, it must have been continued for such a length of time as to have become generally known to those engaged in the trade, and must be so general as to have become the settled rule of commercial intercourse, in the absence of any special agreement or particular course of dealing between individuals.]

[3. The existence of a usage may be proved by one witness.]

[4. An account may be a stated or settled account, though not signed by the parties.]

[5. From the fact of stating an account, the law raises a promise to pay the balance found due.]

[6. The balance found on a statement of account may properly bear interest, though items of interest were included in the account.]

[7. The presumption of a promise to pay the sum claimed arises when the account is rendered and received without objections made in a reasonable time, especially if the same course of dealing is continued by the parties.]

BALDWIN, Circuit Justice. The first question which arises in this cause, is whether it is to be decided by the law of England, or the law of Pennsylvania? The supreme court of the United States have decided that "the general principle adopted by civilized nations is that the nature, validity, and interpretation of contracts, are to be governed by the law of the country, where the contracts are made, or are to be performed." [Bank of U. S. v. Donnelly] 8 Pet. [33 U. S.] 372. If a contract is made in one country or state, and is to be performed in another, the law where it is to be performed governs it. [Lanusse v. Barker] 3 Wheat. [16 U. S.] 146. In this case the conduct of the parties has shown beyond a doubt that the agreement of the defendant has been to perform his contract of purchase, by paying the plaintiffs in England. His uniform mode of payment has been by remitting bills of exchange on England, and paying the premium at which they were purchased, and no objection has been made by his counsel to paying the premium at the present rate of exchange on the balance now due. You will therefore consider the contract between these parties as one which is to be executed in England, and to be governed by the law of that country. Five per cent. interest only can be charged, and the allowance or regulation of interest must depend on the rules established there, not on those which prevail here. We are far from saying that there is any difference between the law of the two countries on the subject of interest, whether simple or compound, on merchants' accounts. But it is unnecessary to make the examination, because, if we were now satisfied that there was a difference, we could not exclude the operation of the law of England on this case, after the parties had for fifteen years adopted it in the com-

putation of interest and the course of remittance.

The next question is, what is the law of England in relation to such a course of dealing as has prevailed between the plaintiffs and defendants from the year 1814 to the close of their accounts. The course of dealing between them was by direct correspondence. Neither party employed an agent. The defendant sent out orders for goods, which were shipped to him by the plaintiffs, without any special agreement as to price, the terms, or time of payment. The plaintiffs also acted as the agents of the defendant in purchasing and paying for articles ordered, but which, not being in the line of their business, the plaintiffs procured for the defendant, who remitted money through them to those who furnished the goods.

The first item in the account is in —, 1814, to the debit of defendant, the last purchase made by him is charged 1 August, 1822. In the intermediate time, the charges amounted to £ stg. — and the credits to £ stg. —. Invoices of the different shipments, with the pattern cards, were sent, from time to time, according to orders, and the capacity of the plaintiffs to fill them.

The following accounts current were sent and received: No 2. Sent in a letter dated 15 November, 1815, exhibiting the balance due up to 31 December, 1815, post mark New York, 4 March. No. 3. Sent in a letter of 5 November, 1817, exhibiting the balance due on the 31 December, 1817, post marked New York, 15 January, 1818. No. 4. Sent in a letter of 12 October, 1818, exhibiting the balance on the 31 December, 1818, no post mark. No. 5. Sent in a letter 10 June, 1821, exhibiting the balance on the 31 December, 1820, no post mark. No. 6. Sent in a letter of 12 May, 1824, exhibiting the balance on the 31 December, 1823, no post mark. No. 7 was handed by T. Stewartson to defendant in 1829, and is a general statement of the accounts from 1815 till their close, being accounts No. 3, 4, 5, 6, contained in one paper. No. 8 was enclosed in a letter of 24 August, 1829, and exhibits the balance for which this suit is brought.

These accounts are made up of charges for the different invoices, and interest up to the time of closing the account, on one side, and credits for payments and interest on the other; a balance of interest is then added at the foot of the account, and a general balance struck, which is carried into the new account for the next year, and the account is carried on as before, with the interest on the balance. This being the admitted course of dealing between the parties, the question before us is whether the law of England sanctions such a mode of stating the account.

It is admitted that if such is the general usage of the trade between this country and England, such accounts are legal, and must be enforced in our courts. By the

usage of trade you will understand is meant the usage of trade and dealing between the merchants of two countries, as evidenced by their actual transactions where no special contract has been made, but both parties have dealt together, on the tacit agreement that their dealings shall be regulated by the general rules which by common consent govern the particular trade. When there is such an established usage, it becomes the law of the trade, and applies to the dealings of the parties, controlling them in the same manner as the statute or common law in ordinary cases. It must, however, have been continued for such length of time as to have become generally known to those engaged in the trade and so general as to have become the settled rule of commercial intercourse, in the absence of any special agreement or particular course of dealing between individuals which form exceptions to the general rule prescribed by usage. The usage and custom of any particular trade is the law by which it is to be regulated. Whether there is such usage, and what it is, are questions of fact which are to be decided on the same principle as any other fact. One witness is legally competent to prove it, though the jury will judge of his credibility; but if his character is fair, his testimony clear, and he appears to have a proper knowledge on the subject, it would be an innovation on the rule of evidence to require a usage to be proved by more than one witness. Of the existence of any usage as to the course of dealing between the parties to this suit, which can affect its merits, you are the exclusive judges; you will decide upon it on a consideration of all the evidence. If any of you have any personal knowledge on the subject, which may have any influence on your verdict, you will state it in open court, so that each party may put to you any proper questions. Should you be satisfied that the plaintiffs have established the existence of an usage or course of trade, conformably to the accounts made out and rendered by them, then your verdict ought to be in their favor. If you are not so satisfied, then we must inquire whether the account has not been settled and agreed to by the parties, as a legal inference from the facts and circumstances in evidence, which make it what is called in law a stated account; that is, a statement of charges and credits agreed to by debtor and creditor,— a balance struck (if there is any due), and carried to a new account, or paid, as a debt admitted to be due by mutual consent, on a settlement of the accounts between the parties, and payable on demand if no time is fixed for payment. An account may be a stated or settled one, though not signed by the parties. The fact of their accounting together and striking a balance by consent, may be proved, as any other fact, by the direct evidence of their signatures, or cir-

cumstances which justify the legal inference that the parties have so accounted. If the facts and circumstances on which this inference depends are uncontested, the law makes the inference; if they are doubtful, the jury will decide how far the party claiming the balance has established a ground for the legal inference. If in their opinion such facts exist as lay the foundation of the legal presumption that the parties have agreed on the balance, it is their duty to find their verdict accordingly. Whenever an account is directly proved or inferred by the law to be settled, the party claiming the balance is not bound to prove any of the items of the account; they are presumed to be correct until the other party produces clear proof of fraud, error, or mistake. The balance stated is a liquidated debt, as binding as if evidenced by a note, bill, or bond. Though there is no express promise to pay, yet from the fact of stating or settling the account, the law raises a promise as obligatory as if expressed in writing, to which the same legal incidents attach as if a note or bill was given for payment. These incidents are an immediate right of action on demand of the balance, with interest from the time of settlement.

It is no objection to a stated account that it contains charges of interest, unless such as are usurious, or otherwise unlawful. If interest is due by the usage of trade, or if the debtor has agreed to pay it, the whole account is to be taken as principal, and a jury are no more authorized to strike out the charges of interest than principal. Both form a settled balance, which the debtor promises to pay on demand, which he has his option to do, or suffer it to enter into a new account. If not able or willing to pay, he ought not to place the creditor in a worse situation than if he had complied with his promise. No one would contend that if the debtor had given his note for the balance of the account, with interest from the settlement, the full account could not be recovered. It would be strange if the creditor should lose his interest, because he left the balance in the debtor's hands by mutual consent, on the faith of the implied promise and legal obligation to pay, without exacting a note.

This is not like a case of compound interest on an original contract. The parties settle their accounts, a certain sum is due for principal, and a certain sum for interest, composing one debt, thus due and payable. The right of the creditor to receive the one item is as perfect as to the other. If the debtor pays the balance, he cannot recover back any of the items of interest which made up the balance. If, instead of paying, he asks or takes time to pay the balance, he ought to be in no better situation than if he had paid his money. He chooses to use his creditor's money, and every rule of law and principle of justice requires that

he should pay the interest. The time to object to the payment of interest is while the account is open, or a current one. It cannot be a stated account, without the express or implied consent of the debtor; but, when he waives his objection to interest till he has signed the settled account, or till the law presumes his agreement to pay the sum claimed, he is precluded by his own acts. This presumption attaches when an account is rendered, received without objections made in a reasonable time, especially when the same course of dealing is continued by both parties after the receipt of accounts, from time to time, on the same principle.

The rendering accounts made up of charges of interest, as those in the present case are, is a declaration by the creditor of the terms on which he gives the credit and continues to furnish his goods to the debtor. The receipt of the accounts without objection, and the continuance to purchase and remit, is an acquiescence and assent to such terms. A contract is thus made by both parties, evidenced by their mutual acts and dealings for years, as binding on both as if made in writing on opening the account. It is an admission of the balance claimed, on which the law raises a promise to pay it, with interest. This promise is not one which a jury will negative, if the law declares the account to be a stated one, any more than they would negative a promise to pay for goods, the sale and delivery of which was admitted. They will enquire into the fact of the accounts having been rendered by one party, received by the other, and whether any objections were made, and when made, in the same manner as they would into the fact of the sale and delivery of goods; but if they have no doubt about the facts, their duty is to find a verdict according to their legal result. When a man buys goods, it is not a question of fact whether the purchaser promises to pay for them, nor, when he settles an account, whether the debtor promises to pay the balance; the law settles these questions. A jury cannot open a settled account, unless on proof of fraud or mistake, or annul the fair agreement of parties which violates no law; and the law declares all accounts to be settled ones which have been received and retained without objection, within a reasonable time.

Of the facts of this case you can have no doubt. The accounts rendered by the plaintiff from time to time, the correspondence between the parties, and the whole conduct of the defendant, show a perfect understanding on his part of the claim of the plaintiff, and his tacit assent to its justice; and when it appears that no objection was made to the payment of interest till 1828, six years after he had ceased to make any further purchases, it cannot be pretended that this was within a reasonable time. On the whole case, we think that the account be-

tween the parties might be considered a stated one, the consequence of which is that the plaintiff is entitled to your verdict for the balance appearing due, with five per cent. interest to this time, with the addition of exchange at its present rate.

YORK & C. R. CO. (MYERS v.). See Case No. 9,997.

Case No. 18,142.

YORK BANK v. ASBURY et al.

[1 Biss. 230.]¹

Circuit Court, S. D. Ohio. April Term, 1858.

FORGED INDORSEMENT—SUIT IN NAME OF PAYEE—WHEN JUDGMENT A BAR—CESTUI QUE TRUST BARRED—USURY IN NOTE—EFFECT OF CONTINGENCY.

1. One partner having given the firm note, and forged the name of the payee to procure its discount at bank, no suit can be maintained by the bank under the assignment.

2. The bank may, however, bring an action in the name of the payee for its benefit.

3. A judgment in such action by a court having jurisdiction is a bar to any subsequent suit for the same cause of action; nor will any other than an appellate court inquire into the correctness of the judgment. The partner having authority to draw and negotiate the note, it cannot be said that the forged indorsement affects the rights of his co-partners.

4. The bank having sued in the name of the indorsee for its use, is substantially a party, and is within the rules that the judgment of a court of competent jurisdiction is final between the parties, and a bar to a subsequent suit.

5. The making a note payable at a place in which exchange sells at a premium does not constitute usury; nor does it render the note void in the hands of a bank whose charter prohibits the taking more than a certain rate of interest. An agreement that the difference of exchange should be added to the interest would be a device to cover usury, and render a note usurious; but on a note payable at such a place, without proof that such a note commanded a premium at the place where it was made, the court will not presume usury. The contingency of the rate of exchange at maturity of the note cannot be incorporated with the contract to make it usurious.

6. A contract not usurious at the time it is entered into cannot become so by any future contingency. The corrupt intent must be apparent on the face of the contract, or rather it must contain all the elements to make it usurious.

This action is brought against the defendants Asbury and Pierce, as partners, the latter being a citizen of California (on whom the process was not served), who are charged to be indebted to the plaintiff in the sum of five thousand dollars for money lent, paid, had and received, and due on account stated &c. The defendants pleaded, (1) The general issue of non-assumpsit. (2) That the bank was not a corporation. (3) That Pierce and Asbury were partners, as cattle dealers, Pierce residing in Pennsylvania, and As-

bury in Ohio; it being the business of the firm to buy cattle in the Western states and sell them in the East; that Pierce without the knowledge of Asbury made an agreement with the York Bank that it should discount a note for four thousand dollars, executed by Pierce, in the name of himself and Asbury, payable to Cyrus Milner, Jr., & Co., indorsed by the payees, and Samuel Milner and Amos Carter, in sixty days, and that when the note should come to maturity, being payable at the York Bank, another note for the same amount, payable at the Western Bank of Philadelphia, in ninety days, indorsed by the same parties, should be received in payment of it. The first note was discounted, and when it became due the second note was made, without the knowledge of Asbury, signed by Pierce in the name of the firm, payable to Amos Carter, and indorsed by Cyrus Milner, Jr., & Co., and Samuel Milner. Pierce forged the name of Amos Carter, as indorser, and delivered the note to the bank, in payment of the former one. The plea further states, that after the bank had knowledge of the forgery of the name of Carter, it brought a suit, in the name of Carter, for its own use, the payee, in the court of common pleas for Madison county, Ohio, against the defendants Asbury and Pierce, the process not being served on Pierce, to which suit the defendants pleaded non-assumpsit; on which issue the jury found for the defendants, and a final judgment was thereon entered, which remains in full force. The pleadings in the case are set out substantially. To this plea there is a demurrer filed.

Swan & Andrews, for plaintiff.
Mr. Wilcox, for defendants.

McLEAN, Circuit Justice. This demurrer raises the question, whether the above judgment is a bar to the present action. In support of the demurrer it is argued, the note was made by Asbury to Amos Carter, or order, and that the indorsement of Carter was forged, of which Asbury was not privy, and that the court of common pleas held that Carter had neither paid anything for the note, nor indorsed it; that Asbury was not concluded by the felonious act of Pierce; that the bank was without remedy on the note against the firm.

It may be admitted that the bank could not claim under the forged indorsement, nor was the action brought in that form. Carter being the payee of the note, the action was brought in his name, as payee, for the benefit of the bank; and no sufficient reason is perceived why this was not properly done. The bank received this note in payment of the first one discounted, of the same amount, which was a full consideration. The forgery did not affect the drawers on the paper, nor the obligations they assumed. It was treated as a genuine note payable to Carter,

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

for the benefit of the bank. And this was the true character of the note, before the indorsement, under the contract with the bank; and the indorsement being void, after the payment of the money, the bank held the note for its security and benefit. The facts stated in the plea are admitted by the demurrer.

The note was made payable to the order of Amos Carter, and without his indorsement the other indorsers, it is supposed, could not be held responsible; but the drawers of the note, who received the money for their own benefit, could be sued in the name of Carter for the use of the bank. The drawers promised to pay him or order; and it is averred that Carter well knew the suit was prosecuted, but made no objection to it. Under the circumstances, the court would protect the bank in the use of his name, requiring it to indemnify him as to the costs.

If the court of common pleas, of Madison county, erred in their decision, on any point, it was the duty of the bank to remove the case by appeal or writ of error to the supreme court, and have the error corrected. Asbury it is said was not concluded by the felonious act of Pierce. This may be admitted; but as one of the partners, it is not disputed, that he had the right to draw the note and negotiate it; and although he was estopped from denying the indorsement of Carter, such indorsement, could, in no respect, affect the rights of Asbury.

If the maker of a note make it payable to a fictitious person, and put it in circulation with the fictitious name written on it; or if he make it payable to a real person and forge the indorsement, or procure it to be done, and then put it in circulation, he is estopped from saying that it was not genuine. Riley, Law Cas. 248; Meacher v. Fort, 3 Hill (S. C.) 227. In England it has been held that a bill drawn payable to a fictitious payee is payable to bearer, and may be declared on as such in favor of a bona fide holder ignorant of the fact. Chit. Bills (10th Am. Ed.) 157. Whether Carter had paid any thing or not for the bill, was a matter of no importance; as it was made to obtain money from the bank, and the suit was brought for its benefit.

But it is contended that the judgment in the Madison court of common pleas, is no bar to the action of the bank; as to constitute a bar, the former action must not only be for the same cause of action, but between the same parties. And it is insisted the action of Carter was on his title as indorser; the present action being for the money originally advanced by the bank to Pierce and Asbury.

The former action was not brought by Carter as indorser, but by the bank in his name as the payee of the note, for its benefit, the drawers having promised to pay him. Whether the cause of action was the same in the former action as in the present, is

matter of fact and law. The present action is brought on general counts for money, claiming five thousand dollars. The former action was brought on the note for four thousand dollars, signed by Pierce and Asbury. But the special plea in bar, states in detail the former action in the name of Carter, for the use of the bank, to be the same cause of action as the present, and this is admitted by the demurrer. And on this, the issue of law is raised, whether the facts stated in the plea constitute a bar to the present action.

The judgment of a court having jurisdiction of the case before it, is final between the litigant parties. And this is true whether the parties have used the proper vigilance or not to bring the entire equity before the court and jury. No defect of either party in this respect can avail him, under a plea in bar. If it be the same subject matter of controversy, if it was fully brought before the court and jury, or might have been so brought before them, the judgment is final. Negligence or want of knowledge in the management of the case by the counsel or party, will constitute no excuse. If, on such ground a judgment could be regarded as not final, it would destroy its effect and make litigation endless. Where injustice has been done a motion for a new trial, appeal or writ of error, is the only corrective at law. The suit brought by the bank in the name of Carter, for its benefit, as appears from the facts admitted in the special plea, brought into litigation the second note given to the bank by Pierce and Asbury, and which, on proof of the facts, entitled the bank to a recovery; nor can it be doubted that it was the same subject matter involved in the present suit. That such a trial and judgment is final between the parties is clearly shown by the authorities cited in the defendants' brief.²

The bank was substantially a party in the first suit. The suit was brought for its benefit and was under its control; and its right so to prosecute the suit would, if objected to, have been protected by the court. The bank was a party within the rule which requires a judgment to be between the same parties, to constitute a bar. 1 Greenl. Ev. 523; Tuttle v. Willson, 10 Ohio, 24. Where a suit is brought for the use of another, a second action cannot be sustained for the same cause.

The case of McDonald v. Rainor, 8 Johns. 442, seems to have no application to the case under consideration. In that case the payee sued the maker of a note who pleaded that the payee had indorsed the note, and the in-

² Le Guen v. Gouverneur, 1 Johns. Cas. 436; Baker v. Rand, 13 Barb. 152, 160; Lawrence v. Hunt, 10 Wend. 81; Wood v. Genet, 8 Wend. 10; Ehle v. Bingham, 7 Barb. 494; Duncle v. Wiles, 6 Barb. 515; Birkhead v. Brown, 5 Sandf. 135; Miller v. Manice, 6 Hill, 114; Rose v. Turnpike Co., 3 Watts, 46; Hughes v. Blake [Case No. 6,845]; Greenl. Ev. §§ 522, 528.

dorsee sued the defendant, who defeated the suit on an objection to the assignment. This was pleaded in bar by the same defendant in a suit by the payee; but it was held, that a defect in the assignment, on which the assignee failed, did not bar the suit by the payee, which did not involve the assignment. For the reasons assigned, the demurrer to this plea must be overruled.

The second special plea is usury. The bank is alleged to be located at the town of York, in York county, Pennsylvania; that by the terms of its charter it is prohibited from taking more than at the rate of one-half of one per centum for thirty days upon a loan. And it is averred that for many years before the time of the loan, the rate of money exchange between the town of York and the city of Philadelphia, was and has been in favor of Philadelphia, and against the town of York, varying in amount from one-quarter of one per centum to one-half of one per centum; all which was known to the York Bank; and that as a scheme and device for the unlawful taking of more than at the rate of one-half of one per centum, for thirty days, it was agreed by the bank to loan Asbury and Pierce, the sum of four thousand dollars; and for the forbearance of the loan, that they should give their note for the above sum, indorsed and payable at the bank in sixty days, reserving forty-two dollars of interest; and when that note matured the said Asbury and Pierce, as had been agreed, paid the bank by way of renewal of the same, the sum of sixty-two dollars in money, and gave another note for the sum of four thousand dollars, payable at the Western Bank of Philadelphia, in ninety days from date, which is the note on which the first suit was brought.

The usury as alleged in the plea, consists in agreeing to make the payment at the Philadelphia Bank, the exchange on which was worth from one-quarter to one-half per centum, at the York Bank. The exchange here spoken of must mean on sight bills, and can have no reference to a bill payable in ninety days. It is not alleged that more than six per cent. was reserved as interest, but this difference of exchange being added to the interest reserved or paid, makes the usury, and was a device adopted for that purpose.

An agreement to pay the first note when due, in a note for the same amount payable at Philadelphia; or on the second discount to pay the note when due at the Philadelphia Bank, does not constitute usury. It is true, the plea alleges a corrupt agreement for the loan, but from the facts stated, there was no such agreement. If the agreement had been, that the difference of exchange proved should be added to the interest, and the payment made at the York Bank, it would have been usurious, and a device to cover the usury. But on a transaction to pay in ninety days the amount at the Philadelphia Bank, without showing that bills on that bank at

ninety days, commanded a premium at York, the court will not presume usury. Such a contingency cannot be incorporated with the contract to pay, so as to make it usurious. To constitute usury there must be a loan of money, and for the forbearance, a corrupt agreement to pay more than the legal rate of interest. In the case under consideration, there was a loan of money, but there was no agreement that more than the legal rate of interest should be paid. The payment was to be made at a bank in Philadelphia, on which at the York Bank, sight bills generally sold at from one-quarter to one-half per centum advance; but whether a bill would sell, at an advance payable in ninety days is not shown. A contract must be usurious at the time it is entered into, or it cannot become so, by any future contingency. The corrupt intent must be apparent on the face of the contract; or at least it must contain all the elements to make it usurious. It is believed that the books furnish no instance of a contract which might or might not become usurious, according to circumstances, at the time of payment.

The plea not only sets up the usury on the ground stated, but it alleges that the charter prohibits the bank from receiving more than at the rate of six per centum, and that on this ground the contract is void. These two defenses united in the same plea make it double, and consequently bad on special demurrer. A general demurrer only has been filed, on which no advantage can be taken of this defect in the plea. But, aside from this consideration, the want of sufficient averments to show the usury is fatal. It must appear that more than at the rate of six per cent. was charged in violation of the charter. It may be a convenience to the debtor to pay the amount in Philadelphia, rather than at the York Bank. And a fair presumption arises that this would be the case with cattle dealers, who generally sell at the large cities.

The demurrer is sustained to the second special plea.

Case No. 18,143.

YORK MANUF'G CO. v. ILLINOIS CENT.
R. CO.

[1 Biss. 377.]¹

Circuit Court, N. D. Illinois. June, 1862.²

COMMON CARRIER—LIMITATION OF LIABILITY.

1. A common carrier may by special contract, limit his common law liability to that of an ordinary bailee for hire.

2. He cannot, however, go beyond this, or escape liability for misconduct or negligence.

This action was brought to recover the value of one hundred bales of cotton, the

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

² [Affirmed in 3 Wall. (70 U. S.) 107.]

property of the plaintiff, which, it is alleged, were lost by the wrongful act of the defendant, in course of transit from Memphis to Boston. Thos. Trout & Sons were the agents of the plaintiff at Memphis in the fall of 1859, and on the 8th of November, purchased 201 bales of cotton on account of the plaintiff. Harris, Hunt & Co. were defendant's agents at Memphis for the purpose of making contracts for the shipment of goods from that place, which might pass over the Illinois Central Railroad or any portion of it.

Gallup & Hitchcock, for plaintiff.

Scates, McAllister & Jewett, for defendant.

DRUMMOND, District Judge (charging jury). I think there can be no doubt of the correctness of this principle, that the defendant, as a railroad corporation of this state could, under the law, appoint agents at Memphis to make contracts for freight to be carried over the road, and for the purpose of this action it is sufficient to regard this as a contract made at Memphis, by Harris, Hunt & Co. with T. Trout & Sons, the agents for the plaintiff, for the transit of the cotton from Memphis to Boston; and inasmuch as no controversy has been made that the cotton was actually in the possession or control of the defendant at Cairo, it is enough for us to know that defendant had authority to appoint an agent to make a contract which would be binding upon defendant the very moment the cotton came into the company's possession at Cairo, or that of its agents, because there it was within the limits of the state of Illinois, and the charter, of course, operated on the subject matter of the controversy. This being so, it was competent for the defendant, through its agents, to make the same kind of contracts, with the same restrictions and conditions, that they would have made at Memphis. The first question, therefore, to be determined is whether the defendant, through its agents at Memphis, made a contract for the transfer of this cotton from Cairo over its road, and if so, what were the terms and conditions of that contract. Thomas Trout & Co. acted for the plaintiff; Harris, Hunt & Co. for the defendant. On the 8th of November the shipment took place on board the steamer Adriatic, at Memphis. A bill of lading has been introduced which refers to the cotton as having been shipped by T. Trout & Sons that day on board the Adriatic, for Cairo, to be delivered without delay at the port of Boston, "fire, and the unavoidable dangers of the river only excepted," to Samuel Batchelor, treasurer, or to his consignee, and paying a freight of \$4.75 per bale, from Memphis to Boston, by rail. And Mr. Trout, when asked in relation to his agency and the business transacted, says, "we had shipped the cotton on account of the York Manufacturing Company, on the 8th of November, 1859, 201 bales; the quality was strictly middling, and marked 'Y. M. Co.'—it was put on the

steamer Adriatic. We made a contract with Harris, Hunt & Co. to ship the cotton to Boston. They signed a bill of lading, as agreed, for the I. C. R. Co."

Now the first question to be determined is, whether this property was shipped under this contract. It is not material as to the authority of Thos. Trout & Sons, from the plaintiff. They acted as the agents of the plaintiff, and delivered the cotton to the agents of the defendant, to transport it from Memphis to Boston. Then whatever contract Thos. Trout & Sons made was binding on the plaintiff, because, so far as the defendant was concerned, the only persons that acted for the company were Thomas Trout & Sons. If they shipped the cotton under a contract with the defendant, the only contract which could be binding on the defendant was the contract with Thos. Trout & Sons, and whether they were authorized by the plaintiff to make it is perfectly immaterial.

A bill of lading is ordinarily a memorandum of the quantity of the goods to which it refers, and, as such, may be explained, and is not conclusive evidence as to the quantity or quality of the goods; but in addition to being a memorandum of the amount of the goods, it is also a contract, and has precisely the effect of any other contract by which a party acknowledges that he receives goods, and agrees to transport and deliver them at a particular place for a fixed sum. That is what is done by the terms of this contract.

Was this property delivered to the agents of the company, and did they receive and agree to hold and transfer it under this contract? If they did, then, as a matter of course, it is the only contract which is binding upon them. And it is generally true of all transactions of this character, that when property is delivered to a carrier, either by land or by water, and a bill of lading is given, by which the carrier agrees to transfer the property for a fixed price, the bill of lading constitutes the agreement between the parties. If the property was delivered under this bill of lading as the agreement binding upon defendant for transit of the property over its road, then it is the only contract which is binding on them, and we must look to the terms of the contract in order to understand what they were.

In this contract there is an exception to the effect that the company are not subject to loss by fire, that is to say, that the obligations of the carrier did not include that of an insurer. He is responsible for all losses, it is said, except those of God and the public enemies. It is competent, however, for the carrier to limit his responsibility, and there can be no doubt, particularly in relation to so inflammable a material as cotton, that it is competent for carriers to put limitations upon their liability, so that they will not be responsible for the loss of any cotton in case of fire. There is such exemption in this bill of lading, and if it was under this contract that

the cotton was shipped, then by its terms the defendant would not be subject to a loss by fire, except under certain contingencies to be hereafter explained.

At the same time this bill of lading was executed by Harris, Hunt & Co., acting as agents of the defendant, the steamboat Adriatic also executed a bill of lading, and, as it appears, with Harris, Hunt & Co., by which it was agreed that the goods should be transported from Memphis to Cairo, and there delivered to Mr Abbott, the agent of the defendant, and the price fixed as stated in this bill of lading. They were to be taken at \$4.75 per bale and by way of the Illinois Central Railroad. The steamer Adriatic arrived at Cairo on the evening of the 10th of November, the shipments having been made on the 8th, during the night. Shortly after its arrival they transferred the cotton belonging to the plaintiff, with other cotton, to the barge lying by the side of the steamer. On the following day, November 11, the whole of the cotton was on board the barge, and the barge was fastened to the landing some little distance from where the steamer was lying. Not very long after the barge was placed there the fire was discovered, by which a very considerable portion of the cotton was consumed, and so far as this plaintiff is concerned, there was a loss of one hundred bales.

Now if you find that there was no contract limiting the liability of the defendant in relation to the fire, then the defendant would be responsible for the loss by fire, when the cotton came into its possession. If you shall find that there was a contract which limited the liability of the defendant, and which exempted the defendant from such liability, then the remaining question is, whether the defendant exercised reasonable care of this property. That is a question of fact for the jury to determine.

It seems to be conceded by the counsel on both sides, and it appears by the evidence we have had before us, that the proper way of transporting cotton is to leave it uncovered. The fact seems to be that if it could be covered completely, so as to prevent all sparks from reaching it, that would be the safest way of transportation; but this is not the general way of transport, and is said to be impracticable. It is found best to leave it uncovered, so that if it catch fire it can be extinguished at the earliest possible moment.

It is for you to say, if you shall find that there was this limitation upon the defendant as a common carrier, and that it was not subject to a loss by fire, in consequence of a special contract, whether the defendant is responsible in consequence of want of due care in the management of this cotton. You will consider, firstly, the value of the property; secondly, the character of the property; thirdly, the circumstances under which it was placed; and it is for you to say whether there was due care exercised in reference to the cotton. If there was due care, and if there

was an exemption, then the plaintiff cannot recover; if there was not due care used by the defendant, then, notwithstanding there might have been an exemption in the special contract, still the defendant would be responsible. If you shall find that the defendant is responsible, the damages will be the net value of the property in the market to which it was to be transported, which, I suppose, would be the value of the cotton at Boston, deducting freight.

It is stated that the cotton was insured by an insurance company in Boston, and that the action is brought by the plaintiff on behalf of the insurance company. That it is competent for the plaintiff to do.

Verdict for defendant.

This case was affirmed by the supreme court in 3 Wall. [70 U. S.] 107, where the case is fully stated, and the same principles announced as in the circuit court decision. See authorities there referred to, and also *Woodward v. Illinois Cent. R. Co.* [Case No. 18,007].

YORK RIVER, The. See Case No. 5,078.

Case No. 18,144.

The YORK RIVER STEAMBOAT CO.

[Cited in *Wallis v. Chesney*, Case No. 17,110. Nowhere reported; opinion not now accessible.]

YORK STREET FLAX SPINNING CO.
(UNITED STATES v.). See Case No. 16,781.

YOST (LLOYD v.). See Case No. 8,437.

Case No. 18,145.

Ex parte YOUNG.

[6 Biss. 53.]¹

District Court, N. D. Illinois. April, 1874.

WAGER CONTRACTS — "PUTS" — SETTLING DIFFERENCES — INADEQUACY OF CONSIDERATION — CLAIMS AGAINST BANKRUPT'S ESTATE.

1. "Puts," or the privilege for a nominal consideration of delivering a large quantity of grain within a certain time at a specified price, when taken of parties notoriously running a "corner," are wager contracts, and void as against public policy.

[Cited in *Wolford v. Powers*, 85 Ind. 304.]

2. Where no delivery of the grain was contemplated by the parties, but they expected simply to settle the differences as established by future prices, the contract is simply a wager, and therefore void.

[Cited in *Clark v. Foss*, Case No. 2,852; *Gilbert v. Gauger*, Id. 5,412.]

3. These "puts" are also within the Illinois statute concerning gaming, and the English decisions under 8 and 9 Vict. are applicable as authorities.

4. Claims against an estate for \$400,000, founded on a consideration of less than \$19,000,

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

are grossly inequitable and unjust, and should not be allowed.

5. The "put" cannot be sustained, as being a measure of insuring prices, when such is not shown to have been the intent of the parties.

6. Money actually paid on these "puts" may be proved as claims against the estate.

These questions come up on motion by Sidney A. Kent, the assignee of Peyton R. Chandler, and Chandler, Pomeroy & Co., to expunge the claims of Wm. Young & Co., Bensley & Wagner, and a large number of others of the same character, on what are called "puts." These claims, having been first allowed pro forma by the register, were referred to him by the court for re-examination under the 34th general order, and the evidence was by him reported to the court. The facts fully appear in the opinion of the court.

Dent & Black, for Wm. Young & Co., claimants.

(1) It was not necessary that Wm. Young & Co. should have any of the property on hand when they entered into or took these contracts. *Benj. Sales* (2d London Ed.) 66; *Chit. Cont.* (10th Am. Ed.) 442; *Hibblewhite v. M'Morine*, 5 Mees. & W. 462; *Wells v. Porter*, 2 Bing. N. C. 722; *Porter v. Viets* [Case No. 11,291].

(2) Nor does the fact that it was optional with Wm. Young & Co. to deliver, render the contracts less binding. 2 *Pars. Cont.* (5th Ed.) 657. The doctrine there laid down, being that "an agreement may be altogether optional with one party, and yet binding on the other."

(3) As a mere offer from Chandler to Wm. Young & Co., these contracts gave a right to the latter to deliver; and this offer not being withdrawn, it continued up to and at the time of the tender. *Boston & M. R. R. v. Bartlett*, 3 *Cush.* 224; *Western R. Co. v. Babcock*, 6 *Metc. (Mass.)* 346; 1 *Pars. Cont.* (5th Ed.) 436, 480-482. Consult, also, *Harlan v. Harlan*, 20 *Pa. St.* 303, 307.

(4) This view also disposes of the objection alleging a want of mutuality. A contract, according to the opinion of *Tindal, C. J.*, in *Arnold v. Mayor of Poole*, 4 *Man. & G.* 896, cannot be said to be void on that ground, except "where the want of mutuality would leave one party without a valid or available consideration for his promise." *L'Amoureux v. Gould*, 7 *N. Y.* 349; *Chit. Cont.* (10th Am. Ed.) 13; *Morse v. Bellows*, 7 *N. H.* 549. The law on the subject of wagers, so far as any question arises in regard to it here, is fully laid down in *Fleming v. Foy* [Case No. 4,862]; *Beadles v. Bless*, 27 *Ill.* 320; *Bryan v. Dyer*, 28 *Ill.* 188. Consult, also, *Wells v. Porter*, 2 *Bing. N. C.* 722, 29 *E. C. L.* 733; *Alsop v. Commercial Ins. Co.* [Case No. 262].

(5) A court should not be quick to set aside a contract on account of any supposed public policy, as clearly the legislature is the forum before which such matters most appropriate-

ly come in the first instance. The observations of *Best, C. J.*, in *Richardson v. Mellish*, 2 *Bing.* 229, are pertinent to the point in hand.

(6) And again, the inquiry as to what was a violation of public policy, and who was the violator, must be made.

(7) But, even if it had to be conceded that the claimants knew that Mr. Chandler's action was wild, so far as his general operations in the oat market were concerned, and would cause irregularities of trade, still the law would not refuse its aid to those who did not instigate or participate in such action. In *Tracy v. Talmage*, 14 *N. Y.* 162, a case of great importance, and maturely considered, the court of appeals held that "mere knowledge by the vendor that the purchaser intends to make an illegal use of the property, is not a defense to an action for its price." Consult, also, *Hill v. Spear*, 50 *N. H.* 253; *Michael v. Bacon*, 49 *Mo.* 474.

Goudy & Chandler, and James E. Monroe, for Bensley & Wagner, claimants.

The contract is valid on its face, and it is not unilateral, nor void for want of mutuality. In the following cases contracts challenged for want of mutuality have been enforced: *In re Hunter*, 1 *Edw. Ch.* 1; *Bing. Real Prop.* 460; *Eno v. Woodworth*, 4 *N. Y.* 249; *Page v. Hughes*, 2 *B. Mon.* 439; *Mason v. Payne*, 47 *Mo.* 517; *Fry, Spec. Perf.* 291; *Towers v. Barrett*, 1 *Term R.* 133; *Story, Sales*, §§ 247, 248, 417; *Metc. Cont.* 21; *Newbery v. Armstrong*, 4 *Car. & P.* 59; *Paige v. Parker*, 8 *Gray*, 213; *Morton v. Burn*, 7 *Adol. & E.* 23; *Kennaway v. Treleavan*, 5 *Mees. & W.* 498; *Giles v. Bradley*, 2 *Johns. Cas.* 252; *Disborough v. Neilson*, 3 *Johns. Cas.* 81; *Cherry v. Smith*, 3 *Humph.* 19. There is no statute prohibiting such a contract, nor is it void by any rule of the common law. That it should not be considered under any claim or consideration of public policy, consult *License Tax Cases*, 5 *Wall.* [72 *U. S.*] 462, 469; *Brown v. Speyers*, 20 *Grat.* 296; 1 *Story, Cont.* §§ 546, 547, 566; *Good v. Elliott*, 3 *Term R.* 698; *Porter v. Viets* [Case No. 11,291]; *Tyler v. Barrows*, 6 *Rob. (N. Y.)* 104; *Hibblewhite v. M'Morine*, 5 *Mees. & W.* 462, overruling, *Bryan v. Lewis, Ryan & M.* 386. A wager is not illegal at common law. *Morgan v. Pebrer*, 4 *Scott*, 230; *Good v. Elliott*, 3 *Term R.* 693; *Wells v. Porter*, 2 *Bing.* 722, 732; *Mortimer v. M'Callan*, 6 *Mees. & W.* 58; *Morgan v. Richards*, 1 *Brown (Pa.)* 171; *Campbell v. Richardson*, 10 *Johns.* 406; *Morgan v. Pettit*, 3 *Scam.* 529; *Smith v. Smith*, 21 *Ill.* 244; *Beadles v. Bless*, 27 *Ill.* 320.

Harding, McCoy & Pratt, for assignee.

These "puts" should not be enforced, as inequitable and unconscionable. *James v. Morgan*, 1 *Lev.* 111; *Thornborow v. Whitaker*, 2 *Ld. Raym.* 1164; *Gwynne v. Heaton*, 1 *Brown, Ch.* 9; *Howard v. Edgell*, 17 *Vt.* 27; *Savile v. Savile*, 1 *P. Wms.* 745; *Fry, Spec. Perf.* §§ 177, 277, 279, and notes; *Os-*

good v. Franklin, 2 Johns. Ch. 24; Johnson v. Dorsey, 7 Gill, 294; Cockell v. Taylor, 15 Beav. 115; Seymour v. Delancey, 3 Cow. 445; Hamilton v. Grant, 3 Dow, 33-47; Kimberley v. Jennings, 6 Sim. 340. This contract is void for want of mutuality. Baxter v. Lamont, 60 Ill. 237. The letter of the contract does not necessarily prevail, but it may be shown by parol to be void. Paxton v. Popham, 9 East, 408; Chandler v. Ford, 3 Adol. & E. 651; Mitchel v. Reynolds, 1 P. Wms. 196; Grizewood v. Blane, 11 C. B. 538; Brua's Appeal, 55 Pa. St. 294; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Tyler v. Barrows, 6 Rob. (N. Y.) 104; Cassard v. Hinman, 1 Bosw. 207. The contract is void on the ground of public policy. Mount v. Waite, 7 Johns. 434; Edgell v. McLaughlin, 6 Whart. 175; Ball v. Gilbert, 12 Metc. (Mass.) 397; Marshall v. Baltimore & O. R. Co., 16 How. [57 U. S.] 333-336; Stanton v. Allen, 5 Denio, 434; Neustadt v. Hall, 58 Ill. 175. These "puts" are also void as contrary to public policy and public interest. Morgan v. Pettit, 3 Scam. 529; Beadles v. Bless, 27 Ill. 320; Gregory v. King, 58 Ill. 169; Edgell v. McLaughlin, 6 Whart. 175; Ball v. Gilbert, 12 Metc. (Mass.) 399; Egerton v. Earl Brownlow, 4 H. L. Cas. 143; Stanton v. Allen, 5 Denio, 441; Neustadt v. Hall, 58 Ill. 175. This contract was really an agreement to "settle the differences," a bet upon the price; and such contracts are void. Rourke v. Short, 5 Bl. & Bl. 904; Shumate v. Com., 15 Grat. 653. Where advantage is taken of the ignorance or distress, or necessity of another, it affords a new and distinct ground for setting aside a contract, and either of these circumstances existing, in connection with gross inadequacy is enough to warrant a court in so doing. Osgood v. Franklin, 2 Johns. Ch. 24; Johnson v. Dorsey, 7 Gill, 269-294; Cockell v. Taylor, 15 Beav. 115; Seymour v. Delancey, 3 Cow. 445; Fry, Spec. Perf. § 277, note 1, and cases cited; Hamilton v. Grant, 3 Dow, 33-47; Kimberley v. Jennings, 6 Sim. 341. The contract is void for want of mutuality. Pothier, pt. 1, c. 1, art. 3, § 7; Fry, Spec. Perf. § 286, note, and cases cited; Baxter v. Lamont, 60 Ill. 237. This is a wagering contract, contrary to public policy and public interest, and therefore cannot be enforced. Sampson v. Shaw, 101 Mass. 145; Hilton v. Eckersley, 6 Bl. & Bl. 47; Paxton v. Popham, 9 East, 201; Collins v. Blantern, 2 Wils. 347; Chandler & Ford, 3 Adol. & E. 649; Mitchel v. Reynolds, 1 P. Wms. 196; Grizewood v. Blane, 11 C. B. 538; Brua's Appeal, 55 Pa. St. 298; Kirkpatrick v. Bonsall, 72 Pa. St. 155; Ex parte Marnham, 2 De Gex, F. & J. 634; Tyler v. Barrows, 6 Rob. (N. Y.) 104; Cassard v. Hinman, 1 Bosw. 207. The case of Porter v. Viets [supra] relates to a contract, not to a "put." These "puts" are void, as being within the first section of the statute of this state concerning gaming. 1 Gross, 312. "All promises, agreements, etc., made, etc., where the whole or any part of the consideration there-

of, shall be for any money, property, or other valuable thing, won by any gaming, or playing at cards, etc., or by betting on the side or hands of any person gaming, etc., shall be void." The spirit in which the supreme court of Illinois regards this species of contract appears in 59 Ill. 160. Another view may be taken of the case—the "put" is simply an agreement to "pay differences"—a bet upon the price. Consult Rourke v. Short, 5 Bl. & Bl. 904; Shumate v. Com., 15 Grat. 653.

Walker, Dexter & Smith, also for assignee.

BLODGETT, District Judge. It appears from the testimony submitted with the register's report that in the month of May, 1872, and for several years prior thereto, the bankrupts, Peyton R. Chandler, and the firm of Chandler, Pomeroy & Co., were engaged in the business of buying and selling grain on the Chicago market, and as members of the board of trade of this city; that Chandler, Pomeroy & Co. were brokers and commission merchants, and Peyton R. Chandler dealt mainly on his own account as a capitalist, through Chandler, Pomeroy & Co., who acted as his brokers; that about the middle of May, Peyton R. Chandler conceived the idea of making a corner in oats for the month of June then ensuing, and with that view he purchased all the "cash oats" as they arrived in the market, and took all the "options" offered him for June delivery,—his purpose being to own all the oats in the market, and compel those who had sold "options" for June to pay his price; or, in other words, to settle with him by paying such differences as should exist between the prices at which he purchased the options, and the price he should establish for cash oats on the last day of June, when his options matured. In pursuance of this plan, he purchased, between the 15th of May and the 18th of June, 2,500,000 bushels of cash oats, being all, or substantially all, the cash oats on the market, and also bought June "options" to the amount of 2,939,400 bushels. The total amount of oats in store in this city on the 18th of June was only 2,700,000 bushels, from which it will be seen that Chandler practically controlled the market up to that time, and the total amount received during the remainder of the month was only 800,000 bushels. As incidental to and part of the machinery of this corner, Chandler also sold what are called "puts," or privileges of delivering to him oats during the month of June, for forty-one cents a bushel. These "put" contracts are alike in form, and read as follows: "Received of E. F. \$50, in consideration of which we give him, or the holder of this contract, the privilege of delivering to us or not, prior to 3 o'clock p. m., of June 30, 1872, by notification or delivery, 10,000 bushels No. 2 oats, regular receipts, at 41 cents per bushel, in store; and, if delivered, we agree to receive and pay for the

same at the above price. Chandler, Pomeroy & Co. P. R. Chandler. Chicago, June —, 1872.”

The amount paid by the purchaser of these “puts” was $\frac{1}{2}$ cent per bushel for whatever quantity was named in the contracts. The tickets, or contracts, were all signed by Chandler, Pomeroy & Co., and part of them were also signed by P. R. Chandler, but Chandler, Pomeroy & Co. acted as the brokers of P. R. Chandler, and their contract was his. The total quantity of oats called for by these “puts” amounted to about 3,700,000 bushels. When Chandler commenced to buy oats with a view to the corner, the price in this market was about thirty-nine cents a bushel. After he took possession of the market he put the price to forty-one cents and upward, and held it there until the 18th of June. In the meantime the price had declined in New York and other markets, so that oats to ship were not worth over thirty-three to thirty-five cents, and July options for this market were not worth over thirty-five cents. On the 18th of June P. R. Chandler and Chandler, Pomeroy & Co. failed, and the price declined before the close of business that day from forty-one to thirty cents, and continued to decline during the remainder of the month, so that at one time they were as low as twenty-six cents per bushel. Between the time of the failure and 3 o'clock on the 30th of June, the holders of the “puts” claim to have made tender to the bankrupts of the quantity of oats called for by their respective tickets, and the oats not being accepted and paid for, they sold them upon the market that day or the next, under the rules of the board of trade, and have proved up their claims for the differences between the price named in the “put” and that for which they sold. The total amount of claims thus proved up is about \$400,000, and the total amount received by the bankrupts for these “puts” was less than \$19,000,—about \$18,500, as I compute it at half a cent a bushel.

The proof shows conclusively that the plans of Chandler, and the fact that he was manipulating the market with express reference to a corner in oats for June, were well known and understood on the board of trade, while the number of these “put” claims, about 125, all, or substantially all, in favor of members of the board, show that the struggle between Chandler, who was endeavoring to hold up prices, and the sellers of “options” and holders of “puts” who were endeavoring to break the price, was quite generally participated in by members of the board. In other words, it was notorious that Chandler was endeavoring to keep the price at forty-one cents or upwards, while the sellers of “options” and holders of “puts” were endeavoring to break down the price. It is true that in this testimony some of the claimants say there was no “corner,” or that they did not know that there was a

corner, but the cross-examination shows that they knew Chandler was trying to make a corner, and they say he did not do it because he failed before the end of the month, so that by their own admission, they knew what he was attempting—knew the reasons for his purchase of such large quantities of “cash oats” and options, and knew he did not sustain his corner because the “short interest broke him down,” and the moment a man bought a “put,” he became identified with the short interest—his interests were antagonistic to Chandler.

The assignee attacks these claims upon the ground that they are fraudulent as against the other creditors of the bankrupt. The main ground, and the only one which I shall consider, being that they are wager-contracts, and therefore void. Without taking time to discuss all the points raised by the able arguments which have been adduced, and the various reasons urged for and against these claims, it is enough to say that it seems to me that the contracts in question partake of all the characteristics of a wager. It is in substance an assertion by the seller of the “put” that oats cannot be purchased on that market before three o'clock p. m. of the 30th of June for less than forty-one cents a bushel, and an undertaking to pay the difference between forty-one cents and any market price. If he, Chandler, sustains the price at forty-one cents or above, he wins the half-cent a bushel paid for the “put,” because the holder will not deliver, while if the price goes below that named he is to pay the difference. This is practically the contract. It is as manifestly a bet upon the future price of the grain in question, as any which could be made upon the speed of a horse or the turn of a card. The evidence in this case shows that in nearly all the cases of settlements on “put” or “option” contracts the grain is never delivered, nor expected to be delivered, but the parties simply pay the difference as settled by the prices. But, if that were not so in all cases, it is clear that in this case no delivery of the grain was intended by these “put” holders, because they knew that Chandler controlled all the oats in the market and fixed the price, and that their only expectation for success depended on their being able to break the market before their time for delivery expired. Some of them say that they intended to deliver the oats, but it is absurd to suppose that they intended to deliver, unless they could do so for less than forty-one cents. They intended to deliver if they could break Chandler, or prevent his “corner” from culminating, as the jockey may intend to walk his own horse over the course after he has poisoned or lamed that of his competitor. They did not intend to deliver if Chandler succeeded. Thus a struggle inevitably ensued between Chandler and the holders of this immense amount of “puts” and “options,” Chandler alone on one side attempting to

hold up the price, and all the rest seeking to put it down. The fact that the sellers of "options" and holders of "puts" were able to get resolutions through the board of trade, making new warehouses, where oats had never been stored before, "regular" for the performance of these contracts, shows the intensity of the contest and the overwhelming influences with which Chandler had to contend. I do not mean to be understood as saying that the fact that Chandler sold "puts" to so many as to create an overwhelming opposition, makes the transaction any more or less a wager than if he had only sold one "put," but it shows the notoriety of the whole proceedings.

From the very nature of the transaction the interest of the holder of the "put," is to break down the price, and that of the seller to maintain it. The number engaged in this transaction, and the quantities involved, demonstrate that neither party expected any grain to be delivered. Chandler expected to hold up the price, in which event no grain would be offered him, and the other parties must have known they could not get the grain to deliver unless they first broke Chandler, as he held all the grain, and then, although they might tender, he could not receive, so that in reality no actual delivery was anticipated. They made their tenders only as a method of establishing differences after he had failed, and was powerless.

That transactions of this kind are only wagers, is abundantly established by authorities.² It is true those cases arose under statutes making such transactions void as gaming contracts. But the test applied was: did the parties intend to sell on one side and buy on the other the stocks which purported to be the subject-matter of the transaction, or did they only intend to adjust the differences? And as it was found that they only meant differences when they said shares, the contracts were held to be essentially gambling contracts, and therefore void.

It is said, however, that there is no statute in this state expressly prohibiting contracts of this kind, as there is in England and Pennsylvania; and, as the supreme court of this state has decided that wagers are not necessarily void, therefore, these contracts—not being inhibited by any express law of this state—are not void. There is no dispute that contracts of wager are valid at common law, unless affected with some special cause of invalidity. *Ball v. Gilbert*, 12 Metc. (Mass.) 397. But wagers which are contrary to public policy have always been held by the courts to be essentially void, without statutory prohibition, and cannot be made the ground of an action. *Hartley v. Rice*, 10 East, 22. And a high authority in the pro-

fession has stated the law on the subject of the validity of wagers with great force and clearness, when he says: "As the moral sense of the present day regards all gaming or wagering contracts as inconsistent with the interests of the community, and at variance with the laws of morality, the exception necessarily becomes the rule." 2 Smith, Lead, Cas. 306. Indeed, any one rising from a full examination of the law applicable to wagers, as expounded by the courts, would undoubtedly testify that, while he has found in the books, and especially among the older text-writers and cases, general expressions to the effect that wagers were valid at common-law, he has found the cases where they have been enforced to be extremely rare, and the courts have been astute to find reasons for not enforcing them.

Following this general current of authority, the supreme court of this state, under the statute prohibiting gaming, has decided that the wagers upon horse-races are void, and cannot be enforced; and that money paid on such wagers can be recovered back. *Tatman v. Strader*, 23 Ill. 493; *Garrison v. McGregor*, 51 Ill. 473. The language of the Illinois statute on which these decisions are based, is, in substance, that all promises made, etc., where the consideration, or any part thereof, shall be money won by gaming, etc, shall be void. The language of 8 and 9 Vict., on which *Grizewood v. Blane* and other English cases were decided, is: "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void." The precise question made in this case has never been before the supreme court of this state to my knowledge, and I am not aware that it has ever been raised at the circuit, except in a late case before his honor Judge Tree, of this city, when he held that "option contracts for grain, when the parties intended only to pay the differences, and not to deliver the grain, were void, as wagering contracts." But it hardly seems possible that any court called upon to construe the Illinois statute in the light of the expositions already made by our courts, and of the English decisions upon a statute so substantially similar, could hesitate to pronounce these contracts wagers, and void as contrary to the statute.

But even if not within the letter or spirit of the statute of this state, the common-law authorities quoted show that all wagers contrary to the public policy are void without reference to any statute. And, as the contracts under consideration are essentially nothing but bets upon the price of oats in this market within the time limited, and as it is obvious that the effect of such transactions is to beget wild speculations, to derange prices, to make prices artificially high or low, as the interests, strength and skill of the manipulators shall dictate, thereby tending to destroy healthy business and un-

² *Grizewood v. Blane*, 11 C. B. 538; *Brua's Appeal*, 55 Pa. St. 298; *Kirkpatrick v. Bonsall*, 72 Pa. St. 155; *Ex parte Marnham*, 2 De Gex, F. & J. 634; *Cassard v. Hinman*, 1 Bosw. 207.

settle legitimate commerce, there can be no doubt of the injurious tendency of such contracts, and that they should be held void as against public policy. As is most cogently said by the learned judge who delivered the opinion in the case cited from 55 Pennsylvania State Reports: "Anything which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another, is gambling, and demoralizes the community, no matter by what name it may be called." The financial disaster and ruin which followed "Black Friday" in New York, and the scarcely less damaging local consequences which followed the various "corners" which have either succeeded or been attempted in this city, furnish conclusive proof, if proof were needed, that such gambling operations should be held void, as contrary to public policy.

The total amount paid by the claimants in these cases was less than \$19,000, and yet the amount they claim is within a fraction of \$400,000—a disparity between the consideration paid and the sum demanded which strikes the mind at once as so grossly inequitable that the judicial conscience is shocked, and revolts from being made the instrument for enforcing such outrageous injustice.

I do not intend to be understood as holding that every option contract for the delivery of grain or stock, or that every "put," is necessarily void, but only that all these contracts, in the light of the testimony before the court, were in their essential features gambling contracts. The parties when they made them did not intend to deliver the grain, but only at the utmost to settle the differences. They knew they could not obtain the grain to deliver if Chandler sustained his "corner," and their action in buying a "put" was virtually a bet on their part that he could not accomplish what they all knew he was endeavoring to do, that is, keep up the price through June to his own figures, and virtually a bet on his part that he could do so.

It is shown in the proof, and urged in the argument, that the "put" is in itself a very harmless contract—that dealers frequently resort to it as a method of insuring prices. It is answer enough to this to say that the proof fails to show that such was the object of any of these claimants. Chandler was taking all the cash oats offered at the price named in the "puts" and upward, and none, with the exception of Bensley, claim that they had any oats to fill the "puts" at the time they bought, or bought for that purpose till after Chandler's failure. It is perhaps possible to imagine a dealer with a stock of grain on hand which he wishes to hold for an advance, who may take a privilege of this kind to insure himself against a decline while waiting for an advance. But the very act of offering to sell a "put" either implies that the seller has control of the mar-

ket so that he expects to make his own price, or else it is a mere reckless assertion of the seller's opinion that the price will be maintained, either of which partakes of the character of a bet. "A wager," says Bouvier, "is a contract by which two parties or more agree, that a certain sum of money or other thing, shall be paid or delivered to one of them on the happening or not happening of an uncertain event." To say that these contracts were taken for the purposes of insurance, is too far-fetched an excuse, and evidently an afterthought.

In what I have said I do not intend to vindicate Chandler. His conduct was as reprehensible as that of the claimants. All were engaged in an immoral and illegal transaction, and this court ought not to allow its powers to be prostituted to the enforcement of these contracts for either party. Money lost at play or in gaming cannot be recovered except where an action is given by statute, but, as I have already intimated, my opinion that these cases are within the statute of this state on the subject of gaming, under which money paid may be recovered back, I shall allow the claimants to prove their claims for the amounts actually paid by them, respectively, which is a half cent per bushel on the grain named on their tickets.

Case No. 18,146.

In re YOUNG.

[Betts, Scr. Bk. 95.]

District Court, S. D. New York. September, 1842.

BANKRUPTCY—DISCHARGE OF DEBTOR—OPENING DEFAULT DECREE.

[A delay of a month in moving to vacate a decree denying the bankrupt's discharge, which was rendered by default after full notice, is sufficient, under ordinary circumstances, to defeat the motion; but, in view of the fact that the bankruptcy law is about to be repealed, the court in this case permits the default to be opened on terms, in order that the bankrupt may not be finally debarred from bringing his case before the court.]

[In the matter of the bankruptcy of Daniel Young. The bankrupt moved to vacate a default decree denying his discharge.]

BETTS, District Judge. This motion, first brought on the 7th inst., was further supported by affidavits served the 14th, and afterwards presented to the court. On the 3d December last, a decree by default was taken in behalf of creditors denying the petition of the bankrupt for a discharge. The proceedings by the creditors were open and perfectly regular, and no suggestion is made that the bankrupt or his counsel were unapprised of the decree immediately after it was pronounced. On the 4th of January notice is served on the attorney of the creditors that a motion will be made to vacate the default and decree, because taken in surprise of the bankrupt, his counsel being absent from court, when the

bankrupt expected and relied upon his attendance to the case. On the 14th the supplementary affidavit of the counsel for the bankrupt is furnished, stating that he did not attend personally to argue the cause, because there was a verbal understanding between him and the attorney for the creditors that both parties would submit the papers and proofs to the court without argument, and that he had confided in that understanding. The affidavit of the attorney for the creditors assents to this general understanding, and states his readiness at all times to have complied with it, and that he did actually submit the papers to the judge on the 2d December, the decree being recorded the succeeding day, but that the bankrupt's counsel never offered any papers on his part, and, as the attorney understood and believes, because the counsel considered the case on the proofs desperate on the part of the bankrupt.

There is no doubt of the competency of the court to open a default of this character, when the decree works no change in the situation of the parties; not but that this would be a proper case for relief if it had been pursued with any color of diligence. No excuse is offered to the court accounting for a delay of a full month after the decree was entered before taking measures to be relieved from it, nor for omitting, in the first instance, to present the affidavit of the counsel explaining the cause of the default.

The proceedings on the part of the bankrupt have been exceedingly remiss, and disregarding of the well-known rules of practice; and this circumstance would be sufficient to induce the court to deny the present application, but that, from the existing situation of the law, it is doubtless to be immediately repealed, and the bankrupt may be debarred the opportunity of ever bringing his case in any other manner before the court. To save him, therefore, from the hazard of losing any possible redress, I shall stretch the equity of the court so far as to open this default, but only upon the condition that the costs of the default be paid, and the creditors' disbursements of the commissioner for taking proofs be deposited in court, to abide the final hearing, and to be paid to the creditors if the bankrupt is defeated, and restored to him if he succeeds on such final hearing. Unless the conditions of this order are so complied with that the case can be put on the docket on Thursday, the 26th inst., it is to be understood as of no longer force.

YOUNG, In re. See Case No. 9,850.

Case No. 18,147.

In re YOUNG.

[5 Law Rep. 128.]

District Court, D. Connecticut. 1842.

BANKRUPTCY DECREE—FIDUCIARY DEBT.

A single debt, due from one petitioning to be declared a bankrupt, in a fiduciary capacity, will

not prevent a decree as to all other debts. But whether the certificate of discharge, in such a case, should contain an exception of such debt,—*quære*.

This being the day of hearing, on the petition of Levi H. Young to be declared a bankrupt, Foster, counsel for one of the creditors, filed an objection to this decree, stating that the debt, by him represented, was due from Young as guardian, and proceeded to argue the question, against the right of the petitioner to be decreed a bankrupt. Owing this debt, as it is now admitted, in the capacity of guardian, the petitioner is excluded from all or any of the supposed benefits of the act.

Gen. Kimberly, for petitioner, having entered a demurrer to the objections, claimed a decree in bankruptcy in common form. If a petitioner has incurred a debt or defalcation as guardian, this will not suspend his rights under the act, as to all other debts. Should a discharge issue, that discharge will not bar the fiduciary debt, provided such a debt or liability did exist prior to filing the decree. It was not the intention of congress, that every person who owed a debt as executor, should thereby be prevented from taking the benefit of this act. A part of the first proviso to the fourth section of the act, is conclusive on this point.

JUDSON, District Judge, was inclined to the opinion, that the objection could not prevent a decree as to all the other creditors, and whether there should be an exception of this debt, in the decree for the discharge, or in the certificate itself, it was not necessary now to determine. When the case comes up for that decree and certificate, the court will then decide whether there shall or not be an exception of this debt, or whether the decree and certificate shall pass in common form, leaving the question to be decided when a suit may be brought on this demand, as to the effect of the discharge upon this debt. The court entertains no doubt, as to the rights of the objector, and although the first decree may pass, these rights will not be prejudiced. The question will be kept open until the next appearance, giving either party opportunity further to discuss the matter. Before dismissing the case, however, it may not be improper to remark, that if the act, after the provisions of the first section had been silent, as to this matter, the objector would have had a very strong argument against any decree, where there was outstanding a fiduciary debt. The words of the first section are, "all persons whatsoever, owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, who shall, &c." The objection in the present case is doubtless indicated by this general language, construed as it is in the first section

of the act. But when recurrence is had to a subsequent provision, a limitation is found for this general language. In the latter part of the first proviso to the fourth section, we have the following provision. "Nor shall any person" (be entitled to a discharge) "who, after the passing this act, shall apply trust funds to his own use." The trust funds in the present case are understood to have been applied to the use of the petitioner before the passage of the act. That being the case, as at present advised, the court will say that the objection cannot be available against the decree, neither does it seem to be a valid objection against the second. But, as already remarked, the court will not conclude the parties from further argument, at the next appearance. Decree accordingly.

Case No. 18,148.

In re YOUNG et al.

[3 N. B. R. 440 (Quarto, 111).] ¹

District Court, E. D. Missouri. 1869.

BANKRUPT—EXEMPTION OUT OF FIRM ASSETS.

Where the assignee had allowed the two members of a bankrupt firm an exemption, under the laws of Missouri, of one hundred and fifty dollars each, out of partnership assets, there being no individual assets, the register disallowed the same, and on application of the bankrupt's attorney, certified facts for opinion of the court. *He. d.*, the bankrupts were entitled to the exemption out of partnership assets.

[Cited in Re Rupp, Case No. 12,141; Re Parks, Id. 10,763; Re Blodgett, Id. 1,555; Re Boothroyd, Id. 1,652; Re Handlin, Id. 6,018; Re Corbett, Id. 3,220.]

[In the matter of Bernard F. Young and John M. Young, bankrupts.]

By LUCIEN EATON, Register:

"At the request of George W. Lubke, Esq., attorney in this matter for John M. Young, I make the following statement of facts: At the second meeting the assignee presented his accounts for audit. In them I found two items of one hundred and fifty dollars each to his credit, thus: By cash exempted to B. F. Young, \$150. By cash exempted to John M. Young, \$150. The assignee's papers showing no assets from any source other than the partnership property, which will fall far short of the amount of the partnership debts proved, I was of opinion that money derived from partnership assets was not subject to exemption for the benefit of the separate members of the firm. Therefore, I disallowed the items. No exception was taken by the assignee or the bankrupts. John M. Young had previously presented to me a check for the sum exempted, which I declined to countersign, and told him I thought it could not be allowed. I also told him it would come up at the meeting. He did not attend, I think. The meeting was held November 20th, 1869, and the schedules of exempted property were filed

the same day. They contain these items as 'exempted under the provisions of sections 12, 13, c. 63, Rev. St. Mo.' No creditor opposed or objected to the exemption, and the disallowance of the items was of my own motion. My views are as indicated. No statutes of Missouri exempt the joint property of the firm from execution for debts of the firm. There can be no individual property, properly speaking, in partnership assets, until partnership debts are paid, and the interest of the copartners in the residue ascertained. Here there is no residue. The partnership debts will never be paid in full, and no occasion to adjust the rights of the several partners inter se will ever arise. If I am in error in my view of the law, I think the mistake can still probably be corrected."

Hitchcock & Lubke, for bankrupts.

TREAT, District Judge. While the foregoing views of the register would in many cases control the action of an assignee, yet, as the bankruptcy act contemplates that the bankrupt shall retain, as exempt, specified property, or its equivalent, in some instances, it is lawful and proper, when there is no individual ownership by the head of a family, of the property referred to in section 11 of the said Missouri statute, to make the allowance out of partnership assets. It is true, as a legal proposition, that the individual interest of a partner in partnership property is as stated by the register, yet his right of exemption in his individual property disregards the otherwise legal rights of his creditors. The policy of exemptions, and the legal rules on which they rest, modify the strict technical rules by which rights of creditors are otherwise enforceable. In this case the exemptions claimed should be allowed.

Case No. 18,149.

In re YOUNG.

[15 N. B. R. 205; ¹ 1 Tex. Law J. 7.]

District Court, W. D. Texas. Dec. 11, 1876.

BANKRUPT—EXEMPTION OF RURAL HOMESTEAD.

If a bankrupt, under the laws of Texas, acquires a right to a rural homestead, the subsequent extension of the limits of a city so as to embrace a part thereof does not affect his right.

I, S. T. Newton, one of the registers of said district in bankruptcy, do hereby certify that in the course of proceedings before me in said matter the following question arose pertinent thereto, which, at the request of E. C. McClure and J. H. Carleton, Esquires, attorneys for said bankrupt, and George W. Chilton and Horace Chilton, Esquires, attorneys for W. G. Cain, assignee, are respectfully certified to the court. On the 12th day of June, A. D. 1875, W. C. Young, bankrupt aforesaid, filed his petition in voluntary

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¹ [Reprinted from 15 N. B. R. 205, by permission.]

bankruptcy, and was adjudged a bankrupt, and on the 3d day of July next thereafter, W. G. Cain, Esquire, of the city of Tyler, in said district, was duly elected assignee of said bankrupt estate. On the 3d day of September, A. D. 1875, the said assignee, in accordance with section 5045, Rev. St., reported to the register his certificate of exempted property, which was filed and recorded in said court, and on the 3d day of February, 1876, the said bankrupt, by his attorneys, filed his exceptions to said report, alleging that a portion of the real estate which constituted his homestead was not embraced in the assignee's certificate of exemptions, but was claimed by him as assets belonging to the estate of said bankrupt. In due course of the proceedings in said matter, I caused the exceptions, pursuant to rule 19, general orders in bankruptcy, to be argued before me, and at the hearing thereof I examined as witnesses touching said matter, W. W. Johnson, Samuel Wilson, E. H. McClure, and W. C. Young, bankrupt, whose depositions are herewith filed, together with other documentary evidence offered by said bankrupt in support of his exemptions filed herewith, and made a part of his certificate.

The testimony of the bankrupt shows that in January, A. D. 1867, being then a married man and head of a family, he purchased of one Abraham Hart, in the county of Dallas, in said district and state of Texas, a tract of land containing twenty-nine acres, but acquired title to only thirteen and one-half; that at the time of the purchase of said tract of land, it was situated in the county of Dallas, being mostly a cedar brake, and remote some five or six hundred yards distant from any other settlement or improvement, and from the then town of Dallas. That he paid two hundred and fifty dollars for the tract and went immediately into the possession, and commenced building and improving the same, and destined it then as his homestead.

The testimony of the bankrupt further shows, and he is in this corroborated by the testimony of the other witnesses, that he has continued ever since in the possession of said tract, residing upon, cultivating, using, paying taxes on and claiming it as his homestead, never at any time having shown or evidenced an intention to abandon it, or to exchange it for other property for similar purposes. By reference to the map filed herewith, it will be seen that the tract of land claimed by said bankrupt as his homestead is designated by a black line drawn in pencil, and the same which is described in his Schedule B, No. 5, containing, as appears from his testimony, twelve acres.

It is further shown in evidence that at the time of the original purchase of said tract and destination as a homestead, it was a country site, and not within the corporate limits of the town of Dallas, and so remain-

ed out of the corporate limits of said town until within the year A. D. 1873, when the corporate limits of said town were extended, pursuant to and authorized by an act of the legislature of the state of Texas, passed 20th of April, A. D. 1871 (see Sp. Laws 12th Leg. 2d Sess. A. D. 1871, p. 156), so as to embrace within its limits the said tract and residence of said bankrupt, when plots were made and streets laid off running and crossing portions of said tract and premises of said bankrupt, against his protests and without the consent of said bankrupt or that of his wife. The exemptions reported by said assignee, though not marked by any definite line, a certified copy of which is hereto attached marked "Exhibit J," includes by calculation about three acres, being that part of the tract claimed and described in bankrupt's Schedule No. 5, upon which said bankrupt has his dwelling house, cow lots, and some parts in cultivation.

The testimony further shows that said bankrupt has at different times since his first purchase bought some other fractional part of lots lying contiguous to and adjoining the land he first purchased, and has sold also since small fractional parts of his first purchase; these fractional lots purchased by him were intended to form a part of his homestead, the whole making the twelve acres claimed, and at no time exceeding in value twenty-five hundred dollars.

From the foregoing statement of the case, the question of law raised by the exceptions will appear: Whether the bankrupt at the time of his adjudication in bankruptcy was entitled to have set apart to him the entire lot of land claimed and described in his said Schedule B, No. 5, or did that portion, not exempted by the said assignee, pass by the deed of assignment to said assignee for the benefit of creditors?

By S. T. NEWTON, Register in Bankruptcy:

The 14th section of the bankrupt act of the 2d of March, A. D. 1867 [14 Stat. 522], excepts from the operation of the assignment of a bankrupt's estate his necessary household and kitchen furniture, and such of his other articles and necessaries, not exceeding in value in any case five hundred dollars, as shall be designated and set apart by the assignee, having reference in amount to the bankrupt's family, conditions, and circumstances; also his wearing apparel, and that of his wife and children, and his uniform, arms, and equipments, if he is or has been a soldier in the militia or service of the United States, and such other property not included in the foregoing exceptions as is exempted by the laws of the state in which he is domiciled, to an amount not exceeding that allowed by such state exemption laws in force in the year 1864, and "in no case shall the property hereby exempted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act." By an amendatory act passed on the 8th of June,

1872 [17 Stat. 334], this provision was changed so as to give the benefit of exemptions under state laws in force in 1871.

The courts of the United States, having recognized as a rule the interpretation given by the state courts to the exemption laws in force in the several states of the Union, we must then look to the constitution of our own state and laws in force passed pursuant thereto. The 15th section of article 12 of the constitution of 1869, of the state of Texas, reads as follows: "The legislature shall have power and it shall be their duty to protect by law from forced sale a certain portion of the property of all heads of families; the homestead of a family, not to exceed two hundred acres of land, not included in a city, town, or village, or any city, town, or village lot or lots, not to exceed five thousand dollars in value at their destination as a homestead, and without reference to the value of any improvement thereon, shall not be subject to forced sale for debts." The laws of Texas provide that there shall be reserved to every citizen, head of a family, or householder, citizen of the state, a homestead, as in the constitution of 1869, from forced sale, of the value of five thousand dollars at the time of destination as such homestead, nor shall the subsequent increase in the value of the homestead by reason of improvement or otherwise subject the same to forced sale.

It is shown by the evidence of the witnesses that the bankrupt is a man of limited means, with a wife and children dependent upon his own exertions and labor for their support and maintenance, and as such is entitled to the beneficial provisions intended by the framers of our constitution for the head of families, unless it is shown that he has by some act of his own forfeited his claim to them. It could not, I think, be contended for a moment with any show or reason but that the tract of land occupied, claimed, and continuously used by said bankrupt and his family from the time of the purchase and destination as his homestead in January, A. D. 1867, until his adjudication in bankruptcy was a rural homestead, being within the constitutional limit, both as to quantity and value, and as such free and exempt from forced sale under the laws of the state, it not being shown that he owned or possessed any other real estate. The only material question then which it seems necessary to mention in determining the rights of the parties in this matter is, whether the extension of the corporate limits of the city of Dallas, so as to embrace the premises occupied and used by said bankrupt at the time of his adjudication, and the laying off and running of streets crossing said premises, changed it from a rural to an urban homestead, and divests the said bankrupt of his previously acquired and vested rights.

It is contended by counsel for the assignee, in support of his report of exemptions, that the extension of the corporate limits of the city had this effect, and he refers to the case

of *Taylor v. Boulware*, 17 Tex. 78, to sustain his position, in which the court say: "We are not disposed to question the power of the legislature to extend the limits of a town, nor to question that after the plat or plan of the town shall have been extended corresponding with its boundaries so authorized to be extended, a homestead so falling within such extension, though acquired before it was done, would work a change in the character of the homestead from a country to a town homestead, and subject necessarily to the value limitation placed upon a city homestead by the constitution." The doctrine here laid down would seem to some extent to favor the position assumed by counsel; but I think the reasoning of the court in the latter part of the same case will bear a different and more liberal interpretation, in which they say: "The protection of the homestead from forced sale was manifestly a favorite object with the convention, and the constitutional provision intended to secure that object has been regarded as entitled to liberal construction. The term lot or lots used in the constitution must be taken and construed in the popular sense of those terms; and when so used, never would be considered as embracing lands within the jurisdictional limits of the corporation not connected with the plan of the city. It might be important to the administration of the police laws of the corporation that such lands and those who owned them should be within its jurisdiction, but until streets had been extended through the land connecting it with the plan of the town, the land could not be called a lot of town."

In the case of *Hancock v. Morgan*, 17 Tex. 582, the court say: "The limitation of the homestead in a town or city is not to the number, but to the value of the lots. It is not required that the lots shall join, or be contiguous to each other; all that is required to entitle the property to exemption from forced sale is that it shall be used for the convenience or uses of the head or members of the family."

In the case of *Bassett v. Messner*, 30 Tex. 604, which is a case more in point, the facts were that Messner, in the year 1854, bought thirty-five and forty-five hundredths acres of land adjoining what was then the village of Brenham, for the sum of three thousand five hundred dollars; that he entered immediately into possession, and with his family occupied it as his homestead until his death, and that his surviving wife and children continued to occupy the premises. That the village of Brenham at that time embraced one hundred acres of land, which was laid off by the county authorities of Washington into streets, lots, and blocks. In the year 1858, the village of Brenham was incorporated as a town in accordance with the provisions of an act of the legislature, on the 27th of January, 1858. By this act of incorporation the limits of the town were extended to one mile, having the courthouse of the county for its center. By this

extension of the original limits of the village, the town boundaries took in the land of Messner. The question raised in this case is the same that is presented in the case in the present matter, as to the effect of the extension of the limits of the town by the act of incorporation upon a rural homestead lying contiguous to a village, and used and enjoyed as a homestead at the time it was incorporated within the extended limits of the town, and as to the liability of such homestead to the claims of creditors.

Upon this state of facts the court say: "By direct act of legislation, the legislature of this nor of any other state, acknowledging the restraint of constitutional obligation, forbidding the disturbance of vested private rights, would undertake to declare as homestead, anywhere in the country, an incorporated town or city without the consent of the owner, and subject it to special taxation and burdens, in addition to the common charge incident to all property of the state, for the fiscal purposes of the government. What it would not, and we may say could not do directly without violating a cardinal principle of the government, it should not do by indirect legislation."

In the case of Nolan v. Reed, 38 Tex. 425, where the same question is discussed, the court say: "We conclude that the legislature itself could not work this metamorphosis of a rural into a suburban homestead without the consent of these peculiar words of construction; much less could the local corporation do so, and certainly we do not feel inclined by any judicial interpretation to achieve a result so repugnant to the letter and spirit of our domestic constitution."

I have been referred by counsel for the assignee to the case of Iken v. Olenick, 42 Tex. 195, as overruling the principle laid down in these cases, but I find upon examination of that case that the facts are dissimilar and do not in my opinion have any application to the question here presented.

I find upon reference to similar statutes in other states, where the same questions have been examined by the courts, they hold the same views. In 12 Iowa, 518, the court say: "The homestead right having once attached, it cannot be taken away without the consent of the owner." The courts of California hold the same doctrine. See 16 Cal. 134.

In the case now under consideration, the evidence shows that the tract of land claimed by said bankrupt lies in one body, and has been continuously occupied and used by him and his family for homestead purposes; that the streets which were laid off and running across his premises have never been opened, and that the value of the lot or tract of land owned by said bankrupt has at no time, including improvements, exceeded the constitutional limitation of five thousand dollars.

In view of the facts as proven, and the authorities cited, I think the exceptions in said matter by said bankrupt to the certificate of the assignee were properly taken, and that

the property claimed by said bankrupt, as described in his schedule, should have been set apart to him, being protected and shielded by the constitution and laws of the state from forced sale and claims of his creditors.

DUVAL, District Judge. An examination of the facts in the case and law applicable to them satisfies me that Mr. Register Newton is correct in his decision. The bankrupt having acquired a rural homestead in accordance with the constitution and laws of the state of Texas has a vested right therein. The fact that the land embracing such homestead was subsequently included within the limits of the city of Dallas by an act of the legislature authorizing their extension cannot affect his homestead rights. The cases cited by the register, decided by supreme court of the state of Texas, appear to me conclusive on this point. The opinion of the register is, therefore, in all respects approved and confirmed, and the clerk will so certify.

Case No. 18,150.

YOUNG'S CASE.

[2 Cranch, C. C. 453.]¹

Circuit Court, District of Columbia. April Term, 1824.

GRANT OF FERRY LICENSE.

This court has a discretion to grant or refuse a license for a ferry over the eastern branch.

Nicholas Young petitioned the court for a license to keep a ferry over the eastern branch of the Potomac, alongside of the eastern branch bridge, and a rule was granted to the Anacostia Bridge Company, and the Navy Yard Bridge Company, and the Eastern Branch Bridge Company to show cause why it should not be granted.

Mr. Marbury, for the petitioner, cited the acts of Maryland, November, 1781, c. 22, and April, 1782, c. 31.

By the act of 1781, c. 22, § 1, the justices of the county courts are authorized and required to grant their license to any inhabitant of their county to keep a public ferry at any place within their county then used as such, if they should think that a public ferry ought to be kept there; and if any person should keep ferry for hire or reward without such license, he should forfeit £5, for every offense.

By the act of April, 1782, c. 31, § 3, it is enacted, "that when, and as often as any person shall apply to the justices of any county court for a license to keep a public ferry, and shall offer two good and sufficient securities, the said justices may and shall grant a license to such person to keep ferry, notwithstanding the said court may have, previous to such application, granted license or licenses to other persons to keep ferry at the same place."

By the act of congress of 3d of March, 1801,

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

(2 Stat. 115), "supplementary to the act concerning the District of Columbia," section 1, it is enacted that the circuit courts of the District of Columbia shall have the same power respecting ferries, &c., for the county of Washington as had been theretofore exercised by the county and levy courts of the state of Maryland.

Mr. Marbury, contended that the act of 1782 was peremptory upon the court and left them no discretion, the petitioner having offered "two good and sufficient securities," and cited the cases of *Thomas v. Cofield*, and *Ringgold v. Cofield* [unreported], so decided in the court of appeals of Maryland in 1810 and 1812, in chancery.

Mr. Key, contra. This is an application to the discretion of the court. The act of 1781, is applicable only to places then used as ferries. This is an application for a new ferry. The old ferry has ceased for many years, and the owner of the old ferry and landing, Matthew Wigfield, was one of the petitioners for the erection of the eastern branch bridge. If the landing had ever been condemned it has, by non-user, reverted to the owner. In the case of *Cofield*, the petition was not for a new ferry.

Mr. Marbury, in reply. This is not an application for a new ferry. This court granted a license for this ferry in 1815.

THE COURT (MORSELL, Circuit Judge, contra) decided that they had a discretion, and refused to grant the license, as the object was to compel the bridge companies to take less toll than they are authorized by law to take. The bridge companies are liable to prosecution and forfeiture if they suffer their respective bridges to be out of repair; and if any one may keep a ferry along-side of them they may not be able to keep them in repair, and the companies may be destroyed, to the great injury of the public.

NOTE. The petitioner, or some other person, afterwards set up a ferry near the bridge, and the court, by injunction, restrained him from receiving hire or reward for the transportation of persons, &c. across the branch.

YOUNG (ALCOTT v.). See Case No. 149.

Case No. 18,151.

YOUNG v. ANDES INS. CO.

[1 Flip. 599; 3 N. Y. Wkly. Dig. 363; 3 Cent. Law J. 719.]¹

Circuit Court, S. D. Ohio. Oct. 5, 1876.

REMOVAL OF CAUSES—TIME FOR APPLICATION.

1. Under the act of March 3, 1875 [18 Stat. 470], a removal of a suit pending in the state court at the passage of that act wherein a trial had been had after such passage, cannot be made, although the verdict was set aside and a new trial granted, and the petition for removal

¹ [Reported by William Searcy Flippin, Esq., and here reprinted by permission. 3 N. Y. Wkly. Dig. 363, contains only a partial report.]

was made at the first term at which the second trial could have been had.

[Cited in *Hendecker v. Rosenbaum*, 6 Fed. 99.]

2. Although no motion be made to remove the cause to the state court until a full term had passed by since the filing of such motion and the transcript of the proceedings in the state court—there is no waiver of the right so to do, nor will such conduct be deemed a submission to the jurisdiction of the United States court; no other proceedings being had therein than the filing of such transcript and motion.

At law.

Matthews, Ramsey & Matthews, for plaintiff.

Moulton, Johnson & Levy, for defendant.

SWING, District Judge. The plaintiff, a citizen of the state of Louisiana, on the 18th day of March, 1874, filed his petition in the superior court of Cincinnati against the defendant, a corporation organized under the laws of Ohio, to recover from it the sum of twenty-three hundred and ninety-three dollars exclusive of costs for a loss under a policy of insurance against fire, issued by defendant to plaintiff. Issue was joined and a trial before a jury had at the April, 1875, term of the court named, resulting in a verdict in plaintiff's favor for the amount claimed in the petition. The defendant filed a motion for a new trial, and the same was at the March, 1876, term of said court, granted, and the verdict set aside, and at the same term and before any further proceedings were had, the defendant made its application in due form, and accompanied with the required security, for a removal of the cause to this court under the act of congress approved March 3, 1875, relating to removals of causes from the state to the federal courts, and a transcript of the record was filed in this court on the first day of its April, 1876, term, thus completing the removal, so far as such filing was necessary; and it is also conceded that, so far as all questions of citizenship of parties, the amount involved and the nature of the suit, as well as the sufficiency within itself of the application and bond for removal, the defendant is within and has complied with the act already referred to. But the plaintiff, by his motion filed at the June term last past, asks to have the case dismissed from this court for want of jurisdiction, and to remand it to the state court, for the reason that the application for removal was not made in time in the state court, inasmuch as a trial was had in that court after the passage of the act of March 3, 1875, under which the removal was sought to be made. The defendant resists the motion, claiming first: that the motion to dismiss comes too late, being filed at a subsequent term to that in which the transcript from the state court was filed; and hence that the right to removal, simply because the application may not have been in time—that not being a jurisdictional element like citizenship or amount—has been

waived or lost; and second, that the application was in time within a fair construction of the act. The defendant's position, under this latter point being that the right of removal is not wholly lost by a failure to make the application at or before the first trial, but suspended merely, and if a new trial be granted, that the right revives, and may be made available by an application at or before the term at which the case may be first tried after the granting of such new trial; in other words, that such granting places both parties in the condition they were before the trial, and the case stands as if no trial had been had, and that an application then made in proper time is within the meaning and purpose of the act—one made at or before the term at which the case could be first tried—and finally, that the trial which occurs and deprives a party of the right of removal must be a final trial.

The statement of facts presents for decision the questions:

1st—Was the application for the removal of the cause in time? The determination of this question involves the construction of the 3d section of the "Act to determine the jurisdiction of the circuit court of the United States, and to regulate the removal of causes from state courts; passed March 3, 1875." The language of that portion of this section which bears upon this proposition is: "That whenever either party, or any one or more of the plaintiffs or defendants, entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make, and file a petition in such suit in such state court, before or at the term at which such cause could be first tried, and before the trial thereof." It has been held that it made no difference that several trials may have been had in a cause, if it stood for trial at the time of the passage of the act, and that it was removable, if application was made at the first term of the court at which it could be tried after such passage. *Merchants' & Manufacturers' Nat. Bank v. Wheeler* [Case No. 9,439]; *Hoadley v. San Francisco* [Id. 6,544]; *Andrews v. Garrett* [Id. 375]. If the language of the act of 1875 was the same as that of the act of 1867 [14 Stat. 558], we should hold, in accordance with the decision of the supreme court in the case of *Insurance Co. v. Dunn*, 19 Wall. [86 U. S.] 214, that although there may have been a trial of the cause after the passage of the act, a new trial having been granted, it could be removed at the first term at which a trial could have been had after the new trial had been granted; but the language of the two acts is entirely different. That of 1867 is: "At any time before the final hearing or trial of the suit." That of 1875 is, "before or at the term at which said cause could be first tried, and before the trial thereof." The supreme court said the word "final" in the first named act, applied as well to the word "trial"

as to the word "hearing." This qualifying word is left out of the new act, and we, therefore, conclude that congress did not mean the final trial. The party having therefore proceeded to the trial of his cause without asking for its removal, is not at a subsequent term, entitled to have it removed, although a new trial may have been granted him.

2d—It is said, however, that the cause having been removed into this court, and the plaintiff having permitted a term of the court to pass without objection, has waived his right to object to the jurisdiction. We do not think so. If the plaintiff had taken any steps in the case after its removal into this court, he might have waived his right, but he did nothing in the cause until he moved for its dismissal, which was at the next term after the record had been filed. We do not think this was such negligence as would deprive him of the right of objection to the jurisdiction. The cause is, therefore, remanded to the superior court.

YOUNG (BAILEY WASH. MACH. CO. v.).
See Case No. 751.

YOUNG (BANK OF ALEXANDRIA v.).
See Case No. 857.

Case No. 18,152.

YOUNG et al. v. BELL et al.

[1 Cranch, C. C. 342.]¹

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

INFANCY AS DEFENSE—PLEADING.

Infancy cannot be given in evidence upon the plea of *nil debet* to an action of debt on a promissory note in Virginia. The promissory note of an infant is voidable, but not void.

[Cited in *Hyer v. Hyatt*, Case No. 6,977.]

Debt on a promissory note. The defendants [Bell & Wray] pleaded *nil debet*, and offered evidence of infancy in support of the plea.

Mr. Youngs, for plaintiff. There is a difference between contracts void and voidable. This note was not void, but voidable. If infancy be pleaded, the plaintiff may reply that it was given for necessaries. The plaintiff ought to have notice of the defence, that he may be prepared to rebut it by evidence of necessaries furnished, or that the defendant was of age, or that after full age, he acknowledged the debt. If not pleaded, notice ought to be given, as in cases of set-off. It is not a defence of which the plaintiff can have knowledge, as in the case of limitations, which the court has decided cannot be given in evidence on *nil debet*. The act of assembly (Rev. Code, 36, § 3), has made a note a substantive cause of action of debt.

F. L. Lee and E. J. Lee, contra. The plaintiff must prove his debt. Whatever shows

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

there is not a debt is good evidence on this plea. A promise of an infant is absolutely void. A contract must imply an assent, but he cannot assent. Nil debet is a good plea where there is no debt. 3 Com. Dig. 165; 5 Com. Dig. 240. Infancy may be given in evidence on non assumpsit (*Darby v. Boucher*, 1 Salk. 279), although it is otherwise in case of a deed (*Zouch v. Parsons*, 3 Burrows, 1805; *Whelpdale's Case*, 5 Coke, 119). A promise of an infant is as void as a bond of a feme covert. It is clear that on non assumpsit it may be given in evidence. *Gilb. Ev.* (Old Ed.) 164. There is a difference between non est factum and non assumpsit. On the latter plea it may be given in evidence. Solemn contracts, which require delivery, are voidable only; but simple contracts are void. If plaintiff can show that the note was given for necessities, he may do it on nil debet. The general principle is, that infancy may be given in evidence on the general issue. 1 Salk. 278; *Buller*, 152; *Gilb. Com. Pl.* 64, 65; *Loft's Gilb. Ev.* 368, 369; 4 *Bac. Abr.* 61; 1 *Sid.* 51; 12 *Vin Abr.* 76.

Noblet Herbert, in reply. In cases of usury and coverture, the instrument is absolutely void. But in case of infancy, it is only voidable. There is a difference between a note and an account. A note reduces the matter to a certainty, but an account does not. The act of Virginia, also, which gives an action of debt upon a promissory note, makes a difference, and puts it on the ground of a specialty. The authorities, which say it may be given in evidence on the general issue, mean in actions of assumpsit, not in actions of debt. See *Trueman v. Hurst*, 1 *Term R.* 40; *Crantz v. Gill*, 2 *Esp.* 472; *Clare v. Earl of Bedford*, 1 *Strange* 168; 13 *Vin. Abr.* 536; 2 *Strange*, 1101.

THE COURT, having taken time to consider, decided (*nem. con.*) that infancy cannot be given in evidence, on the plea of nil debet to an action of debt on a promissory note, being of opinion that it is not void, but voidable. See *Hyer v. Hyatt* [Case No. 6,977], at Washington, December, 1827.

Case No. 18,153.

YOUNG et al. v. BLACK.

[1 *Cranch, C. C.* 432.]¹

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

NON JOINDER OF PLAINTIFF.

Upon a joint shipment and orders by three persons, the master is not liable to an action by two of them only, for breach of those orders, unless he has expressly promised to pay them their proportion of the damages.

Assumpsit for disobedience of orders. The first count of the declaration stated a cargo shipped jointly by plaintiffs and one Lawra-

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

son, and joint orders from all three, and an express promise in writing by the defendant to obey those orders; and a breach of the orders; and averred that if the defendant had obeyed the orders and brought in a cargo of salt, the profit of the plaintiffs on the sale of that salt would have been fourteen hundred and thirty-five dollars; by reason whereof the defendant became liable to pay that sum to the plaintiffs, and being so liable, the defendant, in consideration thereof, promised the plaintiffs to pay that sum to them on demand. The second count was like the first, but upon another breach of the orders. The third, was indebitatus assumpsit for goods sold and delivered. The fourth, money had and received. The fifth, *insimul computasset*.

THE COURT, upon the prayer of Mr. Swann, for the defendant, decided (*nem. con.*) that the plaintiffs, Young and Deblois, could not recover without evidence of an express promise to pay them their proportion of the damages for the breaches alleged. And that the orders, &c., were not evidence of such express promise, nor were they evidence on either of the three last counts. The plaintiffs became nonsuit.

YOUNG (BUTLER v.). See Case No. 2,245.

Case No. 18,154.

YOUNG v. CHIPMAN.

[Nowhere reported; opinion not now accessible.]

YOUNG (CLAPP v.). See Case No. 2,786.

Case No. 18,155.

YOUNG et al. v. COLT.

[2 *Blatchf.* 373.]¹

Circuit Court, S. D. New York. May 14, 1852.

INFRINGEMENT OF PATENT—CROSS BILL FOR DISCOVERY.

1. A defendant in a suit in equity founded on the infringement of a patent, can not, by a cross-bill which sets up no color of title in himself, demand a discovery from the plaintiff in the original suit as to the source or validity of his title.

[Cited in *Stonemetz Printers' Machinery Co. v. Brown Folding-Mach. Co.*, 46 *Fed.* 852.]

2. It is essential to a bill of discovery that it should set forth a title sufficient to support or defend a suit, and pray a discovery pertinent to that title and nothing beyond. And, where it cannot be sustained as a bill for discovery, it cannot be retained for the purpose of relief, unless it makes a case for relief independently of the discovery sought.

[Cited in *Home Ins. Co. v. Stanchfield*, Case No. 6,660.]

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

[Suit by Hiram Young and Edward Leavitt against Samuel Colt. Heard on demurrer to a cross-bill.]

Seth P. Staples and Robert Emmet, for plaintiffs.

Edward N. Dickerson, for defendant.

BETTS, District Judge. The specific points presented for adjudication in this case arise on a demurrer to a cross-bill filed by the plaintiffs, but the discussion has also involved an examination of the original bill and answer, and it has thus become necessary to advert to the case made by the entire pleadings. The original bill was filed November 19, 1851, by Colt, as patentee, for an injunction and other relief against Young and Leavitt, for alleged violations of his patent-right. It avers that the patentee, before the 25th of February, 1836, invented a new and useful improvement in fire-arms, and that, on that day, letters patent were duly issued to him for his invention, and that he was the first and original inventor thereof. On the 28th of October, 1848, he surrendered the patent to the commissioner of patents, because of a defective claim or description of his invention in the specification, and a re-issue of the patent was made the same day, for the complement of the original term of fourteen years. Previous to the expiration of that term, the patentee applied for and obtained, on the 10th of March, 1849, from the commissioner of patents, an extension of the patent for seven years beyond the period of its expiration, and the order for extension was duly endorsed on the patent. The bill charges that the defendants have infringed and violated the patent-right since such extension, and continue to infringe and violate it.

On the 26th of December, 1851, the defendants filed their answer to the bill, denying that the patentee was the first and original inventor of the improvement, and that the patent was legally re-issued and extended, and that the patentee has any interest in the patent, and averring that he had sold and assigned his entire title and interest therein to the Massachusetts Arms Company.

On the same day, the defendants in the original bill filed a cross-bill against the patentee, for discovery and relief. That bill seeks from the patentee a discovery of the time and place when and where he made his discovery and first manufactured any fire-arm under the patent, and whether he sued any person, during the first term of his patent, for infringing it, or made any claim against any one therefor. It also demands a discovery of the proceedings had in the patent office in obtaining an extension of the patent, and whether the application was submitted to the secretary of war for his opinion thereon; and also a discovery of the proceedings before the commissioner of patents sub-

sequently to the act of May 27, 1848 [9 Stat. 231], and whether notice of application for the extension was published, or was given by the patentee to any person. The bill further prays that, when the discovery shall be made, the court may decree the order extending the patent to be inoperative and void, and that the patent expired on the 25th of February, 1850, and also grant a perpetual injunction restraining the patentee from commencing any action at law or in equity for any infringement of the patent since the 25th of February, 1850; and that the court may declare the patent to be void, and may order it to be delivered up to be cancelled. A prayer for general relief is also appended.

The defendant files a general demurrer to this bill.

Upon the averments of the original bill, the plaintiff therein has clearly a prima-facie title to the thing patented, and the legal presumption in his favor is, that he had complied with all the requirements of law which are necessary to render his title complete. Phil. Pat. 407; Webst. Pat. Cas. 129; Cur. Pat. §§ 30, 39; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448.

The answer of the defendants to the original bill denies that the patentee is the first inventor or has acquired a valid patent. This answer will enable them to disprove any title or right of the plaintiff under the grant, or compel him to support it by evidence aliunde the patent. The scope and design of the cross-bill is to make that defence by means of evidence extracted from the patentee, and the demurrer interposed to that bill raises the question, whether the defendants in the original suit have a legal right to demand disclosures from the patentee which might show that he had no valid title to his patent.

It is to be remarked, that the defendants in the original suit do not take their defence in their answer, or file their cross-bill, under any color of title. They neither claim to be prior inventors or to hold by assignment the elder right of any other person. If not naked intruders or trespassers upon the possession of the patentee, they stand upon no higher ground than the allegation that the grant of the government to him is void, and they present this bill to support that assertion. This is engrafting a novel function upon the office of a cross-bill.

The broad principle upon which a cross-bill is allowed is, that equity should give suitors a common advantage in its processes. As it compels a defendant to make disclosures and discoveries under oath, to aid an action against him, so should it secure mutuality in this privilege, by allowing a defendant to become a plaintiff and compel his adversary, in particular cases, to make disclosures and discoveries of matters within his knowledge that are serviceable to the defence. The parties, to that end, alternate places, in order that each may have the same use of the powers of the court for the same object. A cross-bill,

as its name imports, goes no further than to give the party filing it the reciprocal right enjoyed by the complainant in the original bill, in respect to their mutual title or interest in the subject-matter of the suit: Story, Eq. Pl. §§ 389, 390.

The English and American authorities are clear and nearly invariable in respect to the legitimate office of a bill of discovery. It is essential to a valid bill of discovery that it set forth a title in the party which is sufficient to support or defend a suit, and that it pray a discovery pertinent to that title and nothing beyond. Story, Eq. Pl. §§ 317-320; 2 Story, Eq. Jur. § 1490; Wig. Dis. 15; Phillips v. Prevost, 4 Johns. Ch. 205; Van Kleeck v. Reformed Dutch Church, 6 Paige, 600; s. c., in error, 20 Wend. 457. I find but one case (Adams v. Porter, 1 Cush. 170) in which a disposition is indicated to extend to a plaintiff in a cross-bill a wider privilege. That case might seem to authorize such plaintiff to place, in effect, the defendant on the stand, and examine him as to all matters applicable to the defence. But the same court, in a subsequent case (Haskell v. Haskell, 3 Cush. 540), concedes that the general principles of equity law would not favor such a rule, if it is declared in that decision.

Considering the cross-bill in this case as a bill of discovery, the defect is vital to it, that it rests on no title in the parties filing it, either in common with or hostile to the patentee. It is contrary to all principles of equity pleading, to permit a party who has no right himself to a subject-matter in dispute, to subject the one who shows a prima-facie title to it to interrogatories as to the source or validity of that title. Bills framed on that ground are always rejected as fishing, or as attempts to pry into an adversary's title, and as transcending the privilege granted to a suitor to draw from his adversary facts tending to support his own title. It is sufficient to refer to the elementary books, in which this doctrine is stated and amply supported by authority. Har. Ch. Prac. 115; Mitf. Eq. Pl. 189, 190; Coop. Eq. Pl. 58; Wig. Disc. 90, 93, 99; Hare, Disc. 196, 197; Story, Eq. Pl. §§ 324, 571; 2 Story, Eq. Jur. § 1490; Macn. Sel. Cas. 10; 58 Law Lib. 24. An article in 13 London Jurist, 52, gives a learned and able exposition of the late English cases on the subject.

As the defence which the cross-bill is designed to maintain has relation to the weakness of the plaintiff's title, and not at all to any title set up on the part of the defendants, it cannot be sustained as a bill of discovery. But it is contended that, as the bill prays relief as well as discovery, it will be retained for the purpose of relief, although the dis-

covery be denied. This may undoubtedly be so in cases where the bill makes a case for relief independently, of the discovery sought for. But, in the present case, the relief asked is to be a consequence of the discovery. The specific relief prayed for is a perpetual injunction against the patentee and his assigns from bringing any suits in equity or at law for infringements of the patent, and a decree declaring the patent void and that it be delivered up to be cancelled. An injunction against the patentee is also prayed, restraining him from continuing suits he has already commenced in the District of Columbia, against the defendants, for violating the patent. General relief is also prayed, but the counsel for the defendants admitted on the argument that they could point out no other relief appropriate to their case than what the bill specifies.

Without discussing the question of the competency of the court to give the description of relief sought for by the bill, in protection of a party who shows a title to the patent-right in himself, I think that the principle upon which the first point is decided must also govern these demands in the cross-bill, and that, as the plaintiffs therein do not set up any color of right or title in themselves to the patented invention, and seek to defend themselves against the action of the patentee for infringement of his patent, only by evidence to be extracted from him showing the weakness of his title, they are not entitled to any injunction or interference of the court in their behalf, the supposed evidence to support that claim being denied them by the court. Their equity upon their bill is, that the patentee will discover, in his answer to the bill, that he has no valid patent, and that that evidence, when given, will entitle them to be relieved of all suits and prosecutions in his behalf. The court having denied their right to the evidence, the supposed equity to flow from it has no legal existence and affords no cause for upholding the bill.

The other claim, that this court shall enjoin the patentee from bringing actions against any parties whomsoever, and direct the patent to be cancelled, does not seem to be a ground of equity upon which the plaintiffs in the cross-bill can demand the interposition of the court. They have no authority to bring the bill for any other matter than what is connected with their individual rights and interests.

The demurrer must be allowed, with costs.

[For other cases involving this patent, see Cases Nos. 3,030 and 3,032.]

YOUNG (COLT v.). See Case No. 3,032.

Case No. 18,156.

YOUNG et al. v. CUSHING et al.

[4 Biss. 456.]¹

Circuit Court, N. D. Illinois. July, 1865.

DECREE—PERSONS NOT PARTIES.

1. This court will not make a decree the execution of which would affect the right of a party not before it, or throw a cloud upon his title.

[Cited in *Beasley v. Shively*, 20 Or. 503, 26 Pac. 847.]

2. If such absent party is a necessary party for a final decree, the bill should be dismissed without prejudice.

[Cited in *Beasley v. Shively*, 20 Or. 503, 26 Pac. 847.]

In equity.

DRUMMOND, District Judge. The facts, so far as they are material to the decision of the questions in this case, are substantially these: A man by the name of Adams was indebted to the plaintiffs in the sum of about \$1,300. Cushing, one of the defendants, was indebted to Adams in the sum of about \$1,600, and to secure a note given for the indebtedness Cushing had executed a mortgage or deed of trust on the property in controversy. The plaintiffs demanding some kind of security from Adams, he transferred to them as collateral security the note of Cushing to him, and the mortgage or deed of trust. The note was indorsed in blank. No assignment was made upon the mortgage or deed of trust. It was simply turned over to the agent of the plaintiffs. The mortgage or deed of trust of Cushing to Adams was upon the record and he appeared to be the owner of the property as mortgagee. Adams was financially involved, suits were pressing against him in this court, and among the judgments recovered was one in favor of one Edgerton. The note of Cushing to Adams not having been paid at maturity, Cushing transferred his equity of redemption to Adams.

Adams seems to have acted in bad faith toward the plaintiffs. He should not have taken the assignment of the equity of redemption, but it should have been made to the plaintiffs or to their agent for their benefit, but a deed of the equity of redemption of the interest of Cushing was, in fact, made to Adams, and the indebtedness of Cushing to Adams was considered as at an end. In other words, by the transfer of the equity of redemption Cushing extinguished, or intended to extinguish, the note of \$1,600 which he owed to Adams, but which in fact was in the hands of the agent of plaintiffs.

There would have been no trouble in this matter if there had not been rights of third parties intervening, as judgment creditors. This assignment of the equity of redemption was made by Cushing to Adams after a levy was made under the judgment of Edgerton, but before a sale of the property covered by

the deed of trust or mortgage, as the property of Adams the mortgagee, and after the transfer of the equity of redemption Adams was, of course, upon the record, apparently the sole owner of all the interest.

Mr. Strain of La Salle, as the attorney of the plaintiffs, held the note and deed of trust of Cushing. They were not given up, however. After this, proceedings took place in a suit against Edgerton (he being of the opinion that the security which he had for the plaintiffs was gone in consequence of the non-recording of any assignment from Adams to the plaintiffs). Arrangements were made by which security was obtained for the indebtedness. A quarter section of land in the military tract was turned over to him, and consequently, when Adams could not make the payment of the note to the plaintiffs, a deed was made to one of the plaintiffs.

The question is, whether, upon this bill filed to foreclose substantially this mortgage or deed of trust on the part of the plaintiffs, obtained by virtue of this transfer to them or to their agent, the court can make a decree without the presence of Edgerton and without affecting his interest. Edgerton was originally made a party. Afterward the suit was dismissed as to him, and it is now sought to obtain a decree by which their rights may be enforced without affecting the rights of Edgerton.

It is claimed that Adams has refused to execute the trust. He held the property as a trustee of the assignee, and it is insisted that he should enforce the trust by sale of the property, and not being willing to do it, that he should be removed from the position and another appointed, and that the trustee be directed to go on and sell the property and to leave Edgerton with whatever legal or equitable rights he may have under his judgment and sale. If the court could do this upon principles of equity there would be no objection, but I do not think that it can be done.

It was not necessary to come into this court with this case. The party might have gone into the state court, and he might have brought in all the parties who are non-residents, and a decree have been rendered. Edgerton being a non-resident and there being no way by which we can bring him into court by publication, he not voluntarily appearing, of course we can make no decree affecting his interest which would be binding upon him. Neither can we properly make any decree in this court in which he is not a party which would affect his interests. If this court should go on and remove Mr. Adams, and appoint another trustee, and direct the property to be sold, and he should sell it and a deed should be made to the purchaser, would it not affect the interest of Mr. Edgerton? Certainly. It would, to say the least, throw a cloud upon his title, and raise a controversy at once in the mind of any one who was called upon to investigate his title as to where the title actually was. He holds by virtue of a purchase under the judg-

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

ment and execution against Adams the mortgagee of the property. Now, by our law the rights of mortgagees can be sold as well as of mortgagors. On the record Adams was the owner as mortgagee of the property. The judgment creditors had a right to sell that interest, whatever it might be. It was sold and he became the purchaser. Now we cannot make any decree which will affect his interest without making him a party. He is not a party, and cannot, without service or appearance, be made a party in this court. Therefore, the bill will have to be dismissed, but without prejudice.

YOUNG (DADE v.). See Case No. 3,534.

Case No. 18,157.

YOUNG et al. v. DAVIDSON.

[5 Cranch, C. C. 515.]¹

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

TAKING OF DEPOSITION—NOTICE.

In taking a deposition under the 30th section of the judiciary act of 1789 [1 Stat. 88], the notice must be given by the magistrate before whom the deposition is to be taken; a notice given by the party is not sufficient.

Assumpsit [by John M. Young and others against John Davidson] for work and labor.

Upon the trial, R. J. Brent, the plaintiffs' counsel, offered to read in evidence to the jury the deposition of one F. A. Russell, taken *de bene esse*, before the mayor of Washington.

Mr. Marbury, for defendant, objected that the notice to the defendant was given by the plaintiffs, and not by the magistrate, as required by the act of congress of September 24, 1789, § 30 (1 Stat. 88).

THE COURT (THRUSTON, Circuit Judge, absent) for that reason rejected the deposition.

YOUNG (DECATUR v.). See Case No. 3,722.

YOUNG (DENEALE v.). See Cases Nos. 3,785 and 3,786.

YOUNG (GRUNDY v.). See Cases Nos. 5,850 and 5,851.

Case No. 18,158.

YOUNG v. HOOVER.

[4 Cranch, C. C. 187.]¹

Circuit Court, District of Columbia. Dec. Term, 1831.

POUND-BREACH—JUSTIFICATION.

If cattle be impounded for damage feasant, the badness of the plaintiff's fence is no justification of pound-breach, but may be given in evidence in mitigation of damages.

Trespass and pound-breach [by Edward D. Young against Peter Hoover].

Mr. Marbury, for defendant, offered evidence of the plaintiff's bad fence in justification.

Mr. Redin, contra, contended that it was no justification of the pound-breach, and cited Bradb. Dis. 287; *Cotsworth v. Bettison*, 1 Salk. 247; *Lindon v. Hooper*, Cowp. 414; 1 Rolle, Abr. 674, pls. 1, 5; Co. Litt. 47b; and Lat. Just. 135.

Mr. Marbury, in reply. If the distress be unlawful, the owner may take them out of pound if it be not locked, only latched, so as no violence be used. Com. Dig. tit. "Distress," d. 2, p. 500.

THE COURT (nem. con.) said that the want of a sufficient fence was not a justification of breaking the pound, but may be given in evidence in mitigation of damages; the court having before permitted the plaintiff to give evidence of the actual damage done by the cattle in the plaintiff's garden in aggravation of damages.

YOUNG (HOUSE v.). See Case No. 6,738.

Case No. 18,159.

YOUNG v. JONES et al.

[3 Hughes, 274.]¹

Circuit Court, E. D. Virginia. Feb. 18, 1879.

FIRM TRADEMARK—RIGHTS OF PARTNER.

The exclusive right to use the trademark of a firm does not pass to any member of the firm by mere implication; but such member may use it, provided he do so in a manner not to deceive the public.

Injunction against use of a trademark.

HUGHES, District Judge. A bill was filed by the plaintiff on the 15th of January last, complaining of a violation of his trademark by the defendants, and making a case for a temporary restraining order under section 718 of the Revised Statutes; and the order was given, to stand until the 12th instant. A rule was given against the complainant, returnable on the 12th instant, which is now heard. The defendant files his answer and affidavits. The complainant files affidavits, and the case is heard on the defendants' motion to dissolve the temporary restraining order, and on the complainant's motion for a preliminary injunction until the cause shall be finally heard on plenary proofs. Smith, Snyder & Co. was a firm which established a valuable European reputation for a certain manufacture of sumac and bark, and their brand became valuable as a trademark. They were succeeded by the firm of Jones, Snyder & Young, which acquired an exclusive right to their trademark or brand,

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

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

"Smith, Snyder & Co." The firm of Jones, Snyder & Young was composed in part of the firm of Jones, Bros. & Co., which was engaged in another business. This latter firm became insolvent, and went into bankruptcy. Previously to doing so, and in contemplation thereof, and by consent of all parties concerned, this firm of Jones, Bros. & Co. sold to N. J. Young, senior member of the firm of Jones, Snyder & Young, "all their right, title, interest, property, claim, and demand in or to the assets of the firm of Jones, Snyder & Young, as set forth in an itemized schedule" annexed to the assignment. This schedule contained a list of property and shipments of the firm, and did not enumerate either the good will or trademark, either of the firm of Jones, Snyder & Young, or of the original firm of Smith, Snyder & Co.

The question in this case is, whether the name and business of the firm was an asset of Jones, Snyder & Young. The interests of trademark and goodwill are omitted from express mention in this or any oral contract which accompanied the assignment to Young of the effects of Jones, Snyder & Co. It is well-settled law that upon the dissolution of a partnership each partner has a right, in the absence of stipulation to the contrary, to use the name and style of the partnership in any way consistent with the facts of their business which does not have the effect of deceiving the public. He may say successor to the late firm, and may make like representations. In the absence of express stipulations each partner may use the goodwill of the former partnership. It is also held that rights in the trademark are analogous to rights in the goodwill of a partnership. In the absence of express stipulation at the time of dissolution, each partner may go on and use the trademark of the firm. This right does not pass inferentially under a general assignment; but is like a man's skill in any kind of pursuit, it remains with him. See for this principle *Banks v. Gibson*, 11 Jur. (N. S.) 680. It has been a matter of some debate and contrariety of decision by the courts, whether one surviving partner after the death of the other succeeds to the goodwill of the firm; the better opinion now being that he does not. *Hammond v. Douglas*, 5 Ves. 539. Even where the goodwill of a prosperous business of eight years' duration has been sold by its proprietor along with the lease of the premises, and all the stock, wagons, and fixtures used in the business, which consisted of "Howe's Bakery," it was held in a leading case that the vendee had not the right to use the name "Howe" of the vendor, that not having been expressly mentioned in the contract of sale. *Howe v. Searing*, 10 Abb. Prac. 264; Colly. Partn. (last Ed.) 236; 2 Kent, Comm. 372, notes. On the want of right in the complainant, and not on the title to the trademark of the defendants, the injunction must be dissolved.

Case No. 18,160.

YOUNG v. LIPPMAN et al.

[9 Blatchf. 277; 5 Fish. Pat. Cas. 230; 2 O. G. 249, 342.]¹

Circuit Court, S. D. New York. Jan. 2, and March 29, 1872.

INFRINGEMENT OF PATENT—HOOP SKIRTS—APPLICATION FOR INJUNCTION—EFFECT OF AFFIDAVITS.

1. The claim of the letters patent granted to Thomas B. De Forest and Thomas S. Gilbert, February 18th, 1868, for an "improvement in springs for hoop-skirts," namely, "a skirt-hoop, formed by enclosing one or more wires within a covering, which not only envelopes and protects the wire, but forms an edge, A, or connection, B, substantially as and for the purposes specified," is a claim to such a skirt-hoop as is described, as an article of manufacture—a skirt-hoop capable of use in making what is known as a hoop-skirt.

2. The invention in the patent is limited to a skirt-wire made by folding the fabric over one or more wires, and securing it by sizing or glue and pressure, so as to thus enclose the wire or wires in a covering, and leave an edge of the fabric on the one wire, or a connection, formed by the fabric, between the two wires, so as to admit of attaching the skirt-wire to vertical tapes, in making a hoop-skirt.

3. The securing the fabric by gluing it, or using other equivalent adhesive substance, in contradistinction to securing the fabric, to form the enclosure, by weaving around the wires, or weaving pockets, in which to insert the wires, being cheaper, and an improvement in the trade, and useful, is, if new, patentable, the resulting fabric being a different article from one formed by weaving.

4. An article of dress, called a "bustle," containing wire hoops, each of which is a skirt-hoop, formed by enclosing, by means of glue or sizing and pressure, two wires within a covering, which not only envelopes and protects the wires, but forms a connection between them, so that, while the wires are confined to their proper places within the covering, the wire hoop or spring has the appearance of being made from a much broader wire than it in reality is, and may be secured to the vertical tape by means of a metallic fastening passing through the vertical tape and the material covering the spring, is, substantially, a hoop-skirt, of a diminished size, and the making and selling of such bustles is an infringement of said patent.

5. The ownership of a right to manufacture covered wire for springs for skirts, under a patent granted to John T. Loft, March 13th, 1860, for an "improved machine for covering the springs of skeleton skirts," confers no right, as against the De Forest and Gilbert patent, to make, under the Loft patent, the covered wire contained in such bustle.

6. Although such covered wire may be made by means of the machinery described in the Loft patent, no such wire or skirt-hoop is described or shown in the Loft patent, nor is the apparatus of that patent one which necessarily produces nothing else but such wire or skirt-hoop.

7. In opposition to a motion for an injunction, a general allegation, by affidavit, on information and belief, that the thing patented existed before, without disclosing the particulars of the information leading to the belief, is insufficient.

¹ [Reported by Hon. Samuel Blatchford, District Judge, and by Samuel S. Fisher, Esq., and here compiled and reprinted by permission. The syllabus and opinion are from 9 Blatchf. 277, and the statement is from 5 Fish. Pat. Cas. 230.]

8. The fact that the plaintiff is infringing the Loft patent, by using the Loft apparatus to make skirt-hoops, is no ground for refusing an injunction against the defendant, restraining him from infringing the plaintiff's patent.

9. A separate affidavit, by the plaintiff, of his belief that the patentees were the original and first inventors of the thing patented, dispensed with, the bill having in it such an averment, and having been sworn to eleven days before it was filed and notice of application, on it, for the injunction, was given.

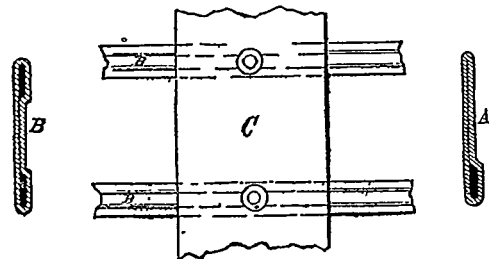
[Cited in Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co., 47 Fed. 895.]

10. A provisional injunction was dissolved, on evidence showing the prior existence, in the United States, of the skirt-wire of the patent, specimens of the thing known before being produced.

[This was a bill in equity by Alexander K. Young against Philip Lippman and Clara Seligman.

[Motion for provisional injunction. Suit brought upon letters patent No. 74,672 for an "improvement in springs for hoop-skirts," granted to Thomas B. De Forest and Thomas S. Gilbert, February 18, 1868, and assigned to complainant.

[The nature of the invention is sufficiently stated in the opinion, and is further illustrated in the accompanying engraving, in which



the black portions of the two side figures represent the flat wire, and the shaded portions the folded fabric. These views are greatly enlarged, the middle figure representing two of the complete springs applied to a portion of one of the tapes.]²

Edward N. Dickerson, for plaintiff.
John B. Staples, for defendants.

BLATCHFORD, District Judge. This is a motion for a provisional injunction, founded on letters patent granted February 18th, 1868, to Thomas B. De Forest and Thomas S. Gilbert, for an "improvement in springs for hoop-skirts," and now owned by the plaintiff. The specification states that the inventors have invented "a new improvement in the manufacture of hoop-skirts." There are three figures of drawings annexed to the specification. Figure 1 is a front view of one of the vertical tapes, with three springs attached. Figure 2 is a section of one of the springs, enlarged. Figure 3 is a like section, of a different construction. The specification says: "This invention relates to an improvement in the manufacture of

springs attached to vertical tapes, and well known as hoop-skirts, the object being to produce a lighter and cheaper skirt than has heretofore been done; and the invention consists in enclosing one or more flat elastic wires in a covering, the said covering being, when sized, folded and pressed, of greater width than the spring, so that, while it confines the spring to its proper position within the covering, it gives to the spring the appearance of being made from a much broader wire than it in reality is, and admits of securing the spring to the vertical tape by means of a metallic fastening passing through both the vertical tape and the material covering the spring. * * * In Fig. 2, we represent the spring as two flat wires enclosed within the same covering, the wires being denoted in black. Various devices may be employed in covering the two wires. One, and, we think, practically, the best, is to take a narrow strip of fabric, sufficient in width to surround the two wires, and form the space between the two. Then, the two wires, with the fabric, are drawn through an apparatus prepared for the purpose, the fabric being sized with any adhesive material, and the wires sustained equidistant from each other, the apparatus folding the fabric over the wires, and pressing it down into the space between, the sizing being sufficient, or, other sizing being added, so that, when thoroughly dried, the wires will be sustained at their given distances from each other, one wire at each edge of the folded fabric. The wires may be very light, and the fabric equally light, and, when completed, the article has the appearance of a broad spring. Instead of the two springs, as seen in Fig. 2, a single spring may be inserted, as in Fig. 3, and the fabric guided and folded so as to leave an edge, A, of fabric upon the spring, as denoted in said Fig. 3. This folded edge, being sized and pressed, secures the wire in its position in like manner as first described, and gives the like appearance of a broad spring, the sizing in all cases being sufficient to sustain that portion of the fabric at the edge of the wire, or between the wires; or, if preferred, and to give more material at the edge, a single spring may be inserted at one edge, and a cord at the other edge. To construct a skirt from springs thus formed, pass the springs, B, through the pocket in the vertical tape, C, in the usual manner, then insert an eyelet, or other suitable metallic fastening, through the vertical tape, and through the fabric of the covering of the spring, as denoted in Fig. 1, and this may be done on the former, and the same means which secure the springs in the vertical tape may also lock the two ends of the spring within the pocket of the tape. A skirt constructed in this manner has every appearance of a strong spring, but is much lighter than the ordinary skirts, as the wire employed for the spring may be much lighter than that

² [From 5 Fish. Pat. Cas. 230.]

used in the ordinary manner, and the manner of attaching the parts together is of the strongest possible character. Other wires may be added, to increase the width, but forming a space in like manner between each two. We do not wish to be understood as broadly claiming the introduction of two or more springs into a fabric, as such is not new; but, in cases when it has been done, the fabric has been first formed into pockets for the reception of the springs, and the springs themselves covered separately and independent of the said pockets. This arrangement is seen in several well-known patents for the whole or lower portions of a skirt. It will be observed, that we do not in any way form a pocket in the fabric, the covering being simply a folded fabric, the folds being secured by strong sizing and pressed hard together." The claim is in these words: "A skirt-hoop, formed by enclosing one or more wires within a covering, which not only envelopes and protects the wire, but forms an edge, A, or connection, B, substantially as and for the purposes specified."

The allegation of infringement, in the bill, is, that the defendants are making and selling springs for hoop-skirts, precisely the same as those described in the plaintiff's patent. The evidence of infringement is, that the defendants have sold an article of dress called a "bustle," containing hoop-skirt wire made substantially in the manner described in the patent, and that the defendant Lippman has been vending such hoop-skirt wire. The making and selling of the bustle is not denied, and a specimen is produced, which contains wire hoops made in the manner described in the patent. Each hoop, in fact, is a skirt-hoop, formed by enclosing, by means of glue or sizing and pressure, two wires within a covering, which not only envelopes and protects the wires, but forms a connection between them, substantially as and for the purposes set forth in the specification of the plaintiff's patent.

There can be no doubt that the claim of the patent is for such a skirt-hoop as is described, as an article of manufacture—a skirt-hoop capable of use in making what is known as a hoop-skirt. The bustle referred to is substantially a hoop-skirt, of a diminished size.

The defendants set up, in defence, that the defendant Lippman is the owner of the right to manufacture covered wire for springs for skirts, under letters patent granted to John T. Loft, March 13th, 1860, for an "improved machine for covering the springs of skeleton skirts," and that he is making, under that patent, covered wire such as is contained in the bustle referred to. The specification of the Loft patent describes a machine for covering, in a continuous manner, the springs for hoop-skirts with any textile or other suitable fabric, the invention consisting in the use of glue or cement, distributing rollers, cutters, guides, folders, and drawing and

pressure rollers, substantially as described in such specification, whereby the desired end is attained. The machine is intended to take the place of machines for weaving or braiding the covering around the wires of which the hoops are made. It describes and claims the covering of wires or springs for hoop-skirts, by passing the same, in connection with strips or covers of suitable fabric, having a suitable glue, cement or adhesive substance applied to them, through folders and between drawing and pressure rollers, arranged to operate substantially as and for the purpose set forth. There is no description or representation of any such skirt-hoop as the plaintiff's. The only wire or skirt-hoop shown or described is one in which the fabric merely encloses or covers the wire, so as to envelop and protect it, and does not, as in the plaintiff's hoop, also form an edge to a single wire, or a connection between two-wires, for the purpose shown in the plaintiff's specification. There is no suggestion, in the Loft specification, of the construction of such an article as the plaintiff's skirt-hoop. It may very well be, that the Loft machine is capable, either with or without modification, of being used to manufacture the plaintiff's skirt-hoop. The specification of the plaintiff's patent speaks of making his skirt-hoop by drawing it through a proper apparatus; but the mere fact of the prior existence of such apparatus shows no want of novelty in the invention covered by such patent. The novelty of such invention would not have been affected even if the plaintiff's patent had stated that the new skirt-hoop was to be made by the use of the Loft apparatus. Such apparatus is not one which necessarily produces nothing else but the plaintiff's skirt-hoop. This is shown by the fact that, as described and represented in the Loft patent, it does not produce the plaintiff's skirt-hoop, or anything having its characteristics.

The defendant Lippman, in an affidavit, states, that he is informed and believes, that, long before the date of the plaintiff's patent, and before the alleged invention of De Forest and Gilbert, covered wire, with spaces of the covering fabric between or on the outside of the wire, was known and used publicly for various purposes, and was an article well known and used and sold. This general allegation, on information and belief, amounts to nothing. If the defendant has any information to the effect stated, sufficient to warrant a belief in the truth of what is stated, he is bound to disclose it for the judgment of the court if it is to be of any avail to him. He cannot swear to the conclusion and withhold the particulars of the information.

The fact that the plaintiff does not or cannot make his hoop without using the apparatus covered by the Loft patent, as is urged, cannot affect the questions involved in this motion. It may be that the plaintiff is infringing the Loft patent, while the defendants are infringing the plaintiff's patent, and

that neither can make the plaintiff's hoop without using what is covered by both of the patents. But the case of each must be treated separately, on its merits, when presented.

It is objected, that the application for the injunction is not accompanied by an affidavit of the plaintiff, that he believes that De Forest and Gilbert were the original and first inventors of the thing patented. The bill, however, which was sworn to on the 13th of November, 1871, and filed on the 24th of November, avers that De Forest and Gilbert were the first and original inventors of the improvement for which the patent was issued. On the filing of the bill, notice of the application, founded on the bill, for the injunction, was given for the 2d of December. Under such circumstances, no separate affidavit is necessary. *Sullivan v. Redfield* [Case No. 13,597].

An injunction must be granted, as prayed for in the bill.

After the granting of the injunction, in January, 1872, a motion was made, in March, 1872, to dissolve it, on matters not presented on the original motion.

BLATCHFORD, District Judge. I do not regard anything adduced by the defendants against the novelty of the invention covered by the plaintiff's patent, as of any importance, except the skirt wires brought from England by Marcus Berliner, in 1865. The invention in the patent is limited to a skirt wire made by folding the fabric over one or more wires, and securing it by sizing or glue and pressure, so as to thus enclose the wire or wires in a covering, and leave an edge of the fabric on the one wire, or a connection formed by the fabric between two wires, so as to admit of attaching the skirt wire to vertical tapes, in making a hoop skirt. This securing the fabric by gluing it, or using other equivalent adhesive substance, is in contradistinction to securing the fabric, to form the enclosure, by weaving around the wires, or weaving pockets, in which to insert the wires. It is in evidence, that the manufacture by folding and gluing is cheaper than that by weaving. It is an improvement in the trade, and useful, and, if new, patentable. The resulting fabric is a different article from one formed by weaving.

The article brought from England by Berliner in 1865, if his affidavit is true, and not a fabrication, and if the specimens which he produces, as the identical articles he brought from England in 1865, are not fabricated for this occasion, is the same thing as the skirt wire of the patent, made of a folded fabric, glued and pressed, over two or more wires, and with the connection of fabric between two wires. If his affidavit and these specimens had been presented on the original motion for injunction, I should not have deemed it proper to grant the injunction; and I think they must now avail to throw such doubt over the

question of the novelty of the invention, as to entitle the defendants to have the injunction dissolved, leaving it to the plaintiff to proceed to proofs for final hearing.

Case No. 18,161.

YOUNG v. MANDEVILLE.

[2 Cranch, C. C. 444.] ¹

Circuit Court, District of Columbia. Nov. Term, 1823.

SUIT ON ADMINISTRATION BOND.

An action will not lie against the sureties in an administration bond until a devastavit has been established in a suit against the administrator.

Debt [by R. Young, Judge, etc.] against the sureties in the administration bond of John Mandeville, administrator of Jonathan Mandeville. The breach assigned was, that the administrator had failed to pay to one Joseph Janney \$111.94, and \$26.86, due from the intestate, for which a judgment had been obtained in this court by the said Joseph against the said administrator.

Mr. Taylor, for defendant, demurred to the replication in which the breach was assigned, and contended that no action would lie against the sureties in the administration bond until a devastavit has been established against the administrator in a separate suit against him, as this court decided in the case of *Gilpin v. Crandell* [Case No. 5,449], at November term, 1812.

Mr. Swann, for plaintiff, admitted the law to be so, according to the decisions in Virginia; but this court is not bound by those decisions.

THE COURT rendered judgment upon the demurrer, for the defendant, at May term, 1824.

Case No. 18,162.

YOUNG v. MARINE INS. CO.

[1 Cranch, C. C. 238.] ¹

Circuit Court, District of Columbia. June Term, 1805.

QUALIFICATIONS OF JURORS.

The qualifications of jurors in this court must be the same as in the county courts of Virginia. [Cited in brief in *First Nat. Bank v. Town of Mount Tabor*, 52 Vt. 92.]

[Action by James Young against the Marine Insurance Company of Alexandria.]

It was yesterday decided (Cranch, Circuit Judge, absent) that the qualifications of jurors in this court shall be such as are required for jurors in the county courts of Virginia; and not those required for jurors in the district courts of Virginia. Jurymen therefore need not hold a freehold estate,

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

but must possess personal property to the value of 150 dollars; but see *U. S. v. Johnston* [Case No. 15,490].

Case No. 18,163.

YOUNG v. MARINE INS. CO.

[1 Cranch, 452.]¹

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

COMPETENCY OF JUROR.

1. In an action against an insurance company, a nephew of a stockholder is not a competent juror.

2. It is not a principal cause of challenge, that the juror has had conversations with some of the parties; but it is evidence for the consideration of triors upon a challenge for favor.

[Action by James Young against the Marine Insurance Company of Alexandria.]

Mr. James R. Riddle, being called as a juror, was objected to by the plaintiff, because he was the nephew of a stockholder in the insurance company.

The fact being agreed, **THE COURT** decided it was a good principal cause of challenge.

Mr. Swann, for plaintiff, cited *Williams v. Delafield*, 2 N. Y. T. R. [Caines] 329; *Livingston v. Delafield*, 3 N. Y. T. R. [Caines] 49. It was then suggested by the plaintiff's counsel that perhaps some of the persons called as jurors had had conversations with some of the parties, and hoped that such persons might be excused, or rather struck off the panels.

But **THE COURT** told the counsel they might challenge for favor and have it tried by triors.

Mr. Swann, for plaintiff.

Mr. C. Lee, for defendant.

Case No. 18,164.

YOUNG v. MARINE INS. CO.

[1 Cranch, C. C. 566.]¹

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

DISCHARGE OF JURY.

If a juror in a civil cause be taken suddenly ill, the jury may be discharged, and the cause may be continued to the next term.

[Action by James Young against the Marine Insurance Company of Alexandria.]

In this case the jury had been out three days and two nights without separating, or agreeing, and on Friday last, the court finding them in a state of fixed disagreement, allowed them, (with the assent of the counsel for the defendants, and with an intimation on the part of the plaintiff's counsel that no advantage would be taken by the plaintiff, but he would not consent,) to sep-

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

arate until Monday, (this day) having charged them to hold no conversation with any person out of court upon the subject of this suit. This morning Dr. Dick, a physician, came into court, and stated that one of the jurymen (Mr. Mandeville) was too ill of a bilious attack to attend without danger to his life, and he did not think he would be able to attend for several days. The court having sat four weeks, and expecting to rise this week, and it being stated by the other jurors that there was no probability that they could agree, and the jury being called, and Mr. Mandeville not appearing, **THE COURT** discharged the other jurors and continued the cause.

YOUNG (METROPOLITAN WRINGING MACH. CO. v.). See Case No. 9,503.

Case No. 18,165.

YOUNG v. MILLER.

[Cited in *Glover v. Shepperd*, 15 Fed. 839. Nowhere reported; opinion not now accessible.]

YOUNG (MILLER v.). See Case No. 9,596.

Case No. 18,166.

YOUNG et al. v. MONTGOMERY & E. R. CO. et al.

[2 Woods, 606; 1 3 Am. Law T. Rep. (N. S.) 91.]

Circuit Court, M. D. Alabama. June, 1875.

BONDS INDORSED BY STATE—FORECLOSURE SUIT—STATE AS PARTY—SUBROGATION TO STATE'S RIGHTS—AUTHORITY OF GOVERNOR—SUIT BY JUNIOR MORTGAGEES—APPOINTMENT OF RECEIVER—PROPERTY IN CUSTODIA LEGIS.

1. It is not necessary to aver matter of law or public statute, of which the court takes judicial notice.

2. Where a state is concerned in the subject matter of the suit, it should be made a party, if that can be done; but the fact that the state cannot be sued is a sufficient excuse for not making it a party.

3. Where a state was an indorser of bonds secured by a statutory mortgage, it was not considered a necessary party in a suit brought by holders of bonds secured by the mortgage to foreclose the same.

4. A state indorser of the bonds of a railroad company, and was indemnified against loss on account of the indorsement by a statutory mortgage on the railroad property. *Held*, that the fact that the state could not be sued was no reason why the holders of the bonds so indorsed should not be subrogated to the rights of the state and have the benefit of the security.

[Cited in *Western Div. of Western N. C. R. Co. v. Drew*, Case No. 17,434; *Tompkins v. Little Rock & Ft. S. Ry. Co.*, 21 Fed. 381.]

[Cited in brief in *Poland v. Lamaille V. R. Co.*, 52 Vt. 159.]

5. An act of the legislature authorized the governor to indorse in behalf of the state the

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

first mortgage bonds of a railroad company, bearing interest at the rate of eight per cent. per annum; the governor indorsed the bonds, and referred to the act in his indorsement as the authority therefor. *Held*, that the act authorized the indorsement of bonds bearing interest at eight per cent. per annum in gold.

6. Bona fide holders for value, of the bonds indorsed by the governor assuming to act under said authority, were not to be charged with constructive notice of the fact that the bonds so indorsed were not first mortgage bonds.

7. An act, passed subsequent to the one authorizing the indorsement of the said bonds, gave authority to the governor to indorse the bonds of the railroad company, notwithstanding there was a prior lien on said company's railroad, but it was claimed that this law did not pass the legislature by the vote required by the constitution, and was therefore null and void; yet that it was nevertheless constructive notice to the bondholders of the fact that the bonds owned by them were not first mortgage bonds. *Held*, that if this enactment were valid, it cured any defect in the authority of the governor to indorse the bonds, and that if it were not valid but void, it was not constructive notice to anybody of anything.

8. When a court having jurisdiction of a case has appointed a receiver for the property which is the subject of the suit, and he is in possession, no other court of co-ordinate jurisdiction can interfere with the property, or entertain complaints against the receiver, or undertake to remove him.

[Cited in *Taylor v. Life Ass'n of America*, 3 Fed. 470; *Judd v. Bankers' & Merchants' Tel. Co.*, 31 Fed. 183; *Dillon v. Oregon S. L. & U. N. Ry. Co.*, 66 Fed. 628; *Hatch v. Bancroft-Thompson Co.*, 67 Fed. 809.]

9. Junior mortgagees may file a bill to foreclose their mortgage without making prior mortgagees parties, but a sale in such a case would necessarily be made subject to the prior mortgages.

10. In such a suit, the prior mortgagees can be made parties only by service of process or voluntary appearance. A general notice calling upon them to present their claims will not make them parties or bind them.

11. If, however, such prior mortgagees are represented by trustees who are actual parties to the suit, then a notice calling upon them to present their claims before the master would be effectual, and the decree of the court would bind them.

12. When junior mortgagees have first brought their suit to foreclose, and the court has taken possession of the mortgaged property by a receiver, the senior mortgagees cannot gain possession of the property by a suit subsequently began, until the first is ended.

[This was a bill in equity by Mason Young and others against the Montgomery & Eufaula Railroad Company and others. Heard on demurrer to the bill.]

Geo. W. Stone, David Clopton, and James T. Holtzclaw, for complainant.

Samuel F. Rice, D. S. Troy, and H. C. Tompkins, contra.

WOODS, Circuit Judge. The defendant company is an Alabama corporation, which has constructed and equipped a railroad from Montgomery to Eufaula in said state. The case made by the bill is substantially as follows: The complainants are holders of certain bonds belonging to a class of

bonds issued by the defendant railroad company and indorsed by the state of Alabama; twelve hundred and eighty of these bonds, for \$1,000 each, were issued, indorsed by the state and put in circulation, and the indorsement was put upon said bonds before they were disposed of by the railroad company. One thousand of these bonds bear date the 31st of August, 1867, and are payable on the 1st day of March, 1886. To each of these bonds are attached coupons, thirty-seven in number, one on each bond for the payment of \$40 in United States gold coin, on the first day of March, 1868, and others severally for the payment of a like sum in like coin, at the end of each six months thereafter, until the bonds themselves become due. The other two hundred and eighty bonds are substantially like the thousand bonds first named, with a like indorsement, but the date of these bonds and the date of their maturity is not stated in the bill. The indorsement upon all the bonds is in these words: "In pursuance of an act of the legislature of the state of Alabama, approved February 19, 1867, entitled 'An act to establish a system of internal improvements in the state of Alabama,' the undersigned, governor of the state, hereby for the state, indorses this bond and makes the state liable for its payment; the Montgomery & Eufaula Railroad Company having complied with the conditions upon which the undersigned is required on the part of the state to give such indorsement. In witness whereof, the undersigned, governor of the state of Alabama, has hereunto set his hand, this — day of —, 1866. (Signed) R. M. Patton, Governor of the State of Alabama." All of these bonds bear date before the first of March, 1873, but may have different dates and the indorsement of different governors, and are numbered serially, from one up to twelve hundred and eighty. The bonds held by complainants were sold before March 1, 1873, at not less than ninety cents on the dollar, and were put in circulation, and complainants became the owners of such of said bonds as are specified in a schedule annexed to the bill bona fide and for a valuable consideration, and the bonds held by complainants amount to \$215,000. No mortgage was executed by the railroad company to secure these bonds, the company being advised by its counsel that no mortgage was necessary. No interest has been paid to the complainants on their bonds since the first day of September, 1872, and the railroad company is, and for more than two years has been, insolvent. The railroad and its property is, and for a long time has been, in the possession and control of the defendant, Andrew J. Lane, who by virtue of an appointment made in a suit brought by Samuel A. Strang against the said railroad company in the interest of certain persons, claiming to be second mortgage bondholders; such suit is pending in the circuit court of the United

States for the Southern district of Alabama. The bonds on which that suit is based show upon their face that they are second mortgage bonds, and that the mortgage by which they are secured is subject to the prior lien of the series of 1,280 bonds before mentioned, part of which complainants hold; and the bill of complaint under which said Lane holds as receiver, admits the prior lien of said 1,280 bonds.

It is charged that Lane, at the time of his appointment as receiver, was, and long before had been, the president of the said railroad company, and was a large creditor thereof, was interested as a stockholder and as a holder of a large number of said second mortgage bonds. It is alleged that the answer of the railroad company to the bill filed by Strang was dictated by Lane; that he was appointed receiver on the same day the bill was filed; that he was authorized to take possession of the road and property of the railroad company and manage and run it, and, on application to and approval of the court, to borrow money on his certificates for the purpose of repairing and running the property of the company; that on the 15th day of July, 1872, he applied to the court for leave to borrow \$60,000, which was granted on the 19th of July, 1872. It is alleged that on the 31st of January, 1873, Lane applied to the court for authority to pay Lehman, Durr & Co., bankers, the sum of \$12,202.09, which he, as receiver, had overdrawn, in order to meet taxes and executions, which would have stopped the operations of the road; and the court ordered him to make the payment out of the earnings of the road. The bill alleges, on information and belief, that Lane has filed no reports or accounts, and that a report made by him to the bondholders shows that he has expended the money, borrowed by authority of the court, for other and different objects than those authorized by the orders of the court. (I may say in passing that I have read the report referred to, which is alluded to in the bill as Exhibit No. 5, and it totally fails to sustain the allegations of the bill.) Other complaints are made of the receiver Lane, that he has applied to the court and obtained orders which the court ought not to have granted. The bill alleges further that the complainants cannot learn from the report of Lane, the receiver already referred to, whether the railroad has realized any and, if any, what net profits. It alleges that the South & North Alabama Railroad Company, by petition, had itself made a party defendant, and has filed a cross-bill in the said suit of Samuel A. Strang, in which it claims that it has a first lien upon said railroad for many thousand dollars; but complainants aver that by virtue of the laws of Alabama, under which the bonds held by them were indorsed, their bonds are the first and best lien on the road, complainants having purchased their bonds without notice of any older lien.

It is further alleged, "that leave has been obtained from Hon. W. B. WOODS, one of the justices of the circuit court of the United States for the Southern district of Alabama, to bring suit against the said Andrew J. Lane, receiver, in the circuit court for the Middle district of Alabama, on the claims of complainant hereinbefore set forth." Such are the averments of the bill.

The Montgomery & Eufaula Railroad Company, the South & North Alabama Railroad Company, the said Andrew J. Lane, receiver as aforesaid, and William Fowler and Thomas Pullum, who are averred to be the trustees of the second mortgage executed by said Montgomery & Eufaula Railroad Company, are made defendants to the bill; and the prayer of the bill is, that this court will remove and take the said railroad and all the property and assets of the company and its control and management out of the custody and direction of the said Andrew J. Lane; that complainants, and all others in similar rights with them, who will come in and contribute to the expenses of the suit, may be subrogated to the lien and rights of the state of Alabama upon the property and franchise of said railroad company, and said lien established and purchased; that the property and effects of the said company may be administered in this court, and said property and assets and its income and profits be appropriated by sale or otherwise to the interest due on the bonds held by complainants and others in similar right; and that an account may be taken of the proceedings and administration of said Lane, etc., and for general relief.

In order to understand clearly the case made by the bill, it is necessary to refer to the act of the state of Alabama of February 19, 1867, as subsequently amended, by virtue of which the governor indorsed the bonds of the railroad company. This act (section 1) authorizes and requires the governor "to indorse in behalf of the state the first mortgage bonds of any railroad company in the state having completed and equipped twenty continuous miles of railroad, at the rate of \$12,000 per mile, for each section of twenty miles so completed and equipped." The act further provides (section 4) that the railroad company is authorized "to issue the bonds of the company for such amount as it may determine, bearing interest at a rate not to exceed eight per cent. per annum, the interest to be paid semi-annually; * * * said bonds when indorsed by the governor on the part of the state shall recite the fact that they are first mortgage bonds, issued in accordance with and upon the conditions of this act; and said first mortgage and bonds issued thereon shall have priority in favor of the state (over) any and all other liens whatever." See Acts Ala. 1866, 1867, p. 680.

It is plain that the theory of complainants is, that the governor having indorsed their bonds in behalf of the state, this act consti-

tutes a statutory mortgage prior in equity to all other claims; that this mortgage was intended to secure the state against its indorsement, and the bonds having come to the hands of complainants as bona fide holders, they are subrogated to the rights of the state, and the lien of the state enures to their benefit.

The failure of the railroad company to execute a trust deed on its property to secure these bonds has placed the bondholders in this embarrassment: that there are no trustees to represent their interest, and they are compelled to appear personally in any suit which affects their interest in the property.

Separate demurrers have been filed to the bill by Andrew J. Lane, by the Montgomery & Eufaula Railroad Company, and by the South & North Alabama Railroad Company. Several of the grounds of demurrer have been avoided by an amendment to the bill. These it is unnecessary to notice. In examining the remaining causes of demurrer, I shall pursue such order as may seem most convenient.

I remark in the outset that the demurrers are filed to the whole bill and not to any specified parts of it. In order, therefore, to sustain the demurrers, the grounds alleged for some of them must extend to the whole bill. Those which refer to or affect only a part of the bill cannot be a ground for a dismissal of the entire bill.

The first ground of demurrer which I shall notice is, that the state of Alabama is not made a party, and no reason is given why she is not made a party. The state cannot be sued in a court of the United States. The eleventh amendment to the constitution of the United States excludes the jurisdiction. She cannot even by her own consent be made a party complainant, for that would oust the jurisdiction of the court, the principal defendant being a citizen of the state of Alabama. As this is matter of law and public statute, of which this court takes judicial notice, it was unnecessary to aver in the bill the reason why the state was not made a party. Does the fact that the state cannot be made a party excuse her absence from the suit, and can the bill be maintained unless she is a party? Where a state is concerned, the state should be made a party if it can be done; that it cannot be done is a sufficient reason for the omission to do it. *Osborn v. Bank of U. S.*, 9 Wheat. [22 U. S.] 378; *Davis v. Gray*, 16 Wall. [83 U. S.] 220. The state is in the position of surety on these bonds on which the suit is based, having received from the railroad company, the principal debtor, indemnity in the form of a statutory lien upon the property of the railroad company. The complainants hold the bonds, and ask a decree against the railroad company for the unpaid interest accrued thereon, and the sale of the property pledged as security; no relief is or can be sought against the state. The state, it is true, is interested in having the pledged property fairly applied to the extinguishment

of its liability, and this court will take care, as it should, that this is done. The fact that the state is thus interested in the property is no reason why she must necessarily be made a party to a suit in which no decree is sought against her. The indorser of a note secured by a mortgage is not a necessary party to a suit to foreclose the mortgage. If the state has paid any interest on these bonds, and is thereby entitled to any part of the proceeds of the mortgaged property, she can propound her claim before the master and it will be allowed. Suppose we turn the complainants out of this court because the state is not a party. If they go into the state court, they are met by the same difficulty, for the state will not allow herself to be sued in her own courts. Can it be possible that these complainants are without remedy against the railroad company because their bonds are indorsed by the plighted faith of the state of Alabama? It would be a reproach to the administration of justice to so hold.

It is set up as another ground of demurrer, that as the state cannot be sued, the complainants cannot be subrogated to the rights of the state under the statutory mortgage which secures the bonds. The law of subrogation is the creation of equity. It is resorted to to prevent a failure of justice. 1 Story, Eq. Jur. §§ 327, 499, 499a, 638; *Moses v. Murgatroyd*, 1 Johns. Ch. 119. In view of this fact, it would be a strange proceeding for this court, sitting as a court of equity, to deny the right of subrogation in this case, because the state cannot be made a party here, while she refuses to be a party elsewhere.

It is next alleged, as a ground of demurrer to the bill, that in fact there is no statutory mortgage or lien upon the property of the railroad company to secure the bonds held by complainants, because the governor had no authority to indorse these bonds. His indorsement is therefore void. The state incurred no obligation by reason of the manual indorsement of the governor, and consequently no lien was created thereby to indemnify the state. There was no liability against which the state could be indemnified. This claim is based on two grounds: (1) Because the statute authorizes only the indorsement of bonds bearing eight per cent. interest, and these bonds bear eight per cent. interest in gold; and (2) because the statute authorizes the indorsement of first mortgage bonds only, and the Public Statutes of the state of Alabama show that the bonds in suit are not first mortgage bonds.

Does the fact that the interest on the bonds is eight per cent., payable in gold, make the interest greater than eight per cent.? The defendants claim that it does; that of necessity the agreement to pay in gold is an agreement to pay more than eight per cent. in currency. I cannot assent to this. It depends entirely upon contingencies, which cannot be foreseen, whether interest in gold is better than interest in currency. If gold is at a premium

when the interest falls due, then it would take more than eight per cent. in currency to pay the interest. If it is not, it would take just eight per cent. If gold was at a discount, as under many circumstances it might well be, then eight per cent. in currency would more than pay the interest. Suppose the agreement were to pay eight per cent. in demand treasury notes of the United States, which are a legal tender, and they, when the interest was due, happened to be at a premium, as compared with United States notes, also a legal tender, would that really make the rate of interest greater than eight per cent.? When the legislature authorized the indorsement of bonds bearing eight per cent. interest, the fair construction was that it meant eight per cent. in any legal tender currency on which the parties might agree. At the time of the passage of the act "there were two descriptions of lawful money in use under the acts of congress, in either of which damages for nonperformance of contracts, whether made before or since the passage of the currency acts, might be properly assessed in the absence of any different understanding or agreement between the parties." *Butler v. Horwitz*, 7 Wall. [74 U. S.] 258. But I place my decision upon this point on the ground that a contract to pay eight per cent. interest in gold is not a contract to pay more than eight per cent., because when the interest falls due, gold may happen to be at a premium. This same question substantially has been decided by the supreme court of the United States in *Meyer v. City of Muscatine*, 1 Wall. [68 U. S.] 391. In that case authority was conferred upon the city of Muscatine to issue bonds bearing a rate of interest "not higher than ten per cent. per annum." The interest on the bonds was made payable semi-annually. This method of payment increased the burden on the city, and was an advantage to the bondholder. It, in fact, and under all circumstances, amounted to a higher rate of interest than ten per cent. per annum. It was objected that by issuing such bonds the authority conferred upon the city was transcended, and a usurious rate agreed to be paid, but the supreme court held otherwise, and sustained the bonds. I am of opinion, therefore, that the governor was not precluded by the law from indorsing the bonds because the interest was payable in gold.

The second ground, upon which it is claimed that the governor was without authority to indorse the bonds is, that there was a prior mortgage upon the railroad company's property, and the bonds indorsed could not, therefore, be first mortgage bonds. Let us concede, what defendants claim, that there was a prior mortgage on the road at the date of these bonds. Were the holders of the bonds under the necessity of taking notice of that fact, and does the fact make the bonds void in the hands of a bona fide holder for value? If the governor was without any authority to indorse any bonds, his in-

dorsement would be void. If the law authorized him to indorse the bonds of the A. & C. Railroad, and he undertook to indorse the bonds of the South & North Alabama Railroad, his indorsement would be void. But in this case there is no dispute that the law authorized him to indorse the bonds of the Montgomery & Eufaula Railroad, on the conditions that there should be completed and equipped twenty miles of road before any indorsement, and that the indorsement should not exceed \$16,000 per mile of completed railroad, and that the bonds indorsed should be first mortgage bonds. The authority of the governor to indorse such bonds on such conditions is not disputed. Now, suppose the governor indorses such bonds of a railroad company before twenty miles of its road are completed and equipped, or indorses the bonds at a rate greater than \$16,000 per mile, are the bonds on that account void in the hands of a bona fide holder? Clearly not. The unbroken authority of cases decided by the supreme court of the United States is to the effect that such bonds are valid. *Knox Co. v. Aspinwall*, 21 How. [62 U. S.] 539; *Mercer Co. v. Hackett*, 1 Wall. [68 U. S.] 83; *Meyer v. Muscatine*, Id. 384. In the case last cited the supreme court says, "that if the legal authority was sufficiently comprehensive, a bona fide holder for value has the right to presume that all precedent requirements have been complied with." See, also, *Grand Chute v. Winegur*, 15 Wall. [52 U. S.] 355.

But do these authorities cover the case where an indorsement is authorized of first mortgage bonds, and the governor indorses bonds of a railroad company whose property is subject to a prior mortgage? After some hesitation I have come to the conclusion that they do. Unquestionably the duty is imposed on the governor by the internal improvement act, as subsequently amended (Acts 1866, 1867, p. 636), to decide whether the conditions precedent to the indorsement have been complied with. "When any railroad company," says the law, "shall have finished, completed and equipped twenty continuous miles of road, it shall be the duty of the governor, and he is hereby required, to indorse on the part of the state the first mortgage bonds of said railroad company to the extent of \$16,000 per mile," etc. It is as much his duty to ascertain that the bonds to be indorsed by him are first mortgage bonds, as it is to ascertain that twenty miles of the railroad have been completed and equipped. These conditions stand on precisely the same ground, namely, that the security of the state for its indorsement may be sufficient. The law not only makes it the duty, but gives the governor the authority to determine these facts, and having determined them, to indorse the bonds. The legal authority to make the indorsement is sufficiently comprehensive to include the indorsement of the bonds in question; and the governor

having placed his indorsement upon the bonds and certified in the indorsement itself that it was made in pursuance of the act of the legislature, I think a bona fide holder has the right to presume that all precedent requirements have been complied with, and that there are no prior liens upon the railroad; and, so far as he is concerned, this presumption cannot be rebutted. But defendants say, that the holders of these bonds are bound to take notice of what is contained in the statutes of the state of Alabama, and that the act approved December 30, 1868 (Laws 1868, p. 497), entitled "An act to authorize the governor to indorse the bonds of the Montgomery & Eufaula Railroad Company, issued under the act of 19th of February, 1867," and its amendments, shows upon its face that the bonds of the railroad company were not first mortgage bonds. This act declares: "That the governor of this state be, and he is hereby, authorized to indorse the bonds of the Montgomery & Eufaula Railroad Company, to the extent authorized by the act to establish a system of internal improvements in the state of Alabama, passed and approved February 19, 1867, and the amendments made to said act, notwithstanding the indebtedness of said company to the state of Alabama for \$30,000, and the mortgage made by said company to the state under the act approved 17th February, 1866. Provided, that all sums of money which have been heretofore advanced by the state of Alabama, by the indorsement of bonds hitherto, shall be reckoned and regarded as so much of the amount authorized to be extended to said road by the authority of this act." If this is a valid enactment, it covers completely any want of authority in the governor to indorse the bonds of the railroad company by reason of a prior mortgage. It is a ratification of his indorsement, and makes it good and valid in all respects; this is conceded. But the defendants say, it was not passed by the number of votes required by the constitution of the state for the passage of such an act, and that the journals of the legislature show the fact; that it is therefore null and void, and no law at all. If this position be true, what becomes of the claim, that the bondholders were bound to take notice of its contents? If it is no law, it is not constructive notice to anybody of anything. It is without effect, to all intents and purposes. It cannot be said that a bondholder in Europe or New York is bound by constructive notice of an act that never passed the legislature, but which by some mistake of the printer, or some one else, found its way among the published acts of the state. I am of opinion, therefore, that the bonds of the Montgomery & Eufaula Railroad Company in the hands of bona fide holders are valid, that the indorsement of the governor is valid, and that by said indorsement the state acquired a

valid lien upon said railroad property, superior to all other liens, unless it be that of the South & North Alabama Railroad Company. Whether the lien of complainants is better than that of the South & North Railroad Company, it is not now necessary to decide.

I have noticed all the grounds of demurrer which go to the entire bill, and am of opinion that none of them are well taken, and the demurrer must therefore be overruled.

A question, raised by one of the grounds of demurrer and much discussed during the argument, was whether this court would, if the bill was sustained, appoint a receiver to take possession of the property of the defendant railroad company, according to the prayer of the bill. It seems to me that there can be but one answer to this question. It appears from the bill that a suit to foreclose the second mortgage, executed by the defendant railroad company, is now pending in the United States circuit court for the Southern district of Alabama; and that in that case the defendant Lane has been appointed receiver, that he has taken possession of all the mortgaged property, and is administering it under the order and directions of the court. If there are any adjudged cases which would authorize this court to interfere with the possession of a receiver appointed by another court having jurisdiction, and who is in actual possession of the property, they have never fallen under my observation. The authorities all sustain the contrary doctrine. *Smith v. McIvèr*, 9 Wheat. [22 U. S.] 532; *Williams v. Benedict*, 8 How. [49 U. S.] 107; *Wiswell v. Sampson*, 14 How. [55 U. S.] 52; *Taylor v. Carryl*, 20 How. [61 U. S.] 583; *Chittenden v. Brewster*, 2 Wall. [69 U. S.] 191; *Mallett v. Dexter* [Case No. 8,988]; *Alabama & C. R. Co. v. Jones* [Id. 127]; *Memphis City v. Dean*, 8 Wall. [75 U. S.] 64. These authorities show that a question, which is pending in one court of competent jurisdiction, cannot be raised and agitated in another court; much less can one court assume to take possession of and administer property which is in the possession of another court and in course of administration by it. Nor is the case for the appointment of a receiver by this court aided by the leave granted to complainants by a judge of the court, wherein the other suit is pending, to sue the receiver appointed in such other suit. It is clear the leave given did not contemplate such a proceeding as the removal of that receiver by this court. No court or judge would be authorized to grant such a leave *ex parte*, and thus dispose of valuable rights and advantages of other parties, without at least giving them their day in court.

There are no averments in the bill which would justify the court which appointed Lane receiver in removing him from his trust. And no matter what showing the complain-

ants may be able to make as to the incompetency, unfitness, or dishonesty of the receiver, this court cannot act. That showing must be made to the court which appointed him, and it must be asked to remove him. If these complainants are not satisfied with the manner in which the suit and proceedings of *Strang v. Railroad Co.* [Case No. 13,523] are conducted in the United States circuit court for the Southern district of Alabama, they must become, if they can, parties to that suit, and make their complaints to that court. This court does not sit to revise or review the proceedings of that court. Any motion, therefore, to appoint a receiver in this case, while the property to be administered is in the possession of a receiver appointed by another court, must be overruled, and this court can entertain no motion to remove or otherwise interfere with a receiver appointed by another court.

I add a few words in regard to the relations which the two cases referred to bear to each other. That suit was commenced by the holders of second mortgage bonds. They did not see fit to make the holders of the first mortgage bonds parties, nor was it necessary for them to do so. *Calv. Parties*, 13, 14; *Story, Eq. Pl. § 193*. They have the right to proceed to a decree and sell the mortgaged property, but the sale must necessarily be made subject to the lien of the first mortgage bonds. The holders of these bonds are not parties, and can only be made parties by service of process or voluntary appearance. No general notice calling on them to present their claims will make them parties or bind them. If they were represented in the case by trustees, then a notice calling upon them to present their bonds before the master would be binding. But they are in no way represented in that suit. Their rights cannot therefore be affected by any decree in that case. *Campbell v. Railroad Co.* [Case No. 2,366]. They have the same right to commence suit on this mortgage as the holders of second mortgage bonds have on theirs. But as the latter have commenced their suit first, and have first obtained possession of the mortgaged property, the suit of the first mortgage bondholders cannot be allowed to interfere with the suit of the second mortgage bondholders. They can only interfere by being admitted as parties in that suit. When the suit of the second mortgage bondholders has ripened into a decree of sale and the property has been sold, the first mortgage holders may then proceed in their suit to subject the property again to sale to satisfy their lien. But not till the proceedings in the first suit have so resulted that the property is no longer in the possession of the court through its receiver, can any other court or parties interfere with it.

YOUNG (MOORE v.). See Case No. 9,782.

Case No. 18,167.

YOUNG v. MORIATY.

[2 Cranch, C. C. 42.]¹

Circuit Court, District of Columbia. June Term, 1812.

AFFIDAVIT TO HOLD TO BAIL.

The affidavit to an account for cash lent was "that the above account, as stated, is just and true, and that the plaintiff has not received any part, parcel, or satisfaction for the same;" but it does not say that the plaintiff had received no security.

THE COURT (CRANCH, Chief Judge, doubting) was of opinion that it was sufficient to hold the defendant to bail.

Case No. 18,168.

YOUNG v. MUTUAL LIFE INS. CO. OF NEW YORK.

[2 Sawy. 325; 2 6 Am. Law T. Rep. 28; 2 Ins. Law J. 289; 4 Bigelow, Ins. Cas. 1.]

Circuit Court, D. California. Jan. 20, 1873.³

INSURANCE POLICY—FORFEITURE PROVISION—WAIVER.

1. It is a general rule that forfeitures are not favored, and that provisions in contracts for forfeitures are strictly construed.

2. These principles apply to forfeitures in policies of insurance for non-payment of premiums when due.

3. Forfeitures provided for in policies of insurance are for the benefit of the party insuring, and may be waived by such party.

[Cited in *Masonic Mut. Ben. Ass'n v. Beck*, 77 Ind. 206.]

4. Where subsequent to the accruing of a forfeiture under the conditions of a life policy for non-payment of premiums, the insurer, with knowledge of the facts, by its own acts, or those of its agents, recognizes the contract as still subsisting, and manifests an intent not to take advantage of the forfeiture, and does not act prior to the death of the assured indicating a purpose to claim a forfeiture, the court will be justified in finding a waiver of the forfeiture.

[Cited in *Pendleton v. Knickerbocker Life Ins. Co.*, 7 Fed. 178.]

5. In such cases, the liability of the insurer accrues on the death of the assured, and it is too late afterward to claim for the first time the benefit of a forfeiture.

On June 5, 1867, McPherson Young made application to H. S. Homans, general agent of the Mutual Life Insurance Company of New York for the Pacific coast, at the office of said company, in the city of San Francisco, for a policy of insurance on his life for \$5,000, and said Homans delivered to him a memorandum of agreement in writing, bearing date on that day, acknowledging the receipt of "ninety-nine dollars and thirty cents, being the first one fourth annual premium on his application for a policy of in-

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

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

³ [Reversed in 23 Wall. (90 U. S.) 85.]

insurance of the Mutual Life Insurance Company of New York, for the sum of five thousand dollars, on the life of Mack P. Young, payable at 45, or death, and premiums paid up in ten years. Said policy of insurance to take effect and be in force from and after the date hereof, provided that said application shall be accepted by the company; but should the same be declined or rejected by the said company, then the full amount hereby paid will be returned to said applicant upon the production of this receipt." The application of said Young was transmitted by Homans to the defendant's office in New York by steamer, the time of passage at that time being from twenty-three to thirty days. The application having been accepted, a policy was duly made out, signed and sealed, and transmitted to said Homans at San Francisco, and was received by him on or about August 2, 1867. The policy bears date April 5, instead of June 5, the date of the foregoing receipt, and, consequently, the time of payment indicated by the two writings does not correspond. The policy recites the consideration to be \$96.60 paid by Young, and of the quarter annual payment of a like amount on or before the sixth day of April, July, October and January in every year. The first quarter's premium, the receipt of which is acknowledged in said memorandum, and in said policy, was not in fact paid in cash, but the promissory note of said Young was given therefor, payable in sixty days, without grace, which note fell due August 4, 1867. The policy states that it is issued and accepted "upon the following express conditions and agreements," among which are: "Second—If the said premiums shall not be paid on or before the days above mentioned for the payment thereof, at the office of the company in the city of New York (unless otherwise expressly agreed in writing), or to agents, when they produce receipts signed by the president or secretary, then, in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine. Third—In every case, when this policy shall cease and determine, or become or be null and void, all payments there in shall be forfeited to this company." Attached to the policy were two regular receipts duly made and signed by the proper officers in New York, dated at New York, April 6, and July 6, 1867, respectively, with blanks to be countersigned by the agent for the Pacific coast, purporting to be for the premiums for the two quarters, commencing at their respective dates. These receipts, upon their arrival at San Francisco, were duly countersigned by said H. S. Homans, agent, stamped, and the stamps canceled with the San Francisco office canceling stamp on August 2, 1867, as the date of the canceling marks on said receipts show. On August 8, the following letter was addressed from the office of said defendant in San

Francisco to said Young: "San Francisco, August 8, 1867. M. P. Young, Esq., Vallejo, Cal.—Dear Sir: Your policy of insurance with the Mutual Life Insurance Company has arrived. Please inform me whether I shall send it to you at Vallejo, or if you will call and get it when you are in the city? Respectfully yours, H. S. Homans, General Agent. Per R. W. Heath, Jr." Heath was a clerk in the said office under Homans, but whether said note was delivered to or received by said Young, or when or in what manner forwarded or when or in what manner it came to the possession of the plaintiff, the administrator, does not appear from the evidence. No notice of the acceptance of said application or of the issue or arrival of said policy is shown to have been delivered to or received by said Young. Nor was any demand made upon him for further payment, nor any receipt or notice requiring payment presented to him, and neither said note, nor any subsequent installment of premium, was in fact paid; said note was never surrendered or offered to be surrendered, but said note and said receipts are still in possession of said company. On August 21, 1867, said McPherson Young was shot with a pistol at Vallejo, and mortally wounded. On the next day he was transported to St. Mary's Hospital in San Francisco, where he was confined in bed from the time of his arrival till September 20, 1867, when he died from the effects of his wounds. From the time of the shooting till his death said Young was neither physically nor mentally competent to transact any matters of business. After the death of Young, but at what date does not appear, the said general agent wrote upon the back of the policy with pencil, the words "Cancel, dead," and sent the policy to the defendant in New York. The policy was canceled October 31, 1867, by tearing off the seal of the company and the signature of the president; cutting a square hole out of the body and writing upon the back in blue ink the words, "C. Oct. 31, 67, Homans." Shortly after the death of said Young, notice was duly given to the general agent, and payment demanded, but refused on the ground that the defendant was not liable. The plaintiff [James Young] is the administrator of deceased.

B. S. Brooks, for plaintiff.
McAllisters & Bergin, for defendant.

SAWYER, Circuit Judge (after stating the facts). It is not denied that there was, in fact, a contract made. The receipt and memorandum given to the applicant, dated June 5, purports upon its face to insure him from its date, provided, only, that the application should be accepted by the defendant. It was accepted, and a policy in due form fully executed and sent to the San Francisco office to be delivered. These acts, it is conceded, constitute a contract.

But it is insisted that, although the memorandum of agreement of June 5 does not specify all the terms of the contract, it is implied that the policy shall be upon the usual terms embraced in the company's policies; that the acceptance was upon the terms of the policy, as it was actually prepared and executed, and that, under these terms, the policy became forfeited for non-payment of premiums, as required by one of its express conditions. The defendant claims that the note given for the first quarter's premium, not having been paid when due, a forfeiture resulted. If not, then, that a forfeiture accrued upon the non-payment of the second quarter's premium, which fell due on July 5, if the date of the policy, or on September 5, if the date of the receipt and memorandum of June 5 is to control.

The plaintiff insists that it is incompetent to show a non-payment of the note against the acknowledgment of the receipt of the money in the memorandum of June 5, and also in the policy, for the purpose of defeating the contract; that the note was accepted as payment, and the defendant is estopped from denying it for such a purpose. It was so expressly held in *Insurance Co. v. Fennell*, 49 Ill. 180. This, I suppose, is on the principle recognized by the authorities, that such acknowledgments are often to be regarded as presenting a double aspect—firstly, as a simple receipt for money; secondly, as constituting a part of a contract. In the first aspect, and for collateral purposes, such as the recovery of the money, the acknowledgments may be contradicted. In the second, and for the purpose of defeating the operation of the contract, they cannot be contradicted. These distinctions are discussed in *Peck v. Vandenberg*, 30 Cal. 23, and cases there cited; *Ashley v. Vischer*, 24 Cal. 322; *Goit v. Insurance Co.*, 25 Barb. 192. But I shall not rest my decision on that ground.

The plaintiff further insists that, if there was a forfeiture it was waived by defendant. It is elementary law that forfeitures are not favored, and that provisions for forfeiture must be strictly construed. The authorities, also, hold that these principles are applicable to forfeitures in insurance policies; that the provisions for forfeiture are inserted for the benefit of the companies, and may be waived by them; and that courts will find a waiver upon slight evidence. See, among many cases, *Ripley v. Aetna Ins. Co.*, 29 Barb. 557; *Id.*, 30 N. Y. 136; *Goit v. National Protection Ins. Co.*, 25 Barb. 189; *Baker v. Union Life Ins. Co.*, 6 Rob. (N. Y.) 394; *Boehen v. Williamsburgh City Ins. Co.*, 35 N. Y. 131; *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 542; *Pino v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 214; *Insurance Co. v. Webster*, 6 Wall. [73 U. S.] 129.

Apply these principles to the facts of this case. The policy bears date April 5, and

the receipts prepared by the company correspond with this date. The company, therefore, regarded the second quarter's premium as due July 6, and acted upon that idea, although the application was made, and the first memorandum, receipt and contract given on June 5. The promissory note given for the first quarter's premium being payable without grace, fell due August 4. It will be seen that the condition of the policy imposing a forfeiture required payment to be made "at the office of the company, in the city of New York, or to agents," when they produce receipts signed by the president or secretary, "unless otherwise expressly agreed in writing." There is no evidence in this case of its having been otherwise agreed in writing. It does not appear that the policy was received at the San Francisco office before the second of August. At or about the sixth of July the policy must have been in defendant's office in New York, which would give twenty-seven days to August 2 to make the passage to San Francisco. The defendant knew, at the time of dispatching the policy, that the second installment of premium had not been paid at the office in New York. It also knew that it could not be paid to its agents here, in accordance with the terms of the contract, so as to be obligatory upon defendant, for the reason that the only receipt duly signed, as specified in the policy, authorizing the payment to its agents, was attached to the policy, and would not reach San Francisco till the month of August, a month after it was due. The defendant did not expect payment at its office in New York City, or it would not have sent its receipt to its agent to enable him to receive payment. The defendant, then, by its officers in New York, transmitted the policy and receipts with knowledge that payments had not, and would not, be made at the office in New York, and that it could not be made elsewhere in the mode required by the terms of the contract for a month after due. Yet the policy was sent with an intent that it should be delivered, and payment received by its agent in San Francisco, although it knew that there must necessarily be a forfeiture upon the strict letter of the contract. Also, after the receipt of the policy at San Francisco, on the second of August, nearly a month after the second installment fell due, according to the terms of the policy, the defendant's agent, necessarily knowing that payment had not been made, stamped and countersigned the receipt, ready for delivery upon payment, thereby treating the agreement as still in force. Again, on the eighth of August, four days after the note given for the first quarter's premium fell due, and after default in payment, and necessarily with knowledge of non-payment of both the note and second installment, the agents of the defendant addressed to Young the note set out in the findings of facts.

This act, after the forfeiture, if any there was, had attached, recognizes the agreement as being still in force. The letter does not even demand payment, or refer to the fact of non-payment, or fix any time when the insured should call for the policy, or make payment. It simply notifies him that his policy has arrived, and asks whether it should be sent to him at Vallejo, or whether he would call and get it, when in the city, implying that it would be at his option to have it sent to him at once, or wait his convenience till he should come to the city, and be able to call for it. The defendant manifested no haste or anxiety upon the subject, for the policy was on hand from the second to the eighth of August at least, before the notice to Young was even written, and it does not appear when it was sent. It does not appear that this or any other notice reached him. No other act of the company is shown inconsistent with this action, or tending in the slightest degree to show an intention to insist upon a forfeiture till after the death of Young, when the policy was canceled October 31, payment of the loss having before been refused.

It could hardly have been expected that Young would call to make the second payment until notified whether the risk had been accepted, especially as there was ample time between June 5, when the application was made, and the fifth of September, the time when the next payment would have fallen due, had the date of the policy agreed with the date of the application, and the preliminary memorandum of agreement given to him by defendant's agent in San Francisco. It was, doubtless, supposed that notice of acceptance or rejection would be given before the note for the first quarter's premium would fall due. But however this may be, the several acts of the defendant, and all its acts, and the acts of its officers in relation to the matter shown to the court, which were performed subsequent to the accruing of the forfeiture, if any accrued, treat the agreement for insurance as still in force. They affirmatively indicate an intention not to insist upon a forfeiture, and had the accident and death not occurred, there can be no doubt, from the facts shown, that even as late as the death of Young, the premium would have been received and the policy delivered. In the case cited by counsel of Chipman against the same defendant, tried in this court a year ago, there was no act of any kind shown on the part of the company indicating an intention to waive the forfeiture, or in any way recognizing a subsisting contract. Whereas, in this case, all the acts of the company, after the forfeiture accrued and prior to Young's death, shown to the court, recognize the contract as still subsisting, and manifest an intention not to claim a forfeiture.

I think, upon the facts, the court must find a waiver of any forfeitures which had ac-

crued, and that under the circumstances, after the death of the assured, it was too late, for the first time, to insist upon the forfeiture. Let the plaintiff have judgment for the amount of the policy, less one year's premiums, and interest from the time payment should have been made.

[The above judgment was reversed by the supreme court. 23 Wall. (90 U. S.) 85.]

Case No. 18,169.

YOUNG v. The ORPHEUS.

LEWIS v. SAME.

[2 Cliff. 29.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1861.²

ADMIRALTY JURISDICTION — CONTRACT FOR SHIP MATERIALS.

A contract to furnish materials for the construction of a vessel, even where the same is built upon the shores of tide-waters, and designed for use upon the navigable waters of the sea, is not within the admiralty jurisdiction of the United States courts.

[Cited in *Edwards v. Elliott*, 21 Wall. (88 U. S.) 556; *Rodd v. Heartt*, Id. 592; *Doolittle v. Knobloch*, 39 Fed. 40, 41; *The Manhattan*, 46 Fed. 799.]

[Cited in *Globe Iron-Works Co. v. The John B. Ketcham*, 21 (Mich.) 59 N. W. 249; *McDonald v. The Nimbus*, 137 Mass. 363; *The Victorian (Or.)* 32 Pac. 1042; *Wilson v. Lawrence*, 82 N. Y. 411.]

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

Both suits were in rem to enforce on the ship *Orpheus* a lien arising under the law of the state, for materials furnished at the request of the builders, and in the construction of the vessel. On the 6th of August, 1855, Mitchell and Rice contracted with the claimants, in writing, to build the ship, or the hull, including all iron-work and joiner-work, and also to furnish masts, spars, and blocks, including iron-work on the same and to the rigging, but not including rigging or copper sheathing. She was to be of certain specified dimensions, and was to be launched and delivered to the claimants by December 15 of the same year. The price for the vessel was \$45,000 equal to cash, in thirty days after she was launched and delivered to them in Boston. Of that sum \$30,000 was to be advanced, "as the ship progressed, and was to be paid out for materials and labor used in her construction." All of the materials constituting the claims of the respective libellants were furnished by them before the launch of the ship to Mitchell and Rice, the builders, and for the purpose of being used in building the same. Sixteen thousand six hundred feet of the lumber furnished by one of the libellants, and one thousand feet furnished by the other, were not used in the building of the ship, but,

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

² [Affirming Case No. 8,330.]

remaining in the yard after she was launched, were subsequently sold by the assignee in insolvency of the builders. The ship was built at Chelsea, was launched in February, and in March following sailed on a voyage to San Francisco. The libels alleged that the materials and lumber were furnished on the credit of the ship; that by the laws of Massachusetts and of the United States the respective libellants had a lien upon the ship for the payment of the amount due, which in the first-named suit was alleged to be \$2,478.84, and in the second \$462.83. It was denied, in the answer, that the statements of the libels were true accounts of the claims for materials furnished in the constructing and launching of the ship. Certain other defences touching the merits of the controversy were also set up by the claimants, but the view of the case taken by the court renders it unnecessary to make mention of them. The answers further set forth that at the time the vessel was seized by the marshal she was in the custody of the sheriff of the county, by virtue of an attachment made by him under process issuing from the state court, and it was denied that the subject-matter of the suits was one within the admiralty jurisdiction. The district court sustained the objection to the jurisdiction arising from the alleged prior custody of the sheriff, and dismissed the libels. [Case No. 8,330.]

E. F. Hodges, for libellant.

Was there ever a lien upon the ship in favor of the libellant? He furnished lumber, materials, &c., "to construct the ship," "by virtue of a contract" with a "person employed to construct her," and "money is due" therefor. By the language of the state statute (chapter 231, Acts 1855), the lien existed. Hawes et al. had no lien on the ship. The statute lien is dissolved, unless a certificate, &c., is filed in the town clerk's office, &c., as per section 2, c. 231, Acts 1855; and they filed no certificate. Hawes et al.'s attachment gives no notice of their lien; for all that appears, it is an attachment in an action of contract, which would give way before a lien process. Certain Logs of Mahogany [Case No. 2,559]; Travis v. Bishop, 13 Metc. (Mass.) 304; Denney v. Lincoln, Id. 200; Buttrick v. Holden, Id. 355. The sheriff, by abandoning the ship, and having no keeper, lost his hold upon the property; it was then no longer in the custody of the law. The process of the state court was no longer operative, and another jurisdiction could be exercised. The attachment in the Hawes Case was dissolved by a bond, and the sheriff abandoned the ship, leaving her in the possession of the marshal. There was clearly, then, no jurisdiction on the part of the state court. The bond is, "to pay the judgment," not "to return the ship." The federal courts then took and had jurisdiction, by taking and holding possession of the rem. It must be remembered that the state court rendered judgment against Hawes

et al. The Oliver Jordan [Case No. 10,503]. The respondents have stipulated in this case, and in so doing waived all objection to the jurisdiction. The case is governed by the decision and reasoning of the court in The Robert Fulton [Id. 11,890]; The Young Mechanic [Id. 18,180].

The federal courts have jurisdiction to enforce such a lien. Prior to the decision in The Jefferson v. Beers, 20 How. [61 U. S.] 393, no doubt existed that the federal courts had jurisdiction over cases of admiralty liens, however those liens may have arisen, or whatever authority may have created them. The decision was followed by a repeal of the twelfth rule of admiralty practice, under which the country had for many years acted, and by the following cases: Roach v. Chapman, 22 How. [63 U. S.] 129; The Coerline [Case No. 2,944]; Morewood v. Enequist, 23 How. [64 U. S.] 494. These cases announce the following principles: That contracts for building ships are not necessarily maritime contracts, and therefore are not necessarily within the admiralty jurisdiction of this court; that the admiralty law will not raise or create a lien in favor of the man who has furnished materials for building a ship in the absence of any local law. These cases do not decide that when a lien has been fairly created upon a ship, the federal courts have not jurisdiction to enforce such lien after the course of courts of admiralty. Nor can any such decision be found here or in any country, where admiralty law has authority. Prior to the decision of The Jefferson v. Beers, 20 How. [61 U. S.] 393, such liens had been enforced by the federal courts in many cases, and in every case where the question occurred the jurisdiction was recognized as undisputed. Since the abolition of the twelfth rule, and the decision in The Jefferson v. Beers, the courts have sustained libels (commenced before the abolition of the rule) to enforce liens created by the state laws. Tupper v. The St. Lawrence [Case No. 14,240]; The Richard Busted [Id. 11,764]. The federal courts have jurisdiction to enforce liens for the construction or repairs of ships, designed for navigating the high seas, however those liens may have been created. By the constitution, art. 3, § 2, the judicial power of the United States extends to cases of admiralty and maritime jurisdiction. The act of 1789, c. 20, § 9 [1 Stat. 76], confers upon the district court "exclusive original cognizance of all original causes of admiralty and maritime jurisdiction." The act of 1845 [5 Stat. 726] extends the admiralty jurisdiction of the district courts to vessels of twenty tons' burden, at the time employed in commerce between ports of different states, upon the lakes and navigable waters between the same. A contract to furnish materials for the construction of a ship, being built upon the shores of tide-water, and designed for use upon the navigable waters of the sea, is a maritime contract, and within the admiralty

and maritime jurisdiction, as these words are used in the constitution and acts of congress. The words "admiralty and maritime jurisdiction," as employed by the state and judicial authorities of this country, have an import much wider than they had in England, at the time of the separation of the colonies from the mother country. They embrace nearly or quite as much as they did under the civil law. *Read v. Hull of a New Brig* [Case No. 11,609]; *Purinton v. Hull of a New Ship* [Id. 11,472]; *The Sandwich* [Id. 13,409]; *The Young Mechanic* [Id. 18,180]; *Mar. Ord. tit. 2, art. 1*; *Davis v. New Brig* [Case No. 3,643]. A contract to build a ship was always maritime *ex vi termini*, both in England and in those countries of Continental Europe governed by the civil law. *The Jerusalem* [Case No. 7,294]; *Ross v. Walker*, 2 Wils. 265. Some decisions have been made in this country, in which such contracts have been held not to be maritime; but it is believed they were either cases in *rem*, where no lien existed, and of course no jurisdiction in *rem* could be maintained, or they were contracts for the construction of vessels not designed for use upon waters over which the admiralty jurisdiction extends. *De Lovio v. Boit* [Case No. 3,776]; *The Jerusalem* [supra]; *Parmlee v. The Charles Mears* [Case No. 10,766]; *Roach v. Chapman*, 22 How. [63 U. S.] 129; *Davis v. New Brig* [Case No. 3,643]; *Read v. Hull of a New Brig* [supra]. The fact that a maritime lien exists upon a ship within the ebb and flow of the tide, gives this court jurisdiction, without reference to the authority under which the lien is created. It is admitted that a state legislature cannot give jurisdiction to a federal court. But it can create a right in a thing over which the federal court has, by other and legitimate authority, jurisdiction. The fact that the law creates a maritime lien upon the ship, out of the contract between the material man and the builder (the ship being for use upon waters within the admiralty jurisdiction), makes that contract itself maritime. The lien created by the statute of Massachusetts is a maritime lien. A maritime lien is a *ius in re*, as distinguished from a *ius ad rem*, and, as such, may be enforced in a court of admiralty. *The Young Mechanic* [supra].

E. H. Derby, for claimants.

The contract declared on is not a maritime contract, and the court will not take jurisdiction. It is a contract to be performed on land. It is for the plank furnished to a ship before launching, before she touched salt water. See *Ferry Co. v. Beers*, 20 How. [61 U. S.] 399. The statutes of a state cannot confer jurisdiction on the United States courts; they derive their jurisdiction from the constitution and laws of the United States, and in admiralty are confined to purely maritime contracts. *Maguire v. Card*, 21 How. [62 U. S.] 249; *Allen v. Newberry*, Id. 246. Jurisdiction in admiralty cases is restricted to the power

possessed by congress to regulate commerce with foreign states, which does not extend to those internal concerns that are completely within a particular state, when they do not affect other states. *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 194. In the case of *Allen v. Newberry*, a steamer bound for Illinois to other states took goods from port to port in Wisconsin. Held, that a suit in admiralty would not lie. See *Roach v. Chapman*, 22 How. [63 U. S.] 129. Any former dicta or decisions which seem to favor a contrary doctrine were overruled by this court in the case of *Ferry Co. v. Beers*, 20 How. [61 U. S.] 400. See, also, *Peyroux v. Howard*, 7 Pet. [32 U. S.] 343, and *The Orleans v. Phœbus*, 11 Pet. [36 U. S.] 183. The duty of the courts of the United States is to take notice of the want of jurisdiction, even where it has been waived by the parties, and without waiting for an objection from either side, when the proceedings in the district court show a want of jurisdiction. *Cutler v. Rae*, 7 How. [48 U. S.] 731; *The Bee* [Case No. 1,219]. The twelfth rule last adopted does not protect the claim of the libellant. It protects only claims of a purely maritime character, such as for repairs of ships in domestic ports, to which a lien attaches by a state law. The change of rule twelfth, which omits the former license to proceed in *rem*, in case of domestic ships, for repairs and supplies, as under the old rule, but puts the rule in force from May, 1859, preserves the suit in *rem* in contracts purely maritime, as for repairs, but does not apply to contracts to be performed on land, as for building a ship. The case of *Roach v. Chapman*, 22 How. [63 U. S.] 129, is directly in point. A contract to build a ship is not a maritime contract. See *Ferry Co. v. Beers*, 20 How. [61 U. S.] 399. In *Roach v. Chapman*, the court say: "A contract for building a ship is clearly not a maritime contract." In the case of *Morewood v. Enequist*, 23 How. [64 U. S.] 494, the court say: "The court decided in that case (*Ferry Co. v. Beers*) that a contract to build a ship is not a maritime contract." The United States courts have no jurisdiction over this case, under that provision of the constitution which gives congress power to regulate commerce with foreign nations and between the several states of the Union. The lien given rests upon an artificial structure, and depends upon a local statute, which must be strictly followed and construed. *Greene v. Ely*, 2 G. Greene (Iowa) 508; *Lynch v. Cronan*, 6 Gray, 532. The lien rests on two statutes of Massachusetts. Chapter 117, Rev. St., combined with chapter 231, Acts 1855. The prerequisites of these statutes have not been complied with. Acts 1855, c. 231, § 2, requires the claimant, within four days from the time that the vessel leaves the port where she was when the materials were delivered, to file a certificate with the town clerk. The seizure made by the marshal was invalid, and gives no jurisdiction to this court. Nor is it helped by the stipulation. A me-

chanic who proceeds under the lien law of New York against owners, for work done under contractors, cannot recover if nothing be due to the latter on their contract. *Pike v. Irwin*, 1 Sandf. (N. Y.) 14.

CLIFFORD, Circuit Justice. It is insisted by the libellants that on this state of facts the federal courts have jurisdiction to enforce the lien under the state law. They in effect admit that to maintain that view of the case it is necessary to show that a contract to furnish materials for the construction of a ship is a maritime contract, and they accordingly submit the affirmative of that proposition, and insist that all such contracts are maritime, especially where the ship is to be built upon the shores of tidewaters, and is designed for use upon the navigable waters of the sea. Maritime contracts are such as relate to commerce and navigation, and unless a contract for the building of a ship is to be regarded as a maritime contract, it will hardly be contended that a contract to furnish the materials for the construction of the same can fall within that designation, as the latter is more strictly a contract made on land and to be performed on land than the former, and is certainly one stage further removed from any immediate and direct relation to commerce and navigation.

On the other hand, if it be admitted that a contract to build a ship is a maritime contract, it is difficult to say that a contract to furnish the materials for the construction of the same is not also of the same character, although its breach and even its performance may involve judicial inquiries into the business transactions of men, as well in the forests and mines, as in the manufactories and workshops of the country.

Consequently, wherever the question involved in the record has been considered, the decision has uniformly turned upon the solution of the inquiry, whether a contract for building a ship is or is not a maritime contract. The parties in this controversy have conducted the investigation in the same way, and very properly, because it is clear that if a contract for building a ship is not a maritime contract, then this court has no jurisdiction of the matters involved in the cases under consideration. Beyond question the supreme court is the ultimate tribunal, under the constitution of the United States, to construe both the constitutional grant of judicial power in cases of admiralty and maritime jurisdiction, and the acts of congress regulating its exercise. Decisions of the supreme court, therefore, are final and conclusive upon the subject. Such a decision is an authority in this court, and of course will be followed even in cases where the present circuit judge is not able to yield his assent to the conclusion. Allowing the rule to be so, it is insisted by the claimants that the question involved in the controver-

sy has been several times conclusively decided in that court, and they refer to the cases upon which they rely to support that proposition. But the libellants deny the proposition, and insist that no one of the cases referred to fully decides the point under consideration. Some care must be observed, under the circumstances, in examining those cases, and the more so, as two of the district courts, in respect to one of them, have come to opposite conclusions as to the proper construction to be given to the opinion of the court. Reference is made, in the first place, to the case of *The Jefferson*, 20 How. [61 U. S.] 393, in which the opinion of the court was given by Mr. Justice Catron. Recurring to the statement of the case, it will be seen that it was a libel filed by the assignees of the builders against a new steam ferry-boat, for a balance due the builders on account of work done and materials furnished in constructing the hull of the vessel. The builders contracted to build three ferry-boats at Keyport, in the state of New Jersey, but they built this one only, and they claimed a lien for the unpaid balance of the price.

Decree was entered in their favor in the court below, and the claimants appealed to the supreme court. When the cause came up for argument, the first point made for the claimants was, that a contract to build and complete a ship is not one within the admiralty jurisdiction of the federal courts, though it be intended to employ her in navigating the ocean, and even though the employer be a citizen or inhabitant of some other place or country than that in which the work is to be done. Direct issue was taken upon that proposition by the libellants, and the court say: "The only matter in controversy is whether the district courts have jurisdiction in admiralty to enforce liens for labor and materials furnished in constructing vessels to be employed in the navigation of waters to which the admiralty jurisdiction extends." Notice was taken in the argument of the fact that the state law in that case gave no lien in favor of the builder, but the main point urged for the claimants was that the building of a ship was purely a local matter in no way directly connected with maritime commerce.

Responding to that argument, the court say: "The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation." Applying that rule to the case then under consideration, the court say: "So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land to be performed on land." Effort is certainly required to misunderstand that language; but the court go fur-

ther, and say, the wages of the shipwrights had no reference to a voyage to be performed. They had no interest or concern whatever in the vessel after she was delivered to the party for whom she was built, and they were bound to rely on their contract.

Looking at the whole case, I am of the opinion that the supreme court in that case decided, and intended to decide, that a contract for the building of a ship is not a maritime contract. Judge Wilson took the same view of the question in the case of *The Revenue Cutter* [Case No. 11,713]; but Judge Sprague, in the case of *The Richard Busteed* [Id. 11,764], held that a contract for the building of a sea-going vessel was maritime, and came to the conclusion that the contrary opinion, expressed in the Case of *The Jefferson*, might be regarded as the reasoning or dictum of the judge who delivered the opinion. Since the last-named case was decided, the same question has more than once come before the supreme court, and on every occasion the decision has been that such contracts are not maritime. Such was the view of the court in the case of *Roach v. Chapman*, 22 How. [63 U. S.] 129, where the opinion of the court was given by Mr. Justice Grier. Proceedings had been instituted in the district court for the Eastern district of Louisiana, in that case against the steamer *Capitol*, to enforce a lien for a part of the price of the engine and boilers, which had been furnished at Louisville, in the state of Kentucky, where she was built. Libellants claimed a lien under the general admiralty law and under the law of the state. Plea was filed to the jurisdiction of the court, and the court say, a contract for building a ship or supplying engines, timber, or other material for her construction, is clearly not a maritime contract, and that any former dicta or decisions which seemed to favor a contrary doctrine were overruled by this court in the case of *The Jefferson*, 20 How. [61 U. S.] 400. During the same session of the court, the same question was again presented in the case of *Morewood v. Enequist*, 23 How. [64 U. S.] 494, and was again decided in the same way. On that occasion the court, after referring to the Case of *The Jefferson*, go on to say that the court decided in that case that a contract to build a ship is not a maritime contract; and though in countries governed by the civil law, courts of admiralty may have taken jurisdiction of such contracts, yet that in this country they are purely local, and governed by state laws, and should be enforced by the state tribunals. Regarding these decisions as authority in this court, it is not possible to sustain the views of the libellants in these cases.

Contracts for repairs and supplies are maritime contracts, and it is for that reason that libels for such claims, if furnished to a foreign ship or for a ship in a foreign port, may be filed against the ship and freight in rem, or against the master or owner in per-

sonam. Libels in rem in such cases are based upon a maritime lien, which arises as an implication of law. Such implication, however, does not arise in cases of domestic ships, but under the old admiralty rule the like proceeding in rem was allowed in such cases where a lien was given by the local law. Suits in personam may still be prosecuted in such cases under the new admiralty rule, but not in rem, as under the previous rule.

Pending cases or such as were brought before the 1st of May, 1854, when the new rule went into operation, are unaffected by the repeal of the old rule. *The St. Lawrence*, 1 Black. [66 U. S.] 522. Explanations touching the repeal of that rule and the effect of that repeal are so fully given in the case last referred to, that it seems unnecessary to say more upon the subject, especially as neither the old nor new rule has any application to the case under consideration.

It was suggested at the argument that the objection to the jurisdiction had been waived, but it is the settled doctrine of the federal courts that consent cannot give jurisdiction, nor can the objection be waived. *Cutler v. Rae*, 7 How. [48 U. S.] 731. Having come to the conclusion that the objection to the jurisdiction of the court must prevail, it is unnecessary to examine the other question. The respective decrees of the district court dismissing the libels are affirmed, but without costs.

YOUNG v. *The ORPHEUS*. See Case No. 8,330.

Case No. 18,170.

YOUNG v. PALMER.

[2 Cranch, C. C. 625.]¹

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

SPECIAL BAIL.

In an action upon the case for selling negroes out of the neighborhood contrary to agreement, the defendant will not be held to special bail, upon an affidavit stating the breach of the agreement, and the belief of the plaintiff that he has sustained damage to a certain amount.

This was an action upon the case upon a special contract of sale of slaves by the plaintiff to the defendant, in which the defendant promised not to sell them out of the neighborhood, &c., whereby the plaintiff was induced to sell them for less money; but the defendant sold them, &c., contrary to his agreement.

The affidavit stated that the plaintiff "believes" he could have sold them for four hundred dollars more than he got for them from the defendant if he had sold them unconditionally, and "considers" that he has

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

sustained damage in the sum of four hundred dollars.

THE COURT (THRUSTON, Circuit Judge, doubting) permitted the defendant to appear without special bail.

Case No. 18,171.

YOUNG et al. v. PORTER et al.

[3 Woods, 342.]¹

Circuit Court, W. D. Texas. June Term, 1878.

EQUITY SUIT FOR LAND—SUFFICIENCY OF COMPLAINANT'S TITLE—EQUITABLE CLAIM.

1. Where complainants in a bill in equity to recover lands of which the defendants were in possession, claimed only an equitable title thereto, and did not set up any facts tending to show that the defendants were in any way affected by their equity, *held*, that the bill could not be maintained.

[Cited in *Lamb v. Farrell*, 21 Fed. 12.]

2. The bare fact that parties who hold an equitable title to land cannot sue at law, does not give a court of equity jurisdiction.

[Cited in *Fussell v. Gregg*, 113 U. S. 554, 5 Sup. Ct. 633.]

3. The remedy of parties so situated is first to obtain the legal title, and then bring their action at law against the parties in possession of their land.

[Bill by John S. Young against James Porter.] Heard upon demurrer to the bill for want of equity.

D. E. Thomas, for complainants, cited *Jackson v. Morse*, 16 Johns. 197; *Bogert v. Perry*, 17 Johns. 350; *Fenn v. Holme*, 21 How. [62 U. S.] 481; *Tyler*, 43, 44.

A. J. Peeler, for defendants, cited *Orton v. Smith*, 18 How. [59 U. S.] 263; *Herrington v. Williams*, 31 Tex. 448.

BRADLEY, Circuit Justice. The bill in this case is filed to recover 640 acres of land, of which the defendants are in possession. The complainants admit that they have not the legal title to the land, but they claim the equitable title; and it is because they have only the equitable title, and cannot maintain an action at law, that they come into a court of equity. They do not state that the defendants have the legal title or that they obtained possession under any person who had it. They do not state any facts going to show that the defendants are in the least affected by the equity which they, the complainants, set up. They only state that the defendants have wrongfully possessed themselves of the land, and are cutting timber and committing other waste thereon. The bill is, in fact, a mere ejectment bill, the only pretense for bringing which in a court of equity is that the complainants cannot maintain an action at law.

We entirely agree with the complainants' counsel in the proposition that the complainants could not maintain an action at law for

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

the recovery of the land. But that does not prove that they can maintain a suit in equity for that purpose. They cannot maintain a suit which is the equivalent of an ejectment, merely because their title is only an equitable one. They must show that the defendants inequitably withhold the possession from them before they can do this. They must show some connection between the defendants and themselves. If the defendants had procured the legal title with notice of the complainants' equities, or were in any other respect guilty of fraud or want of equity towards the complainants in detaining the possession from them, then the latter might probably come into equity for relief. But they have not shown any such state of things. The complainants ask: If we cannot proceed either at law or in equity, what shall we do? The answer is plain: They must first take those proceedings against Alberty or his representatives or assigns which are necessary to obtain the legal title; and having obtained that, then they can bring trespass to try title against the defendants. If they say they cannot find Alberty, they must take those proceedings which the law gives to bring him into court by advertisement, or other constructive service. At all events, a suit in chancery cannot be maintained against the defendants, unless something more is shown against them than is shown in this bill. The bill must be dismissed.

Case No. 18,172.

YOUNG v. POTT.

[4 Wash. C. C. 521.]¹

Circuit Court, E. D. Pennsylvania. April Term, 1825.

CROSS BILL FOR DISCOVERY—JURISDICTIONAL FACTS.

After the cause on the original bill was set for hearing, the defendant was informed that the plaintiff was a nominal one, and that the real plaintiff was a citizen of the same state with the defendant. He immediately filed a cross bill charging this and asking a discovery. The original suit ought not to be heard until the cross bill is answered.

The bill states that the plaintiff and defendant entered into a written agreement for a purchase, by the former, from the latter, of a certain tract of land, for which he was to receive a good title, and was to pay a certain sum by instalments. That the plaintiff was put into possession, but the defendant having refused to convey the land according to his contract, and having brought an ejectment against the plaintiff to recover the land, which was removed from the state court to this, he prays for a specific performance, and for an injunction. No injunction was applied

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

for or granted. The defendant filed his answer in January last, and now, at this court, he filed also a cross bill; stating, that he had been informed that, before the filing of the original bill, the plaintiff had conveyed and assigned all his interest in the premises to a citizen of this state, and that the suit is carried on in the plaintiff's name, in order to give jurisdiction to this court, and praying for a discovery.

Mr. Rawle, for plaintiff, in the original bill, contended that the original cause, standing ready for hearing, should be brought on before an answer is filed to the cross bill.

Mr. Sergeant, for defendant.

BY THE COURT. The cross bill having been filed within a short time after the plaintiff in it had received information of the matter to which it relates, the original cause ought not to be heard until the answer is filed to the cross bill, particularly as the prayer of it is for a discovery of matter going to show, if true, that this court has not jurisdiction of the principal cause.

THE COURT having, during the present term, granted a writ of estrepment in the ejectment cause, refused, on the motion of the defendant in that cause, to discharge the writ in the present state of the equity causes. Unless the plaintiff should succeed on the equity side of the court in obtaining a decree for a conveyance, the defendant must inevitably obtain a judgment at law in the ejectment cause. Until that is decided, it is proper to prevent the commission of waste by the party in possession.

YOUNG (PRESTON v.). See Case No. 11,399.

Case No. 18,173.

YOUNG et al. v. RIDENBAUGH.

[3 Dill. 239; 1 11 N. B. R. 563; 7 Chi. Leg. News, 242.]

Circuit Court, W. D. Missouri. March, 1875.

BANKRUPT ACT—DISCHARGE—DEATH OF BANKRUPT.

1. After the final discharge of a bankrupt is granted, there is a strong, if not conclusive presumption that the final oath required by section 29 of the bankrupt act [of 1867 (14 Stat. 531)] was duly taken. This presumption is not overcome by the mere fact that such oath is not upon the files.

2. Where the bankrupt died after his uncontested application for a discharge had been submitted to the court and a favorable report of the master had been made, the court has power to order the discharge to be entered nunc pro tunc as of the date when the master's report was first filed.

3. Effect of the death of the bankrupt on pending proceedings in bankruptcy, considered.

Petition [by William Young and others] for review under section 2 of the bankrupt act. William Ridenbaugh was thrown into bankruptcy in 1870. The case went through

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

all the stages of bankruptcy proceedings. In April, 1874, the bankrupt regularly applied to be discharged. In September, 1874, his application for a discharge, not being contested, was submitted to the court, and referred to the auditor as master, who, on the 17th day of October, 1874, reported to the court that the bankrupt had complied with the law, taken the final oath, and was entitled to his discharge. The court ordered the discharge. On the 18th day of October, 1874, the bankrupt died. No final oath now appears among the papers. The discharge was not entered of record until the 22d of October, 1874. When the order for discharge was made, whether before or after Ridenbaugh's death, did not exactly appear. Creditors who had proved debts in bankruptcy, sought, by petition in the district court, to set aside the discharge on the ground that no final oath was ever taken by the bankrupt. The court refused to set aside the discharge, and ordered a new certificate to be issued as of October 17, 1874. To review and reverse this order, the creditors bring the present petition for review, making Ridenbaugh's administrator defendant therein. The case was submitted to the circuit judge upon the facts in the opinion of the district judge, a synopsis of which is above given.

Johnson & Botsford and Lee & Adams, for creditors.

Henry Flanagan, contra.

DILLON, Circuit Judge. The order of the district court complained of must be affirmed. If it be admitted that in no case, not even in the death of an adjudicated bankrupt, can a discharge be granted unless the oath required by section 29 has been taken and subscribed, still, it does not appear from the record or from any fact found by the district court that the deceased bankrupt did not take and subscribe the final oath. On the 17th day of October the auditor, as master, reported specially that the bankrupt had filed the oath required by section 29, and was entitled to a discharge and the court indorsed on this report an order for the bankrupt's discharge, and the discharge was entered of record October 22d, and on that date the certificate thereof was issued. The mere fact that the oath required to be subscribed by the bankrupt is not among the files, does not satisfactorily show that it was not taken and is not sufficient to overcome the contrary presumption arising from the report of the auditor and the order of the court for a discharge. The court below does not find, as a fact, that the oath was not taken. Whether the presumption arising from the order granting a discharge that the final oath was taken is a conclusive one, I need not inquire. Conceding that, in a proceeding of this kind, the presumption is a disputable one, it is not overcome by the record now presented to me.

There is no error appearing of record in the action of the district court ordering a

new certificate to be issued as of the day when the auditor's report was filed. The case had gone through all the stages prescribed by the bankrupt act. In May, 1870, a creditor's petition was filed, a warrant issued, and subsequently an adjudication was entered. On April 24, 1874, the bankrupt filed a petition for his discharge, notice was given, and on the 12th day of September, 1874, no objection to the discharge being made by the creditors, his application was submitted to the court, and referred to the auditor, who, on the 17th day of October, reported that the bankrupt had, in all things, conformed to the bankrupt act. Whether the order for the discharge was then made or was made at some time between that day and the 22d of October, does not precisely appear and is not material. On the 18th day of October the bankrupt died. If the order was made before his death the record and the certificate should be changed to conform to the fact. If made after the 18th of October, still, as the application had been fully submitted and was under advisement and the delay was the delay of the court and not of the party, the court had the power to order the discharge to be made as of a date when the bankrupt was in life; and this, whether the proceeding be regarded as legal, or equitable, or strictly statutory in its nature. The authorities leave this point in no possible doubt. *Broom*, Leg. Max. 123; *Miles v. Williams*, 9 Adol. & E. (N. S.) 47; 2 *Daniell*, Ch. Prac. 1027; *Campbell v. Messier*, 4 Johns. Ch. 334. The result is that the order of the district court must be affirmed.

Other considerations not pressed by counsel, growing out of the nature and purposes of the bankrupt law, lead to the same conclusion and may be briefly mentioned. When a debtor is adjudicated a bankrupt and a conveyance of his property is made to the assignee, it is to be administered by the court under the bankrupt law for the benefit of all his creditors who shall make proof of their debts. Everything relates back to the commencement of the proceeding in bankruptcy, and the bankrupt who surrenders his property and complies with the act is entitled to his discharge. To the creditor, the law gives the benefit of an equal participation in all the assets or property of the debtor, except what is exempted. To the debtor, it gives the benefit of a discharge from his debts if he makes an honest surrender of his property. Debts afterwards created and property afterwards acquired do not come within the bankruptcy; as to these, debtor opens a new book, and commences a new career, subject to his discharge being eventually obtained. Suppose after proceedings in bankruptcy are begun, the debtor dies; what is the effect of his death? Does the proceeding abate or go on? If it abates then the estate must be taken from the bankruptcy court and be administered in the pro-

bate or proper state tribunal and creditors must there establish their claims. If, however, the proceeding in bankruptcy continues notwithstanding the death of the debtor, the bankruptcy court must retain the custody of the property and make distribution of its proceeds to those entitled. It is, therefore, material to have settled the effect of the death of the debtor on a pending proceeding in bankruptcy against him. *Troughton & Gitley*, Amb. 630. By statute (6 Geo. IV. c. 16, § 26) no commission of bankruptcy abates by the death of the bankrupt after adjudication, but, if he die before adjudication, the commission cannot proceed. *Ex parte Beale*, 2 Ves. & B. 29; *Ex parte Green*, 1 Deac. & C. 230; *Ex parte Dewdney*, 15 Ves. 494. And so by 12 and 13 Vict. c. 106, § 116.

This matter is regulated here by section 12 of our bankrupt act, which provides that, "if the debtor dies after the issuing of the warrant (against the estate of the debtor) the proceedings may be continued and concluded in like manner as if he lived." That is to say, the death of the debtor after the bankruptcy court has issued its warrant to seize his property shall not have the effect to abate the proceeding. "A bankrupt or insolvent law viewed as operating on the rights of creditors is a system of remedy; it takes out of the hands of the creditors the ordinary remedial processes, and suspends the ordinary rights, which by law belonged to creditors, and substitutes in their place a new and comprehensive remedy designed for the common benefit of all." *Mr. Justice Curtis*, in *Betton v. Valentine* [Case No. 1,370]. And it is in this sense that an adjudication of bankruptcy has been said to be "a statute execution for all the creditors," and hence does not abate by the death of the bankrupt. *In re Foster* [Id. 4,960]; *Hill*, Bankr. § 16, and cases cited.

It appears that the creditors of the bankrupt who in the case before me are seeking to have the discharge set aside, proved their debts in bankruptcy. The effect of this is declared by the twenty-first section of the act, to be that they shall not be "allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt." The 7th section of the act of June 22, 1874 [18 Stat. 179], amending section twenty-one, does not affect the case under consideration, even if it retroacts so as to apply to it. But here, the discharge has not been refused, nor within the meaning of the amendment have the proceedings been determined without a discharge.

These creditors state in their petition that their object in seeking to set aside the discharge is that it stands as an impediment to the proof of their demands against the estate of the debtor in the hands of his administrator. They have participated in all of

the estate in bankruptcy, and now seek to prove their debts against the estate acquired after the bankruptcy in the hands of the administrator, and to come in on a footing with creditors who became such after the filing of the petition in bankruptcy. This, in my judgment, they cannot do, in a case where if the bankrupt had lived he would have been entitled to a discharge from the debts of the petitioners, and they cannot, as I am inclined to think, successfully object to such a discharge on the sole ground that the final oath required by section twenty-nine of the act has not been taken. Notwithstanding the death, the proceedings are to be "continued and concluded" in the same manner as if the debtor had lived, and with the like effect. Section 12. The death dispenses with the necessity of the final oath, and the discharge, if, indeed, a formal discharge in such a case is necessary, may be entered as of a time when the bankrupt was in life. Affirmed.

NOTE. As to the power of the court to enter orders and judgment nunc pro tunc, notwithstanding the death of a party, see *Freem. Judgm.* 34. If one party to an action die, during a curia advisari vult, judgment may be entered nunc pro tunc, for the delay is the act of the court and therefore neither party should suffer. *Broom, Leg. Max.* 123; 1 *Strange*, 426. In *Miles v. Williams*, 9 *Adol. & E. (N. S.)* 47, demurrers were set for argument in Trinity term, 1844, but were not argued until May, 1845, when judgment was given on them for the plaintiff. The plaintiff having died in March, 1845, the court made absolute an order to enter judgment as of Trinity term, 1844, on the ground that the issues of law had been delayed by the act of the court through press of business, until the plaintiffs' death. In *Blewett v. Tregonning*, 4 *Adol. & E.* 1002, judgment was entered in May, 1835, upon a verdict for the plaintiff, which was rendered in the spring of 1834. A like entry was made in *Evans v. Rees*, 12 *Adol. & E.* 167, in 1840 on a verdict rendered in 1839, the judgment to be of Trinity term, 1839; the party in whose favor it was entered having died after verdict, but before judgment. The practice in chancery is the same. 2 *Daniell, Ch. Prac.* 1027. The American cases recognize and adopt the English practice. In *Campbell v. Mesier*, 4 *Johns. Ch.* 334, the case was submitted on the 26th of November, 1819, after which, but before decree, Mesier died. In 1820, the chancellor pronounced his decree, but ordered it to be entered as of November 26, 1819, the day of submission. In *Wood v. Keyes*, 6 *Paige*, 478, the cause was heard and submitted on the 20th of April 1836. In the meantime, and before decree, the cestui que trust died. Decree for complainant was rendered on May 2, 1837, but the chancellor directed it to be entered as of April 20, 1836. *Hess v. Cole*, 3 *Zabriskie* (23 *N. J. Law*), 116, is to the same effect. In *Perry v. Wilson*, 7 *Mass.* 393, the case was submitted to the court at the May term, 1810; final decision was rendered at May term, 1811, before that the defendant had died. Upon this fact being suggested to the court, judgment was rendered as of the preceding term in May, the chief justice remarking, "that when action was delayed for the convenience of the court, they would always take care that no party should suffer by such delay." When the plaintiff was non-suited at the trial, and applied for a new trial, and died while the motion was under advisement, the defendant was permitted to enter judgment as of the term succeeding the

non-suit, the plaintiff being then in full life. *Spalding v. Congdon*, 18 *Wend.* 543; *Bank of United States v. Weissiger*, 2 *Pet.* [27 *U. S.*] 481; *Clay v. Smith*, 3 *Pet.* [28 *U. S.*] 411; *Vroom v. Ditmas*, 5 *Paige*, 528; *Pool v. Loomis*, 5 *Ark.* 110.

Case No. 18,174.

YOUNG v. The ROBERTSON.

[See Case No. 11,923.]

YOUNG (RUGGLES v.). See Case No. 12,122.

YOUNG (RYAN v.). See Case No. 12,188.

YOUNG (STRATTON v.). See Case No. 13,528.

Case No. 18,175.

YOUNG et al. v. TAVEL.

[Bee, 228.]¹

District Court, D. South Carolina. June, 1806.

PRIZE—CONDEMNATION AND SALE—RESTITUTION.

Property purchased at a provisional sale at Barracoa, afterwards confirmed by sentence of condemnation of the constituted authority at Guadaloupe, is not liable to restitution in a suit in personam against the purchaser's consignee.

BEE, District Judge. This is a suit in personam against Tavel, to recover the value of twenty hogsheads and eighteen barrels of sugar, and a large parcel of logwood; part of the cargo of the schooner *Enterprize*, belonging to the libellants. The libel states that this vessel was captured on the high seas by two French privateers, and carried into Barracoa, where the said articles were taken out of the *Enterprize*, put on board the brig *Lear* belonging to the defendant, and brought from Barracoa to Charleston, where they were landed. The libel prays that they may be restored. Tavel's claim and answer admits the capture of said schooner by two French privateers duly authorized to seize all vessels trading with the revolted negroes of St. Domingo; it admits also that she was sold at Barracoa with her cargo, by order of the agent of the government of Guadaloupe then residing at Barracoa. It states that the sale was provisional, and the money ordered to be deposited, to abide the definitive sentence of the government of Guadaloupe. This was afterwards obtained, and a copy of it, marked B, is filed with the answer. The defendant says he was unapprised that the sugar and logwood mentioned in the libel were part of the said cargo, but admits that he received twenty-nine hogsheads and sixteen barrels of sugar from his agent at Barracoa, which were shipped on board the brig *Lear*, on account of the proceeds of a shipment made by him to Barracoa. The claimant pleads the decree of condemnation and sale of said articles in bar to the juris-

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

diction of this court; and insists that no compensation should be granted, because the proceedings are in personam, not in rem, and that any sum the court might award would be in nature of damages, which ought to be grounded on some tort or wilful trespass, which he cannot have committed, as he was a bona fide purchaser of the property in question.

It was argued by the counsel for the libellants, that: 1st. The property is fully proved. 2d. That the trade to St. Domingo was lawful at the time of this capture, and that therefore the decree of condemnation at Guadaloupe was void. 3d. That in the case of *Rose v. Himely* [Case No. 12,045], the decree was declared void, as being founded on an *ex post facto* law; and that the present decree, being founded in error, is also void. 4th. That as the goods were not of a perishable nature, the sale was contrary to an *arrêté*. 5th. That the definitive sentence against the vessel is only by implication extended to the goods, and therefore void as to them. 6th. That by a determination of the supreme court of the United States, sentence of a foreign court does not decide the question of property. Lastly. That the proof offered of the sentence at Guadaloupe is not duly authenticated.

For the respondent it was said, that this case is similar to one formerly determined in favour of the same party, except that this is a suit in personam, and no restitution can be decreed; but damages only as for a tort or trespass, which is not pretended. That the agent at Barracoa was a purchaser in market overt, and the answer states, that the property received from that place was in return for a cargo shipped from hence in the same brig. That the provisional sale was lawful and regular, and the purchase at it equally so, though the money arising from said sale was retained till condemnation should take place. That even if the decree at Guadaloupe had been different from what it was, still this purchase in market overt would have been valid: the claimant being bound to recur to the money deposited, and not to the goods in the hands of a fair purchaser. But as the decree of condemnation actually took place, it must be considered as final; that it is certified in the usual form, and takes away all pretence for a suit here.

The principal points that occur in this case have already been investigated by me in the case of *Rose v. Himely* [supra], which, however, differs from the present in some material respects. The sale there was made without any provisional order, and before any decree. The *arrêté* upon which the decree finally rested was, itself, issued after the capture of the vessel. Here, the property was sold by a provisional order, from a competent source, and the money retained to abide the final decree, which confirmed the sale.

It must also be recollected that this suit

is in personam; every thing relative to the goods being out of the question. The only point now left for the decision of the court is, whether the respondent has done any act that subjects him to restitution. His answer states that the articles he imported were a consignment from his agent at Barracoa in return for a cargo shipped from hence; that they were purchased in market overt; that the sale was made by order of a competent jurisdiction, and was afterwards confirmed by the constituted authority at Guadaloupe. The only questions then for me to decide are: 1st. Whether this decree is sufficiently authenticated. 2d. Whether, under the circumstances of the case, it can be set aside. 3d. Whether the respondent has done any thing to subject him to a suit in personam.

The decree appears to me duly authenticated, and has every mark of being genuine; a witness has been produced who proves the signatures. I do not think that I am authorized to set it aside, for the property is condemned as belonging to enemies, under an *arrêté* of the governor of Guadaloupe; and I have already determined a question like this, as to the validity of a foreign sentence. Nothing appears to me to make the respondent liable to pay damages, or make restitution. I am of opinion, therefore, that the suit be dismissed with costs, and I decree accordingly.

YOUNG (TRUESDALE v.). See Case No. 14,204.

YOUNG (UNITED STATES v.). See Case No. 16,782.

YOUNG (WASHINGTON v.). See Case No. 17,241.

Case No. 18,176.

YOUNG et al. v. WETZELL et al.

[3 Cranch, C. C. 359.]¹

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

LIMITATION OF ACTIONS — ACKNOWLEDGMENT — DESCRIPTION OF DEBT.

A declaration by the defendants to the marshal, at the time of serving the writ (which did not specify the cause of action, nor its amount,) that they would pay the debt if they were not arrested upon other judgments then existing against them, and compelled to clear out under the insolvent act, is not sufficient to take the case out of the act of limitations, although the defendants were not arrested upon other judgments; but if the cause of action and its amount were mentioned to them at the time of such declaration, it may be left to the jury, and if they should find that the promise referred to that particular cause of action, it would be sufficient in law to take the case out of the statute.

Assumpsit on a promissory note [by Young and Queen against Wetzell and Mills]. Plea, limitations. When arrested by the marshal, in this suit, and shown the writ, which did

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

not designate the amount nor specify the cause of action, the defendants said to the marshal that they would pay the debt, if they were not arrested upon other judgments then existing against them, and compelled to clear out under the insolvent act. They have not been so arrested.

THE COURT (MORSELL, Circuit Judge, *contra*) instructed the jury, at the prayer of Mr. Key, for the defendant, that such acknowledgment was not sufficient to take the case out of the statute of limitations. See the case of *Bell v. Morrison*, 1 Pet. [26 U. S.] 351.

Mr. Woodward, the deputy-marshal, who served the writ, further testified that he had filed the note in the clerk's office, in this case, and he thinks he mentioned this note to them as the cause of action; he had no certain recollection that he did, but his impression is that he did.

THE COURT (CRANCH, Chief Judge, *doubting*) said that the evidence might be left to the jury; and if they should be of opinion that the promise to pay referred to this cause of action, that promise was sufficient in law to take the case out of the statute.

YOUNG (WILSON v.). See Case No. 17,849.

YOUNG (WOODS v.). See Case No. 17,994.

Case No. 18,177.

YOUNG v. YOUNG.

[4 Cranch, C. C. 499.]¹

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

CHANGE OF TRUSTEES.

The trustee of a family settlement, in which infants are interested, may be changed by consent of the parties, upon a bill filed for that purpose only.

[Cited in brief in *Davis v. Bessehl*, 88 Mo. 442.]

This was bill in equity to change the trustee of a family settlement in which infants were interested, by consent of the parties. The sole object of the bill, and the whole relief prayed, was the change of the trustee, with the consent of the parties.

THE COURT, at first, had great doubt of its jurisdiction, in such a case, so as to discharge the present trustee from his obligation.

But Mr. C. Cox cited the following authorities, and THE COURT, in May, 1832, would have made a decree, but, as THE COURT required the new trustee to give security, because infants were interested, who could not consent, the decree was never signed.

The authorities cited were *Uvedale v. Etrick*, 2 Ch. Cas. 130; *Lake v. De Lambert*, 4 Ves. 592; *Buchanan v. Hamilton*, 5 Ves. 722; 2 Com. Dig. tit. "Chancery," 4, W. 6, 7.

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

Case No. 18,178.

The YOUNG AMERICA.

[1 Brown, Adm. 462; 1 6 Chi. Leg. News, 197.]
District Court, E. D. Michigan. Jan., 1874.

ADMIRALTY—AMENDMENT OF PLEADINGS—JOINER OF ACTIONS IN REM AND IN PERSONAM.

1. It is not competent to amend a joint libel against three vessels, by substituting the name of the owner of one vessel for the vessel, so as to change it from a libel in rem to one in personam.

2. A libel in rem cannot be changed into a libel in personam against the owner.

3. A joint action for collision cannot be maintained in rem against one vessel, and in personam against the owner of another.

[Cited in *The Corsair*, 145 U. S. 343, 12 Sup. Ct. 951.]

Libel for collision, by Frederick H. Blood, against the tug *Young America*, the schooner *Home*, and Francis R. P. Cottrell, owner of the scow *Wilcox*. Case came up on motion by the respondent Cottrell to dismiss the citation as to him, and to vacate the order allowing an amendment to the original libel upon which the citation was issued. The original libel was filed against the tug, schooner and scow, in rem, for an alleged joint liability for damages on account of a collision. The tug and schooner were arrested and bonded. The scow was not arrested, on account of her being and remaining out of the jurisdiction, and no appearance was entered or bond given on her account. In this state of the case, the libellant presented his petition, setting forth the foregoing facts, and alleging that the respondent Cottrell was owner of the scow at the time of the collision, and praying "that the said libel may be amended, and so far as concerns the said scow may be turned into a libel in personam, and that your said libellant may be permitted to proceed against the said Cottrell, as owner of said scow, instead of proceeding against the said scow herself, and that the said Cottrell may be cited," etc. The court at the time expressed serious doubts as to the regularity of such a proceeding, but finally, without a critical examination of the subject, made an order in accordance with the prayer of the petition. A citation having been issued and served on Cottrell, he now moves to dismiss the same, and to vacate the order amending the libel, and allowing the citation to issue.

F. H. Canfield, for the motion.

The amendment changes the form of action from one in rem to one in personam. The court has no power to allow such an amendment. *Kynoch v. The S. C. Ives* [Case No. 7,958]. See, also, *The North Carolina*, 15 Pet. [40 U. S.] 40; *The John Jay* [Case No. 7,352]; *The Richard Doane* [Id. 11,765]. The amendment is open to the further objection, that it works a complete change of parties,

¹ [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

and is in fact the institution of a new suit. At common law, the rule is well settled that the court has no power to amend, by adding new parties, or by changing the form of action. *Winslow v. Merrill*, 11 Me. 127; *Atkinson v. Clapp*, 1 Wend. 71; *Winn v. Averill*, 24 Vt. 283; *Emerson v. Wilson*, 11 Vt. 357; *Bowman v. Stowell*, 21 Vt. 309; *State v. Cook*, 32 N. J. Law, 347. No case can be found sanctioning the practice attempted here, and the absence of authority is an argument against its adoption.

H. B. Brown, contra.

Any amendment is allowable in admiralty which does not change the cause of action. Improper parties may be stricken out. *Newell v. Norton*, 3 Wall. [70 U. S.] 257, 263. New ones may be added. The Commander in Chief, 1 Wall. [68 U. S.] 49. A libel may be turned into an information. *U. S. v. Four Pieces of Cloth* [Case No. 15,150]. See, also, *Dunl. Adm. Prac.* 87, 129, 213; 2 *Pars. Shipp. & Adm.* 429, 431. An amendment was refused in *Kynoch v. The S. C. Ives* [supra], because an entire change in the nature and character of the action was proposed. See, also, 2 *Conk. Adm.* 258, 415; *The Harmony* [Case No. 6,081]; *Davis v. Leslie* [Id. 3,639]; *Nevitt v. Clarke* [Id. 10,138]; *The Richard Doane* [Id. 11,765]; *The City of Paris* [Id. 2,766]; *The Henry Ewbank* [Id. 6,376]. It is settled that a court of admiralty is governed by the same rules of practice as a court of equity. In equity the name of a plaintiff may be changed. 1 *Daniell*, Ch. *Prac.* 402, 404; *Jennings v. Springs*, 1 *Bailey*, Eq. 181. The amendment is in furtherance of justice, as it is more equitable that the owner should pay, than an innocent purchaser of the vessel. We might discontinue against the *Wilcox*, and file an original libel against her owner, setting forth that his vessel was in fault, and the court would order the causes to be tried together. What may be done indirectly may be done directly.

LONGYEAR, District Judge. The question presented involves two considerations: 1. As a libel against the scow alone, could the court allow it to be changed by amendment from a libel in rem against the vessel to a libel in personam against the owner? 2. In case of a joint liability of two or more vessels for a collision, can a joint action be maintained in rem against one or more of the vessels, and in personam against the owners of the others?

First. Touching the first question, the counsel on either side have not referred the court to any reported or unreported decision in point; and after a pretty thorough investigation I am satisfied that none exists. This would seem to indicate that the matter is so well understood at the bar that the question has never been raised, or if it has, that it has not been considered by the courts of sufficient importance to de-

mand the promulgation of an opinion. But upon which side of the question does this seeming acquiescence of court and bar bear? This question must be answered, if at all, by ascertaining what the courts have decided in cases involving principles lying at the foundation of the question under consideration. In several instances in England and in this country the questions have arisen in collision cases, as to the right to ingraft upon or blend with an action in rem a proceeding in personam for the recovery of a deficiency against the owner, where the proceeds of the vessel were not sufficient to meet the damages pronounced for; and also whether an action in rem against the vessel, and an action in personam against the owner, could be joined in the same libel. In the United States, however, the latter question was settled by a rule of the supreme court in 1845 (admiralty rule 15). Since that time the decisions in this country have all turned upon the construction of the rule, and therefore throw but little light upon the question, and will not be noticed.

The first case in England which has come to the notice of the court was *The Triune*, in 1834 (3 *Hagg. Adm.* 114). In this case Sir J. Nicholl granted a monition to the owner, who had intervened and bonded the vessel, to pay a deficiency, failing to do which he was imprisoned upon an attachment. When the motion was made, Sir J. Nicholl put this pertinent interrogatory to counsel: "Is there an instance of a warrant of arrest under circumstances such as are in this case, against the master and part owner?" The interrogatory does not appear to have been answered, but at a subsequent date he allowed the process to issue. The matter does not appear to have been discussed or very much considered, and altogether the report of the case is quite unsatisfactory. The question next arose in England in 1840, in the case of *The Hope*, 1 *W. Rob. Adm.* 155. In this case Dr. Lushington decided directly the contrary to Sir J. Nicholl in *The Triune*, and held that it was not competent for the court to ingraft upon a proceeding in rem a personal action against the owner to make good the excess of damage beyond the proceeds of the ship. His attention had not at that time been called to the decision of Sir J. Nicholl in *The Triune*. Subsequently, however, in the case of *The Volant*, in 1842 (1 *W. Rob. Adm.* 383), where the same question was again presented, his attention was called to Sir J. Nicholl's decision. Dr. Lushington then went over the subject quite fully, and finally disagreed entirely with Sir J. Nicholl, and fully adhered to his former opinion in the case of *The Hope*; and such appears to have been the settled doctrine in England ever since. In *Citizens' Bank v. Nantucket Steamboat Co.*, in 1841 [Case No. 2,730], Judge Story held that in collision cases it was not competent to proceed in the same suit in rem against the vessel and in personam against the own-

er. And this appears to be the only reported case in which any question of this kind arose in the courts of the United States before the promulgation of rule 15. But we are not concerned here so much with the particular points decided in those cases as we are with the reasons upon which the decisions were founded. In the case of *The Hope*, 1 W. Rob. Adm. 155, Dr. Lushington held substantially that, looking to the general principles upon which the proceedings in admiralty are conducted, it was wholly incompetent to ingraft a proceeding in personam against the owner upon a proceeding in rem against the vessel for the recovery of a deficiency. Applying that declaration to the present question, it may be remarked that, if in view of those general principles, it is wholly incompetent for the recovery of a part of the damages only, that is, the excess of damages over value of vessel, for a still stronger reason it is incompetent to change the whole proceeding from one in rem to one in personam, in which the owner may be made liable for the whole damages without regard to the value of the vessel against which the libel was filed.

In the case of *The Volant*, 1 W. Rob. Adm. 383, Dr. Lushington says: "The jurisdiction of this court does not depend upon the existence of the ship, but upon the origin of the question to be decided, and the locality. Looking to a proceeding by the arrest of the vessel, it is clear that, if no appearance is given to the warrant arresting the ship, there can be no proceedings against the owners, for the court cannot know who the owners are; the court cannot exercise any power over persons not before the court and never personally cited to appear." That is to say, in a proceeding in rem, for a collision, in which the owners are never personally cited to appear, there is no process or proceeding by which the court can obtain jurisdiction of the owners, or know who they are, even in cases where the vessel has been arrested, other than by their voluntary appearance. This doctrine commends itself to my judgment, and, applied to the present case, it seems to me unanswerable. How can it be said that, in a case like the present, where the vessel has not been arrested even, and there has been no appearance, the court can change the proceeding in rem against the vessel to a proceeding in personam against the owner, of whom the court has acquired and can acquire no jurisdiction, and whom the court does not and cannot know, by virtue of any process or proceeding incident to the proceedings in rem? The allowance of the amendment making the change, on the petition of the libellant, necessarily involved a determination by the court of the fact as to who was the owner, thus giving judgment beforehand, in an ex parte proceeding, and in a proceeding in rem, as to an essential and traversable fact in actions in personam

in like cases—a thing no court ever does wittingly, and which, having done, through inadvertence or for want of due consideration, will be at once undone on attention being called to it. In *Citizens' Bank v. Nantucket Steamboat Co.* [supra], Judge Story says: "In cases of collision the injured party may proceed in rem, or in personam, or successively in each way, until he has full satisfaction. But," he says, "I do not understand how the proceedings can be blended in the libel." And in another place, in the same opinion, he says: "In the course of the argument it was intimated that in libels of this sort the proceedings might be properly instituted both in rem against the steamboat, and in personam against the owners and master thereof. I ventured at the time to say that I knew of no principle or authority, in the general jurisprudence of courts of admiralty, which would justify such a joinder of proceedings, so very different in their nature and character and decretal effect. On the contrary, in this court, every practice of this sort has been constantly discountenanced as irregular and improper." It will be observed that the ground upon which the objection to joining the two proceedings in one libel was sustained by Judge Story was that the two are so very different in their nature and character and decretal effect. The same objection, as it seems to the court, applies with increased force to changing the one proceeding into the other by way of amendment. And besides that, there is what seems to the court the further unanswerable objection that such change involves an entire change of the party proceeded against. It is, in fact, the institution of a new suit by way of amendment, a proceeding never tolerated, I believe, in this or any court.

Second. The foregoing considerations, I think, are equally conclusive against joining in one suit proceedings in rem against the two vessels and in personam against the owner of the other. The original libel was brought against the three vessels, upon the theory, of course, that they were guilty of a joint tort. The action was joint as to the three. With the amendment, the action remains joint as to the two vessels which were arrested, but has necessarily become several as to the owner of the third, because, as an action in personam, it involves other and additional proof, and a different decree. The amendment has, therefore, wrought a palpable misjoinder of actions. But in the view taken as to the first point, it is unnecessary to elaborate this one further for present purposes. It results that the amendment was irregular, and therefore that the order allowing the same must be vacated, the amended libel taken from the files, and the citation be dismissed, with costs of the motion against the libellant. Motion granted.

[For subsequent proceedings, see Case No. 18,179.]

Case No. 18,179.

The YOUNG AMERICA.

[1 Brown, Adm. 549.]¹

District Court, E. D. Michigan. Feb., 1875.

COLLISION—INSUFFICIENT MANNING—PRESUMPTION OF FAULT.

1. Where the master of a small tug was also acting as wheelsman and lookout, but it was clear this fact did not contribute to the collision, *held*, the tug was not thereby chargeable with a fault.

2. But where the master, even of a small scow, was acting as wheelsman and lookout, and the proofs left it doubtful whether this contributed to the collision, the scow was *held* liable.

This was a libel, by the same libellant, in rem against the tug Young America and scow Home, and in personam against Francis B. Cottrell, owner of the scow Wilcox, for the same collision, and the two causes were heard together. The collision occurred about noon on the 22d day of November, 1871, at the lower end of the new canal on St. Clair Flats, by the libellant's vessel, the scow Liberty, first bringing up against the lower end of the pier on the port side coming down, and the scow Wilcox running into her stern while she lay against the pier, causing injury to both her stem and stern. The scow Home was in tow of the tug coming down, and the other two vessels were under sail also coming down, the tug and Home ahead, the Liberty next, and the Wilcox in the rear.

[For prior proceedings, see Case No. 18,178.]

H. B. Brown, for libellant in both cases.
W. A. Moore, for the Young America.
John Atkinson, for the Home.
F. H. Canfield, for respondent Cottrell.

LONGYEAR, District Judge. I. The only faults charged against the tug are: First, casting off the line of the Home while still in the canal, and without any warning to the other vessels; and, second, want of necessary officers and crew. (1) The first charge is not only denied by the answer and not sustained by the proofs, but is unquestionably negated by the proofs. (2) The second charge is sustained by the proofs in this, that the master was acting as wheelsman, and there was no lookout man on duty. The Victor [Case No. 16,933], decided by this court July 29, 1873. But no liability can be attached to the tug on this account in this case, because it is clear from the proofs that this fault did not contribute to the collision, as will appear hereafter when considering the case of the other two vessels.

II. The only charge of fault against the Home was for paying off when her line was dropped by the tug so rapidly that the Liberty could not pass her, whereby the latter was caused to collide with the pier. This is

clearly not sustained by the proofs. The Home did pay off, as a matter of fact, not in consequence, however, of her line being dropped by the tug, because her line had not then been dropped, but in consequence of a puff of wind driving her up on to the tug, and obliging her to pay off to avoid running into the latter. The same puff of wind drove the Liberty at the same time up alongside and to leeward of the Home. The vessels having the wind from the starboard and nearly a-beam, the sails of the Liberty were becalmed by the wind being taken from them by the sails of the Home, and in order to extricate her the helm was put to starboard, and other measures taken to make her pay off still more. At first she did not seem to mind her helm, but when she did she payed off very suddenly and very rapidly, and although strenuous efforts were made to bring her back on her course, she proved to be unmanageable, and kept on quite sharply across the channel, and ran against and collided with the pier near its lower extremity, on the port side coming down. She struck the pier at an angle of from two to three points from the line of the channel bank, and did considerable injury to her port bow. The proofs showed that there was ample room for her to have passed between the Home and the pier, and that she could and would have done so with safety, but for her bad steering qualities or some mismanagement on board of her, or perhaps both. There was, therefore, no case made out against the Home.

III. The allegations of fault against the Wilcox are: (1) No lookout; (2) not properly manned; (3) no proper precautions to avoid the Liberty; (4) not coming to windward far enough to avoid the Liberty.

The first and second allegations of fault are fully sustained by the proofs. There was no lookout man on duty, and the master was acting as wheelsman. These are positive faults for which, in case of collision, a vessel will in all cases be held responsible, unless it can be shown by the vessel so in fault, clearly and satisfactorily, that such faults did not contribute to the collision. This was not so shown in this case. The most that can be said is that it was left in doubt whether the Wilcox could or could not have avoided the Liberty after it became certain that the latter could not be brought back on her course, and was in danger of colliding with the pier, even if the former had had a lookout man on duty, and the master had been giving his undivided attention to the navigation of his vessel. The rule above alluded to applies especially to vessels navigating narrow channels, with other vessels ahead in the channel, and in their immediate vicinity, involving the risks of emergencies, as was the case here, requiring intelligent and prompt action on the part of the officer in command. The Genesee Chief, 12 How. [53 U. S.] 443, 463; The Victor,

¹ [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

supra. The case against the defendant Cottrell is therefore sustained.

IV. The only remaining question is whether the Liberty was herself free from fault. This must be held in the negative, for the same reasons and on the same grounds for which the Wilcox has been held liable. The libellant is therefore entitled to recover against the respondent Cottrell for a moiety only of the damages done to the stern of the Liberty. The damages done to the bow of the Liberty were done by her colliding with the pier, for which the Wilcox was in no manner responsible.

Libel against the Young America and the Home dismissed, with costs to claimants. Decree against Cottrell for a moiety of the damages occasioned by the injuries done to the stern of the Liberty by the collision, and referring it to a commission to ascertain and report the same. Costs reserved till the coming in of the commission's report. Ordered accordingly.

YOUNG AMERICA, The (SCOTT v.). See Case Nos. 12,549 and 12,550.

YOUNGER v. GLOUCESTER MARINE INS. CO. See Case No. 5,487.

YOUNG MEN'S ASS'N (KING v.). See Case No. 7,811.

Case No. 18,180.

The YOUNG MECHANIC.

[2 Curt. 404.]¹

Circuit Court, D. Maine. Sept. Term, 1855.²

MARITIME LIEN—DOMESTIC VESSELS—LIEN FOR MATERIALS—INSOLVENCY AND DEATH OF OWNER—EFFECT.

1. A maritime lien is a jus in re, constituting an incumbrance on the property, and existing independent of the process used to execute it. It is not divested by the death of the owner of the vessel, and the representation, by his administrator, of the insolvency of his estate.

[Cited in *The Larch*, Case No. 8,085; *Vandewater v. Mills*, 19 How. (60 U. S.) 90; *Pendergast v. The Kalorama*, 10 Wall. (77 U. S.) 212; *Francis v. The Harrison*, Case No. 5,038, note; *The Kate Tremaine*, Id. 7,622; *Merchants' Mut. Ins. Co. v. Baring*, 20 Wall. (87 U. S.) 163; *The Columbus*, Case No. 3,044; *The E. A. Barnard*, 2 Fed. 722; *The J. W. Tucker*, 20 Fed. 130; *The Cumberland*, 30 Fed. 450; *The Scotia*, 35 Fed. 909; *Bailey v. Sundberg*, 1 C. C. A. 389, 49 Fed. 584; *The Samuel Marshall*, 4 C. C. A. 391, 54 Fed. 401, 402; *The Alvira*, 63 Fed. 149; *The J. E. Rumbell*, 148 U. S. 10, 13 Sup. Ct. 499; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1027; *The Avon*, Case No. 680.]

[Cited in *Briggs v. A Light Boat*, 7 Allen (Mass.) 296; *Atlantic Works v. The Glide*, 157 Mass. 528, 33 N. E. 164.]

2. The statute of Maine conferred on mechanics and material-men, such a lien on domestic

vessels, as the general admiralty law had previously allowed to them on foreign vessels.

[Cited in *The Kate Tremaine*, Case No. 7,622; *The Richard Busted*, Id. 11,764; *The Mary Gratwick*, Id. 17,591; *The Columbus*, Id. 3,044; *Topfer v. The Mary Zephyr*, 2 Fed. 826; *The Cumberland*, 30 Fed. 450; *The Samuel Marshall*, 49 Fed. 759; *The Julia*, 57 Fed. 235; *Lighters Nos. 27 and 28*, 6 C. C. A. 495, 57 Fed. 666; *The Templar*, 59 Fed. 206; *The Alvira*, 63 Fed. 149.]

[Cited in *Perkins v. Pike*, 42 Me. 149.]

This was an appeal from a decree of the district court in a suit in rem, to enforce payment of a claim for materials supplied by the libellant for building a vessel within the district of Maine. The decree was in favor of the libellant [Case No. 18,181], and the claimant appealed. It appeared that the person who was building the ship, upon a contract with whom the materials were supplied, had died before the institution of the suit, and his administrator had represented his estate to be insolvent, according to the local laws of the state. The only question made on the appeal was, whether the lien conferred by the local law, still subsisted and could be enforced in the admiralty, notwithstanding such death and representation of insolvency.

Mr. Shepley, for appellant.

Mr. Evans, contra.

CURTIS, Circuit Justice. This being a domestic vessel, the lien, if any, is conferred by the local law. If by that law it exists, it may be enforced in the admiralty. If it has ceased to exist, it can be enforced nowhere. *The General Smith*, 4 Wheat. [17 U. S.] 438; *Peyroux v. Howard*, 7 Pet. [32 U. S.] 324. The Revised Statutes of Maine (chapter 125, § 35) give to those who perform labor, or furnish materials for or on account of any vessel building or undergoing repairs, "a lien on such vessel for his wages or materials." To decide the question now before me, it is necessary to determine what this statute intends to confer, on the laborer or material-man. Its terms must be construed with reference to its subject-matter; and, prima facie, the word "lien," here used, should bear the same signification which had been attached to it in the maritime law. Under that law, mechanics and material-men have a lien on foreign vessels for the price of their labor and materials; but not on domestic vessels. This statute grants them a lien on domestic vessels. It does not define the term "lien," nor in any manner describe the sense in which it was intended to be employed. Sound rules of construction require me to say, it was intended to be employed in the same sense in which it had been previously known and used; and that the right or interest which it designates, is the same right or interest which laborers and material-men had previously possessed in foreign vessels. Using a legal term, and applying it, to give to laborers and material-men some right in the

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

² [Affirming Case No. 18,181.]

vessels, for or on account of which their labor or materials are furnished, the presumption is, that this term was used in its known legal sense. This presumption may be removed by other provisions of the statute. I shall consider hereafter whether it is so in this instance. But I will first inquire what right or interest is conferred by the statute, provided it intended to create such a lien, as exists by the general admiralty law upon foreign vessels.

Though the nature of admiralty liens has doubtless been long understood, it does not seem to have been described with fulness and precision, in England or this country. That it differs from what is called by the same name in the common law, is clear; for it exists independent of possession. The *Bold Buccleugh*, 22 Eng. Law & Eq. 62; The *Nestor* [Case No. 10,126]. That it is not identical with equitable liens, is equally clear; for the latter arise out of constructive trusts, and are neither a *jus ad rem*, or a *jus in re*; but simply a duty, binding on the conscience of the owner of the thing, and which a court of equity will compel him specifically to perform. 2 Story, Eq. Jur. § 1217; *Ex parte Foster* [Case No. 4,960]; *Clarke v. Southwick* [Id. 2,863].

It has been declared by very high authority, that what we term a "maritime lien," was derived by the maritime law from the civil law. In *The General Smith*, 4 Wheat. [17 U. S.] 443, Mr. Justice Story, delivering the opinion of the supreme court, and speaking of the lien of a material-man, says: "The general admiralty law, following the civil law, gives the party a lien on the ship for his security." And in *The Nestor* [supra], he expresses an opinion that the general maritime law was in this particular, drawn from the texts of the Roman law, with some modifications, to which he refers. In delivering the judgment of the court of appeal in the case of *The Bold Buccleugh*, above cited, Sir John Jervis also declares, in terms, that the rule as to the persistency of a maritime lien, is deduced from the civil law. And the same law is declared by Mr. Abbott to be the source of maritime liens, of material-men. *Abb. Shipp.* 143. But the right conferred by the Roman law upon those who lent money to build, or repair a vessel, was merely a personal privilege, to be paid in preference to general creditors. *Poth. Pan.* 20, 24, 26, note. *Emerigon* (*Traité des Con. a la Grosse*, c. 12, § 1) observes, that *Kuricke* has maintained that, such creditors had an absolute privilege and a legal hypothecation, by the Roman law; but that perhaps he had no other design than to adapt the texts he cites to modern usages. In a similar way, they are probably to be understood, who speak of the deduction of this right from the civil law. Not that any texts of the Roman law can be produced which confer upon those who now possess it, what we call a maritime lien, but that the commercial

usages of the middle ages modified some of the rules of that law respecting hypothecations, and adapted them to the wants of commerce.

The texts of the Roman law on this subject, were doubtless used, and with some modifications afforded the rules which obtained in the maritime laws of Europe during the middle ages. The laws "*Qui in navem extruendam, vel instruendam, credit, vel etiam eruendam, privilegium habet*" (D. 42, 5, 26); and "*Quod quis navis fabricandæ, vel emendæ, vel armandæ, vel instruendæ causa, vel quoquo modo crediderit, vel ob navem venditam petat, habet privilegium post fiscum*" (D. 42, 5, 34); and "*Interdum posterior potior est priori. Ut puta: Si in rem ipsam conservandam impensum est, quod sequens credit; veluti si navis fuit obligata, et ad armandam eam (rem) vel reficiendam ego credidero*" (D. 20, 4, 5),—were probably then understood as conferring, not merely a personal privilege, to be paid in preference to other creditors on a sale of the debtor's goods, but as importing an actual hypothecation tacitly made by the law. *Pothier*, in his note to the law last cited (20, 4, 4), says the correct opinion is, that these laws do not create tacit hypothecations, as they were thought to do by *Accorsius* and some of the ancient commentators. *Pardessus*, in his note to the last cited law (1 *Col. des Lois Mar.* p. 113) and to the law *de exercitoria* (Id. p. 98, note 4), mentions the same difference between the received interpretation and that of the older writers. The suggestion of *Emerigon* respecting *Kuricke*, already quoted, may be applicable, in some measure, to all these old commentators; but whether the texts of the Roman law were misunderstood, and so were the sources of the existing usages, or whether it was only intended to adapt them to those usages which had already obtained, it is certain that in the general maritime law of Europe privileged hypothecations were tacitly conferred in the cases in which, what we term liens, now exist. It is true we do not find their precise nature described in any of the ancient collections of sea laws, so far as I have discovered. These laws were, generally, simple practical rules, often partaking of the rudeness of the ages in which they were compiled, dealing, rarely, with abstractions, containing few definitions, and, with the exception of the customs and ordinances of Catalonia and Arragon, collected by *Pardessus* in volume 5, p. 333, &c., they are not laws of procedure. In the *Consulat de la Mer*, the most ancient and important of all, there is no definition of a maritime lien, nor any account of the way in which it was to be worked out. Its usual formula is, simply, the ship ought to be sold, and the debt or damage paid from its price. And so when the personal liability of the master is ordained, it is only said, he ought to be put into the power of the magistrate. See chapter

289. But that the right or privilege of the seaman in the ship as a security for his wages (chapters 138, 193), of the merchant for injury or loss of his goods, &c. (chapters 59, 63, 106, 227, 254, 259), or for the price of his goods sold to raise money for the necessities of the ship (chapter 107), was a real right, a *jus in re* in contradistinction to a mere personal privilege to be paid in a course of creditors, I have no doubt. In the Laws of Wisbuy this is clearly shown. Emerigon (Con. a la Grosse, c. 12, § 4) and Boulay Paty (1 Cours de Droit Com. p. 38) translate the forty-fifth article of these laws respecting the right of a merchant whose goods have been sold to supply the necessities of the vessel, or who has lent money for the same purpose, "auront special hypothèque et suit le navire." See, also, 1 Pard. Col. des Lois Mar. 492, art. 43. Le Guidon (chapter 19, arts. 1, 2; Pardessus's Col. des Lois Mar. 424) denominates such a right "special hypothèque."

According to the modern civil law of the continent of Europe, movables cannot be hypothecated, and as vessels are movables, to term the privileges created by the maritime law, hypothecations, would introduce a seeming anomaly. Dom. Civ. Law, bk. 3, tit. 1, § 1, note 1655, &c.; Kaufman, Mackeld. Civ. Law, bk. 1, c. 6; 1 Boul. P. Dr. Com. p. 35; Emerig. Con. a la Grosse, c. 12, § 2. For this reason the French ordinance of 1681, after deciding (article 1) that vessels are movables, in article 2, instead of the term "hypothèque," uses the words "affecté aux dettes." Boulay Paty, in his elaborate dissertation on the maritime privileges of the French law, though he distinguishes between "affectés" and "hypothèques," points out no practical difference between them, save that the latter are paid in the order of their dates, while the former are paid according to their causes. And he describes the right of a lender on bottomry, as "privilege sur les choses affectés au pret," as does Pothier also. 1 Boul. P. Dr. Com. pp. 36, 328; Poth. Pret a la Grosse, note 9. There is no doubt that the maritime law of France at this day, following the long existing usages of the commercial world, tacitly creates what we term "liens," but what are called in their law "privileges;" which are, in effect, tacit hypothecations of the vessel. Domat, Civil Law (Cushing's Ed., note 1765, bk. 3, tit. 1, § 5), says: "All privileges make a particular appropriation, which gives to the creditor the thing for his pledge." Merlin (Rep. voc. "Privilege de Creance") a "privilege," properly speaking, is a privileged hypothecation, distinguished by the name of "privilege" on account of the different causes from which they spring. See, also, Pard. Droit Commer. Pat. 5, tit. 1, c. 6, note 1190; and Toulier, liv. 3, tit. 3, c. 5, note 98. Emerigon, after giving the texts of the Roman law, already cited, says: "We have adapted to our own

usages the texts just cited, as will be presently seen. The personal privilege of which the Roman law speaks is unknown in our jurisprudence. Every privilege imports, per se, a tacit and privileged hypothecation upon the thing which is the subject of it." In the law of Scotland such a right is termed "hypothec," and is, professedly, what was known to the Roman law as "hypotheca." Ersk. Prin. bk. 3, tit. 1, § 13.

In my opinion the definition given by Pothier of an hypothecation is an accurate description of a maritime lien under our law. "The right which a creditor has in a thing of another, which right consists in the power to cause that thing to be sold, in order to have the debt paid out of the price. This is a right in the thing, a *jus in re*." *Traité de l'Hypothèque*, art. prelim. See, also, Saund. Justinian, p. 227. It is not divested by a forfeiture for a breach of municipal law (St. Jago de Cuba, 9 Wheat. [22 U. S.] 409); nor by a sale to a bona fide purchaser without notice (*The Chusan* [Case No. 2,717]; *The Bold Buccleugh*, 3 W. Rob. Adm. 220; s. c. on appeal, 22 Eng. Law & Eq. 62). See, also, 1 Notes of Cas. 115; 4 Notes of Cas. 170; 6 Notes of Cas. 68. It is not merely a privilege to resort to a particular form of action to recover a debt. The maritime law, following the Roman, distinguished between actions and privileges, and held that actions do not make hypothecations. Emerigon, Con. a la Grosse, c. 12, § 1. It is an appropriation made by the law, of a particular thing, as security for a debt or claim; the law creating an incumbrance thereon, and vesting in the creditor, what we term a special property in the thing, which subsists from the moment when the debt or claim arises, and accompanies the thing even into the hands of a purchaser.

It is true, such a lien gives to the creditor no right to possess the thing; and it can be executed only by a suit in rem. But the same is true of an express hypothecation by a bottomry bond. Whether the creditor may himself seize and sell the thing or must obtain a condemnation, to be followed by a judicial sale, does not necessarily affect the question, whether he has a real right in the thing, *jus in re*. Under the Roman law he was allowed to sell, himself, even at private sale. Some regulations were made at a late day respecting notice. But the system was very inartificial. The modern civil law of Europe has better protected the rights of debtors and third persons. See Kaufman, Mackeld. Civ. Law, bk. 1, tit. 3. In France the creditor who had but a tacit hypothecation, without any judgment, could not seize and sell. He was obliged to institute judicial proceedings, and obtain a judicial sale. Pothier, *De l'Hypothèque*, c. 2, § 3. But the creditor could maintain a real action, to take the possession of the thing from a third person, *actio hypothecaria*, and have it con-

demmed, to the satisfaction of his debt, *actio mutui*, or *locatio conducti*. See Kaufman, *Mackeld. Civ. Law*, 396, and note. An ordinary *libel in rem* to enforce a lien, includes both these actions of the Roman law, and at the same time recovers the possession and subjects the thing to the payment of the debt. Indeed Pothier's description of the execution of an hypothecation is as applicable to a proceeding in the admiralty to enforce a lien. "The execution of an hypothecation is made by the seizure which the creditor makes of the thing hypothecated and the judicial sale which is ordered thereof." Poth. *De L'Hypothèque*, c. 2, § 3. Whether he can make the seizure himself, only to be followed by a judicial sale, or must resort to a court for both, may be important as to remedy, but does not affect his ultimate and essential right. A right which enables a creditor to institute a suit, to take a thing from any one who may possess it, and subject it, by a sale, to the payment of his debt; which so inheres in the thing as to accompany it into whosoever hands it may pass by a sale; which is not divested by a forfeiture or mortgage, or other incumbrance created by the debtor, can only be a *jus in re*, in contradistinction to a *jus ad rem*; or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledgee or the lien of a bailee for work. The distinction between a *jus in re* and a *jus ad rem* was familiar to lawyers of the middle ages, and is said then to have first come into practical use, as the basis of the division of rights into real and personal. Saund. *Intro. to Just.* p. 49. A "*jus in re*" is a right, or property in a thing, valid as against all mankind. A "*jus ad rem*" is a valid claim on one or more persons to do something, by force of which a *jus in re* will be acquired. Poth. *Traité du Droit de Domaine*, c. "Pretences"; Hugo, *His. du Droit Rom.* p. 118. The lawyers of the middle ages, who gave form to the customs of the seas, and arranged judicial proceedings to carry them into effect, certainly did not rank a lien or privilege among the *jura ad rem*. For it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear any thing; but a claim against all mankind; a suit *in rem*, asserting the claim of the libellant to the thing, as against all the world. It is a real action to enforce a real right. *Just. L.* 4, tit. 6, de *actionibus*, and Sanders' note, p. 527.

I have bestowed attention on the investigation of the nature of an admiralty lien, because it is essential to the decision of the case now before me. If such a lien be, as

has been considered by learned judges, for whose opinions I have great respect, "only a privilege to arrest the vessel for the debt, which, of itself, constitutes no incumbrance on the vessel, and becomes such only by virtue of an actual attachment" (*The Triumph* [Case No. 14,182]), then it might be difficult to maintain that this statute lien, conferred by the local law, subsists after the statute insolvency of the estate of the decedent owner. But if, as I think, it is a real and vested interest in the thing, constituting an incumbrance placed thereon by operation of law, to be executed by a judicial process against the thing, to which no person is made a party, save by his voluntary intervention and claim, then the inability to maintain a suit against the administrator, and the incapacity to make any attachment of the property of the deceased in such a suit, though they may amount to infirmities in the remedy when pursued in the state courts, do not affect the right of the creditor, nor his remedy in the admiralty. Indeed, if a maritime lien be merely a privilege to attach the vessel for a debt, which becomes an incumbrance only in virtue of an actual attachment, it is difficult to see, how it amounts to any special privilege in the New England states, where every creditor has the privilege of attaching all vessels for all debts, which become incumbrances by virtue of such attachments. Incumbrances created merely by attachments, must take rank, in the absence of positive provisions of law to the contrary, according to the dates of such attachments. But incumbrances created by maritime liens are marshalled according to the causes from which such liens spring. That is, they subsist, and bind the property, not in virtue of the legal process used to enforce them, but by operation of the law which creates them and fixes them on the property, at the moment when the debts are incurred. How they are to be marshalled, and what is the effect of a proceeding instituted by one lien creditor upon the rights of others, is quite a different question, upon which it is not necessary here to express any opinion. See *The Globe* [Case No. 5,483]; *The America* [Id. 288]; *The Ord. of Peter 4*, in *Pard. Col.* 389, cc. 32-34; *Emerigon, Con. a la Grosse*, c. 12, § 3; *The Saracen*, 2 *W. Rob. Adm.* 451.

I consider the decision of the supreme court of Maine in *Severance v. Hammatt*, 28 *Me.* 511, shows only that there is an infirmity in the remedy under the local law. But the legislature must be taken to have known that the right conferred could be enforced in the admiralty where no such infirmity exists, and by the act of 1850 (chapter 159) they promptly supplied the defects in the proceedings of their own courts.

My opinion is, that the lien conferred by the local law was an existing incumbrance on the vessel, not divested or extinguished

by the death or insolvency of the owner; and that, consequently, the decree of the district court must be affirmed.

[The libels were referred to a commissioner to ascertain the amount of each claim, and, upon his report being confirmed by the court, the parties were heard on the taxation of costs. Case No. 18,182.]

Case No. 18,181.

The YOUNG MECHANIC.

[1 Ware, 535.]¹

District Court, D. Maine. April 17, 1854.²

LIBEL AGAINST VESSEL — LIEN FOR MATERIALS — DEATH AND INSOLVENCY OF OWNER—EFFECT.

1. The privileged lien against a vessel given to material men by the Revised Statutes of Maine (chapter 125, § 35) amounts essentially to an hypothecation of the vessel to the privileged creditor.

[Cited in The Richard Busteed, Case No. 11,764.]

2. An hypothecary creditor has the same jus in re, or proprietary interest in the thing, as a pawnee or mortgagee.

3. His rights are paramount to the rights of the general creditors under the laws of the state regulating the distribution of estates of deceased insolvent debtors.

4. The case of Severance v. Hammatt, 28 Me. 522, was decided against a lien creditor on the death and insolvency of the debtor, on the ground that the laws provided no means by which the lien could be enforced in such a case, consistently with the rights of the general creditors under the laws for the distribution of insolvent estates. But as no such difficulty exists in the admiralty, that court can give the creditor his appropriate remedy.

Mr. Evans, for libellant.

Mr. Shepley, for respondent.

WARE, District Judge. This is a libel in rem against the hull of a new ship, since named the Young Mechanic, built the last season at Rockland, in this state, by a material man for the price of materials furnished by the libellant for building it. The libel is founded on the statute of the state giving to this description of creditors a lien on the ship, as a security for the price of the materials furnished. Wm. McLoon, the claimant, in his answer alleges that on or about the 8th of April, 1854, one Francis Rhoades, intending to build a ship during the season, applied to him for a loan of money to purchase the materials and pay the laborers; that he advanced for that purpose the sum of \$20,000; that on the 8th of May, Rhoades executed and delivered to him a mortgage of the materials for the sum advanced; and that having required further advances, he, on the 8th of November, executed another mortgage of the vessel for the further sum of \$20,000 advanced; that afterwards the respondent made further ad-

vances to the amount of about \$25,000, and on the 4th of December, Rhoades made an absolute conveyance of the vessel to him, and on the eighth of that month died insolvent; that the estate was duly represented insolvent by the administratrix, and commissioners of insolvency have been duly appointed.

The answer proceeds to state, by way of defence, that the whole advances to the amount of \$65,000 were made on the credit of the ship. It is admitted that the articles mentioned in the schedule annexed to the libel were furnished by the libellant at the request of Rhoades, the builder on account, and on the credit of the ship; but it is contended that if the libellant ever had a lien on the ship, it has been dissolved by the death and insolvency of Rhoades.

The respondent having admitted in his answer that the materials mentioned in the libel were furnished for and on account of the vessel, the case presents but a single question for decision; that is, whether, admitting that the libellant ever had a lien, it has been subsequently dissolved by the death and insolvency of the person who was owner at the time when the materials were furnished, and who remained so until the transfer, on the 4th of December. It appears to me very clear, under this law, that a creditor who has advanced money on a mortgage of the materials, or the ship, is in no better condition to defend against the liens of material men, than the owner or mortgagor; that he merely succeeds to the place of the owner, the evident object of the law being to give to material men and laborers a lien on the vessel for their security, whoever may be the owner, paramount to all other claims.

It is certainly true that there is the same apparent equity in allowing a privilege to a creditor, who loans money to be applied to the building of a ship, if in fact it is so applied, as in allowing it to the furnisher of materials and the mechanics, by whose materials and labor the ship is made, and the Roman law allows the privilege to both concurrently. For the thing thus created by his money, in the pointed language of Domat, is as it were his, to the amount that his money has contributed to make it, "elle est comme sienne jusqu' à la concurrence de ce qu'il y a mis," in the same sense and to the same extent as it is the material man's or the mechanic's. Domat, Lois Civiles, liv. 3, tit. 1, § 5, Nos. 4, 6, 9-11. But the common law gives to the lender no such privilege, and the legislature has not seen fit in amendment of the law to extend the privilege to him, which it has given to the laborer and furnisher of materials. The 35th section of the Revised Statutes of Maine, under which the lien is claimed, is in these words: "Any ship-car-penter, caulker, blacksmith, joiner, or other person, who shall furnish labor or materials for or on account of any vessel, building or standing on the stocks, or under repairs aft-

¹ [Reported by Hon. Ashur Ware, District Judge.]

² [Affirmed in Case No. 18,180.]

or having been launched, shall have a lien on such vessel for his wages and materials until four days after such vessel is launched, or such repairs afterwards have been completed; and may secure the same by an attachment on said vessel within that period, which shall have precedence over all other attachments."

The question whether the lien is dissolved by the death and insolvency of the owner, must depend on the nature and quality of the lien or privilege, and the right and interest in the thing which it assures to the favored creditor. If it is secured by an attachment or arrest of the vessel, within the time limited, it has a precedence over all other attachments, that is, attachments of any other creditors of the owner. The law thus constituting it a privileged lien, it amounts to a legal hypothecation of the ship, like a bottomry bond, or the lien of seamen for their wages. The ship itself becomes in some sense a debtor. It is a *jus in re*, a proprietary interest in the thing, which may be enforced directly against the thing itself by a *libel in rem*, in whose ever possession it may be and to whomsoever the general title may be transferred. It is not indeed a full *jus proprietatis* in every sense, but one of a qualified nature. It does not constitute the lien creditor a tenant in common with the general owner to all purposes, so that if the possession comes into his hands he can hold it as a tenant in common and employ it in that right; but it gives him an interest in the thing, and a right by judicial process to get his pay from it. And this proprietary interest is as complete, as it is in case of pawn or mortgage. In this respect there is no difference between pawn and hypothecation; and such is the decision of the Roman law. "*Inter pignus et hypothecam tantum nominis differt.*" Dig. 20, 1, 5, 51; Just. Inst. 4, 6, 7; Domat, liv. 3, tit. 1, § 1, note. The difference between them consists only in the remedy. The pawnee having the possession of the thing, may, in some cases at least, sell it and pay himself; but the hypothecary creditor, not having the possession, must obtain a judicial order before the thing is sold.

If this view of the subject is correct, it seems to follow on general principles, that in the event of the owner's death and insolvency, the legal interest of the hypothecary creditor remains unaffected by the fact of insolvency and death, precisely as it would in a case of mortgage, the hypothecation being the precise equivalent to a mortgage containing a stipulation that the mortgagor shall retain the possession until the condition is broken. It being a transfer of a legal interest in the thing, *jus in re*, to the hypothecary creditor under a condition, after that is broken he has a right to hold the thing against all other persons, who derive title under the hypothecators, in whatever manner their title is derived, whether from

contract, or whether it is cast upon them by operation of law.

But it is said that the supreme court of the state has given a different construction to the 37th section of the same chapter of the Revised Statutes, which gives to material men a similar lien on houses. The language of the two sections, though not perfectly identical, is so nearly alike in the operative words, that there does not appear to be any satisfactory ground for making a distinction in the construction of the two, both being in *pari materia*, and both apparently having the same general object, the benefit of material men and mechanics. And as the courts of the United States hold themselves bound, in carrying into execution state laws, by the construction given to them by the state tribunals, I might have felt myself bound to follow this decision, if it presented itself to my mind precisely in the same light as it seems to have done to the counsel for the respondent. But in examining the opinions, though it appears that the court intimated, and perhaps pretty strongly, their doubts, whether the lien in that case was not intended by the legislature to be subordinate to the general laws of the state for the distribution of the estates of deceased insolvent debtors, yet I think it is pretty apparent that the decisive, and turning point, in the decision, was the want of power in the court to carry the provisions of the law into effect under any other construction. "It might at least," say the court, "be regarded as doubtful whether such was the intention of the legislature," (that is, to make that lien paramount to the claims of other creditors, and all other claims, in case the debtor died insolvent,) "and if such an intention could be discerned, no provision is made to carry the intention into effect. In such a case the court would not be authorized to supply the enactments necessary to enable one to maintain an action and to recover a judgment only against the estate subject to the lien." *Severance v. Hammatt*, 28 Me. 522. Now, if this case had been under the 35th section, and the suit had been in the admiralty, this objection, which was fatal in a court of common law, would not have existed. For the law, having in its effect and operation made the thing itself a principal debtor, the admiralty proceeds directly against it, as a party, by a *libel in rem*, and the decree is executed upon it without touching the general assets of the estate. And if the law gives to the lien creditor this preference, he ought not to be deprived of it merely because one tribunal cannot consistently with the law, which governs the action of that court, give the remedy, provided another court, to which he is authorized to apply, can give it. And this result is no novelty, but is familiar to the jurisprudence of the state. When a party has rights, which are guaranteed by the general law of the state, and a court of common law cannot,

consistently with its own peculiar jurisprudence and its forms and modes of proceeding, give a remedy, he is turned over to a court of equity. And further; the act of 1850, passed immediately after the publication of this decision of the court, was evidently intended to remedy the imperfection of that section of the Revised Statutes, which the decision disclosed. And though this act does not in its terms extend to the 35th section, it is so clear a declaration of the legislative intention in respect to the 37th section, and the 35th being in pari materia, and the credit being precisely similar in its character with the other, that in reason and equity it ought to be held to be a declaration of the legislative intention in relation to this section as well as the other.

Decree for the libellants.

[NOTE. The decree of the district court was affirmed on appeal to the circuit court. Case No. 18,180. The libels were afterwards referred to a commissioner to ascertain the amount of each claim, and, upon his report being confirmed by the court, the parties were heard on the taxation of costs. Case No. 18,182.]

Case No. 18,182.

The YOUNG MECHANIC.

[3 Ware, 58.]¹

District Court, D. Maine. Feb., 1856.

ADMIRALTY—COSTS—JOINDER OF PARTIES—PROCEEDINGS IN REM—INTERVENING PETITIONS—STIPULATION FOR RELEASE.

1. The act of congress of March 3, 1847 [9 Stat. 181], regulating costs in admiralty proceedings in rem, where less than a hundred dollars is recovered, is repealed by the act of Feb. 26, 1853 [10 Stat. 161]. The process act of July 22, 1813 [3 Stat. 19].

2. In suits in rem all persons having claims of a like nature against the thing, may join in a single libel for the purpose of having that question decided, whether the claims arise from tort or contract.

3. When a vessel is arrested by a lien creditor, all other such creditors may intervene by summary petition without having the vessel arrested again, and have their claims allowed.

[Cited in brief in *The Pathfinder*, Case No. 10,797.]

4. *Quære*. When the vessel is delivered on a stipulation for her full value, whether such creditors may have the same remedy on the stipulation that they have against the vessel remaining in the custody of the court.

In this case, several libels were filed against the vessel while on the stocks, and before she was launched, by material men claiming a lien under the law of the state. The claimant, for whom she was built, had advanced large sums of money to the builder from time to time while the work was in progress, for which he had taken a mortgage of the unfinished vessel, and finally, before she was completed, had taken a bill of sale. A few days after the bill of sale was exe-

cuted, the builder died insolvent, and the material men commenced suits to enforce their liens. It was contended on the part of the claimant, that the liens were all defeated by the death and insolvency of the builder, to whom the materials were furnished. The district court decided against the claimant and in favor of the liens. [Case No. 18,181.] In order to settle the question one of the cases was carried by appeal to the circuit court, where the decree of the district court was affirmed. [Case No. 18,180.] All the libels were then referred to a commissioner to ascertain the amount of each claim, and his report was confirmed by the court, and on motion of the claimants, the parties were heard in the taxation of costs.

Evans & Hovey, for libellants.
Shepley & Dana, for claimant.

WARE, District Judge. Two of the libellants in these cases recovered less than \$100 damage, and it is contended that under the act of March 3, 1847 (9 Stat. 121), they are entitled to no more costs in the whole, than one-half of the amount of the debts or damage recovered; that being the rule established when the suit is in rem. And if that act is to be considered as now in force, it must furnish the measure of costs in these cases. But my opinion is, that this part of the act is repealed by the act of Feb. 26, 1853 (10 Stat. 161). This act orders that "in lieu of the compensation now allowed by law to attorneys, solicitors and proctors, &c., the following and no other compensation shall be allowed," and then goes on to establish a general tariff of taxable costs. The fifth section repeals all previous laws, which are incompatible with the provisions of this act. And the act provides that on a final hearing in equity or admiralty, there shall be allowed to the solicitors or proctors a docket fee of twenty dollars, with a provision that if the libellant in admiralty recovers less than fifty dollars, the docket fee shall be ten dollars. The act does not distinguish between suits in rem and suits in personam, and being general must apply to both. The act of 1847 is clearly incompatible with this provision in the latter act, limiting as it does the costs in particular cases, and providing for a particular distribution of them inconsistent with the provisions of the last act.

Another objection to the allowance of full costs is of a more general character, and applies to all the libels. It is founded on the process act of July 12, 1813 (3 Stat. 19). The second section of this act provides, where several libels are brought against a vessel or cargo, which might be legally joined in one, that there shall be allowed no more costs than are taxable on a single libel, unless special cause for several is shown to the satisfaction of the court. This act, at least this part of it, does not appear incompatible with the act of 1853, and is therefore not repealed by it. The ar-

¹ [Reported by George F. Emery, Esq.]

gument is, that material men, claiming a lien under the statute, may all, like seamen suing for their wages, unite in a single libel, and costs should be allowed only on one libel. This depends on the true construction of the act, and to arrive at that, the whole must be considered. Its professed object is to diminish the cost of judicial proceedings by preventing a needless multiplicity of suits.

The first section provides, that when several actions or processes are brought against persons who might legally be joined in one, the plaintiff or libellant shall recover costs only on one action, unless special cause is shown for more than one. This section contemplates several actions by a single plaintiff against several defendants who might be joined.

The second section is supposed to be applicable to these cases. The provision of this is that when several libels are brought against one vessel or cargo, which might be joined, costs on one libel only shall be allowed except on special and satisfactory cause shown. This section apparently contemplates the case of a single and not of several libellants, and this appears to be evident from the clause that immediately follows, which provides that on libels against a cargo or parts of a cargo, which are seized as forfeited for the same cause, costs shall be allowed only on one libel, whatever may be the number of owners or consignees. There is nothing in the language of this section which leads to the conclusion, that where several persons have a like cause of action founded on a several liability to each, and not on a joint liability to all, they must join under the penalty of a forfeiture of costs.

It is the third section of the act which applies to cases like the present. That provides that when causes of a like nature, or in relation to the same question, shall be pending before the court, it may make such orders or rules as to the course of proceeding as are conformable to usage, for the unavoidable delay and cost, and for that purpose order causes to be consolidated; and authority is given, where any attorney or proctor has multiplied processes unnecessarily and vexatiously, to require him to pay the costs himself.

The questions which arise under this section are, first, whether these libels could legally have been joined, and on this question my opinion is, that they might; and secondly, whether they have been so unnecessarily and vexatiously multiplied as to call for the application of the penalties which the act provides, and on this question my opinion is, that they have not.

A doubt was suggested, on the part of the libellant, whether these parties could unite in one libel, and an obiter dictum in the opinion of the court in the case of *Oliver v. Alexander*, 6 Pet. [31 U. S.] 146, is relied upon as sustaining the doubt. It is there stated *arguendo*, that this privilege, by which several persons, each having a separate and inde-

pendent cause of action, are permitted to join in a single libel, is allowed as a special favor to seamen in suits for their wages and to them only. But the decision in the case of *Rich v. Lambert*, 12 How. [53 U. S.] 352, where this question was directly before the court, establishes the contrary doctrine. That was a libel against the vessel to answer for damage to goods, occasioned, as was alleged, by the improper stowage of the cargo through the negligence or fault of the master. The damaged goods belonged to fifteen different owners. Five of them united in one libel, and the other ten brought separate libels. In the progress of the causes, the court ordered them to be consolidated for the purpose of trying the general question involved in all, that is, the liability of the vessel. It was held, that in such a case, "it is fit and proper that the proceedings should be joint, either by allowing the parties to unite in the libel, or by an order for consolidation, if separate libels have been instituted." What was before allowed by the practice of the court, is now, by the process act of 1813, required under the penalties provided by the third section of the act. It may be stated as a general rule in the admiralty, that when several persons have claims in rem against a single thing, whether arising from tort or contract, of a like nature and all involving one question, all may join in a single libel for the purpose of having that question tried, although, when that is settled, there may be special defenses applicable to each case. When the general question is decided, the case of each libellant becomes separate and independent, and is litigated on its own merits. But though they may, they are not obliged to unite, and if separate libels are brought this will have no influence in a hearing on the merits of the case, but unless satisfactory cause is shown for separate libels, it will affect the question of costs.

The question then presents itself, was there in this case satisfactory cause for separate libels. Without relying on the doubts, which might have been entertained from the novelty of the question, of the right of the different libellants to unite in one libel, or inquiring whether such doubts might constitute a legitimate reason, another cause is shown which must be held satisfactory. When the first libel was filed the ship was restored to the claimant on a stipulation, not for her full value, but for double the amount claimed in the libel. The second libellant was, therefore, under the necessity of arresting her to secure his own claim, and each succeeding libel was brought under the same necessity. It cannot, therefore, be pretended, that separate libels have been unnecessarily and vexatiously multiplied by the fault of the proctors. If the ship had not been restored on stipulation, but had remained in the custody of the law, the other lien creditors might have presented their claims on summary petition and had them allowed without a new

process against the thing; for that being in possession of the court a new arrest is unnecessary. In proceedings in rem, when the res is in the custody of the law, it is retained by the court in *usum jus habentium*, for lien or privileged creditors, who have *jus in re*, as well as for those who have a general or unqualified *jus proprietatis* subject to these liens. In regard to these privileged creditors, the thing itself is considered a debtor, and they may present their claims and have them allowed and paid from the proceeds of a sale. This is the familiar practice of the admiralty after a decree and satisfaction of the first libel, when there are remnants and surpluses remaining in the court. And I can see no reason, in principle or convenience, against allowing the same claims against the res before a decree, and such has been the practice in this district. Hull of a New Ship [Case No. 6,859]. The rights of the creditor are the same against the whole as against the remnants. If the claims stand in different ranks of privilege they are marshaled and paid according to their priorities. If they hold the same rank they are paid concurrently, without regard to the time when the debt was incurred, or the time when the suits were commenced. "Privilegia non ex tempore aestimantur sed ex causa; et si ejusdem tituli fuerunt concurrunt, licet diversitatis temporis in his fuerint." Dig. 42, 5, 32. It is true that a distinction is made by the English court of admiralty, which will allow payments to be made from the remnants on claims, over which the court will not take jurisdiction in an original suit against the thing. But the distinction rests on no intelligible principle. It has been adopted only in obedience to the common law courts and under the duress of prohibition. It should not be followed in this country. Whether, if the owner has the ship restored to him on a stipulation for her full value, the creditors may have the same remedy on the stipulation, that they have against the ship when that is retained in the custody of the law, is a question that has not, to my knowledge, been decided. No satisfactory reason occurs to me why they may not. The stipulation is a substitute for the thing. The owner is allowed to have the possession and use restored on his leaving an equivalent, and, having provided that, there is no reason why his possession should again be disturbed by lien claims existing at the time of the stipulation. If the whole amount of the stipulation is exhausted and paid, it amounts substantially to a re-purchase of the vessel discharged of the liens. If any technical difficulty arises from the form of the instrument, this is an objection not favored in the admiralty, especially in the construction of instruments like this taken by order of the court in the interest of justice. *Lane v. Townsend* [Case No. 8,054]. At any rate it may easily be obviated by a slight alteration in the terms of the instrument.

Case No. 18,183.

YOUNGER v. GLOUCESTER MARINE
INS. CO.

[See Case No. 5,487.]

Case No. 18,184.

YOUNGFALL v. The JAMES GUY.

[The case reported under above title in 5
Int. Rev. Rec. 68, is the same as Case No. 7,
195.]

Case No. 18,185.

YOUNGS v. NEW YORK.

[The case reported under above title in 8
Reporter, 298, is the same as Case No. 4,758.]

YOUNGS (SICKELS v.). See Case No. 12,838.

YOUNGS (UNITED STATES v.). See Case
No. 16,783.

Case No. 18,186.

The YOUNG SAM.

[1 Brunner, Col. Cas. 600; 1 2 Flip. 440; 20
Law Rep. 608.]

Circuit Court, D. Maine. April Term, 1857.

MARITIME LIEN FOR MATERIALS—REQUISITES.

The party claiming a lien on a vessel for materials must show that the contract under which the materials were furnished had reference to some particular vessel, for the construction or repair whereof said materials were to be used.

[Cited in *The General Burnside*, 3 Fed. 229;
The James H. Prentice, 36 Fed. 781.]

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

In admiralty.

Mr. Butler, for appellant.

Mr. Shepley, for claimant.

CURTIS, Circuit Justice. This is an appeal from a decree of the district court, dismissing a libel filed in that court to assert a lien on a vessel for the price of materials used in its construction.

The material facts which I deduce from the proofs are, that in January, 1855, the claimant contracted in writing with one Edmund Merrill, for timber for the keel, shoe, floor timbers, naval timbers, foot-hooks, and risers, sufficient for a ship of about nine hundred tons, and agreed to pay therefor by conveying to Merrill in fee a certain shipyard and the buildings thereon. To enable himself to perform this contract, Merrill contracted with the libellant for the timber, for the price whereof the lien is claimed. This timber was put on to railroad cars by the libellant, consigned to the claimant at Portland, who obtained a delivery order from the railroad company, and directed the cars to

¹ [Reported by Albert Brunner, Esq., and here reprinted by permission.]

be taken to Westbrook, and there received the timber, and used it in the construction of the vessel in question. It does not appear that when this timber was delivered, this vessel had been begun to be built. The inference from the fact that among the timber were keel pieces is that the vessel was not then begun.

There is no evidence that the libelant and claimant ever met at all concerning the timber, save that the libelant was present when the timber was unladen, and assisted in unloading that and other timber from the railroad cars. It is not shown by the libelant that when he contracted to sell the timber to Merrill, he relied on any lien on this vessel, nor that he even knew it was intended for any particular vessel. He neither produces his book of accounts to show a charge to any vessel, nor offers any evidence of the terms of the contract between Merrill and himself. He relies solely on the facts that he was once the owner of the timber; that whatever contract he may have made with Merrill, he himself was present when the timber came into the actual possession of the claimant, and that it was used in building the vessel libelled. The local law (Rev. St. c. 125, § 35) gives to any person who shall furnish materials for or on account of any vessel, building or standing on the stocks, or under repairs after being launched, a lien for the price of such materials. But the materials must be furnished for or on account of some particular vessel, building or standing on the stocks, or undergoing repairs. It has been repeatedly held in this district, and I concur in the correctness of the decision, that the parties must have reference to some particular vessel in the construction or repairs whereof the materials are to be used, and upon which the lien is to be created. The *Calisto* [Case No. 2,316]; on appeal, *Read v. Hull of a New Ship* [Id. 11,609]; *Sewall v. Hull of a New Ship* [Id. 12,682]. I entertain great doubt whether any case can come within this law, if the particular vessel had not been begun to be built before the sale of the materials. But it is not necessary to decide this point, because it is not shown by the libelant that his contract with Merrill had reference to any particular vessel, and I consider the burthen rests on him to prove this.

It was urged at the argument, that in case of materials furnished for a foreign vessel, the admiralty law presumes they were furnished on the credit of the vessel. But in such a case it must first appear that there was a particular vessel in the contemplation of the parties, whose necessities were to be supplied; and, according to the correct doctrine, as expounded by the supreme court at the last term, it must not only appear that the supplies were necessary for the particular vessel, but that it was also necessary that the master should have a credit to obtain them. The liens given by the local law

do not depend on the same requirements. But whatever requirements are made by the local law, as prerequisites for a lien, must be shown by the libelant to have been complied with, before he can claim a preference over other creditors, or entitle himself to assert an interest in the property of a third person. Whether one who agrees to sell materials for building or repairing a vessel, and who contracts with another for the means to enable him to comply with his agreement, can thereby give a lien to a sub-contractor, under this law, it is not necessary in this case to determine. As was suggested in *The Kiersage* [Case No. 7,762], the case of a sub-contractor for labor is not necessarily the same as that of a sub-contractor for materials. I mention it here, only to exclude the conclusion that anything is intended to be decided respecting this question.

The decree of the district court is affirmed with costs.

YOUNG, The WILLIAM. See Case No. 17,760.

Case No. 18,187.

YOUNT v. UNITED STATES.

[Hoff. Dec. 36.]

District Court, N. D. California. Aug. 14, 1861.

MEXICAN LAND GRANTS—LOCATION—ACT OF JUDICIAL POSSESSION—OBJECTIONS TO SURVEY—EXCESSIVE QUANTITY.

[1. Where juridical possession was given by the proper officer of the Mexican government, the boundaries of the grant established, and the grantee formally put in possession of a specific tract, the boundaries of which were long recognized by his neighbors and by the Mexican government in making other grants, the court will not declare that such boundaries were erroneous and void on the ground that the land measured off and delivered was not within the exterior boundaries of the tract out of which it was to be taken, except upon the clearest proof that such was the fact. If, from the rude character of the diseño, it is impossible to ascertain with certainty that the land so delivered was outside of the boundaries delineated on the map, the boundaries will not be altered.]

[2. Where a judicial measurement and delivery of a tract of land according to fixed boundaries has been made by the Mexican authorities, and long acquiesced in, such boundaries will not be modified, although they include a considerable quantity in excess of the amount specified in the grant.]

[Claim by George C. Yount for the rancho of Caymus, 2 square leagues, in Napa county, granted February 23, 1836, by Nicholas Gutierrez to George C. Yount. Claim filed May 26, 1852, confirmed by the commission February 8, 1853, by the district court July 17, 1855 (Case No. 16,784), and appeal dismissed February 23, 1857. Heard on objections to survey.]

HOFFMAN, District Judge. The claim in this case having been finally confirmed, and a

survey made, objections have been filed on the part of persons intervening for their interests under the act of 1860.

The objections urged are: (1) That the official survey should be made in the form of a parallelogram, delineated in dotted lines on the *diseño*, and marked "Terreno Solicitado." (2) That the official survey embraces lands not only without the limits of the parallelogram referred to, but not included within the exterior boundaries of the *diseño*. (3) That the lines of the judicial survey, made under the authority of the former government, have not been followed, and that the same embrace more land than the quantity granted.

The first objection is, in effect, an attempt to procure a review and reversal of the decree of the court, which has become final by the dismissal of the appeal, and on which the survey has been made. On the argument of the cause it was strenuously contended that the delineation of the parallelogram on the *diseño* absolutely determined the location of the tract granted, and showed that it was to extend across the valley diagonally a distance of two leagues, and up and down the valley a distance of one league.

It was alleged by the claimant that the parallelogram in question was no part of the original *diseño*, but had been inscribed upon it after the grant was made. Another *diseño*, almost exactly resembling that found in the expediente, was produced, upon which no parallelogram was delineated. The record of judicial possession was also offered in evidence, from which it appeared that the tract measured out to the claimant in no respect corresponded to that delineated by the dotted lines of the parallelogram.

On the point thus presented full argument was had, and the court, by its decree, determined that the claim was valid to the land described in the record of judicial possession, and included within the boundaries of the tract delineated on Exhibit A,—i. e. the *diseño* which represented the whole tract, but which had no parallelogram inscribed upon it. The question, therefore, as to which should govern in the location of the tract,—the delineation of a certain parallelogram on the *diseño*, or the record of a judicial possession, which fixed the boundaries, and constituted a formal tradition of a specific tract by Mexican authority,—was deliberately and definitively determined, and it is now too late to reopen it for further discussion.

2. The second objection is that the juridical possession given was not within the exterior limits of the *diseño* adopted by the court and marked "Exhibit A." By the Mexican, and almost all continental, laws, a judicial delivery of possession was always necessary to effect a complete transfer of the right of property. By it the *jus in re* was added to the *jus ad rem* confirmed to the grant. When by the terms of the concession the land was imperfectly identified, or a specified quantity

was granted, to be taken within large exterior limits, the delivery of possession operated in addition as a designation of the tract granted, and a severance of it from the public domain. It may therefore be viewed as consisting of two parts—First, the ascertainment of the particular tract to be delivered; and, secondly, the formal delivery to the grantee of the tract so ascertained. Of this tract, when thus delivered to him by the magistrate, in the presence of witnesses, the grantee took formal possession with appropriate solemnities and symbolical acts, by which he proclaimed his ownership. When, therefore, a proceeding of this kind has been had by competent authority under the former government; when the limits of the tract have been marked out, and the grantee has entered into the possession of it, and has remained in its undisputed enjoyment until the conquest of the country; when the boundaries so established have been respected by all his neighbors, and recognized by the government, when granting and giving possession of adjacent tracts,—it should at least require the clearest proof of manifest error on the part of the officer giving possession to justify the court in declaring a proceeding so formal, so long acquiesced in and acted upon, to be void on the ground that the land measured off and delivered was not within the exterior boundaries of the tract out of which it was to be taken.

The only grounds for asserting that so great an error was in this case committed are—First, that the delineation on the *diseño* of the course of the Napa river, and particularly of a considerable bend in it, shows that the tract exhibited on the *diseño* lay lower down the stream than the lands which were measured; secondly, that their situation is also proved by the position of a spring, or *ojo de agua* marked on the *diseño*. But the *diseño* is drawn in a manner far too rude and obviously inaccurate to justify us in attributing so much significance to the particular course which the stream is represented as taking. It represents nothing but two ranges of hills running parallel to each other, between which a stream marked Rio de Napa, pursues a sinuous course. On one of these hills a spring, or "ojo de agua," is represented. Had there been no judicial possession, no fixing of boundaries, no ancient and notorious possession of a tract of recognized limits, the indications of the *diseño* would necessarily have been accepted as fixing the location on that part of the stream which seems to correspond most nearly in course with the representation on the *diseño*. But when a juridical possession has been given, the boundaries established, and the grantee formally put in possession of a specific tract, I cannot consider the vague and unsatisfactory indications of the *diseño* as sufficient to justify me in disregarding the acts of the Mexican authorities, unsettling long established boundaries, and disturbing a possession of nearly twenty

years. With respect to the "ojo de agua," the evidence is conflicting and unsatisfactory.

From the whole testimony, it may fairly be inferred that the spring intended to be represented on the *diseño* was very probably the upper spring, a short distance south of the northern boundary established by the judicial officer. It would seem that that spring from its rise and notoriety is as likely to be the one intended by the draughtsman on the *diseño* as the lower one, which it is urged fixes the position of the tract. If the upper spring be the one intended, the judicial measurements were within the limits of the tract; and, in any event, the question is so doubtful that no argument against the validity of the measurement can be drawn from the position on the *diseño* of the points marked "Ojo de Agua." On the whole, I think it clear that the tract measured off and delivered to the claimant under the authority of the former government should now be surveyed to him.

3. It is further objected that the official survey does not correspond with the judicial measurement. It is not necessary to recapitulate the testimony which in my judgment clearly establishes that the United States surveyor has conformed as nearly as may be to the lines established by the Mexican magistrate. Those lines are described in the record of possession, and the evidence of Leese, Bartlett, Fowler, Coombs, and others, show that the lines of the survey correspond with those of the judicial possession. One of these witnesses, Mr. Leese, officiated as measurer at the survey, while others were present at the measurement of the rancho of Dr. Bale, which immediately adjoins the rancho of the claimant, and whose southern boundary was the northern line of the rancho of the latter. It is also shown that the same line was pointed out by Dr. Bale to various witnesses as constituting the boundary between himself and the claimants, a fact of some significance when it is considered that the only objections to this survey are urged on the part of the representatives of Dr. Bale, the United States having withdrawn all opposition to it. It is contended that the northern or northwestern line should be drawn at right angles to the general course of the valley, or as nearly as possible parallel to the southern or southeastern line. That the course of that line was supposed by the Mexican magistrate to be parallel with the first line run by him is evident from the description of it in the juridical possession; but it is evident that his notion of the points of the compass was very inaccurate. All the witnesses, however, agree that the line was run across the valley from sierra to sierra in the direction of a lone pine tree, which was a conspicuous object from the starting point. An attempt was made to show that a tree lower down the valley than the line adopted by the sur-

veyor general was the object in question. But I think it is shown beyond any reasonable doubt that the tree toward which the line was run was that which has been adopted by the surveyor as determining the course of the boundary. The boundary so fixed seems to be identical with that supposed by the attesting witnesses to have been established and acquiesced in at the time by Dr. Bale, who was present as a commandante, and subsequently, when possession of his own rancho was given.

But the most serious objection to the adoption of the judicial measurement is the quantity of land embraced within it. It appears by the official survey that the area of the tract within the lines established by the *alcalde* exceeds by about two-thirds of a league the quantity granted. There can be no doubt that possession was given of all the land between the two parallel ranges of hills, "from sierra to sierra." Such was clearly the intention of the magistrate, as appears by the record of judicial measurement as positively stated by Leese and other officiating witnesses, and as proved by the very nature of the case; for, independently of the testimony, it would hardly be conceivable that the magistrate would omit to establish for boundaries the great and unmistakable monuments which two abrupt and clearly defined ranges of mountains afforded, but would fix upon imaginary lines drawn near their bases. The width of the valley was correctly assumed by him to be about one league, and by the official survey we find that the length of the lower line, which crosses the valley from sierra to sierra, is 210 chains, while that of the upper line, also running from sierra to sierra, is 206 chains,—one Spanish league, or 5,000 varas,—being equal to 210 chains. As the tract was evidently intended to be one league wide by two broad, it is obvious that, at all events, it must extend from sierra to sierra. The excess in quantity principally arises from the circumstance that in making the measurement up the valley, and establishing the upper line, the *alcalde* has measured more than 10,000 varas, or two leagues in length.

The question is therefore presented, can the court disregard the formal delivery of possession by the Mexican authorities, and restrict the survey and location to the precise quantity granted? The nature and office of a judicial measurement of land and tradition of land have already been adverted to. It was a formality, not only contemplated, but required, by Mexican law, as a mode of establishing boundaries, and effecting a severance from the tract granted the adjoining public lands. Without it the grantee had, in strictness, no legal right of possession. When, therefore, this severance was effected and the boundaries established by competent authority, and with such exactness as, in the absence of instruments and

professional surveyors, was usual, it has appeared to me that we are bound to treat the tract of land so laid off by boundaries as finally and definitely assigned to the grantee.

There may undoubtedly be cases of gross error or fraud where the judicial measurement should be disregarded. But where the excess or deficiency is not greater than may reasonably be attributed to the imperfect modes of measurement which were universally adopted, it seems to me but just to regard the mention of quantity in the grant as intended to designate, not that precise quantity to be ascertained by an exact and scientific survey, such as no one in the department was capable of making, but to be ascertained in the customary and well-known mode adopted by the ordinary magistrates and assisting witnesses. By that mode of measurement, both grantor and grantee impliedly agreed to be bound, and it has sometimes occurred that the quantity measured was less than that called for in the grant. In such cases I have not hesitated to apply the same rule, and to hold that the tract granted was that measured off and designated by the Mexican authority as the quantity conceded by the government. To adopt any other rule would unsettle the boundaries of every rancho whereof judicial possession was given, for it probably never happened that the tract measured off by the alcalde did not exceed or fall short of the precise quantity mentioned in the grant.

It cannot be supposed that the Mexican government contemplated any subsequent and more accurate survey of lands once measured off by the judicial officer, for, when all the lands of an extensive valley were granted to different rancheros, each of whose lands were bounded by the limits established by the judicial measurement of his colindantes, there would exist no means of making up a deficiency in quantity of any one, without encroaching on the lands of his neighbor; while any excess that might be cut off from the lands of any one must either be assigned to his neighbor, thus giving to him a like excess in quantity, or be reserved to the nation; and a strip of public land thus introduced between two ranchos intended to be coterminous, which, as land was then used, would be absolutely without value to the public, and which would almost always be less than a league, and might often not exceed a few hundred varas in width.

It has, for these reasons, seemed to me that the judicial measurement and delivery of land under a Mexican grant, where its boundaries have been definitely established, and a possession taken and held of the tract so laid off, ought to be treated as having effected a severance of the tract so designated from the public, and as definitely fixing its location and limits. I therefore think that the survey in this case, having been shown to correspond with the judicial measurement, ought to be approved.

Case No. 18,188.

YOUNT v. UNITED STATES.

[Hoff. Land Cas. 43.]¹

District Court, N. D. California. June Term, 1855.

MEXICAN LAND GRANT.

Under the decision of the United States supreme court in *Fremont v. U. S.* [17 How. (58 U. S.) 542], this claim is entitled to confirmation.

Claim for [the Rancho La Jota] one league of land in Napa county, rejected by the board, and appealed by claimant [George C. Yount].

Thornton & Williams, for appellant.
S. W. Inge, U. S. Atty., for appellees.

HOFFMAN, District Judge. On the hearing of this case, no oral argument on its merits was had, but the district attorney stated that the objections to its validity on which he should rely were those contained in the opinion of the board of commissioners rejecting the claim. To meet the objections stated in that opinion, additional testimony has been taken in this court, and as no other reasons for rejecting it have been suggested to us, we have now to inquire whether those objections were well founded, and whether they have been since removed by the additional testimony taken in this court. The ground on which the claim was rejected by the commissioners, and the only objection mentioned in their opinion, is that the land was not designated in the original grant with sufficient certainty to effect its severance from the public domain. No juridical possession of the land was given—the officer whose duty it was to give it having been deterred by fear of the Indians from doing so. It appears from the expediente in this case that the claimant made his petition to the governor for the grant on September 14th, 1843. After due reference of the same for information, and several reports thereon, Governor Micheltorena, on the twenty-first of October, 1843, made his order for a concession, and on the twenty-third of the same month issued and delivered to the claimant a grant, subject to the approval of the departmental assembly, and under the usual conditions. The grant duly authenticated is given in evidence in the case, and its genuineness is not called in question. In examining the nature and force of the objection to the validity of the claim on which the commissioners rejected it, it will be necessary to extract some portions of the opinion of the commissioners, as the same appears in the transcript on file in this court: "The petition for the grant alleges that the petitioner is a carpenter, and there being in the mountains, known by the name of 'La Jota,' a vacant place, he prays his excellency to grant him a league

¹ [Reported by Numa Hubert, Esq., and here reprinted by permission.]

of said mountain land for the purpose of establishing a sawmill therein. Some confusion appears in the subsequent papers in the case relative to the application of the name La Jota, but an examination of the original in the Spanish language makes it clear that it is used as the name of the mountain region in which the land solicited was located; and the above is all the description of the land prayed for in the petition, except a reference to some neighboring ranchos bordering, not the square league of land solicited, but a large tract of broken and mountainous country within which it was to be located, and from which it was proposed to separate it by juridical survey. * * * The grant recites that said Yount has petitioned for an addition of one square league in the sierra next to his rancho, named 'La Jota,' and proceeds to declare as follows: 'I have granted him one square league in said range of hills.' * * * The land, a confirmation of which is asked of this board, is denominated in the application to this commission the tract of land called 'La Jota.' The land granted is nowhere in the documentary evidence emanating from the former government designated by that name, but on the contrary, seems, by the terms used, to be excluded from the place thus designated. It is not La Jota which is granted, but lands to the extent of one league which adjoin it—'La Jota.'"

Under the view of the facts of the case indicated in the foregoing extracts, the commissioners rejected the claim, regarding it as a grant, not of any particular piece of land, but of an unlocated quantity of land to be afterwards located within an extensive and undefined tract of mountain country. It is insisted, however, by the appellant, that this conclusion is founded on a misconception of the import of the grant, as appears, not only from the terms of the grant itself and the petition on which it was founded, but also from the additional testimony taken in this court. By the testimony of Elias Barnett, it appears that the tract of land claimed by the appellant was, as early as 1843, and at the time of the grant, well known under the name of "La Jota," both by the Mexicans and also by the Indians, by whom its name was originally given; that the witness has himself known the tract since 1843, and that ever since he first knew it it was called by the name of "La Jota;" that it is a piece of table land on the top of a mountain, and that its limits and extent are generally known, and its boundaries well defined; that a surveyor could have no difficulty in locating it, its extent being a little less than a square league. Ralph L. Kilburn testifies that he has known the tract of land called "La Jota" since the winter of 1843-44; that it lies on the top of a mountain between Napa valley and Pope's rancho, and that it is bounded by the slope of the mountain on every side; that it contains somewhat less than a league of

land, and that it is as easy to ascertain its boundaries as those of Goat island in this harbor. He further states that this tract is generally known by the name of "La Jota," and that it was so known before he became acquainted with it.

It is evident from this testimony and the other depositions in the case, that there is in the vicinity of the rancho of the claimant called Caymas, a tract of land of well defined limits, and with generally recognized boundaries; that it was at the time of the grant, and previously, known under the name of La Jota; that it was occupied immediately after the grant by the claimants, and improvements were made upon it; and that it is now known under the name of La Jota and recognized as the land granted to him. Nothing appears in the evidence to show that the name La Jota was ever applied to the sierra or mountain range in which the tract was situated, or that that name was ever supposed to include any other land than the well defined tract of about a league square, now claimed by the appellant.

Such being the facts of the case, we have next to inquire whether the place called La Jota was granted to the claimant. The commissioners seem to have thought that the name of La Jota is mentioned in the grant as that of the rancho near which the granted land was situated, and not as that of the granted land itself. But independently of the fact that the rancho was not called by the name of La Jota, but was well known as "Caymas," a close examination of the grant will show that the name "La Jota" is applied, not to the neighboring rancho of the appellant, but to the sierra or serrania adjoining it. The original grant recites, that whereas George Yount, etc., has applied for an "estencion" of one square league in the sierra adjoining his rancho named "La Jota." In English the name thus used might well be taken for that of the rancho, but on referring to the original Spanish, it is apparent that the expression "nombrada" La Jota, in the feminine, cannot refer to the masculine antecedent "rancho," but must relate to the feminine "sierra." The land granted is afterwards described as one square league in the said range of hills—"Serrania." The original petition on which the grant is founded, sets forth that there being vacant "una serrania" adjoining the rancho of the petitioner "conocida con el nombre de Jota," he solicits one square league of said sierra, etc., etc. From the petition, therefore, as well as from the grant, it appears that the land granted is not a particular place known as "La Jota," but one square league in the "sierra," or the "serrania," called "La Jota."

It is argued by the counsel for the claimants, that the phrase in the recital of the grant "nombrada La Jota" applies to the "estencion" solicited. But whatever ambiguity there might have been in the recital of the grant, it is removed by the words of

the granting clause, which describes the land granted as one "square league in the said range of hills" or mountain ridge, as the word "serrania" might with equal propriety be rendered. The petition, too, as has been stated, after reciting that there is vacant a "serrania," called La Jota, adjoining the rancho of the petitioner, solicits, not the place known by that name, but a square league of said "sierra," or mountain range. It is clear, then, that the grant cannot be construed as conveying a place called La Jota, but as granting a league square in a mountain ridge of that name. The true facts of the case are, we think, apparent. The petitioner undoubtedly intended to ask for, and probably the governor intended to grant, a particular piece of land in the mountain near his rancho. That piece of land was, as appears by the testimony, well known and had determinate boundaries; that it was what the petitioner asked for, is evident from the facts that its extent is exactly one square league, the quantity solicited; that he immediately took possession of it and made expensive improvements upon it; that it contained pine trees to furnish timber for the saw-mill he proposed to erect; and that it then bore and has ever since retained the name of "La Jota." Unfortunately, however, he does not, as we have seen, solicit the place called La Jota, but a square league in the sierra of that name, and the governor grants him, not La Jota, but a square league in said range of hills "en dicha serrania." Is, then, this grant so vague that the claim of the petitioner must be rejected?

In the case of *Fremont v. U. S.* [17 How. (58 U. S.) 542], it was determined that the claimant had a vested right to the quantity of land named in the grant to be located within the exterior limits mentioned. Those limits embrace a region of country containing more than one hundred square leagues. In the case before us, the claimant's right is to one square league in the mountain ridge named La Jota, adjoining his rancho. The limits within which the grant is to be located are distinctly indicated in his petition by boundaries, for it is stated to be bounded on the south by the rancho of Dr. Bale and Napa, on the east by that of Las Animas, and on the west by Las Mallaimas. We have, then, the exterior limits or boundaries of the league granted, as well as the name of the mountain ridge on which it was situated, with the further specification that it (the mountain ridge) is adjoining (inmediata) his rancho of Caymas. That this description conveyed to those acquainted with the country an accurate notion of the place solicited, appears from the report of Vallejo, to whom the governor referred for information. That report speaks of "the piece of land (el terreno) solicited" as situated north of Sonoma, and as not belonging to any individual, etc. We think the description in the grant, and the other facts in this case, bring it fully

within the principles of the case of *Fremont v. U. S.* [17 How. (58 U. S.) 542]. No other objection than that already discussed has been brought to our notice. It appears by the testimony of José de la Rosa, that the claimant has occupied the land by "building a house, a grist and saw-mill, living on the land, carrying on the lumber business, farming and stock raising." Transcript, p. 10. The claim must therefore be confirmed.

YOUQT (UNITED STATES v.). See Case No. 16,784.

Case No. 18,189.

YOUQUA v. NIXON et al.

[Pet. C. C. 221.]¹

Circuit Court, D. Pennsylvania. April Term, 1816.

CONTRACT TO DELIVER GOODS—BREACH—INABILITY TO PROCURE ARTICLE—DAMAGES.

1. Where the defendant contracted to deliver teas of the first quality, he is not excused from a performance of his undertaking, by proving that no such teas could be obtained at the market. He is answerable to the plaintiff in damages, for the non-performance of such an agreement.

2. The defendant contracted to deliver a certain number of boxes of teas, of first chop, at stipulated prices;—a subsequent agreement to diminish the quantity and the price, does not excuse him for a violation of the contract as to quality.

[Cited in *Cheongwo v. Jones*, Case No. 2,638.]

3. How damages, for the delivery of teas of a quality inferior to those contracted for, are to be ascertained.

[Cited in *Barrow v. Reab*, 9 How. (50 U. S.) 371.]

This was an action on a Canton note, given by the defendants [Nixon and Walker] to the plaintiff. By the agreement of the plaintiff's counsel, the defendants were permitted to give in evidence, the breach of a contract entered into by the plaintiff, at the time this note was given; to deliver to the supercargoes of the defendants' ship, a certain number of chests of Young Hyson tea, of the first chop, at thirty-seven taels per picchol. It appeared, by the evidence of the supercargoes, that after the contract was made, and after the teas from the country had come in, the plaintiff told the supercargoes, that the teas of the denomination specified in the contract, which were then at market, were generally so indifferent, that he should not be able to procure the quantity agreed for; and proposed that they should take other teas, in lieu of the Young Hyson. This they refused, insisting upon the contract. They afterwards agreed, verbally, to reduce the quantity, and the plaintiff promised to select from the large quantity at market, such teas, as he would not be ashamed to put his chop upon. The teas which were delivered, were of three different qualities, for which the plaintiff charged forty, thirty-

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

eight, and thirty-six tales the pichol; for the second quality, the plaintiff at first insisted on charging forty tale, but the supercargoes refused to allow it, and thirty-eight tale was at length agreed upon. The supercargoes knew, that the parcels delivered were of different qualities, but they declared, that they considered themselves in the plaintiff's power, and that they had no alternative, but to receive the teas, at the prices charged; in as much, as by the laws of the place, having secured with the plaintiff, they could not have obtained a clearance, but through his means. But they stated, that they made no express engagement to waive the original contract, nor did they intend so to do. The supercargoes stated, that although the quality of the Young Hyson tea, was generally indifferent, that season, yet the contract might have been complied with, by the plaintiff; but they considered, that his standing in the Hong, was not such as to enable him to do so. The teas were proved to have been of a very indifferent quality, when brought to Philadelphia. The best of them, were worth about sixty cents per pound; whilst teas of the first quality, sold from ninety to one hundred cents; the others would not sell at all, during the year they were imported; but after the embargo was laid, they were sold for seventy-five cents per pound.

The claim for damages for a breach of the contract, was resisted, upon the grounds, that the subsequent agreement, to diminish the quantity of tea mentioned in the contract, as well as the alteration in the price, amounted to a waiver of the original contract; and that the quality of tea mentioned in the contract, should be considered, as referable to the general state of the market.

Mr. Binney, for plaintiff.

Mr. Rawle, for defendants.

WASHINGTON, Circuit Justice (charging jury). The written contract was, to deliver four hundred and fifty chests of Young Hyson tea, of the first chop, at thirty-seven tales the pichol. If that quantity and quality could not be procured at the Canton market, the plaintiff undertook more than he was able to perform; but this does not excuse him from a claim of damages, for his breach of contract. He should have taken care, before he made the contract, to ascertain his ability to perform it; and in case the state of the market would not enable him to do so, he might have qualified the expressions of the contract. The first question is, was the original written contract put an end to, by the subsequent change as to the quantity and price? It is admitted, that it was not waived by any express agreement. The contract consisted of three particulars, quantity, quality and price. Now it does not follow, that a subsequent agreement to vary the price, or quantity, or both, does, necessarily, dispense with the obligation in respect to quality. Under circumstances, it may do so,

but it is at most an implication; and the evidence should be such as to show, that the parties intended to dispense with the same. In this case, it is proved by the supercargoes, that they did not intend to do away with the contract. But if this was the effect of the subsequent agreement, still the plaintiff was bound by his promise, to furnish teas, on which he would not be ashamed to put his chop; and if the jury are of opinion these words do not import teas of the first quality, conformable with the terms of the contract, they cannot mean teas of an inferior quality, and such as it is proved were brought to the Philadelphia market. Upon this point, however, the jury must judge. Upon the whole, if they are of opinion, under all the circumstances, that the original contract was intended to have been given up; still, if the supercargoes were in the power of the plaintiff, and found it necessary to yield to imposition, in order to obtain a cargo at all, and a clearance from Canton; the defendants ought not to be bound, to receive teas of an inferior quality to what was stipulated to be delivered. If the jury should be of opinion, that the teas furnished, were not agreeable to the contract, and were inferior to other teas of the agreed quality; the difference will furnish the rate of damages, to be applied to the first cost. They will calculate interest, on the balance due on the notes to this day; and then deduct from it, the sum to which, by the above rule, the defendants are entitled, for the plaintiff's breach of contract.

Verdict for 1647 dolls. 55 cts.

See *Gilpins v. Consequa* [Case No. 5,452]; *Willings v. Consequa* [Id. 17,766].

[A new trial was subsequently granted. Case No. 13,190.]

Case No. 18,190.

YOUQUA v. NIXON et al.

[Pet. C. C. 224.]¹

Circuit Court, D. Pennsylvania. April Term, 1816.

BREACH OF CONTRACT—DAMAGES—RIGHT TO INTEREST.

1. Damages for a breach of contract do not bear interest.

2. It is not legal in the jury to allow damages, so that they will defeat the right of the party to interest on a debt ascertained; and damages are to be credited by the jury, on the day of their verdict, and are not so to be considered by them, as that, by depriving a party of interest on a debt due, they are made to bear interest, in favour of the person to whom they may be allowed.

[Cited in brief in *Harrison v. Missouri Pac. Ry. Co.*, 74 Mo. 366.]

Rule to show cause why a new trial should not be granted.

It was made manifest to the court, that the jury had allowed to the defendants [Nixon

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

and Walker] damages, at the rate of thirty per cent., applied to the prime cost; and had credited these damages against the notes of the defendants, as of the time when the teas were delivered. [See Case No. 18,189.]

WASHINGTON, Circuit Justice. Whether the rate of damage allowed by the jury, is too high or not, is a question the court will not pretend to decide, that having been left to them upon evidence, by no means clear; but it is plain, that the jury have departed from the rule laid down by the court, in regard to interest, they having credited the defendants with the amount of damages, as of the day when the teas were delivered, instead of the day when the verdict was rendered; as they were directed by the charge. In this way, they have not only allowed interest on the damages, but have made the rate of interest twelve per cent.; interest at that rate, having been stopped upon so much of the note given by the defendants, as this credit amounted to.

A new trial must therefore be awarded.

Case No. 18,191.

YTURBIDE v. UNITED STATES.

[Hoff. Land Cas. 273.]¹

District Court, N. D. California. Dec. Term, 1857.²

MEXICAN LAND CLAIM—APPEAL FROM COMMISSIONERS.

The claimants omitted to file with the clerk a notice of their intention to prosecute the appeal from the decision of the board of land commissioners, within the six months prescribed by the act of 1852 [10 Stat. 99]. *Held*, that the court was without jurisdiction over the cause.

[Claim by the executor and heirs of Agustin de Yturbide for 400 square leagues in Upper California.]

Crockett & Page and Sloan & Hartman, for claimants.

P. Della Torre, U. S. Atty.

HOFFMAN, District Judge. The claim in this case having been rejected by the board, the transcript was duly filed in the clerk's office in this court on the second of June, 1855. No notice of appeal was filed by the claimants within six months thereafter as required by law, but on the 30th of April, 1856, a motion was made by the claimants' counsel for leave to file such notice *nunc pro tunc*, and to prosecute the appeal. No order or decree dismissing the appeal had been obtained by the district attorney, and the circumstances attending the omission to file the notice were such as to have induced the court at once to grant the application, if it had possessed any discretion on the subject. Much

doubt was however entertained by the court whether it could on any showing disregard what seemed the positive requirements of the statute. The motion was therefore, with the acquiescence of the district attorney, granted, in order that if the court had any discretion on the subject it might appear to have been exercised in favor of the application, and in order that testimony on the merits might be taken and the whole case submitted to the supreme court in such a form as to enable them finally to dispose of it when for the first time brought before them. It was however expressly mentioned, that the point as to the jurisdiction of the court to grant the motion was reserved until the final hearing, and that if the court should then be of opinion that it had no power to allow a notice of appeal to be filed after the expiration of six months from the filing of the transcript, the claim would be rejected for want of jurisdiction. This question must therefore be now disposed of.

By the twelfth section of the act of 1851 [9 Stat. 631], it was provided, that to entitle "either party to a review of the decision of the board of commissioners, notice of the intention to file a petition in the district court shall be entered on the journal of the board within sixty days after the decision of the claim has been notified to the parties, and the petition shall be filed in the district court within six months after the decision has been rendered." The mode above prescribed for removing the cause was altered by the act of 1852. In that law it is provided "that the commissioners shall cause a transcript of their proceedings and decision to be filed with the clerk of the district court, and that the filing of such transcript shall ipso facto operate as an appeal for the party against whom the decision shall have been rendered; that if such decision shall be against the private claimant it shall be his duty to file a notice within six months thereafter of his intention to prosecute the appeal, and if the decision shall be against the United States, it shall be the duty of the attorney general, within six months after receiving a copy of the transcript, (directed by the act to be sent to him by the board) to cause a notice to be filed with the clerk aforesaid that the appeal will be prosecuted by the United States. And on the failure of either party to file such notice with the clerk, the appeal shall be regarded as dismissed." The acts of 1824, 1828, and 1830 [4 Stat. 52, 284, 405], relating to lands in Missouri, Arkansas, and Florida, provided that all claims within their purview should be brought before the courts authorized to adjudicate upon them, within a specified period. Under these acts, it has always been held that the courts had no jurisdiction over petitions not presented within the time limited. In *U. S. v. Marvin*, 3 How. [44 U. S.] 623, it is said by the court: "The policy of congress was to settle the claims in as short a time as practicable, so as to enable the gov-

¹ [Reported by Numa Hubert, Esq., and here reprinted by permission.]

² [Affirmed in 22 How. (63 U. S.) 290.]

ernment to sell the public lands, which could not be done with propriety until the private claims were ascertained. As these were many in number, and for large quantities, no choice was left to the government but their speedy settlement and severance from the public domain. Such has been its anxious policy throughout, as appears from almost every law passed on the subject." Similar observations are repeated in *Villabolas v. U. S.*, 6 How. [47 U. S.] 91. In furtherance of this policy it was provided by the act of 1851, that all lands, the claims to which shall not be presented to the board within two years from the date of the act, shall be deemed part of the public domain, and after the decision, though an appeal was allowed, the party to be entitled to it was required to file a notice of his intention to prosecute within sixty days after the decision has been notified to him, and to file his petition in the district court within six months from the date of the decision. These provisions were clearly limitations. Nor will it be contended that under them either party could file a petition or otherwise prosecute his appeal after the expiration of the six months prescribed by law.

The alteration in the mode of taking the appeal made by the law of 1852 above referred to, had for its principal object to relieve the claimants of the burden and expense of procuring copies of the transcripts to be made, and to allow to the attorney general a longer time to determine whether an appeal should be prosecuted than the sixty days within which the notice was required to be entered on the journals of the board. It was accordingly provided that the board should cause the transcripts to be made out and filed in the district court, and that such filing should ipso facto operate as an appeal. As, however, congress did not mean to enact that every case should be appealed, whether the party against whom the decision had been made desired it or not, and as the provisional appeal could not continue forever, the same period for filing the notice of an intention to prosecute it, or to profit by the appeal which had thus by operation of law been taken, was prescribed, as had previously been assigned for filing the petition in the district court. It was therefore not only made the duty of the attorney general or the claimant to file such notice within the time limited, but it was provided that on the failure of either party to file such a notice, the appeal "should be regarded as dismissed."

We think that by these provisions congress intended to prescribe a rule of action to the court, which it is not at liberty to evade or to disregard. That some limitation on the rights of appeal to a definite period is necessary in all cases, is obvious. That it is peculiarly necessary in this class of cases, and that it has been restricted within limits much narrower than those al-

lowed in ordinary suits by all the acts of congress previously passed, is equally evident. When, therefore, we find the act of 1851 allowing a time for appeal still shorter than that prescribed in previous acts, it is difficult to believe that congress, by the amended act of 1852, intended to depart from a policy so well settled, and so necessary, and to permit the court to allow the appeal to be prosecuted whenever in its judgment the party desirous of appealing might sufficiently excuse his omission. If it be said that hard cases may arise, and that such a power might with safety and propriety be committed to the courts, it may be answered—(1) that hard cases must always occur under any general rule of law, however beneficent or necessary it may be; and (2) that courts have never felt themselves at liberty to dispense with express provisions of law, whether in statutes of limitations or in those regulating appeals or in others, upon any equitable ground. To this effect is the language of the supreme court in *Saltmarsh v. Tuthill*, 12 How. [33 U. S.] 389, and in *Bank of Alabama v. Dalton*, 9 How. [50 U. S.] 522, the court decided that it could not engraft on a statute of limitations an exception not found therein, however reasonable and just it might be.

It is argued that the case at bar is to be distinguished from those under the statutes of 1824, 1828 and 1830, inasmuch as the latter limited the time within which the petition was to be filed, which was the commencement of the suit; whereas, by the act of 1852 the filing of the transcript ipso facto constitutes an appeal. The court therefore has jurisdiction of the suit, and the notice is not necessary to confer it. Hence, it is argued, the filing of the notice is not indispensable to the retention of the cause in court after it has been properly brought there. It is true that the filing of the transcript operates as an appeal, and the cause is properly in court. But the appeal so taken and the jurisdiction so acquired, are obviously but temporary and provisional. The very law which declares that the filing of the transcript shall operate as an appeal, prescribes the period and the conditions of its continuance in court, and though the appeal is pending and the court has jurisdiction for six months, yet if during that time no notice be filed, the same law requires that the appeal shall be deemed to be no longer pending, or that it shall be regarded as dismissed. The law which gave vitality to the appeal during the period limited, peremptorily deprives it of life unless certain conditions necessary to continue its existence be fulfilled. Such we consider would be the construction of statutory provisions like these, even if they related to ordinary suits before a court of general and superior jurisdiction. But they should a fortiori be so construed in this case, where the court has but a special and limited jurisdiction de-

rived from the statute alone, and to be exercised, like the jurisdiction of an inferior court, only in the manner and to the extent prescribed by the statute.

The claimants' counsel have adduced in support of their construction of the statute, an illustration from the practice of the court of chancery of New York. It was by the rules of that court provided, that if the plaintiff did not reply within a certain time, "he should be precluded from replying." The court, however, under special circumstances, grants leave to file a replication. But this rule is obviously a mere rule of practice framed by the court for its own government. Such rules, even when prescribed by a superior tribunal, the court has the power to modify to meet the exigencies of special cases—a power which it does not possess over the positive requirements of a statute. [Poultney v. City of La Fayette] 12 Pet. [37 U. S.] 472; [Saltmarsh v. Tut-hill] 12 How. [53 U. S.] 389; [Bank of Alabama v. Dalton] 9 How. [50 U. S.] 522. Moreover the practice under this rule shows that it was merely intended to preclude the right of replying as of course, but that it was not intended to take away the right in all cases. The court which made the rule expounds its intention and meaning, and establishes the practice under it.

But if the views heretofore expressed be correct, the provision in the act of 1852 is not to be limited to a rule of practice established by the court, but is a statute of limitations enacted by the legislature. It prescribes a period within which the party is to adopt the appeal which the government has provisionally taken for him, and which is allowed to be pending and awaiting his action for a specified time. His failure to adopt this appeal by filing the required notice, puts him in the same position as if he had been himself required to take it within the same period, and had omitted to do so.

We are very sensible of the hardship of this and similar cases. We regret that we have no power to relieve them. Under the construction we have felt compelled to give to the statute, we have no alternative but to dismiss the claim.

[The decree dismissing the appeal was affirmed by the supreme court. 22 How. (63 U. S.) 290.]

Case No. 18,192.

The YUBA.

[4 Blatchf. 314.]¹

Circuit Court, S. D. New York. May 5, 1859.
RIGHT OF APPEAL—PROVISIONAL DECREE—REFER-
ENCE TO COMMISSIONER.

Where, on a libel in rem, in the district court, against a vessel, on a bottomry bond for \$9,240, that court made a provisional decree in favor of the libellant, for \$4,000, with interest and

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

costs, with liberty to either party, within 20 days, to take an order of reference to a commissioner to ascertain and report the amount of the sums composing the bottomry debt, and what portions thereof had been previously a lien upon the vessel, and, on the coming in of the report, either party to be at liberty to move the court to frame the decree in correspondence therewith, and the libellant appealed to this court from that decree, but no other steps were taken by either party in the court below, subsequently to the entry of the decree, *held*, that the decree was not a final decree from which an appeal would lie to this court.

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

This was a libel in rem, filed in the district court against the barque Yuba, to recover the amount due on a bottomry bond for \$9,240, given by her master at New Orleans, for money required to repair her, she having put into that port in distress. The district court made a provisional decree in favor of the libellants, for \$4,000, with interest and costs, with liberty to either party, within twenty days, to take an order of reference to a commissioner, to ascertain and report the amount of the sums composing the bottomry debt, and what portions thereof had been previously a lien upon the vessel, and, on the coming in of the report, either party to be at liberty to move the court to frame the decree in correspondence therewith. [Case No. 11,920.] The libellant appealed to this court from that decree, but no other steps were taken by either party in the court below, subsequently to the entry of the decree.

Francis R. Coudert, for libellant.

Welcome R. Beebe and Charles Donohue, for claimant.

NELSON, Circuit Justice. It is manifest, from the form of the decree in this case, that it was not intended to be final. A gross sum is stated provisionally, subject to be modified by the court on the coming in of the report of the commissioner as to the portions of the bottomry debt that were liens on the vessel. Obviously, till this fact was ascertained the true amount for which the ship was liable under the bond could not be determined. The \$4,000 fixed seems to have been a formal sum, with a view to the reference and the ascertaining of specific data from which the proper amount might be inserted in the final decree. But, even if this is not the fair construction of the legal effect of the decree, and the reference was left to the election of either party, the record should have shown the neglect or refusal of the claimant to take action in regard to a reference, and the entry of a final decree.

There being no final decree in the case in the court below, the court has no jurisdiction to revise the action of that court, and the appeal must, therefore, be dismissed.

[NOTE. Subsequently the district court dismissed the libel. Case unreported. The libellant again appealed to this court, where the decree of the district court was reversed. Case No. 18,193.]

Case No. 18,193.

The YUBA.

[4 Blatchf. 352; 1 16 Leg. Int. 317; 41 Hunt, Mer. Mag. 709.]

Circuit Court, S. D. New York. Sept. 17, 1859.

BOTTOMRY BOND—REPAIRS OF VESSEL—COMMISSIONS AND PREMIUM.

1. Where a vessel entered a port of distress, and necessary repairs were made upon her on her credit, and afterwards, it being impossible to procure funds in any other way, a loan was made on bottomry to pay for the repairs, and the money was applied to paying for them: *Head*, that it was no objection to a recovery on the bottomry bond, that the repairs were made before the loan was effected.

[Cited in *The Kathleen*, Case No. 7,624; *The Edward Albro*, Id. 4,290.]

2. It having been necessary to discharge the cargo, to enable the extent of the damage to the vessel to be ascertained and the repairs to be made, the bill of a stevedore was a proper charge, as incidental to the repairs.

3. So, also, a charge for commissions in procuring the loan was proper, as incidental to the loan, it being impossible to raise the loan only through an agent.

4. Charges for repairs and other expenses allowed, as being customary at the bottomry port, although high, and a premium of twenty per cent. on the bottomry bond also allowed.

5. Some of the charges might be reduced, as between the claimants and the persons rendering the services, but the lender upon bottomry in good faith, and under circumstances which justified the loan, cannot be held responsible for the reasonableness of the charges in the repair of the vessel.

[Cited in *The Archer*, 15 Fed. 279.]

This was a libel in rem, filed in the district court against the bark Yuba, to recover the amount of a bottomry bond on the vessel, executed at New Orleans. [The vessel was in New Orleans in distress, and was repaired under the directions of her master, and the money advanced by the firm of Ad. Odier, Stouse & Leisy, who took this bond for the amount with maritime interest of 20 per cent. and afterwards transferred it to the libellant. The money advanced was used for paying various bills for discharging the vessel previous to the repairs, for the bills of repairs, and commissions for procuring the advance, etc., and after the bills were paid there remained a balance of \$192.44, which was handed to the master of the vessel. Judge Betts, in the district court, decided that the circumstances of the case were calculated to throw suspicion upon the good faith of the loan, and gave a decree for the libellant for only \$4,000, with leave to make a reference and show whether claims which were liens on the vessel were paid by this loan to a greater amount. (Case No. 11,920.)² The district court subsequently dismissed the libel, [case unreported,] and the libellant appealed to this court.

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

² [From 41 Hunt, Mer. Mag. 709.]

Francis R. Coudert, for libellant.
Charles Donohue, Dexter A. Hawkins, and Joseph Lovell, for claimants.

NELSON, Circuit Justice. I am satisfied, that the repairs of the vessel at New Orleans, into which port she entered in distress, were necessary; and that the money was lent on the bottomry bond in good faith, for the purpose of paying for those repairs, and was applied to paying for them.

The objection, that the repairs were made before the loan was effected, and, hence, that the loan was not necessary in order to procure the repairs and enable the vessel to proceed on her voyage, is not tenable. The repairs were made upon the credit of the vessel, and the loan was indispensable to relieve her from the charges.

The discharge of the cargo became necessary, to enable the surveyors to ascertain the extent of the damage, and the ship master to make the repairs. That service was incidental to the repairs, and without it they could not be made, and, hence, the stevedore's bill was a proper charge. So, in respect to the commissions for the procurement of the loan. They were incidental to the loan itself, as it could be raised, in the given case, only through an agency. This principle is applicable, also, to several other items objected to.

The charges for the repairs and other expenses connected therewith are high, and may be unreasonable; but, the weight of the proof shows that they are the customary charges and expenses in the port of New Orleans. The premium of twenty per cent. on the bottomry bond is objected to as exorbitant and out of all proportion to the risk, but I cannot so hold, upon the proofs in the case.

If the question was between the claimants and the persons rendering the services to the vessel, I might be disposed to cut down some of the charges, notwithstanding the evidence in support of them. But I think that the lender upon bottomry in good faith, and under circumstances which justified the loan, cannot be justly held responsible for the reasonableness of the charges in the repair of the vessel. He would be required, if held to this responsibility, to take upon himself the burden of contracting for or superintending all repairs.

Reasonable exertions were made by the consignee of the vessel to procure the funds from her owners and agents in New York, but they declined making the advances, or rather admitted their inability to make them, and the parties at the port of distress were left to raise the money as they best could.

Upon this view of the case, I must reverse the decree below, and decree, in favor of the libellant, the amount of the bottomry bond, except the \$192.44 paid to the captain.

Case No. 18,194.

The YUCATAN.

[4 Adm. Rec. 31.]

District Court, S. D. Florida. May 26, 1847.

SALVAGE — AUTHORITY AND DUTY OF MASTER OF WRECK—INTRUDING SALVORS—AMOUNT OF COMPENSATION.

[1. The master of a ship wrecked upon the coast continues to be the master, with all a master's rights, authority, and responsibility, as long as anything remains of ship or cargo to be saved by him. And he cannot divest himself of that character, or so delegate his authority to a salvor as that he may not at any time resume it. He has the custody and charge of the property, and may make such arrangements as he sees fit for saving it, and no stranger can interfere without his consent.]

[2. One who weighs up and carries off, against the express commands of the master, cargo accidentally fallen overboard in the salvage operations, and which the authorized salvors intend to save at their earliest convenience, can recover no salvage therein. Nor can he have salvage in cargo which he takes from the wreck during the temporary absence of the master and authorized salvors.]

[3. Forty-three per cent. allowed, upon a gross valuation of \$41,924.25, for saving cargo, mainly by diving, from a vessel totally wrecked on Florida Reef; 9 vessels and 95 men being employed for about 17 days. Also 60 per cent. allowed to small boats upon remnants of cargo saved by diving after the wreck was abandoned by the principal salvors.]

[4. A vessel, employed for a stipulated sum, by the principal salvors, with the acquiescence of the master of the wrecked ship, cannot, under any circumstances, recover salvage in addition to the sum agreed.]

Adam Gordon, for libelants.

Wm. R. Hockley, for respondent.

MARVIN, District Judge. This suit is instituted by the libelant [John P.] Smith and about 150 others, some of whom are joined with him in the main libel, and the rest appear as petitioners under the libel. They all claim salvage for services rendered to the cargo and materials of the ship Yucatan (Casey, master), wrecked upon Carrysfort Reef. Upon the trial of the cause considerable testimony was taken upon the subject of the comparative merits and demerits of the different sets of salvors in saving the cargo and materials, and also in relation to their respective shares in the salvage to be decreed. I shall not attempt to state or comment upon the mass of the testimony given upon the different branches of the case, or to reconcile any of its inconsistencies; nor shall I often give the reasons why certain portions of testimony should be believed and other portions rejected. I shall only state the main facts in the case as I believe them to be established by the testimony, and then apply the law to these facts.

The principal facts in the main cause, as alleged in the libel, admitted in the answer and proved by the testimony, are these: The ship Yucatan (Casey, master), laden with a cargo of cotton, pork, flour, and meal, while on a voyage from New Orleans to Liverpool,

on the night of the 20th of April last, in tempestuous weather, struck upon that part of the Florida Reef known as Carrysfort Reef, and before morning filled with water. In the morning Captain Smith, of the sloop Gazelle, a regular wrecker on the coast, arrived at the wreck, and soon after the British schooner Triton, a transient vessel bound to this port, and the regular wrecking sloop Globe. In the afternoon of the same day the wrecking sloops George Eldridge and Convoy arrived. When Smith boarded the ship, she was filled with water, and was straining and working badly, so as to endanger her breaking in pieces. To relieve the wreck he advised Captain Casey to cut away the masts, which was accordingly done. The crews of the Gazelle, Globe, and Triton then attempted to save some portion of the cargo by boating it on board the Triton; but after transferring to the Triton eight bales of cotton, sailors' chests, and a few other articles, the weather became so tempestuous as to render it prudent for all persons to abandon the wreck and seek a harbor on board the wrecking vessels. This was accordingly done. The gale continued during the night of the 21st and a considerable portion of the 22d. On the 22d the salvors returned to the wreck, and succeeded in saving a small quantity of corn and a few bales of cotton. They were, however, soon obliged, by the continued bad weather, to seek shelter and safety in the harbor at Key Roderiguez. On the morning of the 23d, they again returned to the wreck, and partly loaded the schooner Triton. At this time, the wrecking sloops Plume, America, Vineyard, and Empire having arrived at the wreck, were consorted with the Gazelle, Globe, George Eldridge, and Convoy, making a force of eight vessels, of an aggregate tonnage of 445 tons and 79 men. These men now went to work to discharge the cargo and put it on board their vessels. During the 23d but little was accomplished, as the sea continued so rough throughout the day that no vessel could lie alongside of the wreck. On the 24th the wind had abated, and the sea had become smooth. The weather now remained good, and the sea smooth, throughout the whole period of the labors of the salvors, except a slight squall one afternoon. They continued their labors in discharging the ship, and placing the cargo on board their vessels, and bringing it to this port, until the 9th of May, when the principal salvors abandoned the wreck to another set of salvors, who saved the residue of the cargo. On the 26th of April the sloop Texas and her crew were united with the other salvors, thus increasing the force by another vessel and 16 men. The labor of breaking out the cargo and of transferring it on board the wrecking vessels was very considerable. The wreck heeled over very much, bringing the deck of the lower side several feet under water. The hold on the lower side was entirely full of water, and nearly so in the cen-

ter. It was a work of great labor and difficulty to break out the cargo. It had been stowed very compactly. The corn in bags swelled, thus pressing the cargo more firmly together. To facilitate the discharge, the beams of the ship were cut asunder, to allow the vessel to open and spread, and thus loosen the cargo. The decks were cut away, and finally, on the 28th of April, the salvors set fire to the wreck, and burned off the deck and sides, down to the water's edge, to enable them to get at the cargo. For several days previous to burning the deck, the noxious gases and impure exhalations arising from the wet corn, in a state of fermentation and decomposition, sickened and blinded the men employed in the hold. Nearly or quite one-half of the cargo was saved by diving. In short, the entire service seems to have been one of some labor and fatigue, particularly to the divers, but unattended by any danger, except to the health of the divers exposed to the impure air in the hold. The general management and direction of the business of saving the cargo was committed to Captain Smith, as the first boarder and principal wrecker, by Captain Casey, who, however, remained by the wreck, advising, assisting, and controlling, as he thought proper. The mate, too, remained at the wreck, and kept an account of the cargo put on board the several wrecking vessels.

These are the principal facts connected with the saving of this cargo. On the trial of the main cause I was disposed to think that more time had been consumed in saving the property than was necessary, and that the active and prompt energies of the salvors had not been so much exerted, as are usual in like cases on this, in consequence of dissatisfactions existing among the salvors themselves as to the terms of their agreement to divide the salvage to be earned, and in consequence of delays arising in making these agreements. In a collateral proceeding, too, it is alleged by Stickney that Smith did not labor in good faith; that he repeatedly refused to permit other men and vessels than those already employed to save cargo; and it is suggested that, if he had allowed all persons arriving at different times at the wreck to save what they could, that the cargo would have been saved in much less time and in better condition. A fuller consideration of the whole case, a comparison of dates, and careful reflection upon the testimony have satisfied my mind that these charges and imputations upon Smith are entirely without foundation in truth. I think that he had at all times vessels and men enough employed to save the cargo, in nearly or quite as short a time as was practicable, and stood ready at any time or moment to employ more, if Captain Casey thought it necessary. Smith was the active man under Casey, and employed for him all the men and vessels Casey desired. The only part of Smith's conduct which appears to me is at all liable to censure is his hesitation and

omission to employ and set to work all the divers he could procure, without waiting to bargain or agree with them as to the amount of their compensation. But even on this point it is difficult to determine from the testimony whether these divers would have gone to work without making terms on their part, or whether they were very much needed before they were actually employed, or whether his associates would have been satisfied if they had been employed without an understanding as to the amount of their compensation.

But, before proceeding to consider and decide the question of the amount of salvage to be allowed in this case, it will be well to examine and dispose of the petition of Captain Stickney. By so doing we shall have a more complete and full view of the whole case. It appears from his petition and the testimony that he arrived at the wreck on the 26th of April, in the Governor Bennet, with a crew of 12 men, and found Captain Smith in charge of the business of discharging the cargo. He applied to Smith for leave to go to work, and was refused. He alleges that the master of the ship had resigned the authority and control to Smith. This allegation is not proved, but, on the contrary, is disproved. He alleges that Smith did not labor in good faith; that he loaded but one vessel at a time, when several might have been loaded; that the cargo might have been saved in half the time; that Smith's forces did not work nights, when they might have done so; that Smith would not permit his (Stickney's) crew to work at night; and that much cargo, of great value, was totally lost by the refusal of Smith to permit him to labor, either by day or night. He alleges that the wreck was totally deserted on the 5th of May, and that he proceeded to take from it 26 bales of cotton, 8 barrels of pork, 7 barrels of lard, 7 barrels of corn meal, and a lot of rigging, all of which he has saved and brought to this port. He also dived up a bale of cotton that had fallen overboard and sunk, although forbidden to do so, which he also brought to this port, and he prays salvage upon these articles.

In regard to several of these allegations and charges against Smith, it may be remarked that they are matters of opinion merely, and are not capable of any direct proof or disproof. In regard to several others, they are disproved. It may be true that Captain Casey had resigned the authority or control in the business of saving the cargo to Captain Smith. Smith acted and labored under Captain Casey. Captain Casey permitted Smith to exercise a general management and control, to employ vessels and men when necessary, to refuse to employ others when unnecessary, and, generally, to act for him, so long as his acts and conduct were satisfactory to Captain Casey. It is true that Smith refused to allow Stickney's crew to go to work, but at that time there were sufficient vessels and men employed to save the cargo. Smith's forces did work,

in the early part of the transaction, several nights, and, at a later period, part of the nights. Whether any men could have worked safely or to any advantage in the night, at any time after Stickney arrived at the wreck, I think very doubtful. After that time all the cargo had to be broken out by diving under the water, and whether this is a safe or prudent operation to be performed in the hold of a vessel in the night is, I think, very doubtful. I do not think that any cargo was lost by Smith's refusal to permit Stickney's crew to work. Much testimony has been taken upon these allegations of Stickney, and a great deal of it has been vague and unsatisfactory, and much of it mere matters of opinion. To recapitulate or comment upon this testimony would be tedious and unprofitable. It is sufficient to say that the impression made upon my mind by all of the testimony on both sides is by no means unfavorable to the capacity, energy, good faith, and good conduct of Captain Smith, as displayed in saving this cargo; nor is the testimony unfavorable in any degree to the competency, efficiency, and good conduct of Captain Casey and Mr. Hezewood, his mate.

Captain Stickney, in his petition, prays salvage on the bale of cotton dived up and saved by him, and on the cotton, pork, lard, and meal taken by him from the wreck; and the question to be decided is, is he entitled to it? As to the bale of cotton saved by diving, it appears that it had fallen overboard accidentally, and some one of the salvors told Captain Stickney that he might have the salvage on it if he would weigh and save it. He accordingly did so, but before and at the time of weighing the bale Captain Casey positively forbade his taking it, and again, before he had carried it on board his vessel, Captain Casey forbade his doing it. He still persisted in claiming that he had a right to save it, and expressed his willingness to abide by the decision of the court on the point. The reason Captain Casey assigned for prohibiting Stickney's saving the bale is that he did not wish to have the bale separated from the rest of the cargo. As to the 26 bales, the pork, lard, etc., taken by Stickney from the wreck, he alleges that, at the time he commenced taking them, the wreck had been totally deserted, and insists, therefore, that he had a right to take them. But before he had got out more than a very few bales, the other salvors returned to the wreck, when they, with the mate of the ship, who had now been left in charge, forbade his proceeding any further in obtaining cargo. It is evident, from the character of these transactions, that Stickney believed that the sunken bale of cotton had been abandoned at the time he weighed it, and that therefore he had a right to do so, and also that he believed that the wreck had been abandoned. There is no doubt that, if the sunken bale or the wreck had been at any time aban-

doned or deserted, in the proper sense of these words, by Captain Casey and the first set of salvors, then Stickney, or any other first comer or finder, would have the right to take possession of the bale and the wreck, and save what they could. But the facts are not so. As to the sunken bale, it had accidentally fallen overboard, the salvors intending at their earliest opportunity to weigh and save it. They had not abandoned it. They were there with all the means necessary, and they intended to save it. Captain Casey had not abandoned it, and he forbade Stickney's interfering with it. Neither had the salvors nor Captain Casey abandoned or deserted the wreck at the time that he took from it the 26 bales of cotton, the pork, and meal. They were but temporarily absent, intending to return. They had given up no right to save the property. They did almost immediately return, and continue to work at the wreck for several days afterwards.

Now, there is nothing clearer than that the master of a ship wrecked upon the coast remains and continues the master, with all a master's rights, authority, and responsibility, as long as a plank of her remains or a particle of the cargo can be saved by him. He cannot divest himself of the character of master, or so delegate his authority but that he may at any time resume it; for it is an authority conferred upon him by law. He has the custody and charge of the property with a special and qualified interest in it, and he may make such arrangements as he sees fit for saving it. No stranger has ordinarily any right to interfere, without his consent, under the pretense of saving the property. It is possible for extreme cases to exist where even a stranger might have the right to interfere to save and protect the property from destruction for the benefit of the owner; as when the captain of a vessel should fraudulently undertake to destroy the vessel and cargo by setting fire to them, or should attempt to run away with them, fraudulently intending to convert them to his own use, or to engage the vessel in acts of piracy. But these are extreme cases, and not at all like the one before us. In the present case Captain Casey was employed with a sufficient force in saving this property, and Stickney had no right to interfere with it without his leave and license. But suppose Captain Casey had resigned, or delegated to Captain Smith the management and control of the business of saving the cargo of the Yucatan; or suppose that the wreck had been abandoned by her captain and crew, and found as derelict by Smith, or by him and his associates, Stickney would not, in such case, have any right to interfere with Smith's possession of the property, or his conduct in saving it without his consent, unless in some such extreme cases as I have noticed above as applicable to the master. Nothing is clearer than that a salvor or set of salvors in possession has a lien,—a quali-

fied property in the thing; and no other persons, without his or their consent, can lawfully intrude themselves upon that possession, or gain a title to be deemed co-salvors. *The Maria*, Edw. Adm. 175; *The Henry Ewbank* [Case No. 6,376]; *Hand v. The Elvira* [d. 6,015]. Even the master of a ship himself would not have a right to dispossess a salvor without his consent who had earned a clear right to salvage by rendering actual meritorious service. In short, in every point of view in which I am able to consider the matter, it appears to me that Stickney's interference, under the circumstances, was wrongful, and that his petition should consequently be dismissed.

To return, now, to the question of the amount of salvage to be decreed. Upon this subject little need be said. The main facts of the case have already been stated. The number of salvors is unusually large, and the services of all of them were needed in order to save the cargo as soon as possible from its perishing and perilous condition. Whatever amount shall be decreed the share of each upon a division and distribution will, in consequence of their great number, be small. The salvors were employed in this service in all about 17 days. The amount of property saved by them is \$41,924.85. A large portion of this amount was saved by diving. All the circumstances considered, I think that 43 per cent. upon the amount saved by the larger wrecking vessels is a reasonable compensation. It will give to each no great reward, but it is as much as, under all the circumstances, I think I ought to allow. It is not common to allow, in any cases in this court, more than the one moiety of the net value of the property saved. In this case, by charging the residue with the payment of the costs and expenses, the wharfage and storage, etc., it will be found that the rate of salvage received will be equal nearly to the one-half of the net amount of the proceeds of sales. Upon the amount saved by the *Robert Henry* and the small boats a larger rate of salvage ought to be allowed. These vessels saved small amounts by diving after the wreck had been abandoned by the other salvors. As to them 60 per cent. of the amount saved ought to be allowed. Salvage, *eo nomine*, cannot be allowed for the services rendered by the schooner *Triton*, not because she was a foreign or a transient vessel, but because her services were hired by Captain Casey, or by Smith acting for him, for the sum of \$300. I know of no principle which can entitle her to any more than the sum agreed upon. If Captain Casey permitted or directed Smith, as being the principal wrecker, and having the chief management under him of the business of saving the cargo, to hire the services of this vessel, all the advantages arising from such hiring must and do inure to the owners of the cargo; and if Casey, or Smith, in charge under him, could have hired all the vessels employed at the same rate, it would

have been his duty to do so, and thereby save the expense of salvage to the cargo. The sum, however, agreed upon for the hire, should be paid, and also the further sum of \$200 should be paid to Smith and his associates as a compensation for loading the *Triton*. The property saved by Stickney and his crew is not to be included in the amount liable for salvage, for the reasons I have given. The petition of Casey and others remains to be considered; but as the subject-matter of this petition relates almost entirely to the distribution of the salvage and the conflicting claims of the different sets of salvors as among themselves, in which the owners of the cargo can have no interest, I forbear for the present expressing any opinion upon it.

Case No. 18,195.

YUENGLING v. JOHNSON.

[1 Hughes, 607; 1 3 Ban. & A. 99.]

Circuit Court, E. D. Virginia. Sept. 7, 1877.

SUIT FOR INFRINGEMENT OF PATENT—PRELIMINARY INJUNCTION—NEW COMBINATION—MECHANICAL EQUIVALENTS.

1. Since the passage of the judiciary act of June 22d, 1874, and the adoption of the Revised Statutes of the United States, the provision of the judiciary act of 1793 [1 Stat. 334], requiring reasonable previous notice of a motion for a preliminary injunction to be given, stands repealed.

[Cited in *Industrial & Min. Guaranty Co. v. Electrical Supply Co.*, 7 C. C. A. 476, 58 Fed. 737.]

2. At the time of granting an order to show cause against a motion for a preliminary injunction, a United States court or judge may, under section 718 of the Revised Statutes, and in patent cases, under section 4921, grant an immediate restraining order to be in force until the decision of the motion, for the purpose of preventing irreparable injury to complainant.

3. In respect to interlocutory injunctions, United States courts and judges have a larger discretion in patent cases than in other cases, conferred by section 4921.

4. In deciding upon applications for interlocutory injunctions in patent cases, the action of the commissioner of patents at Washington usually makes a *prima facie* case for or against granting them.

5. Where a patent is for a peculiar combination or arrangement of old devices, and not for a new device, the patentee is not entitled to insist upon mechanical equivalents.

On bill of injunction [by David G. Yuengling, Jr., against Fountain D. Johnson] to enjoin the infringement of a patent right. Motion for a rule to show cause against a preliminary injunction was made on August 8th, 1877, in the circuit court at Norfolk; and also a motion *ex parte*, without notice, for an immediate restraining order. Exhibits were filed with the bill, consisting of the affidavits of experts, and extracts from the records of the patent office. The extracts showed that a pat-

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

ent had been refused by a primary examiner to the Moffett register for tallying drinks in bar-rooms, as interfering with Fountain's patent for an improvement in fare-registers, 188,349; and the extracts also showed that on the 5th August, a board of examiners of the patent office had, on appeal, affirmed the decision of the primary examiner. The affidavits showed that in the opinion of the affiants as experts the Moffett register did infringe the Fountain register. The bill showed that the right of Fountain's patent for the state of Virginia had been purchased by and duly assigned to Yuengling, the complainant. On the bill and exhibits the court gave an order requiring the defendant to show cause against the motion for a preliminary injunction at Alexandria, on the 4th September proximo, and also an immediate restraining order meantime against the making, using, or vending of the Moffett register. On the power of the court to grant an immediate restraining order on ex parte motion without notice, the judge filed the following note in the record of the case, on the 3d September:

HUGHES, District Judge. On the 8th of August the complainant filed a bill of injunction in this court in term at Norfolk, and moved for a temporary injunction in accordance with the prayer of the bill, and for an immediate restraining order. He also filed sundry documents and affidavits, making out a prima facie case for an injunction. The object was to prevent one Fountain D. Johnson, manufacturer of a certain mechanical register called the Moffett register, from selling and delivering these instruments, it appearing that he was about to deliver a large number of them to the auditor of public accounts of Virginia, to be distributed by him to retail liquor dealers throughout the state for use. The evidence filed with the bill showed that skilled officers of the patent bureau of the United States had officially decided this Moffett register to be an infringement of a patent, the exclusive right to use which was owned by the complainant for the state of Virginia; and it was plain, if this should prove true, that the state was about to embark, in a futile manner, with an improper instrument, upon a new plan of taxation devised by her legislature, to the injury of the rights of the complainant, and that this was likely to be done in a few days.

It being apparent to the court that in case the pretensions of the claimant were true, the injury and confusion resulting would be irreparable, and that the complainant might have no recourse except to the liberality of the legislature of the state, an order was entered by which: 1st. The defendant in the bill was required to show cause at Alexandria, on the 4th instant, why the motion for a temporary injunction should not be granted. 2d. Restraining the defendant and all others meantime from making, using, or vending

the said Moffett register; and, 3d. Requiring the complainant to file a bond in the penalty of ten thousand dollars to answer any orders of this court against him in this cause.

The expediency of this order seemed obvious to the court; but it felt at first some doubt of its power to grant the temporary restraining order, except after reasonable previous notice served. Upon a critical examination of the condition of the law on the subject, however, this doubt was removed, as will appear from the following review of the legislation of congress,—and the order was given:

Section 5 of the judiciary act of congress of March 3, 1793 (chapter 22, Acts 1793, 1 Stat. 334, 335), concludes with the words: "Nor shall a writ of injunction be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same." The greater portion of the provisions of this act of 1793 were incorporated into the Revised Statutes of June 22d, 1874, c. 12; but the foregoing clause requiring reasonable previous notice to be given in all cases of injunction was left out, and therefore stands repealed by section 5596 of the Revised Statutes.² Instead of this provision the seventh section of the judiciary act of June 1st, 1872 (chapter 255, 17 Stat. 197), was inserted, which is in these words: "Whenever notice is given of a motion for an injunction out of a circuit or district court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion, and such order may be granted with or without security, in the discretion of the court or judge." This act had already been in force for two years before the enactment of the Revised Statutes, and had virtually not only repealed the clause quoted from the judiciary act of 1793, but also rendered subordinate to its own provisions that part of rule 55 in equity requiring previous reasonable notice to be given of motions for injunction. While the clause of the act of 1793 in question was in force there were many decisions of the supreme and circuit courts of the United States enforcing it, and these rulings of the courts have gone into the digests and text-books in use by the bar. But when the law itself fell, of course these rulings of the courts and teachings of the text-books ceased to be of authority in contravention of the later law. But even before the passage of the judiciary act of June 1st, 1872, an act of congress revising, digesting, and consolidating all the laws relating to patent rights was passed July 8th, 1870 (see 16 Stat. 206), and a section enacted in it authorizing the courts of the United

² The language of section 5596 is: "All acts of congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; etc., etc., etc."

States to deal with injunctions in patent cases in a special manner. This section placed injunctions in patent cases on a different footing from other injunctions. In this particular class of cases the courts were released from the requirement to adhere strictly to the rules of practice prescribed by law or rule of court in general for the federal courts sitting in equity, and the circuit courts were "vested with power upon bill in equity, filed by any party aggrieved, to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable." Thus was authority given to grant injunctions in patent cases, not upon such limited terms as were at the time required by law or rules in equity to be observed in other cases by the circuit courts of the United States sitting in equity, either as to notice, security, or other requirement; but authority was given to grant them in patent cases on such terms as accorded with the course and principles of courts of equity in general, and as the particular court in which the motion was made "might deem reasonable." This law made injunctions in patent cases exceptional, and conferred on United States circuit courts an unrestricted discretion as to the terms of granting injunctions in them. This provision of the law of 1870 has been carried into the Revised Statutes, with slight literal modifications, and stands now the law of the land in the form of section 4921. Thus, in patent cases, where the emergency was urgent, the court might grant injunctions without reasonable previous notice, before the law of 1872. The passage of the judiciary act of June 1st, 1872, has given this power in all cases, and now injunctions may be granted in any case deemed exigent by the court, without previous notice, whether it be a patent case or not. The terms of the law of 1872, section 718, are, that "whenever notice is given of a motion for an injunction," the court or judge, if irreparable injury or delay be likely to result from delay, may restrain temporarily until the motion can be heard. "Whenever" means "at" whatever time notice is given, and does not mean "after" whatever time. Simultaneously, therefore, with the time of giving the rule to show cause against the motion, the court may grant an order restraining the act threatened until the decision of the motion. There is no doubt of the power under section 718 to instantly restrain in any urgent case. But even if that were not so as to injunctions in general, there is no possible doubt of the power under section 4921 to enjoin in patent cases without previous notice; a power which, however, should always be exercised with great caution.

The motion for a preliminary injunction was heard at Alexandria on the 4th of September, and was for three days quite elaborately argued by counsel.

John B. Young and Hill & Ellsworth, for complainants.

W. W. Crump, Daniel A. Grimsley, and James G. Field, Atty. Gen. Va. (then recently appointed to succeed the late R. T. Daniel, deceased), for defendant.

The order to show cause had required the defendant to file his answer to the bill and sustaining affidavits by the 28th of August, which had been substantially done. On the first day of the argument, defendant's counsel produced in court a patent for the Moffett register just issued to Moffett & Deane by the commissioner of patents. At the conclusion of the argument, the court rendered the following decision:

HUGHES, District Judge. Most of the questions which have been argued at bar will be more properly considered at the final hearing of this cause, and must be adjourned until that time. The motion is now heard after three weeks' notice, on bill, answer, and affidavits. The court will consider now only such questions as necessarily bear upon the motion for a preliminary injunction. It must endeavor as far as practicable to avoid committing or concluding itself on every question which will arise at the final hearing upon evidence regularly taken. The question now to be determined is, whether the complainant is entitled to a preliminary injunction. As his right to the exclusive use of the Fountain patent in Virginia may be assumed as undeniable, the principal inquiry for the court is whether the Moffett register is an infringement of it. Even that question is not now to be finally decided, and the court ought not and is not bound to commit itself finally upon it.

The fact of infringement is denied, and the point to be now determined is whether the fact is *prima facie* made to appear with such certainty as to justify the court in granting a preliminary injunction against the use of the instrument *pendente lite*. The *prima facie* aspect of the case has been reversed since the 8th of August, when the temporary restraining order was granted. Then the action of the patent bureau had been such as to make, in the opinion of the court, a *prima facie* case for the complainant. Now the case in that particular is changed. The action of the patent bureau is such as to make a *prima facie* case for the defendant; for the commissioner of patents, whose action is final in that bureau, has reversed the judgment of his inferior officers, and virtually pronounced that the Moffett register is not an infringement of the Fountain register, by issuing a patent to Moffett & Deane for their invention as new. It is true that the issuing of patents is not conclusive upon the courts. Patents are subject to review by the courts. Suits in a very large proportion of patent cases are but means of appeal to the courts from the action of the patent office. Yet

while this is so, that action must always carry great weight with the courts. It is always very strongly persuasive with them. Patents are the results generally of contests between accomplished experts, and after such contests of the matured judgment of officers selected and appointed by the president for their extraordinary competency and skill, I think it is hardly going too far to say, following Mr. Justice Grier, in *Goodyear v. Dunbar* [Case No. 5,570], that the action of the patent office is sufficient to make such a prima facie case as to justify the action of a court on almost any motion for a preliminary injunction. If, indeed, in any case the general unanimous testimony of experts united in condemning the action of the patent office, in such case a court might well hesitate to treat that action as constituting a prima facie case for or against a preliminary injunction. But when, as in the present case, the weight of expert testimony is nearly evenly balanced, a court may safely presume that the action of the patent office, taken after a sharp contest between patent lawyers and experts, is prima facie correct. On this ground alone I think I would be justified in refusing a preliminary injunction in the present case. But as a court is not at liberty to surrender itself to an unquestioning reliance upon the decision of another tribunal, when the duty and responsibility are upon itself to act upon its own convictions, I will state briefly the view of the facts of the case by which I am led to concur, for the present, in the judgment of the commissioner of patents.

The patent of Fountain is not for the invention of the mechanical devices used in making up his instrument, or of any of them. These are all old and in familiar use by the public. Fountain's patent is only for a particular combination and arrangement of these old and well-known devices in a manner to serve a particular purpose. Moffett & Deane's patent is of the same character. They employ old and well-known devices also; and their patent is for a particular arrangement and combination of these devices in a manner to serve a particular purpose other than that of the Fountain register. And it is a fact, obvious from an inspection of the two instruments, that the devices employed in one instrument are not identical with those employed in the other; and that the arrangement and combination of the respective devices made use of in each are different. Fountain claims the invention of the worm meshing into a cogwheel to impart motion to the indexes. Moffett & Deane use no worm. The striking apparatus of the two instruments are different. Fountain has a single spring attached to the hammer, without any means of withdrawing the hammer instantly from the bell. Moffett & Deane have two springs, one to throw the hammer against the bell, and another to instantly withdraw it. Moffett & Deane use a pinion to drive the registering apparatus; Fountain uses no pin-

ion. Fountain's instrument is portable, and contrived especially for the purpose of registering fares taken on public conveyances; while Moffett & Deane's is intended to be stationary, and is contrived for the purpose of tallying drinks taken in a bar-room. Fountain, in his specifications, claims that "his invention is an improvement in fare-registers," "adapted to be carried in the hand," consisting in an "arrangement and combination of parts whereby full and half fares are registered, and an alarm sounded as rapidly as collected by the conductors," having "on its face one dial and two separate hands." In his specifications he speaks of his instrument as nothing more than a fare-register; and in alluding to devices for registering hundreds, thousands, and ten thousands, he expressly declares that these "form no part" of his instrument, thus indicating that his instrument was intended only for a fare-register. These latter devices are essential parts of Moffett & Deane's register. Moffett & Deane's organization and combination of old devices is also for a special purpose, and that purpose one which was not contemplated by Fountain, and for which Fountain's contrivance could not be used conveniently without material alteration. I think the doctrine of Mr. Justice Clifford and Judge Clarke in *Crompton v. Belknap Mills* [Case No. 3,406], is a sound one; that when the patent is for a peculiar combination of old devices the patentee cannot insist upon mechanical equivalents.

In general mechanics, the pinion may be the equivalent of the worm; but when one invention claimed is a combination of devices including the worm, another invention of a combination including the pinion differs from it in the very fact of using the pinion. It would be almost absurd to hold that a patent for a particular manner of using the worm would be infringed by a patent for a particular manner of using the pinion. We are taught at school that the lever, the windlass, and the pulley are all one and the same in the mechanical principle involved; yet a combination of several devices, of which a pulley should be one, might not, in fact, even remotely resemble a combination in which a lever or a windlass should be used. I think it is a just ruling of the courts that mechanical equivalents cannot be insisted upon in inventions which consist of the mere arrangement of old devices. The same seems to me to be the case with regard to the purpose for which a combination is invented. The invention of a new device is in general patentable without reference to the object it is designed to accomplish, and is good against any subsequent invention of the same device designed for any other object. But it seems to me that this is not necessarily the case where the invention is merely of a combination of old devices. In such inventions the purpose aimed at, the form of the structure, its portableness or non-portableness, whether

it is used as a fixture or carried in the hand;—are elements which, though any one of them might not determine its character with reference to another invention of a combination of devices, yet all, together, might unite to constitute a different instrument. I repeat, however, that I do not wish to be considered as concluding myself or the court in its decision at the final hearing. It is sufficient for me to say that the complainant has not made a prima facie case so strongly in his favor as to warrant the court in awarding a preliminary injunction; and the motion is therefore denied. The order denying the motion will also dissolve the temporary restraining order which was granted on the 8th of August, and put the defendant under bond to account for the number of instruments manufactured by him and his receipts from their sale. The bond of the defendant must also be given with reference to the great number of suits which complainant may be obliged to bring in the event of a decree in his favor at the final hearing.

In accordance with this opinion bond was required of the defendant in the penalty of \$20,000, conditioned as indicated. The case was continued for final hearing at Richmond to the 17th day of October, during the fall term of the circuit court.

Case No. 18,196.

YZNAGA et al. v. PEASLEE.

[1 Cliff. 493.]¹

Circuit Court, D. Massachusetts. Oct. Term, 1860.

DUTIES ON IMPORTS — APPRAISEMENT BY SAMPLES — WAIVER OF OBJECTIONS.

1. Where sugar imported into the United States is appraised by samples which were drawn from the packages by the person called the sampler, and were delivered by him to the local appraisers, and the examination was made by them without having seen the packages, *held*, in the absence of any objection by the importers as to the manner of drawing the samples, or to their identification, that it was a substantial compliance with the requirements of the act of congress authorizing the appraisal in such a case to be made by samples.

2. And where, upon appeal to merchant appraisers, the samples were, after the decision of the local appraisers, placed in the depository in the appraisers' department, and were there kept until the meeting of the merchant appraisers, and were then produced by one of the local appraisers, and no objection as to the identity of the samples being then made by the importers, *held*, that all objections which might have been taken at the appeal were waived by the importers.

3. If the samples are fairly selected from one in ten of the packages, and are fully identified, it is of no importance whether they were drawn from the packages by the appraisers themselves or by the official sampler of the appraisers' department.

[Cited in brief in *Re Rosenwald*, 59 Fed. 766.]

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

This was an action of assumpsit brought by the plaintiffs [Antonio Yznaga and others] as importers of foreign merchandise, against the defendant [Charles H. Peaslee] as collector of the port of Boston, to recover back an alleged excess of duties which they had previously paid on an importation from Trinidad, of two hundred hogsheads of Muscovado sugars. The goods were entered at the custom-house at Boston for warehousing at the public stores, October 23, 1853. Certain additions were made to the invoice value by the importers at the time of the entry, so that the entry value amounted to seven thousand seven hundred and fourteen dollars. To this amount the local appraisers added six hundred and ninety-six dollars and twenty-three cents. The importers appealed to merchant appraisers, but they returned the same sum, making the dutiable value of the importation eight thousand four hundred and ten dollars and twenty-three cents. Duties were accordingly calculated on that basis, and the appraised value exceeding by ten per cent. the value declared in the entry, a duty of twenty per cent. in addition to the duties otherwise imposed by law was levied and claimed by the collector. The local appraisers reported December 23, 1853; and the merchant appraisers, January, 1854. On the 2d and 3d of February the goods were withdrawn from the warehouse and the duties paid under protest. None of the hogsheads containing the sugars were actually examined by the local appraisers, nor were the sugars at any time seen by the merchant appraisers. The appraisement was made by both upon samples drawn out by the examiner of sugars, liquors, and cigars in the appraisers' department. His duties, as he stated, were to sample goods, and carry the samples to the office of the local appraisers. He is called the sampler, holding no commission, but usually selected by the local appraisers, and approved by the secretary of the treasury. Samples are drawn from one in ten of the packages; but where all the packages bear the same mark, indicating them to be all of the same description, one sample, containing a small quantity of the importation, from one in ten of the packages, is usually regarded as sufficient to enable the appraisers to perform their duties according to law. Such samples, when properly prepared, are put into secure wrappers, marked with the number of the manifest, together with the marks of the packages from which they were selected, and other marks to secure their identification. When thus prepared, the samples are placed in a depository designated for the purpose, and there kept until examined by the local appraisers. In case appeal to merchant appraisers is taken, the samples are kept in the same depository until examined by them. Objection in this case was made that the samples were not properly drawn, and also that they were not satisfactorily identified

with the sugars in question. The jury gave a verdict for the defendant, subject to questions of law that arose at the trial.

B. F. Hallett, for plaintiffs.

The merchant appraisers cannot delegate any part of their powers and duty of examining one in ten of the packages, or samples of one in ten, to any other person. The importer, on his appeal, is entitled to the judgment of the merchant appraisers, based upon their knowledge of the true value of the merchandise. *Bartlett v. Kane*, 16 How. [57 U. S.] 263-272; *Rankin v. Hoyt*, 4 How. [45 U. S.] 335; *Tappan v. U. S.* [Case No. 13,749]. That the merchant appraisers should give their decision upon the mere exhibition of supposed samples, without it being conclusively known to them that they are genuine and fair samples, is imposing a risk upon the importer, against which the law expressly protects him. 5 Stat. 563, §§ 16, 17, 21; *Greely's Adm'r v. Burgess*, 18 How. [59 U. S.] 415, 416; 4 Stat. 410; 3 Stat. 375, § 16. If the merchandise be such as is bought and sold by sample, the appraisal may be made by samples, due care being taken that they are fairly selected from the packages, designated on the invoice by the collector, and identified as such. *Treas. Reg. 1857, 321*. The "due care" applies to the appraisers, who must have the knowledge personally. *Greely v. Thompson*, 10 How. [51 U. S.] 225. The act of the appraisers was in the nature of a judicial act.

C. L. Woodbury, for defendant.

As to the duty of appraisers. 3 Stat. 735; 5 Stat. 563. Sampler. 4 Stat. 411. And the clerks and all other persons employed in the appraisers' office shall be appointed by the principal appraisers, and the number and compensation fixed by the secretary of the treasury. *Treas. Reg. 1857, 277*. What examination of goods necessary. *Sampson v. Peaslee*, 20 How. [61 U. S.] 580; *Burgess v. Converse* [Case No. 2,154]. The sampler, as clerk, has a substantial duty to perform, and as an officer of the United States his duties are described in his oath. The drawing of samples is a ministerial act, not requiring judicial discretion. *Barry v. Arnaud*, 2 Perry & D. 646. It is a general principle that a ministerial officer cannot appoint a deputy. *Broom, Leg. Max. 666*; *Cooper v. Coates*, 5 Man. & G. 98; *Midhurst v. Waite*, 3 Burrows, 1260. Where no discretion or judgment are required. *Rex v. Lenthal*, 3 Mod. 150. Ministerial act with discretion involved. *Parker v. Kett*, 1 Salk. 96. There is no imperative statute rendering a personal inspection necessary. *Dwar. St. 606-611*; *Cooper v. Coates*, 5 Man. & G. 98; *Midhurst v. Waite*, 3 Burrows, 1260.

CLIFFORD, Circuit Justice. Mere matters of fact, it must be understood, were settled

by the verdict, and the finding of the jury will not be revised by the court in a proceeding like the present.

Evidence was introduced by the defendant, showing that the goods constituting the importation were of the class bought and sold by samples, but there was considerable contrariety in the testimony as to the manner in which the samples were usually drawn in such sales. Both parties examined the sampler as to the manner in which the samples in this case were drawn, and he admitted that his recollection of the particular transaction was not very distinct. Taken as a whole, however, his testimony shows, to the satisfaction of the court, that he went to the vessel, or to the place where the vessel was discharged, and drew the samples in the usual and regular way, according to the course of business at the custom-house and the practice of the port. Two samples, at least, were exhibited to the appraisers on the appeal, and, from the marks found upon the wrappers recognized by the sampler, there can be no doubt that they were the identical samples drawn from the sugars in question, and used by the local appraisers. Notice was given by the attorney of the plaintiffs of the time and place designated for the hearing of the appeal, and he testifies that he was present with the merchant appraisers. When the samples were exhibited, he inquired what evidence there was of their identity, or that they had been properly taken, and he states in substance and effect that he received no answer to his inquiries; but he made no objection to an examination by samples, and by his silence acquiesced in the proceedings, remaining at the public store until he ascertained that the goods had been advanced. Certain propositions of fact involving the identity of the samples and the fairness of their selection are also submitted by the plaintiffs, which, in the view taken of the case, need not be further noticed, as they are sufficiently answered by what has already been remarked. Suffice it to say, without entering more into detail, that all those propositions are substantially negated by the jury, and in the view of the court were fully disproved by the evidence. With these remarks we come to the examination of the legal questions presented in the case, which are involved in greater difficulty, and will require more careful consideration. Appraisement by samples is conceded to be lawful where the goods imported are such as by commercial usage are bought and sold in that manner in the market, provided due care be taken that the samples are properly and fairly selected from one in ten of the packages as designated on the invoice, and provided the samples when exhibited to the appraisers and examined by them be fully identified as the ones selected for the purpose. But the plaintiffs deny that the appraisers can lawfully delegate their power and duty to another person to select the samples from packages designated on the invoice by

the collector, or, in other words, they insist that to allow the samples to be selected by a sampler, as in this case, is imposing upon the importer a risk and uncertainty wholly unauthorized by law. Collectors are required to designate on the invoice at least one package of every invoice, and one package at least of every ten packages of imported goods, wares, and merchandise, and order the same to the public store to be opened, examined, and appraised. 5 Stat. 565; Treas. Reg. p. 182. Bulky articles, however, are seldom or never sent to the public store; and in respect to such importations the regulations provide that the collector "will direct their examination on the wharf, or other safe and suitable place, to be designated by him for that purpose." Recurring to those regulations, it will be seen that they also provide that, "if the merchandise be such as by commercial usage are bought and sold by samples, or where by such usage the character and quality of the merchandise are so determined, the appraisement may in such case be made by samples, due care being taken that they are properly and fairly selected from the packages designated on the invoice, and identified as such samples." Usage has sanctioned this mode of appraisement as constituting a compliance with the requirements of law, and it is now too late to question its correctness in the cases provided for in the treasury regulations. Those regulations were framed to enable the officers of the customs to perform their duties in the collection of the revenue; and it is difficult to see, where the importation consists of such goods as liquors, sugars, and the like, in what other satisfactory mode the appraisement could be effected. Such considerations undoubtedly induced the department to adopt the regulations, and inasmuch as it comports with a reasonable construction of the act of congress, it may well be sustained. Samplers, it seems, are appointed under the sixth section of the act of the 28th of May, 1830, which, among other things, provides that the clerks and all other persons employed in the appraisers' office shall be appointed by the principal appraiser, and their number and compensation limited and fixed by the secretary of the treasury. 4 Stat. 411. And by the ninth section of the act of the 30th of July, 1846, all clerks employed by the appraiser are required to take and subscribe an oath or affirmation faithfully and diligently to perform their duties, and to use their best endeavors to prevent and detect frauds upon the revenue. 9 Stat. 44. Inspectors in charge of the sample office are required by the regulations of the treasury to make daily reports to the store-keeper, stating what goods have been received and delivered in samples, and what have been transferred to the appraisers' store as merchandise for appraisement; and the regulations also provide that all labor in the receipt and delivery of samples shall be under the charge of the store-keeper at the appraisers' store; and for the faithful and

prompt examination of sample packages, the appraisers are required to designate some competent officer connected with their department, to visit the sample office daily to superintend and aid in the examination of the packages. Pursuant to these various regulations, the samples in this case were drawn by the person designated as the sampler in the appraisers' office, and were by him duly marked and delivered to the local appraisers. Examination of the samples was made by them on the 23d of December, 1853; and they having marked up the goods, and the importer having appealed, the samples were placed in the depository in the appraisers' department, and there kept until the meeting of the merchant appraisers, when the samples were again produced by one of the local appraisers.

No objection is made to the proceedings before the local appraisers, and indeed none could be successfully urged, if the action of the merchant appraisers on appeal was correct. *Burgess v. Converse* [Case No. 2,154]. Some of the remarks of the judge in that case would seem to indicate that samples not drawn by the appraisers themselves could not in any case be allowed, but the conclusion of the opinion entirely negatives that view of the law, because the judge submitted the question to the jury, whether the examination actually made was in substance and effect equivalent to an examination of at least one package in ten of the goods constituting the importation. Examination had been made in that case by samples not selected by the appraisers, and the jury, under that instruction from the court, returned their verdict for the plaintiff, affirming that the examination made was not in substance and effect equivalent to the described examination of the packages. Error was brought by the defendant, but the supreme court approved the charge of the circuit judge. *Greeley's Adm'r v. Burgess*, 18 How. [59 U. S.] 416. Those cases, however, do not decide that a lawful examination and appraisement may not be made by samples where the samples are properly and fairly selected and fully identified, according to the regulations of the treasury department. On the contrary, the opinions in both cases impliedly admit that the appraisement, under some circumstances, may be made in that way, especially if it appear that the examination made was in substance and effect equivalent to an actual examination of the packages. Exceptions were taken to the examination of the packages in *Sampson v. Peaslee*, 20 How. [61 U. S.] 571, upon the ground that it was incomplete and insufficient; but the court held that where the examination is such as is usually made in buying and selling the articles, and was satisfactory to the appraisers, it was not open to the importer to show that it was insufficient. Nothing is wanting in this case to give full efficacy to the action of the appraisers, if in any case the examination may be made by samples, except that the samples were selected by the sampler

in the appraisers' department, and not by the appraisers themselves, as explained in the statement of the case. But due notice of the time and place appointed for the hearing of the appeal was given to the attorney of the plaintiffs, and the evidence shows that he was present at the examination for the purpose of protecting their interests. Inquiry was made by him what evidence there was of the identity of the samples, or that they had been properly selected, but he did not object upon the ground that the samples had been selected by the official sampler of the appraisers' department, and not by the appraisers; and, under the circumstances, he must be understood as having waived all objections respecting the samples, except such as are impliedly involved in his inquiries. Those inquiries had respect to the identity of the parcels exhibited and to the manner of the selection, and not to the person or persons by whom it was made. Both of those objections, even assuming that they were not subsequently waived, are fully overcome by the evidence. Considering the marks upon the wrappers, all question about the identity of the parcels is wholly removed, and the testimony of the sampler is entirely satisfactory to the point that the samples were selected in the regular and usual way. Giving all due latitude of construction to the inquiries made by the attorney, it is not possible to infer from his conduct that he intended to make any other objections to the samples than those already considered; and if not, then the conclusion under the circumstances must be, that all others within his knowledge were waived. Present as he was with the appraisers, he knew the samples were not taken by them; and, what is more, he was present when the local appraiser produced the samples from the depository in the appraisers' department; and being well acquainted with the course of business in the office, he must have known by whom they were selected, as the evidence shows there was but one sampler in the department. Strong doubts are entertained whether there is any validity in the objection, even if it were open to the plaintiffs, but it is not necessary to decide it in order to dispose of the case. No one suggests that casks of sugars or liquors should be broken by the appraisers; and if not, then, practically speaking, it is clear that the appraisement must be by samples, to be selected for the purpose. Assuming that samples are to be used, it cannot be very material to the importer whether they are actually drawn from the casks by the appraisers themselves or the official sampler of the appraisers' department, provided they are properly and fairly selected and fully identified. Samplers are appointed on account of their peculiar qualifications for the duties incident to the employment, and it is not perceived that they are any more likely to make mistakes than appraisers. In view of the whole case, I am of the opinion that there was no error at the

trial, and, according to the agreement of the parties, there must be judgment on the verdict.

Case No. 18,197.

YZNAGA et al. v. REDFIELD.

[4 Blatchf. 469; 1 17 Leg. Int. 357.]

Circuit Court, S. D. New York. Oct. 29, 1860.

DUTIES ON IMPORTS—UNDERVALUATION.

1. Where a valuation of molasses in casks, in an invoice, is correct, but the quantity stated in the invoice is less than the actual quantity found on gauging, the case is not one for the imposition of a penalty for undervaluation, under section 8 of the act of July 30, 1846 (9 Stat. 43).

2. Where an invoice of molasses in casks does not specify the number of gallons, the case is one of undervaluation, and the penalty may properly be imposed.

This was an action [by Antonio Yznaga and others] against [Heman J. Redfield] the collector of the port of New York to recover back a penalty of twenty per cent. imposed, for undervaluation, upon a cargo of molasses and sugar, imported from Cuba into that port.

Almon W. Griswold, for plaintiffs.

Benjamin F. Dunning, Asst. Dist. Atty., for defendant.

NELSON, Circuit Justice. Upon gauging some of the casks in this case, a greater number of gallons of molasses was found in them than was mentioned in the invoice, so that an excess was reported by the gauger and appraisers. The valuation of the article in the invoice was correct, but the quantity stated in the invoice was less than the quantity found in the casks. The case did not fall within the 8th section of the act of July 30, 1846 (9 Stat. 43). That section is confined to the enhancement by the appraisers of the value of the goods in the foreign market at the time of exportation, to the amount of ten per cent. above the invoice value. The increase of the quantity is otherwise provided for. In this instance, the gauging corrected the error. The application of the penalty must not be extended by a strained construction. I think that the plaintiff is entitled to recover back the \$520, with interest from the time it was paid.

As to the other casks, in respect to which the number of gallons contained in them was not specified in the invoice, the penalty was properly imposed. The case was one strictly of undervaluation, not of excess of quantity found by the gauger or appraisers. The general understanding, that a hogshead contains one hundred and ten gallons, when the quantity is not stated, is too indefinite to be relied on to change the result of this construction.

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

Z.

ZACHRISSSEN (BRETT v.). See Case No. 1,845.

Case No. 18,198.

ZAHM v. FRY et al.

[9 N. B. R. 546; 1 10 Phila. 243; 31 Leg. Int. 197; 21 Pittsb. Leg. J. 155.]

Circuit Court, W. D. Pennsylvania. May 11, 1874.

BANKRUPT ACT—ILLEGAL PREFERENCE—PURCHASER UNDER VOIDABLE JUDGMENT.

1. *Wilson v. City Bank of St. Paul* [17 Wall. (84 U. S.) 473], examined, and held not to cover a case where the debtor does the least act whereby the preference is facilitated: as where the judgment was entered upon his warrant of attorney to confess.

2. A purchaser at sheriff sale, after proceedings commenced in bankruptcy, where the levy was made prior thereto, will acquire a good title notwithstanding that the judgments under which the sale took place are afterwards declared void as in fraud of the act.

3. Judgments whereby a creditor of an insolvent obtains an illegal preference are voidable but not void per se.

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

In 1867, Albert G. Fry, George Duerr, and Wm. Holzner, came from York county, Pa., to Cambria county, for the apparent purpose of manufacturing and selling lumber. Having about fifteen hundred dollars capital, they purchased a small tract of land with a steam saw mill thereon, situate in Susquehanna township, for the sum of three thousand dollars; paid a small part thereon, and gave their obligations for the balance, payable in one, two or three years. They immediately bought teams and the necessary materials, largely upon credit, and commenced the business of manufacturing and selling lumber in the firm name of Fry, Duerr & Co. A. G. Fry, the senior partner, in the spring or summer of 1869 opened a store consisting of a general assortment of merchandise in Ebensburg in his own name, the goods being bought principally, if not altogether, upon credit. In the spring of 1870, they quit manufacturing lumber in Susquehanna township, and commenced to erect a new steam saw mill in Cambria township, about three miles south of Ebensburg, at an expense estimated by the witnesses examined at from five thousand to ten thousand dollars, and which was about completed when they failed on the 18th August, 1870. During the whole time they were in business, they were much embarrassed, and in constant difficulty with their

creditors; but especially during the last six months or more prior to the time of their failure, they were generally reputed to be in a failing or insolvent condition. On the 4th of August, 1870, the judgment in favor of respondent Edward Roberts for one thousand and fourteen dollars and nineteen cents was entered; and on the 18th of the same month, judgments were also entered in favor of Edward Roberts, R. L. Johnston, Johnston & Scanlan, Shoemaker & Oatman, W. H. Sechler, John A. Blair, John Wambaugh, Snyder, Harris, Bassett & Co., Samuel A. Fry, for five thousand two hundred and twenty-eight dollars and thirty-three cents, John R. & A. Murdock, James Hill & Co., Samuel A. Fry for one thousand one hundred and seven dollars and seventy-five cents, all upon warrants of attorney, excepting the first one named in favor of Samuel A. Fry, which was entered by the prothonotary upon paper filed, signed by the defendant. The judgment in favor of James Hill & Co. was entered early in the forenoon of the 18th August, 1870, on a warrant of attorney of that date, for one thousand two hundred and ninety-four dollars, and was due the next day. It was publicly reported that an execution would be issued on this judgment as soon as due. The contesting respondents, Samuel A. Fry, Edward Roberts, Johnston & Scanlan, R. L. Johnston, John A. Blair, and John R. & A. Murdock, had actual knowledge or notice of the entry of the judgment in favor of James Hill & Co. on the morning of the 18th August, 1870, either by themselves or through their authorized attorney, as well as of the previously embarrassed condition of Fry, and Fry, Duerr & Co., and in order to obtain priority immediately commenced to enter judgments upon the warrants of attorney held by them, and to issue executions thereon. Other judgments were subsequently entered upon warrants of attorney and executions issued. These executions were levied upon the personal property of A. G. Fry, and Fry, Duerr & Co.; the store closed, mill stopped, and their business entirely suspended and broken up. On the 18th of August, 1870, A. G. Fry assigned to John N. Evans, his clerk in the store, book accounts against persons who had bought goods on credit in the store to the amount of eight hundred and sixty-seven dollars and fifteen cents, for the alleged purpose of paying the salary then due him; and four days afterwards transferred to the respondent, John A. Weiser, all the balance of the accounts in the store, by a transfer under his hand and seal endorsed upon the fly leaf of the ledger, for the purpose of securing the payment of two thousand five hundred dollars, alleged in the transfer to

¹ [Reprinted from 9 N. B. R. 546, by permission.]

be due said Weiser. John N. Evans collected the accounts assigned to him, and John N. Weiser, by his counsel, Johnston & Scanlan, a part assigned to Weiser, before the appointment of the assignee.

S. Ewart & Co., and other open account creditors filed a petition in bankruptcy against A. G. Fry on the 7th September, 1870, at 11 o'clock a. m., and George Huntley filed a petition against Fry, Duerr & Co., on the same day, at 3 o'clock p. m., on which adjudications in bankruptcy were made, and the complainant subsequently elected assignee.

The complainant filed the present bill in the district court on the 8th August, 1872, for the purpose of setting aside the transfers of the book accounts, and the judgments confessed, and executions issued thereon in the common pleas of Cambria county, in violation of the bankrupt act, to liquidate liens, and to recover the assets of the estate. After the bill was served, all the respondents named in it, compromised, on the 28th of October, 1872, by a decree entered setting aside the preferences obtained in their favor, excepting Samuel A. Fry, John A. Weiser, Edward Roberts, R. L. Johnston, Johnston & Scanlan, John A. Blair, and John R. & A. Murdock, who filed answers, and the case proceeded as to them. The subpoena was not served on Lawrence Smith and John Ludwig, who were not found within the district; and the bill was taken pro confesso against John N. Evans for want of appearance. On the 7th September, 1870, judgment was entered in favor of E. B. Camp, execution issued, and on the 19th of November, 1870, levied upon the steam saw mill in Susquehanna township, including two small pieces of land; the piece with the mill on it was on the 8th of March, 1871, sold to respondent Thomas H. Cresswell, who afterwards moved the mill away, and converted it to his own use; the other piece was sold to respondent Henry Hopple. The judgment and execution of E. B. Camp, on which these sales were made, was also set aside by the decree of the 28th October, 1872. On the 26th September, 1872, the complainant, with leave of the court, filed an amendment making respondents Thomas H. Cresswell, Susan Keith and Henry Hopple parties, alleging that the levy and sale after petitions in bankruptcy filed, were void and conferred no title upon the purchasers. Afterwards the case was compromised as to Henry Hopple, and proceeded as to Thomas H. Cresswell and Susan Keith, who claimed as terre tenant.

The case came on for hearing before the Hon. Wilson McCandless, on the 9th July, 1873, upon bill, amendment, answer, and replication to each, proofs and exhibits; but upon intimation from the respondents' counsel that the case would be taken to the circuit court in any event, his honor remarking that it had better go there at once, dis-

missed the bill pro forma, as to the respondents, Samuel A. Fry, John A. Weiser, Edward Roberts, R. L. Johnston, Johnston & Scanlan, John A. Blair, John R. & A. Murdock, Thomas H. Cresswell and Susan Keith; from which decree the respondent appealed.

Geo. M. Reade, for complainant.

R. L. Johnson and W. D. Moore, for respondent in the judgments and book accounts.

F. A. Shoemaker, for respondents in amended bill.

McKENNAN, Circuit Judge. Creditors' petitions were filed in the district court on the 7th September, 1870, against A. G. Fry and Fry, Duerr & Co., who were merchants and traders, and were so proceeded in that they were duly adjudicated bankrupts and the complainant was appointed their assignee. On the 18th August, 1870, judgments were entered in the court of common pleas of Cambria county, on warrant of attorney in favor of the respondents severally, except Weiser, Cresswell, and Keith, executions were issued and levied upon the stock in trade of the bankrupts and their business was stopped.

The bill seeks to avoid these judgments as fraudulent under the bankrupt act [of 1867 (14 Stat. 517)], and to obtain a transfer of the fund produced by the executions to the complainant. By the thirty-fifth section of the bankrupt act any transfer, direct or indirect, of any part of his property, by an insolvent debtor to a creditor who had reasonable cause to believe that he is insolvent, and that such transfer is made in fraud of the provisions of the act, is declared to be void, and the assignee is empowered to recover the property or the value of it, from the persons receiving it or to be benefited by its transfer. Under this section, it was held by this court, after careful consideration, in *Hood v. Karper* [Case No. 6,664], that the confession of a judgment, the issuing of an execution and a seizure and sale of property under it, constituted an indirect transfer of such property by the debtor. In the same case it was also held that the objectionable transfer and preference were to be considered as made and obtained when the warrant of attorney was executed by the entry of the judgment, irrespective of the date of the warrant; and that when an execution must necessarily stop the debtor's business, the creditor, in general, has reason to believe the debtor to be insolvent, and must be considered as intending what, if not prevented, would be a fraud on the provisions of the act.

The co-existence of these elements of illegality in the judgments complained of, is clearly established by the proofs in the present case. At the time of their entry the bankrupts were insolvent, within any definition of insolvency, the judgments were en-

tered upon warrants of attorney a few days before the institution of the bankruptcy proceedings, executions were contemporaneously issued upon them, which were levied upon all the available assets of the bankrupts, and their business was at once entirely broken up. There is no room for doubt, therefore, that these judgments are impressed with all the attributes of fraudulent preferences as the bankrupt law defines them. Nor, as was urged at the argument, is this conclusion inconsistent with the decision of the supreme court in *Wilson v. City Bank of St. Paul* [17 Wall. (84 U. S.) 473]. In that case the creditor's judgment was obtained without the aid or co-operation, direct or collusive, of the bankrupt, and so was strictly adverse. The resulting preference lacked the essential element of promotion by the bankrupt to infect it with the taint of fraud. The court, therefore, held that the mere failure of the debtor to file a petition in bankruptcy to prevent the judgment and levy was not sufficient evidence of an intent to give preference, or to defeat the operation of the bankrupt law. But in this case the attitude of the debtors was not passive. The judgments against them were obtained by their own act, because what was done by another by their express authority was done by them, and the preference thereby secured by the creditors is conclusively presumed to have been the intended consequence of that act. There is, then, as broad a distinction between the cases as there is between bona fide passiveness on the part of an insolvent debtor in an adverse proceeding, which is not an element of fraud, and positive promotion of an objectionable preference, which is.

It was insisted, however, that this court cannot take cognizance of the complaint, because the fund produced by the sale of the bankrupt's property under the judgment and executions sought to be avoided is in the custody of a state officer, and is subject to distribution under the direction of the state court. The bankrupt law provides the necessary machinery for its complete administration. Ample jurisdiction in law and equity, is conferred upon the federal courts to fulfill all its exigencies. Indeed, the efficient, successful and uniform operations of the system depends upon the adequacy of the means provided for its execution and their prompt availability, as occasion may require. Certainly it was not made dependent upon the optional exercise, by independent tribunals, of the jurisdiction which it confers. While the state courts may exercise concurrent jurisdiction with the federal courts, in certain cases arising out of proceedings in bankruptcy, they are not bound to do so. The latter alone are the appointed instrumentalities for the execution of the law, and their duty to do it is imperative. A federal court was, therefore, the appropriate tribunal to resort to for the relief sought in the present case. The complainant might have re-

sorted to the state court, but he was not bound to do so. He is necessarily the actor, and until he invoked its cognizance, and thus acquired jurisdiction over the parties and the subject matter of the cause, no rule of comity even is violated by an appeal to the federal tribunal expressly constituted for the adjudication of his complaint.

In the unquestionable and necessary exercise of the power conferred by the bankrupt law, it is the practice of the federal courts to inquire into the validity of the judgments entered in the state court, to restrain their enforcement by execution, and, if adjudged to be fraudulent under the act, to set them aside and decree the transfer of the property seized in execution under them, or the proceeds of its sale to the bankruptcy assignee. Even when such proceeds have been received under the order of a state court, by a creditor obtaining a fraudulent preference, the value of the property sold or appropriated has been adjudged to the assignee. And this is not only expressly authorized by the bankrupt act, but has been decided by the supreme court in *Shawhan v. Wherritt*, 7 How. [48 U. S.] 627, to be a proper method, under the analogous provisions of the bankrupt act of 1841 [5 Stat. 440]. In this circuit the equitable remedies to effectuate these results have been allowed only against the beneficiaries of illegal preferences and transfers of the bankrupt's property. Possibly a too fastidious interpretation of the act of congress, forbidding injunctions against proceedings in state courts, has induced the exemption of the executive officers of these courts from these remedies; but in some other circuits, at least, this immunity is not accorded. In the second circuit similar bills to the one in this case are entertained against sheriffs, and in answer to an objection that the authority of the state courts was hereby interfered with, the able judge of that circuit, Mr. Justice Woodruff said: "On behalf of the sheriff it is insisted that he is an officer of the state court and held the property by virtue of their mandate, and that this is an interference with the authority and jurisdiction of the state courts, and therefore the sheriff ought not to be made a party. There is nothing in this. The proceeding no more interferes with him, or with the state courts, than would an action of trover or replevin, where he levies upon and retains property which he has no right to apply to pay an execution. He is made a party for his own protection, and because he holds the subject of controversy. No decree is sought and none should be made affecting him, otherwise than as the custodian of the fund, and to secure the control of the court over it. He has in no other sense any personal interest in the controversy, and ought not to be prejudiced in any manner by the decree." But if only the parties beneficially implicated in the objectionable transfers are to be affected by the decree, there even is less reason for the

suggestion that there is any encroachment upon the rightful province of the state courts. There was, however, no question of which the state court has assumed cognizance which this bill seeks to withdraw from it.

Pending the levy under the judgments complained of, proceedings in bankruptcy were commenced against the defendants in them. Upon the finding of a jury on an issue demanded by them, they were adjudged bankrupts, and the present suit was thereupon instituted. The property seized by the sheriff was sold, and the proceeds are in his custody without any movement for their distribution, having been made in the state court when this bill was filed. As a distribution of the fund by that court, without the intervention of the complainant, would not affect his right to recover it from those to whom its payment might be decreed, and as he alone could contest the validity of the judgments as fraudulent preferences, the state court had not acquired a jurisdiction of the parties, which would preclude him from resorting to another tribunal invested with full power to decree and enforce the relief to which he might be entitled. There is, therefore, no reason of comity why the complaint should not be entertained. On the contrary, obvious considerations touching the prompt and complete adjustment of the equities of the parties, and the speedy administration of the bankrupt's estate, required that it should be entertained. The transfer of the book accounts to John A. Weiser is clearly unsustainable. It was made after executions had been issued against the bankrupts to a large amount, when their business was stopped and their insolvency manifest, and avowedly to give Weiser a preferential security for his claim against them.

The supplemental bill against Thos. H. Cresswell and Susan Keith stands upon a different footing. Susan Keith is the bona fide alienee of Cresswell of a small piece of land purchased by him at sheriff's sale as the property of the bankrupts, under a judgment entered on the day of, presumable under the proofs, before the filing of the petition in bankruptcy. This judgment and the process issued upon it were not void, but only voidable in the bankruptcy court. Although Cresswell had constructive notice of the bankruptcy proceeding, yet the judgment under which he purchased was apparently a valid lien under the state law upon the property, and he had no notice of any infirmity in it. Its subsequent avoidance, as fraudulent preference, by the consent of the plaintiff in it, in a proceeding to which Cresswell was not a party at the time, can have no effect upon his title. He, therefore, occupies the position of a bona fide purchaser for value, without notice of the invalidity of the judgment, and bill against him and Susan Keith must be dismissed.

No actual fraud is imputable to any of the other respondents, and they ought not to be

subjected to the harsh penalty of exclusion from participation in the assets of the bankrupts, which would result from a final decree against them. They should be allowed the choice of the only alternative of escape from it. If, therefore, within thirty days the holders of the objectionable judgments, respondents in the bill, cause the fund produced by their executions with any interest which may have accrued from its use, to be turned over to the complainant less the sheriff's commission and costs of sale; if John A. Weiser account for and pay to the complainant the amount of the book accounts collected by or for him, and transfer to complainant all the accounts remaining unpaid, deducting any sum or sums paid by him for collection; and if all these respondents deliver a writing to the complainant surrendering their alleged liens or preferences, and agreeing that the costs of this suit together with a reasonable compensation to the complainants' solicitor, to be fixed by agreement of the parties or the allowance of this court, may be deducted from their dividends of the bankrupt's assets, no final decree will be entered in this case, and they will be allowed to prove their debts before the register.

Case No. 18,199.

ZANE v. D'ESTÈ.

[Cited in *Zane v. Loffe*, 2 Fed. 230, 231. Nowhere reported; opinion not now accessible.]

Case No. 18,200.

ZANE et al. v. PECK et al.

[3 Ban. & A. 36; 1 12 O. G. 518.]

Circuit Court, D. Connecticut. Aug. 11, 1877.

PATENTS FOR SELF-CLOSING FAUCET—ANTICIPATION.

1. The patent for a self-closing faucet, granted to Nathaniel Jenkins, June 27th, 1865, was not anticipated by the French patent of Chretien Morand, dated November 14th, 1851.

2. Where an anticipating device has been changed, so that by the change the thing which is produced is practically a new structure, the new device, though subsidiary to the former one, is patentable.

In equity.

Thomas William Clarke, for complainants.
Benjamin F. Thurston, for defendants.

SHIPMAN, District Judge. This is a bill in equity [by Joseph Zane and others] to restrain the defendants [Peck Bros. & Co.] from the infringement of letters patent for a self-closing faucet, which were issued to Nathaniel Jenkins on June 27th, 1865, and which have been duly assigned to the plaintiffs. The defendants admit infringement.

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

and the sole question is as to the novelty of the alleged invention. The validity of the patent has been sustained by decree of the circuit court for the District of Massachusetts, in a case where other anticipatory devices than those which are here relied upon were set up in defence. The present defendants are the licensees of the defendants in the Massachusetts case.

The invention consisted in opening a self-closing faucet by means of a quick-threaded screw-follower, the threads of which are inclined at so great a pitch that, when the power to turn the screw is removed, the pressure of the water and of a spiral spring under the valve forces the valve to its seat, where it is held by the pressure of the water. The specification says that another part of the invention consists in combining with the valve and screw-follower a swivel, so that the rotary movement of the spindle shall not be imparted to the valve, which shall have only an axial movement, and thus twisting or friction of the valve shall be prevented. This swivel connection of spindle and valve is frequently used in structures where rotation of the valve is not desired. The faucet has gone into extensive use.

The claims of the patent are: "1. The screw-follower H, in combination with the valve of a self-closing faucet, substantially as set forth, and for the purpose described. 2. The combination of the swivel P, screw-follower H, valve K, and spring O, substantially as and for the purpose described." Self-closing faucets opening by means of a lever, and also by means of a quick-threaded screw, have long been known. The invention in this case is the combination of quick-threaded screw, valve and spring, substantially as described in the specification.

In the pre-existing English patent of Moses Poole, dated April 15th, 1845, and in the specification of William Thomas Cheetham, left with the English commissioner of patents, March 14th, 1860, and in the English patent of Thomas Melling, dated October 6th, 1857, no spring was used, and by reason of that omission these devices did not anticipate the Jenkins invention.

The French patent of Chretien Morand, dated November 14th, 1851, is chiefly relied upon by the defendants as anticipatory of the plaintiffs' patent. The Morand device was designed in part to prevent what is called the "water-hammer," or the unpleasant sound which is caused by the reaction of the water when the valve is suddenly closed. The faucet is of two parts, of unequal size; the induction-way is of larger size than the ejection-way. There are two valves, also of unequal size. The outer valve is in rigid connection with and is turned by a quick-threaded screw-spindle. This valve is so connected with the inner one that the inner valve is guided longitudinally, and is forced to its seat by the same rotation of the screw-

follower which operates upon the outer valve. The connection of the inner valve with the spindle is not by means of a swivel-joint. Below the inner valve is a spring, which, with the pressure of the water, causes the valves to be closed when the power that turns the screw is removed. The patentee remarks that while he prefers two valves, "it will be understood that in certain cases he can employ but one." The manner in which the faucet will then be constructed is not described. By the use of two valves, the body of water which is between the valves forms a cushion, which checks the force of the sound or of the blow of the water-hammer when the faucet is suddenly closed.

The principal elements which are employed to produce a self-closing faucet—to wit, the screw-follower with a quick-threaded screw, valve and spring—are found in both the Morand and the Jenkins patents; but the double valves of Morand, and the general method in which the mechanism of the inner valve and the spring was arranged, with reference to each other and the water-way, caused his faucet to be cumbersome and lacking in simplicity and economy. It was a contrivance of many parts, and lacked general utility. Jenkins omitted one of the valves, and of course discarded the connection between the two, and made the passage-ways for the entrance and discharge of the water of the same size, and connected the valve and the screw-follower by a swivel, and, generally, materially simplified the construction and arrangement of the valve and spring mechanism. He thus made a simple and economical self-closing faucet, which has gone into general use. He has produced the old result of Morand in a more economical and beneficial manner. The invention of Jenkins is subsidiary to that of Morand; but he has essentially changed the Morand device in such manner that, by the change, the thing which is produced is practically a new structure, and his improved device is, therefore, patentable.

This change was not merely formal, but was, to a certain degree, a structural change and modification of the parts of the Morand faucet, which change required inventive and not merely mechanical skill, and required a sufficient exercise of the inventive faculty to justify the grant of an exclusive right to the use and sale of the article which was produced. It was not simply the "carrying forward or new or more extended application of the original thought," and was not "a change only in form, properties, or degree." *Smith v. Nichols*, 21 Wall. [88 U. S.] 112. Let there be a decree for an injunction and an account.

[See *Zane v. Peck Bros.*, 9 Fed. 101, and 13 Fed. 475.]

ZANE (PRENTICE v.). See Case No. 11,383.

Case No. 18,201.

ZANE v. The PRESIDENT.

[4 Wash. C. C. 453.]¹

Circuit Court, E. D. Pennsylvania. Oct. Term, 1824.

LIEN OF MATERIAL MAN—FOREIGN VESSEL—EFFECT OF GIVING CREDIT.

1. If the subject matter of a contract concern the navigation of the sea, it is a case of admiralty and maritime jurisdiction; although the contract be made on land. Such are the contracts of material men.

[Cited in *The Gold Hunter*, Case No. 5,513; *Leland v. The Medora*, Id. 8,237; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (47 U. S.) 421.]

2. How far the district courts, sitting as instance courts, are to regard the law of the admiralty court of England as to questions of jurisdiction and rules of decision.

[Cited in *The Stephen Allen*, Case No. 13,361; *Waring v. Clarke*, 5 How. (46 U. S.) 474.]

3. By the common law, material men have no lien for articles furnished a vessel, whether she be foreign or domestic; and this is the law of the English admiralty. By the civil law they have such a lien in both cases. In the United States they have it only in cases of foreign ships; or ships belonging to one of the states furnished in another.

[Cited in *The Boston*, Case No. 1,669; *U. S. v. New Bedford Bridge*, Id. 15,867; *Nall v. The Illinois*, Id. 10,005; *Cox v. Murray*, Id. 3,304; *The Alida*, Id. 199; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (47 U. S.) 390; *The Wexford*, 7 Fed. 681.]

4. But if the person furnishing a foreign ship gives credit, the lien is discharged, or does not attach. Water casks furnished to a foreign vessel, are of the nature of materials which create a lien.

[Cited in *Maitland v. The Atlantic*, Case No. 8,980; *Raymond v. The Ellen Stewart*, Id. 11,594.]

5. But although the giving of credit may so far discharge the lien as to exclude the material man from bringing a suit in rem to enforce it, or from his being a privileged creditor, still he is entitled upon petition to be paid out of remnants and surplus remaining in the registry.

[Cited in *The Santa Anna*, Case No. 12,325; *The Boston*, Id. 1,669; *The Lady Franklin*, Id. 7,983.]

This was an appeal from the district court, where the appellant filed a petition praying to be paid the sum of \$408.10 cents, due to him for a certain number of water casks, and two barrels of vinegar, furnished the brig *President*, at Baltimore, where she then lay, in October, 1821, as part of her outfits. The brig having performed a voyage from Baltimore, after the above articles were furnished, returned the following year to the port of Philadelphia, where she was libelled for sailors' wages, and sold under a sentence of the district court. The petition is, to be paid out of the surplus of the proceeds of the brig, her tackle, &c. remaining in the

registry of that court, after payment of the wages, &c. From the evidence of Dieter, taken in this court, it appears that this was a foreign vessel, owned by persons residing beyond sea, and was commissioned as a letter of marque. That whilst lying in the port of Baltimore, in October, 1821, Zane furnished the brig with the water casks and vinegar, at the instance of Dieter, who acted as the agent of the owners, he being a part owner, and, at that time, master. That no written or specific contract respecting these articles was made, except that the master promised to pay for them upon the return of the brig, or upon his own return. That the casks were calculated only for the brig, and as a part of her equipment, and were not more in number than her necessities demanded. The cost of the articles so furnished amounted to \$508.10 cents, of which \$100 was paid by Dieter in July, 1822, after the arrival of the brig at the port of Philadelphia.

A pro forma decree of the district court was made, dismissing the petition, from which decree the appeal was taken.

The following objections to the claim of the petitioner were made in this court: (1) That the debt claimed never created a lien on the vessel, inasmuch as the articles furnished were to be paid for on the return of the vessel, or of Dieter; and were therefore furnished on the personal credit of the master and the owners, and not on the security of the vessel. (2) That if there ever existed a lien, it was waived by the omission of the petitioner to enforce it in due season. (3) That the articles furnished are not such as entitle the creditor to a lien on the vessel. (4) That if there be no lien, the creditor can have no claim even against a surplus remaining in the registry of the admiralty. 1 Holt, Shipp. 390, 391; 2 Show. 338; Salk. 34; 2 P. Wms. 367; Abb. Shipp. 135, 154; 7 Term R. 312; 9 East, 420; Gardner v. The New Jersey [Case No. 5,233]; 5 Rolle, Abr. 92; Bull, N. P. 45; Ex parte Lewis [Case No. 8,310]; Jac. Sea Laws, 6, 12, 354; 1 Term R. 108; 7 East, 5; 1 East, 4; 3 Term R. 119; 6 Term R. 25.

For the appellant the following cases were cited: [The General Smith] 4 Wheat. [17 U. S.] 438; [The Aurora] 1 Wheat. [14 U. S.] 96; The Jerusalem [Case No. 7,294]; North v. The Eagle [Id. 10,309]; 4 Law J. 101; Gardner v. The New Jersey [Case No. 5,233], note; Abb. Shipp. 135, 153; De Lovio v. Boit [Case No. 3,776]; Poth. Hypo. p. 117, c. 1, art. 3; Id. p. 176, c. 2, § 3; Code Nap. bk. 3, p. 226, tit. 18, c. 3, § 1, pl. 3; Id. § 2, pl. 4; 4 Griff. Law Reg. 728, p. 14; The John, 3 C. Rob. Adm. 288; The Favourite, 2 C. Rob. Adm. 236; 2 Brown, Civ. & Adm. Law, 81, 95; The Sybil, 4 Wheat. [17 U. S.] 98; Gardner v. The New Jersey [supra].

C. J. Ingersoll, for appellant.
J. R. Ingersoll, for appellee.

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

WASHINGTON, Circuit Justice, (after stating the case as above). That this is a case of maritime contract, of which the admiralty has jurisdiction, is not disputed by the counsel for the appellee. Although it was made at land, *infra corpus comitatus*, yet the subject matter of it concerned the navigation of the sea, and it is consequently maritime in its nature. This point, if it were not conceded, is conclusively settled by the following cases: *The General Smith*, 4 Wheat. [17 U. S.] 438; *The Aurora*, 1 Wheat. [14 U. S.] 96; *The Jerusalem* [Case No. 7, 294]; *Gardner v. The New Jersey* [Id. 5, 233]; *Stevens v. The Sandwich* [Id. 13, 409], note; *North v. The Eagle* [Id. 10, 309]. The question, in short, which this court has to decide, is not of jurisdiction, but of lien, or an equitable claim against the proceeds of the vessel remaining in the registry of the court, and unclaimed by any other persons than the former owners of the vessel. The case of material men being then within the undisputed jurisdiction of the admiralty, it becomes important to inquire by what law their claim is to be decided? If by the civil law, which, with the laws of Oleron and Rhodes, furnish the general rules of decision of the admiralty court, where they are not inconsistent with the municipal laws of the country to which the court belongs, then it is indisputable that those who repair, or fit out a vessel, or who lend money for those purposes, possess a right of payment in preference to other creditors upon the value of the ship, without any express hypothecation, contract, or agreement whatever, to subject the vessel to such a claim. *Abb. Shipp.* p. 2, c. 3, § 9, who cites the *Digest*.

The common law courts of England have not adopted this rule of the civil law, but adhere to the strict doctrine of the common law in relation to implied liens, which are recognized only in certain cases where the subject on which the lien is to operate remains in the actual possession of the creditor. Upon this principle it is allowed in the case of the ship builder, who retains such possession, and who is not bound to surrender it until he is paid. But the repairer of a ship, or the tradesman who furnishes her with ropes, sails, or other necessaries, to enable her to navigate the sea, has no lien on the ship, or right of preference over other creditors, although she be a foreign ship, and is so repaired or furnished in England in the course of her voyage. Even the jurisdiction of the admiralty to proceed in rem in these cases is denied, upon the ground that the contracts are made on land, *infra corpus comitatus*, and this, notwithstanding the maritime nature of the subject-matter of the contract, which, in the case of *Minet v. Gibson*, 3 Term R. 451, Mr. Justice Butler held to be the criterion of the jurisdiction of that court. But it would seem, from the case of *Justin v. Ballam*, Salk. 34, 2 Ld. Raym. 805, which was that

of a foreign ship, which had been furnished on the Thames with a cable and anchor, which were rendered necessary in consequence of stress of weather at sea; that if the ship had been in her voyage when she became distressed for want of those articles, and at the time of the contract, the implied lien would have been allowed, and that the master might, even in the case before the court, have given a valid hypothecation of the vessel in England for the security of the person who furnished the articles, upon the ground of the vessel being foreign. This then I must consider to be the law of the English court of admiralty, inasmuch as every attempt of that court to introduce the rule of the civil law upon subjects of lien, has been arrested by writs of prohibition from the courts of law.

This view of the subject presents a question of infinite importance, which has never yet been decided in this country, but which it is to be hoped may, ere long, be submitted to the consideration of the supreme court of the United States. How far are the district courts of the United States, sitting as instance courts, to regard the law of the admiralty court of England, as to questions of jurisdiction and rules of decision? It may possibly be answered that this question, so far as the present case is concerned, was settled by the supreme court of the United States in the case of *The General Smith*, 4 Wheat. [17 U. S.] 438, in which it was decided, that the common law of England being the law of Maryland, where the materials were furnished, material men and mechanics furnishing repairs to a domestic ship, have no particular lien upon the ship itself for the recovery of their demands. But the common law makes no distinction in this respect between domestic and foreign ships, denying the right of lien equally against both, making no distinction between them, so far as I am informed. Yet the supreme court, in the case just alluded to, and also in the case of *The Aurora*, 1 Wheat. [14 U. S.] 96, decided that where repairs are made, or necessaries are furnished, to a foreign ship, or to a ship in one state which belongs to another state of this Union, the general maritime law gives the party a lien on the ship for his security, and that he may maintain a suit in rem to enforce his right. In the case of *The Jerusalem* [supra], Mr. Justice Story, after asserting the jurisdiction of the admiralty over all maritime contracts, maintains the doctrine, that a contract for repairs and supplies furnished to a foreign vessel, is governed by the maritime law, and creates a lien which has a preference over a prior bottomry bond. He adds, that the decisions at common law, on the subject of the admiralty jurisdiction, are not binding on us, and he proceeds avowedly upon the ground of the general maritime law, by which every contract of a mas-

ter for repairs and supplies, is said to import an hypothecation. It does not appear from the report of the case of *Stevens v. The Sandwich* [supra] whether the ship was foreign or domestic; but the learned judge states, in general terms, that a carpenter, by the maritime law, has lien on the ship for repairs in port; and that he is admitted by the civil law into the class of privileged creditors, without any regard to the place where the services are rendered. The same doctrine, as to a lien for repairs and supplies furnished a foreign ship, is maintained in the case of *North v. The Eagle* [supra].

But I shall pursue this inquiry no farther, it being sufficient for this part of the case, that for materials furnished to a foreign vessel in a port of the United States, the creditor has a lien on the ship, and may proceed to enforce it by a suit in rem in the admiralty. That is the present case, unless by the giving of credit, the lien was discharged, or never attached. It must be admitted, that by the common law of England, if credit be given in a clear case of lien, had the credit not been allowed, the lien is discharged. This was decided in the case of *Raitt v. Mitchell*, 4 Camp. 146, and is conformable to more ancient decisions of the common law courts. The same doctrine was maintained by Mr. Justice Story in the case *Ex parte Lewis* [Case No. 8,310], whose opinion seems, from the cases cited by him, to have proceeded entirely upon the decisions of the common law courts of England, but apparently contrary to the conclusion to which his own judgment had led him.

It is neither my intention, nor wish, to controvert the principle upon which these decisions are founded, or their application to maritime cases in the courts of the United States; inasmuch as the law which is to govern in admiralty cases, is by no means so settled as to leave me at liberty to express an opinion upon the subject, which I could, with any confidence, venture to maintain. Taking, then, the law to be as it is laid down in these cases, I am brought to the consideration of the two last objections urged against this claim. (1) That water casks furnished to a foreign vessel, are not of the nature of materials which entitle the creditor to a lien on the ship; and if they are, still (2) the claims of such creditor against surplus proceeds remaining in the registry of the court, cannot be maintained, in a case where that lien has been waived by an allowance of credit.

As to the first of these objections, I can feel no doubt whatever. I cannot agree with the counsel for the appellee, that the ground of lien for materials furnished is their adherence to the ship; as cables, anchors, ropes, and the like. I think it is more correctly contended on the other side, that the right of lien arises from the fact that the materials are necessary for the use of the vessel, to enable her to navigate the sea, and to pursue

her voyage in safety. If this be the correct principle, the objection cannot be well founded, since it is obvious, that no article on board of a ship can be more essential to her conservation, and successful navigation of the sea, than the vessels which contain the water for the sustenance of those who are to navigate her. In the case of *The Aurora* [supra], which was that of an hypothecation, all that was required of the creditor was, to prove that the supplies furnished were necessary to effectuate the objects of the voyage. And in the case of *North v. The Eagle* [supra], the material furnished, and for which a lien on the ship was claimed, and decreed by the court, was ship chandlery, which surely cannot be considered more an article of necessity for the use of the ship than the water casks.

2. I am lastly to consider, whether this claim can, under the circumstances which attend it, be maintained against surplus and remnants remaining in the registry of the court? It seems to me that, upon principles of equity, and upon sound reason, independent of the authority of adjudged cases, this claim is well founded. Whatever objections may oppose it when it is asserted against the ship by an original suit, or when it assumes the character of a privileged debt, they lose all their consequences, when they are interposed to prevent its being satisfied out of surplus money, under the power and control of the court. The jurisdiction of the admiralty, in personam, for materials furnished even to a domestic ship, which creates no lien, or in cases where a lien might exist, and be enforced in rem, if it had not been waived, is, I think, indisputable; and if this were such a suit, it would, in my opinion, be the duty of the court to retain the fund, or as much of it as might be necessary, to await the final decision; and this upon ordinary principles of equity. But the owners of this fund are foreigners, and could not be reached by such a suit. They have, however, money in court, being the surplus of the proceeds of the vessel, for the necessities of which the materials in question were furnished. Would it consist with the plain dictates of equity and good conscience to pay out this fund to the owners, and to leave this claimant to pursue his remedy in some foreign tribunal? I think it would not. What are the objections upon the ground of reason which are opposed to this claim? It was said by the counsel that these implied liens are detrimental to commerce whenever they are considered as adhering to the vessel after she has left the port where they were created, by depriving her of the means of raising money abroad for her necessities, from persons who, not having the means of ascertaining by what liens she might be encumbered, would be unwilling to advance money upon her security. I acknowledge the weight of this objection against any original suit in rem against the vessel, and against any claim of prefer-

ence over other creditors to her proceeds. But the reason on which the objection is founded loses all its weight when the decree is asserted against remnants and surplus.

I beg it to be here understood, that I mean to confine the above course of reasoning to the particular case under consideration. I have merely endeavoured to show that this claim is reasonable, and consonant with the dictates of equity and good conscience. But although it may be all this, it does not follow that it is to be sustained merely on this ground. For I shall endeavour to prove that this claim is supported by the authority of at least one adjudged case, and by the principles laid down in two others.

The first case I have met with applicable to this subject, is that of *The Favourite*, 2 C. Rob. Adm. 232, which came before the court upon the petition of the mate; who, by the capture of the master at sea, and his detention by the captors, became master ex necessitate; to be paid his wages as mate, and as master out of the proceeds of the ship which had come into the registry under a decree in favour of holders of bottomry bonds. The court allowed the claim for mate's wages for the whole voyage; but as to the additional wages claimed as due to him in his character of master, the court said, that he must go elsewhere to recover them. But Sir William Scott lays down the general doctrine thus—"As to the distinction taken between an original suit, and a permission to be paid out of the proceeds, upon inquiry, no instance has been found in which a master has been permitted to sue against proceeds in the registry, except in cases of mere remnants and surplus, and not even then, if there have been any adverse interests opposing it." The clear inference deducible from the above quotation is, that even a master, particularly where he becomes such by devolution on the loss of the former master, is permitted to sue against a surplus in the registry, if there be no adverse interests in third persons which oppose it. The suit was not sustained in that case, because it was against proceeds which were claimed by other persons to satisfy bottomry bonds, and not against a surplus which would go into the pocket of the former owners of the vessel. And even in the case of a master suing against proceeds for satisfaction of his wages, the judge states, that if the case of *Read v. Chapman*, 2 Strange, 937, had not stood in his way, he might have been disposed to entertain the suit.

The next case which I shall notice is that of *Gardner v. The New Jersey* [supra], which was a suit against a surplus by the master, for moneys expended during the voyage for the purchase of necessaries required in the service of the ship, and wages paid to mariners, and also for his wages as master. The physician filed a similar petition, to be paid his demand for his professional services rendered on board of the ship. The claim of the master for moneys advanced for the use of

the ship was allowed; but that for wages, and also the petition of the physician, were dismissed. In the opinion delivered by the learned judge, he states his rule to have been, that where a sum is claimed out of the surplus or remnant, it must appear to be either of itself, or in its origin, a lien on the ship, or other thing out of which the moneys were produced.

I understand the rule thus laid down, as embracing, not only claims founded upon continuing liens, but such as in their origin, create a lien, but are discharged, or afterwards waived, as by giving credit, negligence of the creditor in enforcing it, and the like. If cases of discharged liens were not within the view of the court, what could be meant by the expression "in its origin, a lien;" as contradistinguished from "existing liens?" The judge obviously intended to exclude all claims of a mere personal nature in their origin, because the rule was to be applied to the very case before him, which was that of a master suing for his wages, and of a physician for a remuneration for professional services, in neither of which cases was there an original lien. But those are, in my apprehension, very different cases from one where an implied lien is created by operation of law, but which the law, contrary to the intention of the party, considers as being impliedly waived where credit is given: I say contrary to the intention of the party, for it is inconceivable that the creditor would designedly waive the security which the law gives him against the ship. He may, by such a contract, be justly excluded as a privileged creditor, and denied the right of maintaining an original suit against the ship, because of his having, though unintentionally, waived his lien. But to deprive him of the benefit of being paid out of a surplus which no other creditor claims, would seem to be a harsh doctrine, applied to him against reason and without necessity. I take the liberty further to remark upon this case, that the rule there laid down, understood as I think it ought to be, is much more rigid than that which Sir William Scott seems to sanction in the case of *The Favourite*.

I now come to the case of *The John*, 3 C. Rob. Adm. 238, which I consider to be decisive in the present case. That was a claim for the price of certain arms and stores furnished to an American ship in the port of London, on a voyage from thence to Venice. After her return from Venice to London, she was libelled and sold for mariners' wages; and the creditor who had furnished those articles, applied to the court by petition, praying to be paid his demand out of the surplus remaining in the registry. The payment was decreed; and in the opinion delivered by the judge, he observes, that he had had all the cases upon the point looked up, and he finds that it has continued to be the practice of that court to allow material men to sue against remaining proceeds on the registry, though prohibitions had been obtained on original

suits instituted by them; and he refers particularly to a similar decision of the court as far back as the year 1763.

Here then we have it laid down as the ancient and well established doctrine of the admiralty of England, in the face of the common law courts, that material men, who have originally no lien on the ship, upon the principles of the common law, and who if they had, had waived it by a personal contract on credit, may maintain a suit against remaining proceeds in the registry, although they could not originate a suit against the ship. That was a stronger case than the present, because in this the contract, in its nature, would have created an original lien, if it had not been waived by the giving of credit. No case was cited at the bar, nor do I know of any, which contradicts, or in the slightest degree impairs the authority of the case of *The John* [supra]. The *Levi Dearborne* [Case No. 17,988] was the case of an original suit against a domestic ship for materials furnished to her. The case *Ex parte Lewis* [supra] was a suit by a wharfinger, not against a surplus, but against the whole proceeds, to be paid as a privileged creditor, in preference to the holder of a bottomry bond, whose demand, for aught that appears, left no remnant. The case of *Clinton v. The Hannah* [id. 2,898] was that of an original suit by a shipwright for his contract wages for building those vessels, and is therefore totally unlike the present.

After the fullest consideration which I have been able to give to this case, I am of opinion, that the claim of the petitioner, except for the two barrels of vinegar, which his counsel gives up, ought to be allowed. I shall therefore reverse the pro forma decree of the district court, and refer it to the clerk of this court to value the two casks of vinegar, unless the value is agreed by the parties or their counsel, and I shall then decree the balance to be paid out of the surplus remaining in the registry of the court.

ZANE'S WILL CASE. See Case No. 8,952.
ZANTZINGER (UNITED STATES v.). See Case No. 16,785.

Case No. 18,202.

ZANTZINGER v. WEIGHTMAN et al.

[2 Cranch, C. C. 478.]¹

Circuit Court, District of Columbia. May Term, 1824.

MALICIOUS HOLDING TO BAIL—ACTION FOR DAMAGES—NEW TRIAL—MALICE—WANT OF PROBABLE CAUSE—EVIDENCE—NE EXEAT BOND—EFFECT.

1. In an action for maliciously holding the plaintiff to bail upon a ne exeat, for a larger sum than was due, the court will grant a new trial, if the verdict for the plaintiff is against the weight of evidence.

2. In granting a new trial for the defendant, the court will make it a condition that the verdict shall stand until another shall be rendered.

3. The court will not permit evidence to be given of the private opinion of the witness as to the fraud or fairness of the plaintiff's conduct, derived from facts which appeared before the witness as an arbitrator.

4. The ex parte deposition of a deceased witness, not taken by consent, cannot be read in evidence.

5. In an action for maliciously holding the plaintiff to bail upon a ne exeat, the plaintiff may give evidence that he has suffered in the public estimation in consequence of the process of ne exeat, but not in consequence of reports circulated by the defendant, although such reports may be given in evidence by the plaintiff to show malice in the defendant; nor can he give evidence of special damage not averred in the declaration.

6. The plaintiff, in such an action, must show both malice and the want of probable cause, and that the defendants knew that they had not probable cause.

7. The bill and affidavit and the order of the judge granting the ne exeat, are prima facie evidence of probable cause.

8. A ne exeat bond only binds the sureties to the extent of the final decree of the court, and, if the defendant continually remains in the district, according to the condition of the bond, they will be discharged altogether.

9. The declaration, in such an action, must aver the want of probable cause, and for want of such averment the judgment will be arrested.

This was an action upon the case for maliciously holding the plaintiff [W. P. Zantzinger] to bail, upon a ne exeat, for a much larger sum than was due.

The declaration states that the defendants [R. C. Weightman and others], "maliciously and injuriously" intending to cause the plaintiff "to be unjustly, and without any probable cause, arrested and imprisoned for a large sum of money," and to cause him, "without any just or reasonable cause, to expend divers large sums of money on that occasion," "did falsely, unjustly, and maliciously file a bill of complaint," &c., "whereupon they prayed a certain process called a 'ne exeat,' and an account; and although the plaintiff has never been indebted to the defendants at any time in a larger sum than \$3,531.75, yet the defendants, by certain false statements in their said bill, and in the affidavit accompanying it, procured the aforesaid process called a 'ne exeat' to be issued, and an indorsement thereon from one of the judges of the said court requiring the plaintiff to give bond in the sum of \$16,000, conditioned," &c., by reason of which said process, so indorsed, he was, "by the unjust and malicious procurement of the defendants arrested and imprisoned," &c., whereas, in truth and in fact, the plaintiff was not at the time of issuing the said process, and at the time of the imprisonment, &c., indebted to the defendants in more than \$3,531.75, which fact has been so found by arbitrators, &c.; "nor was his conduct such as to justify or require the

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

extraordinary process of ne exeat; by reason whereof," &c.

At November term, 1821, the jury found a verdict for the plaintiff, with \$2,000 damages; but THE COURT (THELUSTON, Circuit Judge, not giving any opinion), upon the defendants' motion granted a new trial, upon payment of costs, and upon condition that this verdict should stand until another should be rendered, agreeably to the practice in the English courts; this court being of opinion that the verdict was against the weight of the evidence.

The cause came on for trial again at November term, 1822, when THE COURT (THELUSTON, Circuit Judge, absent) refused to permit a witness (Mr. Davidson) to state his opinion as to the fraud or fairness of the plaintiff's conduct, derived from the facts which appeared before him, as an arbitrator.

THE COURT also refused to permit H. C. Wilson's deposition to be read (he having died since the last trial), not being satisfied that it was taken by consent; and knowing that it was objected to, at the last trial, on that ground, and that in consequence of that objection Mr. Wilson was then brought into court.

The plaintiff's counsel asked a witness (Mr. Munroe,) whether the character of the plaintiff had suffered in the public estimation in consequence of the process of ne exeat, and the proceedings thereon.

THE COURT permitted the question to be put; but did not permit the witness to be asked whether he had heard injurious reports of the plaintiff's conduct from the defendants, and whether the plaintiff did not suffer in reputation in consequence of such reports; but said that the plaintiff, in order to prove malice, might give evidence of the declarations of the defendants.

THE COURT also refused to permit the plaintiff to give evidence of special damage resulting from the reports in circulation, in consequence of the ne exeat (that is, that the plaintiff was nominated to an office by the president, and that the character of the plaintiff was injured in the opinion of the senators by those reports), the same not having been specially averred in the declaration.

THE COURT gave the same instructions to the jury which they had given at the former trial; which were, in substance, that the plaintiff must show both malice, and the want of probable cause. That the award of the arbitrators is not proof of the want of probable cause. That there must have been, not only the want of probable cause, but the defendants must have known that there was not probable cause. That the bill, and affidavit, and order of the judge, are prima facie evidence of probable cause.

THE COURT, also, by the assent of both parties, instructed the jury that the ne exeat bond would only have bound the sureties to the extent of the final decree of the court, and that if the defendant should have re-

mained in the district, according to the condition of the bond, the sureties would have been discharged altogether.

The jury again found a verdict for the plaintiff, and \$2,000 damages.

Mr. Taylor and Mr. Jones, for defendants, moved in arrest of judgment: (1) Because the plaintiff has not alleged, in his declaration, that the writ of ne exeat was, in fact, sued out without probable cause. (2) Because the plaintiff's own declaration shows that there was sufficient probable cause for suing out the said writ. (3) Because the plaintiff does not show by his declaration that the proceedings on the ne exeat were at an end.

First. There is no direct averment, in the declaration, of the want of probable cause. The only part of the declaration in which it is mentioned is in the indictment, where it is said that the defendants, "intending to cause the plaintiff to be unjustly, and without probable cause, to be arrested," &c., "did, falsely, unjustly, and maliciously, file a bill, &c., and procure a ne exeat, &c., which is not an averment that the defendants filed the bill and procured the ne exeat without probable cause." *Johnstone v. Sutton*, 1 Term R. 544, 784; *Reynolds v. Kennedy*, 1 Wils. 232. The inducement could not be traversed.

Second. The declaration shows good cause of arrest to the amount of \$3,531.75; and that there is no averment of the want of probable cause as to the excess of bail required. "Falsely, unjustly, and maliciously," are not a sufficient substitute for an averment of the want of probable cause. *Ellis v. Thilman*, 3 Call, 3; *Young v. Gregory*, Id. 446; *Kirtley v. Deck*, 2 Munf. 10.

Third. The third objection (that is, that the plaintiff does not show in his declaration, that proceedings upon the ne exeat were at an end,) is fatal upon general demurrer, and equally so in arrest of judgment.

Mr. Jones, on the same side. When the declaration admits a probable cause of holding to bail to a certain amount, and the gravamen is the holding to excessive bail, the excess must be averred to be without probable cause. *Lilwell v. Smallman*, Selw. N. P. 946, 1056; *Savil v. Roberts*, 1 Salk. 13; s. c. 1 Ld. Raym. 374; *Farmer v. Darling*, 4 Burrows, 1971. Malice cannot be inferred, but must be averred and expressly proved. *Gibson v. Chaters*, 2 Bos. & P. 129; *Purcell v. Macnamara*, 9 East, 361; *Sinclair v. Eldred*, 4 Taunt. 7. Upon the third objection, he cited *Fisher v. Bristow*, 1 Doug. 215; *Morgan v. Hughes*, 2 Term R. 225.

Mr. Hewitt, contra. The recital may be carried into the substantial averment; as the county named in the margin will supply the want of naming it in the averment. The gist of this action is the procuring an extraordinary process of the court upon false suggestions or statements. As to the third objection, he referred to *Young v. Greg-*

ory, 3 Call, 446. But the declaration does show that proceedings upon the *ne exeat* were at an end, by averring that the award of the arbitrators was affirmed by the final decree of the court. In the cases cited there was no such argumentative averment of the want of probable cause as there is in this. The averment that the plaintiff's conduct was not such as to justify or require the extraordinary process of *ne exeat* is tantamount to an averment of the want of probable cause. For the general definition of an action for a malicious prosecution, he referred to *Esp. N. P.*, and *Daw v. Swaine*, 1 Sid. 424; and, as to what defects are cured by verdict, he referred to 2 Saund. 228; *Jackson v. Burleigh*, 3 Esp. 34; the statute of jeofails of Virginia (pages 111, 112); and the judiciary act of the United States of 1789, § 32 (1 Stat. 73).

Mr. Swann, on the same side. "Without probable cause" are not technical words, which cannot be supplied by equivalent expressions. *Young v. Gregory*, 3 Call, 446. "Want of probable cause" is necessary in a suit for vexatious criminal prosecution, but not for a vexatious civil suit. If the whole declaration be taken together, the inference is irresistible that the *ne exeat* was procured, and the excessive bail required, without probable cause.

Mr. Hewitt cited Read's Pleader's Assistant (page 30), which is the precedent he followed, and which does not aver the want of probable cause. He also cited 1 Chit. 230, 292, 308, as to the distinction between inducement and averment.

THE COURT (THRUSTON, Circuit Judge, absent), having fully considered the case, arrested the judgment, because there was no averment of any act done by the defendants without probable cause; and because, by the plaintiff's own showing, there was probable cause to a certain extent.

Case No. 18,203.

The ZARALLA.

[Blatchf. Pr. Cas. 173.]¹

District Court, S. D. New York. May 30, 1862.

CONDEMNATION OF PRIZE—EVIDENCE—SPOILIATION OF PAPERS—DECREE BY DEFAULT.

1. The vessel was destroyed by her captors because unfit to be sent in for adjudication. The cargo was sent in. *Held*, that the court had judicial cognizance of the capture of the vessel without having her within its territorial jurisdiction.

2. The crew of the vessel were, at their request, put on shore by the captors, and no person on board of her at her capture was sent in for examination. On special leave of the court, witnesses from the capturing vessel were examined.

3. The rule that the testimony for the condemnation of the prize must be obtained direct-

ly from documents or witnesses found on board of her at the time of her seizure is always adhered to, unless satisfactory reasons are shown for its non-observance.

4. The court, during the present war, always regards, by force of the standing prize rules, a decree by default, regularly obtained, as equivalent to an admission on the record of the offence charged in the libel.

5. Spoliation of papers not explained by satisfactory proof.

6. Vessel and cargo condemned as enemy property, and for a violation of the blockade.

In admiralty.

BETTS, District Judge. This vessel and cargo were captured, September 30, 1861, by the United States steamer Huntsville, in Atchafalaya Bay, an outlet of Berwick Bay, Louisiana. The vessel, valued at \$1,000, being adjudged by the United States naval officer in command at the capture, unfit to be sent to a Northern port for adjudication, was destroyed by his orders, and the cargo was transmitted to this port, and here arrested by due process of law in this suit. None of the crew of the prize were produced for examination in preparatorio at this port. They were landed on the coast at their request by the captors, and immediately departed from the custody of the captors. On motion of the United States attorney, an order was granted by the court to take the examination of witnesses present at the capture, and who were produced from the capturing vessel. The supposed specialties in the proceedings in this case are, that the vessel prosecuted as prize was not brought into port, nor were any individuals of her crew produced to be examined as witnesses.

This court has judicial cognizance of the capture, without at the time having the prize within its territorial jurisdiction, and without its being brought there during the pendency of the suit. *Jecker v. Montgomery*, 13 How. [54 U. S.] 498, 18 How. [59 U. S.] 110. Accordingly, no more irregularity or imperfection exists in acting upon the appropriation of the prize by the government, either in destroying it or converting it directly to public use, than if it had been placed bodily under the jurisdiction of the court by process issued against it.

The other informality suggested, of not having testimony for the condemnation of the prize, obtained directly from documents or witnesses found on board of the vessel at the time of her seizure, is a departure from a rule of practice which the prize court always expects will be honestly adhered to, unless satisfactory reasons are shown for its non-observance. *The Anna*, 5 C. Rob. Adm. 373. It is clear that the rule cannot be absolute and peremptory. The crew of the prize may all of them be killed or escape in the act of capture, or the ship's papers may be destroyed or effectually concealed, in a flagrant attempt to violate a blockade by force, or to commit some other offence subjecting the

¹ [Reported by Samuel Blatchford, Esq.]

prize to forfeiture by the law of nations. In like instances the court would be governed by the palpable merits of the case, and not sacrifice clear right to formalities of practice. In the matter of Proceeds of Prizes of War [Case No. 11,440].

The court, during the present war, always regards, by force of the standing prize rules, a decree by default, regularly obtained, as equivalent to an admission, on the record, of the offence charged in the libel. The vessel here was apprehended in the effort to evade a blockade, the existence of which the master knew, as he admitted to the witness, and which he had before violated. The papers found on the vessel show that the vessel and cargo belong to an enemy port; and the master was seen to tear up and throw overboard papers as the capturing vessel approached the prize to seize her. No appearance has been made in the case, nor has any claim been filed against the libel, and the marshal returned to the monition that the prize had been attached; and that due notice has been given to all persons claiming the same. The facts of the destruction or spoliation of papers on board, not explained by satisfactory proof, and also the enemy property of the prize, supply legal causes for its condemnation and forfeiture. *Jecker v. Montgomery*, 18 How. [59 U. S.] 110; *Wheat. Mar. Capt.* 101; *The Pizarro*, 2 Wheat. [15 U. S.] 227; *The Adriana*, 1 C. Rob. Adm. 313; *The Two Brothers*, Id. 131. Judgment ordered, condemning the vessel and cargo as enemy property, and also for a violation of the blockade of the port from which the vessel was attempting to escape.

Case No. 18,204.

ZAREGA'S CASE.

[1 N. Y. Leg. Obs. 40, note; 4 Law Rep. 480.]

District Court, S. D. New York. Feb., 1842.

BANKRUPTCY—DISCHARGE—FOREIGN CREDITORS.

[The discharge of a bankrupt in this country bars actions brought against him here by foreign creditors, though it might not be recognized as a bar against foreign creditors in courts of their own country.]

In the case of Augustus Zarega, heard before the United States district court of New York, one of the questions submitted to the court for its decision was whether the certificate of the bankrupt, under the laws of this country, would discharge him from the debts of those creditors who reside abroad? It appeared that several of the petitioner's creditors resided in Antwerp, and some in Rio Janeiro, and it was submitted by the counsel for the creditors that, if the petitioner obtained his certificate, it would be inoperative as to those creditors whose debts were not contracted in this country.

Mr. Joachimssen, for opposing creditor.
J. H. Patten, for petitioner.

BETTS, District Judge. The question is whether the discharge of a bankrupt, under the law of this country, would operate as a bar to the demands of foreign creditors, it being asserted that the United States have no power to destroy a contract entered into without their jurisdiction, and the contract is to be left to the jurisdiction of that country wherein it originated. It is not important, in disposing of this question, to enter into a discussion of the essence of contracts, or their obligations, nor to inquire into the effect of a discharge in this country under the bankrupt law, if set up in a foreign country as a bar to the claims of creditors. In England, as well as in France and Holland, and perhaps throughout Europe generally, the discharge of a bankrupt under the laws of either country operates in all other places whatsoever. So a person having been decreed a bankrupt in France may avail himself of the privileges it confers on him in any part of England, and plead it with the same effect as in his own country. So in England, where they set up that claim in behalf of their own bankrupts in foreign countries, they allow the same privilege to others. But in this country we do not recognize such a doctrine. A discharge as a bankrupt in a foreign country is not deemed here a bar to any action that may be brought. The discharge is considered as local, and, although an assignee of an individual declared a bankrupt in a foreign country would be allowed to sue as such assignee, yet our courts would not recognize the discharge as a bar to debts contracted in this country, or due to citizens of this country. Here the law operates as a bar to any action brought in any of our courts.

It is objected that congress is not competent to pass a law which should destroy debts contracted abroad. The discharge operates as a bar to any suit brought in our courts, and, while the act extinguishes the debt, it declares in the same section that it may be pleaded in bar of any action brought in any court within our jurisdiction.

Taking the questions on the broad ground that the law is not competent to discharge debts contracted abroad, I see no ground for the argument urged. If the petitioner had come here with the intention of availing himself of this law to extinguish debts contracted in another country, that might defeat the proceedings. But if he resides here, and the debts were contracted abroad, I see nothing that should exempt him from the full effects of a discharge given to a bankrupt. Nor is it important to consider how far the discharge here might avail him if set up abroad. His creditors abroad might perhaps proceed against him there, if he should come among them; we have nothing to do with that. The comity of nations recognizes the unity of the bankrupt law. Although this is applicable, as a general rule,

in other countries, we do not recognize it as exonerating the person of a foreign bankrupt from arrest, or his property from seizure. Under these views, I see no ground for interrupting the proceedings. The law operates as a bar to all creditors here, and may be pleaded as a bar to any suit brought against him here.

Case No. 18,205.

The ZEALAND.

[1 Lowell, L.]¹

District Court, D. Massachusetts. May, 1865.

SALVAGE OF DERELICT.

A derelict was found at sea and towed for two days by a fishing schooner, with some difficulty and injury to the schooner, into a port of safety, and was libelled for salvage, and remained unclaimed for nearly a year, and there was evidence that the owner was informed of the proceedings and refused to appear, and the proceeds of sale were only \$206. The whole net proceeds were decreed to the salvors.

[Cited in *The Carl Schurz*, Case No. 2,414; *The Cairnsmore*, 20 Fed. 524.]

The fishing schooner *Pescador*, of Gloucester, of ninety-one tons burden, and having a crew of nine men, all told, fell in with this derelict near the edge of George's Banks on the 27th of March, 1864, and undertook to tow her to Gloucester, a distance of about one hundred and eighty miles, abandoning her own voyage. The wind and weather were not favorable, and on the second day, in trying to make the harbor, the *Pescador* broke her main-boom. The libel was pending nearly a year, and no claimant appearing, was heard *ex parte*. Besides the facts above recited, it was proved that the proceeds of sale, after deducting the marshal's costs, were \$206; and that the owner of the derelict was known, and had been informed of the proceedings, and did not choose to appear.

C. P. Thompson, for libellants.

We ask for as much as the court ever allows. There is a case in which five-sixths of the value was awarded.

LOWELL, District Judge. There is authority for giving the whole net proceeds in a case of this peculiar character. The *Rutland Derelict*, 3 Ir. Jur. 283; *The Castletown*, 5 Ir. Jur. 379. It is not only in the Irish courts that we find a precedent for decreeing the whole property as a reward for saving the remainder. It is has been done in England (*The William Hamilton*, 3 Hagg. Adm. 168, and note); and that case is in fact the leading authority on this point, and is cited without disapproval by many learned authors. I have not met with an American case which goes so far, but neither have I seen one in

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

which there was occasion to rule upon the matter. In England, if no claimant appeared, the question would be between the salvors and the crown; but here there is evidence of a distinct refusal by the owner to claim. If he had appeared, I should not feel at liberty to make the order; yet as the salvors might well ask for remuneration for the actual damage suffered by their schooner, in the name of expenses, there would be very little left to divide; and this, probably, was the motive operating with the owner in refusing to claim. His abandonment must be held to enure to the benefit of the libellants.

Decree that the money in the registry, after payment of costs, be transferred to the libellants for their salvage and expenses.

ZEBA, The (*HOPKINS v.*). See Case No. 6,694.

Case No. 18,206.

ZEIBER v. HILL.

[1 Sawy. 268; 1 8 N. B. R. 239.]

District Court, D. Oregon. Aug. 15, 1870.

BANKRUPTCY—DISSOLUTION OF ATTACHMENT—OFFICER'S FEES—DUTY OF REGISTER—CUSTODY OF BANKRUPT'S PROPERTY—DISSOLUTION OF ATTACHMENT—KEEPER'S FEES.

1. An adjudication in bankruptcy relates to the filing of the petition, and works a dissolution of an attachment before then levied upon the bankrupt's goods from that date.

2. An officer must look to the party, or his attorney, who employed him, for his fees; he has no claim upon the adverse party.

3. Where a debtor is adjudged a bankrupt upon his own petition, it is the duty of the register to take his property into his custody by the intervention of an agent, or other proper means.

4. Where a debtor was adjudged a bankrupt upon his own petition, and prior to the filing thereof a flock of sheep belonging to him had been taken on an attachment and kept by the officer until delivered to the assignee: *Held*, that such officer is entitled to a compensation from the assignee for keeping such sheep, until claimed and received by the assignee.

[This was an action by Albert Zeiber against Andrew Hill, assignee of Thomas Martin, to recover the balance of an amount alleged to be due him for keeping defendant's sheep.]

E. C. Bronaugh, for plaintiff.
Charles A. Ball, for defendant.

DEADY, District Judge. On July 12, 1870, the parties to the above entitled cause filed a statement of facts upon which the controversy between them depends, and submitted the same to the determination of this court without action. Code Or. 202.

On August 8, the case was argued by counsel for plaintiff, and submitted without argument for defendant. From the statement

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

it appears that on April 4, 1870, one Croft commenced an action against Thomas Martin, aforesaid in the county court for Multnomah county. On the same day an attachment issued in the action and was received by the plaintiff, then sheriff of the county aforesaid, and levied among other things upon 149 head of sheep and 550 pounds of meat. On April 5, plaintiff sold the meat as perishable property for \$24.94, and put the sheep into the custody of a keeper, where they remained twenty-six days, when they were delivered to the defendant as assignee as aforesaid.

On April 5, said Martin filed his petition in this court to be adjudged a bankrupt, and on April 8 was so adjudged by the register. On April 15, Croft obtained judgment in the county court for \$405, and on April 19 execution issued thereon against the property of Martin directed to plaintiff. On April 28, plaintiff was restrained by injunction from the court from selling Martin's property on execution, and thereupon plaintiff delivered said property to defendant as aforesaid, and returned the execution unsatisfied.

That the plaintiff paid said keeper for keeping said sheep during the period aforesaid the sum of \$2 per day, or \$52 in all, which was a reasonable reward for his services; and that the said plaintiff has not received payment for said sum so expended, or any part thereof, except said sum of \$24.94, which he still retains.

The adjudication in bankruptcy related back to the filing of the petition of April 5, and dissolved the attachment from that day. An officer must look to the party, or his attorney who employs him, for his fees. He has no claim upon the adverse party for them. Croft obtained nothing by his judgment in the county court, and he must pay the fees earned by the officers at his instance, without having any recourse upon Martin or his property. Upon Martin's being adjudged a bankrupt, the register should have taken his property into his custody by the intervention of an agent and other proper means, and kept it for the assignee when appointed. However, at that time there appears to have been some doubt as to his power to do this, and it was not done. The consequence was, the sheep remained in the plaintiff's custody, and he incurred this expense in keeping them.

I think upon general principles that the plaintiff is entitled to a reasonable reward for keeping these sheep. For this purpose he may be considered as a bailee, and entitled to compensation as any other agister or feeder of cattle. The cases *In re Housberger* [Case No. 6,734], and *In re Williams* [Id. 17,705], sustain this conclusion, while the first case goes even farther, and probably too far. I have found no case to the contrary. The plaintiff is entitled to judgment on the statement for the sum expended, after deducting the amount of money in his hands belonging to the estate, to wit, \$27.06.

ZEIGLER v. MOBILE & O. R. CO. See Cases Nos. 4,137-4,139.

Case No. 18,207.

ZELLWEGER v. The ROBERT COOPER.

[N. Y. Times, Dec. 2, 1852.]

District Court, S. D. New York. 1852.

SHIPPING — RIGHTS OF PASSENGERS — DELAY IN SAILING.

[Plaintiff engaged passage in a ship from New York to California, paid his passage money, and obtained a receipt therefor. Becoming dissatisfied at the delay in sailing, he complained to the ship's agent, who thereupon added to the receipt the words "Ship to sail 27th October." Before that day plaintiff demanded his passage money back, which was refused, but half of it was tendered to him. This he refused, and on Nov. 7th the ship sailed without him. It was claimed that the delay beyond Oct. 27th was caused solely by storms. *Held*, that as plaintiff, before that date, had determined not to take passage in the ship, he had no cause of complaint that she did not sail on that day, and that under the circumstances he should have a decree for one-half the money, leaving the rest as indemnity to the ship for expenses in preparation for carrying him on the voyage.]

JUDSON, District Judge. This was a suit to recover back money paid for a passage to San Francisco. On the 20th of September, 1850, the libellant [Charles Zellweger] applied to Edmund Kimball, Jr., ship agent, for a passage from New York to San Francisco, in that ship, and paid for his passage money \$250, for which the agent gave his receipt in the following words: "Received, New York, September 26, 1850, from Mr. Charles Zellweger, \$250, for passage of himself to San Francisco, California, in the cabin of ship Robert Cooper. E. Kimball, Jr., Agent for Ship." From this day the ship was engaged in taking in her freight, and the libellant was in waiting. On the 21st or 22d of October, 1850, the libellant becoming uneasy by the ship's delay, called on Kimball, and complained of the delay, and after some conversation between the parties, it was arranged that the ship agent should write at the foot of the receipt these words, "The ship to sail 27th October;" and with this remonstrance added to it the receipt was returned to the libellant. It is very evident, therefore, that by this memorandum all previous arrangements as to the time of the sailing of the ship and the previous delay, were waived by the libellant, and both parties expressed their satisfaction in the change of time. Four or five days after the memorandum was added to the receipt, the libellant, accompanied by a witness, called again on the ship's agent, and demanded that the passage money be refunded, in order that he might go over the isthmus. Kimball refused to refund the money, and notified the libellant that he might live on board at the expense of the ship, or board on shore until she sailed. After this interview, Kimball by direction of the

master, offered to pay back half the passage money, which was refused, and this suit is brought to recover the whole.

The ship sailed on the 7th of November without the libellant, and the owners retained the money, and claim that, by law and custom of the city, the libellant has forfeited his right to its return. It was testified, that between the 26th October, and the 7th November, the weather was stormy, and unsafe for vessels to proceed to sea upon a long voyage. The vessel was therefore excused from going to sea on that account, and her remaining in port until the 7th of November was no violation of the stipulation contained in the memorandum. But be that as it may, the libellant has no cause of complaint that the ship did not sail on the 27th October, having determined before that day, not to take passage in her, relying upon his right to recover back his money. Under these circumstances, the libellant may have a decree for \$125, without interest or costs; the other half of the money to remain in the hands of the ship owners, as an idemnity for the money expended on their part to convey the libellant in their ship to San Francisco. No costs to be taxed to either party.

Case No. 18,208.

The ZENOBIA.

[Abb. Adm. 48.]¹

District Court, S. D. New York. July, 1847.

PROCEEDINGS IN REM AND IN PERSONAM—JOINER IN ONE ACTION—ELECTION OF REMEDIES—CONTRACT OF AFFREIGHTMENT—BREACH BY VESSEL.

1. Where a libel is filed for a cause of action upon which both vessel and master may be together liable, the court will not make an order that the libellant elect between the remedy in rem and that in personam, nor that he submit to have either the arrest of the respondent or the attachment against the vessel vacated.

2. In respect to the liability of the ship for contracts made with the master for transportation for hire in the regular course of the vessel's occupation, the law makes no distinction between the transportation of passengers and of merchandise.

[Cited in *The Director*, 26 Fed. 709.]

3. Where an agreement is entered into between the master of a vessel and a passenger, for the transportation of the latter, with his baggage, and passage-money is paid in advance, and the agreement is unperformed through the fault of the master, the ship is liable, in specie, to refund the advance passage-money, and to pay damages for any failure to deliver the goods shipped.

[Cited in *The Director*, 26 Fed. 709.]

4. There is no abstract incompatibility between proceedings in rem and proceedings in personam, which forbids them to be joined in one action where such joinder is calculated to advance the ends of substantial justice.

[Cited in *The Monte A.*, 12 Fed. 337; *The Director*, 26 Fed. 709; *The Hudson*, 15 Fed. 176; *The J. F. Warner*, 22 Fed. 344; *Joice v. Canal Boats*, 32 Fed. 554. Cited in brief in *Heney v. The Josie*, 59 Fed. 732.]

5. Where both the vessel and the master or owner are conjointly liable upon a contract of affreightment, the personal remedy, and the remedy against the vessel, may be sought in one and the same action.

[Cited in *The Director*, 26 Fed. 711; *The Baracoa*, 44 Fed. 103.]

This was a libel filed by Henry J. Carr against the bark *Zenobia*, in rem, and also in personam against her master, A. R. Cronstadt, to recover damages for the non-performance of a contract of affreightment. The libel stated in substance that the libellant, in November, 1847, at Whampoa, China, engaged passage for himself and family, with their personal baggage, and certain merchandise or freight, on board the *Zenobia*, for the United States, and thereupon shipped sundry cases of merchandise, among which was a chest of drawers containing twenty-five hundred dollars in specie. The agreement was made with Cronstadt, the master of the bark, to whom libellant paid \$150 in advance, being one half the passage-money stipulated. November 28th was the appointed day of sailing, but the vessel sailed two days previous to that time, unknown to libellant, leaving him and his family behind. The libellant followed the *Zenobia* to this country, and arrived, as it happened, a few days before her. On the arrival of the *Zenobia* he went on board and claimed the property shipped by him. The master, however, refused to deliver it, or to recognize the libellant as its owner, and moreover refused to make the proper entries upon the ship's manifest, which were necessary to enable the libellant to obtain the property from the custom-house. For a fuller statement of the facts, reference is made to the case upon the final hearing, December, 1847, which is reported, post, in its order of time. The libel, as amended under the direction of the court upon this hearing, and the substance of the answer, are there given. Upon this libel, process was issued against the master, upon which he was arrested and held to bail; and also against the bark, for which the usual stipulations were given on the part of the owners. The master then moved in the cause, "that the libellant be required to elect whether he would proceed in rem against the vessel, or in personam against the master; and that either the arrest of the master or the attachment against the vessel should be vacated."

Francis B. Cutting, in support of the exceptions.

Abner Benedict, opposed.

BETTS, District Judge. The libel being filed for a double cause of action on the shipping contract and for its tortious violation by the master, for which the ship and master may be unitedly liable, the case is not one in which the court will compel the libellant to elect which branch of his remedy he will pursue. He may maintain the suit in personam against the master for wrongfully

¹ [Reported by Abbott Brothers.]

abandoning the libellant and his family in China, and for abstracting or withholding, in the exercise of his authority over the ship and her lading, the specie and baggage shipped on board, and may therein seek damages against the master beyond the liability of the ship. According to the practice in this district, he may also pursue his claim in a joint action against the ship in rem and the master personally, upon the contract of affreightment, and for the transportation of himself and family (Betts, Adm. Prac. 20); provided he establishes a case within the jurisdiction of the court.

The motion to dismiss the suit, because of incongruity or multifariousness in the demands, is therefore denied.

The owner of the Zenobia, David Carnigie, intervened and filed exceptions to the libel for insufficiency. The objection raised by the first exception was, that the court had no jurisdiction to enforce such a claim as was preferred in the libel against the vessel and owner. The second and third exceptions raised the objection, that at any rate the claim was not one which could be enforced both against the vessel in rem, and against the master in personam, in the same libel. The remaining exceptions related only to the form of the libel, as tested by the rules promulgated by the supreme court, and raised no questions of importance. These exceptions, save one only, were allowed, and the libel ordered to be amended in the particulars to which they related. The opinion of the court relates almost wholly to the questions raised upon the liability of the vessel for the cause of action shown, and upon the propriety of uniting the claim against the vessel and the personal claim against the master in one action.

BETTS, District Judge. The allegations of the libel are deficient in perspicuity and certainty; but I think a reasonable construction of the pleading as a whole, may regard it in effect to represent the master as having wilfully withheld the property shipped by the libellant on board the vessel, and as having put impediments in the libellant's way on ship-board and at the custom-house, and prevented him from receiving its delivery at this port, and as refusing to repay the passage-money advanced to him, or to recognize the libellant as having any right to or interest in the baggage and other goods shipped by him on the vessel.

The first legal point raised against the action is, that the ship is not liable for the undertaking of the master, to bring the libellant and family to this country as passengers. It is unnecessary to consider whether the vessel would be chargeable with a lien upon a naked agreement for the carriage of libellant, for in this case a part of the passage-money was actually paid in advance.

The agreement was plainly within the au-

thority of the master, and the receipt of the money was for the benefit of the ship-owner, and was so much freight paid. In respect to the liability of the ship for contracts of transportation made with the master, the law makes no distinction between passengers and merchandise, each being alike carried for hire, and in the regular course of the vessel's occupation in trade and commerce. *Wolf v. Summers*, 2 Camp. 631; *Mulloy v. Backer*, 5 East, 316; *Howland v. The Lavinia* [Case No. 6,797]; *Griggs v. Austin*, 3 Pick. 20.

There is no reasonable ground for doubt, that if the libellant had paid in advance the freight of his goods, and the master had designedly left them behind in China, the vessel would be answerable to the amount of freight so received. This would be both because the vessel is bound in specie for the fulfilment of the contract of the master made within the scope of his powers (3 Kent, Comm. 218, note; *The Volunteer* [Case No. 16,991]; *The Phebe* [Id. 11,064]; *Curt. Merch. Seam.* 169), and because the vessel is liable for the repayment of freight not earned by the wilful failure to perform the contract of affreightment (*Mashiter v. Buller*, 1 Camp. 84; *Pitman v. Hooper* [Case No. 11,185]; *Watson v. Duykinck*, 3 Johns. 335; *Griggs v. Austin*, 3 Pick. 20).

It is equally clear, that the neglect or refusal of the master, without justifiable cause, to deliver the goods at the port of destination, renders the owner, and consequently the ship, responsible upon the contract of affreightment. *Abb. Shipp.* 156, 275; *Curt. Merch. Seam.* 198.

These principles, so well established in their application to contracts for the transportation of merchandise, are applicable also to agreements for the carrying of passengers. The ship is therefore liable in specie to refund the passage-money advanced by the libellant, and to pay damages for the non-delivery of the goods shipped by him.

The libellant is entitled to the responsibility of the ship to cover these liabilities of the master, and is not obliged to rely solely upon the personal responsibility of the master or owners. Had application been made to the court to reduce the amount of bonds exacted from the ship, the court would have taken care that the owners were not charged with an unreasonable amount of security, and would have discharged the attachment upon stipulations sufficient to cover the probable recovery and costs. But the exception taken by the claimants to the right of libellant to maintain upon the facts charged an action in rem, cannot be sustained.

The next general point made by the exceptions, is, that this suit cannot be prosecuted conjointly in rem and in personam. This objection is supported by the language of Judge Story, in *Citizens' Bank v. Nantucket Steamboat Co.* [Case No. 2,730]. In that case, a libel in rem against a steamboat, and in personam, against her master and owners, was

filed to recover the value of bank-bills entrusted to the master for transportation, and lost on the passage. The judge remarked, that he knew of no principle or authority in the general jurisprudence of the courts of admiralty which would justify such a joinder of proceedings, so very different in their nature and character and decretal effect. "On the contrary," he says, "in this court, every practice of this sort has been constantly discountenanced as irregular and improper." And again he says, "In cases of collision, the injured party may proceed in rem or in personam, or successively in each way, until he has full satisfaction. But I do not understand how the proceedings can be blended in the libel."

The objection thus suggested to the joinder of the two-remedies was evidently placed upon a supposed incompatibility between the two modes of proceeding, rendering them improper to be combined in one action. It is not because, in the case before him, there was not both a personal remedy and a remedy against the ship, that the learned judge disapproves the practice referred to, but it is upon the ground that the proceeding in personam and the proceeding in rem are "so very different in their nature and character and decretal effect." It is obvious therefore, that the objection, if sound, applies in all cases, irrespective of the nature of the cause of action.

Conceding the view taken by the learned judge to have been a correct exposition of the practice as established in October, 1841, the date of the decision above cited, it must be regarded as untenable since the adoption of the rules of the supreme court, framed pursuant to the act of congress of August 23, 1842 (5 Stat. 518, c. 188, § 6). Those rules make specific provision in respect to the mode of pursuing remedies by libellants in several classes of cases. They authorize libellants in suits for mariners' wages, for pilotage, or for damages by collision, to proceed against the ship, and master, or owner, or against the ship alone, or against the master or owner alone, in personam. Rules 13, 14, 15. In cases of maritime hypothecation by the master, or for salvage, the libellant must elect between the remedy in rem and a personal suit. Rules 17, 19. And in suits for assault and battery he is restricted to a suit in personam alone. Clearly, therefore, it can be no longer contended that a joinder of the two remedies in one action is impracticable, or inconsistent with the theory upon which the court proceeds in awarding relief; or that there is any incompatibility in principle between the two forms of proceeding, either in their nature, character, or decretal effect, which forbids their union in one action, in those cases in which such joinder is calculated to advance the interests of substantial justice.

It is true that the case of a suit for damages for non-fulfilment of a contract of

affreightment, or one brought to recover back freight paid in advance but not earned, is unprovided for by either of the supreme court rules. Those rules do not contain any specific authority to unite the two remedies in claims of that character. They do not, however, forbid the joinder. The consequence is, that such cases fall within the scope of rule 46, which prescribes that in all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of those courts respectively, in such manner as they shall deem most expedient for the administration of justice. The practice in respect to the question under consideration is therefore left to be regulated at the discretion of the courts in the various districts.

I perceive no principle demanding a distinction in respect to joining in the same action a personal remedy with one against the ship, between an action founded upon a contract of affreightment, express or implied, and one brought to recover wages or pilotage, or for damages by collision. The considerations of convenience which dictated the permission given by the rules of the supreme court, to combine the actions in the last mentioned cases, seem to apply with equal force to the case now before the court.

The practice in this district, on the instance side of the court, has, moreover, always been different, it is believed, from that pursued in the Massachusetts district, as stated by Judge Story in the case above cited. The party directly liable upon the claim chargeable upon the vessel may, in this court be joined with the ship in one suit, and a decree may be prayed and taken against him in uno flatu with that against the vessel. Or, for want of a prayer to that effect at the initiation of the suit, the libel may be amended by inserting it, even after decree in rem rendered, if that decree proves fruitless to the libellant, and if the party sought to be personally charged has appeared and contested the suit. The expense and delay of two or three actions requiring to be disposed of upon identically the same pleadings and proofs, are thus saved the creditors, and the association of remedies promotes the simplicity and celerity so much sought for and favored in admiralty procedure.

It seems to me, also, that this is the spirit of the English practice, both early and modern, although under that system a somewhat circuitous method was originally employed in effecting the object. Instead of directly arresting the party sought to be made personally responsible, it seems, in actions lying purely in rem against vessels, that when the owner enters an appearance, the court thereupon takes jurisdiction over him individually; because, appearance in the English admiralty being by stipulation, the court thus acquires the power to act against him in personam. 2 Browne, Civ. Law, 398;

Id. 407-409. And his fide jussors are compelled to satisfy the condemnation and costs. Clarke, Praxis, tits. 4, 5, 12.

The practice continues substantially the same in the English admiralty to this day. The St. Johan, 1 Hagg. Adm. 334; The Triune, 3 Hagg. Adm. 114. The case of The St. Johan also shows, that where the remedy is doubtful against the vessel, but is legal and equitable against the owner, the court will avail themselves of his appearance to decree the debt and costs against him personally. This personal appearance is also constrained by the course of the court; for in suits in rem, on his failure to intervene, the property is absolutely condemned to the libellant. 2 Browne, Civ. Law, 400.

I am not aware that any confusion or perplexity need arise in respect to the decree to be pronounced in a case thus prosecuted. If the action be in rem only, a decree is rendered for the sum which the prevailing party is entitled to recover, and the thing is condemned, i. e., ordered to be sold to satisfy the decree. If the suit is in personam, the decree is the same in all essentials, varying only in that it directs execution by fieri facias or by capias ad satisfaciendum, instead of venditioni exponas.

I think that the mode of procedure resorted to in this case is not only justifiable upon authority, but that it is one that ought to be encouraged, as tending to prevent a multiplicity of actions for the same cause, in cases where all the rights and remedies might be equally well secured in a single suit. An action against both the ship and the master may oftentimes be indispensable. Cases not unfrequently occur in which neither remedy is separately adequate to afford complete relief. The court will, however, be cautious so to guard the practice that exorbitant stipulations shall not be exacted, and that double arrests shall not be made in cases of doubtful right or for trivial amounts. Betts, Adm. Prac. 20.

In the present case, the ship and master are separately and conjointly liable for the passage-money advanced by the libellant, and also for the safe delivery of the merchandise and baggage shipped by him. The master may also be individually liable for any wilful misconduct in the transaction, committed by him, but out of the scope of his authority as master, by which the libellant has been prejudiced, although the ship and owner may not be conjointly chargeable therefor. The libel is so drawn as to leave it ambiguous, whether damages are sought to the amount of the value of the merchandise and baggage and specie charged to have been shipped, as not having been delivered at all, or whether it only seeks compensation for the oppressive and tortious conduct of the master, in baffling the libellant in obtaining his rights and property from the ship or master. If the latter is the only object of the action, there certainly can be but

slight reason for continuing the suit against both the vessel and the master; and on a proper application, the court will see that the owners are relieved from all unreasonable burdens in that respect.

The first three exceptions, relating to the jurisdiction of the court, are therefore disallowed. The remaining four relate to the formal construction of the libel. As it does not conform to the requirements of rule 23 of the supreme court, those exceptions are allowed, save only exception 5, which is disallowed, the libel being sufficient in the particular to which that exception relates. The libellant must take proper measures to reform his pleading before proceeding with the cause. This order is without costs.

[Subsequently the cause came up for final hearing, when there was a decree for libellant, with costs of suit. Case No. 18,209.]

Case No. 18,209.

The ZENOBIA.

[Abb. Adm. 80.]¹

District Court, S. D. New York. Dec., 1847.

COMMON CARRIER—INJURY TO GOODS—LIABILITY—NEGLIGENCE OF MASTER—FAILURE TO PRESENT MANIFEST—BREACH OF PASSENGER CONTRACT—RECOVERY OF MONEY PAID.

1. Where there is no provision in the contract of affreightment varying the liability of the common carrier, he can only relieve himself from liability for injury to goods intrusted to him, by proving that it was the result of some natural and inevitable necessity superior to all human agency or control, or of a force exerted by a public enemy.

[Cited in Dible v. Morgan, Case No. 3,881.]

2. A delay of the master to present to the custom-house officers at the port of consignment a proper manifest, by which delay the owner of goods shipped on board is unable to pass them through the custom-house, is a neglect of his duty as a master, for which the vessel is responsible.

3. Where libellant contracted with the master in a foreign port for a passage to this country, and paid a part of his passage-money in advance, but the master failed to fulfil his contract, and libellant was obliged in consequence to take passage in another vessel,—Held, that the vessel was responsible for the fulfilment of the agreement; and that the libellant was entitled to recover from her the passage-money paid in advance, the expenses incurred by him in awaiting the sailing of another ship, and the sum paid by him to such second vessel for his passage in her.

[Cited in Marshall v. Bazin, Case No. 9,125; Oakes v. Richardson, Id. 10,390; The Director, 26 Fed. 710.]

This was a libel filed by Henry J. Carr against the bark Zenobia in rem, and also in personam against her master, A. R. Cronstadt. The case was brought before the court in July, 1847, upon a motion by the master to require the libellant to elect between the two remedies sought by him, and upon exceptions filed by the owner, as claim-

¹ [Reported by Abbott Brothers.]

ant, to the jurisdiction of the court, and to the form of the libel. The decision of the court upon the questions then raised, is reported [in Case No. 18,208]. The cause now came up for final hearing upon the proofs.

As the case was peculiar in its character, and as the libel was required to be reformed in its construction, and when reformed was prosecuted to judgment without further objection to its structure, the libel is now inserted in full.

"The libel of Henry J. Carr, of the city of New York, against the Swedish bark Zenobia, her owners, and Auguste R. Cronstadt, master thereof, in a cause civil and maritime of contract as against said vessel and owners, and of tort or damage against said master, respectfully shows: That for the last six years previous to the month of December last, your libellant has been a resident merchant in Hong Kong, China. That in the month of November last your libellant having determined to return with his family to the United States to reside, your libellant chartered, at Hong Kong, a 'lorchar,' or small schooner, at an expense of \$40, being the usual means and rate of travelling in China, and came down to Whampoa, a distance of some ninety miles, to secure a passage for your libellant and his family, consisting of a wife and infant child, to the port and city of New York. That on arriving at Whampoa your libellant found the Swedish bark Zenobia, whereof Auguste R. Cronstadt was master, the first vessel up for the port of New York from Whampoa; and thereupon, on the 14th day of November, 1846, your libellant shipped on board of said bark Zenobia eight cases of merchandise, seven marked L. E. C., Nos. 1, 2, 3, 4, 5, 6, 7, and one case marked F., No. 8, for which shipment the mate of said bark, H. Brandt, gave your libellant his receipt; also, three other cases of baggage and a chest of drawers, which contained the sum of \$2,500, for which cases said mate gave your libellant his receipt in the Swedish language. That after putting on board of said bark the wearing apparel of your libellant and his family, your libellant also paid, on the said November 14, 1846, to the said A. R. Cronstadt, master of said bark, the sum of \$150, as one half of the passage-money for your libellant and his family, from Canton to New York, and took from said master his receipt therefor. That the said master thereupon informed your libellant that said bark would not sail from Whampoa before the 1st of December following, and that he would advise your libellant, by letter, of the time of his sailing. That your libellant thereupon returned to Hong Kong for his family; and on the 21st day of November last your libellant received a letter from the said A. R. Cronstadt, dated the 18th of November, stating that he should sail with said bark from Whampoa on the 28th of November; and on the next day, the 22d of November, your libellant received an-

other letter from said A. R. Cronstadt, dated the 19th, stating that he had written a letter on the 18th, but lest it might not have been forwarded properly, he repeated its contents, namely, that he should so sail from Whampoa on the 28th of November. That thereupon your libellant got himself and family in readiness, and on the 24th day of November, left Hong Kong in a lorchar hired for the purpose, at the rate of \$60, for Whampoa, and arrived there early on the morning of the 27th of November. That not seeing said bark in the river and your libellant being informed she had sailed the day previous, namely, the 26th of November, your libellant leaving his family on board of the boat which brought them from Hong Kong, immediately hired a small boat, and proceeded to Canton to see Messrs. McLean, Deane & Co., the agents of the owners of said bark, and consignees in Canton. That upon arriving at Canton, your libellant learned from the said house of McLean, Deane & Co., that said bark had sailed from Whampoa, on her voyage to the port of New York, on the 26th day of November, two days previous to the time said master had informed your libellant he should sail. That, as your libellant was informed by said firm, said master, after the 14th of November, informed them there were no passengers to go out in said bark. That at the request of your libellant, the agents and consignees of the owners of said bark, Messrs. McLean, Deane & Co., wrote a letter to the said master by your libellant, directed to him in New York, dated November 30, 1846, in which they say, among other things: 'We have perused your letters to Mr. Carr, at Hong Kong, wherein you informed him that you would not sail from Whampoa for New York until the 28th inst.; and as Mr. Carr kept his time, and was at Whampoa on the day you named, we consider that he has not in any way forfeited his right to a passage for himself and family to New York, as agreed between you and him, as per your receipt.' That in addition thereto, your libellant was also informed at Canton, by Mr. John N. Griswold, that said bark sailed on the 26th of November from Whampoa, and that on the 14th of November the said captain, A. R. Cronstadt was informed that he would be required to sail on the 25th of November.

"And your libellant further shows, that on his return to Whampoa, the only vessel then lying in the river of Whampoa, bound for the port of New York, was the ship Rainbow, which was to leave about the 3d of December following. That said bark Zenobia having on board all the property, money and effects of your libellant, together with the wearing apparel of your libellant and his family, your libellant was left at Whampoa wholly destitute, and was obliged to negotiate bills of exchange at an enormous rate of exchange, in order to raise funds to provide your libellant and his family with proper outfit at that season of the year for a voyage to the

United States, which cost your libellant \$423, and to pay for his passage on board of said Rainbow, which was, under the circumstances in which your libellant was placed, fixed at \$400. That your libellant was therefore obliged to borrow \$1,000, at the rate of 50 per cent. upon the bills of exchange of your libellant, at three and four months, payable in the city of New York. That your libellant was obliged to incur an expense of \$16 in going to and from Canton to Whampoa, to arrange for the passage of himself and family in the Rainbow; and during which time the detention of the lorchar in the river at Whampoa, on board of which was the family of your libellant, from the said 27th day of November to the 3d day of December, on which day your libellant went on board of said Rainbow, cost your libellant the further sum of \$64, there being no hotel or house of entertainment at Whampoa, and he consequently being obliged to remain in the boat in the river, until they could go on board ship. That your libellant arrived in the port, of New York, in the ship Rainbow, on the 1st day of March last, with his family, and finding that said bark Zenobia has not yet arrived, and your libellant being a stranger in the city, and destitute of the means of immediate support, in order to borrow a small sum to supply the current wants of your libellant and his family, your libellant was obliged to effect insurance on his property in said bark Zenobia, at an expense of \$61, and to assign the policy to the party loaning your libellant the sum so required.

"And your libellant further shows, that said bark Zenobia arrived in the port of New York on or about the 9th day of May instant; and on or about the 10th instant your libellant saw said A. R. Cronstadt, who appeared surprised, and said to your libellant, 'I thought you were in China yet.' That your libellant thereupon requested the said master of said vessel to return to your libellant the money he had so advanced, and to repay your libellant the money and expenses he was put to in Whampoa by the detention of libellant, in consequence of the violation of said contract and undertaking of said master in relation to the transportation of your libellant and his family to the United States. That said master set your libellant at defiance, and told your libellant to get redress as he best could.

"And your libellant further shows unto your honor, that said master, following up the great injury and damage so as aforesaid done to your libellant, on the arrival of said bark Zenobia in the port of New York, has refused to make the proper entry of the merchandise and effects shipped by your libellant on board of said bark at Whampoa, on the manifest or proper exhibit of the cargo of said bark at the custom-house in the city of New York, thereby preventing your libellant or his consignee from obtaining the property and effects of

your libellant from said bark, or the public store, should they be left there; the only entry on said manifest or exhibit in relation thereto, being as follows: '1—8 to order,' meaning packages No. 1 to 8 to order, said master refusing to enter the name of your libellant as shipper; it being customary and requisite to enter on said manifest or exhibit the numbers and marks of the several packages, the name of the person shipping them, and the name of the consignee, if consigned, as was the case with the whole of the cargo of said bark Zenobia on her said voyage, except the property and effects of your libellant; the entry of which, as above stated, was without marks and without the name of any person as shipper or consignee. That said master utterly refused to make any other entry, although informed by the collector of the port of New York, or his agent, that he is liable to a penalty of \$500 for not so doing,—the said master, A. R. Cronstadt, at one time pretending that he does not know your libellant and never saw him before,—at another time, as your libellant is informed, alleging that your libellant came to him at Whampoa destitute, and tried to beg a passage for himself and family to the United States, all of which said master knows to be totally untrue. That when the several cases of merchandise were shipped on board said vessel, they were marked as herein stated, and the receipt of the first officer of said bark taken therefor. That at the same time, on the 14th of November, your libellant took blank bills of lading to said master, and requested him to fill them out; he being unwell, your libellant left them on his table, said master saying he would have them made out and hand them to your libellant when he came on board the vessel,—the receipts of said first officer of said bark being the only evidence of such shipment left with your libellant. That the value of said merchandise, wearing apparel, and money so shipped, was at least five thousand dollars.

"And your libellant further shows, that your libellant offered to produce and exhibit to said master in the custom-house, on his pretending he did not know your libellant, his letter to your libellant, written at Whampoa to your libellant at Hong Kong, with the Chinese postmark thereon; also the original receipts of his first officer of said bark, for the cases of merchandise and luggage so shipped, but the said master refused to see them, or pay any attention thereto. All of which actings and doings of said master have been and are oppressive and unjust towards your libellant. That said vessel is a foreign vessel, and is now lying within the jurisdiction of this court, and as your libellant is informed and believes, carried freights on her said voyage which have not yet been paid over to the owners or their agents, to something like eight thousand dollars.

"And thereupon your libellant alleges and articulately propounds as follows: First.

That on or about November 14, 1846, your libellant shipped on board the said bark Zenobia, then lying at Whampoa, (China,) for transportation to the port and city of New York, eight cases of merchandise, duly marked and numbered, and also three other cases of luggage, with a chest of drawers, which contained the sum of \$2,500; taking the receipt of the mate of said bark for said last mentioned cases. Second. That on the same day your libellant contracted with the master of said vessel to convey your libellant and his family to the city of New York, and paid the master of said bark \$150, as one half of the passage-money therefor. Third. That in coming down from Hong Kong to Whampoa with said merchandise, to ship the same to the United States, your libellant incurred the expense of \$40. Fourth. That after shipping said merchandise on board of said bark, and after the payment of said sum of \$150 to said master, on account of the passage of your libellant and his family to New York, your libellant returned to Hong Kong for his family, under the assurance of the master of said bark that she would not sail before the first of December; and that he would advise your libellant in time of the day of sailing of said bark from Whampoa. Fifth. That on or about the 22d day of November last, your libellant received a letter from the master of said bark, dated the 19th of said month, stating that he had written a letter on the 18th to your libellant, but lest it might miscarry, he repeated its contents, viz.: that he should sail from Whampoa on the 28th of November. Sixth. That on the 24th of November your libellant and his family left Hong Kong, and arrived at Whampoa on the morning of the 27th of November last, and found said bark had sailed from Whampoa the day previous, to wit, the 26th of November. Seventh. That the expense incurred by your libellant in coming down from Hong Kong to Whampoa with his family to go on board of said bark was \$60; and the necessary and additional expense by reason of his detention until the sailing of the next vessel to the United States, the further sum of \$64, besides the sum of \$16 paid by your libellant in going to Canton to see the agents of said bark. Eighth. That the master of said bark was, on the day of the shipment of said merchandise on board of said bark by your libellant, to wit, the 14th of November last, and some days previous to the date of his letter to your libellant of the 19th of November, duly notified that said bark would sail on the 25th of November; and said master well knew that said bark would sail before the 28th of November last. Ninth. That by the misconduct of said master, your libellant and his family were, on the 26th day of November last, after the shipment of all the merchandise, money, and wearing apparel of your libellant on board of said bark, and the payment of one half their passage-money to the United States, thereby left in Whampoa wholly

destitute. Tenth. That your libellant was obliged to raise \$1,000, by drawing bills at an enormous rate of exchange, to wit, fifty per cent. premium. Eleventh. That your libellant was, in consequence of being so left destitute as to wearing apparel for himself and family, obliged to expend the sum of \$432 for a new outfit. Twelfth. That your libellant, in securing a passage for himself and family by the first vessel from Whampoa to the United States, was obliged to pay \$400 therefor. Thirteenth. That upon the arrival of your libellant in the United States in March last, before the arrival of said bark with the effects of your libellant, your libellant was obliged to effect an insurance upon his property at an expense of \$61, in order to borrow a small sum for the immediate wants of his family. Fourteenth. That said bark Zenobia arrived in the port of New York on the 9th day of May last; and said master, being called upon by your libellant to refund the passage-money so paid him in Whampoa, with the money and expenses incurred by your libellant in consequence of being left in China, said master wholly refused, and set your libellant at defiance. Fifteenth. That said master, A. R. Cronstadt, after his arrival in New York with said bark, interposed every obstacle in his power, and endeavored to defeat your libellant from obtaining his merchandise and effects so shipped by said vessel, by refusing to enter the same on the manifest of the cargo of said bark with their marks and numbers; and also by refusing to enter the name of your libellant therein as the shipper of said merchandise and effects, to the great damage and injury of your libellant. Sixteenth. That the value of said merchandise, wearing apparel, and money, shipped on board of said bark by your libellant, was at least five thousand dollars.

"And your libellant therefore charges, that said breaches of the undertaking and contract of said bark Zenobia and her master, to and with your libellant, are properly cognizable and relievable in this court of maritime jurisdiction. And your libellant therefore prays the aid of this honorable court, that process maritime may issue against said bark, her tackle and apparel, as well as against her owners and all persons interested therein, pursuant to the practice of courts of admiralty and maritime jurisdiction; and that an attachment in personam may issue against said master, A. R. Cronstadt, and that said bark, her owners, etc., may be by this honorable court decreed to pay to your libellant the money paid to said master on account of said voyage, for the passage of your libellant and his family, together with the damages sustained by your libellant, and the money and expenses necessarily and properly incurred by your libellant in China, by reason of said breach of the contract and undertaking of said master and bark with your libellant, and of all loss and damages sustained by your libellant therefrom, as well

also by reason of the refusal of said master to deliver or make the proper entries of the merchandise and effects of your libellant in the custom-house of the port of New York, thereby preventing your libellant from receiving the same; and for such aid and redress against said bark, her owners, or the said A. R. Cronstadt, the master, as the court is competent to give in the premises. And that said bark, tackle and apparel, owners, and all interested in her, may be decreed also to pay to your libellant the costs of this suit. And your libellant will ever pray." (Verification.)

To the libel, as amended, A. R. Cronstadt, the master, and David Carnigie, owner and claimant, interposed separate answers. The answer of Cronstadt, the respondent, denied nearly all of the allegations of the libel, which charged any misconduct upon him. The narrative of the facts given by him was substantially as follows: On November 14, 1846, the libellant came on board the Zenobia, then making ready to sail for New York, and applied to respondent for a passage for himself and family. He stated that he was poor and unable to pay full price, and desired to work his passage in part. He said that he was a Dane, and conversed with respondent, who was also a Dane, in the Danish language, and thus interested the sympathies of respondent in his behalf, as a fellow countryman. The respondent was thus persuaded to agree to give him passage at the reduced price of \$300, payable in advance. When, however, the time of payment came, the libellant represented that he had only money enough to pay one-half, and the respondent was then persuaded to accept half the money in cash, and the balance in libellant's note. The libellant thereupon sent on board several cases of merchandise, amongst which was a chest of drawers, as stated in the libel, but respondent had no knowledge of their contents. No bills of lading for this property were given, and the only receipt obtained by libellant was one which he took from the second mate, and was merely for a hat, a compass, and a tea-caddy, which were specially entrusted to the mate. In respect to the time of sailing, the respondent told libellant at the time of his taking passage, that he could not tell when he should sail, but did not expect to sail before the latter part of November, but he recommended libellant to get his family down and on board as soon as possible. The libellant then left to go for his family, but he having been gone a long time, respondent wrote to him, urging him to return without delay, and saying that as near as he knew, the vessel would sail on or about the 28th. The vessel did not actually leave Whampoa till the 27th. The answer also denied having done anything to delay or thwart the libellant in procuring his property to be passed through the custom-house. The answer insisted that the claim of the libellant that he had \$2,500 in specie in his chest of drawers, showed that the contract

of affreightment was procured through false and fraudulent pretences of poverty, and for this reason respondent contended that libellant was entitled to no remedy upon the contract. He also insisted that the contract was a personal one, and not within the jurisdiction of the court. The answer of the claimant, David Carnigie, set up substantially the same matters of defence with that of Cronstadt. The details of the testimony given at the hearing are omitted,—the interest of the case lying in the points of law ruled by the court.

Abner Benedict, for libellant.

Francis B. Cutting, for claimant and respondent.

BETTS, District Judge. The libellant seeks to recover, in this action, for several distinct items of damage connected with a breach of a contract of affreightment, entered into between himself and the master of the Zenobia, and which, as he charges, was wilfully violated by the latter. The allegations of damage are, many of them, distinct in their nature, and require to be separately considered.

The libellant shipped on board of the Zenobia, then lying at Whampoa, China, for transportation to this port, sundry cases of merchandise. On the arrival of the vessel here, it was found that the articles contained in a trunk belonging to libellant had become injured by being wet. The other cases passed into the custom-house, and by the neglect of the master to make the proper entries upon the ship's manifest, the libellant was greatly delayed in obtaining their delivery to him. The vessel is undoubtedly responsible to the libellant for the safe carriage and delivery of the goods laden by him on board her, and he is entitled to recover damages for a breach of duty in this respect.

As regards the injury to the articles contained in the trunk, the defence is, that the damage was occasioned by the perils of the sea. But there being no bill of lading in the case, exempting the vessel from liability for losses arising from perils of the sea, it becomes necessary for the claimants to prove that the injury arose from supernatural causes. In other words, the liability of the ship, as a common carrier, can only be discharged by showing that the loss was incurred from perils embraced within the meaning of the phrase, "the act of God." The cases are very numerous in which the attempt has been made to exempt the common carrier from this strict liability for losses occasioned by casualties not absolutely unavoidable; but the rule is uniform, and is sanctioned by authority too strong to be questioned, that to bring a disaster within the scope of the phrase, "the act of God," for the purpose of relieving the common carrier from responsibility, it is necessary to

show that it occurred independent of human action or neglect. It is only a natural and inevitable necessity, and one arising wholly above the control of human agencies, which constitutes the peril or disaster contemplated by that phrase. 2 Kent, Comm. 597. In the absence of an exemption to be gathered from the contract of affreightment, the carrier cannot excuse a loss, resulting in any degree from the influence of human means, excepting only a loss from the force exerted by a public enemy. Numerous cases upon this subject are collected and discussed in *McArthur v. Sears*, 21 Wend. 190. See, also, *The Reeside* [Case No. 11,657]; 1 Conn. 487; *Story, Bailm.* §§ 512, 531; *Whitesides v. Russel*, 8 Watts & S. 44. Any act of omission, neglect, or carelessness on the part of the master or crew, contributing to the loss, takes away the protection of the defence here relied upon.

It is in proof, on the part of the libellant, that the trunk was stored in the long-boat, and that such storage was not proper for freight of that description. The vessel must therefore be held responsible for the injury received by the contents of the trunk.

There is also a demand for damages because of the misconduct of the master in the preparation of his manifest, and in thwarting the libellant in his efforts to obtain the delivery of his goods in this port. How far these particulars if proved with all the aggravations charged in the libel, might afford substantive ground of action, I do not now examine or decide. The testimony does not present a case requiring such decision. But the delay of the master in presenting a proper manifest, so that the libellant could pass his property through the custom-house, is a neglect of his duty as master; and damages naturally incident to any failure of duty towards the shipment on the part of the master, fall properly within the responsibility of the vessel. She is bound for the safe carriage and due delivery of the cargo; and acts of misconduct by the master, which are injurious in either respect to the shipper, will subject her to make adequate recompense to the freighter. The liability of the vessel upon this score is, however, limited to damages for the act or neglect of the master in his capacity as such. For any tortious endeavor on his part to prevent the libellant from recovering possession of his goods, she is not responsible; nor would such acts of the master, committed at this port, and in command of the ship, fall within the jurisdiction of the court, in an action against him personally.

It will be difficult to fix upon a measure of damages in that respect which will meet the particular merits of the case yet rest on principles of general application. The actual damage to the owner of goods may be very great, yet when the damage to a considerable degree is merely consequential, it cannot be charged in its entirety upon the ves-

sel as the immediate and proximate cause of it. If the goods were subject to freight, I should be inclined to regard a loss from the misconduct of the master in withholding their delivery, a proper counter-claim against the freight; but these goods being the personal baggage of libellant and family, and not chargeable with freight, I think some compensation awarded by way of demurrage as it were, will be the appropriate mode of satisfaction. The master made oath before the deputy collector to the manifest, on May 8th, the libellant being then here, seeking the delivery of his property; and did not make the proper baggage entry thereon, so that the goods could be obtained by the libellant until June 15th. This act, although importing wilful misconduct on the part of the master, was yet within the scope of his authority, and accordingly the vessel stands chargeable with its consequences. *Abb. Shipp.* 152, 158. I regard the delay to the owner in obtaining his goods, and his necessary expense in procuring them from the custom-house, as imposing on him a loss or damage amounting to \$2 per day; and without a more satisfactory measure of compensation, I shall adopt that as a reasonable remuneration, and allow him the sum of \$74, because of the wrongful non-delivery of his property pursuant to the shipping contract.

The libellant charges that a chest of drawers which was shipped by him amongst the cases of merchandise above referred to, contained the sum of twenty-five hundred dollars in specie, and that this money was missing from the chest when delivered to him in this port. There is no evidence, however, to support either of these averments; and the claimant proves, by the testimony of one of the mates of the vessel, that the libellant himself had access to the chest of drawers while it was yet on board the vessel; that he took a bundle from the furniture previous to its being landed, and that no complaint was then made by him of the loss of any money. He establishes no right to recovery on this part of his claim.

The libel avers that the libellant contracted with the master of the *Zenobia* to convey him and his family from Whampoa to this port; that he paid the master of the bark in advance \$150, being one half of the passage money, and that the vessel sailed without him, previous to the time appointed and without his knowledge. I think the libellant has established this charge, and is entitled to recover against the bark his damages for this breach of contract by the master, to transport him and his family as passengers. This contract was one which it was competent for the master to make in the employment of the ship, and became binding on the vessel. *Abb. Shipp.* 160; 3 Kent, Comm. 162. The vessel is liable on this contract for the \$150 paid the master in advance in China, upon the grounds stated

in the former decision of the court in this cause, in July last. [Case No. 18,208.]

The libellant came down from his residence at Hong Kong to Whampoa, in season to embark on the Zenobia on November 28th, which was her appointed day of sailing, but found she had already left. His expenses incurred in coming down to Whampoa are stated at \$60, and his further expenses incurred through his detention at Whampoa, at \$64, besides \$16 paid in going to Canton to confer with the agents of the bark respecting her departure. There is no ground upon which the libellant can claim to recover the cost of his passage from Hong Kong to Whampoa, as he must necessarily have made that voyage, whether he came home in the Zenobia or the Rainbow. But the vessel is chargeable with the expenses of the libellant incurred in waiting at Whampoa, after the Zenobia had left, for the sailing of a vessel in which he might take passage to the United States. The evidence shows that \$64 is a moderate allowance for those expenses, and that sum should accordingly be allowed.

It is not necessary to discuss the question of the liability of the vessel or master to the libellant for the disbursements said to have been made at Canton in a premium for the loan alleged in the libel to have been paid, or for the new supply of clothing for himself and family there purchased. No proof is given that the libellant made any such disbursements, and the court cannot presume them from any supposed necessity, arising from the circumstances of the case.

I consider the bark equitably liable because of the violation of the contract to transport the libellant and his family to this port, in damages equal to the cost of his passage to this country in the Rainbow, upon the general grounds upon which I have already placed his right to recover back the advance passage-money. That disbursement is fairly chargeable upon the ship as a portion of the damages recoverable by libellant for the breach of the passage contract. The sum of \$400 paid by him is proved to be below the usual and customary rate of charge for such passages, and that sum he is entitled to recover.

A reference must necessarily be had to a commissioner, to ascertain the amount of injury to the clothes contained in the trunk, by wetting, unless the parties can agree to the amount of such damage.

It is proper to remark, in respect to the deposition of Captain Cronstadt, the respondent, which was offered in the cause, that even if it were legally admissible, it would not in my estimation, displace the other evidence in the cause, nor vindicate his conduct. But he stands a party to the suit, being prosecuted in personam, and subject to a decree against himself for all the liabilities of the vessel in this behalf; and the case of *Bridges v. Armour*, 5 How. [46

U. S.] 91, seems to settle the point that he is an incompetent witness in the cause.

The decree will accordingly be for the libellant, as above, and for full costs of suit.

Case No. 18,210.

The ZEPHYR.

[3 Mason, 341.]¹

Circuit Court, D. Massachusetts. May Term, 1824.

BOTTOMRY BOND—PLEDGE OF FREIGHT—RECOVERY OF EXCHANGE.

1. Where a bottomry bond is given upon vessel and freight, it binds them only, and not the cargo, although in a recital in the bond it is stated, that the master was necessitated to take the sum loaned on the vessel, her cargo, and freight.

2. If the omission were by mistake, and so stated in the libel, it might be reformed.

[Cited in *Pope v. Nickerson*, Case No. 11,274.]

[Cited in *Bell v. Morse*, 6 N. H. 209.]

3. Where a bottomry bond was given, payable within five days after the arrival of the vessel at Boston, and a bill of exchange was drawn for the amount loaned, at the same time, payable in London, and the agreement was, that if the bill was paid, the bottomry bond should be void, at the option of the borrower, and the borrower does not elect to pay the bill, the lender cannot, in a suit on the bottomry bond, recover the exchange between Boston and London, but must receive the amount of his bottomry bond.

[Cited in *Greely v. Smith*, Case No. 5,750.]

4. When freight is pledged in a bottomry bond, it means the freight of the whole voyage, and not the freight for that part of the voyage unperformed at the time of giving the bottomry bond.

[Cited in *Brett v. Van Praag*, 157 Mass. 142, 31 N. E. 763.]

This was a libel, upon a bottomry bond, against the schooner *Zephyr*, her cargo, and freight. The schooner was bound on a voyage from Messina in Sicily to Boston, with a cargo consisting principally of fruit, and being greatly injured by the perils of the sea during her voyage was compelled to put into the port of Lisbon for repairs and refitment. A survey was here called, and the cargo was unladen for the purpose of repairs, and the latter being completed, the undamaged part of the cargo was reladen, and the libellants also shipped on board about 50 casks of wine for the Boston market. The libellants advanced the money necessary for the repairs, amounting to £856. 7s. sterling, for which the master of the *Zephyr* drew a bill on his owner's agents, in London, and the libellants also took, as they assert, as collateral security, the bottomry bond now in controversy, upon a premium of £15 per cent. The bond recites, that the master "was necessitated for the prosecution of his voyage from the port of Lisbon to the port of Boston, to take upon the said schooner her cargo and freight for the said voyage," the sum stated in the bond. It then states a

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

covenant on the part of the master to proceed to Boston and finish his voyage, and he binds "the said schooner Zephyr, her freight for the said voyage" (omitting any mention of the cargo), "with her appurtenances, for the payment of the sum lent, and the bottomry interest, viz. £984. 16s. sterling, within five days after the ship's arrival at Boston, or at any other port of discharge." He then covenants, "that the said schooner Zephyr, her freight for the said voyage, together with her tackle &c. after her next safe arrival at Boston or any other port of discharge, shall be liable and chargeable at all times" for the amount of the bond. Then follows a clause, "that in case the schooner Zephyr shall be lost, taken, burnt, or cast away before her next safe arrival at Boston or any other port of discharge, or that a bill of exchange dated this day, signed &c. for the said sum £856. 7s. payable in London at 60 days' date to order of Charles Higgs on Messrs. N. H. C. & Company, shall be duly accepted and paid, then and in either of the two cases aforesaid the said payment of £984. 16s. sterling shall not be demanded or recoverable," &c. The schooner duly arrived in Boston, and the bottomry bond not having been paid, the present suit was commenced in October, 1822, and from various causes, was delayed upon the appeal until the hearing at the present term.

Mr. Hubbard, for libellants.
Mr. Peabody, for respondents.

STORY, Circuit Justice (after reciting the facts). It is unnecessary to state any other points presented by the case, except those which have been suggested for argument in this court. The first is, whether the cargo is bound by the terms of the bond, that cargo having been shipped partly on freight, and partly on account of the owners of the ship. It appears to me that the cargo is not, upon the true construction of the terms of the bond, bound by the hypothecation. It is true, that in the preliminary recital it is stated, that the master was necessitated to take upon the schooner, her cargo, and freight, the sum loaned; but the subsequent clauses containing the actual hypothecation confine it in terms to the schooner and her freight for the voyage. If the cargo had been omitted by mistake, and that was made clear by the evidence, it might have furnished another ground to reform the contract. But the libel does not address itself to any such state of facts; and the court is therefore relieved from any further inquiry as to the true import of the terms of the bond. Upon this I have no more to say, than that as they speak a positive and clear language, putting only the vessel and freight under hypothecation, I see no reason to extend the obvious meaning from the more large, but not very definite intention, indicated by the recital.

The next point is, whether the libellants

are not entitled to an allowance, upon the sum due by the bond, of the rate of exchange between London and Boston. The argument is, that the bill of exchange was payable in London; and therefore the court ought to give the party the same benefit, as if it were actually paid there. But the present is not a suit upon the bill of exchange, to recover the simple amount thereof with damages. It is a suit in rem upon the bottomry bond, in which the libellants seek to recover the whole bottomry loan and premium, which by the terms of the bond is payable within five days after the arrival of the vessel in Boston. The money therefore was clearly payable here; and the party cannot entitle himself to the rate of exchange, since the undertaking was not to pay it in London. As to the bill of exchange, recited in the bond, there is no pretence to say, that there was an absolute undertaking by the owners of the schooner to pay it. There is an option given to them by the bond to pay it in lieu of the bottomry premium; and if they do not choose to avail themselves of the alternative inserted in the bond for their benefit, the only effect is, that the hypothecation becomes absolute, and may now be rigorously enforced against the ship and freight.

The remaining point requires more consideration. The district judge decreed to the libellants an allowance of the freight of the whole cargo from Lisbon to Boston, excluding what may be considered a pro rata freight from Messina to Lisbon. The question is, whether the bottomry bond was not intended to cover the whole freight earned in the voyage from Messina. If this were to be decided upon the general principles of maritime law, independently of the particular circumstances of this case, I should have great difficulty in confining the hypothecation to the freight earned on the voyage from Lisbon to Boston. Where the freight is pledged generally, it seems to me, that it includes the freight for the whole voyage, which the ship is in the course of earning; and it would be unjust and inconsistent with the intention of the parties, to restrict it to freight subsequently earned, as upon a new contract. Upon any other construction, where the vessel is repaired at an intermediate port, without any change of her cargo, no freight at all would be hypothecated; for no distinct freight would grow due for the voyage from the port of repairs. The freight ultimately paid would not be divisible; it would be the entire freight for the fulfilment of the original contract for the whole voyage, and not a pro rata freight, as upon a receipt and delivery at the intermediate port. When the parties pledge freight, it must, in the absence of all other counter proofs, be presumed, that they mean the freight to be earned by the ship in the course of the voyage, which has been interrupted by the disaster. By the maritime law of France, indeed, freight, which is to be earned, is not

the subject of hypothecation, though Valin and Emerigon admit, that freight actually earned may be. 2 Valin, Comm. lib. 3, tit. 5, art. 4; 2 Emerig. c. 5, § 2, p. 479. Whether this is the law of other continental nations, it is unnecessary to inquire, for our law is certainly different, and by that alone the present suit is to be determined. Unless, then, some language is used in the instrument now before the court, which calls upon it to narrow the general interpretation of hypothecations of freight, the freight, which was earned upon the whole voyage from Messina, must be brought into court, and subjected to the claim of the bottomry holders. Various clauses are relied upon for this purpose, in which the expression is used, that the hypothecation is of "the schooner and her freight for the said voyage;" but all these expressions, by necessary reference, reflect back upon the antecedent recital, in which the voyage is mentioned, and therefore the whole case resolves itself into the true interpretation of the words of that recital. I have already had occasion to quote the words. There is nothing in them, that points to the commencement of a new voyage. The vessel is stated to be riding at anchor within the port of Lisbon, and bound for Boston, and the money loaned is for the prosecution of the voyage from Lisbon to Boston, and the money is said to be "taken upon the schooner, her cargo, and freight for the said voyage." This is certainly true in point of fact, for her voyage was at that time from Lisbon to Boston; but that is not inconsistent with its being a part of the larger voyage in prosecution from Messina to Boston. If the cargo had been directly hypothecated, it would scarcely be pretended, that it included only the new cargo taken in at Lisbon, for this belonged exclusively to the libellants. As little reason is there to suppose that the freight of this new cargo only was actually hypothecated, for the libellants might have arrived at their object in that view by a shorter way. The freight, in contemplation of the parties, must have been the freight which would be earned by the prosecution of the voyage from Lisbon to Boston; and that freight was what the owners of the ship earned, as well upon the shipment at Messina, as that at Lisbon. I see nothing in the words used in the bond that prevents the court from giving them this reasonable construction. Instruments of this sort are rarely drawn with technical accuracy, and it is the duty of the court to give them a liberal interpretation. The parties have imperfectly expressed their meaning; they have referred to a voyage then intended to be prosecuted farther, which had been partly accomplished, and they take up the voyage at that point of time only at which the bottomry risk was to commence, and describe so much of it as fixed the beginning and termination of that risk. The whole earnings of the vessels were intended to be

pledged; and the whole depended upon the successful termination of the remaining part of the voyage. I have no doubt, therefore, that the bottomry holders are entitled to have an account and allowance of the whole freight for the whole voyage from Messina, and I shall decree it to be paid them accordingly.

ZEREP (FERGUSON v.). See Case No. 4,742.

Case No. 18,211.

ZEREGA et al. v. GEE et al.

[Betts' Ser. Bk. 265.]

District Court, S. D. New York. April, 1858.

LIABILITY OF SHIP-OWNER—INJURY TO CARGO.

[Ship-owners are not liable for damage to iron shipped under a bill of lading exempting the ship from accountability for rust, unless the rust was received on board, and through want of proper stowage and care.]

Suit by Augustus Zarega and others against Edward A. Gee and others for freight on bill of lading from Liverpool to this port. A lot of iron was delivered to respondents by the libellants in this port, in a very rusty condition, produced by water or soda ash stains. The bill of lading had a reservation written on it, "Ship not accountable for rust," and the libellants proved that the cargo was put on board at Liverpool badly rusted. The proof was that the iron was properly stowed in the ship, and that barrels of soda ash, laden on board, were also properly and securely stowed in the sides of the ship, and in the usual manner in relation to the stowage of iron with it.

Held (BETTS, District Judge): That the ship owners were not liable for the damage to the iron without proof that the rust was received on board, and for want of proper stowage and care.

Decree for the full freight, with leave, however, on application of the respondents, to open the case for further proofs to the want of due care and attention by the master to the cargo, or in stowing the iron or soda ash on board.

Case No. 18,212.

ZEREGA et al. v. McDONALD.

[1 Woods, 496.]¹

Circuit Court, S. D. Georgia. April Term, 1873.

ATTACHMENT PROCEEDING—BREACH OF CONTRACT—UNLIQUIDATED DAMAGES—JURISDICTION OF COUNTY COURT—INJUNCTION AGAINST JUDGMENT.

1. Under the local law of Georgia, no attachment lies for the recovery of unliquidated damages consequent upon the breach of a contract.

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

2. And when from the answer of the garnishees, it appears that there are no debts due the defendants in attachment in the county where the proceedings are commenced, and none of their property is seized in the county, the county court has no jurisdiction to proceed further in the case.

3. A judgment in attachment will be enjoined in equity if the defendant had no actual notice, and had a good defense, and his failure to make defense was owing not to any fault or negligence on his part, but to the fault of the plaintiff.

This was a cause in equity which was submitted for final decree on the pleadings and evidence.

Arthur Hood, for complainants.

Herbert Fielder, for defendants.

WOODS, Circuit Judge. This cause was commenced in the superior court of Randolph county, and was removed thence to this court by complainants, who are citizens of the state of New York. The object of the bill is to set aside a judgment of the county court of Richmond county, rendered in a proceeding in attachment at the August term, 1867, in favor of McDonald, the defendant in this cause, and against the firm of Scott Zerega & Co., of which complainants [Zerega and Scott] are surviving partners, for \$1,600. The alleged facts, upon which said judgment was predicated, are these: McDonald had consigned thirty-three bales of cotton to complainants, in the city of New York, to be sold by them, not before the lapse of a specific time. The complainants sold the cotton without authority before the time fixed by McDonald for the sale, whereby he claimed to have suffered a loss of \$1,600. McDonald swore out an attachment against Scott, Zerega & Co., in the county court of Randolph county, Georgia, on the ground that they were nonresidents of the state, and garnishee process was served on several citizens of Randolph county, and upon Nutting, Powell & Co., of Bibb county, Georgia. All the persons served in Randolph county answered under oath, that they had no effects of, and were not indebted to the defendants in attachment. Nutting, Powell & Co., of Bibb county, made no answer. No property was anywhere seized by virtue of the attachment. Notwithstanding these facts, the plaintiff in attachment proceeded with his cause, submitted the same to a jury which rendered a verdict in his favor for \$1,600, and Nutting, Powell & Co., having failed to answer, judgment was rendered against them in Bibb county for the amount of the demand of McDonald. The complainants aver, that they had no notice or knowledge of these proceedings in attachment; that they were not in any manner indebted to McDonald; that he had no claim upon them for damages; that they had a good defense to the said action,

and that the county court of Richmond county had no jurisdiction to render said judgment.

We think this judgment should be set aside, on several grounds:

1. The Code of Georgia authorizes proceedings in attachment in cases of debt, and requires that the party seeking this remedy make oath of the amount of the debt claimed to be due. It was held by the supreme court of this state in *Mills v. Findlay*, 14 Ga. 230, that "under the laws of this state no attachment lies for the recovery of unliquidated damages consequent upon the breach of a covenant." The attachment in that case appeared to have been taken out for breach of covenant, in this, that the defendant had sold to the plaintiff the patent right for Bibb county to "Woodworth's Planing Machine," whereas, the plaintiff was not the owner of said patent, and had no right to sell the same. It is true that this decision was made in 1853, before the present Code of Georgia was in force, but the law then in force required the plaintiff in attachment to make affidavit of the amount of "the debt or demand which he believed to be due" (1 Cobb's Dig. p. 77), and this was held not to embrace unliquidated damages. This decision is contrary to the current authority in other states (*Lenox v. Howland*, 3 Caines, 323; *Wilson v. Wilson*, 8 Gill, 192; *Peter v. Butler*, 1 Leigh, 285; *Weaver v. Puryear*, 11 Ala. 941); but it is the construction put upon the local law by the supreme court of this state, and must be considered as a part of the statute (*Massingill v. Downs*, 7 How. [48 U. S.] 767; *Nesmith v. Sheldon*, Id. 812; *Webster v. Cooper*, 14 How. [55 U. S.] 504).

2. When, from the returns of the garnishees in Richmond county, it appeared that there were no debts due said Scott, Zerega & Co., in that county, and there being no property of complainants seized in that county, the county court had no jurisdiction to proceed further in the case.

3. I am satisfied from the evidence in this case that the complainants have a good defense against the claim of McDonald. As the judgment was taken against them without notice, it ought to be set aside. A judgment in attachment will be enjoined, if the defendant had no actual notice and had a good defense to the suit, and his failure to make defense was owing not to any fault or negligence on his part, but to the fault of plaintiff. *Farmers' & Exchange Bank v. Ruse, Patten & Co.*, 27 Ga. 391. A decree will be entered setting aside the verdict and judgment rendered in the county court of Randolph county against Scott, Zerega & Co., as in the opinion of this court, the county court of Randolph had no jurisdiction of the case.

Case No. 18,213.

ZEREGA et al. v. POPPE et al.

[Abb. Adm. 397.]¹

District Court, S. D. New York. Jan., 1849.

BILL OF LADING—CONTRADICTION BY PAROL—INSUFFICIENT PACKING.

1. Under a bill of lading which acknowledges the receipt of goods for transportation in good order, the carrier may, notwithstanding, show, in case of injury to the goods, and as against the owner of them, that it was occasioned by insufficiency in the cask, case, &c., in which they were packed, and not by any negligence or misfeasance upon his part.

[Compare, also, on the right to explain a bill of lading, *Manchester v. Milne*, Case No. 9,006; *Goodrich v. Norris*, Id. 5,545; *Baxter v. Leland*, Id. 1,124.]

2. But the law presumes that the goods were delivered to the carrier in the condition specified in the bill of lading; and the burden of proof lies upon the carrier to rebut this presumption.

3. It is not sufficient, in case of damage to goods received under such a bill, for the carrier to show that the goods were delivered to him in insufficient packages, and that the defect was not discoverable by him. He must also show that the loss actually resulted from such insufficiency, and from no fault of his.

[Cited in *Kennedy v. Dodge*, Case No. 7,701.]

This was a libel in personam, by Augustus Zerega, Thomas Andrews, and Isaiah C. Whitmore, owners of the ship James H. Shepherd, against Edward Poppe and Theodore Poppe, to recover the freight of thirty-two casks of linseed oil, shipped on board the James H. Shepherd, at Antwerp, and consigned to the defendants at this port. The goods were shipped under a bill of lading, in French, of which the following is a translation: "I, J. Ainsworth, captain of the American ship James H. Shepherd, at present at Antwerp, bound for New York, acknowledge to have received on board my said ship, in good order, from Messrs. F. & J. Badart Frères, thirty-two casks of linseed oil, containing together twenty thousand and sixty-three litres, which I bind myself to deliver at the said place, well-conditioned, excepting the perils of the sea, to order, they paying me for freight two American cents per gallon, and no more; for the accomplishment of which I bind myself, my property, and my said ship, freight and equipment, and have signed four receipts of the same tenor and of one effect. Done at Antwerp, March 10, 1848. Contents unknown—not accountable for leakage. James Ainsworth."

Thirty-one of these casks of oil were safely delivered to the respondents, the consignees, in New York. The other cask was found, on unloading, to have been broken, and its contents had escaped. The consignees, considering that the value of the oil lost, including duties paid upon the lost oil, as a part of the invoice, exceeded the amount due for freight, and that the carriers were liable for the loss, refused to pay the charges for

freight, and this suit was accordingly brought by the ship-owners, to recover it. The amount claimed was \$89.20. Other facts appear in the opinion.

Mortimer Porter, for libellants.

Edgar Logan, for respondents.

BETTS, District Judge. This action is by the owners of the ship James H. Shepherd, to recover the freight of thirty-two casks of linseed oil from Antwerp to New York. Thirty-one of these casks were delivered to the defendants, as consignees. One cask, of the capacity of two hundred and six gallons, was found, on discharging the vessel, to be broken, and its contents had leaked entirely out. The value of the oil lost, including sixteen dollars duties paid upon it by the consignees, exceeds, it is contended, the amount of freight stipulated for the transportation of the thirty-one casks. And the question between the parties is, upon which this loss shall fall.

The liability of the ship-owners is fixed prima facie by the bill of lading, as between the parties to it; and considering the defendants to have no other rights than those of the owners of the goods shipped, the burden is on the respondents to show an adequate excuse for not delivering the entire cargo, conformably with the terms of the bill of lading. Abb. Shipp. 323; Curt. Merch. Seam. 169. The acknowledgment by the bill of lading that the cargo was received in good condition is prima facie evidence that, so far as indicated by the external appearance of the casks, it was in good order when laden on the ship. It is not, indeed, conclusive upon the libellants. They are at liberty to show that the loss resulted from inherent insufficiency or concealed defects in the cask, or other facts constituting an adequate cause for its breakage, without fault or negligence on their part. It, however, devolves upon them to supply satisfactory proof that the admission made in the bill of lading is inaccurate, and that this cask was not received by the ship in good condition.

The exculpation set up is, that the cask, when sent to the ship, was rotten and insufficient to bear the weight of oil in it, and the handling necessary for lading and unloading it. Such defects of the cask, not discernible to the carrier on an ordinary examination, will undoubtedly relieve him of responsibility in case of the loss of its contents in the course of transportation. Story, Bailm. § 492. But this insufficiency of the package, and the fact that it was the cause of the loss, must be proved. It is not to be presumed from the circumstances that the goods were not safely delivered. The libellants have undertaken to establish the fact, by proving the broken cask was in appearance old, decayed, and rotten; and from that condition of infirmity, they contend the leakage was owing to the insufficient state of the cask, and not

¹ [Reported by Abbott Bros.]

to any negligence or improper act of the master or crew.

It is not necessary to consider the pertinency and weight of those suppositions and inferences, for the libellants have not succeeded in showing that the injury to the cask did actually arise from its insufficiency to sustain the ordinary treatment of lading and stowage on board. Several respectable and intelligent witnesses have been examined, who express the opinion, that from the present state and appearance of the broken stave, it would not have borne rolling over a stone or other hard substance, in getting it to the ship, or being let down heavily on dunnage of wood in the course of stowage. The stave was crushed inwardly near the bilge. The fracture was manifestly caused by the cask encountering a sudden shock or pressure. The ligaments of the stave are severed by being driven inwardly in a splintered state, but held in contact without being actually broken short off. Some of the witnesses inferred this appearance of the fracture was caused by prying the cask with a lever of iron or other hard material, in endeavoring to lift it or move it in stowing; but all agree that the break could not result merely from the resting of the cask on its bed and supporters, in the manner the evidence shows it was dunnaged on board. This testimony displaces all ground of presumption that the breakage arose from any inherent defect of the cask. The opinion of all the witnesses and the exhibition of the stave, demonstrates that the fracture must have been produced by considerable external violence, and could not result from the working of the cask in its place on board.

Admitting, then, that the shippers were bound to supply casks of strength sufficient to bear the ordinary usage in stowing, it is incumbent upon the libellants to prove that this one came to the ship in a broken state, or in such condition that the loss befel it without any act of carelessness on their part. The call upon them to make this proof is pertinent and the more stringent, as it appears that, before the cargo was exposed to sea-perils, the pumps threw up oil from the hold, and on examination of the stowage at the time, this cask was found empty. The strong presumption upon the evidence is, that the injury happened in lading the cask on board, while it was under the responsibility of the respondents.

It is to be remarked, that the opinions of witnesses respecting the inherent defectiveness of the cask are strongly contradictory, and the indirect evidence from that source must be received with great caution. Many coopers and others, experienced in this business, pronounce the cask a sound and sufficient one for the transportation of oil. Some consider its long use as a whale-oil cask tended to strengthen it, and that it was at that time as sufficient to carry linseed oil as when new, whilst others considered its

long service had softened and enfeebled the stave so as to destroy its tenacity. Those who carefully inspected the stave, and picked the fibres of wood in presence of the court, disagree in their opinions whether there was any decay or want of strength in it. The weight of evidence in point of numbers is, in that respect, with the respondents.

I think the libellants have failed to prove that the loss of the oil in this case was owing to the defectiveness and insufficiency of the cask, and the respondents, on their part, have proved no more than that it was carefully and safely stowed, and that the fracture cannot reasonably be ascribed to improper stowage; that, however, does not satisfy the bill of lading, nor excuse them from delivering the entire cargo.

The decree must accordingly be, that the value of the oil be deducted and allowed the respondents against the demand of the libellants for freight. If the parties do not agree between themselves in the adjustment of the amount, let a reference be taken to a commissioner to state it. If the loss equal in amount the freight, a decree will be entered dismissing the libel, with costs; if a balance remains payable to the libellants, they will take a decree for the amount, with costs.

ZIMMERMAN (VIRGINIA v.). See Case No. 16,968.

Case No. 18,214.

ZINKEISEN v. HUFSCHMIDT.

[1 Cent. Law J. 144.]¹

Circuit Court, E. D. Wisconsin. March, 1874.

REMOVAL OF CAUSES—AMOUNT IN DISPUTE.

[Where a suit is commenced by summons, and no complaint is filed showing the amount in dispute, defendant may, in a proper case, in his petition for removal, show that the amount in controversy exceeds \$500, and thereby obtain a removal to the federal court; and, the jurisdiction of the latter court having attached, plaintiff cannot acquire a right to have the case returned to the state court by afterwards filing a complaint, stating the amount in dispute at less than \$500.]

This action was brought in the state court to recover the value of a quantity of wheat. Upon the defendant's application, an order of removal to the circuit court of the United States was granted by Judge Small, of the state court. At the time he made the order, no pleading or writ was on file showing the amount in dispute, except the petition of the defendant, asking for the removal. After the order was granted, Zinkeisen & Co. filed a complaint in the state court, alleging the cause of action and claiming damages in a stated sum. In that complaint they obtained an order from Judge Small to show cause why the order made by him, removing the cause into the federal court, should not be

¹ [Reprinted by permission.]

vacated and set aside. On hearing the order to show cause, Judge Small refused to vacate the order of removal. On the first day of the session of the United States circuit court after the order of removal, Hufschmidt brought into the court a certified copy of the papers filed in the state court, including the complaint filed after the order of removal was granted, and asked that said papers might be filed and the cause docketed in that court. The motion was argued before one of the judges of the United States district court, who denied it, holding that the complaint filed after the order of removal was conclusive as to the amount in dispute. A motion was then made before DRUMMOND, District Judge, to vacate and set aside the order made by the district judge, and that the cause be docketed, and after argument the order was set aside and the plaintiffs required to file a declaration. This settles a question of practice which has perplexed the profession in the state, and also settles that when the plaintiff chooses to commence suit by summons, and not file either his summons or complaint, the defendant, in a proper case for removal, may enter an appearance and show by petition that a suit has been commenced, and the amount claimed exceeds \$500, and tender a proper bond, and thus secure a removal of his cause into a federal court; and when he has done this, it is not in the power of the plaintiff to destroy that right by filing a complaint in the state court reducing his damages below \$500; and that, when a cause is once properly in a federal court, the plaintiff cannot then file a declaration laying his damages at less than \$500, and cut off the jurisdiction. In other words, when the jurisdiction of the federal court has once attached, it cannot be taken away by any act of the plaintiff.

Case No. 18,215.

In re ZINN et al.

[4 Ben. 500; 1 4 N. B. R. 436 (Quarto, 145); 43 How. Prac. 64.]

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

BANKRUPTCY—APPOINTMENT OF TRUSTEE—RELATIONSHIP TO PERSONS INTERESTED.

The mere fact of relationship on the part of a proposed trustee, under the 43d section of the bankruptcy act [14 Stat. 538], to the bankrupt or to a creditor, or to a proposed member of the committee of creditors, or on the part of a proposed member of such committee to a creditor or to the bankrupt, cannot be regarded as a disqualification.

[Cited in brief in Re Cooke, Case No. 3,169.]

[Proceedings in the matter of William G. Zinn and others, bankrupts. For prior proceedings, see Case No. 18,216.]

J. S. L. Cummins, for the resolution.

A. C. Fransioli, for opposing creditor.

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

BLATCHFORD, District Judge. In this case, at the first meeting of creditors, eight creditors, who had proved their claims, and whose claims amounted, in the aggregate, to \$332,712 68, and to three fourths in value of the aggregate amount of all the claims proved, subscribed, under section 43 of the act, a resolution that it was for the interest of the general body of the creditors of the bankrupts, that the estate of the bankrupts should be wound up and settled, and distribution made among the creditors, by trustees, under the inspection and direction of a committee of the creditors, and nominating John H. Wyman as trustee, and Samuel Wyman, Junior, Henry Almy and George C. T. Seaman as the committee. Among the eight creditors are Herman D. Aldrich, to the amount of \$188,866 88, who signs by the said Samuel Wyman, Junior, as his attorney; the said Samuel Wyman, Junior, to the amount of \$14,985 36; the said George C. T. Seaman, to the amount of \$64,942 45; and the firm of which the said Henry Almy is a member, to the amount of \$4,500. The said Herman D. Aldrich is the uncle of two of the bankrupts. The wife of the said Herman D. Aldrich is the cousin of the said John H. Wyman, and the sister of the said Samuel Wyman, Junior. The said Herman D. Aldrich is now in a lunatic asylum, as a patient for his health, but has not been adjudged a lunatic by any legal proceedings, nor has any committee of his person or estate been appointed. The said Samuel Wyman, Junior, acted as the attorney for the said Herman D. Aldrich, in proving the said claim of the said Herman D. Aldrich, and in voting for said resolution, in pursuance of a power of attorney executed by said Herman D. Aldrich, in January, 1870, when he was of sound mind.

John H. Wyman, the proposed trustee, is, therefore, related, by consanguinity and affinity in the fifth degree, to Herman D. Aldrich, and in the ninth degree to the two bankrupts, who are the nephews of Herman D. Aldrich. Samuel Wyman, Jr., is related by consanguinity and affinity in the third degree, to Herman D. Aldrich, and in the seventh degree to the two bankrupts, who are the nephews of Herman D. Aldrich, and in the fourth degree to John H. Wyman.

A creditor who has proved his debt, and who did not vote for or sign the resolution, objects to its confirmation by the court, on the ground of the relationships and the other facts thus stated.

The mere fact of relationship in the ninth degree, or a less degree, on the part of a proposed trustee, to a bankrupt, or to a creditor, even the largest in amount, of a bankrupt, or to a proposed member of the committee, or on the part of a proposed member of the committee, to such creditor, or to the bankrupt, cannot be regarded as a disqualification. Other facts, indeed, may concur with such relationships, to make a confirmation

improper. But, in the present case, there are no such facts. The three persons named as the members of the committee are all of them creditors, the aggregate of their claims being more than \$84,000. Samuel Wyman, Junior, is the attorney of the largest single creditor. The theory of the provisions of the 43d section are, that three fourths in value of the creditors who have proved their debts shall designate the trustee and the committee. The persons designated in the present case are gentlemen of high character and standing, free from all reproach. Nothing appears to indicate that they will act in the interest of the bankrupts, at the expense of the creditors. John H. Wyman and Samuel Wyman, Junior, are more nearly related to the principal creditor than they are to the bankrupts. The trustee is required, by the 43d section, to wind up and settle the estate for the equal benefit of all the creditors, and is at all times subject to the direction of the court in executing his trust. There is nothing to warrant the suggestion, that the bankrupts procured the creditors to make these appointments, or that they are made in the interest of the bankrupts, as against the creditors.

Mr. Seaman, although a resident of New Jersey, has a place of business in the city of New York, which he frequents daily.

The questions raised in regard to the power of attorney from Herman D. Aldrich to Samuel Wyman, Junior, and to the insanity of Herman D. Aldrich, I do not consider, for the reason, that, if the claim of Herman D. Aldrich be stricken out from the signatures to the resolution, it must likewise be stricken out from the debts proved, and there would thus still be signatures to the resolution, of creditors to three fourths in value of the debts proved. Notwithstanding the appointment of a trustee and the assignment of the estate to him, the claim of any creditor may be investigated under section 22, and the bankrupt and other persons may be examined under section 26.

The resolution passed by the creditors will be confirmed when the register shall have signed the proper certificate under form No. 63.

Case No. 18,216.

In re ZINN et al.

[4 N. B. R. 370 (Quarto, 123); 1 40 How. Prac. 461.]

District Court, S. D. New York. Jan. 9, 1871.

ASSIGNEE IN BANKRUPTCY—QUALIFICATIONS.

The election of a near relative of the bankrupt as assignee is not proper. In such case, the appointment by the register of a regular assignee (according to the rules of the district) will be confirmed.

¹ [Reprinted from 4 N. B. R. 370 (Quarto, 123), by permission.]

By JOHN FITCH, Register:

The above entitled matter is now pending before me, at chambers of this court, and is a voluntary proceeding under the bankrupt act [of 1867 (14 Stat. 517)]. A warrant was issued to the U. S. marshal as messenger, duly served and published, and returned in due form. The petitioners have been duly adjudged bankrupts upon their own petition as a firm and individually. The whole number of creditors named in the warrant, including those of the firm and the individual creditors, are about sixty (60). That on or previous to the day of the first meeting of creditors, eighteen claims had been proven. At the first meeting of creditors eight creditors signed a paper in the words and figures following, to wit, and to which John H. Bradley was sworn (form No. 63), which is herewith returned. [In conformity to the decisions (In re Bliss [Case No. 1,543]; In re Scheiffer [Id. 12,445]), I state the reasons which compel me to withhold my approval of the choice of trustee.]²

It is represented to me by creditors who have proved their claims, that John H. Wyman, of the city of New York, Samuel Wyman, Jr., H. D. Aldrich, and the bankrupts, or some of the bankrupts, are related to each other, and that the bankrupt, Herman D. Aldrich, Jr., is a nephew of Herman D. Aldrich, who is one of the creditors of the estate of said bankrupts, making a claim by Samuel Wyman, Jr., his attorney, in the sum of one hundred and eighty-eight thousand eight hundred and sixty-six dollars and eighty-eight cents. It is also represented to me that said Herman D. Aldrich is now insane, and is in the insane asylum. Said Samuel Wyman, Jr., exhibited but did not place on file a power of attorney, but not a power of attorney in these proceedings in bankruptcy. It appears that George C. T. Seaman, one of the committee of creditors, is a resident of the city of Elizabeth, in the state of New Jersey, and not a resident of the Southern district of New York; and the decisions in the cases (In re Harris [Case No. 6,112]; Anon. [Id. 461]), would render him ineligible, [as the court in the Case of Havens [Id. 6,231], say that an assignee must reside in the judicial district in which the proceedings are pending.]² It has been uniformly held by the courts, that they will not affirm the appointment or election of an assignee who is a relative of the bankrupt. It is also held that it is an objection to the trustee that he is a relative of the bankrupt. In re Stillwell [Id. 13,447];² [In re Powell [Id. 11,354]; In re Bogert [Id. 1,600]. And if an assignee has been chosen by the particular friends of the bankrupt, the court will not affirm such choice. In re Bliss [supra]; In re Mallory [Case No. 8,990].² As such a large amount of the debts proved are owned by H. D. Aldrich, who is said to be insane, and by Samuel

² [From 40 How. Prac. 461.]

Wyman, Jr., attorney for H. D. Aldrich, and by George C. T. Seaman, and the claims of many of the other creditors being small, the larger claims so overbalance them that they had but little or no voice in the proceedings. Their rights must therefore be more carefully protected by the court than if they appeared by counsel. Mr. John H. Wyman and George C. T. Seaman are both men of good character and standing in the community.

After examining the authorities applicable to this case, and particularly the decision of Judge Hall, in *Re Stillwell* [supra], I cannot legally sign the certificate attached to form No. 63 without the direction of the court. I hold, as a matter of law, that the proceedings had by the creditors on the return day of the warrant were void, and not a compliance with the rule and practice of this court. That an assignee was chosen or voted for, and that John H. Wyman is ineligible as trustee on account of relationship, [and that all notes given for a near relation of the bankrupt are void,—similar to the clause in the constitution of this state (1847), declaring all votes cast for a justice of the supreme court during his continuance in office void except for the court of appeals. A similar provision is contained in the constitution of the state of Michigan.]² And that George C. T. Seaman is ineligible as one of the committee on account of his not being a resident of the Southern district of New York; that under the bankrupt act, and by the rules of this court, to appoint John Sedgwick assignee, in order that, should your honor concur in the opinion of Judge Hall, in *re Stillwell*, the case may proceed regularly. Should I not do so, an alias warrant would have to issue delaying the proceedings unnecessarily. I also send a blank form, No. 63, in order, should your honor decide adversely to the decision of Judge Hall, I can sign the certificate thereto nunc pro tunc. In doing so, the court gets entire possession of the case, and can dispose of it on the hearing. Mr. Cummings, counsel for some of the creditors, desires to be heard orally by the court, and also requests the certificate to form No. 63. Augustus C. Fransioli, attorney for creditors, also desires to be heard orally by the court.

The proof of the claim of H. D. Aldrich, by Samuel Wyman, Jr., attorney, in the sum of one hundred and eighty-eight thousand eight hundred and sixty-six dollars and eighty-eight cents, is hereunto annexed, and the papers in the case not on file in the clerk's office submitted, and also the papers and protest of the creditors represented by F. C. Fransioli, attorney. Should any question arise as to the relationship of the parties, a reference can be had to ascertain the facts. It is exceedingly desirable that the court should lay down a rule as to relatives of bankrupts, etc., serving as trustees on committees, in order that it may be followed

² [From 40 How. Prac. 461.]

in all cases. That the application of creditors for the examination of the bankrupts and witnesses is hereto annexed, and the register desires directions from the court as to the course he should pursue in regard to the same.

BLATCHFORD, District Judge. Under section 43, the bankrupts and such creditors as may desire to be heard will be heard, on notice, as to whether the resolution appended to the certificate of the register was duly passed, and whether the interests of the creditors will be promoted thereby, and whether it ought to be confirmed by the court. Meantime the appointment of Mr. Sedgwick as assignee is approved, and he will take such steps as shall seem proper in view of the facts set forth in the certificate of the register and in the papers annexed to it.

[For subsequent proceedings, see Case No. 18,215.]

Case No. 18,217.

The ZODIAC.

[9 Ben. 171.]¹

District Court, S. D. New York. June, 1877.

COLLISION—OPPOSITE COURSES—LIGHTS—REMISS
LOOKOUTS—STEAMER AND SCHOONER—
STEAMER'S DUTY.

1. A collision took place at night off Cape May, between the steamship Z. and the schooner W. W. The schooner was heading S. W. by S., and going about 7 knots, with a fresh breeze from S. E. The steamer was heading N. E. by N., when a red light ahead was seen, soon after changing to red and green, and then to green. The steamer then starboarded one point, changing her course to N. N. E., when the schooner changed her course and showed her red light alone. It was not till after this change that the schooner noticed the steamer. The steamer immediately put her helm hard-a-port, whistled, slowed, stopped and backed, but struck the port side of the schooner, sinking her. In extremis, the schooner ported hard. The schooner averred that the steamer had a bright light visible, but no red or green light. The testimony of the lookout and of the wheelsman of the schooner was not taken: *Held*, that it was a fault on the part of the schooner for her lookout not to have sooner seen the white light of the steamer.

2. There can be no doubt that the steamer's green and red lights were burning.

3. The steamer was in fault in not starboard-ing enough when the schooner showed her green light. Damage apportioned.

[Cited in *The Beta*, 40 Fed. 900.]

In admiralty.

Edward L. Owen, for libellants.

John Sherwood, for claimants.

BLATCHFORD, District Judge. The libellants, as owners of the schooner William Wallace, bring this libel against the steamship Zodiac, to recover the damages sustain-

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

ed by them in consequence of the total loss of the schooner through a collision, which took place between her and the steamer, about midnight on the 6th of October, 1872, in the Atlantic Ocean, off Cape May. The schooner was bound from Boston to Philadelphia, in ballast. The steamship was bound from North Carolina to the city of New York. She struck the schooner about amidship, on the port side of the schooner.

The libel alleges that the schooner was heading about southwest by south; that the wind was about southeast; that she had all sails set except the jib topsail; that she had her green and red lights properly set, and they were burning brightly, and were seen in due time by those navigating the steamer; that she had a competent lookout properly stationed and faithfully attending to his duties, and kept her course; that the collision was caused solely by the carelessness and improper manner in which the steamer was equipped and navigated; that she was heading in the usual course for such a voyage, which was about northeast; that she had no lookout properly stationed, attending to his duty; and that she had only a bright light at the masthead, and did not carry at the time either a red or green light. The libel gives no intelligent account of how the collision could have happened, or came to happen. It alleges that the schooner headed southwest by south, and the steamer northeast; and yet, that the steamer struck a square blow on the port side of the schooner, and the schooner kept her course. This would require that the steamer should have changed her course nine points, and have come to be heading north-west by west, at the time of the collision. The libel does not allege how the steamer came to perform so strange a manœuvre in the presence of the visible lights of the schooner, which lights it alleges were seen in due time by those navigating the steamer.

The answer alleges, that, on the steamer, a red light ahead was reported and seen, the course of the steamer being north-east by north; that soon thereafter a red and green light appeared, and immediately the red light was shut out; that thereupon the order was given to heave the wheel to starboard, which order was promptly executed, thus presenting the green light of the steamer to the green light of the schooner, which was for a considerable time plainly visible from the starboard of the steamer; that the steamer was then on a course about north north-east, when, suddenly, the schooner changed her course, shutting in her green light and again opening her red light; that immediately the wheel of the steamer was hove to port and the signal given to stop and back her, but she struck the port side of the schooner; that the steamer had a competent lookout who faithfully performed his duty, and her bright mast-head light and her green and red side lights were good, clear lights and burn-

ing brightly; that the red light of the schooner was seen at a considerable distance, and, after her first change of course, her green light was plainly in view for a considerable time, and the green light of the steamer was, during that time, plainly visible to those upon the schooner; and that the collision was wholly due to the change in the course of the schooner and to the unskilful navigation of those on board of her.

That the schooner had her green and red lights set and properly burning is clear. The only witnesses from the schooner whose testimony has been given, are two in number—Ireland, the master, and Jackson, the mate. There were three other persons on board, part of her crew—a steward and two seamen. One of the seamen was stationed forward as a lookout and another seaman was at the wheel. Those two seamen, with the master and the mate, were the only persons on deck. The steward was a negro. All reasonable effort seems to have been made by the libellants to secure the testimony of the two seamen who were on deck. It is admitted, that, before this suit was commenced, the counsel for the libellants took down in writing their statements, and that, on such statements, their testimony was of importance for the libellants. Although the absence of their testimony cannot be attributed to any fault on the part of the libellants, yet the lack of their testimony is a misfortune for the libellants and for their case. When the question in issue is as to whether a vessel sailing by compass changed her course, the testimony of the man whose hands moved her helm and whose eyes were on her compass, is very necessary, and, generally, indispensable. When the question in issue is as to whether a lookout saw as soon as he ought to have seen them, the lights of an approaching vessel, his testimony on the subject is very desirable.

On the schooner, it was the master's watch on deck. The man at the wheel and the man forward were in the master's watch. The master's watch on deck had commenced, and the mate's watch on deck had terminated, shortly before, but the mate still remained on deck. The master's story is, that he was standing by the after companion-way on the port side, which was the weather side, when the lookout forward reported that he saw some kind of a light on the port bow; that he, the master, then walked forward thirty or forty feet, and when he reached there saw a very dim white light bearing about south south-west, (his course being south-west by south, and the light thus being about a point on his port bow), and about 300 yards distant; that he saw no other lights on the vessel, and could not at that time see her hull or her sails; and that, when the vessel came nearer he saw her hull and started to go aft, and was knocked down by the collision. He also says, that the wind was about south-east, a good fresh breeze, and

the schooner was making about seven knots; that, with her sheets flat, she could sail five points from the wind; that, when his watch began, she was heading south south-west, (which was six points from the wind), and he changed her course to south-west by south, which was one point further away; that she at no time had her sails shaking in the wind; that, in the alarm and just before the vessels collided, the wheel of the schooner was put hard-a-port; and that the steamer struck the schooner just forward of the main rigging of the schooner, glancing a little aft, on the port side of the schooner.

The testimony of the mate of the schooner is to the same effect as that of the master. He says that he saw the white light of the steamer, after it was reported, about a point and a half on the port bow of the schooner, and about 300 yards off; that the light continued to preserve the same bearing; that, when the steamer was half her length, or a little more, away, the master gave the order to hard up; and that the sails of the schooner did not at any time shake in the wind.

The change of course on the part of the schooner of which the steamer complains is, that after the schooner had changed her light from red to green, and the steamer had starboarded, the schooner shut in her green light and again opened her red light. It is alleged that the green light of the schooner was in view for a considerable time from the steamer, over her starboard, after the steamer had starboarded, and that after that the schooner changed so as to show her red light. When the white light of the steamer was seen a point and a half over the port bow of the schooner, the schooner must have presented her red light to the view of the steamer. As it was then for the first time that the steamer's light was seen by the schooner, I conclude that the schooner first saw that light a considerable time after the steamer had seen the schooner's lights. The steamer's white light had been taken down and trimmed and replaced, and it was after it had been replaced that all the changes of the schooner's lights which are detailed in the answer were seen from the steamer. The steamer noticed all those changes in the schooner's lights, whereas it was not till after the last change in the schooner from green to red that the schooner noticed the steamer's white light.

What bearing does this tardy observation of the steamer's light have upon the case? It has this bearing. Till the steamer's light was observed, her presence was not known. Where there is nothing to arrest the attention, and exact care and vigilance, the attention is apt to flag and care is apt to be relaxed. The special importance of keeping his course, because there was an approaching steamer ahead, was not presented to the mind of the master of the schooner. Hence, before he saw over his port bow the white

light of the steamer, at which time he was presenting his red light to the steamer, and after which time he made no change except the porting in extremis, he had no especial motive to keep his particular course strictly, or to observe by his compass whether such course was strictly kept. Undoubtedly he kept his general course; but, with such a wind, in direction and force, the schooner sailing seven points off the wind, would tend to make lee way, and the impulse and effort of the man at the wheel would constantly be to keep her from falling off before the wind. Moreover, with a compass course south-west by south, it is shown that she could lie at least one point nearer to the wind with her sails trimmed as they were, and not have them shake. So that, consistently with the testimony of the master and the mate, the schooner may very well have presented to the view of the steamer the appearances and changes of her lights, to which those on board of the steamer testify, and which will be considered hereafter. I think it was a fault on the part of the schooner for her lookout not to have sooner seen the white light of the steamer. That light had been trimmed and put in place again, and was burning well at the time the first light on the schooner was first seen by the steamer. It must have been visible at a greater distance than the colored lights on the schooner. Yet it was not observed by the lookout on the schooner until a considerable time after the steamer saw the first time the red light of the schooner, or, if he did see it, he failed to report it. He was remiss in the one respect or the other. If he had not been thus remiss, the master of the schooner would have had earlier knowledge of the approach of the steamer, and would have been careful to keep his course strictly, and not present vacillating lights to the view of the steamer. The vessels were approaching each other nearly end on, and it was of the utmost importance that the steamer, after determining, from the appearance of the schooner's lights, on which side she would pass the schooner, should be left free to carry out that determination. Such fault on the part of the schooner contributed to the collision.

The steamer had her green and red lights burning. The master and the mate of the schooner did not at any time see them, but, on the evidence, there can be no doubt they were burning. The red light of the schooner was seen nearly ahead by those on the steamer, and, almost immediately after that, such red light disappeared, and the green light of the schooner came into view. Thereupon the steamer starboarded one point and went upon a north north-east course. Sabiston, the second mate of the steamer, who was in the pilot-house with the master and the man at the wheel, and whose watch it was at the time, used his glass to look at the red light, and judged it to be two or three

miles off, and, while still using his glass, saw the green light appear, so that red and green were visible together, and then saw the red disappear, leaving the green in view. There can be no mistake about such testimony. It is distinct, and shows a change of course on the part of the schooner. Such change was notice to the steamer to starboard, and she did starboard. Sabiston says that the starboarding threw the steamer's head to port probably a little more than a point; that thereafter the green light of the schooner remained in view on the starboard bow of the steamer; and that, after the steamer had so fallen off a point or more, she was steadied on her new course. After that the schooner shut in her green light and showed her red, and the steamer immediately put her helm hard-a-port and blew her steam whistle, and slowed and stopped and backed, but the vessels collided.

Sabiston testifies, that when the wheel of the steamer was steadied after starboarding, the green light of the schooner bore a point or a little more on the starboard bow of the steamer; that she was then the best of a mile off; and that, when she showed her red light again, she was two points on the starboard bow of the steamer, and from 200 to 500 yards off. He also says, that if the schooner had not changed her course after the steamer had starboarded, the steamer would have cleared the schooner by from 300 to 400 yards. It is evident that the steamer did not give the schooner a very wide berth. She had turned to the leeward of the schooner, and, as before remarked, the schooner could not fail to make leeway. The steamer did not shake off the schooner to any safe degree. The steamer had seen the schooner change from red to green, and such a change in the broad ocean, at the place where the vessels were, and with the wind as it was and the steamer's white light burning so as to be visible to the schooner, because her colored lights were visible to the steamer, ought to have induced the steamer to believe that the schooner did not see the steamer's light (as was the fact), and to give the schooner more of a berth. With the schooner's green light in view a little on the starboard bow of the steamer, it was proper for the steamer to starboard, but she ought not to have steadied as soon as she did. She ought to have starboarded more than a point. It was her duty to avoid the schooner as much after the schooner showed her green light as before, and even to be more cautious to do so, because of the previous erratic change of the schooner from red to green. The steamer had plenty of time and opportunity to make a change of more than one point to port. I do not regard it as by any means clear, on the evidence, that the steamer would have cleared the schooner, even if the schooner had continued to show her green light.

As both vessels were in fault, there must

be a decree for an apportionment of the damages which shall be shown to have been sustained by the libellants.

Case No. 18,218.

ZOLLINGER v. The EMMA.

[3 Cent. Law J. 285; 22 Int. Rev. Rec. 154.]¹
District Court, S. D. Mississippi. Jan. Term, 1876.

ADMIRALTY JURISDICTION—MATERIALS FURNISHED AT HOME PORTS—C. O. D. BILLS—LIENS AND MORTGAGES—PRIORITIES.

1. The admiralty jurisdiction of the United States courts in no way depends on the residence, or citizenship of the parties.

2. It is only when liens are given by state laws for materials supplied at home ports that they can be enforced in the admiralty courts.

3. When goods are delivered to the master of a vessel to transport to consignees and collect and return the money therefor, the consignor has a lien against the vessel for the money so collected, since the whole contract is one of affreightment.

[Disapproved in *The Illinois*, Case No. 7,005.]

4. The master and clerk of a vessel are not entitled to liens for their wages.

5. Maritime liens have priority over mortgages.

[Cited in *The J. E. Rumbell*, 148 U. S. 18, 13 Sup. Ct. 502.]

In admiralty.

HILL, District Judge. The questions now presented for decision, arise upon the exceptions of the intervenor, Samuel Bazinsky, mortgagee of said steamboat, to the libel and interventions here, and upon exceptions filed by libellant and other intervenors to the claims propounded by John King, master, and J. B. Denny, clerk, Bazinsky & Hirsch, supply-men, and by Forbes & Fitzpatrick, on contract of affreightments.

The exceptions filed by H. H. Miller and Porter, proctors for Samuel Bazinsky, are in substance as follows: (1) That there is no lien for any of the claims propounded, because the Emma was engaged in navigation between two ports of the same state. (2) That there is no averment that the boat is of more than twenty tons burden. (3) That contracts to deliver goods to consignees and return money collected from said consignees, on what are commonly called C. O. D. bills, are not maritime contracts. (4) That there is no jurisdiction in the court, because all of the libellants and owners of the boat are residents and citizens of the state of Mississippi.

The first question is as to the admiralty jurisdiction over vessels plying upon the navigable waters, entirely within the body of the state. On this subject, I do not deem it necessary to review the history of judicial decisions in this country, further than to say that since the case of *The Genesee Chief*, 12 How. [53 U. S.] 457, it has been the set-

¹ [Reprinted by permission.]

tied doctrine, that the ebb and flow of the tide is not the line limiting the admiralty jurisdiction but that it extends to all navigable rivers and waters of the United States. Subsequently in the case of *The Magnolia*,² it was held that the admiralty jurisdiction extended to collisions occurring upon navigable waters entirely within the body of a state. But the case of *The Belfast*, 7 Wall. [74 U. S.] 624, which has never been overruled, conclusively settles the principle that the admiralty courts have jurisdiction over all maritime contracts, to be performed by, or all torts committed by vessels navigating the navigable rivers and waters of the United States, whether the same be wholly within one state or passing through several states. It is urged by learned counsel for the mortgagee that opinion of the court in that case does not go so far, or that if it does, it has since been overruled in the case of *The Lottawanna*, 21 Wall. [88 U. S.] 588.

The careful examination of these cases and attentive consideration of the arguments of counsel, have failed to convince me of the correctness of the view taken by counsel. That the rule stated in *The Belfast* case was intended to fix and settle the admiralty jurisdiction upon all navigable waters of the United States irrespective of state boundaries I have no doubt, and an examination of *The Lottawanna* will show that this rule has not therein been questioned or disturbed. The sole question in that case, was whether supplies, material and repairs furnished a vessel at her home port, created a lien upon the vessel which could be enforced by a proceeding in rem against the vessel. No question of this sort was raised in *The Belfast* case [supra]. By the general admiralty law, as enforced in continental Europe, material and supply-men, whether in the home port or a foreign port, have a lien upon the vessel, and a right to proceed in rem. The war made upon the admiralty courts of England, by the law courts, armed with writs of prohibition, restricted this jurisdiction so as to exclude the lien at a home port. The supreme court of the United States, in the case of *The General Smith*, 4 Wheat. [17 U. S.] 438, adopted the English rule, which the court reaffirms in *The Lottawanna* case. A modification of the twelfth rule in admiralty was adopted in 1872, and it was thought by several of the courts, and by many of the bar, that its language indicated an intention, upon the part of the court, to overrule former decisions, and hold that there was a lien for supplies and materials furnished at the home port. The court in *The Lottawanna* case, corrects this view and construes the rule to extend no further than to permit the courts of admiralty to enforce liens given by state laws upon vessels for supplies and materials furnished at the home port. I am

satisfied, therefore, that exception is not well taken, and must be overruled.

As to the exception that it is not averred that the vessel is of twenty tons burden, that is also overruled as it was unnecessary to state it, and if necessary, the defect would have been cured by allegations in exceptor's intervention that she was of more than one hundred tons burden.

The next exception is a jurisdictional one, based upon the residence of the parties. It is sufficient to say that admiralty jurisdiction in no way depends upon the residence or citizenship of the parties. Therefore this exception is overruled.

The other exceptions relate to the character of the several claims set up in the libels and interventions, and may be considered together. A portion of these claims are for seamen's wages, and the jurisdiction of the court having been maintained, there can be no question as to mariner's wages being the first lien upon the boat. The next class of claims is for supplies and materials furnished at the home port. Their character has already been discussed, and counsel representing such claims admit in argument that they can not be sustained as liens unless a lien is given them by the laws of Mississippi. The act of the legislature of Mississippi, March 4, 1874, provides for an attachment against a vessel for supplies and material furnished, and it is evident that this act intended to give an implied lien for such supplies and materials, but I do not think such implied lien can be maintained, and if intended to give a remedy in rem against the vessel enforceable in the state courts, it would be an infringement upon the exclusive admiralty jurisdiction of the United States, and void under the decision of the supreme court in *The Belfast* case. I hold, therefore, that these claims constitute no lien.

The next and last exception offered by the mortgagee is as to the liability of the vessel in rem, upon what are styled C. O. D. bills, that is where the master of the vessel contracted to deliver goods to the consignees to whom they had been sold, and collect and bring back the price thereof to the shipper. There can be no doubt of the liability of the vessel for the safe transportation and delivery of the goods upon these contracts. The more difficult question is as to the liability of the vessel for the failure of the master to return the money received to the shipper. It is, I believe a settled rule, that where a cargo of goods delivered to a vessel upon a contract that the master shall convey them to some market, and there sell them for account of owner, until he makes a sale and delivers the goods he is acting as the master of the vessel, and not as the agent of the shipper; but that after he sells and receives the money he is agent of the shipper, and consequently that for any breach of contract of affreightment the vessel is liable, but for any default in payment of the

² 20 How. (61 U. S.) 296.

money to the shipper the master is personally liable only. But there is a marked distinction between such a case and one in which the consignor has already sold the goods to the consignee upon an agreement that money is to be paid upon delivery of the goods. In such case, the contract is entirely one of affreightment. The master contracts for a certain sum to be paid as freight to transport the goods to the consignee and transport the money delivered to him by the consignee back to the consignor, or if the money is not placed upon the vessel by the consignee to re-transport the goods themselves to the shipper. The duties assumed are entirely those of a common carrier and a common carrier is as much liable for a failure to transport and deliver money received by him for transportation as he is for a failure to deliver any other character of freight. The immense commercial business now transacted in this way can only be protected by this rule, which can be applied without infringing upon any established principle of admiralty, and is fully sustained in the case of *The Hardy* [Case No. 6,056], decided by Judge Nelson. The claims so far as proved must therefore be allowed as liens upon the vessel.

I will next consider the exceptions offered by *Pittman & Pittman* and *Gilland & Birchett*, for libellant, and intervenors to other claims and interventions filed and set up by the counsel who represents the mortgagee. The first is that of *John King*, master of the vessel, for his wages as such. The rule that such a claim is not a lien upon the vessel, enforceable in rem, is too well settled to require either reason or authority to sustain it. His contract is with the owner, and only recoverable against him personally. The exception to this claim must be sustained and claim disallowed. The claim of *J. B. Denny*, first clerk, is also a claim for wages as such, which I am satisfied must be disposed of in the same way. The first clerk of a steamboat is the chief financial agent of the owner, employed by him and accountable to him and not to the master. He receives and disburses all moneys for the boat, pays the wages of the crew, and practically pays the master of the vessel himself his wages, and, having the money of the boat in his own hands, pays his own salary. The reason a lien is given to mariners for their wages is because they are employed by the master of the vessel, on the credit of the vessel, and would in most cases be practically without remedy if they were compelled to hunt up and sue unknown owners. The first clerk does not occupy any such position; he is the financial agent of the owner, and can at all times pay himself out of moneys in his hands, which he receives for freight and passage. I believe the office of first clerk is one unknown to the general admiralty law, according to which the master is the sole representative and agent of the owner. The

same principles which exclude the master from the privileges of a mariner's lien, would also be applicable to the first clerk, and upon principle and reason in the absence of adjudicated cases, I am satisfied that first clerks of steamboats are not entitled to a lien for their wages. So the claim must be disallowed. The claim of *Bazinsky & Hirsch* is for money advanced in the home port, and does not rank any higher than supplies and materials, and must be disallowed. The claim of *Forbes & Fitzpatrick* is disallowed, because they have obtained judgment against the owner in a state court, and levied upon goods sufficient to pay the debt.

This leaves but one question to settle—the claim of the mortgagee, *Bazinsky*. It is insisted by his counsel, that his mortgage is a prior and higher than all others. I am satisfied that this position is not maintainable. It is not a maritime lien, but only a lien upon the vessel, subject to all maritime liens. The mortgagee is only allowed to come into court of admiralty as claimant, and occupies exactly the same position that the owner would. His mortgage, from the date of its record, gives him a lien for his mortgage debt, good against all subsequent vendees and incumbrancers, except those holding maritime liens, which are liens in rem, and without regard to the ownership of the mortgage. A vessel is only a conditional sale, and, as an absolute sale or transfer of the title cannot effect maritime liens, a conditional one cannot. To hold otherwise would destroy the credit of vessels, and hamper commerce, beyond reason, for every employé and every shipper and every passenger would have to examine the customhouse records of the home port of the vessel, before he could safely risk his services, his property, or his person upon a boat. This position is fully sustained by all the authorities. Hence the mortgagee can only claim any surplus that may remain after satisfying all of the maritime liens against the vessel.

Case No. 18,219.

ZOLLINGER v. The EMMA.

[See Case No. 18,218.]

Case No. 18,220.

The ZONE.

[22 Law Rep. 725; 2 Spr. 19.]¹

District Court, D. Massachusetts. March, 1860.

LIBEL AGAINST VESSEL—DAMAGE TO CARGO.

1. The French Code de Commerce does not differ from the general maritime law, in respect to liens on the ship for damage to the cargo.

2. On trial of a libel against a ship, to recover damage to cargo proved to have been shipped sound, and delivered damaged, the burden of accounting for such damage is on the claimants.

¹ [2 Spr. 19, contains only a partial report.]

This was a libel in rem to recover damage to a quantity of almonds shipped under a French bill of lading, of which the following is a translation. "Marseilles, February 6, 1858. Shipped in the name of God and of good luck, at the port and harbor of this city, by Rabaud Bros. & Co., for account of whom it concerns, in the American ship called the Zone, commanded by Captain Wells, to be conveyed and transported (God assisting) to New Orleans, and delivered to order, or to whomsoever the below-mentioned merchandise shall be for; marked as follows, viz.: 'G. H.' Four hundred and six bags almonds in the shell, weighing in the whole twenty thousand three hundred kilogrammes, K. 20,300,—making thirty one tons $230/1000$. And on receipt thereof, well-conditioned and free from wet or damage, freight shall be paid, six dollars, with ten per cent. primage per ton. Weight, contents unknown to (Signed) John C. Wells." The testimony of sixty-eight witnesses was put into the case, the trial of which lasted six days.

² [The libellants, who are residents of Barcelona, in Spain, by their agents at Marseilles, shipped on board the Zone about thirty tons of soft-shelled almonds to be delivered at New Orleans. The almonds had been purchased at Alicante, and carried thence, by water, to Marseilles. The persons who packed the almonds at Alicante, the master of the steamer that carried them to Marseilles, and the persons employed in transshipping them at Marseilles, severally, testified that they were in good condition when they passed through their hands. The bills of lading signed by the master were not in the ordinary form. They did not contain any admission that the almonds were in good condition when received, nor any undertaking to deliver them in good order; nor did they contain the usual exception of the perils of the seas; but they provided that, upon the delivery of the almonds in sound condition at New Orleans, the stipulated freight should be paid. The master and mate of the Zone testified that the almonds, so far as they knew or saw, were in good condition when received at Marseilles. They saw them, however, only in the imperfect light of the hold of the vessel, and neither of them was acquainted with the article; and they both testified that when taken out of the vessel at New Orleans they were in as good order as when received, except about a dozen bags, which had been rat-eaten, and the bagging of a part of the rat-eaten bags, which had fallen down against the ballast, was rotten from humidity. On the voyage, the vessel encountered strong gales and a "short heavy sea," and carried away some of her lighter sails and spars. She was, however, very tight, the water never rising in her more than eleven inches, and never coming up within several inches of her ceiling. On ar-

² [From 2 Spr. 19.]

iving at New Orleans, the almonds were taken out of the ship, and about half of them were sent to the store of a merchant who had bought them to arrive; he then refused to receive any more, alleging that they were damaged. The consignees thereupon took the remainder into their own store, and had them all examined by two port-wardens, who reported that they found them generally stained and mouldy, and thereby rendered unmerchantable, and ordered them to be sold at public auction. They were sold accordingly, and bought in by the merchant who had before bought them to arrive, for about half the price he had agreed to pay for them. The master of the vessel was not notified to be present at the examination by the port-wardens, though he was notified afterwards of the intended sale. The testimony as to the actual condition of the almonds, when they came out of the vessel at New Orleans, was very conflicting. The merchant who had bought them to arrive, and the consignee, both testified that many of them were actually wet, and that more than half of them showed signs of having been wet or were actually wet. The marine inspector, who was also agent of the insurance company that insured them, saw part of them in store, part in the hold of the vessel. He said he found them "stained, mouldy, and diseased, and musty; that they had been wet, and part of them were still damp." Two of the employees of the consignees testified that they were wet, and "the greater part of them perfectly black." Other employees of the consignees testified that they were not then wet, but appeared to have been wet, and were then damp. The two port-wardens, who examined them after they had been taken out of the vessel, and who ordered them to be sold, testified that they found them "generally stained and mouldy." Some of them appeared to be damaged by salt water and by dampness and humidity. One of them spoke of finding stained almonds in bags that showed no external appearance of damage. One of them spoke of the bags as appearing "rusty." One employee of the consignees testified that he opened three or four bags, and found them wet and mouldy. A dealer in almonds, who attended the auction sale, and saw these almonds there, said they were "stained and black, and appeared to have been wet." Another said, they "evidently had been damaged by salt water." The libellants also called three stevedores, two Italians and one Spaniard, who testified that almonds should not be stowed in the hold of a double-decked vessel, and, if so stowed, there should be under them at least two feet of ballast, and twenty inches of dunnage on top of that. Several of the libellants' witnesses attributed the damage to bad stowage and insufficient dunnage. Two of them thought the damage had been caused by blowing. One or two suggested the steam of the hold as the cause, and there was no oth-

er cause of damage than the above suggested by any witness. The almonds were in fact stowed in the lower hold of the ship, a part between the fore and main mast, and the remainder between the main and mizzen mast; other cargo being stowed forward and aft of and between the piles of almonds. The vessel was ballasted with shingle ballast, thirty inches in depth at least, and coming above the top of the rider keelson, and on top of this was dunnage of wood.

[There was some controversy as to the thickness of the dunnage, but no witness made it less than three or four inches. On behalf of the claimant many witnesses were called of large experience, port-wardens, ship-masters, and merchants, all of whom testified that the place where the almonds were stowed was the best place in the ship to stow cargo liable to be damaged by seawater, and that the dunnage under this cargo was ample; that a single board over this ballast, and on the sides of the ship, with four or five inches in the bilge, was, in their opinion, sufficient dunnage, and all that usage required. The claimant also proved that the ship was rated A 1; that she delivered her outward cargo at Gibraltar, in perfect order; that she brought to New Orleans other almonds, in bales, stowed alongside in part, and in part on top of these said to be damaged, which were delivered in perfect order, except only a slight staining on the bagging of a few bales; that, at New Orleans, immediately after taking out the cargo, a cargo of cotton was taken in, and stowed directly upon the ballast, which had not been moved or changed, and came out in Boston dry and unstained. The discharging clerk, who was present nearly all the time the ship was unloading, testified that the almonds came out in good order, except that a few bags, not over twelve in all, were rat-eaten, and the bagging of five of these, that had fallen down upon the ballast or against the sides of the vessel, was stained and rotten by "humidity." A port-warden who was present when the hatches were taken off, and two or three times afterwards, on account of the damage above named, testified that he saw no other damage to the almonds than that above stated; that he saw no appearance of seawater having touched any part of the cargo; and that he found the ship an unusually dry ship. The stevedore who unloaded the ship in New Orleans, his foreman, and two or three assistants, testified that they saw no appearance of wet on the almonds. The stevedore further said, he found some bags of almonds with dry stains on them, mixed indiscriminately among the bright bags. Two persons in the employ of the consignees were in the hold of the vessel before the almonds were taken out. One of them drew samples from the almonds while in the vessel, and neither of them discovered any damage until the almonds were taken out of the ves-

sel. The claimant put in the testimony of three Boston dealers in almonds, to the effect that salt water always rots the bags and discolors the meat of the nut as well as the shell, while fresh water affects only the shell. It was not contended that these bags were rotten, except the few above named; and several of the witnesses for the libellants testified that they found the shell of these almonds discolored, while the meat was white and sweet, and they gave this as their reason for the belief that the almonds were injured on the voyage. The claimant further proved that, for two weeks immediately preceding the shipping of these almonds, the weather was rainy with high winds, and that another cargo of almonds, shipped from Marseilles to Boston about the same time, was mouldy and discolored, while the bags showed no appearance of damage.

[The claimants contended: 1st. That the contract, having been made in France, was to be governed by the law of France, and that by the law of France the ship is not liable for damage to cargo unless the damage is occasioned by the fault of the master or crew. 2d. That the fair result of the foregoing evidence was that the almonds did not come out of the vessel wet; that the only external signs of damage were stains on the bags; that the stains were not so dark in color as to attract the attention of persons not acquainted with the usual appearance of bags of almonds; that the testimony demonstrated that every usual and necessary precaution had been taken for the preservation of the almonds; that the fact proved by the libellants' witnesses, that some bags which appeared bright on the outside contained stained almonds, the position in which the stained bags were placed in reference to the bright bags, the fact that the bags were not rotten, the nature of the damage to the nuts, the dryness of the vessel and her ballast after her cargo was taken out, the fact that the ship made no water on the voyage, and the fact that other almonds stowed with these came out sound, proved, conclusively, that the damage had not been done on board the ship, or, at all events, not by any of the causes for which the ship is responsible under the general maritime law; that the evidence that the cargo came on board in good condition was by no means satisfactory; that the master of the steamer that carried the almonds from Alicante to Marseilles had not opportunity to know what he testified to be true, and the persons who saw them at Marseilles had no duty to do which would lead them to examine carefully; that the clear result of the whole evidence was, that either the almonds came on board in bad condition or not in condition to bear the voyage, or, if injured on the voyage, it was by "perils of the sea." 3d. That, as matter of law, damage to cargo by blowing or steaming, the only means

of damage suggested by the libellants' witnesses, in a vessel well stowed and dunnaged, is damage by perils of the sea.

[The libellants contended: 1st. That the contract was to be governed by the laws of the United States; because its performance was to be completed there, and, if not so, that the law of France did not differ from the law of the United States, as to the extent of the lien upon a vessel for damage to cargo. 2d. That it was proved that the almonds came on board in good condition, and came out damaged; that the burden of proof was upon the claimants to account for this damage, and to show that it was occasioned by a peril of the sea, or by some other cause for which the ship was not responsible; and that, in the conflict of testimony in this case, the claimants had not sustained the burden of proof; that damage by blowing could not be considered damage by peril of the sea, under the facts and circumstances of this voyage. The trial lasted six days, and the testimony of sixty-eight witnesses was taken orally, or by depositions.]²

B. R. Curtis and C. P. Curtis, Jr., for libellants.

John C. Dodge, for claimants.

SPRAGUE, District Judge. The libellants claim as owners and shippers of the almonds mentioned in the bill of lading, for damage to their property. The claimants have made two objections to the maintenance of this suit in the name of the libellants; first, that the property belonged to the consignees, Messrs. Cusack & Co. of New Orleans; and second, that the suit was commenced without authority from the libellants; but I am satisfied upon the evidence that the libellants were the owners of the property, and that the suit was rightfully brought, and is rightfully prosecuted by them.

The first question to be decided is whether the rights of the parties are to be settled by the French Code de Commerce, or by the general maritime law. It is argued, on behalf of the claimants, that as the contract of shipment was made in Marseilles, the law of France controls it, and establishes their duties and liabilities. And they allege that by the French Code (section 191), no lien on the ship is given, for damage to cargo, unless caused by the fault of the master or crew. I do not find it necessary to decide this question, for the reason that I do not think I am authorized to infer from the French Code, that it differs, in respect of liens for damage to cargo, from the general maritime law. I think, in the first place, that it is fairly to be presumed that a commercial code of so commercial a nation as France, would not differ from the general maritime maxim, "that the ship is bound to the goods, and the goods to the ship." The Code is the only

² [From 2 Spr. 19.]

evidence of the law offered. No testimony of French jurists is in the case, and I am left to form my own judgment of the law from the Code itself. The section (191) insisted upon by the claimants does not profess to create liens, but only to marshal certain liens elsewhere declared to exist. We must look elsewhere for the creation of liens on ships for damage to cargo.³ Under the chapter of the Code treating of charter-parties, contracts of affreightment, and freightings ("Des chartres-parties, affretemens ou nolissemens"), this subject is treated. The 280th section is as follows: "The ship, her tackle and apparel, the freight and the cargo, are respectively bound to the performance of the agreements of parties." The claimants insist that this section is limited to charter-parties, or to contracts for the hiring of a specific portion of the ship. It would be very extraordinary if it were so limited, and would interfere very materially with the powers of the captain to load his ship in such a manner as to render her seaworthy. Some goods require to be put at the bottom, and others at the top of the cargo. Too much dead weight on the bottom will make the ship labor. Too little will make her crank. Now, if the hirer of a portion of a ship should have the right to insist upon having that portion established by metes and bounds, either perpendicularly or horizontally, it would follow that he would have the right to stow his cargo as he chose, and in such proportions as he preferred. And in case there were several such partial hirers, the control of the stowage would be altogether taken away from the master. But it is said that there is a special chapter of the Code, treating of bills of lading, in which no mention is made of any lien. A bill of lading is not inconsistent with there being also a charter-party, or a contract of affreightment. A bill of lading is evidence of a contract, but it does not necessarily constitute the whole contract. If section 191 is the only one giving a lien for damage to cargo, then it would follow that there is no lien on the ship for damage arising from the fault of the owner. The ship might be unseaworthy, and the owner know it, and yet no lien for the damage caused thereby. This is not to be supposed, and I should not adopt the construction of the claimants' counsel, without further proof that such is the meaning of the French Code. Believing that the French law does give a lien on the ship in accordance with the general maritime law, it does not become necessary for me to decide by which of the two this contract is governed.

³ [The authority of the master to bind the ship and her owners is determined by the law of the country to which the ship belongs. *Pope v. Nickerson*, Case No. 11,274; *The Bahia*, 1 Brown. & L. Adm. 292; *Peninsular & Oriental Steam Nav. Co. v. Shand*, 3 Moore, P. C. (N. S.) 272.]

Is the ship liable? In the first place, were the goods damaged when delivered in New Orleans? In regard to twelve bags, damaged by rats and rotten from humidity, there is no controversy. As to the residue, the depositions of the consignees, of the person to whom they had been sold to arrive, and who rejected them as damaged, of the portwardens and marine inspector who examined them, and of others who saw them,—all show that they were damaged. Notice was given to the captain and to the consignees of the ship in New Orleans, and in the newspapers, that the almonds would be sold at auction, and they were so sold for half the value of sound ones. The captain was notified of the damage, and there was an examination of the almonds in his presence. He was requested to extend a protest, to enable the consignees to recover of the underwriters; but he declined to do so, on the ground that he had had no bad weather on his voyage. On the evidence, I cannot doubt that the almonds were damaged very much beyond the extent admitted by the claimants. The almonds having been shown to be damaged when delivered, and the master having signed a bill of lading implying that they were in apparent good condition when shipped, the burden of proof is on the claimants to show why they did not arrive in good condition. In this bill of lading, it is true that there is no express admission of their reception in good condition; but it is therein provided, that "on their delivery in New Orleans without wet or damage freight shall be paid;" and this imports that they were without "wet or damage" when shipped. It is conceded by the libellants, that although the bill of lading does not in terms except the dangers of the seas, this exception is implied.

It is contended that the almonds must have been wet or damaged before going on board in Marseilles. To meet this, the libellants have produced the testimony of the persons in Spain who purchased the almonds, dried them in a granary, put them into bags, put them on board the steamer for Marseilles, and of the captain of the steamer himself. They have also produced the testimony of the shippers in Marseilles; of their clerks, draymen, and lighterman, by whom the almonds were examined and put on board the ship; and by this complete chain of testimony, exhausting the sources of evidence, it is shown that they were handled only in fair weather, and were in a sound and dry state when put aboard. Furthermore, the mate testifies that the weather was fine the day they came aboard; that he received and saw them, and reported them in good order to the captain for him to sign the bill of lading. He superintended the stowage, and it was his duty to see and report whether they were wet or not.

In reply to this direct evidence, the claimants say that the almonds must have been damaged before coming on board, because

the injury could not have arisen on board the vessel. They show that the vessel was properly dunnaged according to usage in Boston; that the ballast was some two feet deep, and that there was sufficient dunnage to protect the cargo from water from the bottom, and that there was but little water in the hold. But there is evidence that these bags, or the greater part of them, were wet when taken out; that there was wet then in the vessel and that some of them lying against the side of the vessel were rotten from humidity. Have the claimants shown how this damage was caused? Was it by "blowing?" This may happen where there is but little water in the hold, but from the evidence it would seem that the bags were too generally damaged to have been wet from this cause, which would be more likely to wet only the outer tiers of bags. Was it from a leak in the deck? The mate says the upper deck was tight; but in fact the lower deck was not tight. It cannot be that the goods came on board dry, were delivered wet, and were not damaged while in the ship. Some one of these three propositions must be untrue.

Now, the evidence shows satisfactorily that the goods were wet and damaged when delivered at New Orleans, and the bill of lading admits that the sacks appeared externally to be in good order when taken on board in Marseilles. The burden of proof is then on the claimants to show what caused the damage. Theories may be formed as to the cause of damage, and one theory which is no more improbable than another is, that water may have got in between decks during the voyage. It must be borne in mind, that one of the reasons for casting the burden of proof of the cause of damage (after the damage itself has been shown) upon the ship-owner is, that as to what takes place during the voyage no one except his agents can testify. This burden of proof does not allow of a conclusive inference that the damage must have arisen before shipment, because the ship was tight and well dunnaged and that the ship-owner will be relieved of his liability by such inference. The burden of proof requires that the owner should go farther, and satisfy the court that the damage arose from one of the causes excepted,—anything short of this will not relieve him of his responsibility. I cannot say that the claimants have done this, because my mind is left in a state of uncertainty as to the cause of the damage, and I therefore must order a decree to be entered for the libellants. In regard to the amount of the decree, the auction sale must have great weight in determining the value of the almonds in New Orleans, as it appears to have been a fair public sale, of which the captain and the consignees of the ship were notified, and which was abundantly advertised. There were several dealers and bidders present, and there is no evidence of any unfairness.

If the parties do not agree as to the amount of damages, the case may be sent to an assessor.

Case No. 18,221.

The ZOUAVE.

[Brown, Adm. 110.]¹

District Court, E. D. Michigan. March, 1864.

COLLISION—DUTIES OF TUGS AND TOWS.

1. The contract of towage implies knowledge of the channel and safe pilotage.

2. Good seamanship requires that vessels of heavy draft should be placed behind those of lighter draft.

[Followed in *The Sweepstakes*, Case No. 13,687. Cited in *Orhanovich v. The America*, 4 Fed. 340.]

3. An improper order given in a moment of imminent peril is no fault.

[Cited in *The Coleman*, Case No. 2,981.]

Libel by John Kilderhouse, owner of the schooner *Arnold*, against the tug *Zouave* and the schooner *Rich*.

Alfred Russell, for libellant.

J. S. Newberry and W. A. Moore, for the *Zouave*.

A. W. Buel, for the *Rich*.

WILKINS, District Judge. This was a collision on the St. Clair Flats, caused by the grounding of libellant's vessel by the tug *Zouave*, in consequence of which the *Rich*, which was second in tow, ran into her, occasioning considerable damage.

At the close of the evidence, I entertained no doubt as to the *Rich*, but deemed it best, as well as courteous to the counsel, to reserve an opinion until the entire case should be heard. The *Zouave* had taken the *Rich* first in tow at the head of the river, when, subsequently, the *Arnold*, of greater draught, appeared, and by direction of the master of the tug, the position of the *Rich* was changed, and the *Arnold* was placed first and the *Rich* second. It is clear, that had the *Rich* been kept in her original position, there would have been no collision—she would not have been forced into the *Arnold*, and, therefore, the stranding of the latter, however it might have affected the other vessels in line, would not have occasioned the collision by the *Rich*. Having contracted for safe towage, the *Rich* was under the control and government of the tug, and her duty was simply to follow her lead, obey her direction, and faithfully submit to her guidance.

The contract of towage comprehends safe pilotage, especially through the perilous passage of the St. Clair Flats, where the channel is narrow and requires the greatest precaution. The contract embraces more than mere progress against adverse wind, or the supply of speed, when there is no wind. The

tug is presumed in the undertaking she makes, to know the channel and all its perils, and engages to take her tow line safely through. It comprehends knowledge, caution, skill and attention. The proofs show that the *Rich* was of less draught than the *Arnold*, and had her position in line remained unchanged, she would not have stranded, whether or not the *Zouave* was in the channel. Placing her in the rear of the *Arnold*, was the act of the *Zouave*, with the presumed knowledge of the risk to be incurred, and not the act of the *Rich*.

But the court holds further: That there was no fault in the *Rich* as to the order given, even if, under the excitement of the moment, that order was improper. The peril was sudden and imminent. She was in great danger both in front and rear, with little, scarcely a moment's, time for consideration; and, as was strenuously urged and admitted in the case of *The White Cloud*, an improper order given under such circumstances, is not to be considered a fault. She had a full complement of men, and every man was at his post. The tow line was going at the rate of five miles an hour. The danger was immediately perceived by the lookout of the *Rich*, immediately reported, and the order as immediately given. Neither is it so very clear that this order was not the best under all the existing circumstances. The *Penfield* was coming upon her, within 110 feet, and affording but a few seconds to her captain to determine how his vessel should escape from the danger in which she was placed by the stranding of the *Arnold*.

The expert testimony differs as to the proper order under such circumstances, yet the testimony of the officers and crew, also experts, under whose personal observation the facts occurred, is much more satisfactory and reliable on this question than that of others, however learned in the theory and practice of navigation, who were not present at the time, and could not see all the incidents as they actually occurred at the crisis. Hypothetical proof, though drawn from experience, is not as satisfactory in cases of this kind as the observation of experience on the spot and at the time. But, be the order given strictly right or wrong, it was necessarily given on the instant, under great peril, and for self-safety, and, therefore, was no fault. It would be gross injustice to punish the *Rich* in damages, when the propelling power of the *Zouave*, the force of the current, and the stranding of the *Arnold*, placed her, unwillingly, in the great peril to which she was so suddenly exposed, and under which an order, at least of only doubtful propriety, was given. At best, it was scarcely possible for her, under the speed and space that has been established by the proofs, to escape being run into by the *Penfield*, running ashore, or colliding with the *Arnold*. Self-safety was with her the paramount law.

¹ [Reported by Hon. Henry B. Brown, District Judge, and here reprinted by permission.]

The case of *The Morton* [Case No. 9,864], has been cited. Though somewhat similar, it is not exactly this case. There was proof that the collision could have been avoided in that case by the proper management of the stranded vessel, and the court then held, and now holds, that vessels in tow have duties to perform, the neglect of which, if causing a collision, would release the tug. They must exercise the proper care for self-preservation, obey the directions of the pilot, in emergency give proper orders, and are certainly not discharged by their contract from all duty. The *Rich*, as the proofs demonstrate in this case, was vigilant, prompt, careful, and obedient, and the mere probability of her escaping a collision by a different order than that given, does not place her in fault. There must be a reasonable certainty to convict. Releasing the *Rich* from the allegations of the libel, the *Zouave* must be held responsible, unless the collision was an inevitable accident, for I do not deem the *Arnold* in fault. Her crew was competent, she obeyed the orders of the pilot, followed her lead, practiced no deception as to her draught, and, when taken in tow, was open to the inspection of the master of the *Zouave*, who, knowing the channel and its depth, made his contract accordingly. Unavoidable accident is an event unexpected by human experience, not the act of man or man's agency, as a sudden storm of wind, or a stroke of lightning. Unforeseen peril, that which cannot be calculated by human science or experience, can only make a collision on lake or river an unavoidable accident. Such, certainly, was not the case here.

It is established by the proofs that the *Arnold* was the vessel of the greatest draught in the whole line, and therefore more apt, in shallow water, to run aground. Placing her first imperiled the rest as well as herself. She ought to have been placed last. This good seamanship required. The master of the *Zouave* so testifies, but he omitted this very obvious duty so essential in order to secure the *Arnold's* safety. The collision occurred from her running aground, and had she been last instead of first, it certainly would not have occurred. This arrangement of the tow line was a primary fault in the tug, and independent of the other circumstances in the case, renders her liable.

In the contract of towage, the tug master is bound to arrange his vessels in tow, with the view of securing the safety of all with whom he contracts, and no reckless and unsanctioned usage on the part of tug masters will be allowed to modify such a salutary rule for the protection of life and property. Furthermore, the court is satisfied from the proofs, that the *Zouave* was not in the proper channel when the *Arnold* stranded. She was too far to the eastward. The *Naomi* and the *Two Fannies*, of equal, if not greater draught, passed the *Arnold* to the westward, while she lay aground. She was pulled off

to the westward when extricated, found water sufficient, and her mate states substantially that he ported his wheel shortly before the stranding, unquestionably with the view to keep in the channel, as she evidently was not then in the middle of the channel, but kept so close to its eastern border, if not outside, as to lose the depth of water necessary for the *Arnold*. This was not the skillful navigation for which she contracted. And, if before the collision, she was in the channel, there was no sufficient excuse for varying her course from the obscuration of the ranges. The wind was down the river, and if the ranges were obscured at all it was but for a short time that the obscuration existed. The master and the mate of the *Rich* state that the ranges were obscured but a few moments, and the tow carried no canvas. An unusual obscuration might excuse and make the collision unavoidable, but such a difficulty should always be anticipated and provided against by skillful tug masters, who should then slacken speed and proceed with greater caution. Decree for libellant.

The case of *The Morton* [Case No. 9,864], cited in this opinion, was reversed on appeal.

Case No. 18,222.

In re ZUG et al.

[16 N. B. R. 280; 1 23 Int. Rev. Rec. 392; 34 Leg. Int. 402; 25 Pittsb. Leg. J. 29.]

Circuit Court, W. D. Pennsylvania. Sept. 22, 1877.

BANKRUPTCY PROCEEDINGS—ASCERTAINING CHARACTER OF ASSETS—PARTNERSHIP REAL ESTATE—APPEAL TO CIRCUIT COURT.

1. The bankrupt law [of 1867 (14 Stat. 517)] does not prescribe any rule or furnish any method for ascertaining the character of distributable assets. That is a subject of preliminary judicial inquiry, to be determined by legal principles of recognized controlling applicability.

2. As to questions touching the tenure of real estate, the federal courts are to be governed by the laws and decisions of local tribunals of the country where such real estate is situated.

3. Where real estate has been held by partners as tenants in common, the classification thereof as partnership assets, in the schedule filed by them, will not change the nature of the title to the prejudice of the rights of separate creditors.

4. An appeal to the circuit court is allowed only upon final decrees of the district court in a suit in equity by or against an assignee where the sum in controversy exceeds five hundred dollars.

Bill to review order of the district court distributing proceeds of sale of bankrupts' real estate.

MCKENNAN, Circuit Judge. This controversy arises out of the distribution of the proceeds of sale of certain real estate of the

¹ [Reprinted from 16 N. B. R. 280, by permission.]

bankrupts, which are claimed, on one hand, by the partnership creditors, and on the other by the creditors of the individual members of the firm. This real estate was the product of partnership assets, was conveyed to Christian Zug, one of the partners, individually, and was used in carrying on the firm business, and while being so used, Christian Zug conveyed to the remaining partner, Charles H. Zug, his heirs and assigns, one-fifth part of it. Both deeds were duly recorded, so that apparently C. Zug and C. H. Zug were tenants in common of the property in the proportion of four-fifths and one-fifth respectively. To which class of creditors is the fund produced by the sale of this real estate to be applied? The bankrupt law provides for the primary payment of the firm debts out of the partnership assets, and of individual debts out of the separate estate of each partner, but it does not prescribe any rule or furnish any method for ascertaining the character of distributable assets. That is a subject of preliminary judicial inquiry, the result of which must be determined by legal principles of recognized controlling applicability. The methods of acquiring and transferring title to real estate are peculiarly matters of local jurisprudence and regulation. "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated, which alone can prescribe the mode by which a title to it can pass from one person to another." *McGormick v. Sullivan*, 10 Wheat. [23 U. S.] 192. See, also, *U. S. v. Crosby*, 7 Cranch [11 U. S.] 116; *Kerr v. Moon*, 9 Wheat. [22 U. S.] 565; *Clark v. Graham*, 6 Wheat. [19 U. S.] 577; *Darby v. Mayer*, 10 Wheat. [23 U. S.] 465. Whatever rules, then, are established, either by statutory enactments or the decisions of local tribunals, touching the tenure of estate within their territorial jurisdiction, must be accepted as the law by which the federal courts, when they are called on to pass upon such questions, are to be governed. So the highest federal courts have repeatedly decided. In *Jackson v. Chew*, 12 Wheat. [25 U. S.] 162, says Mr. Justice Thompson, "The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law establishing a rule of real property has been settled in the state courts, the same rule will be applied by this court that would be applied by the state tribunals. This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of." So also said Mr. Justice Baldwin, in *McQuesney v. Hiester*, 9 Casey [33 Pa. St.] 444, note: "We must administer the jurisprudence of the state in this court as it bears on the rights of the parties, and decide them precisely as the courts of the state might." And again in *Beauregard v. City of New Orleans*, 18 How. [59 U. S.] 502, the court says,

"The constitution of this court requires it to follow the laws of the several states as rules of decision wherever they properly apply. And the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the state, especially when applied to the title of lands. No other course could be adopted with any regard to propriety. Upon cases like the present the relation of the courts of the United States to a state is the same as that of its own tribunals. They administer the laws of the state, and to fulfill that duty, they must find them as they exist in the habits of the people, and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the state and the Union would be productive of the greatest mischief and confusion. *Jackson v. Chew*, 12 Wheat. [25 U. S.] 153."

These cases—and they have been consistently followed by numerous others—sufficiently show how firmly established in the federal courts is the rule of conformity to the decisions of the state tribunals in questions touching the title to real estate. By whatever tenure, then, the courts of this state would adjudge the real estate, represented by the fund in controversy, to have been held, so we must decide. And upon this subject the law of the state seems to be as well settled, by a series of long-adhered to decisions of its highest court, as is the rule which makes it our guide. From *McDermot v. Laurence*, 7 Serg. & R. 438, through a long train of decisions to *Ebbert's Appeal*, 20 P. F. Smith [70 Pa. St.] 79, the supreme court of the state has held, with unshaken constancy, that a recorded conveyance of title to real estate to the members of a partnership, as tenants in common, could not be charged, as to purchasers, mortgagees, and creditors, by parol evidence that it was purchased with partnership assets, and was used for partnership purposes, but that such a result could only be effected by an appropriate written instrument. In *Hale v. Henrie*, 2 Watts, 145, Mr. Justice Sargeant says: "No averment of any right by parol, or by what is still less, the nature of the fund which pays, or the uses or purposes the property is applied to, can be allowed to stamp a character on the title inconsistent with that appearing on the deed and record, to the prejudice of third persons. . . . In conformity, therefore, with the suggestion of Tilghman, C. J., in *McDermot v. Laurence*, after a review of the American and English cases on the subject (and, I think, in accordance with the course of legislation in Pennsylvania, on the modes of acquiring title to real estate), where partners intend to bring real estate into the partnership stock, we think that intention must be manifested by deed or writing, placed on record, that purchasers and creditors may not be deceived." This doctrine is reaffirmed in *Ridgway, Budd &*

Co.'s Appeal, 3 Harris [15 Pa. St.] 177; Kramer v. Arthurs, 7 Barr [7 Pa. St.] 170; Lancaster Bank v. Myley, 1 Harris [13 Pa. St.] 544; Cummings' Appeal, 1 Casey [25 Pa. St.] 263; Erwin's Appeal, 3 Wright [39 Pa. St.] 535; Lefevre's Appeal, 19 P. F. Smith [69 Pa. St.] 125; and Ebbert's Appeal, 20 P. F. Smith [70 Pa. St.] 79. In Lefevre's Appeal, Mr. Justice Sharswood reviews most of the cases on this subject, and demonstrates that the doctrine of Hale v. Henrie rests upon such a foundation of repeated authoritative recognition, that it must be regarded as the settled law of the state. After stating the principle upon which some of the cases apparently in conflict with Hale v. Henrie were decided, that the purchase of property by one partner in his own name, by the use of partnership assets, raised a resulting trust in favor of the firm, and that the equities of joint creditors could only be worked out through the equities of the respective partners, he says: "When the partners during the continuance of the firm, have all agreed to the appropriation of the funds to the purchase or improvement of real estate in the private name or names of one or more of the partners, no one of them has any equity to have such property applied to the joint debts; and it follows that the joint creditors have no such equity." This has peculiar applicability to the present contention. For although the title originally acquired by Christopher Zug was paid for with partnership assets, he subsequently conveyed to his copartner, Charles H. Zug, a share of it in exact proportion to his interest in the partnership stock. They thereby became tenants in common of the property, in relative proportions corresponding to their original equities, viz., partners, the trust, if there was any, ceased to exist, and no subsequent use of the property could change the character thus impressed upon the title. Neither of the partners, under these circumstances, would have any equity against the other to insist upon the application of the property, in the first instance, to the payment of firm debts, and so the joint creditors could not have any. Under the law of the state, it is clear, then, that down to the time of the

bankruptcy, the real estate in question was not partnership property, but the separate property of Christopher and Charles H. Zug. It was agreed, however, that the classification of this real estate as partnership assets in the schedule filed by the bankrupts, had the effect of changing the nature of the title, and of converting what was before the separate property of the individual partners, into property of the firm. Independently of the reason upon which the rule of law before adverted to mainly rests, viz., the protection of strangers, purchasers, mortgagees, and creditors, and of the due registration of the instrument by which it might be sought to effect such a change, the argument is answered by the operation of the bankrupt law itself. By the terms of the act, the title of the trustees to all the bankrupt's property relates back to the date of the commencement of the bankruptcy proceeding. They took it impressed with the character with which it was invested at that time. They cannot change that character to the prejudice of any one's rights, much less can this be done by the bankrupts, after they have parted with all control over it, and it has passed in gremio legis for the benefit of creditors.

This court is therefore of opinion that the district court rightly adjudged the fund in controversy to be assets of the individual members of the firm of C. Zug & Co., and ordered its distribution accordingly; and that the bill of review must be dismissed at the cost of the complainants. An appeal was also taken from the order of the district court, which it is moved to quash. An appeal is allowed only upon final decrees of the court, in a suit in equity instituted by or against an assignee in bankruptcy where the sum in controversy exceeds five hundred dollars. As the record does not show that the order complained of was of that character or was made in any such suit, no appeal lies from it, and the motion to quash is, therefore, allowed.

ZUSI (ABBETT v.). See Case No. 7.



ADDITIONAL CASES.

COMPRISING CHARGES TO FEDERAL GRAND JURIES, PRONOUNCEMENTS CONCERNING COSTS, FEES, ETC., AND OTHER MISCELLANEOUS OPINIONS FROM THE APPENDICES OF THE UNITED STATES CIRCUIT AND DISTRICT COURT REPORTS, DELIVERED PRIOR TO 1880; CERTAIN TERRITORIAL DECISIONS FROM HEMPSTEAD, AND OTHERS FROM HAYWARD AND HAZELTON'S REPORTS, NOT HERETOFORE INCLUDED IN THE FEDERAL CASES; AND SEVERAL UNREPORTED CASES, RECEIVED TOO LATE FOR ALPHABETICAL CLASSIFICATION.

A.

Case No. 18,223.

ALLEN v. ALLEN.

[Hempst. 58.]¹

Superior Court, Territory of Arkansas. April, 1828.

PLEADINGS—ANSWER AND CROSS-BILL—DIVORCE—ALIMONY.

1. A defendant cannot file a cross-bill until the original bill is answered.
2. Alimony will not be granted to a wife before she answers.

Appeal from Independence circuit court.

[Suit by Samuel Allen against Elizabeth Allen for divorce. From a decree of the circuit court, plaintiff appeals.]

Before JOHNSON, ESKRIDGE, and TRIMBLE, JJ.

OPINION OF THE COURT. This is an appeal from a decree of the circuit court of Independence county, pronounced in the suit in chancery for a divorce, in which the appellant was plaintiff, and the appellee, defendant. Various reasons have been assigned by the appellant for reversing the decree of the court below. Conceiving, however, that the first point relied upon, is decisive in favor of the appellant, we shall confine our remarks to that point alone. The point is, that the circuit court erred in overruling the demurrer.

The plaintiff below filed his bill, praying for a divorce from bed and board, and the bonds of matrimony. The defendant instead of answering this bill, filed her cross-bill praying a divorce from bed and board, and for alimony. This was clearly irregular. The bill should have been answered, and the allegations therein contained contested before the cross-bill could be properly filed. 1 Har. Ch. 35; 3 Bl. Comm. 444-448. In the case of Lewis v. Lewis, 3 Johns. Ch. 519, the chancellor refused to grant alimony to the

wife before she answered, because it did not appear whether she intended to defend herself against the charges in the bill. We feel no difficulty in reversing the decree of the court below. Decree reversed.

Case No. 18,224.

ANONYMOUS.

[Hempst. 215.]¹

Superior Court, Territory of Arkansas. Feb., 1833.

ABATEMENT—FORM OF PLEA—EVIDENCE.

1. Pleas in abatement, not being received with favor, require the greatest accuracy and precision in their form, and must be certain to every intent, and are not amendable; they must not be double.
2. If bad, the plaintiff need not demur, but may treat them as nullities and sign judgment.
3. If on the whole record the judgment of the inferior court is correct, it will not be reversed because improper evidence was admitted.

PER CURIAM. Pleas in abatement require the greatest accuracy and precision in their form; they must be certain to every intent; they are never received with favor (1 Chit. Pl. 491); they are dilatory, not reaching the merits of the action, and are not amendable; the plaintiff need not demur thereto when bad, but may treat them as nullities and sign judgment. 1 Tidd, Prac. 588. Tested by these rules, a plea in abatement which avers the suing out a former writ for the same cause, that it is still remaining in the clerk's office, that the defendant was arrested on such writ and surrendered to a person who represented himself to be deputy sheriff, that the suit is still pending, as defendant believes, and concluding with a verification, is destitute of requisite precision and formal accuracy, and does not tender a certain issue. What issue

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

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

is tendered? Is it the suing out of the writ; its existence in the clerk's office; the arrest or surrender of the defendant, or the fact that T. was deputy sheriff, or that he represented himself to be such; that the suit is still pending, or that the defendant believes it to be pending? Such a plea is clearly insufficient, and may be treated as a nullity. Where it appears to the appellate court that improper evidence has been admitted on the trial of an issue in the inferior court, yet if upon the whole record the judgment is right, it will be affirmed.

Case No. 18,225.

ARCHER v. MOREHOUSE.

[Hempst. 184.]¹

Superior Court, Territory of Arkansas. July, 1832.

TRIAL OF ISSUES—EFFECT OF JUDGMENT—PLEA OF PAYMENT—INTEREST.

1. Where a case is submitted to the court, all questions of law and fact involved, are necessarily passed on, and the result is embodied in the judgment.
2. In such case no formal and technical finding of the issue is necessary.
3. A general finding for the plaintiff or defendant by a jury is good, and disposes of all the issues.
4. A plea of payment admits all the allegations in the plaintiff's declaration, essential to support the action, and it is unnecessary for the plaintiff to prove them.
5. Judgment may be given for interest from the maturity of the note, or in damages. Either mode is regular.

Error to Chicot circuit court.
Before JOHNSON, ESKRIDGE, and CROSS, JJ.

OPINION OF THE COURT. This was an action of debt, brought by Alanson Morehouse against George W. Archer, in the circuit court of Chicot county, and comes to this court by writ of error. Issues were joined on the pleas of payment at the day, and payment after the day, and neither party requiring a jury, the cause was submitted to the court, and a judgment was rendered in favor of Morehouse, for the sum of eight hundred dollars, to bear ten per cent. interest from the 17th day of November, 1831. Seven grounds are assigned for reversing the judgment of the circuit court, most of which were very properly abandoned in argument, and it will only be necessary to give an opinion on three, relied on in the assignment of errors.

The first ground, and that on which most stress was laid by counsel in argument, is that the circuit court did not, in the judgment which it rendered, make any disposition of the issues of fact joined in the cause; but proceeded to render judgment without

saying anything of such issues. The practice of submitting a cause to the decision of the court is peculiar to the laws of this territory, and was altogether unknown to the common law. The court, when a cause is thus submitted to its decision, performs the office of the jury, in addition to its ordinary duty of deciding the law. The whole cause, whether of law or fact, is before the court; and it passes upon it accordingly. Why is it that the jury, when a cause is tried by them, find a verdict upon the issues joined? It is to enable the court to pronounce a judgment of law upon the facts as ascertained by the jury in their verdict. But even in a cause tried by a jury, a general finding for plaintiff or defendant, according to the practice of this court, is considered good. In this case, the court acting in the double capacity of jury and court, it would seem to be an act of supererogation to spread upon the record a formal finding of the issues. It appears from the judgment of the circuit court, that "issues being joined upon the pleas of payment at the day, and payment after the day, and neither party requiring a jury, the matters and things were submitted to the court. It was adjudged by the court that the plaintiff have, and recover, etc." Can any doubt exist as to the intention of the court? Is there any uncertainty in the judgment? Why, then, incur the record with a formal and technical finding of the issues? The judgment, as rendered, relates not only to the issues but to all the matters and things in the cause.

The second point which we deem it material to give an opinion upon, calls in question the correctness of the decision, on the subject of the testimony in the cause. The court, it appears from the bill of exceptions, decided that when the plea of payment is relied on by the defendant, it devolves upon him to support such plea by evidence, before the plaintiff will be required to adduce any evidence on his part. There can be no doubt, but that this decision was correct. The plea of payment is an affirmative plea, and the burden of proof is imposed on the defendant. The plea of payment admits all the allegations in the plaintiff's declaration. What do the pleas of payment admit in the case before the court? Why, that the notes declared upon were executed by the defendant, and that the amount of money named in the notes was due from the defendant to the plaintiff at the time of the execution of the notes. All the allegations, therefore, contained in the plaintiff's declaration, essential to the support of his action, being admitted by the defendant in his pleas of payment, it was wholly unnecessary for the plaintiff to produce any evidence on his part.

The third and last point on which we propose to give an opinion calls in question that part of the judgment of the circuit court which relates to the interest. The judgment is for eight hundred dollars, to bear ten per

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

cent. interest from the 17th day of November, 1831. It is contended that the interest should have been ascertained by the court, and a judgment rendered for it in damages. It is admitted that this is a very common way of giving judgment; but on the other hand, the mode adopted by the circuit court, is sanctioned by the practice of several of the states, especially by the practice in Kentucky, and we cannot conceive that one mode has any particular advantage over the other, each being equally calculated to promote the ends of justice. Judgment affirmed.

Case No. 18,226.

ARMSTRONG v. JOHNSON et al.

[2 Hayw. & H. 13.]¹

Circuit Court, District of Columbia. Nov. 5, 1850.

ORPHANS' COURT—DISTRICT OF COLUMBIA—JURISDICTION.

Where an issue from the orphans' court is pending in the circuit court, as to whether a paper is the last will and testament of the deceased or not, and the question to be decided as to which of two papers is the last will and testament of said deceased, the orphans' court has no jurisdiction to pass upon the question as to whether another paper is the last will of the deceased, as the orphans' court had divested itself of the jurisdiction of that question. [Dunlop, Circuit Judge, dissenting.]

Appeal from orphans' court.

[Proceeding by Kosciusko Armstrong against Lewis Johnson, administrator de bonis non of Thadeus Kosciusko, and others, heirs of Thadeus Kosciusko.]

This was a petition of Hyppoletus Estko and others, against admitting the following will to probate:

"This is my will: I, the undersigned, Thadeus Kosciusko, residing at Buville, in the township of Geneviage, department of Seine and Marm, being at present at Solena, in Switzerland. Not wishing to be overtaken by death before having made known my last disposal, I have made this my will and declaration of my last intentions, written entirely with my own hand as follows:—Desiring to give to Misses Zeltner, daughters of Mr. Peter Josephus Andrew Louis Zeltner, proprietor, residing at said Buville township of Geneviage, near Fountainbleau, and of the late Mrs. Angeliue Charlette Adelaide Durgn de Vandeil de Lanys, proof of the friendship which I have for them, and acknowledge toward them the sense of my esteem for the friendly attention which I received from them and from their father and mother during 15 years of my living with them, and to secure for said young ladies suitable settlements. I give and bequeath to Miss Thadea Emilie Wilehmine Zeltner, my god-daughter, aged nearly 16 years, born at Paris the 20th Mipider, in the 8th year,

corresponding with the 9th day of July, 1800, the sum of 60,000 francs, to be paid at once in the standard currency and value of France. I give and bequeath to Miss Moin Charlotte Julie Magaueritte Zeltner, eldest daughter of said Mr. and Mrs. Zeltner, born at Solena, in Switzerland, on the 26th day of May, 1796, the sum of 35,000 francs, likewise to be paid at once in the same standard currency and value. Which two sums making together 95,000 francs, shall bear interest at legal rate from the day of my death, without it being necessary to demand the same judicially, and shall be taken as well as the interests aforesaid out of the most unincumbered real and personal property belonging to me on the day of my death, particularly and by preference out of the money funds of my estate, which may be found in France, either in the hands of Mr. Hottinger, my banker at Paris, or in the hands of my other bankers, debtors or holders of money or effects belonging to me; which sums shall be recovered and collected after my death by my testamentary executor herein named, and by him remitted to said Misses Zeltner, when they be married, but if they are not married, I direct him to invest the sums aforesaid in the hands of one or several persons in the manner which to him shall seem to be the safest and the most profitable, the interest or proceeds arising from the same so invested, shall be collected annually by my said testamentary executor upon his receipts, and by him remitted to each of said Misses Zeltner, in the amount due to each of them for their maintainance until their marriage. I wish and intend that the said Misses Zeltner shall not receive nor dispose neither of the whole nor of a part of the sums above bequeathed as long as they shall be single, but once married, each of them shall have the free disposal of the sum bequeathed to her; and my testamentary executor shall be discharged from the duty of receiving and remitting to them the annual interest, which they may then collect themselves directly. I appoint Mr. Bompach Pin, notary at Merch, department of Seine and Marm, executor of this, my will, begging him to be so kind as to take that trouble and to accept as token and pledge of my friendship the sum of 5,000 francs, which I give and bequeath to him by this present, which sum shall likewise be taken out of my most unincumbered estate, and particularly out of any money fund which may be found in the hands of Mr. Hottinger, or elsewhere as aforesaid, and: I revoke all the wills and codicils which I may have made previous to the present, to which alone I confine myself as containing my last wishes: Done at Solena, at Switzerland, on the 4th day of June, 1816. Thadie Kosciusko."

Opinion of William F. Purcell, judge of the orphans' court:

"The within cause having been set for hearing on the 5th of January, 1849, last, as or-

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

dered by Judge Causin, the former judge of this court, and since continued from time to time by counsel. This court after having minutely examined the wills within referred to of Thadeus Kosciusko, deceased, it is the opinion of this court that the will, executed by said Kosciusko on the 4th day of June, 1816, and recorded in the court in 1847, revokes the wills of the 28th of June, 1806, and of the 5th of February, 1798, of said Kosciusko, deceased, and the probates of the same are hereby revoked this 6th February, 1849."

From which order and decision Richard S. Coxe, Esq., counsel for Kosciusko Armstrong takes an appeal, which is by the court granted February 9th, 1849.

R. S. Coxe, for appellant.

H. M. Morfit, for appellees.

[Before CRANCH, Chief Judge, and MORSELL and DUNLOP, Circuit Judges.]

CRANCH, Chief Judge. This is an appeal from the order of the orphans' court, of the District of Columbia, of the 6th of February, 1849, revoking the probate of the will of General Thadeus Kosciusko, of the 5th of May, 1798, and 28th of June, 1806, by which last mentioned will a legacy of \$3704 was bequeathed to the appellant Kosciusko Armstrong. The proceeding was by petition to the orphans' court of the District of Columbia, filed on the ——— day of ———, by Hyppoletus Estko and others, next of kin of General Kosciusko, stating that in December, 1845, the then petitioners filed a petition in the orphans' court, praying: 1st. That the validity of a certain paper writing, dated 28th of June, 1806, which at the instance of a certain Kosciusko Armstrong, was, on the 19th of November, 1828, proved as, and for the last will of the said Thadeus Kosciusko, might be allowed to contest the same, and that probate thereof might be revoked; and 2nd. That George Bomford, administrator de bonis non, with the will of the 5th of May, 1798, annexed, might be ordered to pay over to the petitioners the fund deposited by General Kosciusko with Mr. Jefferson. The petitioners further state that the orphans' court, acting upon the said former petition on the 17th of February, 1846, ordered the register of wills to make up and transmit to the law side of the circuit court, District of Columbia, to be there tried, an issue, "Whether the writing produced by the said Kosciusko Armstrong, and admitted to probate on the 19th of November, 1828, is the last will and testament of the said Thadeus Kosciusko or not." The petitioners state further that some of the former petitioners died, and S. S. Williams and John F. Ennis have obtained letters of administration of their effects; that Colonel Bomford also died, and Lewis Johnson became administrator de bonis non in his place; that while the issue at law was pending in the circuit court in

January, 1847, the will of June 28th, 1806, more fully described in the said former petition, was produced, proved and recorded among the wills of the orphans' court, by which will the testator expressly revoked "all the wills which he might have hitherto made;" that the issue sent to the circuit court is now an issue at law and not of fact, and is cognizable in the orphans' court only: "Upon these grounds, and others which will be more fully set forth during the hearing of the case," they pray that "further proceedings in that court may be resumed, and that citations may be issued: 1st. To the said Kosciusko Armstrong, or his counsel of record, to show cause why the probate of the paper writing, purporting to be a will of General Thadeus Kosciusko of the 28th of June, 1806, should not be revoked and annulled. 2nd. To the said Lewis Johnson, administrator de bonis non of said Kosciusko's estate, to show cause why the paper writing, purporting to be a will of said Thadeus Kosciusko, of the 5th of May, 1798, and the probate thereof, recorded among the wills of this court, should not be stricken out from the records of this court, and declared null and void." This petition is signed by "R. Johnson, Gaspar Tocman, for the Petitioners."

Nothing appears by the records to have been done until the filing of another petition by Roman Estko and others, claiming, with the former petitioners, Hyppoletus Estko and others, to be next of kin of General Kosciusko; which new petition sets forth all the preceding proceedings in the orphans' court, and in the supreme court of the United States; and also circumstances to account for the delay of the petitioners in prosecuting their claim. They also pray "that the validity of the said instrument of writing" (of June 28th, 1806), "may be inquired into; that they may be allowed to contest the same, and that the probate thereof be revoked; and that the said instrument of writing be declared null and void as a testamentary paper." "And they further pray that the said George Bomford, administrator de bonis non as aforesaid, be ordered to pay over and deliver to the petitioners all and every sum and sums of money which he now hath, or for which he is accountable as administrator de bonis non of said Thadeus Kosciusko." This petition is signed by "Joseph H. Bradley, G. Tocman."

Whereupon the following order was made by the judge of the orphans' court, viz.:

"On the petition filed in this court, this 2nd day of December, 1845, of Roman Estko and others, claiming to be next of kin and distributees of Thadeus Kosciusko, praying that the decision of this court heretofore made, admitting to probate a paper writing propounded by Kosciusko Armstrong, as the last will of the said Kosciusko be again examined, and that the matter thereof be

again heard by this court. It is this 2nd day of December, 1845, ordered that the said case be again examined and heard, and that notice be given to the said Kosciusko Armstrong to appear in this court on or before the 3rd Tuesday of January next, in person or by solicitor, to show cause why the said probate of the said will shall not be set aside, and the said paper writing therein propounded by him as the last will of the said Thadeus Kosciusko be declared null and void; and provided that a copy of this order be published in the National Intelligencer once a week for three successive weeks previous to the 3rd Tuesday in January, 1846. Nathaniel P. Causin."

No further proceeding appears upon the records of the orphans' court until the 22d of December, 1848, when the judge made the following order, viz.:

"It is ordered that the Register of Wills issue citations. 1st. To Richard S. Coxe, Esq., counsel of Kosciusko Armstrong, to appear in this court on the 5th day of January, 1849, to show cause why the probate of the paper writing, purporting to be a will of General Thadeus Kosciusko, of the 22d of June, 1806, should not be revoked and annulled. 2d. To Lewis Johnson, administrator de bonis non of Kosciusko's estate, to appear on the same day, on the 5th of January, 1849, to show cause why the paper writing, purporting to be a will of Thadeus Kosciusko, of the 5th of May, 1798, and the probate thereof recorded among the wills of this court, should not be stricken out from the records of this court and declared null and void. Nathaniel P. Causin, 22d Dec., 1848."

The citations seem to have been issued and served on the same day, 22d Dec., 1848. On the day appointed (January 5th, 1849), Lewis Johnson, the administrator de bonis non appeared, by Mr. Morfit, his counsel, and objected, "that the orphans' court should not hold or entertain jurisdiction of this cause at this time, or in the present form of this application." 1st. Because an issue is still pending on the law side of the circuit court of the District of Columbia, as to the validity of the respective wills named in the application of the parties to the citations, and that the said issue was taken on a petition before the orphans' court upon the same questions which are now presented; and the effect of the present petition, if sustained, will be to bring back a question before this court which has, by having been put in issue elsewhere, passed beyond its present control. 2d. If the issue should be stricken off the docket of the circuit court, it would be a surprise upon the parties. 3d. That the testator re-establish the will of 1798 by a subsequent will, but of this this respondent has no evidence. 4th. That there is a bill in equity pending in the circuit court, and involving all the matters contained in the proceedings in the orphans' court in this

case, &c. 5th. That this respondent is ready to pay over the money to any person authorized to receive it. 6th. That there should not be a decision in any one of the cases until all are brought together.

Upon consideration of this case as it is now brought before this court, I am of the opinion that the orphans' court, by sending an issue to this court, to be tried at law, "whether the writing produced by the said Kosciusko Armstrong, and admitted to probate on the 29th of November, 1828, is the last will and testament of the said Thadeus Kosciusko or not," had divested itself of the jurisdiction of that question, so long as it remains undecided by this court the case was coram non judge, and the sentence of the orphans' court of the 6th of February, 1849, must be reversed.

Upon appeal from the sentence of the orphans' court of the District of Columbia, passed on the 6th of February, 1849, declaring it to be the opinion of that court that the will executed by Thadeus Kosciusko on the 4th of June, 1816, and recorded in that court in 1847, revokes the wills of the 28th of June, 1806, and of the 5th of May, 1798, of the said Kosciusko, deceased, and revoking the probate of the same.

It is considered and adjudged by this circuit court of the District of Columbia, this 5th day of November, 1850, that the said sentence of the said orphans' court be, and the same is hereby reversed with costs; the said sentence having been passed by the said orphans' court, while an issue sent by that court to the circuit court aforesaid to be tried at law, whether the writing produced by the said Kosciusko, and admitted to probate on the 19th of November, 1828, is the last will and testament of the said Thadeus Kosciusko or not, was and is pending undecided in said circuit court.

DUNLOP, Circuit Judge, dissented.

ARMSTRONG v. KOSCIUSKO. See Case No. 18,226.

Case No. 18,227.

ASHLEY et al. v. MADDOX.

[Hempst. 217.]¹

Superior Court, Territory of Arkansas. Jan., 1833.

GARNISHMENT—PROSPECTIVE OPERATION OF ACT—DOUBLE JUDGMENT FOR SINGLE DEBT.

1. Garnishments could not issue on judgments rendered prior to November 7, 1831, as the garnishment act was prospective and not retrospective. Ter. Dig. 346.

2. A double judgment cannot be rendered for a single debt.

Error to Phillips circuit court.

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

[This was a proceeding by Chester Ashley against Easther Maddox, administratrix of Thomas Maddox, deceased.]

Before ESKRIDGE, CROSS, and CLAYTON, Judges.

OPINION OF THE COURT. The defendant in error, in the year 1827, obtained several judgments against Samuel K. Green, and in February, 1832, issued a summons from the circuit court of Phillips county against the plaintiffs, under the act passed in November, 1831, entitled "An act to enable judgment creditors to collect their debts with more facility," (Ter. Dig. 346), calling upon the plaintiffs, as garnishees, to state whether they were indebted to Green, or had any effects of his in their hands. Percifull and Ashley did not enter their appearance to the summons, and a jury being impanelled, to ascertain if anything was due to Green from Percifull and Ashley, or either of them, returned a verdict that Percifull was indebted to Green in a sum sufficient to pay the amount due from Green to the defendants, and that the claims were in the hands of Ashley, as an attorney, for collection. Upon this verdict the court rendered a joint judgment against Ashley and Percifull, for two hundred and ninety-six dollars, and ninety-three cents. It is contended that the judg-

ment is erroneous for several reasons, and of this opinion is the court. The act of 1831, under which the proceeding purports to be had, gives this remedy, "in all cases where any plaintiff shall obtain judgment." Its words only comprehend judgments obtained after its passage, and this court cannot, by construction, give it a retrospective effect, and make it embrace judgments previously rendered. It is not for us to speculate on the supposed meaning and intention of the legislature. Where there is no doubt or ambiguity in the words used, there is no room for construction. Upon the finding of the jury, a judgment is rendered which is manifestly wrong. Percifull was indebted to Green, and the claim was in Ashley's hands for collection. It was error to give a double judgment for a single debt. The statute places the judgment creditor, the defendant in this case, in the same situation which Green occupied. If the case were otherwise within the purview of the statute, she might go against Percifull, or might go against Ashley, if he were in default, but could not go against both for a debt due from one only. Judgment reversed.

ATTORNEY'S FEES. See Case No. 18,290.

B.

Case No. 18,228.

BALDWIN et al. v. WYLIE.

[2 Hayw. & H. 126.]¹

Circuit Court, District of Columbia. Oct. 1, 1853.

WILLS — PROBATE — EXECUTORS — POWER OF ATTORNEY — APPEARANCE OF ATTORNEY AS EVIDENCE OF HIS AUTHORITY.

1. In order to make a will effective it must first receive the probate of the proper court.

2. Where the executrix in a will gives a power of attorney to receive and control any fund of the estate in her individual name, as widow, and not as executrix and guardian, such power is without authority.

3. The appearance of an attorney in a cause is received as evidence of his authority, and no additional evidence is required.

Appeal from orphans' court.

This is a petition of Robert Baldwin, Mary Baldwin Davis, John Baldwin, James W. Davis and Amanda B. Davis, his wife, surviving children of Robert Baldwin, deceased, and of the children of James P. Baldwin and Julia A. B. Baird, both deceased; that Samuel Baldwin was also the child of Robert Baldwin, deceased; that at his death he left no father or

mother; that the above named children were his brothers and sisters of the whole blood, and as such, with the children of those alleged to be dead, are entitled by law as such and as next of kin to the succession and entire personal estate of which said Samuel Baldwin was possessed at the time of his death. That his domicile was in Pennsylvania. That while he resided in Mexico he suffered from the hands of the officers and citizens of Mexico to such an extent as to cause his premature death. That by the treaty of peace, dated February 2, 1848 [9 Stat. 922], the United States exonerated Mexico from any liability for the payment of claims made by the citizens of the United States, and assumed payment thereof. That a person calling herself Clotilde Pellet Story Baldwin announced the death of said Samuel Baldwin and averred that she is his widow. That the board of commissions created under act of congress, March 3, 1849 [9 Stat. 393], being ready to receive memorials, setting forth the claims of the citizens of the United States, and the said Samuel Baldwin having died as was believed intestate, John Baldwin, brother of said Samuel, petitioned that letters of administration be issued to Andrew Wylie, which petition was granted. That the claim against Mexico was estimated at the

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

nominal value of \$500. The administrator gave bond in the sum of \$1,000. That the said administrator afterwards estimated the claim at \$150,000, and presented an inventory and appraisal of the estate of the deceased. The judge of the orphans' court, upon seeing the document, ordered a rule on said Andrew Wylie, administrator, to show cause why his administration bond should not be increased. That an award had been made in favor of said Wylie, as administrator, of the sum of \$75,000. In answer to the rule he alleged that he had paid for fees, &c., \$12,575; that the administrator had paid over to a certain Peter Hargons, of New York, and had taken from said Hargons and a person called Peter Goix, of Vera Cruz, in Mexico, a bond in the penalty of \$62,000, to indemnify said Andrew Wylie, Jr., for making the payment of \$62,425, neither of whom resided within the jurisdiction of the court. That said Clotildo executed a full power of attorney to said Peter Goix; that he, the said Peter Goix, under a power of substitution contained in the power of attorney, to him executed a power of attorney to Messrs. Hargons & Bros., under which last power of attorney the said Wylie paid over to Peter Hargons the sum of \$62,425, and took from him the above bond of indemnity; this on the same day on which he made a return to the rule to show cause, &c. Among the papers filed with the return was what purported to be a copy and translation of the entry of marriage of said Samuel Baldwin with said Clotildo Pellet Story, and also what purported to be the last will and testament of said Samuel Baldwin. That if the said will be genuine then the acts of said administrator are null and void, and that a deliberate and substantial fraud has been perpetrated. Citation was issued as prayed against Andrew Wylie. The following answer was made to the citation:

"The above named defendant, Andrew Wylie, represents to the honorable, the judge of the orphans' court, that the parties named in said bill are non-residents of this District, and therefore prays that they be required to give security for costs, or that the bill be dismissed. He further states that he has good reason to believe that this suit has been instituted without authority from some at least of said parties, and therefore prays that said Richard S. Coxe be required to show by what authority he has brought said suit."

The following is the answer of the attorney:

"To the Honorable, the Judge of the Orphans' Court, for the County of Washington. The undersigned has been served with a citation from your honorable court, calling upon him to show by what authority he has filed a certain petition in said court, calling upon Andrew Wylie to do certain things in said petition mentioned. The undersigned, except for the respect he owes to the court, might pass this citation by without notice, as unauthorized by law and without any sanction in the usage and practice of this or any other court. Having appeared and practiced in this court

for nearly thirty years, he can say with confidence that no instance can be found of a citation addressed personally to an attorney, calling upon him personally to answer as such, has ever been issued from said court, nor can an instance be found in which an attorney has been required to exhibit any authority from his clients, empowering him to act for them and in their names. Within a brief period this same Wylie made a similar application to the circuit court, to require the same party to exhibit a power of attorney, to authorize him to appear in a case then pending, and received for answer, that no attorney of that court ever has been, or could be, required to exhibit his authority. Indeed, unless on the complaint of a party who alleged that an attorney has, without the sanction of the party for whom he professed to act, appears for him, no such exhibition of a power is ever required. Even in courts where a form of a power of attorney is in use, every member of the profession knows that it is a mere form appended to the pleadings, the want of which is wholly immaterial. The answer therefore which the undersigned makes to this irregular and unprecedented call upon him, is that he is a regularly admitted attorney and counsellor at law, and that this is the authority under and by which he acts, and filed the petition; that it is the same authority under which he has been recognized as empowered to appear and act for his clients in the supreme court, circuit court, and criminal court and orphans' court, and which no one has a right to question or gain-say. Out of respect to your honor, who it is supposed has inadvertently been induced to issue this citation, the undersigned would respectfully call your attention to the language of the supreme court, in the great case of *Osborn v. Bank of U. S.*, 9 Wheat. [22 U. S.] 829, wherewith some appearance of plausibility of similar objections had been started. Chief Justice Marshall delivered the opinion of the court, then says, after speaking of attorneys, in fact: "The case of an attorney at law—an attorney for the purpose of representing another in court and prosecuting or defending a suit in his name—is somewhat different. The power must indeed exist, but its production has not been considered as indispensable. Certain gentlemen, first licensed by government, are admitted by order of court to stand at the bar, with a general capacity to represent all suitors in the court. The appearance of any one of these gentlemen in a case has always been received as evidence of his authority, and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any state, or of the Union." The respondent therefore prays that he be hence dismissed with his costs. Richard S. Coxe."

Ordered that the petition of Andrew Wylie in this case be dismissed with costs.

The answer of the administrator represents

that the bill or petition is not sustained by the affidavit of any one of the petitioners, or any other party in their behalf, and prays that he be excused from answering the same until the same is sworn to, as required by law. The petition and prayer of administrator is overruled and dismissed, and he is required to answer. The respondent, Andrew Wylie, Jr., answered and filed the documentary evidence in answer to the allegations in the bill, and denies that a deliberate and substantial fraud has been perpetrated.

The following is the decision and decree of [Wm. F. Purcell] the judge of the orphans' court:

"Andrew Wylie, administrator of Samuel Baldwin, deceased, who died in Mexico, was appointed administrator on the estate of said Samuel Baldwin on the 11th day of August, 1849, at the request of John Baldwin, and gave bond in the sum of \$1,000, with the understanding that said bond should be enlarged if the amount to be received from the treasury of the United States require it. It was made known to the court in 1851, on the 19th of April, that said administrator has or was about to receive the sum of \$75,000 belonging to the estate of said Samuel Baldwin, and in discharge of its duties a citation was issued and served on said administrator, to show cause why his said bond should not be increased, and in obedience to said citation, on the 24th of May, 1851, he came into court, and filed a paper purporting to be the last will and testament of said Samuel Baldwin, deceased, as well as a power of attorney from Clotilde Pellet Story Baldwin, as widow of Samuel Baldwin; gave to Peter Goix, who subsequently appointed Peter Hargons, of New York, to receive for her. The said will purporting to appoint his wife executrix and guardian of his children; said administrator acknowledged the receipt of \$75,000, and filed a bond of said Peter Hargons for \$62,000, in which it seems that the said Hargons acknowledged the receipt of the same and agreed to the said charges of said Wylie, &c.; reference is here had to all of said papers. The court, on the said 24th of May, 1851, upon the filing of said papers, there being no objection from any source, discharged said rule and ratified what had been done by said administrator in paying over said money to said Hargons, although the sanction of the court had not been previously asked or obtained. On the 29th of May last past Robert Baldwin and others, claiming to be next of kin of said Samuel Baldwin, filed their petition, which may be called a bill of review, and prayed that the decree rendered on the 24th of May, 1851, be set aside, and such other and further relief be granted as deemed equitable in the premises.

"This court, having had the cause under consideration for several days, as well as the advantage of able counsel on both sides and authorities referred to, doth decree that said decree of the 24th of May, 1851, be set aside. That the will purporting to be the last will and

testament of said Samuel Baldwin, executed in Mexico, cannot have the effect of a will to control the money in question until it has received the probate of the proper court in this county and district. See *Armstrong v. Lear*, 12 Wheat. [25 U. S.] 176. And if the will had been duly proved before this court and recorded, Hargons' power of attorney could not give him authority to receive and control the said fund, because, by a minute inspection of the said power, it is clear that she executed it as widow of Samuel Baldwin, and not as executrix and guardian. She makes no mention in the power to the will. The widow and other parties claiming will be allowed a reasonable time to make perfect their pretensions to said money in question. But the administrator in the meantime must give a bond, with sureties, as the law directs, in the sum of \$100,000, to be approved by this court, within eight days from this, to hold said money subject to the future order of this court, it being acknowledged by said administrator that said Hargons has not paid said sum over to said widow."

To which decree the administrator, Andrew Wylie, appealed.

Richard S. Coxe, for heirs.

Andrew Wylie, in pro. per.

Before CRANCH, Chief Judge, and MORSELL and DUNLOP, Circuit Judges.

PER CURIAM. Decree of orphans' court affirmed and ordered to be certified to the orphans' court.

BANK OF WASHINGTON (ELLSWORTH v.). See Case No. 18,294.

BANKS, CHARGE TO GRAND JURY IN RELATION TO FRAUDS OF OFFICERS OF NATIONAL BANKS. See Case No. 18,246.

Case No. 18,229.

BARGIE v. UNITED STATES.

[2 Hayw. & H. 357.]¹

Circuit Court, District of Columbia. Jan. 8, 1861.

INDICTMENT FOR FALSE PRETENCES.

1. An indictment under the penitentiary act of March 2, 1831 [4 Stat. 448], need not show whether the prosecutor paid the money on the draft and endorsement or not. The false pretence of the prisoner was complete when he fraudulently obtained the endorsement of the prosecutor; by that endorsement the prosecutor contracted an obligation in writing conditional in its terms to pay the money named in the draft to the bona fide holder of it.

2. In an indictment under the statute it is superfluous to call the offence by its general and uncertain statutory name if the offence is set out in *hæc verba*, so that the court can see and determine whether the instrument is such a one as comes within the terms of the statute.

Error to criminal court.

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

[Indictment of Ludam A. Bargie for false pretences.]

There were two counts in the indictment, the substance of which will be found in the opinion of the court. The jury brought in a verdict of guilty.

The prisoner, through his counsel, moved that judgment upon the verdict be arrested for the following reasons, viz: 1st. The paper writing, called a draft for \$120, which is a foundation of the alleged false pretence in this indictment, is not fully set out in its legal effects, which is necessary to render the indictment good and sufficient in law. 2nd. It is charged in the indictment that the paper writing, called a draft, upon which the prisoner obtained the money of the prosecutor was not a good and available draft, and the indictment does not allege that the said paper or draft was ever presented to the drawee, nor does he allege a reasonable excuse why it was not presented. 3d. If it is necessary to prove on the trial the presentation of the draft to the drawee, or aver an excuse for not presenting the same, it is necessary to allege these facts in the indictment, which allegation is not contained in the indictment. 4th. It is not averred in the indictment that the prosecutor, Abraham Chambers, was legally liable for the money alleged to have been obtained on a false pretence, which is necessary to be averred to make the indictment good. Motion in arrest of judgment overruled. [Defendant sued out a writ of error.]

Daniel Ratcliff and John E. Norris, for the prisoner.

Robert Ould, U. S. Dist. Atty.

Before DUNLOP, Chief Judge, and MORSELL and MERRICK, Circuit Judges.

DUNLOP, Chief Judge. This is a writ of error to the judgment of the criminal court, upon an indictment against the prisoner for false pretenses charged in two counts, upon which a verdict of guilty was rendered by the jury on both counts. No bill of exceptions was taken on the trial below, and we cannot therefore entertain or consider the argument addressed to us here, and there was no evidence on the trial in that court to maintain the allegation that the prisoner obtained from the prosecutor, Chambers, \$120, as charged in the first count of the indictment. The verdict concludes that question, and we must assume here that all the averments and allegations in both counts were proved as laid.

The writ of error brings before us for review only the sufficiency of the indictment. The clause of the act of congress of March 2, 1831 [4 Stat. 448], upon which it is framed is in these words: "Section 12. That every person duly convicted of obtaining by false pretenses any goods or chattels, money, bank note, promissory note or any other instrument in writing for the payment or delivery

of money, or other valuable thing," shall suffer imprisonment, &c. It will be observed by the terms of the statute that the obtaining by false pretenses, "any instrument in writing for the payment or delivery of money or other valuable thing," is itself an offence, whether the money or other valuable thing be paid or delivered or not by the party charged or bound in the written instrument so to do. In other words, to consummate the crime it is not necessary to aver or prove that the maker of the writing obligatory has paid or delivered the money or valuable thing stipulated in the writing. It is enough that he is charged and liable so to pay or deliver. The gist of the 1st count is that the prisoner on the 2d of August, 1830, at the county of Washington, in this district, with intent to cheat and defraud one Benjamin Chambers of his moneys, did falsely pretend to said Chambers that he was authorized by one Wm. Francis McLean to draw upon him for about the sum of \$120, and did then produce to said Chambers a certain paper writing, purporting to be a sight draft upon Wm. Francis McLean, for the payment, through the Citizens' Bank of New Orleans, to the order of Benjamin Chambers, of the sum of \$120, with the word "accepted" written upon the back of said draft, and that the same was then and there a good, genuine and available draft for the payment of \$120. The 1st count then negatives these pretenses, with others set forth in it, avers them to be false, and so well known to be false by the prisoner and are found to be false by the verdict. The count concludes by averring that by colour and means of said false pretenses the prisoner did then and there unlawfully, knowingly and designedly obtain from said Benjamin Chambers the sum of \$120 of the moneys and effects of the said Benjamin, with the intent to cheat and defraud the said Benjamin Chambers. There can be no doubt this is a good count and charges an offence under the statute, if the false pretenses are set forth in it with sufficient certainty. The money of Chambers was obtained on a fraudulent draft, which the prisoner was not authorized, and which it is found by the verdict he knew he was not authorized to draw on McLean. *Rex v. Jackson*, 3 Camp. 370; *Attorney General v. Morgan*, 2 Russ. 307.

It is objected that the count does not allege that the draft was delivered to Chambers or was endorsed by him, and that it is not set forth according to its tenor, that is to say in hæc verba. The count avers that the paper writing, purporting to be the draft, was "then and there produced by the said Ludam A. Bargie to the said Chambers." This averment is in the usual and approved form. See *Whart. Prec.* 540. It was not needed to aver the endorsement by Chambers; the prisoner is not charged in this count with fraudulently obtaining the en-

dorsement of Chambers; the charge is that by the fraudulent draft the prisoner fraudulently obtained \$120 of the money of Chambers. To constitute the offence it was wholly immaterial whether Chambers endorsed the draft or not. It was not necessary to set out the draft in hæc verba. "If the pretence be in writing it is not necessary to set it out in hæc verba, unless some question turn on the form of the instrument; it is sufficient to state the pretence in substance as it appears in writing." Archb. Cr. Prac. & Pl. 604. It was not necessary that the indictment should show how the pretence operated in the mind of the party or in what way it was calculated to effect the obtaining the money, it is merely matter of evidence. *Hamilton v. Reg.*, 9 Adol. & El. (N. S.) 277, per Lord Semmans. See, also, Whart. Cr. Law, 729.

It is also suggested in the reasons, in arrest of judgment, that the count ought to have averred presentment of the draft to the drawer for acceptance, and notice of its dishonor to the prisoner, but it is settled law that a drawer without funds in the hands of the drawee, and who is not authorized to draw, has no right to require of the holder presentment to the drawee for acceptance or payment, or notice to him the drawer of refusal or dishonor. The prisoner in this case having fraudulently drawn the bill, without funds in the drawee's hands, or authority to draw from the drawee, could not claim its acceptance or payment, or expect it to be honored or paid. As he fraudulently drew the bill, he could not claim the right of a bona fide drawer in any proceedings against him civil or criminal, no averment of the facts suggested, therefore need have been made in the count or proved on the trial. We think the pleader has in this count substantially set forth the draft, and that the 1st count is a good count to sustain the judgment of the criminal court.

The gist of the 2d count is that the prisoner, with intent to defraud the said Chambers, on the 2d of August, 1859, at the county aforesaid, upon like false pretenses, in substance as charged in the 1st count, and upon the further false pretense that said Chambers would thereby incur no personal pecuniary liability or responsibility, did request and solicit said Chambers to sign his name upon the back of a certain draft or bill of exchange, drawn by said Bargie, on one Wm. Francis McLean, for the sum of \$120, dated Washington, D. C., August 2, 1859, and payable at sight to the order of said Benjamin Chambers, which said false pretenses are negatived and averred to be false, and known to the prisoner to be false and fraudulent, by means of which false pretenses the prisoner did, then and there unlawfully, with intent to cheat and defraud said Benjamin Chambers, procure and obtain the signature of said Chambers from said Chambers, to and upon said draft or bill of exchange, for the sum of \$120,

by the writing of the name of the said Benjamin Chambers, by the name of B. Chambers on the back of the said draft or bill of exchange, and beneath the word "Accepted;" it then proceeds to set out in hæc verba the draft and endorsement. "\$120.00. Washington, D. C., August 2, 1859. William Francis McLean pay to the order of Benjamin Chambers, at sight, through the 'Citizens' Bank of New Orleans, La., one hundred and twenty dollars. L. A. Bargie." And on the back of which said draft or bill of exchange is endorsed and written the words following, that is to say, "Accepted, B. Chambers." The draft and signature so set out for inspection of the court, and the signature so averred to be obtained and procured by the prisoner from Chambers on the back of a negotiable draft, is in law an endorsement. It is a contract in writing by the endorser Chambers, for the payment to the holder of the \$120 named in the draft. It is, in the language of the statute, "An instrument in writing for the payment of money." That the contract of the endorser is conditional and not absolute, does not, in our judgment, vary the offence charged against the prisoner. It is a valuable security, proper to be, and we think meant to be protected by the legislature. The contract of endorsement, though conditional, is still, we think, an instrument in writing for the payment of money within the true intent of the 12th section of the penitentiary act. If this be the true construction of that act, then, as we have before said, it is immaterial whether Chambers paid the money on the draft and endorsement or not. The offence of the prisoner was complete when he fraudulently obtained the endorsement of Chambers. By that endorsement Chambers contracted an obligation in writing, conditional in its terms, to pay the money named in the draft to the bona fide holder of it.

The second count, in the conclusion of it, avers that afterwards, to wit: on the 1st of November, in the year aforesaid, Chambers, by reason of his signature, was obliged to pay and did pay the said sum of \$120 in cash, to his great damage and against the statute. If we are right in the construction we have given of the statute, the pleader has performed a work of supererogation in making the last averment. Supposing the averment, however, to be necessary, it is assailed for its generality and want of precision. It is objected that the count nowhere charged that the prisoner negotiated the draft after endorsement, and received the money for it; that the liability and obligation of Chambers, the endorser, to pay, ought to have been set out with the same precision as in a declaration in a civil suit against him as endorser to charge him in that capacity; that is to say that presentment on a day certain, and notice of non-acceptance or non-payment on a day certain, should have been averred,

so as to show this court that Chambers was bound and liable in law to pay the money on the draft, and that it ought to have charged to whom, and when Chambers paid the money. All these objections are met and answered by the supreme court of New York in the case of *People v. Stone*, 9 Wend. 183, 184, 189, 190. The first and second counts in the indictment in that case were held good by that court, although they were substantially as general as the second count in the indictment before us.

Lastly, it is objected that the prisoner has not been charged in this second count for fraudulently procuring the endorsement of Chambers in the terms and language of the statute; that is to say, if we understand the objection, he ought to have been charged with fraudulently obtaining from Chambers "an instrument in writing for the payment of money." It is true that we have held that an offence under the grade of felony, created by statute, where the offence so created was unknown to the common law, it was sufficient as a general rule to follow the terms of the statute creating the offence. But this, even in such cases, is not a rule of universal application, and false pretences is one of the exceptions laid down in the books. Where the language of the statute is so general and vague, as in the case now before us, to give no notice to the accused of any specific instrument in writing for the payment of money, and to what amount, it would be most unjust to him to call him to answer when he could not know against what to defend himself, and when it would be impossible in any subsequent criminal proceeding for the same offence, to plead in bar a former acquittal or conviction. In all such cases reasonable legal certainty must be used in the indictment. But we have never said, where the language of the statute is even reasonably certain in defining the offence, that the pleader cannot use other language more specific and more certain to define the same offense, which the language of the statute imparts in more general terms.

In the case now before us, in the second count, "the instrument in writing for the payment of money" alleged to have been fraudulently obtained by the prisoner from Chambers, is set out by the pleader with all the particularity of which it was capable; it is set out in *hæc verba*, so that the court can see and determine whether it is such an instrument as comes within the terms of the statute. Having shown us the thing named with perfect certainty in all its particulars, it is surely superfluous also to call it by its general and uncertain statutory name. Upon the whole, we think the second count also good, and we affirm the judgment of the criminal court.

BARNEY v. BARNEY. See Cases Nos. 18,230 and 18,308.

30 Fed.Cas.—61

Case No. 18,230.

BARNEY v. DE KRAFT.

[2 Hayw. & H. 404.]¹

Circuit Court, District of Columbia. Oct. 21, 1862.

JUDGMENT—EXTRA TERRITORIAL EFFECT—GUARDIANSHIP—JURISDICTION OF ORPHANS' COURT—CHANCERY.

1. A personal judgment or decree obtained in any state over a non-resident, who has not been served with process within the state, has no extra territorial validity and does not come within the operation of the 4th article of the constitution, declaring the effect within one state of judicial proceedings in another state.

2. The will of the maternal grandfather, which declares that his estate should be held by trustees, in trust for his daughter and heirs, free from the control or disposal of any husband she might have and exempt from his debts, contracts or engagements, does not affect the right of the husband to the guardianship of his infant children.

3. Whenever our statutes use the term "guardian," the father, although in one sense the natural guardian, is never to be included, unless there be something more which imperatively demands that it should be embraced by the expression.

4. The orphans' court has no jurisdiction to inquire whether a father be a fit person to be intrusted with the personal custody and education of his children; its jurisdiction as to him extends only to the due care and management of the infant's estate.

5. Where, for any reason, a father becomes incompetent or unfit to act as the natural guardian of his children, the remedy is in a court of chancery.

Appeal from orphans' court.

At law.

[Proceeding by Samuel Chase Barney against John W. De Kraft, next friend of Samuel C. Barney, Jr., and other minor children of Samuel Chase Barney and Mary E. De Kraft (formerly Barney), deceased.]

[See *De Kraft v. Barney*, 2 Black (67 U. S.) 704; *Same v. Same*, Case No. 18,288; and *In re Lindsley*, Case No. 18,308.]

BARNEY (DE KRAFT v.). See Case No. 18,288.

BELKNAP MILLS (CROMPTON v.). See Case No. 18,285.

BELL (BILLINGSLEY v.). See Case No. 18,237.

Case No. 18,231.

BELL v. LEWIS et al.

[2 Hayw. & H. 136.]¹

Circuit Court, District of Columbia. Nov. 8, 1853.²

ASSIGNMENT OF CLAIM FOR INDEMNITY—PROOF OF

The convention created for the settlement of claims between Brazil and the United States, held in the case of the American brig *Caspien*, condemned and sold as a prize of war at Montevideo, that the proof of an assignment of a

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

² [Affirmed 17 How. (58 U. S.) 616.]

claim for indemnity for the loss of personal property by the pilot of the brig, which had been mislaid or lost, could not be supplied by parol proof or by a copy of the same, but required the original to be produced, in order to establish the claim in the assignee.

In equity. [Bill for an injunction.]

The bill in substance states that the American brig Caspian was sold with her cargo in Montevideo, in South America, on the 20th of September, 1827, to sundry persons, one of whom, Stephen J. Lewis, late of New York, but now deceased, acquired an interest of \$5,000, or one-fifth part thereof. That the said brig, with her cargo, while pursuing her voyage, was illegally captured on the 2nd of October, 1827, in the river La Platte, by the Brazilian squadron, carried into Montevideo, and condemned as prize of war. That Lewis, who was on board as her pilot, had his baggage robbed by the captors of monies and effects to the amount of \$4020; that demand was thereafter steadily made by the United States government on behalf of Lewis, against the government of Brazil, for indemnity for the loss of his interest in said brig and cargo, and of his monies and effects of which he had been robbed, until his claims were included in the convention of January 27th, 1849, between the two governments. That on the 6th of November, 1828, Lewis being indebted to Isaac Bell, of New York, in the sum of \$12,500, and having no property of his own in possession, assigned his claim against the Brazilian government for indemnity, as aforesaid, to Isaac Bell, his executors, administrators or assigns, with full power to collect the same, and never thereafter asserted any right to the said claims, which were afterwards urged upon the United States government by Isaac Bell. That Lewis died on the 31st of July, 1844, intestate and without any property, never having paid any part of his indebtedness to Isaac Bell, except so far as his claims against Brazil for indemnity, so assigned to Isaac Bell, might be realized, discharged the same. That Lewis' claims for indemnity against Brazil were prosecuted by Isaac Bell, his assignee, before the commissioners appointed to carry into effect the convention of January 27th, 1849, upon a duly proved copy of the assignment, the original of which was believed to have been lost, but the commissioner would not admit this evidence of the assignment, and on the 30th of June, 1852, awarded to Mary Lewis, administratrix of Lewis, the sum of \$11,551.24, which he found to be due on account of Lewis' claims. That subsequently to the making of this award Isaac Bell assigned all his right, title and interest as Lewis' assignee, to and in Lewis' claim to Isaac Bell, Junior, of Mobile, in Alabama, who afterwards assigned the same to Edward R. Bell, of New York, who now claims by virtue of said assignments to be the actual bona fide owner of the whole of the award, so as aforesaid, made to Mary Lewis. That

the original assignment from Lewis to Isaac Bell, believed to have been lost, has since the date of the said award been found. That Isaac Bell, Junior, and Edward R. Bell, assignee as aforesaid, having complied in all respects with the act of congress of July 3, 1852 [10 Stat. 11], in the premises, Edward R. Bell has filed his bill of complaint against Mary Lewis for relief, praying that Mary Lewis, the defendant, be enjoined from asking and receiving from the secretary of the treasury, and the secretary of the treasury from paying to her the whole or any part of the award.

The defendant answers that she knows nothing of her father having assigned at any time the claim; that if any assignment was ever made, she insists that it will be found to have been a mere nominal assignment, creating a mere temporary trust or bailment for the use of said Lewis, the occasion for which has long ceased to exist, and with it the trust or bailment.

That such a trust is not the subject of assignment, and that it was not in the power of said Isaac Bell, Sr., to make a voluntary assignment to his son Isaac, Jr., and by consequence that the assignment to plaintiff alleged in the bill is a nullity, cannot be recognized in a court of equity, and the plaintiff cannot in virtue thereof prosecute this suit.

That the assignments from father to son and from brother to brother, and for the purpose declared in the bill, are champertous and against public policy, illegal, the result of improper combination and confederate, voluntary, void, and will not be enforced, by a court of equity especially.

That the transactions out of which supposed assignment arose, if it ever had existence, are stale; that the alleged debt upon which it rests, if any debt ever had existence, is a stale demand, barred by the statute of New York for the limitations of actions; and such debt, if it ever existed, was contracted, which is preferred against the estate of dead men, under circumstances of suspicion, is sought by parole proof alone to be sustained; proof touching matters of near twenty-five years standing, if they ever had an existence at all, and upon all these grounds not entitled to the aid of a court of equity.

G. Suthen, for complainant.

Chitten & Ratcliffe, for defendants.

The following is the decree:

This cause having been regularly set for hearing, and coming on to be heard on the bill, answer, the exhibits and proofs taken and filed in the same (the complainant having refused to read in evidence the depositions of Isaac Bell, Senior, which have been taken by said complainant, and the defendant's counsel having thereupon read the same) and the court having heard, read and considered the same and the arguments of counsel thereon:

It is this 8th day of November, 1853, by the

court ordered, adjudged and decreed, that the several assignments set up in the said bill have been fully proved to the satisfaction of this court to have been duly made, on sufficient consideration by the said Stephen J. Lewis, in his lifetime, and by said Isaac Bell, Senior, and Isaac Bell, Junior, respectively; and thereby the whole claim passed to and has become vested in said Edward R. Bell, and the said sum of money of right belongs to said Edward R. Bell.

And this court doth further order, adjudge and decree, that the sum awarded by George P. Fisher, Esq., commissioner, &c., to said Mary Lewis, administratrix of Stephen J. Lewis, and now remaining in the treasury of the United States, be paid by the said secretary of the treasury to the said Edward R. Bell.

Decree affirmed. See 17 How. [58 U. S.] 616.

BELL v. SECRETARY OF TREASURY.
See Case No. 18,231.

Case No: 18,232.

BENTLEY v. JOSLIN et al.

[Hempst. 218.]¹

Superior Court, Territory of Arkansas. Jan., 1833.

INJUNCTION—SUIT ON BOND WHILE PENDING.

Where an injunction has been dissolved, and afterwards reinstated, and is still pending, no suit can be maintained on the injunction bond, as for a breach of it.

Appeal from Conway circuit court.

[This was an action of debt by George Bentley against Samuel B. Joslin and others. From a judgment against plaintiff for costs, he appeals.]

Before **ESKRIDGE, CROSS** and **CLAYTON**, Judges.

OPINION OF THE COURT. This was an action of debt brought in the Conway circuit court by the appellant against the appellees, upon an injunction bond. The defendants craved oyer of the bond, set out the condition, and pleaded that after injunction for which the bond was given had been dissolved, and before the institution of the suit, they paid the damages decreed against them by the order dissolving the injunction, and that upon an amended bill filed the injunction had been reinstated, was still pending, and a new bond given. To this plea a general demurrer was filed by the plaintiff. The court overruled the demurrer, and gave judgment against the plaintiff for the costs, from which an appeal was taken to this court.

The reinstating of the injunction placed the cause in the court of chancery, in the same situation in which it stood previous to

the dissolution of the injunction. It is a matter of daily occurrence to reinstate an injunction upon the filing of an amended bill. It does not thereby become a new cause, but in our opinion is the continuation of the same cause. The injunction bond is not broken so long as the injunction remains in force. The demurrer admits the injunction in this cause to be still in existence. To permit the party to go on and collect the amount of the bond, before it is ascertained whether the injunction will be dissolved or perpetuated, is too obviously contrary to justice to be consistent with law. Judgment affirmed.

Case No. 18,233.

BENTLEY v. SEVIER et al.

[Hempst. 249.]¹

Superior Court, Territory of Arkansas. July, 1834.

SCIRE FACIAS—EXECUTION.

A scire facias is an action to which a party may plead, and it may be executed in the same manner as a summons.

[Scire facias by Eli Bentley, executor of the will of George Bentley, against Ambrose H. Sevier and others.]

Before **CROSS** and **LACY**, Judges.

OPINION OF THE COURT. This is a motion by the defendants to quash the return of a scire facias executed in the same manner as a summons. It is contended that the statute does not embrace this writ, and that it cannot be executed as an ordinary summons, but must be served agreeably to the common law. Geyer's Dig. p. 245, § 10, declares that "the original process in all actions of slander, trespass, assault and battery, actions on the case for trover or other wrongs, and personal actions," shall be a writ of summons. It further provides that service of a summons shall be by reading the writ, declaration, petition, or statement, to the defendant, or by delivering him a copy thereof, or leaving such copy at his usual place of abode, with some person of the family above the age of fifteen years, and informing such person of the contents thereof; such service to be at least fifteen days before the return day of the writ. There is also a statute among the territorial acts (Acts 1818, p. 35), which, without naming any particular action, provides generally that notice on all suits then pending, or thereafter to be commenced, might be served by leaving a copy as above indicated. The service of the scire facias under consideration is agreeable to the direction of this statute, and the question is whether it is sufficient.

There can be no doubt it was the object and intention of the legislature, by using

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

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

general language respecting suits, to include this writ, and treat it as an action. A scire facias is declared to be a judicial writ founded on some matter of record, such as a recognition or judgment. 2 Tidd, Prac. 982. It is said by Lord Coke (3 Co. Litt. 290b, 524): "Although it be a judicial writ, yet in law it has ever been held to be an action to which a party could plead, and a release of all actions includes a scire facias." Skin. 682; 10 Mod. 258; 2 Term R. 46; 1 Term R. 267; 4 Bac. Abr. tit. "Scire Facias," 409; 2 Ld. Raym. 1048; 2 Wils. 251. It will be perceived, upon examination, that many of these cases are somewhat conflicting, and most of them apply to suits brought upon recognizances, or to repeal letters patent, or on like subjects, when it is declared to be either an original, or in the nature of an original writ. 2 Tidd, Prac. 983-1035. And the courts appear to have frequently determined that it was a judicial, or in the nature of an original, writ, as best suited their rules of practice, and consequently no satisfactory test is given whereby the distinction can always be exactly ascertained. And without attempting to reconcile these differences, we say that in this instance, if it can be considered as process intended to notify a party of an action pending, agreeable to the statute cited, as we think it may, the service is good, and we overrule the motion.

Motion overruled.

Case No. 18,234.

In re BENTON'S WILL.

[2 Hayw. & H. 315.]¹

Orphans' Court, District of Columbia. Dec. 11, 1858.

EXECUTORS — QUALIFYING AFTER RENUNCIATION.

Notwithstanding the renunciation of an executor, under the Maryland statute of 1798 (chapter 101, subc. 3, § 7),² he can come into court and take the responsibility by complying with the law at any time before letters of administration had been granted to another.

[Motion to appoint an executor.]

It appears that all the executors named in the will of Thos. H. Benton had renounced or failed to qualify and give bonds when summoned.

WM. F. PURCELL, Judge. The judge decided that notwithstanding the renunciation of an executor he might come into court and take the responsibility upon himself by complying with the law at any time before letters had been granted to any other person. This decision is based upon the Maryland statute of

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

² If any executor or executrix named in a will shall file — an attested renunciation in writing of his or her trust, there may be the same proceedings with respect to granting letters testamentary or of administration, as if the party so renouncing had not been named in the will; provided, nevertheless, that any executor or executrix named in a will shall be entitled, notwithstanding any failure or renunciation as aforesaid, on filing a bond as aforesaid, before letters testamentary or of administration shall actually be committed to another or others as aforesaid, to have letters testamentary granted to him or her, or to be included therein, as the case may require.

1798 (chap. 101, subc. 3, § 7), which is now in force in this district. Upon this decision Montgomery Blair, Esq., one of the executors who had renounced, came into court and gave bonds in the penalty of \$20,000; F. P. Blair and John C. Rives, Esqs., becoming his sureties.

Case No. 18,235.

BIBBS v. DAVIS.

[2 Hayw. & H. 364.]¹

Circuit Court, District of Columbia. Feb. 16, 1861.

MARRIED WOMEN — RENEWING CONTRACT AFTER COVERTURE CEASES.

Where a woman during coverture makes a contract in reference to her separate estate, and subsequently after the death of her husband promises to pay the same, she is liable.

At law. This was a suit brought by [R. A. Davis, to the use of Thomas Waters, against Mary R. Bibbs] on the following instrument in writing: "September 9, 1858. Balance due on settlement with Mr. R. A. Davis, by me, 34 dollars. Mary R. Bibbs." Judgment was rendered against the appellant for the amount, with interest, from September 9, 1858, and costs, by William A. King, a justice of the peace. On appeal the judgment was affirmed. The appellant, through her attorney, moved a new trial for the following reasons: It having been proven upon the trial in this case that the appellant, while a married woman, executed and delivered to the appellee, in consideration of work and labor done and performed upon her farm, the paper writing herewith filed, and that after the death of her said husband (to wit, after the service of the writ) she promised to pay to the defendant the amount therein specified. The said appellant moved the court to instruct the jury in substance as follows, to wit: If they believe from the whole evidence aforesaid that the said appellant, during coverture, executed and delivered to the said appellee the said paper writing, and after coverture promised to pay the same, it is null and void, and they must find for the appellant.

This instruction the court refused to grant, and instead, instructed the jury that if they believe the said evidence to find for the appellee. The refusal of the instructions prayed and the instruction granted, are respectfully assigned as error, and the grounds for a new trial for the following reasons: First. The contract of a feme-covert is null and void and not voidable, and a judgment cannot be rendered at law against her person or property thereupon. Second. The promise of a feme-covert being null and void, and her subsequent promise when sole, without a new consideration is also void. Third. In equity the agreement of a feme-covert made upon the faith of her separate estate is not an obligatory contract, for as a feme-

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

covert she is incapable of contracting, but is rather an appointment out of her separate estate. The power of appointment is incident to the power of enjoyment, and every security thereon executed by her is deemed an appointment, pro tanto, of the separate estate. A feme-covert can bind her separate estate only according to the terms of the instrument creating the same. Courts of equity never decree in personam but in rem. All of which we respectfully submit to the consideration of the court.

Robert G. Thrift, for appellant.
Mr. Mathews, for appellee.

Upon full argument by counsel, THE COURT held that where a lady during marriage makes a contract in reference to her separate estate, and subsequently after the death of her husband, promises to pay the same, she is liable thereupon at law. Motion overruled and judgment on the verdict.

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BIBBS v. WATERS. See Case No. 18,235.
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Case No. 18,236.

In re BIDDLE et al.
[2 Hayw. & H. 193.]¹

Circuit Court, District of Columbia. May 18, 1855.

CIRCUIT COURT OF DISTRICT OF COLUMBIA — APPEAL FROM COURTS MARTIAL—HABEAS CORPUS.

1. It is not in the power of the circuit court of the District of Columbia to revise or correct the error of a court martial if any exists. The appeal must be to the president who confirmed the sentence.

2. The circuit court can not look beyond the record of the court martial; it has no power or jurisdiction to examine the proceedings under a writ of error; it cannot therefore usurp power or jurisdiction by a writ of habeas corpus.

[On a writ of habeas corpus.]

Four United States sailors named Richard Biddle, Sam'l Kays, David Hazard, and John McKenny. The first and second were tried by a court martial at Norfolk, Va.; the others, by a court martial at New York City, and convicted and sentenced to service at hard labor in the penitentiary of this District. They pray that writs of habeas corpus may issue to bring them before the court, not having, they say, been convicted of any offence punishable with imprisonment at hard labor under the laws of the United States or District of Columbia, and if it shall be found that their confinement is illegal and contrary to law, they may be discharged from imprisonment.

Charles L. Jones, for petitioners.
P. B. Key, against petitioners.

DUNLOP, Circuit Judge, referred to the petition of Richard Biddle, who enlisted as

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

a sailor in the naval service in October, 1852, for the period of three years. He was tried by a general court martial at Norfolk for "mutinous conduct and language" on the 23d February, 1854; convicted and sentenced to ten years imprisonment at labor in the District penitentiary. The proceeding, judgment and sentence of the court martial were submitted to the president of the United States, and approved by him.

The jurisdiction of the court martial, the court said, is not denied, but it is insisted that the court martial exceeded its authority by passing the sentence. He read the law of congress of 1800 [2 Stat. 45] for the government of the navy, which prescribes the punishment for the several offences known to the naval service, to be determined by a court martial, the finding to be submitted to the president for his approval.

It was not therefore in the power of the circuit court to revise or correct the error of the court martial, if any exists; the appeal must lie to the president who confirmed the sentence of the court martial.

The circuit court could not look beyond the record; it had no power to examine the proceedings under a writ of error, as the law had placed such jurisdiction beyond its power; it cannot usurp power by a writ of habeas corpus.

There is no doubt the court martial had power to punish Biddle for the crime of which he was charged. The court was satisfied that Biddle must be remanded, and the same principle applies to the other three cases.

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Case No. 18,237.

BILLINGSLEY v. BELL.

[Hempst. 24.]¹

Superior Court, Territory of Arkansas. Oct., 1824.

APPEALS—NOTICE.

If the appeal is prayed on the day of trial, notice is unnecessary, and the appeal bond may be given at any time within ten days.

Appeal from Crawford circuit court.

[Suit by Robert Bell against James Billingsley.]

Before JOHNSON, SCOTT, and TRIMBLE, JJ.

OPINION OF THE COURT. This was a suit originally brought by Bell against Billingsley, before a justice of the peace, who rendered judgment for Bell, and from which Billingsley, on the day of trial, prayed an appeal to the Crawford circuit court, which was granted; and a transcript of the proceedings sent up to that court. Upon the calling of the cause, Bell moved to dismiss the appeal, and this motion was sustained.

From the bill of exceptions, it is apparent

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

that the court acted under a misapprehension of the fact that an appeal had been prayed by Billingsley on the day of trial. Such being the fact, the court erred, for the law is express that notice to the opposite party need only be given where the appeal is not prayed on the day of trial. Geyer's Dig. 391. It has been said that, as the appeal bond was not entered into on the day of trial, the appellant could give bond within ten days. This is true, and as the bond in this instance was executed in that time, it is sufficient. Geyer's Dig. 390. Reversed.

BISCOE (BLAKELEY v.). See Case No. 18,239.

Case No. 18,238.

BLAGDEN v. BROADRUP.

[2 Hayw. & H. 278.]¹

Circuit Court, District of Columbia. May 5, 1857.

CERTIORARI—REMEDY FOR WRIT IMPROPERLY ISSUED.

Where a case has been improperly taken out of the hands of a magistrate through a writ of certiorari, on a motion presented to the court by way of a writ of error cum nobis, the court will issue a writ of procedendo.

This was a case of certiorari issued to two justices of the peace, J. D. Clark and Z. K. Offutt, to bring up the proceedings then before them in a case of forcible entry and detainer [by Thomas Blagden against George Broadrup]. After the case was thus brought up before the circuit court an improper rule to declare was laid by the plaintiff in the certiorari, and by virtue of said rule the case went off the docket as non-prossed at the last term of the court. A motion was made by the defendant's counsel to have the case restored to the docket, with a view to having the writ of certiorari quashed. The court refused the motion.

Mr. Jones moved the court to issue a writ of procedendo to the magistrates to proceed with the case where it was left off at the hearing of the certiorari, contending that as the case had been improperly taken out of the hands of the magistrates at a stage of the proceedings when it was exclusively within their jurisdiction, it ought to go back to them by the same authority by which it was taken from them, and a writ of procedendo was the only appropriate remedy in such a case, insisted that the defendant had an indefeasible right to such writ.

W. S. Cox, for petitioner.
Charles Lee Jones, for defendant.

The following cases were cited by the counsel for the petitioner: U. S. v. Smith

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

[Case No. 16,324]; Sherburne v. King [Id. 12,759]; McCormick v. Magruder [Id. 8,723]; Union Bank v. Crittenden [Id. 14,354]; Ault v. Elliot [Id. 655]; Ringgold v. Elliot [Id. 11,804].

The court will set aside a judgment on putting the plaintiff in as good a condition. Strange, 823.

THE COURT decided that the case had been improperly taken out of the hands of the magistrates, and that they would issue the procedendo, but requested the motion might be presented to them by way of a writ of error cum nobis.

BLAIR (DOVE v.). See Case No. 18,292.

BLAIR (HALLACK v.). See Case No. 18,292.

Case No. 18,239.

BLAKELEY v. BISCOE.

[Hempst. 114.]¹

Superior Court, Territory of Arkansas. Jan., 1831.

EQUITY JURISDICTION—REMEDY AT LAW.

Where there is a plain and adequate remedy at law, a court of chancery has no jurisdiction.

[Bill in chancery by William Blakeley against Henry L. Biscoe for an accounting. Defendant demurred to the bill, and the demurrer was sustained.]

Before JOHNSON, ESKRIDGE, CROSS, and BATES, Judges.

JOHNSON, J. This is a bill in chancery, filed by Blakeley against Biscoe, to which the defendant has filed a general demurrer. Blakeley, in his bill, alleges that in the year one thousand eight hundred and twenty-one, administration of the estate of Moses Graham was duly granted to him in the county of Clark; that he proceeded to sell the personal estate of Graham according to law, taking notes or bonds of the purchasers amounting to six hundred and fifty-three dollars; that shortly after the sale he employed the defendant Biscoe, to act as his agent in all things pertaining to the administration of the estate, and that Biscoe undertook and faithfully promised to do and perform every duty required of the complainant in relation to his administration, and finally to settle the same as required by law, and to pay over the balance of the assets, if any, after the settlement, to the complainant, and as a consideration for his services, Biscoe was to retain six per centum out of the amount of the estate; that Biscoe agreed and bound himself to keep a just and true account of all money received by him, as agent, stating when

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

it was received and how appropriated, and to exhibit the account to the complainant whenever requested; that the complainant, in pursuance of the agreement, delivered the notes taken at the sale before mentioned, amounting to \$653, to the defendant Biscoe, who received and collected the amount of the notes. The bill further alleges, that the defendant Biscoe failed and still refuses to make the settlement of the administration, refuses to account for and pay over the money in his hands unexpended, and also refuses to exhibit a just and true account of all moneys received, of whom received, to whom paid, and for what purpose. The prayer of the bill is, that the defendant may be compelled to state and set forth a just and true account of his agency, pay over the money remaining in his hands, and for general relief.

Upon the case just stated the question arises whether a court of chancery can entertain jurisdiction. Where there is a plain and adequate remedy at law, a court of chancery will not grant relief. This principle has become a maxim in the code of equity, and is sustained by innumerable authorities. 1 Bibb, 212; 2 Bibb, 273. Is there a plain and adequate remedy at law for the case stated in the present bill? The case stated and set out in the bill is nothing more nor less than a contract between the plaintiff and defendant, by which the latter agrees to act as the agent of the former in collecting certain bonds or notes, and of attending to the settlement of an intestate's estate, and to pay the balance over. For the breach of this contract the law surely affords an adequate remedy without a resort to equity. An action on the case, either in contract or in tort, is the appropriate action in which the plaintiff may recover all the damages to which he is entitled. If he seeks a recovery only of the money remaining in the hands of the defendant as in the present bill, the action of assumpsit is the appropriate remedy. If he also claims damages, as he would seem to do in the present bill, a special count for the non-feasance or misfeasance, will afford redress. It is manifest, then, that there can be no necessity to resort to a court of equity to obtain relief. It is not a case for an account, as has been contended. A bill for an account will lie only when there are mutual demands forming the ground of a series of accounts on one hand, and a series of payments on the other, and not merely one payment and one receipt. 1 Madd. Ch. 570; 6 Ves. 136; 9 Ves. 473. Nor does the bill allege the necessity of coming into chancery for a discovery. There is no allegation that the plaintiff is unable to prove the contract and the delivery of the notes to the defendant. Upon the whole we think it a clear case for an action at law, which is competent to afford ample redress, and consequently the chancellor will not take jurisdiction. Demurrer sustained.

Case No. 18,240.

BLAKELY v. FISH.

[Hempst. 11.]¹

Superior Court, Territory of Arkansas. April, 1822.

APPEAL—WHEN LIES.

An appeal will not lie except from a final decision or judgment, and where none is given, the appellate court has not jurisdiction.

[At law. Action on the case by William Blakely against David Fish. From an order overruling a demurrer to the declaration, defendant appeals.]

Before JOHNSON, SCOTT, and SELDEN, Judges.

OPINION OF THE COURT. This is an action on the case brought by the appellee against the appellant. The appellant in the court below demurred to the declaration, which demurrer was overruled, and he excepted and prayed an appeal to this court, which seems to have been granted. It does not appear from the record that the court proceeded to give final judgment in favor of either party. We are clearly of opinion, that an appeal will not lie except from the final decision or judgment of the court; and here there being no final judgment, this court has no jurisdiction. Geyer's Dig. 261; [Rutherford v. Fisher] 4 Dall. [4 U. S.] 22; [M'Clay v. Hanna] Id. 160; [Young v. Grundy] 6 Cranch [10 U. S.] 51. Dismissed.

Case No. 18,241.

BLAKELY v. RUDDELL.

[Hempst. 18.]¹

Superior Court, Territory of Arkansas. Aug., 1822.

CONVERSION—TROVER—DEMAND—APPEAL—PRESUMPTION AS TO INSTRUCTIONS.

1. The fact that a party came lawfully into possession of property is not the criterion to determine whether a demand and refusal are necessary in an action of trover.

2. If A. lends his horse to B., and B. sells him, the plaintiff need make no demand of B. to maintain an action of trover against him, because this is strong evidence of conversion.

3. Demand and refusal are not the only evidence of a conversion.

4. Instructions will be presumed to be correct where the evidence is not spread upon the record by exception or otherwise.

[Cited in Wiley v. Robinson, Case No. 17, 656a.]

[At law. Action of trover by William Blakely, administrator of Moses Graham, against Abraham Ruddell. There was a verdict and judgment for defendant, and plaintiff appealed. Affirmed.]

Before JOHNSON, SCOTT, and SELDEN, Judges.

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

OPINION OF THE COURT. The only ground relied on for the reversal of the judgment in this action of trover is that the court erred in instructions to the jury. Upon the trial, on the motion of the defendant, the court instructed the jury that "the plaintiff had not sustained his action by proving a demand and refusal before the commencement of the suit, the defendant having become lawfully possessed of the property." There are cases where the plaintiff cannot recover unless he proves a demand and refusal, and it is equally clear that there are cases where a demand and refusal are unnecessary, although the defendant may have come lawfully into possession; as where A. lends his horse to B., and B. sells him. This would be as strong evidence of conversion as could be adduced, and no demand would be necessary to enable the plaintiff to recover. 1 Chit. Pl. 177, 178; 5 East, 407; 6 East, 538; 1 Johns. Cas. 407. But, in the case before the court, the evidence of the plaintiff, if he adduced any, is not contained in the bill of exceptions, nor spread upon the record in any other manner; and, as the court might have been justified in giving the instruction, we are bound to presume in favor of the court in that respect. If, indeed, the plaintiff on the trial adduced evidence of a conversion other than that of a demand and refusal, the court no doubt committed an error in giving the opinion contained in the bill of exceptions; but, as no such evidence is shown to have been introduced, we cannot presume it, and consequently the judgment must be affirmed. Affirmed.

BLODGETT (UNITED STATES v.). See Case No. 18,312.

BLOOMER v. BUNTING. See Case No. 18,242.

BLOOMER v. DILWORTH. See Case No. 18,242.

BLOOMER v. DOUGLAS. See Case No. 18,242.

BLOOMER v. DRAHER. See Case No. 18,242.

BLOOMER v. HILL. See Case No. 18,242.

BLOOMER v. KELLY. See Case No. 18,242.

Case No. 18,242.

BLOOMER v. McQUEWAN et al. SAME v. DILWORTH. SAME v. MASON et al. SAME v. MILLINGAR. SAME v. KELLY et al. SAME v. HILL et al. SAME v. DRAHER.¹

Circuit Court. W. D. Pennsylvania. May 21, 1851.

PATENTS — VALIDITY — PLANING, TONGUING, AND GROOVING MACHINE.

[The Woodworth patent of December 27, 1828, and the reissue thereof granted July 8, 1845, are both valid.]

[Cited in Pitts v. Edmonds, Case No. 11,191.]

¹ [Not previously reported.]

Shaler & Stanton and G. G. Sickles, for plaintiff.

Dunlop & Loomis, for defendants.

GRIER, Circuit Justice (charging jury). As has been stated by the counsel for the plaintiff, the issues in this case were ordered by me, sitting on the equity side of the court, to ascertain—First. Was William Woodworth the original inventor of the machine patented by him on the 27th of December, 1828? Second. Is the reissued patent of July 8, 1845, for the same invention, intended to have been patented by the patent of December 27, 1828? This patent has been before me so often and for so long a time that it has become stereotyped. In a recent case tried by me at Philadelphia, under the apprehension that the jury might not agree, I gave them a month to consider, but they decided the case by rendering the verdict in a day. If the same question should again arise, I would not make a like order, because I am now perfectly satisfied. The first question you will ask will be, what did Woodworth invent? You know that, to entitle an inventor to a patent, his machine must be both new and useful. The intellectual production must differ from all others; it must have a distinctive character. It is plain, and the fact is admitted, that Woodworth did not invent circular cutters, rollers, nor cog work,—that is, the star gearing which has been spoken of,—nor an endless chain; nor did he invent pressure by a spring or by levers. Did Woodworth invent the machine patented to him on the 27th of December, 1828, as it is in combination? If he did, then he is entitled to the patent,—to the monopoly as a reward for his discovery. He was entitled to fourteen years, and in this case there have been two extensions of the patent, each for seven years, making, in the whole, twenty-eight years. Much is frequently said about the word "principle" in the trial of patent actions. It may be considered as the foundation of every invention. It is, however, a slippery word, meaning the *modus operandi*, or mode of operation. Have we any account of a patent or means to effect the same object—to do the same work—as is effected by the machine of Woodworth? A hundred trials have been had, including almost, if not quite, every circuit, but the patent has never been successfully assailed. There is no pretense that Woodworth was the inventor of the mechanical means detailed; but his claims cover a combination of tools which do the work. All the numerous attempts for a like purpose moved with the board or plank, and failed to do the work. Many persons came near being successful, but not one succeeded until the time of Woodworth. The art of printing was not discovered until very recently,—it was nearly perfected, but it was not successful until the fifteenth century. The art of printing calico preceded it, with the desire of intelligence exhibited by each

generation. It may be considered remarkable. It is the same with many other inventions which have since been added to the arts. People may be found who will swear that they know all about it, although no person can be found to corroborate such testimony. It is proper, perhaps, for counsel to do all that can be done, but such evidence cannot avail against the fact of an invention and the issue of a patent. In the trials which have been had in other circuits, resort has been made to the inventions of Bentham, Bramah, Muir, and also Uri Emmons. In the issues the counsel have abandoned the repetition and claims of the persons named. The cheat of Emmons is palpable. He cheated Woodworth out of one-half of his patent. The counsel have abandoned urging that objection.

The French patents were the only matters that I desired to hear about. They are, however, defunct things, dug out of the archives of a foreign office. Neither of them contain the elements of the Woodworth patent. The learned Prof. Locke has explained to you the several devices contained in the French patents, and the difference between the Woodworth cut and the cut of the French inventors. He has explained the matter fully. Woodworth invented, as I have already said, a combination of cutters and pressure rollers to effect an object. It accomplished the purpose. No man can appropriate the machine without authority. The pressure rollers, in his machine, may be graduated as may be desirable. The essence is to combine the whole to produce a beneficial result. The Frenchmen have been trying, but they are like Bentham and Bramah and Muir,—they have done nothing. The next question is, is the reissued patent of July 8, 1845, for the same invention, intended to have been patented by the patent of December 27, 1828? If the patents were alike, it would have been useless to have made the surrender. My Brother Story examined the old patent, and he informed the counsel for the patent that the ingenuity of the opponents of the patent would defeat it, if not amended. In consequence of that suggestion it was surrendered, and a new and amended patent applied for and granted. The court has examined the old patent, and find it to be imperfect. You will ask, what machine did Woodworth send to Pittsburgh in 1830? Was it a vertical machine, like the Dry Dock machine, which was at work in 1828, and all the world were running to look at? or was it a horizontal machine of the same kind? The tools in the first machine were the same as at present used. They were not quite so perfect as the tools which were put into the horizontal machine. Every mechanic would see the want of such tools. The Washington witnesses, whose depositions have been read, have supposed that the two patents must be alike. They have misapprehended the subject. Surely, if the first patent was im-

perfect, he had a right to surrender it. The question, therefore, is, what kind of a machine did Woodworth invent? Did the specification attached to the patent correspond with the machine? If not, he had a right to correct it. I have very little doubt about the question, and I think that you should not. If you agree in the affirmative, you will say so by adding "Yes" to the first question. The case, however, is with you.

Jury affirmed both questions.

[For cases involving this patent, see note to *Bicknell v. Todd*, Case No. 1,389.]

BLOOMER v. MATSON. See Case No. 18,242.

BLOOMER v. MILLIGAN. See Case No. 18,242.

BLOOMER v. ROSS. See Case No. 18,242.

Case No. 18,243.

BOUKER v. The DELAWARE.¹

District Court, S. D. New York. Jan. 31, 1878.²

COLLISION—FERRYBOAT WITH SCOW—CHANGE OF COURSE.

[Where a ferryboat laden with passengers changed her course to avoid being run into by a sloop which had missed stays, and, in consequence of such change, collided with a scow, held, that she was free from fault, it appearing that she reversed as soon as it was perceived that the change of course involved risk of striking the scow, and that a collision with the sloop would probably have been disastrous.]

[This was a libel by John A. Bouker against the steam ferryboat Delaware to recover damages resulting from a collision with libellant's scow.]

Beebe, Wilcox & Hobbs, for libellant.

Shipman, Barlow, Larocque & McFarland, for claimant.

BLATCHFORD, District Judge. I am of opinion that the Delaware has freed herself from the charge of fault in this case. The collision took place on the 4th of September, 1873. The statute in force at that time contained, in the shape of a formulated rule, what was before recognized as a principle of navigation and of decision, namely, that, in obeying and construing rules and regulations for preventing collisions on the water, due regard must be had "to any special circumstances which may exist in any particular case" rendering a departure from such rules "necessary in order to avoid immediate danger." Act April 29, 1864, art. 19; 13 Stat. 61. The faults alleged against the Delaware are that she changed her course and ran against the scow, and that she did not stop and reverse in time to avoid a collision. The evidence shows that the Delaware changed her course to avoid being run into by a

¹ [Not previously reported.]

² [Reversed in Case No. 18,244.]

sloop which had missed stays, and under the impending danger of a collision with the sloop, which would probably have been disastrous to the Delaware, laden as she was with passengers; that she stopped and reversed immediately as soon as it appeared that such necessary change of her course would cause her to approach towards the scow; that she had reason to believe her headway would be stopped before she would reach the scow, inasmuch as the scow was moving away from her; that her change of course to avoid the sloop was necessary in order to avoid immediate danger; and that she was not guilty of anything which can be imputed to her as a fault under the special circumstances of the case.

I do not think the facts of this case bring it within the principle of *Sherman v. Mott* [Case No. 12,767]. The act of the Delaware, in endeavoring to avoid the sloop, was a lawful and proper act, she had no intention of striking the scow, the situation did not indicate serious risk of collision with the scow, and she exercised reasonable care and caution and nautical skill. The case is very much like that of *The Thornley*, 7 Jur. 659. The *Thornley* was forging with the wind and the tide over the Nore Sand, and was approaching the *Mentor*, which was at anchor on the other side. She went over the Sand, and fouled the *Mentor*. It was claimed that she should have anchored either before she reached the Sand, or on the Sand, or after she had crossed it. It was shown that it would have been perilous for the *Thornley* to anchor on the Sand. Dr. Lushington stated the question to be whether the *Thornley* could have anchored so as to avoid the collision "without imminent risk to herself in doing so." The decision was that the collision was accidental, because the *Thornley* could not anchor until clear of the Sand, and because, if she had anchored immediately on being clear, the collision would still have occurred. The libel is dismissed, with costs.

[Reversed by circuit court in Case No. 18,244.]

Case No. 18,244.

BOUKER v. The DELAWARE.¹

Circuit Court, S. D. New York. July 31, 1879.²

COLLISION — LIABILITY — CHANGE OF COURSE BY STEAMER.

[A steamer is liable for a collision with a scow caused by the steamer suddenly changing her course to avoid being run into by a sailing vessel, unless it is proved that the steamer was without fault in getting into a position which made the change of course necessary.]

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

[This was a libel by John A. Bouker against the steam ferry boat Delaware. From a judg-

ment dismissing the libel (Case No. 18,243), libelant appeals.]

Facts Found by the Court.

(1) On the 4th of September, 1873, between 10 and 11 o'clock in the forenoon, the steam ferryboat Delaware was proceeding on one of her regular trips from Pavonia, N. J., across the Hudson river, to her slip at the foot of Chambers street, in the city of New York. (2) At the same time the scow or float "N-8," owned by the libelant, in tow of the steam tug Adriatic, was passing down the river, from the foot of Gansevoort street, New York, towards the Battery, with a heavy deck load of artificial stone. Her course was about parallel with the heads of the piers on the New York side, and from four to six hundred feet distant. The scow or float was lashed to the starboard side of the Adriatic, and their speed with the tide was about four miles an hour. There was only one man on the scow, and there was no railing or guard on her deck aft of the bow. (3) The wind was a moderate breeze from the southward and westward and the tide ebb. (4) At the same time, also, a schooner and sloop were beating down the river, and running out their starboard tacks towards the New York shore. (5) While the Delaware was approaching her slip, the Adriatic, with the scow in tow, was passing down the river in such a way as to enable the Delaware, if she held her course, to get by astern in safety. The schooner went about on her port tack, and passed the Delaware port to port and astern. In this state of things, the Delaware discovered that the sloop was not coming around upon her port tack, and that, if she kept on her starboard tack, it would be impossible to pass her bows without a collision which might endanger the lives of passengers. The Delaware, thereupon, ported her wheel, and stopped and reversed her engines to keep out of the way of the sloop; but in so doing, before her headway could be stopped, her port guard ran against and shifted the cargo of the scow in such a way that, when the boats were separated, the scow upset and the cargo was lost overboard.

Conclusion of Law.

(1) The Delaware was at fault in not slackening her speed or changing her course in time to keep out of the way of the sloop without coming into collision with the scow. (2) The libelants are entitled to recover.

Beebe, Wilcox & Hobbs, for appellant.
Shipman, Barlow, Larocque & McFarland, for appellee.

WAITE, Circuit Justice. The principal defense relied on by the claimant is that a sloop beating down the river, and running out her starboard tack toward New York, while attempting to come about on her port tack, missed stays, "and suddenly and unex-

¹ [Not previously reported.]

² [Reversing Case No. 18,243.]

pectedly her bow fell off to leeward and filled away toward the New York shore, causing her to head down the river and directly in the course of the Delaware." It is then alleged that on this course the sloop would have run into the Delaware, and endangered the lives of the passengers on board. For this reason, and to avoid such a collision, the Delaware, without any fault of her own, was compelled to change her course, and in so doing ran against the scow and her loading. This defense has not, I think, been made out by the testimony. When a steamer, bound to keep out of the way of another, attempts to excuse herself for a collision on the ground of an unexpected peril into which she was brought by the fault of some other vessel, she must free herself from all blame for getting into her place of danger. The burden of proof is on her, and, unless she shows that she was in no way responsible for the original fault, her excuse must fail. The witness chiefly relied on by the claimant is the pilot of the Delaware. He says: "I first observed the scow when I was about one-half way across the river. Scow was above Chambers street slip, headed down, between two hundred and three hundred feet out in the stream. * * * We would have passed under her stern. When I first discovered scow there were two sailing vessels beating down. They were some way above, on starboard tack, standing toward New York. According to ordinary course, they would have gone about one or two piers above my slip, and I would have gone across bows of both of them, and they would have gone about and passed on my port side. The other, I think a sloop, missed stays, and filled away again on starboard tack, heading toward New York. When she missed stays, if Delaware had held course, the sloop would have gone into the ladies' cabin of Delaware. When I discovered that scow had missed stays, stern of scow was about opposite lower side of ferry slip. When I saw sloop had missed stays, I hove my wheel to port, and tried to turn my boat away from sloop. * * * When I ported * * * scow was probably 150 or 200 feet away. * * * If sloop had not missed stays, she would have gone clear of Delaware." This is the entire testimony of this witness, so far as it bears upon the point now under consideration. The other pilot of the Delaware, who was standing on the north bridge of the Chambers street slip, waiting to relieve the pilot on board when he came in, saw the Delaware sheer off and collide, but did not notice either the schooner or the sloop. A clerk of the steamer Naragansett, sitting on the forward deck of his steamer, as she lay, with her bow out alongside of the pier next above the ferry slip, saw the occurrence, and says: "I observed sailing vessel to north of Delaware. When I first saw sailing vessel, she was heading towards Jersey City." Then, again, on cross-

examination: "When I first saw sloop, she was heading towards New York, so was the Delaware. Then I heard signal, and after that, and after collision, I saw sloop heading towards Jersey City, may be, and down stream, and a little shaky." This closed the testimony for the claimant. The libelants then called the pilot of the steam tug Whipple, in the employ of the claimant. He was on his tug lying at the pier next above the ferry slip, and within twenty feet of the end of the pier. He saw the Delaware when she was some where about the middle of the river heading about for the pier next above her slip, and on her regular course with the wind and tide as they were. He says: "Saw a sloop and schooner; small sloop. I noticed schooner going about when I first saw ferryboat,—going in stays. She stood off to windward. She bore at that time about north by west from Delaware. I should think schooner went within one hundred feet of Delaware. She went under stern of ferryboat. I saw sloop at the same time. She was between me and schooner. I did not see her go about. I think her jib was shaking when schooner went about. At that time sloop was within sixty or seventy yards of the Delaware, on port hand of Delaware, bearing northeast from Delaware. Sloop and Delaware were at that time a little nearer the New York shore than half way of the river. After that I noticed nothing till noise of collision. As I looked they were 150 to 200 yards out in the river. The Delaware was heading about southeast by south. * * * The sloop was half way from them to New York, and four hundred feet from sloop to Delaware." The libelant himself testified that he saw the sloop somewhat above the Delaware on the New York shore, heading for upper side of the ferry slip, or perhaps above. The schooner was then off in the river heading towards the ferry shore, astern of the Delaware, and the sloop was three hundred yards from the Delaware. Such is the testimony and all of it relating to the sloop. I am satisfied, from the evidence, that the collision must have occurred not much less than six hundred feet out in the river from the ends of the piers. The Delaware had not then got straightened down the river after changing her course, and, as she hit the scow on the starboard side with her port guard, it is evident that when she changed her course she was even further out. She was going ahead all the time, and was not finally stopped until the collision. Taking everything into consideration, I am entirely satisfied that the collision was caused, not by the sloop's "missing stays," but by her not attempting to go in stays and put herself on her port tack as soon as the pilot of the Delaware expected she would. Seeing the schooner go about and pass under his stern, he seems to have taken it for granted that the sloop would do the same thing, and kept on until it was too late to correct his

mistake without running on to the scow. The pilot stands alone in saying that the sloop "missed stays," and even his testimony leaves a decided impression that what he calls "missing stays" was, after all, nothing more than "not going in stays." At any rate, he carefully avoids all details of her movements, which, as his case depended entirely upon his establishing this one important fact, is, to say the least, suspicious. I find nothing to show that the sloop ought to have gone about sooner than she did. It is true the pilot says that according to course they (the schooner and the sloop) would have gone about one or two piers above his slip, but there is nothing to show that the sloop had reached that point when he found it necessary to change his course, or that she had got so near the New York shore as to make it proper for her to go about. She had the

right, as against the Delaware, to keep her course until prudence required her to take the other tack. If the Delaware misjudged as to her movements, that furnishes no justification for the collision which followed or the consequence. I cannot but think that is the position which the Delaware occupies.

The libelants are entitled to a decree fixing the liability of the Delaware, and directing a reference to ascertain the amount of damages. An entry may be prepared to this effect.

BROADRUP (BLAGDEN v.). See Case No. 18,238.

BROOKE (DARRELL v.). See Case No. 18,287.

BUNTING (BLOOMER v.). See Case No. 18,242.

C.

Case No. 18,245.

CALDWELL v. WINDER.

[2 Hayw. & H. 24.]¹

Circuit Court, District of Columbia. Dec. 17, 1850.²

MECHANICS' LIENS — EXTRA WORK — APPLICATION OF PAYMENTS.

1. Under the lien law no extra work not completed within three months preceding the filing of the claim in the clerk's office is covered by the lien.

2. Under the rule that payments made by a debtor should be applied to the debt least secured, general payments by a debtor not directed by him to be applied to the contract specifically may be applied to the extra work, whether completed within the three months or not, provided such extra work was completed and the money due for it.

[At law. Scire facias under lien law.]

This action, under the act of March 2, 1833, was commenced by serving on the defendant the following writ: "District of Columbia, the United States of America, to wit—To the Marshal of the D. C., Greeting: Whereas, a certain Andrew D. Caldwell did, on the 9th day of March, A. D. 1849, file in the clerk's office of the circuit court of the D. C., for the county of Washington, his certain account or claim against a certain William H. Winder, amounting to the sum of \$14,586.39, for lumber and other material furnished at his request, and used by him in and about the construction and erection of a certain building or house erected by him on lots 1, 2, 3, the east half of lot 4, and the north half of lot 22, in

square 169, according to the original plan, and being lots 1, 2, 3, 4, 17, 18 and 19, according to Davidson's sub-division of said square in the city of Washington, in the District aforesaid; in pursuance of the act of congress of the United States, entitled 'An act to secure to mechanics and others payment for labor done and material furnished in the erection of buildings in the D. C.' [4 Stat. 659], which said account has been enrolled among the records of said court, by the record thereof in the office of the clerk of the said court, remaining manifestly appears, and the said Andrew D. Caldwell alleges that the said sum of \$14,586.39 is still due and unpaid, and that judgment remains to be rendered upon the account and record aforesaid. Therefore you are hereby commanded that you make known unto the said William H. Winder, according to the act of congress aforesaid, that he be and appear before the circuit court of the D. C., to be held for the county aforesaid at the city of Washington, on the fourth day of March, inst., to show cause, if any he hath, why the said court ought not to render judgment for the sum of \$14,586.39 aforesaid, according to the force and effect of the said act of congress; and further to do what the said court shall then and there consider concerning him in this behalf, and have you then and there this writ, and make return of the manner in which you shall have executed the same. Hereof fail not, as you will answer the contrary at your peril. Witness the Hon. Wm. Cranch, chief judge of our said court, at the city of Washington, the 20th day of March, A. D. 1849. Issued this 20th day of March, 1849. John A. Smith, Clerk."

The following was filed by the counsel of the

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

² [Reversed in 14 How. (55 U. S.) 434.]

defendant: "Take notice that the above named defendant, not admitting the existence of any claim against him of the above named plaintiff, or a due performance of any part of the contract filed by the said plaintiff in the clerk's office, will give in evidence and insist that the said plaintiff did not perform and furnish certain work and material called for by the said contract, whereby the benefits stipulated for by the said defendant was not received; that among other things, the said plaintiff did not perform the work or furnish the material for the items mentioned in the annexed account, and that the said defendant will set off and allow so much of the amount of the said account against any demand of the said plaintiff to be proved at the said trial, as will be sufficient to satisfy and discount said demand, according to the statute in such case made and provided. And further take notice, that the said defendant will give in evidence and insist that there were defects in the said work and materials and delay in the execution and furnishing of the same, as called for by the said contract; that said delay was for a period of not less than one month, and that the sum of twenty-five dollars per day therefore ought to be deducted from any demand of the plaintiff, to be proved at the said trial. Dated 20th day of November, 1850." Notice of plea set off.

Whereupon the said defendant, by his counsel, filed in court here a paper purporting to be a notice of set off, which is in the words and manner following, to wit: "Take notice that the above named defendant, on the trial of this cause, will give in evidence, and insist that the above named plaintiff, before and at the time of the commencement of this suit was, and still is, indebted to the said defendant in the sum of \$9,000, for money by the defendant before that time paid, laid out and expended for the plaintiff by the defendant, on account of and on behalf of the said plaintiff, under his contract as aforesaid and at his special instance and request; and further, that certain portions of the work required by said contract and specifications and plans, to the amount of \$—— had been, by the direction of said plaintiff, and of his benefit, dispensed with in the progress of the building; wherefore he, said defendant, claimed the right to rebate the same from the contract price for the said building, and that the said defendant will set off against the said plaintiff, on said trial, so much of the said \$9,000, and of the value of the work so rebated against, any demand of the said plaintiff, to be proved on the said trial, as well as be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided. March 20, 1850."

Bradley & Smith, for plaintiff.

Walter D. Davidge, for defendant.

THE COURT'S instructions:

When a debtor owes on two accounts and makes a payment, he has a right to direct to

which debt it shall be applied, and when so directed the application must be so made; when no such direction is made the creditor may apply it to which debt he thinks proper; if neither does so, before suit brought, the court and jury may apply it, and the rule then is to apply it to the debt which is the least secure. If however one only of the two debts is due, the application must be made to such debt. The court instructed the jury that no extra work not completed within three months preceding the filing of the claim in the clerk office was covered by the lien then. Can the jury apply any payment made by the defendant in the case to the payment of the claim for extra work not completed within three months as specified above? We think the jury can apply any of the general payments made by the defendant, not directed by him to be applied to the contract specifically, to the credit of any of the extra work, whether completed within the three months referred to or not, provided the jury shall be satisfied by the evidence that such extra work was executed, and the money due for it at the time such payments were made.

The following instructions were excepted to by the plaintiff: On the trial of this cause, the plaintiff, to maintain the issue on his part, joined, offered and read in evidence, without objection, the contract and specifications signed by the parties respectively, and gave evidence tending to show that said contract and specifications referred to certain plans of the building therein referred to, which had been prepared by Mr. Walters for the defendant, and upon which defendant had invited bids for the said buildings; and afterwards certain other plans, in addition to and in some respects modifying the said plans of said Walters, had been prepared by the direction of the defendant, under which modified plans, with certain alterations required by the defendant, the plaintiff did the work specified in said contract, and defendant took possession of said building before the said contract was fully completed, and rented out a portion of it, and hath continued to hold it to this time. He further gave in evidence to show that he did at the time request, and for the use and benefit of the defendant, furnish the material and do the work on said building, particularly set out in the account for extra work filed in said cause, and the value thereof; that the principal part of said contract work and of said extra work was done about and before the 1st of October, 1848, but the completion thereof was delayed to accommodate the defendant, and the contract work and part of the other said extra work was finished in February, 1849; and the claim for his lien on said building was filed by the said plaintiff in March, 1849, and rested. And thereupon the defendant prayed the court to instruct the jury as follows: If the jury shall believe, from the evidence aforesaid, that the work and material mentioned in the open account filed by the plaintiff in the clerk's of-

rice, and offered in evidence by him as extra work and material, were not done and furnished in part, or any part thereof was not done and furnished within three months before the filing of the claim in the clerk's office, then the plaintiff is not entitled to recover in this action for such work and materials claimed as extra work, or such part thereof.

The defendant then offered to give in evidence tending to show that certain portions of the work required by said contract and specifications and plans had been for his benefit and by his direction dispensed with in the progress of the said building, and claimed the right to rebate the same from the contract price for the said building, for the purpose of showing what work was actually done and what materials were actually furnished, so as to ascertain the extent of the plaintiff's lien on the building, and the plaintiff by his counsel objected thereto, and the court admitted the same. And thereupon the defendant offered to give in evidence, by Mr. Gilpin, who was the architect of the building, that after the said contract and specifications had been signed by the said parties, the said plaintiff admitted that he was, by that contract, bound to do the carpenter's work for flat ceilings in all the rooms of said building. The witness stated that the plaintiff, at the invitation of said defendant, made a bid in writing for the carpenter's work of said building, including all the material parts thereof, and afterwards defendant stated to witness that Mr. Downer had also bid in writing for said work, but he was higher than Mr. Caldwell and had given the contract to Mr. Caldwell. That there was a good deal of conversation and negotiation between them before the contract was signed, but he could not recollect any distinct or specific alteration from said bid. He did not know that the written bid of said Caldwell had been accepted by the defendant or became a part of the contract. There was, after the bids were made, much negotiation between the parties. It was also admitted that neither the contract nor the specifications refer to the plans, nor do the plans exhibit any such flat ceiling. And the plaintiff objected to the admissibility of said evidence, but the court overruled the objection and admitted the evidence.

The following instructions were accepted to by the defendant: And thereupon the defendant, to support the issue joined on his part, gave in evidence to prove that the said contract and specifications referred to a set of plans prepared by Mr. Gilpin, at the instance of the defendant. The defendant further gave evidence to prove that said plans were prepared by said Gilpin, at a time when the plaintiff was constantly with him; that they were fully explained to and understood by the plaintiff, and recognized by him as a part of said contract. The defendant further gave evidence to prove that portions of the work and material mentioned in the account or claim filed in the clerk's office as extra were not such, but were called for and required by

the said contract and specifications and plans, and that the prices for said work and materials claimed as extra were unreasonable and extravagantly high. The defendant further gave evidence to show that during the progress of the building certain portions of the work and materials called for by the said contract and specifications and plans were dispensed with at his instance, and with the assent and acquiescence of the plaintiff, and that certain other portions of said work and materials were not done and furnished, or procured to be done and furnished by the plaintiff according to the said contract, specifications and plans, and that to the omission thereof the plaintiff never at any time objected. The defendant further gave evidence to prove that sundry large sums of money, exceeding in amount \$9,000, had been paid to the plaintiff for the work and material done and furnished under the said contract, specifications and plans, and then offered to show by competent witnesses that there was delay on the part of the plaintiff in the performance of his said contract; that said delay was not caused by or in any manner attributable to the defendant, and that in consequence of the plaintiff not being ready to put up his work according to said contract, delay was occasioned by him in the construction of said building of not less than three weeks, to the admission of which evidence so offered the plaintiff by his counsel objected, which objection the court sustained, and refused to allow the said offered evidence to be given to the jury.

At the further trial of this cause, and in addition to the evidence contained in the foregoing, which is made part hereof, the defendant gave evidence to prove that the plaintiff before, at and since the date of the said contract was, and has been a resident of the city of Philadelphia, and by occupation a contractor or undertaker for the construction of houses, and that the plaintiff performed no manual work upon or for the building against which the claim was filed, or in the erecting or constructing of the same, but that said work and labor were done and performed by mechanics and laborers employed by him and acting under the superintendence and directions of the plaintiff and his agent. The defendant further gave evidence to prove that a large portion of the materials found and provided for said building was not furnished for the same by the plaintiff, but by persons employed by him to find and provide the same for the said building. The defendant further gave evidence to prove that, with the exception of the work and material dispensed with and omitted as aforesaid, and of a portion of the work and materials claimed as extra, and admitted as such by the defendant, the work and materials done, found and provided for the said building were so furnished under and in pursuance of the contract, specifications and plans. The defendant further gave evidence to show that the work done and materials

found and provided for the said building, under said contract, specifications and plans were with the exception of the flooring of the balcony attached to said building done, found and provided before the 1st of October, 1848, and were then three months before the claim of the plaintiff's was filed in the clerk's office, and that the work and materials mentioned in said claim as extra or as additional were also, with the exception of the last item thereof, done, found and provided before the said 1st of October. And thereafter offered to prove, by competent testimony, that the work and materials done, found and provided upon and for the said building were defective in quality and character and far inferior in value to what said contract and specifications called for, to the admissibility of which offered evidence, or any part thereof, the plaintiff, by his counsel, objected, which objection the court sustained, and refused to allow the same, or any part thereof, to be given to the jury. At the further trial of this cause the defendant, in addition to the evidence contained in the foregoing, which is made part hereof, gave evidence to prove that the work and material before, and for the balance aforesaid, might have been completed but for the neglect and delay of the plaintiff, and finished as required by the said contract, specifications and plans in the month of November, 1849, and that all the work and material found and provided under the said contract, specifications and plans might have been fully performed and furnished, and the said agreement fully executed by the plaintiff, anterior to the 1st of December, 1849, but for the delay and neglect of the plaintiff. And therefore the defendant, by his counsel, prayed the court to instruct the jury, that if they shall believe from the evidence aforesaid that there was made and entered into between the plaintiff and defendant on the 8th of July, 1847, a special agreement, and that under and in pursuance of said agreement certain work and materials were done, found and provided by the plaintiff for the said building, then for such work and materials the plaintiff is not entitled to recover in this action. Which instructions the court refused to give, and to such refusal this defendant by his counsel excepts. And thereupon the defendant, by his counsel, prayed the court to instruct the jury that if they shall believe from the evidence aforesaid that the price agreed to be paid by the special agreement, offered in evidence by the plaintiff, was partly in consideration of the skill or superintendence of the plaintiff, then the plaintiff is not entitled to recover in this action the said contract price, or any part thereof, which instruction the court refused to give, and to such refusal the defendant, by his counsel, excepts. And thereupon the defendant, by his counsel, prayed the court to instruct the jury, that if they shall believe, from the evidence aforesaid, that the work and materials furnished under the special agreement aforesaid, and in addition thereto, and mentioned in the ac-

count filed by the plaintiff in the clerk's office or any part of said work and materials were, or was found, done or provided by third parties upon the personal credit of the plaintiff, and not upon the credit of the building against which the said account was filed, then the plaintiff is not entitled to recover in this action for such work and materials, or such part thereof, although the jury should further believe that the said work and materials, or such part thereof, were performed and furnished upon, and for the said building. Which instruction the court refused to give, and to such refusal the defendant, by his counsel, excepts. And thereupon the defendant, by his counsel, prays the court to instruct the jury, that if they shall believe, from the evidence aforesaid, that the claim of the plaintiff was filed in the office of the clerk of this court on the 9th of March, 1849, and that a portion of the work and material done, found and provided under the said special agreement, or as additional thereto, was not performed and furnished within the space of three months before the filing of the said claim, then for such portion the plaintiff is not entitled to recover in this action. Which instructions the court refused to give, and to such refusal the defendant, by his counsel, excepts. And thereupon the defendant, by his counsel, prayed the court to instruct the jury, that if they shall believe, from the evidence aforesaid, that a portion of the materials found and provided for said building were not found and provided for the same by the plaintiff, but by persons employed by him to find and provide the same for the said building, then for such portion the plaintiff is not entitled to recover in this action. Which instruction the court refused to give, and to such refusal the defendant, by his counsel, excepts. And thereupon the defendant, by his counsel, prayed the court to instruct the jury, that if they believe from the evidence aforesaid, that the plaintiff did, and performed himself no work or labor upon or for the said building, or in the erecting or constructing of the same, but that said work or labor was done and performed by mechanics and laborers employed and hired by him for the purpose, then the plaintiff is not entitled to recover for such work and labor in this action. Which instruction the court refused to give, and to such refusal the defendant, by his counsel, excepts. And thereupon the defendant, by his counsel, prayed the court to instruct the jury that if, upon the evidence aforesaid, they shall believe the same, the plaintiff is not entitled to recover for the work and materials, or any part thereof done, found and provided under the said special agreement. Which instruction the court refused to give, and to such refusal the defendant, by his counsel, excepts. That if the jury believe, from the evidence aforesaid, that the plaintiff has not fully executed and performed the said agreement entered into between him and the defendant, and so far as the same was not dispensed with by mutual

consent, or by the direction of the defendant, then the plaintiff is not entitled to recover in this action the said contract price, or any part thereof. Which instruction the court refused to give, and to which refusal the defendant, by his counsel, excepts.

And after the plaintiff and defendant respectively had given the evidence set out in the foregoing bills of exceptions, and thereupon made part hereof, and by leave of the court, and by way of rebutting evidence, the plaintiff gave evidence tending to show what the said plans of said Walter, copies whereof are hereto annexed, and the specifications hereinbefore set out were the only plans and specifications in existence, and were the only ones shown to plaintiff at the time he entered into his said contract; but it was understood by plaintiff that Mr. Gilpin was to make the plans for the execution of the work, and the said plans of said Gilpin were intended to carry out that understanding. He further gave evidence to show that he is a practical carpenter and house builder, and did actually, with his own hands, labor upon the said building in the progress thereof; that all the materials furnished and provided by him, and all the labor done in and about the said carpenter's work on said building were done and provided by him or on his credit, and under his direction and superintendence. Verdict for the plaintiff for \$4,740, with interest, from March 9, 1849. Motions for a new trial and arrest of judgment. Motion for a new trial. Reasons: (1) Because of error or mistake of the jury in finding the said verdict without evidence. (2) Because of error or mistake of the jury in finding the said verdict against evidence.

Both motions overruled, and judgment rendered on the verdict.

[Reversed in 14 How. (55 U. S.) 434.]

Case No. 18,246.

CHARGE TO GRAND JURY.

[5 Blatchf. 558.]¹

Circuit Court, D. Connecticut. Nov. 12, 1867.

VIOLATION OF NATIONAL BANKING LAWS—FRAUD AND EMBEZZLEMENT BY BANK OFFICERS AND DIRECTORS—NECESSITY FOR PUNISHMENT—DUTY OF GRAND JURY.

SHIPMAN, District Judge (charging grand jury). You are assembled, in pursuance of law, to enquire into the truth of any charges that may be submitted to you against individuals, for crimes committed in this district, or on the high seas, in violation of acts of congress. You are aware that the courts of the United States have no common law jurisdiction. They can punish no offences except such as are prohibited by some specific acts of the national legislature. These are comparatively few in number. The great body of offences against society pertain exclusively to the jurisdiction of the state courts, and can be punished by them alone. You are also aware, that no man can be put on trial before a federal

court, until he has first been indicted by a grand jury. The law is different in the tribunals of our own state. There, in all cases when the punishment is neither death nor imprisonment for life, the state attorney can file his information and bring the offenders directly to trial. But, in this court, before any trial can be had, a grand jury of the district must present the accusation, and upon that accusation all the subsequent proceedings are founded.

It will be your duty, at the present term of this court, to investigate charges against several alleged offenders. The district attorney will see that you are supplied with such evidence as can be obtained, and he will prepare and furnish you with bills covering the offences that you may find proved by the requisite evidence. In order to find a true bill against any person, the proof should be such as, in your judgment, would warrant a petit jury in pronouncing the accused guilty. You proceed upon the evidence furnished you by the government, leaving the alleged offender to meet the charge, before the petit jury, by such proof as he may command. Sixteen of your number should always be present whenever you are engaged in the work before you, and twelve at least must concur in order to find a true bill.

It is not my purpose, at the present time, to dwell upon many of the particular crimes with which you may have to deal, but there is one class to which I invite your particular attention. By the fifty-fifth section of the act approved June 3, 1864 (13 Stat. 116), entitled, "An act to provide a national currency secured by pledge of United States bonds, and to provide for the circulation and redemption thereof" it is provided, "that every president, director, cashier, teller, clerk or agent of any association, who shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association, or shall, without authority from the directors, issue or put in circulation any of the notes of the association, or shall, without such authority, issue or put forth any certificate of deposit, draw any order or bill of exchange, make any acceptance, assign any note, bond, draft, bill of exchange, mortgage, judgment or decree, or shall make any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment not less than five nor more than ten years." It is hardly necessary to remark, that the word "association," in the section, refers to what are commonly termed "national banks." Now, I am informed, gentlemen, that in two instances, at least, officers of such banks, located in this district, and organized under the provisions of this statute, have committed one or more of the offences prohibited by the section which I have read. It will be your duty, therefore, to inquire into the facts, and, if you ascertain that such crimes have been committed, and who are the guilty parties, to present indictments against them. To this end the district attorney will see that you are supplied with such evidence as can be obtained. He will cause the necessary witnesses to be summoned, and the books that may throw light on your inquiries to be produced before you. You will have the statute before you, and will carefully discriminate between embezzlement and false entries, and mere loose transactions done under the express or implied authority of the directors. Let your investigation be thorough and complete, and if, after full inquiry and deliberation, you find, upon adequate proof, that any person has, within this district, committed any offence of the character specified in

¹ [Reprinted by permission.]

this statute, you will find a bill against him. The faithful execution of this law is of the utmost importance. The business of banking has, in a great measure, been withdrawn from the oversight and supervision of the local state authorities, and these duties have been committed to officers far removed from the communities which are most interested in the safe and prudent management of these institutions. It is, therefore, of great moment that the provisions of the law enacted for the protection of the stockholders and the public should be strictly enforced.

It is not my habit to indulge in lengthy addresses to grand juries, but I feel constrained to say, that offenses of this character are alarmingly frequent in this country, and the omission to bring the offenders to justice is followed by the worst consequences. Vast interests are committed to the hands of officers of banks. They occupy places of trust and confidence, conferred upon them for their intelligence and supposed integrity. They are men of good social standing, are raised, by their salaries, above want, and are removed from many of the temptations which assail those in the obscurer and humbler walks of life. To fail to punish them when they deliberately violate their trusts and plunder those who have relied on their integrity, while, at the same time, the more ignorant and degraded offenders against law are visited with its penalties, shocks the moral sense, and is a bitter mockery of justice. It renders property insecure, encourages fraud, and removes those wholesome checks which should guard and warn others from treading in the path of crime. The position of the active officers of a bank, who are daily employed in conducting its affairs, is one of peculiar responsibility. They are not only entrusted with the property of the opulent, who are able to bear losses, and who have usually a potent voice in selecting these officers, but they control the interests of the small stockholders, of widows and orphans, whose sole means of support are often the small savings of a life of industry and self-denial, carefully invested by those who have passed away, as a security against want, for friends who have shared their affections and been dependent on their care. No more delicate or sacred earthly trusts than these can be committed to men. And yet they are often shamefully violated, and the public and the victims are told that the high position of the culprits, their attractive and many qualities, their past unblemished reputation, or their eminent piety, or all combined, are such, that those who have the earliest and freest access to the evidence of guilt do not desire their punishment, and cannot find it in their hearts to aid in bringing them to justice. If the moral sense of those most immediately interested in the management of these institutions is reduced to this sickly condition, it is quite time that a law was enacted declaring every officer, director, or stockholder of a bank who has knowledge that a fraud has been committed upon it, and fails to make immediate complaint to the officers of the law, an accessory after the fact, punishable by fine and imprisonment. If the miserable vendor of counterfeit currency passes a spurious note at a bank, and is detected, he is at once handed over to the officers of the law. If the bolder robber seizes a package of bills from its counter or messenger, he is immediately arrested, if possible, and brought to justice. Shall it be said that an officer of a bank, who commits, with coolness and deliberation, a long series of crimes, the smallest of which is more flagrant than counterfeiting or ordinary theft, may, when he can no longer pursue his guilty vocation with secrecy and success, assemble his partial friends, make his confession and apology, and then leisurely depart with none to hinder or molest him? Are laws made only for the comparatively weak, ignorant, and help-

less? Is the whole force of society, operating through the expensive machinery of criminal justice, to be expended upon its obscure and worthless members, while the more conspicuous ones are screened from punishment and treated as mere victims of misfortune, entitled to sympathizing regrets and to every facility for concealment and flight? The practical answer which the community shall give to these questions, concerns every citizen. Courts and marshals and sheriffs are not omnipresent, and their efficiency in detecting and punishing crime must always, and in a great degree, depend upon the temper and conduct of the community whose laws they are appointed to execute. If those who are more immediately affected by unlawful acts, and who necessarily are the first to discover them, are to remain silent and connive at the escape of the perpetrators, it will soon be difficult to punish any except the friendless. If high social position, or reputation for moral worth in the offender, is to shield him from prosecution, and release the members of the community from all obligation to uphold the enforcement of the law, courts of justice will soon be powerless to punish for any crime where a breach of trust is involved. For, only the respectable and the intelligent are honored with great pecuniary trusts. It is to such men that the vast and varied interests of corporations are committed, and to exempt them from all penalties for embezzlement, is to license the crime, without even the poor return of a revenue derived from those who practise it. It is to proclaim to the thousands of young men who are now employed in these institutions, that they can appropriate the money of others without fear of any worse consequences than the loss of their places, and perhaps a short voluntary exile from the state or country. So demoralizing has the sentiment of the community on this subject become, that offenders of the more respectable class begin to demand, as a right, exemption from punishment. Not long since, a man of education and prominence, notoriously guilty of repeated and extensive forgeries, while temporarily confined, or, rather, lodged in the jail in this county, had the effrontery to denounce every one of his victims who hesitated to unite with him in suppressing the evidence of his guilt. He finally overcame all their scruples, and is now engaged in enlightening other communities on their moral duties, and enjoying the patronage and favor of society. But mark the contrast. About the same time, in the same city, an obscure, uneducated day laborer forged a single small check, presented it at the bank, was detected, and was speedily consigned to the state prison at Wethersfield for a term of years. Nothing but a sense of duty has constrained me to state these humiliating facts, and, were they the only ones of the kind which have occurred in this community, I might still have remained silent.

The punishment of men for crime is always a painful duty, but, to every right-minded person, one of the saddest features of this duty comes, when the heavy hand of the law must be laid on the outcasts of society who have grown up in vice and ignorance, whereby they have been deprived of many of those restraining motives, the power of which, persons of intelligence and social repute are supposed to feel. If we look at the palliating suggestions which are so often offered to excuse men of former good name who violate the law, we see upon what delusive notions they rest. When such men are guilty of embezzlement and forgery, it is often said that they did not intend to injure any one. They appropriated the money, or simulated the signature, of another, with no design to ultimately defraud, but with the full purpose of restoring the funds, or meeting the note when due. Their failure to do so is attributed to the result of unfortunate speculations, and the turpitude of their offenses is softened down by the excuse that they were not animated by a pur-

pose to injure others. This mode of reasoning would palliate nearly every crime against property. The burglar and the thief are not often prompted by malice or a desire to injure others. Their ruling motive is to supply themselves. They are willing that others should lose if they can gain. Those who embezzle with the hope to restore, or forge with intent to protect the paper, are willing that others should bear the risk of loss, and, if the worst comes, actual loss, provided they can enrich themselves. The essence of the crime, in both classes, consists in a lawless disregard of the rights of others, but it is greatly aggravated where the offence involves a breach of trust as well as a breach of law. I am justified in dwelling on this subject, by the magnitude of the evil; for, more money is lost to the rightful owner, and more families are ruined, by embezzlement and forgery, than by all other forms of private robbery. These crimes plough the furrows of sorrow deep in the hearts of innocent relatives, and plant the seeds of misery which death alone can eradicate. When committed on a large scale, they are usually the work of men who occupy at the time places of responsibility and trust, and who are too often shielded from punishment by the leniency of the public or the connivance and partiality of friends. This evil is rapidly increasing in every direction where men are employed to handle the money of others, and we see the fruits of this indulgent public sentiment in the plunder of the revenue of the government, in the repeated sale of official connivance and favor, in crippled or broken corporations, in families reduced from affluence to poverty, in relatives plunged into grief and shame, and in the boldness and impunity with which pecuniary fraud is so often perpetrated. With the increase of wealth, and especially with the eagerness of our people to speedily become rich, and their growing fondness for extravagance and display, this evil will rot away every security against commercial dishonesty and infuse its poison through the whole frame of society, unless the community adopt a higher standard of judgment and action, in dealing with those who forfeit their integrity in places of trust. The man who takes the money of another by indictable fraud must be treated the same as the one who takes it by force. The man who robs a bank from behind the counter must stand upon the same level with the one who does it in front. At all events, the fact that, by a false pretence of honesty, he has obtained the confidence of others only to betray them, should not entitle him to occupy higher and safer ground than ordinary offenders. I am aware that there are deeper themes of inquiry which belong to this subject—the feverish and artificial state which has characterized the finances and the business of the country, engendering aversion to the slow processes of regular industry; and habits of speculation which border on gambling, and are as barren of substantial and permanent benefits as the practice of that vice; and the hot haste for riches, generating a moral atmosphere in which the solid virtues of moderation, sobriety and probity often yield and melt away. But the discussion of these is no part of my judicial duty.

You will retire to your room, gentlemen, and first dispose of the current business which the district-attorney may lay before you. You will then proceed to investigate the frauds upon the two banks to which I have referred, and submit the result to the court. You will take all the time necessary to perform this work thoroughly. The court will be kept open until your labors are completed. As I have already remarked, if you ascertain that any of the crimes enumerated in the act to which I have called your attention have been committed within this district, and find out who the guilty parties are, you will present bills against them. Whether or not they have fled beyond the limits of this

district, or out of the country, will make no difference in your action. If you should find that any offender has compromised with those he has defrauded, this fact will not deter you from indicting him. Compounding crimes is not yet a bar to their prosecution. If any person refuses to testify to facts within his knowledge, or to produce books or papers within his reach, you will notify the court. If any one shall corruptly, or by threats, attempt to influence or impede any witness in the discharge of his duty, and if it shall come to your knowledge, you will find a statute applicable to his case. Act March 2, 1831 (4 Stat. 488, § 2). The district-attorney will provide you with a copy of the acts, and the marshal will furnish you with a room, and such conveniences as you may require.

Case No. 18,247

CHARGE TO GRAND JURY.

[6 Blatchf. 555.]¹

Circuit Court, S. D. New York. May 10, 1869.

FRAUDS ON THE REVENUE.

1. Description of the manner in which frauds on the revenue are perpetrated, in obtaining from the government the payment of moneys on drawbacks, on the exportation of goods which have paid internal revenue taxes.
2. Frauds in the warehouse department, commented upon.
3. The subject of giving and taking gratuities for the performance of official duties, referred to.
4. The duties of a grand jury, enforced.

BENEDICT, District Judge (charging grand jury). It is proper for me, on this occasion, to explain to you the nature of the duty you are called upon to perform, to show you the importance, at the present time, of a careful and conscientious discharge of that duty, and to direct your attention to some provisions of law and some questions of fact which you will be required to consider. The character of the duty devolving on a grand jury in a court of the United States, many of you doubtless understand. It is that of declaring what persons shall be held to answer in court for violations of the laws of the United States. Your services are made necessary by reason of that provision of the federal constitution which declares, that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. This provision, while it affords citizens protection against arbitrary power, carries with it a great responsibility; for, under this provision, it rests with the people, as represented by a grand jury, drawn from the mass of citizens by lot, to say who shall and who shall not be accused of crime in the courts of the United States. You, therefore, represent the important community dwelling in the Southern district of New York, and, in behalf of that community, you are called on to say what laws of the United States have been disobeyed within the district; to inquire as to what frauds upon the revenue of the United States have been committed therein; to ascertain what violations of the laws of the United States which provide for the currency, which protect the post office, which guard the soldier and the sailor from imposition, which forbid smuggling, which punish bribery, perjury or conspiracy to defraud the government, have been committed; to say whether any and what officers of the United States, having sworn to execute and enforce the laws of the United States, have themselves assisted or connived at the evasion of them. The importance of this duty, which

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

is obvious from a statement of it, will be more fully appreciated, if you consider the circumstances under which it is now to be discharged.

The war, which decided the question whether a government framed like ours had the ability to quell by force of arms a great rebellion, raised another question, which is now in process of solution, namely, whether such a government can surely provide for the payment of the interest upon a great debt. The interest upon the public debt must be obtained by taxation, and this taxation, under the most favorable circumstances, must be heavy. It will become odious and intolerable, if it is to be borne by the honest and well-disposed classes alone, and avoided by those willing to grow rich at the expense of their fellow citizens, through fraudulent evasions of the law. This latter class, numerous and powerful, both socially and politically, has, from the beginning, confronted the government in its effort to collect the revenue. At first, the government attempted to compel their obedience by seizure of their property, and large quantities of merchandise detected in the act of escaping taxation were forfeited and sold. But the attempt was a failure, the frauds increased both in number and in magnitude, and the government was compelled to turn to its last resort—the criminal jurisdiction of its courts. It is now, therefore, here and elsewhere engaged in the effort to check these frauds by means of criminal prosecutions—the indictment, trial, conviction and imprisonment of defrauders of the revenue. Inasmuch, then, as no man can be tried until accused by a grand jury, the government and the community, of which the government is but the representative, now turns to the grand juries of the land, and asks the indictment of every man, whether high or low, rich or poor, who is found to be engaged in fraudulent evasions of legal taxes. Time would fail me to describe to you the various forms which these frauds assume, but it is my duty to put you in possession of what I have understood to be the facts in regard to some transactions which must come before you, and to allude in general terms to others which your own inquiries will expose.

I begin with what have been designated the drawback cases. These cases have been the subject of examination in the adjoining district, and are transferred to this district because most of the transactions took place here. They are frauds perpetrated under cover of the provisions of a law which enables a person who has paid taxes upon manufactures which he afterwards exports, to receive back the taxes he has paid, upon proving the actual exportation of the goods. To obtain this drawback, a set of papers is necessary in every case, consisting first of an internal revenue collector's certificate, that the tax on the goods has been paid; second, a certificate of the collector of customs, that such goods appear on a ship's manifest, on file in the custom-house, as actually exported; third, an affidavit by the shipper as to the identity of the goods upon the manifest and the goods upon the tax receipt; fourth, a certificate of an internal revenue collector, that a proper bond to secure the government against any relanding of the goods has been filed with him. These papers must be certified to at the custom-house and then go to the department at Washington, to be examined there. If found correct, a check for the amount of tax, drawn to the order of the shipper, upon the treasury, is returned. Numerous sets of such papers, representing sums of from \$300 to \$7,000 each, all false, no such goods having been exported, there being no such shipper and no such manifest on file, the bonds being fraudulent, the signatures forgeries, and the affidavits perjuries, have, within a space of six months' time, passed through the custom-house here and been certified, have then passed through the department at Wash-

ington and been there approved, and corresponding checks have been drawn and paid, every one, or nearly every one, upon a forged endorsement, until the total probably exceeds the sum of \$700,000. The fraud which I am thus enabled to describe, because it has already been the subject of examination in the adjoining district, is not disputed, and the money is gone. It will be your duty to say who shall be accused before this court as criminally responsible for the transaction. Some of the parties supposed to have been engaged in this affair are already under bail. One has been brought from Florida, for the arm of the government is long. Others have escaped beyond the seas. It will be your duty, however, to indict all who appear to have been connected in the design, whether present or absent. In your examination of this case, you will have occasion to see with what looseness the public business is sometimes conducted, for it will appear that great numbers of bonds required by law have been accepted as good, without any identification of signatures or of persons, and without any inquiry as to the sufficiency or even existence of the sureties, the greater part being, in fact, executed in fictitious names or by persons entirely worthless. It will also appear that the genuine seal of an internal revenue collector can constantly appear upon certificates now claimed to be forged, and that part of the files of the collector's office, being bonds required by law, can be removed and taken to a neighboring city, by persons having no connection whatever with the government, there be dealt with as unknown parties may desire, and then be returned without objection or remark. I have explained the features of this case to you fully, because you will be called on to act in regard to it, and not because it is to any very great extent exceptional.

If you extend your inquiries into other departments of the custom-house, you will find that similar frauds have been there committed. You will find that, in the warehouse department, it has been possible for certain parties to withdraw dutiable goods without payment of any duty, until the loss from a single warehouse has equaled \$400,000, according to the estimate of an official. The parties who committed this fraud walk the streets to-day, well known, but unprosecuted and unpunished, unless the repayment of a part of their great gains is to be called punishment. Nor is the case to which I am now alluding, and which you will find fully disclosed upon the files of this court, the only one of this class which has occurred, and with a similar result, if I am correctly informed. You may think proper to inquire into them all. Frauds like these are, of course, not to be accomplished without the connivance on the part of officials; and you will have occasion, no doubt, to consider what persons shall be accused before this court, for giving or accepting bribes.

There is also an abuse at the custom-house, proper to be spoken of in this connection, which, I notice by the public prints, is now attracting some attention, and of the evil effects of which the drawback cases will give you painful proof. I refer to the custom of giving and taking gratuities for the performance of official duties. Strengthen the hands of the collector, gentlemen, in any effort to stop this steady flow. The law lies at your hands, and it reads thus (Act March 3, 1863, § 4; 12 Stat. 739): "If any officer of the revenue * * * shall knowingly accept, from any person engaged in the importation of goods, wares or merchandise into the United States, or interested, as principal, clerk, or agent, in any such importation, or in the entry of any goods, wares or merchandise, any fee, gratuity or emolument whatsoever, such officer shall, on conviction thereof, be removed from office and shall be fined in any sum not exceeding five thousand dollars, or be imprisoned not exceeding

two years, at the discretion of the court." The 6th section of the same act is as follows: "If any person who shall be engaged in the importation of goods, wares or merchandise into the United States, or who shall be interested, as principal, clerk, or agent, in the entry of any goods, wares or merchandise, shall at any time make, or offer to make, to any officer of the revenue, any gratuity or present of any money or other thing of value, such person shall, on conviction thereof, be fined in any sum not exceeding five thousand dollars, or be imprisoned not exceeding two years, at the discretion of the court."

The market price of whiskey is still less than the first cost of manufacture, with the taxes added. From the tobacco trade honest dealers are fast being driven out. Much of the income tax goes uncollected. The fraudulent bond-maker still plies his busy trade. Men known to have grown rich by illegal means have escaped even the accusation of fraud, and flaunt their wealth before the public eye. Honest officials have been compelled to leave the service for want of due support in the performance of their duty, while other officers of the revenue who have remained and dared to endeavor to protect the government have found the very government they sought to serve turned against them and used with effect to accomplish their destruction and disgrace. In view of a demoralization such as these facts disclose, do you wonder that some men query whether the proper enforcement of revenue laws is possible for such a government as ours, with such a civil service as it has hitherto had? These remarks will have failed of their intended effect, if they have not served to deepen your sense of the responsibility which rests upon you, and to strengthen your determination to discharge yourselves of that responsibility in such a manner as to satisfy the proper demands of the community in which you live. To enable you to do this, great powers are given you. No matter within the jurisdiction of the court is exempt from your scrutiny. No man, of whatever degree, can refuse to obey your summons or decline to answer your proper interrogatories. No compromise of a department can have effect to stay your hand. Within your extended sphere you are supreme. Use, then, these great powers freely, examine diligently and inquire widely, but accuse with all due care, mindful always, that the mere examination of a transaction in open court, is often of great public benefit, but, also, mindful that such an examination is often, of itself, a great punishment. It is not your province to try the cases which you may consider. That duty devolves upon the petit jury and the court; but you are diligently to inquire and true presentment make of every offence arising under the laws of the United States which shall be made to appear by reasonable prima facie proof. This duty I charge you to perform, and if to its performance you shall bring that patience, that intelligence and that good courage which the occasion demands, you will render an important service to your fellow-citizens as well as to the government which protects you and under which it is your good fortune to live.

Case No. 18,248.

CHARGE TO GRAND JURY.

[Chase, 263.]¹

Circuit Court, D. West Virginia. Aug., 1868.

AUTHORITY AND DUTY OF GRAND JURIES—EXAMINATION OF PUBLIC OFFICERS.

[A grand jury of the United States should not be satisfied by acting upon such cases only as may be

brought before them by the district attorney. They have authority, and it is their duty, to summon before them officers of the government, and others who, they have reason to believe, possess information proper for their action. Officers connected with the collection of internal revenue—collectors and assessors, and their subordinates—may with special propriety be thus examined.]

CHASE, Circuit Justice (charging grand jury). You have been selected among your fellow-citizens for your intelligence, your impartiality, and your integrity, to inquire concerning offenses against the United States within the district of West Virginia. Your general duties are sufficiently defined by your oath, which binds you under the most solemn obligations to present no one from envy, hatred, or ill-will, and to leave no one unrepresented from fear, favor, and affection. The same oath binds you to diligent inquiry as well as true presentment.

You will not acquit yourselves of these obligations by slight or careless investigation. You must not be satisfied by acting upon such cases only as may be brought before you by the district attorney, or by members of your body to whom knowledge of particular offenses may have come. Your authority and your duty go much further. You may, and you should, summon before you officers of the government, and others whom you may have reason to believe possess information proper for your action, and examine them fully. Officers connected with the collection of internal revenue—collectors and assessors and their subordinates—may with special propriety be thus examined.

In respect to the mode and extent of your inquiries, your own good sense will be your best guide. The district attorney will always be ready to aid you with information on matters of law; and the court also will take pleasure in responding to any inquiries you may see fit to make.

There are three subjects, and, so far as we are at present advised, only three subjects, to which it is necessary to direct your particular attention.

The first of these is the faithful execution of the internal revenue laws. The war in which the nation has been recently engaged for the preservation of the national union and government endangered by rebellion, made the contracting of a large debt inevitable. This debt is the price of our national existence, and binds irrevocably the good faith of the people. Its inviolable obligation has been recognized by a solemn act of the nation in adopting the fourteenth amendment of the constitution of the United States, which declares that "the validity of the public debt of the United States, authorized by law, including debts incurred for the payment of bounties for services in suppressing insurrection or rebellion shall not be questioned." There are differences of opinion as to the mode of payment required by the contracts of the American people made through their government, but nobody questions openly, if anybody questions at all, that the debt contracted must be paid, and paid in perfect good faith. The law of the amendment that the validity of the national debt shall not be questioned, was already written upon the hearts of the people before they made it part of the constitution. To provide for the reduction and final payment of this debt and for the annual expenses of the government, taxes are necessarily imposed. In other words, the equal proportion to be contributed by each citizen is ascertained by law. He who withholds his just proportion deprives the rest of the people of exactly the amount withheld. His fraud operates as theft.

The sum total necessary to meet the obligations of the nation must be raised. Fraud upon the revenue does not reduce that sum, it merely shifts the burdens evaded by the fraudulent upon others who pay their full proportion

¹ [Reprinted by permission.]

besides. All honest men, therefore, have a common cause against the dishonest.

You, gentlemen, represent the honest men, and it is your duty to see that no defrauder of the revenue who can be brought to justice escapes merited punishment. The higher in office and the higher in social position the delinquent may be, the more unremitting and searching should be your diligence in inquiry and presentment.

Some of the observations just made might be properly enough repeated upon the next topic to which I must invite your attention. I refer to counterfeiting. It is to be regretted that the currency of the country now consists wholly, or almost wholly, of paper; but it is not the less important on that account that the people should be protected as far as possible against counterfeiting. Whatever the currency of the country may be, payments must be made in it, and exchanges effected through it. It is practically the common measure of values. Whoever imposes a counterfeit dollar on the public, robs successively all who take it in payment. Counterfeiting is continuous robbery, and it robs chiefly those who are least able to bear the loss. Occasionally men are defrauded by counterfeit money in large transactions, but the principal sufferers are laboring men, whom it is the peculiar duty of government to protect from wrong. You will be vigilant, gentlemen, in your investigations concerning this class of crimes.

What remains to be said concerns offenses against the post-office laws. Under our benignant system of government, the means of cheap and frequent intercourse between the most distant parts of the republic are provided; relatives and friends separated by the breadth of the continent correspond freely with each other. Correspondence is nearly as cheap as talk. And not only do the mails convey messages of affection, science, and business, but they are also the agents of immense pecuniary transactions, by remittances of bills of exchange and small government money orders. You see at once how important it is that the laws which regulate this vast interchange should be faithfully executed, and we are confident that nothing more is needed to insure your best endeavors to detect and bring to justice all those whose crimes and offenses deprive the people of the great benefits which those laws are intended to secure.

There seems to be no necessity at this time for further observations from the court. You will retire to your room, gentlemen, carrying with you, we doubt not, in your retirement, a profound sense of the serious obligations you have taken upon yourselves, to your country and to your God.

Case No. 18,249.

CHARGE TO GRAND JURY.

[1 Curt. 509; 2 Liv. Law Mag. 427.]

Circuit Court, D. Rhode Island. Nov. 15, 1853.

SEAMEN—FLOGGING—ACT ABOLISHING—SHIPPING
—VESSELS OF COMMERCE—CONSTITUTIONAL
LAW—WHALE FISHERIES.

[1. Whale fishing is a branch of the commerce of the United States, and is therefore under the exclusive control of congress by virtue of its constitutional right to regulate commerce.]

[2. Congress, by act of September 28, 1850 (9 Stat. 515), in a clause thereof enacted: "Provided that flogging in the navy, and on board vessels of commerce, be, and the same hereby is, abolished." Held, that "vessels of commerce" include vessels engaged in whale and other fisheries.]

[3. "Flogging," as practiced in the navy and merchant marine, has acquired a certain recognized meaning, viz., punishment by stripes inflicted by a cat o' nine tails or other instrument capable of inflicting the same kind of punishment. Therefore the abolition "of flogging" does not prohibit corporal punishment

of a different kind administered by officers of vessels to compel obedience to lawful commands or to preserve the discipline and good order of the ship.]

Extract from the charge of Mr. Justice CURTIS to the grand jury, concerning the law of corporal punishment in the merchant service.

CURTIS, Circuit Justice (charging grand jury). The regulation of the rights and duties of merchant seamen is an important subject of the criminal laws of the United States. The power to regulate commerce with foreign nations, and among the general states, conferred by the constitution on congress, includes the power to prescribe rules for the government of persons engaged in such commerce. And from a very early period in the history of the government, congress has passed criminal laws on this subject. One of those laws, which, more frequently perhaps than any other criminal law, comes under the notice of the courts of the United States, is an act passed on the third day of March, 1835 [4 Stat. 775], which is in the following words: "If any master or other officer of any American ship or vessel, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall, from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel or unusual punishment, every such person, so offending, shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding five years, or by both, according to the nature and aggravation of the offence." By a series of adjudications, and by frequent practice, this law has acquired a settled meaning. And I should not deem it necessary to give you any special instructions concerning it, if more recent legislation by congress had not given rise to grave doubts and difficulties concerning its present effect. To convey to your minds what these doubts and difficulties are, and to supply a solution of them, it is necessary for me to begin by explaining what is the effect of this act standing by itself.

You will observe, then, that three things are required to constitute an offence under this law: (1) That the master, or other officer of a vessel of the United States, should beat, wound, or imprison one of the crew, or withhold from him suitable food and nourishment, or inflict on him some cruel or unusual punishment. (2) That either of these should be done without justifiable cause. (3) That the motive of such act of the master or officer should be malice, hatred, or revenge.

At the time this law was enacted, the master of an American vessel was intrusted by the law with the power to inflict punishment on the crew, and to use force to compel obedience to his lawful commands; and to preserve the discipline and good order of the ship. This law, the terms of which I have repeated to you, was not intended to restrain the proper exercise of that authority, but merely to prevent its abuse. And, therefore, it requires the government to prove, not only that punishment was inflicted, but that it was without justifiable cause. That is, that there was no offence calling for punishment, or no occasion to use force, or that the force used, or the punishment inflicted, was immoderate and disproportioned to the offence. And it also required that the act should be the product, not of mistake or erroneous judgment, but of malice; that is, of an evil intention. In other words, that it should be an intentional departure from a known duty. Under this law, therefore, when it had been proved that the master had inflicted corporal punishment on one of the crew, inasmuch as in some circumstances he had the right so to punish, the government was obliged to show, not only that the circumstances of the

particular case were such that the right did not exist, but that they were such that the master must be taken to have known that it did not exist, and acted in disregard of what he knew to be his duty.

In September, 1850 (9 Stat. 515), there was inserted in an appropriate bill, passed by congress, this clause: "Provided that flogging in the navy, and on board vessels of commerce, be, and the same hereby is, abolished, from and after the passage of this act." It is to be regretted that what we are bound to presume were the necessities of the case, did not permit congress, in dealing with a subject of so much practical importance, to be more explicit in declaring its intention; and that, consequently, the powers and rights of masters and seamen, engaged in the merchant service, are involved in doubts which can be finally removed only by further legislation, or at the expense of much time and money, and no small suffering by many persons. To remove some of those doubts, so far as may be in my power, by an exposition of what I deem to be the legal effect of this clause, is my present purpose. In the first place, then, what is meant by the words "vessels of commerce." So far as I am aware, these words are here used for the first time to describe a class of vessels. The phrases found in other laws are, "any American ship or vessel," "any vessel belonging in whole or in part to any citizens or citizen of the United States," or other equivalent terms. And the argument which may be derived from this departure from the use of these usual words is, that if congress had intended to embrace every vessel belonging to a citizen or citizens of the United States, or every American vessel, the act would have said so; and that, instead of doing so, it restricts the operation of the law to one kind of vessels only, that is to say, vessels of commerce; and that vessels employed only in the fisheries, are not vessels of commerce; that they are recognized by the legislation of congress as engaged in a distinct business, viz. in the capture of whales and the taking of fish, and are under restrictions and requirements, and are entitled to privileges, which are not attached to other vessels, whose business it is to carry on the intercourse and traffic of the commercial world.

It must be admitted that this argument is entitled to no small weight; and I believe the opinion that vessels engaged in the fisheries are not within this law, is entertained by some, though I do not know that it has been yet announced in any judicial decision. The great and increasing number of persons employed on board vessels engaged in the whale fishery, the length of many of their voyages, the large proportion of green hands, unaccustomed to the necessary subordination of the service, its frequent emergencies, and great hazards, the terms of the contract, by which all participate in the disappointments as well as the successes of the voyage, and in some places, there is too much reason to believe, the unfair practices which have been used to obtain men,—all combine to render it extremely important that the lawful powers of the master to inflict punishment on the crew of such a vessel, should be clearly defined. I believe it is within the experience of all who are accustomed to administer the criminal laws of the United States, in the districts constituting this circuit, from whence mainly, this fishery is prosecuted, that there is no class of vessels, in respect to which it is so necessary that the relative rights and duties of officers and seamen should be settled and known; or in respect to which doubts upon important points would work so much mischief. I have therefore given to this question the consideration which it demands, and my opinion is, that by this law it was intended by congress to embrace vessels engaged in the whale and other fisheries, under the words "vessels of commerce;" and I will state briefly the reasons which have brought me to this

conclusion. In the first place, I do not perceive any sufficient reasons why masters of fishing vessels should continue to possess the power to inflict the punishment of flogging, when it is taken away from all others. If, as we are bound to presume, there was a mischief to be remedied, I cannot find any firm ground upon which it can be asserted, that fishing vessels were not within that mischief. There are differences, undoubtedly, between the ordinary merchant service and the persons engaged in it, and the fisheries and those who carry them on. But if those differences are such as to render this power more necessary in whaling than in merchant voyages, they clearly render its existence less necessary in the other fisheries, in which, from the character of those employed, and the nature and terms of their enterprises, an occasion to inflict such punishment is, happily, extremely rare. And if we consider the purpose of the law to have been, to abolish this mode of punishment, because of its effects upon those subjected to it, those engaged in the fisheries, so far as I can see, have an equal claim to be protected from these effects. And, therefore, if the words, "vessels of commerce," can be fairly interpreted so as to include vessels engaged in the whale and other fisheries, I feel it to be my duty so to interpret them.

From a very early period in the history of the government, congress has regulated the vessels and the persons employed in the fisheries. Their national importance was well understood when the constitution was adopted. Their rights and privileges had formed a prominent subject of the negotiations for peace with Great Britain, and hold an important place in the treaty of 1783 [8 Stat. 80]. And they have at all times been treated as a subject of legislation within the constitutional powers of congress. Yet there is no clause of the constitution, conferring that power on congress, except this: Congress shall have power "to regulate commerce with foreign nations, and among the several states." It is clear, then, that unless the fisheries were a branch of the commerce of the United States, congress would not have power to regulate them; a power which, so far as I know, has never been questioned, and certainly has been exercised so long, and in so many forms, that it must now be deemed to be beyond dispute. Nor does there seem to be any real difficulty in considering the fisheries as one branch of commerce. It has been said, by high authority, that the term commerce, though it includes traffic, is not limited to the buying and selling of commodities. It includes also intercourse; and therefore, a vessel which merely transports passengers from one country to another, is engaged in commerce, and is under the regulating power of congress. So it includes the mere transportation of commodities; and a vessel which carries commodities for hire, though the master or owners neither buy nor sell any thing, is engaged in commerce. Now, though whaleships are engaged in capturing whales, and in manufacturing their oil, they are also engaged in transporting that commodity across the ocean, for sale on its arrival here. They not only transport from without the United States, one of the commodities of commerce, but that commodity is brought into the United States, and is sold for the account of those employed in the voyage and owning the vessel. In the strictest sense, therefore, such vessels are engaged in commerce, and may be called, though it is in legislation a new phrase, vessels of commerce. In this sense, I consider congress used the words; intending to embrace in them all vessels within the commercial power of congress.

The next inquiry is, what is meant by the word "flogging?" It is applied to the navy and to vessels of commerce. The words are "flogging in the navy and in vessels of commerce." They plainly refer to, and are intended to identify

fy, some one known mode of punishment theretofore lawfully practised, and which was thereafter to be prohibited. And inasmuch as it is the duty of the court to construe the statute, and inform the jury what it means, when it speaks of the punishment of flogging, I must be able to find, somewhere in the law, written or unwritten, a definition of the punishment of flogging, theretofore lawful and by this law prohibited. Otherwise it would be wholly out of my power to give any interpretation to these words. Now, the punishment of flogging in the navy was a known and lawful mode of punishment, when this law was enacted. The instrument by which it was inflicted, and the number of blows which could be ordered without a court-martial, are described in the rules and articles for the government of the navy, enacted by congress. It may be added, that it was the only lawful mode of inflicting corporal chastisement recognized by those rules and articles. It was corporal punishment, by stripes, with what is called in the articles, a cat o' nine tails. This is the only mode of punishment prohibited in terms by the law of 1850. But it must be taken to have prohibited it, not in this precise form only, but in substance and effect. Its prohibition is directed not against a particular form of punishment merely, but against any punishment which in substance and effect is the same as that mentioned. The form of the instrument may be varied, while substantially the same effects are produced. And here, I think, the prohibition stops. I see no safe ground upon which it can be carried further. The law does not abolish all corporal punishment. It is plainly restricted to one particular mode of inflicting corporal punishment, described in this law, as the punishment of flogging in the navy and in vessels of commerce, and defined in the act of congress for the government of the navy. And consequently, whenever a case arises, in which corporal punishment has been inflicted, the first inquiry must be, was it the punishment of flogging within the meaning of this law? in other words, was it, in substance and effect, punishment by stripes inflicted with a cat o' nine tails, or other instrument capable of inflicting the same kind of punishment? If not, the case is to be determined irrespective of this law. I am fully aware of the distressing uncertainty in which this subject is thus left. But it is an uncertainty which can be removed only by legislation. Having put upon the law the only interpretation which its language seems to me to admit of, if it is found to have left open much debatable ground, in a matter where plain and clear rules are especially necessary, it belongs to the power which makes, and not to that which administers the law, to prescribe these rules. One practical effect of this uncertainty is worthy of your especial notice, as it bears on the performance of your duties. I have already informed you that, in proceeding against a master under the law of 1835, the government must not only prove a beating or wounding, but want of justifiable cause, and malice. Now, if a case should arise, and certainly such cases are likely to arise, in which the beating was, in your judgment, in substance and effect the punishment of flogging, then you must find there was not justifiable cause, however atrocious the conduct of the seaman may have been; while, at the same time, you may be of opinion, that the master honestly thought it was not the punishment of flogging, but some other corporal punishment within his lawful power to inflict, and so did not act in disregard of a known duty, and therefore did not commit the offence described in the statute.

Before I leave this subject, I think it proper to call your attention to an important distinction, between punishment and the use of force to compel obedience to a lawful order. The necessities of the service require of the crew

prompt obedience to the orders of the master, or other commanding officer. These necessities are such, that it is often inconsistent with the general safety to permit delay or hesitation. In all such cases, the master, or other officer in command has the right to compel obedience by the use of the necessary force. He also has the right, and it is his duty, to interpose to quell all affrays between the officers and men, and especially all forcible resistance to his lawful commands. And he may and should use that degree of force in doing so, which the occasion renders apparently necessary. I say apparently necessary, because all that can reasonably be required of the master so interposing is, that he should act with as much coolness and judgment as are ordinarily possessed by masters of vessels, and should honestly endeavor to do his duty. Such occasions do not permit the degree of force necessary to be used, to be very exactly measured, or the necessity itself to be estimated with the same precision which those judging after the event, with time for deliberation, and a more full knowledge of the facts, might find possible. This law, abolishing the punishment of flogging, does not affect either of these last mentioned powers of the master. They exist now, and are to be governed by the same rules as before that law was passed.

I have only to add, in conclusion, on this topic, that the act of 1850 is not a penal law. It may, as I have explained to you, have an important effect upon the questions of justifiable cause and malice, on the trial of indictments under the act of 1835, and also in civil suits for damages; but it describes no offence, and enacts no penalty; and therefore is not one of the criminal laws of the United States, and no indictment can be framed upon it.

Case No. 18,250.

CHARGE TO GRAND JURY.

[2 Curt. 637.]

Circuit Court, D. Massachusetts. June 7, 1854.

OBSTRUCTING PROCESS—FEDERAL AND STATE LAWS —PRINCIPAL AND ACCESSORY.

[1. The criminal laws of the United States are to be enforced by the federal judiciary, including grand juries summoned by the federal courts, without any regard to the criminal laws of the state in which the court is sitting, or the nature of the crime under the state laws.]

[2. The act of April 30, 1790 (1 Stat. 112), making it a misdemeanor to willfully obstruct, resist, or oppose an officer of the United States in serving or executing any process or warrant, embraces every legal process whatsoever, whether issued by a court in session or by a judge or magistrate, or commissioner acting in the due administration of any law of the United States.]

[3. To constitute the offense of obstructing the service of process under this statute, it is not necessary that the accused shall have used or even threatened active violence. Any obstruction to the free action of the officer or his lawful assistants, willfully placed in his or their way, is sufficient. If a multitude of persons should assemble, even in a public highway, with the design to stand together and thus prevent the officer from passing freely along the way in the execution of his precept, and he should thus be hindered or obstructed, this would, of itself, and without any active violence, be an obstruction, within the meaning of the law.]

[4. In cases of misdemeanor, not only those who are present, participating in the act, but those who, though absent when the offense was committed, did procure, counsel, command, or abet others to commit it, are indictable as principals.]

[5. Language addressed to persons who immediately afterwards commit an offense, if actually intended by the speaker to incite those addressed to commit it, and adapted thus to incite them, is such a counseling or advising to the crime as the law contemplates, and the person so inciting is liable to indictment as a principal.]

CURTIS, Circuit Justice (charging grand jury). The preceding part of the charge related to certain offences under the acts of congress against the slave-trade; the court being informed by the district-attorney that a complaint on that subject was to be laid before the grand-jury. The court was also informed by that officer that it was his intention to lay before the grand-jury, which had then been summoned for the May term, recent occurrences which had resulted in an attack made on the marshal of the United States, for this district, while holding in his custody an alleged fugitive from service, and the homicide of one of the assistants of the marshal. In reference to these occurrences, the following part of the charge was given. No indictment growing out of them was returned at the May term. When the grand-jury for the next term, (October, 1854,) had been summoned and impanelled, the district-attorney again informed the court that it was his intention to lay these occurrences before them. And, after giving them instructions on other subjects, the court informed the jury that its views concerning the law of the United States against the obstruction of legal process, having theretofore been fully expressed; and the district-attorney, who was their legal adviser, having, as the court understood, a copy of those remarks, it was not deemed needful to say any thing further on the subject; but that if the jury should desire any instruction concerning any point of law which might arise in the course of their duties, such instruction would be given, at any time, on their application. Indictments for misdemeanors in obstructing legal process, were returned by the grand-jury. The disposition thereof will appear, by reference to the case of *U. S. v. Stowell* [Case No. 16,409].

There is another criminal law of the United States to which I must call your attention, and give you in charge. It was enacted on the 30th of April, 1790 (1 Stat. 117), and in the following words: "If any person shall knowingly or wilfully obstruct, resist, or oppose any officer of the United States in serving, or attempting to serve or execute any mesne process, or warrant, or any rule or order of any of the courts of the United States, or any other legal or judicial writ or process whatever, or shall assault, beat, or wound any officer, or other person, duly authorized in serving or executing any writ, rule, order, process, or warrant aforesaid, every person so knowingly and wilfully offending in the premises shall, on conviction, be imprisoned not exceeding twelve months, and fined not exceeding three hundred dollars." You will observe, gentlemen, that this law makes no provision for a case where an officer, or other person duly authorized, is killed by those unlawfully resisting him. That is the case of murder, and is left to be tried and punished under the laws of the state within whose jurisdiction the offence is committed. Over that offence against the laws of the state of Massachusetts we have here no jurisdiction. It is to be presumed that the duly constituted authorities of the state will, in any such case, do their duty, and if the crime of murder has been committed, will prosecute and punish all who are guilty.

Our duty is limited to administering the laws of the United States; and by one of those laws, which I have read to you; to obstruct, resist, or oppose, or beat, or wound any officer of the United States, or other person duly authorized, in serving or executing any legal process whatsoever, is an offence against the laws of the United States, and is one of the subjects concerning which you are bound to inquire. It is not material that the same act is an offence both against the laws of the United States and of a particular state. Under our system of government, the United States and the several states are distinct sovereignties, each having its own system of criminal law, which it ad-

ministers in its own tribunals; and the criminal laws of a state can in no way affect those of the United States. The offence, therefore, of obstructing legal process of the United States is to be inquired of and treated by you as a misdemeanor, under the act of congress which I have quoted, without any regard to the criminal laws of the state, or the nature of the crime under those laws. This act of congress is carefully worded, and its meaning is plain. Nevertheless, there are some terms in it, and some rules of law connected with it, which should be explained for your guidance. And first, as to the process, the execution of which is not to be obstructed. The language of the act is very broad. It embraces every legal process whatsoever, whether issued by a court in session, or by a judge, or magistrate, or commissioner, acting in the due administration of any law of the United States. You will probably experience no difficulty in understanding and applying this part of the law. As to what constitutes an obstruction—it was, many years ago decided by Mr. Justice Washington, that, to support an indictment under this law, it was not necessary to prove that the accused used, or even threatened active violence. Any obstruction to the free action of the officer, or his lawful assistants, wilfully placed in his or their way, for the purpose of thus obstructing him, or them, is sufficient. And it is clear, that, if a multitude of persons should assemble, even in a public highway, with the design to stand together and thus prevent the officer from passing freely along the way, in the execution of his precept, and the officer should thus be hindered or obstructed, this would, of itself, and without any active violence, be such an obstruction as is contemplated by this law. If to this be added, use of any active violence, then the officer is not only obstructed, but he is resisted and opposed, and of course the offence is complete, for either of them is sufficient to constitute it.

If you should be satisfied that an offence against this law has been perpetrated, you will then inquire by whom? and this renders it necessary for me to instruct you concerning the kind and amount of participation which brings individuals within the compass of this law.

And first, all who are present and actually obstruct, resist, or oppose, are of course guilty. So are all who are present, leagued in the common design, and so situated as to be able, in case of need, to afford assistance to those actually engaged, though they do not actually obstruct, resist, or oppose. If they are present for the purpose of affording assistance in obstructing, resisting, or opposing the officers, and are so situated as to be able, in any event which may occur, actually to aid in the common design, though no overt act is done by them, they are still guilty under this law. The offence defined by this act is a misdemeanor; and it is a rule of law, that whatever participation in a case of felony, would render a person guilty, either as a principal in the second degree, or as an accessory before the fact, does, in a case of misdemeanor, render him guilty as a principal; in misdemeanors all are principals. And therefore, in pursuance of the same rule, not only those who are present, but those who, though absent when the offence was committed, did procure, counsel, command, or abet others to commit the offence, are indictable as principals. Such is the law, and it would seem that no just mind could doubt its propriety. If persons having influence over others, use that influence to induce the commission of crime, while they themselves remain at a safe distance, that must be deemed a very imperfect system of law which allows them to escape with impunity. Such is not our law. It treats such advice as criminal, and subjects the giver of it to punishment, according to the nature of the offence to which his pernicious counsel has led. If it be a case of felony, he is by the common

law an accessory before the fact, and by the laws of the United States and of this state is punishable to the same extent as the principal felon. If it be a case of misdemeanor, the adviser is himself a principal offender and is to be indicted and punished as if he himself had done the criminal act. It may be important for you to know, what in point of law, amounts to such an advising or counselling another as will be sufficient to constitute this legal element in the offence. It is laid down by high authority that though a mere tacit acquiescence, or words, which amount to a bare permission, will not be sufficient, yet such a procurement may be, either by direct means, as by hire, counsel, or command, or indirect, by evincing an express liking, approbation, or assent to another's criminal design. From the nature of the case the law can prescribe only general rules on this subject. My instruction to you is, that language addressed to persons who immediately afterwards commit an offence, actually intended by the speaker to incite those addressed to commit it, and adapted thus to incite them, is such a counselling or advising to the crime as the law contemplates, and the person so inciting others is liable to be indicted as a principal.

In the case of *Com. v. Bowen*, 13 Mass. 359, which was an indictment for counselling another to commit suicide, tried in 1816, Chief Justice Parker, instructing the jury, and speaking for the supreme court of Massachusetts, said: "The government is not bound to prove that Jewett would not have hung himself, had Bowen's counsel never reached his ear. The very act of advising to the commission of a crime is of itself unlawful. The presumption of law is that advice has the influence and effect intended by the adviser, unless it is shown to have been otherwise; as that the counsel was received with scoff, or was manifestly rejected and ridiculed at the time it was given. It was said in the argument, that Jewett's abandoned and depraved character furnishes ground to believe that he would have committed the act without such advice from Bowen. Without doubt he was a hardened and depraved wretch; but it is in man's nature to revolt at self-destruction. When a person is predetermined upon the commission of this crime, the reasonable admonitions of a discreet and respected friend would probably tend to overthrow his determination. On the other hand, the counsel of an unprincipled wretch, stating the heroism and courage the self-murderer displays, might induce, encourage, and fix the intention, and ultimately procure the perpetration of the dreadful deed; and if other men would be influenced by such advice, the presumption is that Jewett was so influenced. He might have been influenced by many powerful motives to destroy himself. Still the inducements might have been insufficient to procure the actual commission of the act, and one word of additional advice might have turned the scale."

When applied, as this ruling seems to have been here applied, to a case in which the advice was nearly connected in point of time, with the criminal act, it is, in my opinion, correct. If the advice was intended by the giver, to stir or incite to a crime, if it was of such a nature as to be adapted to have this effect, and the persons incited immediately afterwards committed that crime, it is a just presumption that they were influenced by the advice or incitement to commit it. The circumstances or direct proof may, or may not, be sufficient to control this presumption; and whether they are so, can duly be determined in each case, upon all its evidence.

One other rule of law on this subject is necessary to be borne in mind. The substantive offence to which the advice or incitement applied must have been committed; and it is for that alone the adviser or procurer is legal-

ly accountable. Thus if one should counsel another to rescue one prisoner, and he should rescue another, unless by mistake; or if the incitement was to rescue a prisoner, and he commit a larceny, the inciter is not responsible. But it need not appear that the precise time, or place, or means advised, were used. Thus if one incite A. to murder B., but advise him to wait until B. shall be at a certain place at noon, and A. murders B. at a different place in the morning, the adviser is guilty. So if the incitement be to poison, and the murderer shoots, or stabs. So if the counsel be to beat another, and he is beaten to death, the adviser is a murderer; for having incited another to commit an unlawful act, he is responsible for all that ensues upon its execution. These illustrations are drawn from cases of felonies, because they are the most common in the books and the most striking in themselves; but the principles on which they depend are equally applicable to cases of misdemeanor. In all such cases, the real question is, whether the accused did procure, counsel, command, or abet the substantive offence committed. If he did, it is of no importance that his advice or directions were departed from in respect to the time, or place, or precise mode or means of committing it.

Gentlemen,—the events which have recently occurred in this city, have rendered it my duty to call your attention to these rules of law, and to direct you to inquire whether in point of fact the offence of obstructing process of the United States has been committed; if it has, you will present for trial, all such persons as have so participated therein as to be guilty of that offence. And you will allow me to say to you that if you or I were to begin to make discriminations between one law and another, and say this we will enforce and that we will not enforce, we should not only violate our oaths, but so far as in us lies, we should destroy the liberties of our country, which rest for their basis upon the great principle that our country is governed by laws constitutionally enacted, and not by men. In one part of our country the extradition of fugitives from labor is odious; in another, if we may judge from some transactions, the law concerning the extradition of fugitives from justice has been deemed not binding; in another still, the tariff laws of the United States were considered oppressive, and not fit to be enforced. Who can fail to see that the government would cease to be a government if it were to yield obedience to these local opinions? While it stands, all its laws must be faithfully executed, or it becomes the mere tool of the strongest faction of the place and the hour. If forcible resistance to one law should be permitted practically to repeal it, the power of the mob would inevitably become one of the constituted authorities of the state, to be used against any law or any man obnoxious to the interests and passions of the worst or most excited part of the community; and the peaceful and the weak would be at the mercy of the violent. It is the imperative duty of all of us concerned in the administration of the laws, to see to it that they are firmly, impartially, and certainly applied to every offence, whether a particular law be by us individually approved or disapproved. And it becomes all to remember, that forcible and concerted resistance to any law is civil war, which can make no progress but through bloodshed, and can have no termination but the destruction of the government of our country, or the ruin of those engaged in such resistance. It is not my province to comment on events which have recently happened. They are matters of fact, which, so far as they are connected with the criminal laws of the United States, are for your consideration. I feel no doubt that, as good citizens and lovers of our country, and as conscientious men, you will well and truly observe and keep the oath you

have taken, diligently to inquire and true presentment make of all crimes and offences against the laws of the United States given you in charge.

Case No. 18,251.

CHARGE TO GRAND JURY.

[1 Deady, 657.]

District Court, D. Oregon. March 1, 1869.

FRAUDS UPON THE REVENUE—COUNTERFEITING THE CURRENCY—VIOLATIONS OF POSTAL LAWS—CORRUPTION AND INTIMIDATION OF JURIES.

DEADY, District Judge (charging grand jury). You have been selected from among the body of your fellow citizens to inquire concerning the commission of crimes against the United States, within the district of Oregon. A more delicate and important trust you could not be called upon to fill. Upon the proper discharge of your duties depends the stability of government and the purity of its administration. Your official oath is a sufficient direction as to your general duties. By this you have become bound under the most solemn obligations to present no one from hatred, envy or ill-will, and to leave no one unpresented through fear, favor or affection. This oath binds you to make diligent inquiry, as well as to present truly. You cannot acquit yourself of this obligation by slight or careless investigation. It is not enough that you dispose of the cases laid before you by the district attorney, or one of your own number. Your power and duty authorize and require of you to make special inquiry for yourselves as to the violations of law throughout the district. Except by the consent of twelve of your members, no person can be put upon trial in this court on a criminal charge. You are a shield to protect the weak and innocent from false and unjust charges, and a power able to accuse the guilty, be they ever so great or popular.

In respect to the manner and extent of your inquiries, your own good sense will be your best guide. You ought only to act upon legal evidence, or what satisfies you that the legal evidence exists. The party accused, or concerning whom an inquiry is made, has no right to be heard before you, and you should not allow him in the jury room, or to be examined as a witness in his own behalf. The district attorney will be ready to assist you in your inquiries, and give you information upon matters of law. You may also at any time come into court, and propound such inquiries concerning the business before you as you see proper. If you have any reason to believe that any officers of the government possess information proper for your action, you should summon them before you, and examine them thoroughly. Officers connected with the assessment and collection of internal revenue may with special propriety be thus examined.

Upon the three subjects of internal revenue, counterfeiting and the postoffice, I will give you in charge the following, from the charge delivered by Chief Justice Chase, to the United States grand jury for West Virginia, in August last: "The first of these is the faithful execution of the internal revenue laws. The war in which the nation has been recently engaged for the preservation of the national Union and government endangered by rebellion, made the contracting of a large debt inevitable. This debt is the price of our national existence, and binds irrevocably the good faith of the people. Its inviolable obligation has been recognized by a solemn act of the nation in adopting the fourteenth amendment of the constitution of the United States, which declares that the 'validity of the public debt of the United States, authorized by law, including debts incurred for the payment of bounties for services in suppressing

insurrection or rebellion, shall not be questioned.' There are differences of opinion as to the mode of payment required by the contracts of the American people made through their government; but nobody questions openly, if anybody questions at all, that the debt contracted must be paid, and paid in perfect good faith. The law of the amendment that the validity of the national debt shall not be questioned was already written upon the hearts of the people before they made it part of the constitution. To provide for the reduction and final payment of this debt, and for the annual expenses of the government, taxes are necessarily imposed. In other words, the equal proportion to be contributed by each citizen is ascertained by law. He who withholds his just proportion deprives the rest of the people of exactly the amount withheld. His fraud operates as theft. The sum total necessary to meet the obligations of the nation must be raised. Fraud upon the revenue does not reduce that sum; it merely shifts the burdens evaded by the fraudulent, upon others, who pay their full proportion besides. All honest men, therefore, have a common cause against the dishonest. You, gentlemen, represent the honest men, and it is your duty to see that no defrauder of the revenue who can be brought to justice escapes merited punishment. The higher in office and the higher in social position the delinquent may be, the more unremitting and searching should be your diligence in inquiry and presentment. Some of the observations just made might be properly enough repeated upon the next topic to which I must invite your attention. I refer to counterfeiting. It is to be regretted that the currency of the country now consists wholly, or almost wholly, of paper; but it is not the less important on that account that the people should be protected, as far as possible, against counterfeiting. Whatever the currency of the country may be, payments must be made in it, and exchanges effected through it. It is practically the common measure of values. Whoever imposes a counterfeit dollar on the public, robs successively all who take it in payment. Counterfeiting is continuous robbery, and it robs chiefly those who are the least able to bear the loss. Occasionally men are defrauded by counterfeit money in large transactions; but the principal sufferers are laboring men, whom it is the peculiar duty of government to protect from wrong. You will be vigilant, gentlemen, in your investigations concerning this class of crimes. What remains to be said concerns offences against the postoffice laws. Under our benignant system of government, the means of cheap and frequent intercourse between the most distant parts of the republic are provided; relatives and friends separated by the breadth of the continent correspond freely with each other. Correspondence is nearly as cheap as talk. And not only do the mails convey messages of affection, science, and business, but they are also the agents of immense pecuniary transactions, by remittances of bills of exchange and small government money orders. You see at once how important it is that the laws which regulate this vast interchange should be faithfully executed; and we are confident that nothing more is needed to insure your best endeavors to detect and bring to justice all those whose crimes and offences deprive the people of the great benefits which those laws are intended to secure." [Case No. 18,249.]

Before closing, I feel bound to call your attention to some supposed offences against public justice in this district, which, if true, should not go unpunished. By the second section of the act of March 2, 1831 (4 Stat. 483), it is enacted that: "If any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror * * * in any court of the United States, in the discharge of his duty, or shall corruptly, or by threats or force, obstruct or impede the due

administration of justice therein, every person or persons so offending shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment not exceeding three months, or both, according to the nature and aggravation of the offence." To endeavor to corruptly influence a juror in the discharge of his duty, is a crime which strikes at the very foundation of civil society. A verdict which is produced or prevented by any other means than the proper and natural effect of the law and evidence given in court, is a falsehood and a wrong, the evil consequences of which are enduring and not limited to the parties immediately interested. With honest and fearless juries, protected from the corrupting influences and misleading misrepresentations of unscrupulous and interested parties, all other forms of crime against society and individuals may be successfully combated and repressed. But so soon as it is understood in the community that jurors or juries may be tampered with by outside parties with impunity, then there is an end of an honest administration of the law, by jury trial, and the country will speedily drift into anarchy or despotism. Any improper attempt to influence a juror is forbidden by this statute. Of course it is improper to offer a juror any valuable thing or consideration to obtain a verdict, or prevent one being found, or to influence his opinion or action in any particular. It is also improper and criminal to endeavor to influence a juror by conveying or imparting information to him out of the jury box, for the purpose of affecting his conduct or judgment, or to endeavor to persuade him by arguments or appeals of any kind, except those addressed to him by counsel in open court.

It has been bruited abroad, that such practices have been resorted to for the purpose of influencing the action of jurors in this court, in a criminal case of great importance, lately tried herein. It is your duty to investigate the matter thoroughly, and if you find cause, present the offending parties for trial. I also deem it proper in this connection to warn you against hasty and inconsiderate action in the premises. At the same time, I repeat, that it is your bounden duty, to probe this matter to the bottom, and present the offending parties, if any, for trial. If such evil practices are tolerated by the grand jury, unscrupulous men will engage in the manipulation of juries as a trade, and then whether a party accused of a crime is convicted or acquitted, will depend more than anything else upon the skill and influence of the "jury-broker," whom he may chance to retain to manage the case on the outside for him. We often boast of our high civilization and not infrequently deplore the ignorance and barbarism of our ancestors. But as a means of determining the guilt or innocence of the accused, the ancient wager of battle was quite as trustworthy as such a jury trial, and much less demoralizing to the community at large.

Case No. 18,252.

CHARGE TO GRAND JURY.

[2 Hughes, 518.]¹

Circuit Court, D. West Virginia. Aug., 1870.

ELECTIONS AND VOTERS—CONSTITUTIONAL LAW—ENFORCEMENT ACT OF 1870.

[1. The act of May 31, 1870 (16 Stat. 140), to enforce the rights of citizens of the United States to vote in the several states of the Union, which provides, in section 1, that "all citizens of the United States, who are otherwise qualified to vote by the laws of the states in which they live, shall be entitled to and allowed to vote at all elections, without distinction of

race, color, or previous condition of servitude," is not unconstitutional on the ground of discriminating between different classes of citizens. The words, "without distinction of race, color, or previous condition of servitude," are general terms, descriptive in character, and are not restricted, and do not limit the preceding words, which apply to all citizens otherwise qualified to vote.]

[2. Under section 2 of that act, which relates to registration of voters, any officer having charge of the registration of voters under the state laws, who "refuses or knowingly omits to give full effect to the law," by placing the name of any citizen on the list of voters, who applies for registration, and who is entitled under the state constitution and laws to be registered as a voter, is guilty of a misdemeanor, and is liable to a criminal prosecution, as well as to a civil action by the party aggrieved.]

JACKSON, District Judge (charging grand jury). Congress at its last session passed an act, the title of which is "to enforce the right of citizens of the United States to vote in the several states of this Union, and for other purposes." Under the ninth section of the law, the circuit courts of the United States, "with a view to afford reasonable protection to all persons in their constitutional right to vote, without distinction of race, color, or previous condition of servitude," and for "the prompt discharge of the duties of this act," are required "from time to time to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this (the) act." During the late term of the circuit court, upon application made to it, some additional commissioners were appointed under the act for the purposes specified in it. Information has reached this court that, under and by virtue of its provisions, several persons have been arrested charged with a violation of it, and, after examination by the commissioners, have been held to answer indictments to be preferred against them at this term of the court. It therefore becomes your duty to investigate the charges preferred against the parties who are recognized to answer, and at the same time it is my duty to expound the law under which you are to act. This act, from its supposed political importance, has, as I am aware, been the subject of considerable discussion, and, as is usual under such circumstances, various interpretations have been placed upon it. It is to be regretted that a public law which was so likely to receive judicial construction and interpretation as the one under consideration, should become the subject of heated partisan discussion before it had received the calm and deliberate consideration of the judicial mind, to which we must always look for the proper legal interpretation and construction of the law. It has been suggested that some of the sections of this law are unconstitutional, for the reason, as it is supposed, that they make a discrimination in favor of one class of our citizens, affording protection to them alone. In the view that I take of this act, I think no such discrimination has been made in favor of any class, and I am inclined, without entering upon a full discussion of the objections raised to some of its provisions at this time, to maintain its validity, and shall therefore proceed to give you the views of the court in relation to it.

It is a general principle quite familiar to the legal profession that, in giving construction to a public statute, it is the duty of the court to ascertain the meaning and intention of its framers from the words employed and the matter to which it relates, and so to construe and interpret it as to give effect to all the words used when not inconsistent with the object expressed. And while this principle of law is unquestioned, it is equally true that, when the intent of a statute is plain, nothing is left to construction, and it is the duty of the court to interpret it according to its positive and explicit provisions. Testing this act of congress by the principles just stated, let us ascertain, if possible, what was the design and intention of

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congress in its adoption. From an examination of its various sections, it is evident that its framers had primarily three objects in view: First, to promote the public good by preserving the rights of the citizens, in requiring all citizens, whether officers of the law or not, to respect the rights of each and every person in the enjoyment and exercise of the right of suffrage, "without distinction of race, color, or previous condition of servitude." Second, to prevent evil-disposed persons from unlawfully interfering or intimidating the officers of the law in the discharge of their official duties in protecting the integrity and purity of elections. Third, to prevent any one from holding office under the government who is disqualified by reason of the fourteenth amendment to the constitution. That the act was framed for more than one purpose is evident from the title itself, which is to "enforce the right of citizens to vote," as well as "for other purposes."

At this time it is only necessary to consider the act so far as applicable to the first two objects named. And here it becomes a pertinent inquiry to ascertain who is entitled under this act to exercise the right of suffrage, or, in the language of the act, who is "qualified by law to vote at any election by the people in this state?" An answer to this question necessarily involves the consideration of the first section, and, as preliminary to it, I assume that all persons born or naturalized in the United States, and subject to its jurisdiction, are citizens of the United States and of the state wherein they reside, whether white or colored. The first section declares in plain terms "that all citizens of the United States, who are otherwise qualified to vote by the laws of the state in which they live, shall be entitled to and allowed to vote at all elections, without distinction of race, color, or previous condition of servitude." This section provides who shall exercise the right of suffrage, imposing no limitation upon the laws of the state, except that no citizen shall be disfranchised on account of "race, color, or previous condition of servitude." The words, "without distinction of race, color, or previous condition of servitude," are general terms, descriptive in their character, and are not restrictive, and do not limit the preceding words, "all citizens of the United States who are or shall be otherwise qualified to vote in any election by the people in any state." The language employed is plain, and affirms "that all citizens otherwise qualified to vote" shall not be denied the right for the reason just assigned. Whilst the primary object of this section seems to be intended to destroy all distinction between white and colored citizens, so far as the ballot is concerned, by placing them on the same equality in the exercise of the right of suffrage, yet it also in substance declares that "all citizens," who are by the laws of the state qualified to vote, shall exercise that right, but that none of them shall be prevented from the exercise of it by reason of race, color, or previous condition of servitude. It follows, therefore, that "all citizens" who are entitled to vote under the constitution and laws of the state are "protected in the exercise of the right of suffrage under this section of the law." Whilst the first section declares who shall use the ballot, the second is intended to protect the voter in the exercise of that right, by securing to "all citizens," whether white or colored, who, by the terms of the first section, are entitled to vote, a fair and impartial registration, when registration is a "prerequisite or qualification for voting." It declares that where "any act is or shall be required to be done as a prerequisite or qualification for voting by the constitution and laws of any state," the persons or officers who are charged with the performance of (such) duties in furnishing to citizens "an opportunity to perform such prerequisite or to become qualified to vote," shall give to "all citizens of the United States" the same and

equal opportunity to perform such prerequisite, and to become qualified to vote, and that no citizen shall be denied "the same and equal opportunity to perform such prerequisite, and to become qualified to vote" because "of race, color, or previous condition of servitude." The language here employed is positive and explicit, and I see no occasion to resort to any legal rules to aid the court in giving the interpretation of or construction to this section. The object of this section is evident, and clearly means that any officer having charge of the registration of voters under the laws of the state, who "refuses or knowingly omits to give full effect to the law," by placing the name of any citizen on the list of voters who applies for registration, and is entitled under the constitution and laws of the state to be registered as a voter, is guilty of a misdemeanor, and is liable to a criminal prosecution as well as to a civil action to the party aggrieved. The last clause of the fourteenth amendment to the constitution of the United States provides that no one shall be denied the equal protection of the law. In framing this act congress must have had this provision of the constitution in view. It cannot be supposed that it would escape their attention. It must therefore be conceded that all citizens are under the fundamental law of the land entitled to equal privileges, and the equal protection of the law. The latter right is embraced by the very words of the amendment. It is incredible to suppose that congress intended by the passage of this act to do so vain a thing as to enact a law purely for the benefit of one class of citizens, to the manifest neglect and prejudice of another, thus attempting by legislation to deprive them of the equal privileges and the equal protection of the law, as guaranteed by the fourteenth amendment. If such is its true construction, it would be clearly in conflict with this amendment to the constitution of the United States.

If I am right in the view I have just presented, it follows that no doubt can exist in the minds of any one as to the proper construction of the first and second sections, and that they were not intended, and do not discriminate in favor of any class of citizens. No right protected by our common constitution is held more sacred and dear to the citizen than the right of suffrage, and it cannot be supposed that congress, in enacting a law for the protection of the rights of those who were enfranchised by the fifteenth amendment, would at the same time so frame the law as to secure protection alone to that class of citizens, leaving nine-tenths of the population of the entire country unprotected by its provisions. The third section makes provision for the exercise of the right of suffrage where any citizen has by reason of the wrongful act or omission of the persons or officers charged with the duty of receiving or permitting the performance or the offer to perform any act, which by the laws of the state is required to be done as a prerequisite to qualify or entitle such citizen to vote, by declaring that "the offer of any citizen to perform the act required to be done by the constitution and laws of the state as a prerequisite to qualify or entitle him to vote, being otherwise qualified to vote, shall be deemed and held in law as a performance of such act, and entitle him to vote in the same manner and to the same extent as if he had in fact performed such act, by requiring the officer holding the election to receive and give effect to the vote of such citizen upon the presentation by him of his affidavit, stating the time and place of the offer to perform the required act, and the name of the officer who wrongfully prevented him from performing the necessary prerequisite to vote." It will be perceived that the object of this section is not only to give relief to the voter who is wrongfully deprived of his right to register, when registration is a prerequisite and a qualification to vot-

ing, by providing a mode of voting in such cases, but to furnish a remedy against the exercise of arbitrary power upon the part of the persons and officers who have charge of and conduct the elections. Under this section it is clearly the duty of all persons and officers who have charge of the registration of voters, to permit every person who can comply with the laws of the state, where they propose to vote, to register, and if they omit or refuse any citizen who applies for registration, and can comply with the laws of the state regulating the same, then it is the duty of the officer holding the election, upon such citizen presenting himself at the polls with an affidavit of the facts, to receive his vote. This section, unlike the two preceding sections, which inhibit a discrimination against the colored citizen on account of race, color, or previous condition of servitude, makes no exception or qualification whatever. It must, however, be construed in connection with them, "in pari materia," and by this means we ascertain beyond all question what is the meaning of the preceding sections, and when so ascertained it must govern the construction of them. Adopting this rule of construction, the third section clearly qualifies the two first sections, and indicates their meaning by declaring "that all persons who offer to perform or do perform the necessary prerequisite to qualify or entitle them to exercise the right of suffrage shall vote, upon presenting themselves with the affidavit required by the law." Its provisions are mandatory, constituting those who offer to vote under it the sole judge of their right to do so, leaving the officers, who are ministerial, and in no wise judicial, the exercise of no discretion whatever. Being comprehensive in its terms, it embraces all classes of citizens, preserving alike the rights of all and furnishing a like remedy for all in assertion of their rights, by imposing severe penalties for an omission or refusal to comply with its provisions. The fourth, fifth, sixth, and seventh sections are in harmony with the preceding sections, furnishing additional safeguards and remedies to the citizen by punishing all "who oppose by any unlawful means his registration, or the exercise of the right of suffrage, or who band or conspire against him to prevent him from the exercise of all his rights and privileges granted or secured to him by the constitution and laws of the United States." I deem it unnecessary to call your attention at this time to any other provisions of this act, except to the nineteenth and twentieth sections, which have for their object, as I have heretofore indicated, the preservation of the integrity and purity of elections and the punishment of all unlawful interference with them, by securing a proper registration of voters as well as protecting the voter in freely exercising the right of suffrage at any election for representatives or delegates to the congress of the United States, which by the laws are to take place at the ensuing election. The nineteenth section secures to any qualified voter of the state the free exercise of the right of suffrage, and inhibits the commission of a number of offences, amongst which is illegal voting and the interference in any manner with any officer of said elections in the discharge of his duties. The twentieth section seems to be somewhat confused. I think, by some means, some two or three lines in relation to voting have been interpolated into it unnoticed, and which I do not regard as germane to its leading object. It is evident that the whole scope of this section was intended to be confined to the subject of registration. It provides for the punishment of any person who "shall knowingly personate and register or attempt to register in the name of another person, or who shall fraudulently register or attempt to register, or do any unlawful act to secure the same for himself or another person, or who shall prevent any person, by any unlawful means, from duly exercising the right of registration, or who

shall induce any officer of registration, by any unlawful means, knowingly and wilfully to register one not entitled to it, or knowingly and wilfully to refuse to register one entitled to it, or shall aid, counsel, or advise any voter or officer to do or omit any act," the commission or omission of which is inhibited by this section. A careful examination of the nineteenth section must satisfy every one that its main object is to protect every qualified voter in the exercise of the right of suffrage, whilst it is just as clear that the chief purpose of the twentieth section is to secure to all qualified voters the right of registration, as well as to punish fraudulent registration. It also secures protection to all officers of registration in the legal discharge of their duties by punishing all persons who unlawfully interfere in any manner with them. It is obvious that congress, by the passage of this act, intended to enter the states for the purpose of maintaining as near as possible the purity of elections, in securing to every qualified voter under the law of the state the right to register, when the same is a qualification to voting, as also the free exercise of the right of suffrage. This act does not repeal or interfere with the laws as they exist in the states, unless they are in conflict with its plain provisions, and then only so far as such conflict exists. It is remedial in its character, and is supposed to be in harmony with the laws of the state, intended, however, to furnish full and adequate protection to all qualified voters when the state laws are inadequate, by enforcing their right to vote. It is, therefore, the duty of all officers under it to enforce its provisions firmly, exercising, however, the greatest caution and prudence, inasmuch as they may be called on to deal with officers executing laws under the authority of the state.

They should be fully satisfied that the case of an applicant is meritorious, and not frivolous. Upon the hearing of any case, if they have any doubt as to the commission of an offence under the law, they should discharge the party. At the same time the state officers should remember that the constitution and laws of the United States are the supreme and paramount laws of the land, and they must be governed by them in the discharge of their duties, under the laws of the state, whenever a conflict exists between them. I presume that most of the difficulties that have occurred with "registrars" acting under the laws of the state, arise from the fact that they suppose they are invested with the exercise of a discretion in the execution of them. It is not important to determine whether they are so invested with the exercise of such discretion, as the third section of this act, if such discretion exists under the state law, qualifies the state law by taking away from the officer acting under it all discretion affecting the rights of citizens in the exercise of the right of suffrage. It imposes severe penalties against any officer of election "whose duty it is to receive, correct, certify, register, report, or give effect to the vote of any citizen," for refusing or omitting to perform any one of the duties thus enumerated, if the citizen who proposes to exercise the right of suffrage shall have complied with the requirements of the law. In the discharge of my official duty to you on this occasion, I have directed your attention to the leading features of the law. In the examination and investigation of the cases that have been referred to you by the United States commissioners for your action, it is your imperative duty under the law to find presentments against all persons who have violated any of its provisions. Whilst it is your duty on the one hand to afford protection to every citizen in the free exercise of the right of suffrage, a right which American citizens hold so dear, and next to the protection of their lives and liberty they prize and value so highly, by enforcing the law against all persons who violate their rights under it, on the other hand it is equally your duty to protect all

officers in the lawful discharge and performance of their duties under the law, from any unlawful interference with them. Commissioners of the United States who are acting under this law in the proper discharge of their duties are entitled by the law to the fullest protection. They are invested with powers of a most plenary character. But whilst this is true, this court will expect them to confine themselves in their action under the law to its letter and spirit, and under no circumstance to exceed it, as it will be both its duty and pleasure to remove any commissioner for improper conduct in the discharge of his official duties.

Case No. 18,253.

CHARGE TO GRAND JURY.

[1 Newb. 323.]

District Court, E. D. Louisiana, Nov., 1846.

SHIPPING—PUBLIC REGULATIONS—NEGLIGENCE IN RESPECT TO STEAM VESSELS.

[The twelfth section of the act of 1838 (5 Stat. 304), which declares that every captain, engineer, pilot, or other person employed on board of any steam vessel, by whose misconduct, negligence, or inattention to duty the lives of any persons on board may be destroyed, shall be deemed guilty of manslaughter, makes the negligence, etc., in question a crime, when followed by the consequences named, without regard to the question of motive or intent on the part of the persons charged.]

McCALEB, District Judge (charging grand jury). I deem it my duty to call your serious attention to the provisions of the act of congress of 1838, relating to "the better security of lives of passengers on board of vessels propelled in whole or in part by steam." To give you a clear understanding of your duty under that act of congress it will be necessary for me to notice briefly its requirements, and to direct your attention particularly to the offences which come within the criminal jurisdiction of this court, and towards which, therefore, your inquiries are to be solemnly directed. The first section of the act requiring a new enrollment and license, it is not necessary at this time to consider. The second section declares that it shall not be lawful for the owner, master or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any merchandise or passengers upon the navigable waters of the United States, after the 1st of October, 1838, without having first obtained from the proper officer, a license under the existing laws, and without having complied with the conditions imposed by this act; and for every violation of this section, the owner of the vessel shall forfeit and pay to the United States the sum of five hundred dollars, one-half for the use of the informer; and for this sum the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offence. The third section of this act makes it the duty of the district judge of the United States, within whose district any ports of entry or delivery may be on the navigable waters, bays, lakes and rivers of the United States, upon the application of the master or owner of any steamboat or vessel propelled in whole or in part by steam, to appoint from time to time, one or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same, who shall not be interested in the manufacture of steam engines, steamboat boilers or other machinery belonging to steam vessels, whose duty it shall be to make such inspection when called upon for that purpose, and to give to the owner or master of such boat or vessel duplicate certificates of such inspection; such persons before entering upon the duties enjoined by this act, are to take an oath

well, faithfully and impartially to execute and perform the services herein required of them. The fourth section provides that the person or persons called upon to inspect the hull of a steamboat under the provisions of this act, shall after a thorough examination, give to the owner or master, a certificate in which shall be stated the age of the boat, when and where originally built, and the length of time the same had been running. The inspectors must also state whether in their opinion the boat is sound, and in all respects seaworthy, and fit to be used for the transportation of freight or passengers. The fifth section requires the inspectors to state in the certificate, after a thorough examination of the boilers and machinery, whether the same be sound and fit for use, and also the age of the boilers. Duplicates of these certificates are to be granted, one of which is to be posted up in some conspicuous part of the boat for the information of the public. The sixth section makes it the duty of the owners and masters of steamboats to cause the inspection provided under the fourth section, that is to say the inspection of the hulls of steamboats, to be made at least once in every twelve months; and the examination required by the fifth section, that is to say the examination of the boilers and the machinery, to be made at least once in every six months. And they are to deliver to the collector or surveyor of the port where their boats have been enrolled or licensed, the certificate of such inspection; and on failure thereof they are to forfeit the licenses and be subject to the same penalty as though they had run their boat without a license, to be recovered in like manner. And it is moreover the duty of owners and masters of steamboats licensed in pursuance of this act, to employ on board their respective boats a competent number of experienced and skillful engineers, and in case of neglect to do so they shall be held responsible for all damages to the property of any passenger of any boat, occasioned by an explosion of the boiler or any derangement of the engine or machinery of any boat. The seventh section declares that whenever the master of any steamboat, or person charged with navigating said boat, shall stop the motion or headway of said boat, or when she shall be stopped for the purpose of discharging or taking in cargo, fuel or passengers, he shall open the safety valve, so as to keep the steam down in the boiler as near as practicable to what it is when the boat is under headway, under the penalty of two hundred dollars for each and every offence. I pass over the eighth and ninth sections, which relate more immediately to the navigation of the northern lakes or the high seas. The tenth section makes it the duty of the master and owner of every steamboat running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars. The eleventh section provides that the penalties imposed by this act, may be recovered in the name of the United States, in the district or circuit court of such district or circuit where the offence shall have been committed, or in which the owner or master of said vessel may reside, one-half to the use of the informer, and the other to the use of the United States; or the said penalties may be prosecuted for by indictment in either of the said courts. This last clause in the section, then, shows plainly the duty that devolves upon you as the grand inquest of this district. You are diligently to inquire and true presentment make of all such captains or owners of steamboats who may be found acting in defiance of the requirements of the law.

But it is to the twelfth section of this act that I desire to direct your most serious and solemn attention on the present occasion. It provides that every captain, engineer, pilot or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by

whose misconduct, negligence or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period of not more than ten years. The frequent loss of human life in consequence of explosions of the boilers of steamboats, of collisions and the burning of steamboats on our western waters, and especially on the Mississippi river, imposes upon you the solemn duty of diligently inquiring into every case that may be brought before you or that may come under your cognizance. The strong arm of the law must be interposed to put an end if possible to these terrible disasters. The frightful loss of life and property annually sustained by our community from such causes, demands the utmost vigilance on the part of all who have any agency in the administration of criminal justice before this tribunal. The legislation of congress calls for prompt and energetic action. That legislation is wise and salutary. You have seen from the details through which we have gone, the solicitude exhibited by congress to prescribe every rule and regulation that was best calculated to insure security to life and property. This legislation was dictated by humanity, and it is to be hoped that no mawkish sensibility, no false notions of clemency may be interposed to screen those who may be shown to have been guilty of a violation of the law. There is a disposition in the public mind to take any representation having the semblance of plausibility as sufficient to exculpate an offender. There is a disposition to inquire whether wicked motives may have prompted the commission of the act, and in the absence of all supposed malice to conclude that there can be no guilt. The law, however, looks to the consequences of the act, and is utterly regardless of the purpose that may have prompted its commission. I wish you, gentlemen, to bear in mind that the twelfth section of the act of congress has nothing to do with the motives. It was designed to punish the captains, engineers and pilots of steamboats for their negligence or inattention. Whether there be malice or not, is a question which cannot be a subject of inquiry under the law. We may admit what doubtless generally is the fact, that when a boiler explodes or a collision takes place, there was no malice on the part of the officer of the boat, through whose negligence or inattention it occurred; still, if there be evidence to show that negligence or inattention, the officer is guilty in the eye of the law. We are not driven to the English common law to find out what constitutes manslaughter. The statute itself contains the definition of the crime, and it is unnecessary to look beyond it. That statute virtually says to the officers of steamboats who assume the solemn responsibility of transporting persons and property from one port to another: You shall attend strictly to the duty which you have, for a valuable consideration, assumed to perform. You shall observe abundant caution; you shall take all proper care that no disaster occurs which may result in the loss of life. It imposes upon the owners of steamboats the duty of employing intelligent and prudent captains. It imposes upon captains the duty of employing skillful, sober, prudent and attentive pilots and engineers. There is too much reason to believe that there has hitherto been a shameful remissness on the part of both owners and captains generally, in the performance of this duty; and those who from parsimonious motives have failed in their duty to the public, should be promptly made to feel the consequences of their criminal cupidity and their indifference to the rights of others. The only manner pointed out by the law by which owners can be made to suffer is by civil action for damages, as set forth in the last section of the act.

Gentlemen of the grand jury, it is in vain that the prosecuting officer of the government discharges his duty if you be not fully alive to the responsibility imposed upon you. Vigilance on your part will create a corresponding vigilance on the part of those against whose negligence and inattention the penalties of the law have been denounced. Let us hope that a salutary influence will be exerted by prompt and energetic action. Let us hope that the time will speedily come when there will be in the navigation of the Mississippi and her tributaries the same security to life and property which is enjoyed in other parts of the world. Let us hope that the time may soon come when we shall cease to have occasion to regard the stupendous invention of our great countryman Fulton, which has created such important revolutions in the commerce of the world, in any other light than as a blessing to mankind. To bring about this happy realization of our hopes, the officers of the law must be vigilant, the courts must be vigilant, the juries must do their duty firmly, fearlessly, regardless of all consequences. In a word, the wise, humane and salutary enactments of congress must be respected and enforced without fear or favor.

Case No. 18,254.

CHARGE TO GRAND JURY.

[2 Sawy. 663.]

District Court, D. Oregon. Nov. 4, 1873.

VIOLATION OF ELECTION LAWS—ACT OF MAY 30, 1870, ANALYZED AND EXPLAINED.

DEADY, District Judge (charging grand jury). An election has lately been held in this district for a representative in congress. It is publicly charged that numbers of persons voted at such election, illegally, and that others aided, counseled, procured or advised such votes to be so given. This being an election for an officer of the national government, congress has the power to make such laws to secure a fair and honest vote as may be necessary and convenient. Const. U. S. art. 1, § 4. In pursuance of this power, congress enacted section nineteen of the act of May 30, 1870. 16 Stat. 144.

By this section it is provided: "That if at any election for representative or delegate in the congress of the United States, any person shall knowingly: (1) Personate and vote, or attempt to vote in the name of any other person, whether living, dead, or fictitious; (2) vote more than once at the same election for any candidate for the same office; (3) vote at a place where he may not be lawfully entitled to vote; (4) vote without having a lawful right to vote; (5) do any unlawful act to secure a right or an opportunity to vote for himself or any other person; (6) by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any state of the United States of America, or any territory thereof, from freely exercising the right of suffrage, or by any such means induce any voter to refuse to exercise such right; (7) compel or induce by any such means (see clause sixth) or otherwise, any officer of any election in any such state or territory to receive a vote from any person not legally qualified or entitled to vote; (8) interfere in any manner with any officer of said elections in the discharge of his duties; (9) by any of such means (see clause sixth) or other unlawful means, induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; (10) knowingly and willfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any

person entitled to vote; (11) aid, counsel, procure, or advise any such voter, person, or officer, to any act hereby made a crime, or to omit or do any duty the omission of which is hereby made a crime, or attempt to do so,—every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction, and on conviction thereof, shall be punished by a fine not exceeding \$500, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of the prosecution.”

By section twenty-one of the same act to vote or offer to vote a ballot at any election where a representative in congress is to be chosen, is prima facie evidence that the person voted, or attempted to vote for such representative. In this case, such would be the reasonable inference, in the absence of any such presumption of law, from the fact that no votes were authorized to be given or received for any other person than a candidate for representative.

The success of a government based upon universal suffrage and frequent elections, presupposes that the elector will give his vote upon considerations of public policy, and the fitness of the candidate for the office to be filled, and not otherwise.

When this condition of things ceases to be the rule, and votes are given or withheld by reason of “force, threat, menace, intimidation, bribery, reward, or offer or promise thereof,” the days of the republic are numbered, and it will not be long ere it dies in its own stench.

A representative government, selected and sustained by the free and unpurchased votes of honest and intelligent citizens, is probably the most desirable state of civil society known to man; while on the other hand, such a government, resting upon and reflecting the result of corrupt and dishonest elections, is an organized anarchy, more intolerable and unjust than any other. It is the triumph of vice over virtue—the means by which “evil men bear sway.”

To preserve the purity of elections and thereby secure the integrity of congress, this law has been enacted. You have been chosen and sworn to enquire, among other things, if there has been any violation of it in this district. You cannot keep your oaths and neglect or overlook this duty. If you find that any one has voted more than once, or in the name of another, or at a place where he was not entitled to or anywhere without having a lawful right to do so, it is your duty to present him for trial. And further, if you find that any one has aided, counseled, procured or advised any one to do any of these unlawful acts, it is your duty to present such person for trial. The persons who procure or aid others to vote illegally are generally the worse of the two, and always the most dangerous to society.

To bring a case within the eleventh clause of this section as I have subdivided it, it is not necessary that the party should have hired or bribed another to vote illegally. It is equally a crime to counsel or advise the commission of such an act, or in any way to procure or aid it to be done.

But illegal votes are seldom given intentionally without a money consideration, or its equivalent, being at the bottom of the transaction.

The use of money in elections, particularly in the large towns and cities, is fast becoming a dangerous evil. If not prevented, our elections will in effect soon become what the election for an emperor was in the decline of Rome—a sale of the empire by the mercenaries of the Pretorian Guard to the highest bidder.

The use of money in elections, besides being in nine cases out of ten radically wrong and corrupt, imposes in the end a heavy and unjust tax upon the property and industry of the country.

By one indirection or another, through the acts and influence of those who are elected by this money, the public are compelled to return it

with interest—often an hundred fold—to the persons who furnished it.

It may be said that this evil is confined to a few great cities, where ignorance, poverty and vice are used and abused for political purposes by rapacious and unscrupulous wealth.

But, judging from the statements of the press, and the common speech of men, there is ground to believe that for some years past the elections in portions of this state, and particularly in this city, have been materially influenced, if not actually controlled, by the use of money, expended to promote and produce illegal and dishonest voting. So late as the last session of the legislature, a distinguished member of that body was reported as saying on the floor of the house, that elections in Portland were controlled by the purchased votes of a rabble, who could be bought at \$5 per head.

You, gentlemen, are supposed to represent the honest, law-abiding portion of the community, who only desire that our elections should be what the founders of the commonwealth intended—an authorized process of ascertaining the unbiased and honest opinion of the voters in relation to public men and measures.

To this end this law has been enacted by congress, and you have been called here to aid in its enforcement by presenting all persons for trial whom you may find to have violated it.

Present no persons through envy, hatred or malice. Weigh well the evidence produced before you. Do not allow yourselves to be made the means of accusing the innocent, or setting on foot a public prosecution in aid of one side or the other of a mere political or personal controversy.

Neither should you leave any person unprotected through fear, favor or affection. You should be vigilant and patient in your enquiries, and let no man escape a trial who is shown to have voted illegally, or counseled, or procured another to do so. Do justly—let the consequences be what they may, and you have discharged your duty.

Case No. 18,255.

CHARGE TO GRAND JURY.

[2 Sawy. 667.]¹

Circuit Court, D. California. Aug. 22, 1872.

FUNCTIONS AND POWERS OF GRAND JURY—LIMITATION ON POWER OF INVESTIGATION—PRESENTMENT AND INDICTMENT—OBLIGATION OF SECRECY.

[1. To justify the finding of an indictment, the grand jury must believe that the accused is guilty. They should be convinced that the evidence before them, unexplained and uncontradicted, would warrant a conviction by a petit jury.]

[2. A grand jury of the United States sitting in California has no such general authority to inspect the books of officers of the United States as is exercised by the grand juries of the state in relation to the books of the state officers.]

[3. A grand jury of the United States is limited, as to the scope of its investigations, (1) to such matters as may be called to its attention by the court; or (2) may be submitted by the district attorney; or (3) may come to the knowledge of the grand jurors in the course of their investigations of the matters thus brought before them, or from their own observations; or (4) may come to their knowledge from the disclosures of their associates on the grand jury. They should not allow private prosecutors to intrude themselves into their presence and present accusations.]

[4. Since the passage of the act of 1872 (17 Stat. 153), to prevent and punish the obstruction of the administration of justice in the federal courts, it is the duty of a federal grand jury to present any person who, in violation of this law, and for the purpose of influencing their action, sends to them any letter or communication relating to any matter pending be-

¹ [Reprinted by permission.]

fore them, or pertaining to their duties, without a previous order of the court.]

[Cited in *Hurtado v. California*, 110 U. S. 556, 4 Sup. Ct. 301; *Ex parte Bain*, 121 U. S. 10, 7 Sup. Ct. 786.]

[5. It is the duty of the grand jurors to keep their deliberations secret. They are not at liberty to state even that they have had a particular matter under consideration. They should allow no one to question them as to their own individual actions or the actions of their associates on the grand jury.]

[6. A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jurors upon their own knowledge, or upon evidence before them, without having any bill from the public prosecutor. It is an informal accusation, to be regarded in the light of instructions upon which an indictment may be framed. This form of accusation has, however, fallen into disuse since the practice has prevailed for the prosecuting officer to attend the grand jury and advise them in their investigations.]

[7. The district attorney has a right to be present before the federal grand jury at the taking of testimony, for the purpose of giving information or advice, and may interrogate the witnesses; but he has no right to be present during the deliberations of the grand jury.]

At a term of the circuit court of the United States for the district of California, held at San Francisco on the 26th of August, 1872, a grand jury was empaneled, and to its foreman the following oath was administered: "You, as foreman of this inquest for the body of the district of California, do swear that you will diligently inquire, and true presentment make, of such articles, matters and things as shall be given you in charge, or otherwise come to your knowledge, touching the present service. The government's counsel, your fellows', and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unpresented for fear, favor, affection, hope of reward or gain, but shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God!" Then to the rest of the grand jurors the following oath was administered: "The same oath which your foreman has taken on his part, you, and every one of you, shall well and truly observe on your part. So help you God!"

Before FIELD, Circuit Justice, and SAWYER, Circuit Judge.

FIELD, Circuit Justice, then charged the grand jury as follows:

You are summoned as grand jurors of the circuit court of the United States for the district of California, and the duties with which you are charged are of the highest importance to the due administration of justice. By the constitution of the United States, no person can be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. No steps, therefore, can be taken, with the exceptions mentioned, for the prosecution of any crime of an infamous character—and under that designation the whole series of felonies is classed—beyond the arrest, examination and commitment of the party accused, until the grand jury have deliberated and acted upon the accusation. Your functions are, therefore, not only as already stated, important; they are indispensable to the administration of criminal justice.

The institution of the grand jury is of very ancient origin in the history of England; it goes back many centuries. For a long period its powers were not clearly defined; and it would seem, from the accounts of commentators on the laws of that country, that it was at first a body, which not only accused, but which also tried public offenders. However this may have been in its origin, it was, at the time of the settlement of this country, an in-

forming and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial.² And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown.

In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen, which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it come from government or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes, unless this body, consisting of not less than sixteen, nor more than twenty-three, good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.

From these observations, it will be seen, gentlemen, that there is a double duty cast upon you as grand jurors of this district; one a duty to the government, or more properly speaking, to society, to see that parties against whom there is just ground to charge the commission of crime, shall be held to answer the charge; and on the other hand, a duty to the citizen to see that he is not subjected to prosecution upon accusations having no better foundation than public clamor or private malice.

The government has appointed the district attorney to represent its interest in the prosecution of parties charged with the commission of public offenses against the laws of the United States. He will, therefore, appear before you, and present the accusations which the government may desire to have considered by you. He will point out to you the laws which the government deems to have been violated; and will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct.

In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more: if, in the course of your inquiries, you have reason to believe that there is other evidence, not presented to you, within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced. Formerly, it was held that an in-

² There were a few exceptional cases in England in which a party could be arraigned and tried for a felony without the previous action of a grand jury. Thus, in a case of death, a party could be arraigned upon the inquisition of a coroner's inquest. And where the verdict of a jury in a civil case necessarily involved a finding that the defendant was guilty of a public offense, he might sometimes be called upon to answer. Thus, in an action for taking away goods, if the jury found that they were taken feloniously, the verdict might be used as an indictment. So in an action of slander, in which the plaintiff was charged with a criminal offense, and the defendant justified, if the jury found that the justification was true, the plaintiff might be immediately put upon his trial for the crime alleged against him without the action of the grand jury. See 1 Chit. Cr. Law, 165.

dictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment, you must be convinced, so far as the evidence before you goes, that the accused is guilty—in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury.

How far you should proceed to inquire into other matters than such as are brought to your consideration by the government, through its prosecuting officer, the district attorney, has been a matter of much conflict of opinion among different judges.

Before giving our views upon this subject, it is proper to state that there is a wide difference between the powers and duties of grand juries of the state courts of California and of grand juries of the national courts.

By a statute of the state, grand juries of the state courts possess very great inquisitorial powers. They are required to inquire into the official misconduct of public officers of every description in their county, and are entitled to the examination of all its public records. They are bound by their oath to inquire into and presentment make of all public offenses against the laws of the state committed or triable in their county, of which they have, or "can obtain" legal evidence. In order to ascertain whether or not there has been any official misconduct in any public officer, they have, under the statute, authority to inspect all his books and records, and to subject him to a searching examination.

No such general authority to inspect the books of the officers of the United States, and to subject the officers themselves to examination in respect to the entries in those books, is possessed by the grand juries of the national courts. The exercise of such authority might prove of serious detriment to the public service, for it might interfere with the established system by which the accountability of the local officers of the United States to the executive departments at Washington is secured. You will readily perceive that an inspection by the grand jury, for instance, of the books of the collector of customs at this port, and requiring that officer to explain his entries and his conduct, often directed by private and confidential communications from those departments, might seriously embarrass the government in its action. So, too, embarrassment might follow from a similar inspection of the records and examination of other officers of the United States.

The examination of the books and accounts of the officers of the general government is provided for by law or by regulations of the executive departments. When on such examination the accounts are found to be unsatisfactory, and defects and delinquencies are discovered which render the officers liable to prosecution, civil or criminal, the proper instructions are given to the district attorney of the United States, and the matter is brought by him to the attention of the court or of the grand jury.

We return now to the inquiry as to what matters you can direct your investigation beyond those which are brought to your notice by the district attorney. Your oath requires you to diligently inquire, and true presentment make, "of such articles, matters and things as shall be given you in charge, or otherwise come to your knowledge touching the present service."

The first designation of subjects of inquiry are those which shall be given you in charge; this means those matters which shall be called to your attention by the court, or submitted to your consideration by the district attorney. The second designation of subjects of inquiry are those which shall "otherwise come to your knowledge touching the present service;" this means those matters within the sphere of and

relating to your duties which shall come to your knowledge, other than those to which your attention has been called by the court or submitted to your consideration by the district attorney.

But how come to your knowledge?

Not by rumors and reports, but by knowledge acquired from the evidence before you, or from your own observations. Whilst you are inquiring as to one offense, another and a different offense may be proved, or witnesses before you may, in testifying, commit the crime of perjury.

Some of you, also, may have personal knowledge of the commission of a public offense against the laws of the United States, or of facts which tend to show that such an offense has been committed, or possibly attempts may be made to influence corruptly or improperly your action as grand jurors. If you are personally possessed of such knowledge, you should disclose it to your associates; and if any attempts to influence your action corruptly or improperly are made, you should inform them of it also, and they will act upon the information thus communicated as if presented to them in the first instance by the district attorney.

But unless knowledge is acquired in one of these ways, it cannot be considered as the basis for any action on your part.

We, therefore, instruct you that your investigations are to be limited: First, to such matters as may be called to your attention by the court; or, second, may be submitted to your consideration by the district attorney; or, third, may come to your knowledge in the course of your investigations into the matters brought before you, or from your own observations; or, fourth, may come to your knowledge from the disclosures of your associates.

You will not allow private prosecutors to intrude themselves into your presence, and present accusations. Generally such parties are actuated by private enmity, and seek merely the gratification of their personal malice.

If they possess any information justifying the accusation of the person against whom they complain, they should impart it to the district attorney, who will seldom fail to act in a proper case. But if the district attorney should refuse to act, they can make their complaint to a committing magistrate, before whom the matter can be investigated, and if sufficient evidence be produced of the commission of a public offense by the accused, he can be held to bail to answer to the action of the grand jury.

When the court does not deem the matter of sufficient importance to call your attention to it, and the district attorney does not think it expedient to submit the matter to your consideration, and the private prosecutor neglects to proceed before the committing magistrate, we think it may be safely inferred that public justice will not suffer, if the matter is not considered by you.

A preliminary examination of the accused before a magistrate, where he can meet his prosecutor face to face, and cross-examine him, and the witnesses produced by him, and have the benefit of counsel, is the usual mode of initiating proceedings in criminal cases, and is the one which presents to the citizen the greatest security against false accusations from any quarter. And this mode ought not to be departed from, except in those cases where the attention of the jury is directed to the consideration of particular offenses by the court, or by the district attorney, or the matter is brought to their knowledge in the course of their investigations, or from their own observations, or from disclosures made by some of their number.

We have been led, gentlemen, to give these instructions upon the nature of your duties and the limits to the sphere of your investigations, because an impression widely prevails that the institution of the grand jury has outlived its usefulness, an impression which has been created from a disregard of those limits, and the

facility with which it has, unfortunately, often been used as an instrument for the gratification of private malice.

There has hardly been a session of the grand jury of this court for years, at which instances have not occurred of personal solicitation to some of its members to obtain or prevent the presentment or indictment of parties. And communications to that end have frequently been addressed to the grand jury filled with malignant and scandalous imputations upon the conduct and acts of those against whom the writers entertained hostility, and against the conduct and acts of former and present officers of this court, and of previous grand juries of this district.

All such communications are calculated to prevent and obstruct the due administration of justice, and to bring the proceedings of the grand jury into contempt. "Let any reflecting man," says a distinguished judge, "be he layman or lawyer, consider the consequences which would follow, if every individual could at his pleasure throw his malice or his prejudice into the grand jury room, and he will of necessity conclude that the rule of law which forbids all communications with grand juries, engaged in criminal investigations, except through the public instructions of courts, and the testimony of sworn witnesses, is a rule of safety to the community. What value could be attached to the doings of a tribunal so to be approached and influenced? How long would a body, so exposed to be misled and abused, be recognized by freemen as among the chosen ministers of liberty and security? The recognition of such a mode of reaching grand juries would introduce a flood of evils, disastrous to the purity of the administration of criminal justice, and subversive of all public confidence in the action of these bodies." Judge King, of Philadelphia, in *Com. v. Crans* [2 Clark, 172].

At its last session congress passed a stringent act to prevent the continuance of this pernicious practice, as well as to prevent any attempt to influence the administration of justice corruptly or by the intimidation of jurors. It is entitled "An act to prevent and punish the obstruction of the administration of justice in the courts of the United States." It enacts "that if any person or persons shall corruptly, or by threats or force, or by threatening letters, or any threatening communications, endeavor to influence, intimidate, or impede any grand or petit jury or juror of any court of the United States in the discharge of his or their duty, or shall corruptly or by threats or force, or by threatening letters, or any threatening communications, influence, obstruct or impede, or endeavor to influence, obstruct or impede the due administration of justice therein, such person or persons so offending shall be liable to prosecution therefor by indictment, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the aggravation of the offense." And it also enacts, that "if any person or persons shall attempt to influence the action or decision of any grand or petit juror upon any issue or matter pending before such juror, or before the jury of which he is a member, or pertaining to his or their duties, by writing or sending to him any letter or letters, or any communication in print or in writing in relation to such issue or matter, without the order previously obtained of the court before which the said juror is summoned, such person or persons so offending shall be deemed guilty of a misdemeanor, and shall be liable to prosecution therefor by indictment or information, and shall, on conviction thereof, be punished by fine not exceeding one thousand dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment, according to the aggravation of the offense."

You thus perceive that congress intends that in the investigation of public offenses you shall

be secure from intimidation or personal influence of every kind.

The distinguished judge whom I have already quoted observes that, "into every quarter of the globe in which the Anglo Saxon race have formed settlements, they have carried with them this time-honored institution, ever regarding it with the deepest veneration, and connecting its perpetuity with that of civil liberty." And congress has designed by the act in question, that this high character of your body shall not be lessened. If, therefore, in violation of this law, to influence your action or decision, any letter or communication in print or writing relating to any issue or matter pending before you, or pertaining to your duties is sent to you without the previous order of the court, a case will arise coming to your knowledge, within the principle already stated, and it will be your duty, upon that knowledge to indict or present the offending party. It will, also, be your duty to preserve and deliver to the district attorney the letter or other communication sent to you, to be used as evidence in the prosecution of the party.³

The oath which you have taken indicates the impartial spirit with which your duties should be discharged. You are to present no one from envy, hatred or malice; nor shall you leave any one unrepresented for fear, favor, affection, hope of reward or gain; but shall present all things truly as they come to your knowledge according to the best of your understanding.

You are also to keep your own deliberations secret; you are not at liberty even to state that you have had a matter under consideration. Great injustice and injury might be done to the good name and standing of a citizen if it were known that there had ever been before you for deliberation the question of his guilt or innocence of a public offense. You will allow no one to question you as to your own action or the action of your associates on the grand jury.

To authorize you to find an indictment or presentment there must be a concurrence of at least twelve of your number; a mere majority will not suffice.

The constitution, as you have observed, speaks of a presentment or indictment by a grand jury. The latter—the indictment—is a formal accusation made by the grand jury charging a party with the commission of a public offense. Formerly it was the practice in all courts having jurisdiction to inquire by the intervention of a grand jury of public offenses, amounting to the grade of felonies—and such is the practice now in many courts—for the public prosecutor to hand to the grand jury an instrument of this character—that is, a bill of an indictment in form, with a list of the witnesses to establish the offense charged. If in such case the jury found that the evidence produced justified the

³ In a case which arose in Philadelphia in 1845, Judge King considered at length, in an elaborate and very able opinion, the duties of grand juries in criminal cases; and his views agree substantially with those expressed in the charge. "Our system of criminal administration," said the judge, "is not subject to the reproach that there exists in it an irresponsible body with unlimited jurisdiction. On the contrary, the duties of a grand jury in direct criminal accusations, are confined to the investigation of matters given them in charge by the attorney-general; and of those which are sufficiently within their own knowledge and observation to authorize an official presentment; and they cannot, on the application of any one, originate proceedings against citizens, which is a duty imposed by law on other public agents. This limitation of authority we regard as alike fortunate for the citizen and the grand jury. It protects the citizen from the persecution and annoyance which private malice, or personal animosity, introduced into the grand jury room, might subject him to. And it concerns the dignity of the grand jury and the veneration with which they ought always to be regarded by the people, by making them umpire between the accuser and accused, instead of assuming the office of the former." *Communication of Grand Jury*, 5 Pa. Law J. 63, 64.

finding of an indictment they indorsed on the instrument "A True Bill," otherwise, "Not Found," or, "Not a True Bill," or the word "Ignoramus"—we know nothing of it—from the use of which latter word the bill was sometimes said to be ignored.

A presentment differs from an indictment in that it wants technical form, and is usually found by the grand jury upon their own knowledge, or upon the evidence before them, without having any bill from the public prosecutor. It is an informal accusation, which is generally regarded in the light of instructions upon which an indictment can be framed.

This form of accusation has fallen in disuse since the practice has prevailed—and the practice now obtains generally—for the prosecuting officer to attend the grand jury and advise them in their investigations.

The government now seldom delivers bills of indictment to the grand jury in advance of their action, but generally awaits their judgment upon the matters laid before them. The district attorney has the right to be present at the taking of testimony before you for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you, but he has no right to be present pending your deliberations on the evidence. When your vote is taken upon the question whether an indictment shall be found or a presentment made, no person besides yourselves should be present.

These, gentlemen, are all the general instructions which we have thought important to give you at this time. There are some few observations, however, which we would add respecting the execution of the revenue laws; and these we will take from a charge of the present chief justice of the United States, delivered to a grand jury in West Virginia. "The war," says that great judge, "in which the nation has been recently engaged for the preservation of the national union and government, endangered by rebellion, made the contracting of a large debt inevitable. This debt is the price of our national existence, and binds irrevocably the good faith of the people. Its inviolable obligation has been recognized by a solemn act of the nation in adopting the fourteenth amendment to the constitution of the United States, which declares that 'the validity of the public debt of the United States, authorized by law, including debts incurred for the payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.'"

"There are differences of opinion as to the mode of payment required by the contracts of the American people, made through their government; but nobody questions openly, if anybody questions at all, that the debt contracted must be paid, and paid in perfect good faith. The law of the amendment that the validity of the national debt shall not be questioned, was already written on the hearts of the people before they made it part of the constitution. To provide for the reduction and final payment of this debt and the annual expenses of the government, taxes are necessarily imposed. In other words, the equal proportion to be contributed by each citizen is ascertained by law. He who withholds his just proportion, deprives the rest of the people of exactly the same amount withheld. His fraud operates as theft. The sum total necessary to meet the obligations of the nation must be raised. Fraud upon the revenue does not reduce that sum; it merely shifts the burdens evaded by the fraudulent, upon others who pay their full proportion besides. All honest men, therefore, have a common cause against the dishonest."

You, gentlemen, represent the honest men, and it is your duty to see that no defrauder of the revenue who can be brought to justice, escapes merited punishment. The higher in office, and the higher in social position the delinquent may be, the more unremitting and search-

ing should be your diligence in inquiry and presentment.

To these observations of the chief justice, it may not be out of place to add here, that great as is the debt forced upon the nation by the recent Rebellion, the results to the country which have followed from the war, to which that Rebellion led, should make us feel that the burden of the debt is light.

That war has done away forever with the miserable notion, which extensively prevailed at the time of the outbreak of the Rebellion, that the general government, because it was formed by the people of the several states, sovereign in some of their powers, should not exert any coercion to enforce its laws. No one is now willing to run a tilt against common sense by adducing any argument in support of this absurd position; and the war has demonstrated that the general government possesses all the power necessary to enforce obedience to its laws throughout the limits of the republic.

That war has also led to the great constitutional amendments; the amendment which declares that "neither slavery nor involuntary servitude, except as a punishment for crime, of which the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction;" and the amendment which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

These amendments constitute the great, the crowning glory of the country, for they make freedom, when not forfeited by crime, the legal condition of every human being within the jurisdiction of the United States, and equality before the law his constitutional right.

We had intended, gentlemen, to say something respecting the treatment which Chinese and other Asiatics have sometimes received in this district. But the district attorney informs us that there are no cases pending which would require a consideration of this matter by you. We will therefore only observe that although there may be reasonable differences of opinion with respect to the wisdom and policy of encouraging the immigration to this country of persons, between whom and our people there is such marked dissimilarity in constitution, habits and manners; yet so long as our country seeks to enlarge her commerce by treaties with Asiatic countries, and to secure protection to her own citizens in those countries by pledging protection to their citizens in this country, it is the duty of the government to exert its power, its entire power if necessary, to enforce its obligations in this respect.

And more than this—independently of all such considerations of duty or interest, it is base and cowardly to maltreat these people whilst they are within the jurisdiction of our government. If public policy requires that they should be excluded from our shores, let the general government so provide and declare, but until it does so provide and declare, they have a perfect right to immigrate to this country; and whilst here they are entitled, equally with all others, to the full protection of our laws. It is unchristian and inhuman to maltreat them, as has been sometimes done by disorderly persons, we are sorry to say, in this district.

We are not aware, gentlemen, that any matter will be presented to you requiring any other special directions than those already given. Should any such arise, the court will again call you before it and give such instructions as the matter may require. You are at liberty at any time to ask the advice of the court upon any questions of law relating to matters under investigation before you, although you will probably find the advice of the district attorney upon those matters sufficient to guide your action.

Case No. 18,256.

CHARGE TO GRAND JURY.

[2 Spr. 279.]

Circuit Court, D. Massachusetts. May 15, 1861.

CONSTITUTIONAL LAW—POWER OF CONGRESS TO PROTECT COMMERCE—PENAL ENACTMENTS—INSURRECTION—BELLIGERENT RIGHTS—FUNCTIONS OF JUDICIARY.

[1. The clause in the constitution which gives to congress the power to define and punish piracy is not the only provision conferring authority to protect the commerce of the United States by penal enactments. The power given to regulate commerce, and to make all laws necessary and proper for carrying that power into effect, invests congress with authority to give full protection to commerce by its criminal jurisprudence.]

[2. Statutes passed by congress in pursuance of this power are of paramount authority, and cannot be invalidated or impaired by the action of any state or states. Any law, ordinance, or constitution made by them for that purpose is wholly nugatory, and can afford no legal protection to those who may act under it.]

[3. In case of an attempted revolution to overthrow the authority of the United States, where a number of states combine for that purpose, it is the province of the political department of the government to determine whether belligerent rights shall be accorded to them. Until belligerent rights are so accorded, the judiciary cannot recognize any right in the insurgents to carry on legitimate war, but must regard them as rebels and lawless aggressors upon the citizens of the United States, and apply to them the penal laws which make their acts punishable as crimes.]

SPRAGUE, District Judge (charging grand jury). At the last term of the district court, I gave some instructions to the grand jury upon the subject of treason, and other offences tending to subvert the government or prevent the execution of its laws. [Case No. 18,273.] That charge having been published will be in the hands of the district attorney, and a printed copy may be laid before you.

I do not deem it necessary, therefore, now to repeat it. I would invite your attention to that part of the Criminal Code which is intended for the protection of the commerce of the United States, and the suppression of general piracy, but more particularly the former:

By St. 1790, c. 9, § 8 (1 Stat. 113), it is enacted "that if any person or persons shall commit upon the high seas, or in any river, haven, basin, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which is committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; * * * every such offender shall be deemed, taken and adjudged to be a pirate and felon and, being thereof convicted, shall suffer death."

By section 9, it is enacted "that if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death."

The tenth section extends the punishment of death to accessories before the fact. They are those who aid, assist, procure, command, counsel, or advise any person to commit any such robbery, murder, or other piracy.

The eleventh section punishes accessories after the fact. They are those who, "after any murder, felony, robbery, or other piracy what-

soever aforesaid," shall have been committed, shall furnish aid to those by whom the crime has been perpetrated.

By section 12, "if any seaman or other person shall * * * confederate, or attempt or endeavor to corrupt any commander, master, officer, or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate knowing him to be such, or shall furnish such pirate with any ammunition, stores or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; * * * such person or persons so offending, and being thereof convicted," shall be subject to fine and imprisonment.

By St. 1820, c. 113, § 3 (3 Stat. 600), "if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate;" and, on conviction, shall suffer death.

"And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate;" and, on conviction, shall suffer death.

By St. 1825, c. 65, § 6 (4 Stat. 116), "if any person or persons upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, shall, by surprise, or by open force or violence, maliciously attack, or set upon, any ship or vessel belonging in whole or part, to the United States, or to any citizen or citizens thereof, or to any other person whatsoever, with an intent unlawfully to plunder the same ship or vessel, or to despoil any owner or owners thereof of any moneys, goods, or merchandise, laden on board thereof, every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony," and subject to fine and imprisonment.

By section 7, "if any person or persons upon the high seas, or in any other of the places aforesaid, with intent to kill, rob, steal, * * * or to do or perpetrate any other felony, shall break or enter any ship or vessel," he shall be liable to fine and imprisonment.

By St. 1846, c. 98, § 5 (9 Stat. 73), "if any captain or other officer or mariner, of a ship or vessel, on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, shall piratically or feloniously run away with such ship or vessel, * * * or yield up such ship or vessel voluntarily to any pirate," he shall be subject to fine and imprisonment.

By St. 1847, c. 51, § 1 (9 Stat. 175), "any subject or citizen of any foreign state, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy," may be tried, convicted, and punished in the same manner as other persons charged with piracy.

So far as the foregoing enactments are intended to punish aggressions upon the vessels

of foreign nations by pirates who are regarded as the enemies of mankind, hostes humani generis, they are founded upon the first article of the constitution, which gives to congress the power to define and punish piracy. But that is by no means the only clause in the constitution that gives authority to protect the commerce of the United States by penal enactments. Congress is, in express terms, vested with the power to regulate commerce, and to make all laws necessary and proper to carry that power into effect; and there can be no doubt that the legislature is thus authorized to give full protection to the commerce of the United States by its criminal jurisprudence. This power has been exercised ever since the organization of our government, and has been affirmed by the supreme court. *U. S. v. Coombs*, 12 Pet. [37 U. S.] 72. It is, then, the province of those who have the power of legislation to determine what penalties shall be inflicted upon such as commit aggressions or depredations upon our commerce; and it is the province of the judiciary to ascertain and follow the legislative will.

These statutes being enacted pursuant to the constitution are of paramount authority, and cannot be invalidated or impaired by the action of any state or states; and every law, ordinance, and constitution made by them for that purpose, whatever its name or form, is wholly nugatory, and can afford no legal protection to those who may act under it. But suppose that a number of states undertake by revolution to throw off the government of the United States and erect themselves into an independent nation, and assume in that character to issue commissions authorizing the capture of vessels of the United States, will such commissions afford any protection to those acting under them against any penal laws of the United States? Cases have heretofore arisen where a portion of a foreign empire—a colony—has undertaken to throw off the dominion of the mother country, and assumed the attitude and claimed the rights of an independent nation; and in such cases it has been held that the relation which the United States should hold to those who thus attempt and claim to institute a new government is a political rather than a legal question; that, if those departments of our government which have a right to give the law, and which regulate our foreign intercourse and determine the relation in which we shall stand to other nations, recognize such new and self-constituted government as having the rights of a belligerent in a war between them and their former rulers, and the United States hold a neutral position in such war, then the judiciary, following the other departments, will to the same extent recognize the new nation.

But if the legislative and executive departments of the government utterly refuse to recognize such new government, or to acknowledge it as having any belligerent or national rights, and, instead of taking a neutral attitude, endeavor by force to suppress depredations on commerce by such assumed government, as violating the rights and infringing the laws of the United States, then the judiciary will hold that such depredations are not to be considered as belligerent, and entitled to the immunities of lawful war, but as robbery or other lawless depredations, subject to the penalties denounced by our laws against such offences. *U. S. v. Palmer*, 3 Wheat. [16 U. S.] 618, 634, 635; *U. S. v. Klintock*, 5 Wheat. [18 U. S.] 144, 149; *U. S. v. Smith*, Id. 153, 155, 161, 162; *U. S. v. Pirates*, Id. 193, 194, 197. See, also, *The Palmyra*, 12 Wheat. [25 U. S.] 16; *The Marianna Flora*, 11 Wheat. [24 U. S.] 40; *U. S. v. The Malek Adhel*, 2 How. [43 U. S.] 232. The judiciary certainly cannot adopt a more indulgent rule toward those who are in open rebellion against the authority of the United States, or toward aliens co-operating with and

acting under the assumed authority of such rebels. While the other departments of the government and the nation refuse to regard any state, or association of states, as having the rights of a belligerent, or as carrying on legitimate war, and are exerting not only moral but physical force against them as rebels, and lawless aggressors upon the United States and its citizens, the courts also must so regard them, and cannot admit that any legislation or assumption of power by such state or states can authorize acts in violation of the laws of the United States, or change the character of offences under them.

There is another view. Mere rebellion absolves no man from his allegiance. Citizens of the United States, therefore, may not only be subject to the penalties of treason; but if they commit hostilities upon the commerce of the United States, under a commission from any foreign nation, even the oldest and best established,—such as England or France, for example,—they may be dealt with as pirates by the express enactments in the ninth section of the statute of 1790, which has already been referred to. And aliens who are subjects or citizens of any foreign state, with whom we have a treaty,—such as is described in the statute of 1847 (chapter 51), which has already been quoted,—if, in violation of such treaty, they make war upon the United States, or cruise against our vessels or property under a commission from any foreign government, however long acknowledged, may, by the clear provisions of that statute, be dealt with as pirates.

If aliens, subjects of a nation with whom we have no such treaty, commit acts of hostility upon our commerce, under the alleged authority or commission of a new and self-created government claiming to be independent, it may be material to inquire whether such government is to be regarded as having the immunities of a belligerent, or whether such aliens may be treated as robbers on the seas; and this inquiry will be governed by the principles which I have already stated.

Besides the laws to which I have called your attention, there are others designed for the protection of persons and property upon the ocean, by prescribing the duties and liabilities of the officers and marines on board American vessels; but these do not seem to require any particular attention at the present time.

Case No. 18,257.

CHARGE TO GRAND JURY.

[Taney, 615.]¹

Circuit Court, D. Maryland. April, 1836.

GRAND JURIES—EVIDENCE TO JUSTIFY PRESENTMENT.

[Grand jurors should present no one, unless, in their deliberate judgment, the evidence before them is sufficient, in the absence of any other proof, to justify the conviction of the party accused.]

TANEY, Circuit Justice (charging grand jury). It has been usual for this court, at the opening of the term, to deliver a charge to the grand jury; and you will probably expect one from me, in conformity with this practice. As I doubt much the necessity of continuing the custom, and may not hereafter adhere to it, my address to you will be a brief one, and its chief object to explain why I am disposed to depart from the former practice.

There was a time, without doubt, in the days that have gone by, when precise and detailed instructions from the court, to the grand jury, were necessary for the purposes of justice. But in the present enlightened state of the public mind, when education and useful information

¹ [Reprinted by permission.]

are not confined to a few, but diffused generally throughout the community, every citizen summoned as a juror, has a general knowledge of the duties he is called there to perform, and of the manner in which it is incumbent on him to discharge them; and in all cases demanding more precise and particular knowledge, you will have the aid of the district attorney, whose duty it is to counsel you in matters of law, whenever you may think proper to require it. It cannot, therefore, be necessary, in a charge from the bench, to enumerate and define, with legal precision, the various offences against the United States, which are punishable by indictment in this court. But few, I trust, if any, infractions of the law are likely to come before you, and it would be a waste of time in the court to engage itself in discussing principles, and enlarging upon topics which are not to lead us to some practical result; nor can any useful purpose be answered by calling upon you to follow the court through the wide field of criminal jurisprudence, when it is well known that your labors will be confined to a very small portion of it. It is my earnest desire, that we should proceed at once, with industry and energy, to execute the duties for which we are assembled, and while we give to every subject brought before us, the most ample time for full examination and elaborate judgment, not a moment should be wasted in unnecessary forms.

The court must, however, impress upon you the propriety of being diligent in your inquiries, and careful and elaborate in your conclusions. In a country like ours, blessed with free institutions, the safety of the community depends upon the vigilant and firm execution of the law; every one must be made to understand, and constantly to feel, that its supremacy will be steadily enforced by the constituted tribunals, and that liberty cannot exist under a feeble, relaxed or indolent administration of its power, where crime goes unpunished and the law is contemned. With a criminal code so mild and forbearing as ours, there can be no just cause for sympathy with any party who voluntarily, under any pretext, incurs its penalties; and negligence or carelessness in your inquiries would tend to multiply the number of offences, and would deprive society and the individual citizen of the protection and security to which they are entitled.

But in our desire to bring the guilty to punishment, we must still take care to guard the innocent from injury; and every one is deemed to be innocent, until the contrary appears by sufficient legal proof. You will, therefore, in every case that may come before you, carefully weigh the testimony, and present no one, unless, in your deliberate judgment, the evidence before you is sufficient, in the absence of any other proof, to justify the conviction of the party accused. And this rule is the more proper, because he is not permitted to summon witnesses or adduce testimony to the grand jury, and your decision must be made without hearing his defence. Gentlemen, you may retire to your room.

Case No. 18,258.

CHARGE TO GRAND JURY—THE CIVIL RIGHTS ACT.

[1 Hughes, 541.]¹

Circuit Court, W. D. North Carolina. April, 1875.

CIVIL RIGHTS BILL—EFFECT.

1. In North Carolina, the equal rights, in inns and public conveyances, of all persons without distinction of class, are fully protected by state statutes, and existed as to inns at common law; and the act of con-

gress commonly called the "Civil Rights Bill," was unnecessary in the state; and its only effect is to give jurisdiction of wrongs committed against citizens on account of class to the federal courts.

2. These laws, state and national, were intended to secure political and legal equality of rights to all citizens, but were not intended to establish social equality, or to enforce social intercourse between different classes of citizens.

3. Quære, whether the civil rights acts of congress are constitutional in so far as they legislate upon the rights which appertain to men in their character as citizens of the states as distinguished from those which belong to them as citizens of the United States?

The following opinion was given in response to inquiries from the grand jury, in regard to their duties under the act of congress just then passed, commonly called the "Civil Rights Bill." See Acts 1874-75 [18 Stat.] c. 114, p. 335.

DICK, District Judge (charging grand jury). I will consider the subject in the following order: (1) What was the existing law before the passage of the act? (2) The provisions and purposes of the act. (3) Had congress the constitutional authority to pass the act?

Under the constitution and laws of the United States, and the constitution and laws of this state, the colored man is a free citizen, and entitled to the legal rights of all other citizens.

We propose, in the first place, to inquire what were the rights of persons at common law, before the passage of the civil rights bill, as to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances by land or water, theatres, and other places of public amusement. We will confine our attention chiefly to inns, as the principles of law in such cases are applicable to common carriers, and other public undertakings and employments. By referring to standard works which treat of this subject at common law, we will find the following principles established by frequent adjudication: A person who makes it his business to entertain travellers and passengers and provide lodgings and necessaries for them and their horses and attendants, is a common innkeeper; and it is no way material whether he have any sign before his door or not. 3 Bac. Abr. 660. The duty of innkeepers extends chiefly to entertaining and harboring travellers, finding them victuals and lodgings, and securing the goods and effects of their guests; and, therefore, if any one who keeps a common inn refuses either to receive a traveller as a guest into his house, or to find him victuals and lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages for the injury, in an action on the case, at the suit of the party grieved, but may also be indicted and fined at the suit of the king. For he who takes upon himself a public employment must serve the public as far as his employment goes. Id. 662. Also it is said that an innkeeper may be compelled by the constable of the town to receive and entertain a person as his guest. Id. 664. An inn has been judicially defined to be "a house where the traveller is furnished with everything which he has occasion for whilst on his way." But a mere coffee-house, or eating-room or boarding-house, is not an inn. 1 Pars. 623. One who entertains strangers occasionally, although he receives compensation for it, is not an innkeeper. Mathews' Case, 2 Dev. & B. 424. An innkeeper may refuse to receive a disorderly guest, or require him to leave his house. He is not bound to examine into the reasonableness of the guest's requirements. And while travellers are entitled to proper accommodations, they have no right to select a particular apartment, or to use it for purposes other than those for which it was designed. 1 Pars. 523.

The law only obliges an innkeeper to furnish proper and convenient accommodations for his guests, and in doing this, he may arrange his business to suit his own advantage, while he

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

complies with the reasonable requirements of his guests. This state and other states of the Union, have statute regulations upon the subject of inns. In every prosperous and commercial country there are laws upon this subject, as travellers and men of business must have places of entertainment where their reasonable wants of lodging and subsistence can be conveniently obtained. We find in ancient Rome, that the pretors established many wise regulations for the accommodation of travellers, which are very similar to the principles of the common law and our state statutes.

In this state we find a statute originally passed in 1798, which provides, that every person wishing to keep a common inn, tavern or ordinary for the entertainment of travellers and others, shall apply to the board of county commissioners for a license to do so, "and the applicant must give bond in the sum of one thousand dollars, payable to the state of North Carolina," and conditioned for finding and providing good and wholesome diet and lodgings for his guests, and stable and provender for their horses; and also to safely keep for his guests all such articles and property as may come to his care and charge as an innkeeper; and on breach of any condition thereof, any person injured may put the same in suit. Bat. Revisal, c. 51. This is a statute remedy in addition to the remedies at common law, and is secured by bond with sufficient sureties. This statute asserts the rights provided for in the civil rights bill, and secures them more effectually than the act of congress. The penalty in the act of congress is five hundred dollars without any security; but any damages incurred are secured in the state statutes by a thousand dollar bond with sureties. In both instances, if the statute remedy is pursued by the party injured, the common law remedies are waived. It is thus apparent that all the rights to the full and equal enjoyment of the advantages, accommodations, facilities, and privileges of inns, public conveyances, etc., are derived from the common law and state statutes, and fully existed before the passage of the civil rights bill. By the common law and statutes of this state, no discrimination is made against colored men as a class, or against non-resident citizens. The civil rights bill was, therefore, it would seem, unnecessary, so far as this state is concerned; and being unnecessary, the question arises whether congress, under any provision of the constitution, had the authority to legislate upon domestic and local subjects, which are properly under the control of state action. We will consider this question in a subsequent part of this charge.

Both the national and state governments have conferred upon the colored man all the legal rights of citizenship, and both governments would be untrue to themselves if those rights were not properly protected and enforced by suitable legislation. In political circles it may be said that the rights of citizenship ought not to have been conferred upon the colored man by the general government, and the Southern states acted under an unwarranted compulsion when they recognized and established those rights in their new state constitutions. Those states entered into a rebellion against the general government, to protect and secure the institution of slavery, and the Rebellion was suppressed by force of arms, and the government imposed upon those states certain fundamental conditions as prerequisites to their readmission into the Union. These fundamental conditions were accepted by the insurrectionary states, and were incorporated into their constitutions. The full rights of citizenship were thus conferred upon colored men by the amendments of the national and state constitutions, and directly resulted from the Rebellion, and were not created by the civil rights bill. If these rights were unjustly and improperly conferred the wrong is attributable to the Rebellion which brought on such consequences. These amendments to the national

and state constitutions have been approved and adopted by the people in the manner provided by our fundamental law and are now a part of the law of the land, which courts of justice are bound to administer.

We will now consider what are the provisions and purposes of the civil rights bill. The first section enacts that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to the citizens of every race and color, regardless of any previous condition of servitude. The second section provides that any person who shall violate the first section, shall be liable to a penalty of five hundred dollars, and also to an indictment for misdemeanor: the penalty to be recovered by suit of the party injured, and the indictment to be prosecuted in the federal courts. The third section gives to the federal courts exclusive jurisdiction of the suit and indictment mentioned in section 2, and makes it the duty of district attorneys, marshals, deputy marshals, and United States commissioners, to see that all offences under section 2 are properly prosecuted. Section 4 provides that no citizen shall be excluded from jury service in the national or state courts on account of race, color, or previous condition of servitude. Section 5 provides that all cases arising under this act in the federal courts, may be reviewed by the supreme court without regard to the sum in controversy. In this act we find all the usual safeguards which are adopted in the enactment of laws to prevent oppression and secure the rights of individual citizens. The purposes of the bill are fully expressed in the preamble: "Whereas, we recognize the equality of all men before the law, and hold that it is the duty of the government in its dealings with the people to mete out equal and exact justice to all of whatever nativity, race, color or persuasion, religious or political."

From the preamble and all the provisions of the act, it is obvious that the civil rights bill neither directly nor indirectly confers, nor was intended to confer any rights or privileges of social equality among men. Neither have the recent amendments of national or state constitutions any such purposes or effect. Every man has a natural and inherent right of selecting his own associates, and this natural right cannot be properly regulated by legislative action, but must always be under the control of individual taste and inclination. There have always been different circles in society, and this condition of things will ever remain among men. This natural right and inclination of selecting associates exists among the animals of every species. Even in free and enlightened Athens we find among the citizens of the republic well-defined social distinctions which could not be regulated by public law. The Athenians would not associate on terms of social equality with the most learned and distinguished foreigners, who were regarded as barbarians. They once put a citizen to death for interpreting into the language of his country the message of a Persian king. The iron laws of Sparta placed the citizens upon terms of social equality, and made them a nation of savage warriors and ignorant barbarians. The founders of Rome were a band of robbers and outlaws and mingled in free and equal social intercourse; but when Romulus selected the centum patres, the social distinction of patricians and plebeians was established, which for seven hundred years disturbed the peace of the kingdom and commonwealth, and led to the establishment of the empire. In England political and social distinctions have always existed, and cannot be broken down without the complete subversion of the government. The hope and expectation that there will ever be a nation on earth in which all men will asso-

ciate upon terms of social equality is a wild dream of fanaticism, which can never be realized. It certainly cannot be a matter of surprise that among the white people of the Southern states, there should be strong opposition to according equal social privileges to the colored race. The colored men were formerly slaves, and the condition of servitude rendered them greatly wanting in education, refinement and social culture. White men often came in contact with colored men, but the association was that of superiors with inferiors. Before the war, white men who associated with colored men on terms of social equality became degraded in the eyes of the community. These social prejudices naturally resulted from the condition of things and are too deeply implanted to be eradicated by any legislation. Any law which would impose upon the white race the imperative obligation of mingling with the colored race on terms of social equality would be repulsive to natural feeling and long established prejudices, and would be justly odious. There is no principle of law, human or divine, that requires all men to be thrown into social hotchpot in order that their equality of civil rights may be secured and enforced. The civil rights bill neither imposes nor was intended to impose any such social obligation. It only proposes to provide for the enforcement of legal rights guaranteed to all citizens by the laws of the land, and leaves social rights and privileges to be regulated, as they have ever been, by the customs and usages of society. I will briefly restate the principles of law which we have been considering as they exist in this state, independent of the civil rights bill. The law only requires innkeepers, common carriers, etc., to furnish accommodations to colored men, equal to those provided for white men, when the same price is paid. Innkeepers may have separate rooms and accommodations for colored men, but they must be equal in quality and convenience to those furnished white men. Railroad companies may have first class coaches for colored men, and first class coaches for white men. If white men are protected from the intrusion of colored men, colored men must likewise be protected from the intrusion of white men, as the legal rights of both classes are the same. Both races are alike entitled to receive convenient and comfortable accommodations in inns and public conveyances, and neither a white man nor a colored man has a right to say that the innkeeper shall put them in the same room without their mutual consent. If a traveller gets inn accommodations and comfortable transportation according to the price paid, he has no just cause of complaint, and the innkeeper and common carrier discharge the obligations imposed upon them by law. If the innkeeper tenders such accommodations, and the guest refuses them, he may compel the guest to quit the inn, and seek for accommodation elsewhere. *Fell v. Knight*, 8 Mees. & W. 276.

I have thus stated the conditions and limitations established by the common law and statute law of North Carolina, regulating the relative rights and responsibilities of innkeepers and their guests. If any person within the jurisdiction of this state is denied his legal rights by an innkeeper, the party injured has the following remedies under the state laws: (1) By civil action and indictment at common law, prosecuted in the superior court. (2) By civil action on innkeeper's bond, as provided by statute.

If these legal rights cannot be properly enforced by a colored man in the state courts, then he may remove his suit in the state courts to the federal court, under the civil rights bill of the 9th of April, 1866 [14 Stat. 27]. Thus, it would seem that under existing laws in this state, the colored man has all the rights and remedies of any other citizen, in relation to the subjects embraced in the civil rights bill. I am not aware that there is any law in North Carolina which in express terms makes any discrimination against the colored race, except

the statute regulating the domestic institution of marriage, and this subject is and must ever remain under the exclusive control of local state government. It has been alleged that a few municipal charters granted by the present legislature, in effect deprive colored citizens of some elective franchises which are enjoyed by white citizens. This subject is not embraced in the civil rights bill, and calls for no expression of opinion in this charge.

We will now proceed to consider the important question as to what extent congress has the constitutional authority to establish and regulate the civil rights of citizens of the United States in the several states. This question has recently been elaborately considered by the supreme court of the United States, in the *Slaughterhouse Cases*, 16 Wall. [83 U. S.] 36, and also by the supreme courts of Ohio and Indiana in the cases of *State v. McCann* [21 Ohio St. 198] and *Cory v. Carter* [48 Ind. 327]. In these cases the following principles of law may be regarded as established. We only refer to the salient points pertinent to our discussion. Previous to the adoption of the recent amendments to the constitution of the United States, with the exception of a few express prohibitions and restrictions in the federal constitution, "the entire domain of the privileges and immunities of citizens of the states lay within the constitutional and legislative power of the states, and without that of the federal government." The states, with the restrictions and prohibitions referred to, could establish and regulate the civil rights of their own citizens. But when those rights are established by state laws, the constitution declares to the states that those rights, neither more nor less, shall be the measure of the rights of the citizens of other states within their jurisdiction. And quoting from the language of Chief Justice Taney in another case, it is said, "that for all the great purposes for which the federal government was established, we are one people, with one common country, we are all citizens of the United States," and it is as such citizens that their rights are supported by the United States courts. The recent amendments to the constitution were intended to secure freedom and the benefits of citizenship to colored men, and protect their civil rights against hostile state legislation. All state laws which discriminate against colored men as a race, and deny them equal civil rights with other citizens, are now prohibited by the constitution, and may be declared unconstitutional by the courts; and congress may also enforce the civil rights thus denied, by suitable legislation.

A state has the constitutional and legislative power to change or modify the common law, and by statute establish and regulate the rights of its citizens to the enjoyment and benefit of inns, public conveyances, etc., but cannot deny to any citizen of the United States, within its jurisdiction, the equal protection of the laws. In the *Slaughterhouse Cases* [supra] it is said: "The clause which forbids a state to deny to any person the equal protection of the laws, was clearly intended to prevent the hostile discrimination against the negro race, so familiar in the states where he had been a slave, and for this purpose the clause confers ample power upon congress to secure their rights and equality before the law. We doubt very much whether any action by a state, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision." As no such contingency had arisen in this state, as is contemplated by the fourteenth amendment, it may well be considered as a matter of grave doubt whether congress had the constitutional authority to legislate upon matters properly belonging to the local and domestic government of the state, when the state had in no way denied to persons within its jurisdiction the equal protection of the laws.

In a charge to a grand jury I will not pretend fully to discuss and decide upon the constitutionality of the civil rights bill, as this is an exceedingly delicate and important question, and one that has induced much public consideration and excitement.

Judge Cooley, in his learned and valuable treatise on Constitutional Limitations, at page 159 says: "It must be evident to any one that the power to declare a legislative enactment void, is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously do so, and with due regard to duty and official oath, decline the responsibility. Neither will a court, as a general rule, pass upon a constitutional question and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause. While the court cannot shun the discussion of constitutional questions, when fairly presented, they will not go out of their way to find such topics. They will not seek to draw in such weighty matters collaterally, nor on trivial occasions. It is both more proper and more respectful to a co-ordinate department to discuss constitutional questions only when that is the very *lis mota*. Thus presented and determined, the decision carries a weight with it to which no extrajudicial disquisition is entitled."

The constitutionality of the civil rights bill has been asserted by the deliberate action of congress, composed of many able lawyers and wise and enlightened statesmen, and it would be very presumptuous in me, collaterally, and without argument, to decide differently upon a question which that body carefully considered and acted upon under the solemn sanction of official obligation. "It is a solemn act in any case to declare that that body to whom the people have committed the solemn function of making the laws of the commonwealth, have deliberately disregarded the limitations imposed upon their delegated authority, and usurped power which the people have been careful to withhold." Cooley, Const. Lim. 160. This question will doubtless soon be decided by the supreme court of the United States, and when determined by that august tribunal, I feel confident that the decision will be acquiesced in by all the American people disposed to observe the law of the land. Although the constitutionality of the civil rights bill may be questioned, the act cannot properly be regarded as an oppressive exercise of legislative power. It only re-enacts the law already in force in this state, and furnishes new remedies not more stringent than those existing at common law and under our state statutes. It provides that those remedies shall be enforced in the federal courts, where all cases are tried by juries composed of just, impartial and enlightened citizens of the state, selected as state juries are selected; and the legal rights of parties are under the final control of the supreme court of the United States, consisting of learned and just judges, whose opinions are regarded as high authority in all the courts of this country and England. In the civil rights bill the legislative will of the nation has been solemnly expressed by the chosen representatives of the sovereign people; and it is to be hoped that all good citizens will yield obedience to the law, feeling well assured that the vexed and difficult constitutional questions which it involves, will be properly determined, and the rights of all citizens be justly administered by the judicial department of the government. This course of conduct will be in conformity to the true theory and spirit of our federal and state governments, and manifest the patriotic loyalty of our people.

If, therefore, any bill of indictment founded upon the civil rights bill is presented by the district attorney for your action, it is your duty to pass upon such bill as you pass upon all

other bills, and leave the constitutionality of the act to be determined by the court upon mature consideration, after being aided and enlightened by the careful investigations and able and learned arguments of counsel.

Case No. 18,259.

CHARGE TO GRAND JURY—CIVIL RIGHTS ACT.

[3 Hughes, 576.]¹

Circuit Court, W. D. Virginia. March, 1878.

CIVIL RIGHTS ACT OF MARCH 1, 1875.

A state officer, empowered by law to select jurors to serve in the courts of the state in the trial of civil and criminal cases, who for a series of years selects only white jurors, and fails to select colored jurors, is amenable to indictment in a court of the United States, under section 4 of the act of congress approved March 1, 1875 [18 Stat. 335], entitled "An act to protect all citizens in their civil rights."

The laws of Virginia intrust the whole duty of selecting jurors to serve in the state courts to the judges of the county courts. An act of the general assembly of the state, passed in 1870, provides that "all male citizens, twenty-one years old and not over sixty, who are entitled to vote and hold office under the constitution and laws of the state, shall be liable to serve as jurors." It is alleged as a fact that in many counties of the state colored men have never been put upon the juries. The act of congress of March 1, 1875, for the protection of the civil rights of all citizens, provides that: "Sec. 2. No citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color or previous condition of servitude, and any officer or other person charged with the duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars." At the March term of the circuit court of the United States for the Western district of Virginia, held at Lynchburg, the grand jury made presentment by indictment of several of the judges of the county courts of counties in the district for violation of the second section of the said act of congress just quoted. The indictments were found in pursuance of a charge of the judge of the court, which was as follows:

RIVES, District Judge (charging grand jury). I am required by act of congress to provide for your selection, as nearly as practicable, in conformity with the state law, such is the deference properly paid by congress to the laws and practice of the states. Hence, in the rule of court I have prescribed for the purpose, the lists are returned by the marshal from the various counties appurtenant to this court without discrimination as to race and without reference to politics. The only injunction is to have duly-qualified jurors, of sound judgment, and liable to no suspicion of any disaffection to the government or of any disinclination to execute the laws. From these lists you are then drawn by lot, so as to remove all possibility and repel any imputation of your being impaneled for any sinister purpose or for the accomplishment of private ends. With these precautions the court is assured of your impartiality and your ability to assert and vindicate the laws. You have no sooner taken your oaths, and your seats in the panel, than you are set aside and consecrated to a special and responsible duty, that of inquiring into offenses of every description

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

against the laws of the United States. You cannot, then, be approached by any one on the subject of your inquiries, either by verbal or written communications, unless with my leave, and any attempt at such tampering should be promptly reported to the court for its action. The witnesses you may need are fully protected from all intimidation and hindrance, and the officers who are to execute your process are encouraged and shielded by similar guards. All this displays the anxiety of the laws to insure you the most ample opportunities of prosecuting your inquiries free from all external pressure, and with exclusive reference to your own sense of duty. Outside opinions and outside influences are not to invade the sacred precincts of your deliberations. Fidelity to the laws and intrepid fidelity to your oaths is the motto that should be emblazoned over the door through which you retire, and where none can follow save the district attorney, on whom you can at all times call for the laws, and the witnesses who are to give you the facts. In order to preserve the due sanctity of your deliberations, you must be cautious to abstain from all disclosure of your proceedings, and in every respect to observe that secrecy to which you are sworn for obvious ends of justice and dignity.

As to the scope of your inquiries, they are coextensive with the jurisdiction of this court. They cannot go beyond. You are restricted to the statutes of the United States. The warrant for your finding must be found in them. This results from the nature of our governments, state and federal. Congress ordains laws to define and protect the operations of the government of the United States within the states. To this end it establishes courts of its own, and intrusts to them the due assertion and enforcement of its laws. Every question arising under the constitution, the laws, and the treaties of the United States are either primarily or mediately referable to the federal courts. Hence, if these respective tribunals, state and federal, keep within their prescribed orbits, and discharge their whole duty to the laws of both, there will scarcely be room or occasion for conflict of jurisdiction. But the moment a law of congress is disobeyed in any judicial quarter the danger of this collision becomes imminent, and it becomes the duty of all having power to guard against it to take every possible precaution to prevent it.

Under this persuasion and with this view I deem it my duty to call your special attention to a law of congress designed to secure to all persons "the equal protection of the laws," the denial of which, in a late case in this district, has brought the circuit court of the district in conflict with a state court, apparently to the disquietude of the public. I allude to an act of congress forbidding, under penalties, any discrimination on account of race or color to be made by those charged with the duty of returning jury lists.

Before citing it, however, I would beg leave to recall to you the requirements of your state laws and constitution, not that you have to deal with them on this occasion, but to show you that in the execution of this act of congress you are not asked to do anything contrary to them, but only what is strictly conformable to them. By the laws of the state no discrimination is made on account of race or color in the liability of its citizens to jury service. All male citizens, twenty-one years of age, not over sixty, who are entitled to vote and hold office under the constitution and laws of this state, shall be liable to serve as jurors, etc. Code Va. p. 1058, c. 157, § 1. This could not be otherwise, under the state constitution or the fourteenth amendment of the United States constitution. The former was adopted prior to the ratification of the latter, and it will be seen that the guarantees of the bill of rights are quite as strong as the language of this amendment. It is declared as follows (chapter 20): "That all citizens of the

state are hereby declared to possess equal civil and political rights and public privileges." Chapter 21: "The declaration of the political rights and privileges of the inhabitants of this state are hereby declared to be a part of the constitution of this commonwealth and shall not be violated on any pretence whatever." This, then, is a fundamental provision of your own state constitution. It was adopted by an overwhelming majority on the 6th of July, 1869. Following this, on the 8th of October, of the same year, was the formal ratification of the fourteenth amendment of the constitution of the nation. It is in these words: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." By the concluding clause of this amendment congress has power to enforce its provisions by appropriate legislation. In the exercise of this power congress has passed sundry laws to maintain this equality of rights, and to redress their violations. Prominent among these acts is the one I now desire to give you in charge. It is the act of March 1, 1875. It assures to all, without discrimination of race or color, the full and equal enjoyment of the accommodations and privileges of inns, public conveyances, theatres, and other places of amusement, and provides exemplary redress for the denial thereof. But it does not stop here. These are the lesser matters of the law, which, indeed, it scrupulously guards and protects; but it goes farther, and embraces the great monument of life and liberty in preserving "the trial by an impartial jury," and conforming to the grand "rescript" that "no man shall be deprived of his liberty except by the laws of the land or the judgment of his peers." This act, therefore, secures by its fourth clause to the lately enfranchised race the inestimable privilege of having their rights and privileges tried by jurors not subject to the traditional influences and spirit of caste. This is a great practical good, which this law seeks to secure, and, as such, deserves your earnest attention in the inquest with which I now charge you. But it must be admitted its scope is broader. It is well for you to consider its language. It is in these words: "That no citizen, possessing all other qualifications which are or may be prescribed by law, shall be disqualified for service as grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor and be fined not more than five thousand dollars."

It so happens that under the state laws the duty of making out and returning jury lists is devolved upon the judges of the county and corporation courts. Code Va. § 3, ch. 157, p. 1059. The act in question has, therefore, to deal with these officers. It is at this point congress intervenes, and constrains them by penalties to observe these provisions, which have naturally grown out of the fourteenth amendment. The offense thus denounced consists in the exclusion by these officers from their jury lists of qualified citizens because of their race, color, or previous condition of servitude. The motive makes and constitutes the misdemeanor. It may be difficult to prove. It is not given to you to know what passes in the mind of another; but, like all unlawful intents, the evidence of it may be found in presumptions of fact. When this intent has been declared, or where a de-

mand of a lawful jury without this discrimination has been refused, the offense would be clearly made out, provided you believe the witness to the declaration or denial. But such indubitable proof may not often be expected. You must look to the surrounding circumstances of the case and the overt acts of the parties to fix the intention of the latter in this exclusion. If it should appear to you that such officer has, by a long and unvarying course, refused to put on his lists the names of colored persons duly qualified, you would be compelled to accept this conduct as evidence of his guilt, indict him for the offense, and give him the opportunity to repel these strong presumptions of fact against him. If, on the contrary, it shall appear that these persons have sometimes listed, or offered to summon when asked, juries without this discrimination of race, you would scarcely be justified to impute this unlawful intent to such occasional omission. It is, in my view, the habitual neglect or the special denial in civil or criminal suits involving the antipathies of race that is aimed at by this act of congress. I trust it will be sufficient for the ends of public justice that attention should be attracted to this law by your findings. I cannot and do not suspect these officers of obstinate or determined disobedience to law. That may be determined by the future. It is the observance of the law, and not punishment for the violation, that is sought. But you and I must obey the laws we are sworn to administer. We cannot be deterred from it by clamors and threats, however industriously raised against us. I feel confident you are duly impressed with the sense of your responsibility, and that you cannot and will not shrink from doing your whole duty.

This inquisition has already taken place in the counties pertaining to the courts at Danville. It remains for you now to prosecute it in counties represented on your panel, leaving the grand juries of the other courts to resume it on their respective parts. If it should be found here, as at Danville, that some obey and others disobey the law, you must needs choose between them. Both cannot be right. If you excuse the disobedient, you reflect on the obedient. It is your duty to enforce a uniform obedience, and exact a universal respect for the laws. If this shall be faithfully and fearlessly done throughout my whole district, it will arrest future resort to the federal courts for a denial in this respect of "the equal protection of the laws," and leave the state courts in the full and free exercise of their appropriate jurisdiction. But if this be not done, and a plain duty is evaded under artfully devised and misplaced scruples as to the law, you will be fomenting further disorders and conflicts. I am at loss to conceive of any motive on the part of honorable and intelligent citizens to undertake in any way to obstruct the great organic measures to which your faith, as a people, is pledged in the most solemn manner, or to thwart the mission of the general government, in all its departments to give the equal protection of the laws to all its citizens without distinction.

Before the Rebellion it must be conceded that the general government was felt by our people only in the blessings it dispensed; in the maintenance of commerce and peace with all nations; the encouragement of our industries, productions, and manufactures; in a sound, convertible currency; and in admirable postal facilities for all the varied demands of intercourse and business. This was necessarily and in a great measure changed by the war of the Rebellion. A heavy debt was incurred in its suppression by arms. That debt fell upon the people of all the states alike, and had to be raised by direct excises. But happily these direct taxes are not, like those following the war of 1812, a burden upon property. They now rest upon articles of luxury, and arise from consumption. Those who do not use tobacco or whisky, nor

deal in them, go free of this impost. Nevertheless the necessities of its collection and the protection of these revenues from illicit traffic brings within the states the collector for the sale of stamps to legitimate the traffic, and his deputies to supervise and suppress the violation of these laws. But they do not come among us without ample protection by law against their venality, extortion, or corruption. You will therefore scrutinize this as well as every other branch of the federal service in your midst, with the view of detecting and exposing any and every malversation in office. But, at the same time, you will see to it that these officers are duly protected in their rightful functions. It is not to be tolerated that they should be met and resisted by arms, and exposed to dastardly assassination by bands of defiant offenders. Not only has this resistance gone thus far elsewhere, but the state courts have arrayed themselves against these officers by indicting them for acts of resistance to these marauders, and refusing them a trial in the federal courts, as ordained by act of congress. This state of things is insufferable, and subversive of government and law. I trust it can never exist in this district. I look to you to denounce all such lawlessness, and to spare no pains to search out these contempters of law and civilization, and bring them to this bar for trial and punishment.

In calling your attention thus emphatically to the foregoing offenses, I would not have you forget that you have to pass under review, however cursory, all the criminal statutes of the United States. You will find them compiled under title 70 of the Revised Statutes, and are classified under heads respectively of crimes against the existence of the government; against public justice; against official misconduct; and finally against the elective franchise and the civil rights of citizens.

From this title you will see that there is no form of official wrong or corruption that has not been foreseen and provided for by congress. It is therefore largely in your power to maintain the purity and integrity of the federal service by denouncing all infractions of these laws. Hence, I especially solicit your scrutiny into the conduct of all the federal agencies within your district, pertaining to the courts, the revenue service, the national banks, and the postoffices. They are all closely allied to the interests of the people, and all reposing trust in you would like to be certified by you that all these departments are satisfactorily and purely administered. It does not fall to your lot, as much as elsewhere, to take cognizance of illicit distilling. It is, for the most part, restricted to the mountain fastnesses of the district, where it is more apt to escape detection and secure impunity. I am sorry to say that this offense has not decreased, as I hoped it would from the number of convictions had and the exemplary punishment inflicted. There seems to be a strange sort of fascination about it, proof against all the pains and penalties of the law. Nevertheless we are bound to pursue it. The law is too plain; the mischief too manifest; the evil example of impunity too flagrant. We must persevere to the end. The law must not be borne down by continuous violations and persistent defiance.

In conclusion, you need scarcely be assured that the court is ready to exert all its authority to maintain the dignity and promote the success of your deliberations. Its process and its officers are at your call, to enable you to extend your researches; but at the same time I must urge you to all convenient dispatch, and the utmost practicable economy of time and money.

NOTE [from original report]. By the resolution of the general assembly of Virginia the attorney-general of the state was instructed to take proper steps to bring the subject of arrest of the county judges indicted under this charge for review by that court. That court had not passed on this subject when this volume was published.

Case No. 18,260.

CHARGE TO GRAND JURY—CIVIL RIGHTS ACT.

[21 Int. Rev. Rec. 173.]

Circuit Court, W. D. Tennessee. March, 1875.

CONSTITUTIONAL LAW—CIVIL RIGHTS OF COLORED PEOPLE—THIRTEENTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

[1. The thirteenth amendment to the constitution of the United States simply abolished slavery. It gave the freedman no right of protection from the federal government superior to that of his white fellow citizens, and no exemption from the power of state control which might be exercised against others. It gave congress no more authority to enact that he should have the right to vote, to testify, to make contracts, to hold real estate, exercise trade, attend public school, or any other matter within the limits of a state, than it does to enact the same thing in reference to white men.]

[2. The provision of the fourteenth amendment, that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," prohibits the action of the state alone; it gave congress no power to legislate against the wrongs and personal violence of citizens.]

[3. The privileges and immunities which this clause forbids the states to abridge are only that limited class which depend immediately upon the constitution of the United States, such as the right to pass from state to state and to the national capital, to protection upon the high seas and in foreign countries, and the like.]

[4. Congress has no authority, under the thirteenth and fourteenth amendments, or otherwise, to declare it a crime for any individuals to deny to negroes the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the theaters and inns of a state.]

EMMONS, Circuit Judge (charging grand jury). It is to be regretted that a question of such exceptional importance, and one which is producing so much excitement, should come before the court in this form. At an early day, however, and during the term, we are compelled by law to decide the matter you lay before us. The severe penalties imposed by this law upon prosecuting attorneys and other officials will, we are advised, be attempted to be enforced should the grand jury fail to indict, in the assumption that their action will be controlled by such officers unless the court acts. Every consideration makes it a duty to answer your question at once. You ask whether it is a crime for which you have a right to find an indictment that a negro has been denied "the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of the theaters and inns" of the state. Such a denial is not an offense over which congress can give this court jurisdiction. Those are matters which the state government alone controls. The parties who think themselves aggrieved can bring civil action in this court at once. Any decision we may then make can be reviewed by the supreme court. In ordinary circumstances, this brief reply is all which we should make. It is all which, as a very general rule, the proprieties of such occasions authorize. But such are the exceptional conditions which attend these complaints before you, and such the excited condition of those classes whom the law was intended to affect, that after much hesitation we have yielded to an earnest request to state, in a simple and untechnical form, the reason upon which our advice rests. To do this successfully, in haste and without preparation, is still more difficult for a judge than to treat the matter technically, when addressing the judicial and professional mind.

Until the three recent amendments to the national constitution, which abolished slavery and attempted to protect the civil and political rights of the freedmen, all parties conceded that the federal government had no power

whatever to restrain such an offense as this. The punishment of murder, arson, assaults and batteries, trespasses, frauds, injuries to reputation, of obstructions to the right of attending church, public schools, theaters, and forcing the right of being accommodated in inns, and by common carriers within the state, were matters not only not granted to the general government, but in the constitution itself expressly reserved to the states. The vast mass of civil and political rights included in the commendous phrase, the right of "life, liberty and the pursuit of happiness," rested entirely under state protection. To this familiar and unquestioned truism, there was universal assent then and is now. The only question presented for judicial determination is, have these amendments completely revolutionized the whole character of our government? Because it is entirely evident that, if congress has the power of regulating the theater and "other places of amusement" in Memphis and other cities of the Union, this necessarily involves the power of protecting the more sacred and important rights of the colored citizen.

The thirteenth amendment abolished slavery only; it did no more. It gave the freedman no right of protection from the federal government superior to that of his white fellow citizens, and no exemption from the power of state control which might be exercised against others. The right of legislation secured to congress in the amendment was that only of creating penalties for a violation of its provisions, and providing securities against the re-establishment of slavery, either generally or in particular instances. It accords no more authority to enact that he should have the right to vote, to testify, to make contracts, to hold real estate, exercise trade, attend public schools, or any other matter or thing within the limits of a state, than it does to enact the same thing in reference to white men. The utmost effect of this great provision in our constitution was to make the colored man a citizen, equal before the laws with the race which had enslaved him. For this purpose the fourteenth amendment was by no means necessary. So far as the control of congress is concerned, the states were still free to legislate in reference to what persons should attend theaters, be accommodated at inns, or be transported by common carriers within the states. As an illustration of unquestioned local state power anterior to this amendment, we suggest a fact in the history of the state of Michigan. By the voice of the people, it three times denied the colored race, though taxed, the right of voting. The supreme court of that state sustained as lawful the action of a steamboat master excluding a colored person from the steamer's cabin, compelling him to take passage on the deck. These judges were high-toned gentlemen, of far more than ordinary legal culture and ability, and elected to their places by a then strongly predominant antislavery party in the state. They sustained the action of the carrier, as a wholesome police regulation, calculated, in view of our American education and prejudices, to secure peace and harmony in that department of commerce and business under his control. It was deemed injudicious that the law should interfere with his action. The state legislature, also overwhelmingly antislavery in sentiment, might have changed this rule, but refused to do so. Against this action, political and judicial, a large and influential portion of the people earnestly struggled and protested. But all understood, from the numerous rulings of the supreme court, there was no power in congress to interfere with the decision of the judges and the people of the state. Like conditions, in a greater or less degree, characterized nearly every free state in the Union. A nearly similar judgment, arising upon facts since the amendment, has recently been pronounced by the learned judge of the superior court of

Cleveland, Ohio, in which he ruled that the manager of a theater might lawfully exclude from the dress-circle a colored person of ever so much respectability. It would seem to be clear that the abolition of slavery placed the negro in the former slave states just where he had before stood in the free states. What congress could not do in reference to a free negro in a Northern state, where slavery never existed, before the abolition of slavery, it could not afterwards do in regard to one living in the South. We conclude with confidence that the thirteenth amendment did not authorize congress to interfere with the private and internal regulations of theater managers, hotel keepers, or common carriers within the state, in reference to colored persons, any more than it did in regard to their white fellow citizens.

It will simplify the subject, before considering the fourteenth amendment, to say that the clauses forbidding the "states to deprive any person of life, liberty, or property, without due process of law, or deny to any person the equal protection of the laws," have no application to this subject. They are intended solely to prevent the arbitrary transfer of property from citizen to citizen without legal adjudication or process, and to prevent the establishment of tribunals for one class of persons varying from those which determine the rights of all. These inhibitions, too, beyond all controversy, are aimed at the action of the state only, and have no reference to individuals. The only provision of the fourteenth amendment which affects this question is that which provides that "no state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States." It would be as useless as it would be improper, in view of the authoritative judgment of the court of last resort, to do more than to explain just what it announces. In what are known as the Slaughterhouse Cases, 16 Wall. [83 U. S.] 394, two points were established: First, that this clause prohibited the action of the state alone, and gave congress no power to legislate against the wrongs and personal violence of the citizen; second, that the privileges and immunities which a state could not abridge were only that limited class which depended immediately upon the constitution of the United States. They are few in number, and of little importance to the great mass of the colored race in their present condition. The right to pass from state to state and to the national capital, to protection upon the high seas and in foreign countries, and a few others, were stated as illustrations. The great body of our civil and political rights, that of acquiring and enjoying property, real and personal, to exercise trades, attend schools and churches, to be protected against personal violence, and enjoy the freedom of opinion, were declared to rest entirely under state protection, and were not included in this amendment.

In reference to the first proposition, that the power of congress was not called into action under this clause until the state, through its political power, had violated its provisions by passing or attempting to enforce some law, obtained the unanimous consent of every member of the court. We do not understand that this is anywhere questioned. This legislation, therefore, when no such exigency has occurred, is without authority, and it is our duty, for this reason, to advise you not to find an indictment for a violation of its provisions.

The second proposition, affirmed by a majority of the court, just as conclusively establishes the invalidity of this law. The character of the wrong done—that of excluding a citizen from an hotel and a theater—is not such as congress has any right to punish. They, say the supreme court, are violations of such rights as attach to citizens of a state, and do not belong to those which he enjoys as a citizen of the United States. It is this latter limited

class of rights only which the fourteenth amendment protects. Within this judgment, therefore, there is no power of federal legislation to provide penalties for the violation of any privilege save the few which are enjoyed peculiarly under the federal constitution. The right to go from state to state, to visit the capital, and other national privileges, congress may protect. All others, among which are the rights claimed to have been infringed in the present instance, are beyond its control. For this additional reason the law which attempts to protect them is void for the want of power in the body which passed it. The Slaughterhouse Cases [supra] were well calculated to have elicited a different judgment, if the court had not felt constrained upon principle to decide it as it did. A state law had substantially interfered with the trade and calling of a large class of citizens. Every butcher and dealer in meats over a widespread territory was compelled to pay an onerous tribute to a single corporation. But their right to carry on a trade, to acquire and dispose of property, was held not to come within the protection of the fourteenth amendment. There was no middle ground for the court. They must hold either that it completely revolutionized the whole theory of our government, and transferred to federal control all those rights hitherto alone protected by state laws, or hold, upon the other hand, that it referred only to the few privileges secured by the national constitution. That court in the same volume applied the same principle where a woman in Illinois was rejected as an applicant for admission to the bar. It again decided that such right was not one of the immunities protected by the amendment. In [Bartemeyer v. Iowa] 18 Wall. [85 U. S.] 129, a state law having deprived a citizen of the right to sell what he owned and possessed, it held that the selling of property was a privilege and immunity protected by state laws and constitutions only, and was not protected by this clause. With the fact that this interpretation was equivalent to expunging it from the amendments altogether we have nothing to do. It is true, unquestionably, that any violation of any privilege or immunity protected by the federal constitution, by the state, could be punished and redressed by congressional law before the adoption of this amendment. As now judicially read by the court of last resort, it leaves the organic law in this regard precisely where it was before. It is one of those constructions, often resorted to, to prevent consequences serious and revolutionary, which courts believe were not contemplated by legislatures who pass laws, and by the people who adopt constitutions.

We do not deem it indelicate to express our sympathy with that large and respectable class of our fellow citizens, including beyond question a majority of the more conservative Christian gentlemen of the South, who regret that there exists nowhere, in either government, state or national, the power of punishing those mean and cowardly murders which are so frequently disgracing our civilization before the world. Although we have carried the doctrine of local government in township and county organizations to a great extreme, we find in all its ordinary administrations most beneficial effects. To its universal application, however, most statesmen now agree there should be some exceptions. In no country but our own is the discreditable fact true that where murder, and cruel and shocking outrages, are perpetrated by a dominant party in a narrow region of country, there is no power of punishment, save through the impracticable instrumentality of those who have either committed or sympathized with the crime. When conspiracies and combinations against the property, well-being, and life of classes of persons in the small divisions of our country include large portions of the constabulary, the magis-

tracy, and the jurors, grand and traverse, the inevitable consequence must be that the offenses they commit, or with which they sympathize, will be perpetrated with impunity. Unless our statesmen, state or national, create some jurisdiction of wider scope, and which will authorize indictments and trial beyond the narrow limits a majority of whose citizens abet the crime to be punished, the nation must still submit to the disgrace of yearly additions of mean and courage-wanting murders of the innocent and the helpless, without the slightest infliction of any legal penalty upon the offenders. It has been our painful duty in repeated instances to charge juries that the federal court had no cognizance of offenses where crimes so cruel and shocking have been proved that court, jury, and audience could scarcely refrain from tears of sympathy, and where the elegantly dressed, socially well-connected, and shameless murderers had, in the communities where they had shed innocent blood, not only confessed but boasted of their crimes, and who had either not been indicted at all, or, when tried, had been acquitted by juries, their coadjutors in crime, amid the acclamations of their co-conspirators. In a very recent case it was proved that a young man of wealth, education, and most estimable moral character was shot to death at midday in his own house by a band of ruffians, for no other reason than that he had acted as the chairman of a committee to wait upon the governor of his state to solicit his action for the protection of the negroes of his county who were being driven from their homes, their houses burned, and themselves murdered by the lawless conspirators by whom he was killed. The mock trial by which these infamous offenders were triumphantly acquitted was a still greater stain upon our civilization than the monstrous crime it affected to try. It is believed by many of our best citizens that there should be here, as in every other government on earth, some power to bring such wicked men to justice, outside of, and uncontrolled by, the wills and hands which have united in their atrocities. As it does not now exist, and as no attempt at alteration is made by the state powers, it is natural that all those whose hearts are not of flint, and hope to be blessed and prosper as they do unto others so they would that others should do unto them, should strive to the uttermost to find the source of protection in the federal constitution. In the present condition of public opinion the remedy should, perhaps, be sought through the political action of the state only. I have but small sympathy with the right of the negro to see the immodest and vulgar display in the ballet dance, which in modern times so universally disgraces the best theatrical presentations. I would have selected some more precious and beneficent privilege for protection, if the power had existed. We turn from this almost grotesque exercise of national authority, and express our regret only that it cannot be exerted to protect from pillage and murder the humble homes of those peaceful toilers who quietly and inoffensively labor to support their wives and little ones, and who do not officiously and distastefully thrust themselves in the face of those lighter and less reflective portions of society so frequently found among theatrical audiences. We believe the actual history of this unhappy question demonstrates that, where no legal force or constraint is used, the lady and gentleman of solid position and real cultivation are least annoyed by his presence when he is really worthy and cultivated; that, when left unstimulated by foreign and wicked influences, his own good sense, guided by public opinion, keeps him in his proper position as uniformly as all other classes of society.

A recent judgment of one of the learned justices of the supreme court, after enjoying the benefits of the elaborate arguments, and participating in the dissenting opinions in the

Slaughterhouse Cases, still affirms that violence upon the negro, simply because he is such, finding its sole animus in his race and color, may be made penal by congressional enactment. This utterance suggests, what otherwise we should have deemed impossible, that the supreme court may still find in the thirteenth amendment, which abolishes slavery, or the first clause in the fourteenth, which creates citizenship, so much incidental power to protect what they create, as will sustain a national law punishing the crime, where life, liberty, and property are violently taken, solely on account of the race and color of the party injured. Our sympathies are in that direction. Could we see a plausible path, leading to such ground, after what that court has said, we would gladly stand upon it. But so demonstrative appears to us the arguments, in view of the judgments of the supreme court already rendered, that a crime perpetrated by one citizen of Tennessee upon another, when it consists in the violation of some right which is enjoyed solely as the citizen of the state, and depends in no degree upon the national constitution, that we feel at liberty to give no different advice.

Case No. 18,261.

CHARGE TO GRAND JURY—FUGITIVE SLAVE LAW.

[1 Blatchf. 635.]¹

Circuit Court, S. D. New York. April, 1851.

THE FUGITIVE SLAVE LAW.

1. Considerations stated, which led to the enactment of the law of September 18, 1850 (9 Stat. 462), commonly called "The Fugitive Slave Law."
2. The several provisions of that law examined.
3. The prior act of February 12, 1793 (1 Stat. 302), was constitutional.
4. In regard to the power conferred by the act of 1850 upon those appointed to administer it judicially, it simply substitutes commissioners in place of the state magistrates to whom the act of 1793 confided the power.
5. The power to execute the act of 1850 is exclusive in the federal courts and officers named in it.
6. State tribunals and officers cannot, by the writ of habeas corpus, interfere with the federal authorities when they are acting upon cases arising under that act.
7. Nor can the state tribunals, under that writ, enquire into the constitutionality of the law or the jurisdiction of the federal court or officer.
8. The writ may be issued by the state authority, and it is the duty of the federal officer to make a return to it; but, when it appears that the detainer is by virtue of process issued under the act of 1850, any further proceeding under the writ is void.
9. In such case the federal officer must not give the party up, but must maintain his process with all the power conferred upon him.
10. The last clause of section 6 of the act of 1850 includes, among other process, the state writ of habeas corpus; but it does not embrace that writ when issued by the federal judiciary.
11. The constitutionality of the provisions of the act of 1850, which confer on commissioners the power to act under it, and which provide for a summary hearing and decision, was settled by the case of *Prigg v. Pennsylvania*, 16 Pet. [41 U. S.] 539.
12. The "judicial power" mentioned in the constitution and vested in the "courts," means the power conferred upon "courts" in the strict sense of that term—courts that compose one of the three great departments of the government; and not power judicial in its nature, or quasi judicial, invested from time to time in individuals, separately or collectively, for a particular purpose and limited time.
13. The proceeding contemplated by the clause of the constitution in regard to the delivery of fugitives from service or labor, is not a suit at common law,

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

within the meaning of the seventh amendment to the constitution.

14. So far as state laws conflict with the act of 1850, or tend to obstruct and embarrass its execution, they are utterly void.

At the commencement of the term, NELSON, Circuit Justice, in charging the grand jury, after instructing them upon the law applicable to the several cases that were to come before them, proceeded as follows:

Besides these instructions in respect to the cases on the calendar of the district attorney furnished to the court, I desire to call your attention, with some particularity, to a recent act of congress, commonly called "The Fugitive Slave Law," passed September 18, 1850.

This act has been the subject of much comment since its passage, and of various and conflicting opinions, both as concerns the constitutional principle involved, and the matters in detail embodied in its several provisions. It is a law, open resistance to the execution of which, as unconstitutional, has been recommended in some quarters; and in others, whether constitutional or not. As all persons concerned directly or indirectly in this resistance, or in any obstruction to its due execution, are guilty of an offence, and subjected to heavy punishment criminally, and also by civil damages to the aggrieved party, it is proper that the law should be understood, so that those, if any there be, who have made up their minds to disobey it may be fully apprised of the consequences.

The act, as you are aware, was passed for the purpose of carrying more effectually into execution a provision of the constitution of the United States; namely, a part of the second section of the fourth article. That provision is as follows: "No person held to service or labor in one state under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

At the time of the adoption of the constitution by the convention, on the 17th of September, 1787, slavery existed, I believe, to an extent more or less in each of the states then composing the Confederacy. About one-fifteenth of the population of New York were slaves; the proportion in the New England states and Pennsylvania was much less; and in New Jersey about the same as in New York. All the original states, therefore, were interested, more or less, in the adoption of this provision into the constitution, but more especially the Southern states, where, speaking generally and without strict accuracy, about half the population consisted of this class. It was, however, anticipated that, in the progress of time, slavery, while it would increase in the South, would diminish and finally become extinguished in the North.

So just was this provision regarded at the time by the members of the convention, and so necessary for the security of this species of labor, and the existence of friendly relations between the different members of the Union, that it was adopted without opposition, and by a unanimous vote. It was of the deepest interest to the Southern states, as, without the provision, every non-slaveholding state in the Union would have been at liberty, according to the general law of nations, to have declared free all runaway slaves coming within its limits, and to have given them harbor and protection against the claims of their masters. I need not say at this day, that such a state of things would have led inevitably to the bitterest animosities, especially between border states, and have been the source of perpetual strife, and of the fiercest passions, between the Northern and Southern portions of the Union. The evil was felt at the time by the Southern portion, as the articles of confederation contained no such provision; and it was to guard against that evil, and to lay a

foundation that would afford future security, and preserve the friendly relations and intercourse of the states, that the provision was incorporated into the fundamental law. No one conversant with the history of the convention, and particularly with the difficulties that surrounded this subject in almost every stage of its proceedings, can doubt for a moment, that without this, or some equivalent provision, the constitution would never have been formed. It was of the last importance to the Southern portion of the Union, and could not have been surrendered without endangering their whole interest in this species of property. It is not surprising, therefore, that it is still adhered to with unyielding resolution, and is made the groundwork of a question upon which the continued existence of a Union thus formed is made to depend.

The clause in the constitution is general, and simply declares that the slave escaping into another state shall not thereby be discharged, by any law or regulation of the state to which he has fled; but shall be delivered up on claim of the person to whom the service is due.

The mode of delivering up to the claimant is not prescribed, and, until regulated by law, continued to be the source of embarrassment to the master, and of disturbance and disquietude among the states. This led to the first act of congress, passed February 12, 1793, during the sitting of the second session held under the constitution. It was enacted by a body of men, several of whom had been distinguished members of the convention, and is framed, in its leading features, in the spirit of the provision of the constitution which it was designed to carry into effect. It is signed by Jonathan Trumbull, of Connecticut, as speaker of the house of representatives, and John Adams, as vice president and president of the senate, and approved by George Washington, president of the United States, and was passed on the urgent recommendations of the governors of Pennsylvania and Virginia, between which states a difficulty had arisen in the surrender of fugitives.

The first section on the subject declares, that when any person held to labor in any of the United States, or in either of the territories, under the laws thereof, shall escape into any other state or territory, the person to whom such labor may be due, shall be authorized to seize or arrest such fugitive, and take him or her before any judge of the circuit or district courts of the United States, residing or being within the state, or before any magistrate of a county, city or town corporate, wherein such arrest shall be made, and upon proof to the satisfaction of the judge or magistrate, either by oral testimony or affidavit, that the person so arrested owes service to the person claiming him or her, it shall be the duty of the judge or magistrate to give a certificate thereof to such claimant, which shall be a sufficient warrant for his or her removal to the state or territory from which he or she fled. The remaining section inflicts a penalty upon any person who shall knowingly obstruct or hinder the claimant from arresting the fugitive, or rescue the same from him, or harbor or conceal the fugitive after notice.

This act has been on the statute book and in operation for more than fifty-seven years. Its constitutionality has been recognized and affirmed by the courts of Massachusetts, Pennsylvania and New York, and by the supreme court of the United States in *Prigg v. Pennsylvania*, 16 Pet. [41 U. S.] 539, and has never been denied by any court, with the qualification that will be presently noticed. The case of *Prigg v. Pennsylvania*, in the courts of that state, is no exception to these remarks, as the jury found a special verdict, and the judgment was entered pro forma by agreement of counsel, for the purpose of carrying the question before the supreme court.

Doubts had been expressed, and, in some in-

stances, decided opinions given by state judges, that it was not competent for congress to confer upon state magistrates the power to carry into execution a law of congress, inasmuch as the judicial power of the federal government was vested by the constitution in a supreme court, and in such inferior courts as congress might ordain and establish. It was also argued with much force, that if congress possessed this power, it might burden the state judiciary and magistrates with duties that would be incompatible with, or embarrass the faithful discharge of those which concerned the state.

Influenced by these views, or some others, the legislatures of some of the states passed laws forbidding their own magistrates from acting under the law in the surrender of fugitives, and enforced the prohibition with heavy penalties. It is not doubted that it was entirely competent for the states to prohibit their own magistrates from assuming the duty of executing the law; but it was held in *Prigg v. Pennsylvania*, to be clear, that if not so forbidden, it was competent for them to act, and that the exercise of the authority under the law would be valid and binding upon all the parties concerned. This interference of the state legislatures greatly paralyzed the execution of the law; and, indeed, had the effect, for the time being, to abrogate virtually the provision of the constitution. It left but one, or at most two officers in a state, competent to execute it, as the power was thereby restricted to the circuit and district judges of the United States. Our own state, as early as 1830, forbade her magistrates from acting, under the penalty of fine and imprisonment. 2 Rev. St. p. 561, § 14. These, and other more direct interferences by legislative acts of the states with the execution of the law of 1793, together with the open resistance with which its execution was met in some instances, by combinations against law, led, necessarily, to the recent supplementary act: and to which I wish now particularly to call your attention.

This act is designed, first, to substitute officers of the federal government in the place of these state magistrates; and second, to arm the officers with sufficient power and authority to enable them to execute the law against any resistance actual or threatened, and in whatever form it may be presented. The act has grown out of the exigencies and necessities to which I have referred, and was forced upon the attention of congress, mainly by the legislative interference of the states. Had not the law of 1793 been thus crippled it would, probably, have afforded all the means necessary to the execution of the constitutional provision.

This supplementary act is obviously framed with great skill and care; and bears upon its face the deep conviction of the body that enacted it, that the constitutional provision had not only been disregarded, but, that a settled purpose, a fixed determination, existed in some portions of the country, to set its obligations at naught. The act meets this condition of things, real or supposed, and clothes the public authorities with powers adequate to the exigency.

It confers authority upon commissioners appointed by the circuit courts of the United States, in addition to the judges, to carry into execution its several provisions, and makes it the duty of the marshals and deputy marshals to execute all warrants and precepts issued by the judges or commissioners under the act, subjecting them to a fine of \$1,000, to the use of the claimant, in case of refusal; and, after the arrest, and while the fugitive is in their custody, if he or she is allowed to escape with or without their assent, the marshal is made liable upon his official bond, to be prosecuted for the benefit of the claimant, for the full value of the slave. The commissioners are also empowered, within the counties in which they respectively reside, to appoint, in writing, one or more suitable per-

sons, from time to time, to execute all warrants and other process issued by them in the performance of their duties, with authority to the commissioners, or the persons thus appointed, to summon and call to their aid the by-standers or posse comitatus of the county, when necessary to insure the due execution of the law; and it is made the duty of the citizens thus called to the aid of the officers, to assist in the execution of the process whenever their services are required.

The act further provides, that the claimant may pursue and reclaim the fugitive, either by procuring a warrant from the court, judge or commissioner of the proper circuit, district, or county, for his apprehension, or by arresting him, or her, where it may be practicable, without warrant, and by taking or causing the fugitive to be taken forthwith before the proper officer, whose duty it is made to hear and determine the case in a summary manner; and, upon satisfactory proof, either oral or by deposition, properly taken and certified, that the person so arrested owes service and labor to the claimant, in the state or territory whence he or she fled, and that he or she had escaped from such service, to grant a certificate to the claimant, setting forth substantially the facts of the case. This certificate is made conclusive evidence of the right of the claimant to remove the fugitive back to the state or territory whence he or she escaped, and is declared to be sufficient authority to prevent all molestation of the claimant by any process issued by any court, magistrate, or other person whomsoever.

The act subjects to fine and imprisonment, and also to civil damages to the party aggrieved, any and every person who shall knowingly obstruct, hinder or prevent the claimant or his agent from arresting the fugitive, either with or without process, or who shall rescue or attempt to rescue the same from the custody of the claimant or his agent, or who shall aid or assist, directly or indirectly, in the escape of the fugitive, or who shall harbor or conceal the same, so as to prevent the discovery and arrest, after notice that such person is a fugitive from service.

The act further provides, that if the claimant or his agent shall make affidavit, after the certificate is granted, that he has reason to apprehend a rescue by force, before the fugitive can be taken beyond the limits of the state in which the arrest is made, it shall be the duty of the marshal or officer making the arrest, to retain the fugitive in his custody, and to remove the same to the state whence he or she had escaped, and there to deliver him or her to the claimant or his agent; and to employ as many persons as he may deem necessary to overcome such force; and to retain them in his service so long as, in his judgment, the circumstances may require.

These, together with some regulations as to the mode of proof before the judge or commissioner, embrace substantially every material provision of the act. And it will excite, I think, some surprise, after the determined opposition to its passage, and even threatened, and, in some instances, actual resistance to its execution in certain quarters, when it is seen, that there is not a power conferred upon those appointed to administer it judicially, that was not conferred upon the judges and other state magistrates under the act of 1793—a law approved by Washington and Adams, and enacted by the fathers and founders of the republic. It is simply, in this respect, a substitution of the commissioners in the place of the state magistrates, who were disabled and prevented from discharging the duty by the state authorities. Full confidence was reposed in them by the federal government, so long as they were permitted to act. When thus disabled, other officers were selected, of necessity, to supply their places. This is the only difference, as it regards

the judicial authority conferred by the act. Neither is there any power conferred by it on the claimant, his attorney, or agent, that is not found in the act of 1793. All the additional powers are conferred upon the ministerial officers, the marshals and deputy marshals, who are required to execute the warrants and other process issued in pursuance of its provisions, and which warrants and process are the same as those provided for in the previous act, and none others. Every ground of opposition to this recent act, distinguishable from opposition to the former, is exclusively referable to the powers with which the marshal and his deputies are armed with a view to its execution—powers essential to enforce obedience to the mandates of the officers, and to put down, with a strong hand, if necessary, all disaffection, disorder, insubordination, or resistance, in whatever form presented. The apprehension that any new or extraordinary powers have been vested in the judges or commissioners is entirely groundless; there is not even a pretext for any such apprehension. The only apprehension for which there is the slightest foundation is, that the powers which have been possessed by the judges and state magistrates, since the act of 1793, and are now given to the commissioners in their places, may be effectually executed; that the law is made stronger than the combinations and treasonable influences arrayed against it; and that the provision of the constitution may be enforced and executed in the faith and spirit in which it was adopted.

Another subject arising out of the provisions of this law, and which has a material bearing upon its execution, it is proper should be noticed. By the second section of the third article of the constitution it is declared, that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." The power, therefore, it will be seen, to execute this act of congress belongs to the tribunals and authorities of the federal government; and, in respect to these, can be executed only by such courts or officers as are especially designated in the act for the purpose. The power, therefore, is exclusive in these courts or officers, both as it respects the tribunals of the state, and others of the federal government. Neither can act or interfere in the execution of the law; and, in case of any attempt by either to interfere or exercise the authority, its acts would be *coram non iudice* and void. These propositions are elementary, and so obvious as to require no further comment.

It seems to be supposed, however, in some quarters, that the state power exercised by its tribunals under the writ of habeas corpus, forms an exception to this generally admitted doctrine; and that, through the agency of this writ, the fugitive may be taken out of the hands of the federal officers, and the authority or propriety of the arrest or detainer be inquired into, and the person be discharged or remanded, according to the judgment of the state magistrate. This is the exception claimed to the exclusive power of the federal officers designated in the act.

It is apparent, if this exception can be maintained, that there is an end to the complete execution of the law; or, indeed, of any law of the general government by which the party is subject to an arrest. It is not claimed that the state magistrate can, under this writ, administer the act and enforce its provisions, as that authority, as we have seen, is confined to the tribunals appointed by the act for the purpose. The fugitive must therefore be taken, if taken at all, out of the hands of the federal officers by force of some other law; and the question whether he or she shall be discharged or remanded, will depend upon the application of that law to the particular case. What that law is, or may be, must necessarily depend upon

on state regulation; and the rights of the claimant under the constitution and laws of the Union will thus be determined by a law of the state.

The effectual abrogation of the act by the interposition of this writ, if admitted, will be still more apparent, when we reflect that the power exercised under it is such as the state legislatures may choose to prescribe; and that the state tribunals are not only invested with that power, but, if they act at all, are bound to act in obedience to and in conformity with it. There is no limit, therefore, to the extent of the powers that may be exercised under this proceeding, in respect to the arrest and detainer of the fugitive, but the discretion of the state legislatures. They may confer jurisdiction upon their magistrates to re-examine and revise the acts and decisions of the federal tribunals out of whose hands the fugitive is taken, and the state magistrate would be bound to execute the power accordingly. It is manifest that it would be impossible to uphold the due execution of the law with the admission of any such authority.

Conceding, however, the soundness of this general view, and the inability of the state tribunals to interfere with the federal authorities when they are acting upon cases arising under the constitution, laws of congress, or treaties, still, it is argued that they possess the power, under this writ, to inquire into the legality of the authority under which the prisoner is held, and which may involve the constitutionality of the law and the jurisdiction of the court or officer. But, it is obvious that the existence of either power, on the part of the state tribunals, would be fatal to the authority of the constitution, laws, and treaties of the general government. No government could maintain the administration or the execution of its laws, civil or criminal, if their constitutionality, or the jurisdiction of its judicial tribunals, were subject to the determination of another. I need not stop, however, to discuss this question, as it arose and was settled in the case of *U. S. v. Peters*, 5 Cranch [9 U. S.] 115, more familiarly known as *Olmstead's Case*. The legislature of Pennsylvania had passed an act declaring that the jurisdiction claimed by the district court of the United States was unconstitutional, and empowered the governor to resist the execution of its judgment. Chief Justice Marshall, in delivering the opinion of the court, observed, that "if the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals." He further remarked that "if the ultimate right to determine the jurisdiction of the courts of the Union is placed by the constitution in the several state legislatures, then this act concludes the subject; but, if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court of Pennsylvania over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question." I need not add that the judgment was regularly enforced, notwithstanding the state act.

There have been different opinions entertained by the judges of the states as to their power, under this writ, to decide upon the validity of a commitment or detainer by the authority of the United States. But those who have been inclined to entertain this jurisdiction, admit that it cannot be upheld, where it appears from the return that the proceeding belonged exclusively to the cognizance of the general government. This necessarily results from the vesting of the judicial power of the Union in

the federal courts and officers; and from the fourth article of the constitution, which declares, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." If the exclusive power to execute the act is in the federal judiciary, and the act is to be regarded as the supreme law of the land, and to be obeyed as such, it is difficult to see by what right or authority its execution can be interfered with, through the agency of this writ, by state authorities. Any such interference would seem to be a direct infraction of the constitution.

It is proper to say, in order to guard against misconception, that I do not claim that the mere fact of the commitment or detainer of a prisoner by an officer of the federal government, bars the issuing of this writ, or the exercise of power under it. Far from that. Those officers may be guilty of illegal restraints of the liberty of the citizen, the same as others. The right of the state authorities to enquire into such restraints is not doubted; and it is the duty of the officer to obey the authority, by making a return. All that is claimed or contended for is, that when it is shown that the commitment or detainer is under the constitution, or a law of the United States, or a treaty, the power of the state authority is at an end; and any further proceeding under the writ is *coram non iudice*, and void. In such a case, that is, when the prisoner is in fact held under process issued from a federal tribunal under the constitution, or a law of the United States, or a treaty, it is the duty of the officer not to give him up, or allow him to pass from his hands in any stage of the proceedings. He should stand upon his process and authority, and, if resisted, maintain them with all the powers conferred upon him for that purpose. I certainly do not anticipate any such exigency. Far from it. The habitual respect of the judiciary, state and national, for the law of the land, and legal authority, forbid it. But it is proper that the officers should know their rights and their duties, if, unfortunately, by possibility, any such exigency should arise.

These views of the paramount authority of the laws of the federal government in no way endanger the liberty of the citizen. The writ of habeas corpus secured to him under that government, affords the appropriate and effectual remedy for any illegality in the process or want of jurisdiction in the court, or for any unconstitutionality of the law. The remedy is as prompt and summary, as when administered by the state judiciary: and, in this way, by conceding to each government the free and unobstructed execution of its own laws and exercise of its own authority, harmony is maintained and perpetuated in the working of our most complex system of government.

The views I have presented will explain a provision in this act of 1850, which is somewhat obscure. I allude to the last clause of the sixth section, which declares, that the certificate granted to the claimant to remove the fugitive "shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever." This clause doubtless includes, among other process, the state writ of habeas corpus. It could not have been intended, or at least ought not to be construed as intending to embrace that writ when issued by the federal judiciary, as congress did not possess the power to suspend it. As it respects the state writ, we have seen, from the views expressed, that it is but declaratory of the existing law, and not the introduction of any new principle. With-

out this clause, the paramount authority of the certificate would have been the same, so far as that process was concerned.

It has been made a question upon this act, whether or not it was competent for congress to confer the power upon the United States commissioners to carry it into execution. As the judicial power of the Union is, by the constitution, vested in the supreme court, and in such inferior courts as congress may from time to time establish, the judges of which shall hold their offices during good behavior, it has been supposed that the power to execute the law must be conferred upon these courts, or upon judges possessing this tenure. It is a sufficient answer to this suggestion, that the same power was conferred upon the state magistrates by the act of 1793; and which, in the case of *Frigg v. Pennsylvania*, 16 Pet. [41 U. S.] 539, was held to be constitutional by the only tribunal competent, under the constitution, to decide that question. No doubt was entertained by any of the judges in that case, that these magistrates had power to act, if not forbidden by the state authorities.

The judicial power mentioned in the constitution, and vested in the courts, means the power conferred upon courts ordained and established by and under the constitution, in the strict and appropriate sense of that term—courts that compose one of the three great departments of the government prescribed by the fundamental law, the same as the other two, the legislative and the executive. But, besides this mass of judicial power belonging to the established courts of a government, there is no inconsiderable portion of power, in its nature judicial—quasi judicial—invested, from time to time, by legislative authority, in individuals, separately, or collectively, for a particular purpose and limited time. This distinction, in respect to judicial power, will be found running through the administration of all governments, and has been acted upon in this, since its foundation. A familiar case occurs in the institution of commissions for settling land claims and other claims against the government. 2 Stat. 324, 440. A strong illustration will be found in this state, under the old constitution of 1777. By that, justices of the peace were appointed by the council of appointment, and held their offices during the pleasure of that body. Yet, the powers possessed by these magistrates were conferred by acts of the legislature upon the aldermen of cities, who were elected by the people. But I need not pursue the subject, as the question must be regarded as settled by the case referred to.

The same answer may be given, also, to the objection founded upon the seventh amendment to the constitution, which provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The summary mode of hearing and deciding upon the claim to the service of the fugitive, prescribed by the recent act, is the same as that prescribed by the act of 1793, which the court, in the case already referred to, held to be clearly constitutional in all its leading provisions. The proceeding contemplated by the clause of the constitution in question, is not a suit at common law, within the meaning of that amendment. It settles conclusively no right of the claimant to the service of the fugitive, except for the purpose of the removal to the state from which he or she fled—no more than the proceeding, in the case of a fugitive from justice, for the purpose of removal, settles his guilt. The question of right to the service in the one case, and of guilt in the other, is open to a final hearing and trial in the states whence the fugitives escaped. After their arrival there, the certificate is no longer of any authority, or evidence of any right. Indeed, so obviously does the constitution contemplate a summary hearing and decision in the matter, that the counsel for the state

of Pennsylvania, in the case referred to, did not make it a point or call it seriously in question on the argument.

I have now gone over the several provisions of this law, and some of the more material questions arising out of it; and, if I am not greatly mistaken, have shown that all the leading features of it, all the principles involved, have been either confirmed by the only tribunal competent to pass upon them, or are so obvious that no lawyer can entertain a well grounded doubt upon them; and that congress has but obeyed an imperative constitutional obligation in its enactment. It is a law, therefore, which every citizen is bound to obey, and the public authorities to enforce, with all the powers conferred upon them by the government.

The legislatures of some of the states have passed laws bearing directly upon this provision of the constitution, and upon its execution in the mode prescribed by congress. So far as these laws are in conflict with the provisions of the one in question, or tend to obstruct and embarrass its execution, they are unconstitutional, and utterly void; and can afford no protection against its penalties. The law of congress is paramount, and must be obeyed.

Opinions were expressed in the case of *Prigg v. Pennsylvania*, that the power of congress to provide the mode of surrendering up the fugitive under the constitution was exclusive, and that the states were disabled from acting at all on the subject; others, that the power was concurrent, and, although the states could pass no law in conflict with the act of congress, it was competent for them to pass laws in aid of it, and in furtherance of the execution of the constitutional provision. It is not important here to express any opinion upon these different views; for, whether the one or the other shall finally prevail, the result is the same. In either view, a law in conflict with the act of congress is void, and of no effect.

It is not to be disguised, that the legislation of most if not all of the Northern states, tending to embarrass, and, in some instances, to annul the provisions of the act of 1793, has strongly impressed our Southern brethren with the conviction, that these states have resolved to throw off this constitutional obligation. They take it for granted, and it is difficult to deny the inference, that the acts reflect the general sentiment of the people on the subject; and that that must have become deep and abiding, to be sufficiently powerful to mould the legislation of the states. It is this legislation, more than occasional riotous assemblies in resistance of the law, that has forced them to the question, whether the Union, with this provision of the fundamental law rejected and condemned—a provision vital to the rights and interests of that portion, and without which the Union would never have been formed—is to them a blessing or a curse. A question raised, not by disaffected and tumultuous assemblies, often very equivocal evidence of the real sentiment of the public mind, but by the people of the states, through their organized governments; a question examined and discussed in the mode and through the agencies that examined and discussed that of entering into the Union at the adoption of the constitution.

This question has been raised by fifteen states of the Confederacy, six of whom were original parties to the compact. It has been examined and considered over and over again, by the governors in their public messages, by the representatives in their legislative halls, by the people in their primary assemblies, and by the press; and they have come to the resolution, one and all, that if this hostile legislation is carried into effect, and the constitutional obligation is no longer adhered to by their Northern brethren, but thrown off, disregarded, and condemned, the Union is no longer a blessing, and should be dissolved—that the abrogation of one material provision of the fundamental law is

destructive of the compact—and that the portion of the Union for whose benefit it was adopted, and whose rights and interests are thereby endangered, is absolved from its allegiance. This I believe to be the settled conviction and sentiment of fifteen states of this Union, and it presents an issue of the gravest aspect, and one that can neither be evaded nor suppressed. It is an issue which the Northern states must determine for themselves. That laws exist on the statute books of most, if not all of them, in conflict with the act of congress, and repugnant to this provision of the constitution, is matter of history. That the enforcement of these laws would be a virtual abrogation of the provision, is not to be denied. It remains for these states to determine whether any attempt shall be made to enforce them—whether they are to remain on the statute book a dead letter, or be repealed. These are questions of transcendent import; for the determination of them, in my humble judgment, involves the perpetuity of the Union.

I am aware that opinions are entertained, and doubtless honestly entertained, that the Union has not been at any time in danger, and is not now. I wish these opinions were well founded. My deep conviction and belief are, that it depends, at this moment, upon the confidence inspired by the late proceedings in congress, and by the indications of public sentiment in the free states that this constitutional obligation will be hereafter executed in the faith and spirit with which it was entered into; that the friends of the Union in the slaveholding states now maintain their ascendancy, and the allegiance of their states, by the confidence thus inspired; and that in case of any action on the part of the Northern states, destructive of that confidence, and of all hope of the execution of the obligation, it would not be in their power to maintain their position—and, I may add, they would not, if they could.

If any one supposes that this Union can be preserved, after a material provision of the fundamental law upon which it rests is broken and thrown to the wind by one section of it—a provision in which nearly one-half of the states composing it are deeply and seriously interested—he is laboring under a delusion which the sooner he gets rid of the better. If it is preserved, which I do not doubt, it will be by a stern adherence to this fundamental law, and to every part and parcel of it; neither section can throw off the obligation of a part in which it has no interest, and expect to preserve the Union. The very supposition implies degradation and dishonor, broken faith on the one side, and abject submission on the other.

Neither can the motive for breaking the compact afford any apology or justification. If one article may be set aside by one portion, because it is repugnant to their sense of right and justice, another may be by another, because it is against their interest. That “no state shall, without the consent of the congress, lay any imposts or duties on imports or exports,” is an article of this fundamental law. Suppose New York, deeming this article prejudicial to her interests by crippling too much her resources and revenue, should levy duties upon the immense trade and exchange now existing between the Great West and our Eastern brethren; or upon the vast coal trade with our neighboring sister, Pennsylvania, for which we afford so extensive a market; would the motive afford any excuse for the infraction of the constitution? And yet, looking at the compact, and to the constitutional duties and obligations arising out of it and binding all, this motive is just as available as any other to excuse or justify the infraction. The example of breaking the compact upon any motive is dangerous. With what face can one state rebuke another for want of allegiance, when she has thrown it off herself? Her rebuke would be “laughed to scorn.”

This Union must be preserved, if at all, by that stern, old-fashioned honesty and principle which inculcates the fulfilment of the whole of our constitutional duties and obligations, and of every part of them. It was this spirit that formed the compact, and has thus far preserved it through all its trials and assaults; and it is this spirit that must and will, I trust, carry it safely hereafter through whatever perils and misfortunes it may be destined to encounter. As men possessing these sturdy and manly virtues have thus far been found in the republic, equal to every trial and exigency, so, I do not doubt, such men will be found hereafter. And they will have their reward—the blessing of all good men of the times in which they live, and of unborn millions, who will be indebted to them, under the favor of heaven, for the rich heritage they enjoy.

Case No. 18,262.

CHARGE TO GRAND JURY—FUGITIVE SLAVE LAW.

[2 Blatchf. 559.]¹

Circuit Court, N. D. New York. Oct., 1851.

THE FUGITIVE SLAVE LAW.

1. So far as it respects an obstruction to the execution of legal process, or a forcible rescue of a fugitive from service, under the act of September 18, 1850 (9 Stat. 462), commonly called "The Fugitive Slave Law," the provisions of that act probably supersede those of the act of April 30, 1790 (1 Stat. 112), with one exception.
2. The provision in the 22d section of the act of 1790, for the case of assaulting, beating or wounding any federal officer, or other person duly authorized, while engaged in serving or executing any process, may apply as well to the execution of process under the act of 1850 as under any other act, the case not being specifically provided for in the act of 1850, and there being no necessary repugnancy between the two acts in this respect.
3. There is some doubt whether a circuit court has jurisdiction of the offences named in the 7th section of the act of 1850, as that act in terms limits cognizance of those offences to the district courts.
4. It may be a question whether the provision of the 11th section of the judiciary act of September 24, 1789 (1 Stat. 78), conferring on the circuit court concurrent jurisdiction with the district court of all crimes and offences cognizable therein, applies to jurisdiction subsequently conferred on the district court in as specific terms as that conferred by the act of 1850.
5. The provision of the 2d section of the act of August 8, 1846 (9 Stat. 72), by which the district court is authorized to remit to the circuit court any indictment pending in the district court, no doubt embraces the cases specified in the 7th section of the act of 1850.
6. The consequences of forcible resistance and obstruction to the execution of the act of 1850, considered.

At the commencement of the term, NELSON, Circuit Justice, in charging the grand jury, after instructing them upon the law applicable to the several cases that were to come before them, proceeded as follows:

The district attorney has called my attention to a crime recently committed in one of the most populous towns in the western part of this state—the case of the seizure and rescue of a fugitive slave out of the hands of a federal officer, by an unlawful assemblage of people, more or less armed, pending an examination before a magistrate in pursuance of an act of congress passed September 18, 1850 (9 Stat. 462). The crime, as alleged, was committed in the edge of the evening, in the midst of the local police and municipal authorities of a city of intelligence and character; and this, after threats and other unmistakable evidences of an intended rescue and crime had been given

out. The marshal, and all the authorities associated with him, and other persons coming to his aid and assistance, were overborne by the violence of the mob, and law and legal authority were trampled under foot. The case is one calling for grave and serious inquiry on the part of the public authorities. Neither time nor expense should be regarded in the investigation of the crime, and in bringing the guilty offenders to justice. In a case so serious, striking at the very foundation of a government of laws, and substituting in its place brute force and anarchy, the whole power of the government should be put into requisition to suppress the spirit of disorder and punish the guilty. No government is worth preserving that does not or cannot enforce obedience to its laws.

The 7th section of the act of 1850 makes it a misdemeanor, subject to fine and imprisonment—the fine not to exceed \$1,000, and the imprisonment not to exceed six months—for any person knowingly to obstruct the arrest of a fugitive from service, or for any person to rescue or attempt to rescue the fugitive after the arrest is made, or to aid or abet or assist, directly or indirectly, in an escape or rescue. The punishment, according to this act, is by indictment and conviction before the district court of the United States for the district within which the offence is committed.

The 22d section of the act of congress passed April 30, 1790 (1 Stat. 117), also provides for the case of the obstruction of legal process in the hands of an officer of the federal government. The offence is punishable by a fine not exceeding \$300, and imprisonment not exceeding twelve months. So far as it respects an obstruction to the execution of legal process, or a forcible rescue of the prisoner, under the fugitive slave act, the provisions of that act probably supersede those of the act of 1790, with one exception. The act of 1790 provides for the case of assaulting, beating or wounding any federal officer or other person duly authorized, while engaged in serving or executing any process. This case is not specifically provided for in the act of 1850, and may apply as well to an execution of process under that act as under any other act, there being no necessary repugnancy between the acts in this respect.

There is some doubt as to whether the circuit court of the United States has jurisdiction of an offence committed under this act of 1850, as the act in terms limits the cognizance of the offence to the district court. I have, therefore, advised the district attorney to present the cases before that court. The 11th section of the judiciary act of 1789 (1 Stat. 78) confers on the circuit court concurrent jurisdiction with the district court of all crimes and offences cognizable therein. But it may be a question whether this provision applies to jurisdiction subsequently conferred on the district court as specifically as that conferred by the act of 1850. There is a provision in a recent act of congress, by which the district court is authorized to adjourn or continue criminal cases pending therein to the circuit court, which, no doubt, embraces the cases in question. Act Aug. 8, 1846 (9 Stat. 72, § 2).

The forcible resistance to and obstruction of the law to which I have referred, involve something more than the simple defeat of the execution of an act of congress. The act of 1850 was passed to carry into effect an important provision of the constitution of the United States, which declares that "no person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

The state of New York, in full convention assembled, ratified and adopted the constitution of which this provision is a part, on the 26th of July, 1788, when she entered into the Union,

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

and thereby pledged the faith and honor of the people of the state to the observance and fulfillment of all its provisions and injunctions, and of all laws enacted by congress in pursuance thereof. The faith and honor of the state are involved, therefore, in the discharge of these duties and obligations, and, while these virtues are acknowledged by the people of the state, the constitution will be revered and obeyed, and, so far as she is concerned, the Union will be cherished and preserved. It is not to be believed that, in the comparatively short period, in the being of a nation, of sixty-three years, her sons have so far degenerated as to become recreant to the obligations of the government formed by their fathers and cemented by their blood, and under which they have enjoyed a degree of freedom and prosperity, and a share of all the social blessings flowing therefrom, that never before fell to the lot of the human race. Nor is it to be doubted that, when it is seen that there is a sentiment of treasonable opposition, in some parts of the state, against the government, organized and breaking out into open acts of resistance to the constitution and laws, they will awake to the danger, and put down, with a strong hand, this spirit of disunion, and vindicate the faith and honor of their fathers and the character of their state.

The question, whether this provision of the constitution is to be carried into execution in the spirit in which it was adopted, is not one that concerns New York alone. If that were all, the question could be settled among ourselves. But other states have an interest—fifteen of them, a deep and abiding interest—in its observance. The compact has been made with them and with their people, and, until they consent to release us from it, we are bound by it, by every faith and tie that can give sanction to an obligation. It is true, New York may possess the physical power to disregard her obligation, and set the constitution at naught, and abide the consequences. There are, I am sorry to say, acts upon her statute-books which, if carried out into practical effect, would have already accomplished it. But they have not been carried into effect, and I trust never will be. They are, fortunately, a dead letter. Before the people of New York, or of any other Northern state, make up their minds to disregard and disobey this provision of the constitution, they will, I doubt not, look well to the consequences. Common sense, as well as common prudence and wisdom, would dictate this.

As I have already said, the provision in question is a material part of the constitution—the fundamental law of the Union, framed by our fathers, and under which we live—so material and important, that any one conversant with the history of that instrument knows that without it the Union would never have been formed. Let any one or more of the Northern states, therefore, annul or utterly disregard it, setting the fundamental law, in this respect, at defiance, and be successful in maintaining such disregard and abandonment of duty, against the whole force and power of the general government, and a disruption of the Union is already accomplished. One or more members of the confederacy cannot annul a material part of the compact which they have entered into with the other states, because they have no interest in it, or even if it be against their interest, and, at the same time, claim an observance of the compact by others. There can be no such obligation on those others, legal or moral. It requires but common sense, and common honesty, to settle this. That other state or those other states, interested in the rejected and repudiated part, after an unavailing effort by the constituted authorities of the Union to enforce obedience, would have a right to regard the compact as at an end, and to withdraw from a confederacy of faithless associates. There are

two sides to the compact, and both must be observed, or neither.

These principles are fundamental. They lie at the foundation of all contracts and compacts entered into by parties, whether for government or any other purpose; and they exact nothing more than common honesty and good faith, in the observance of the duties and obligations of each.

Seeing, therefore, and properly appreciating these consequences, as the inevitable tendency and result of breaking and setting at naught a material part of the constitution, with what concern should every good citizen contemplate the act, and with what alacrity and spirit should he come up to its support and maintenance! What vast and momentous interests may depend upon his active and patriotic devotion in defence of the constitution and laws of his country!

No one need for a moment harbor the supposition or belief that the Northern states will not be held to a strict fulfillment of their constitutional obligations arising out of this clause of the compact. The people of fifteen states of the Union are deeply interested in its execution, and demand its observance. They have already determined that it must no longer be disregarded, and have appealed to their Northern brethren to come up to their constitutional duties and obligations and save the Union. Many of them have confidence that they will, and are at this moment, upon the strength of that confidence, maintaining a vigorous and manful struggle with their less confident brethren, in behalf of the Union. It requires but an honest and faithful discharge of these duties and obligations by the North, to cheer them on and crown their patriotic efforts with success. Let the great state of New York, therefore, not falter in her duty, nor prove recreant to her obligations, at this time and in this struggle. No state has a greater stake in the preservation of the Union; nor is there any one whose voice, for good or for evil, will be more powerfully felt throughout its limits.

Disorderly and turbulent men—the common disturbers of society—are found in every government; and occasional outbreaks against law and legal authority must be expected. They scarcely compromise the character of a people, when the violence is speedily suppressed and the guilty offenders are sternly punished. New York may thus redeem herself from the odium of suffering the constitution and laws of the Union to be trampled under foot, and from a just responsibility to the other members of the confederacy. She will thus vindicate herself from the bad example of having broken the compact; and other states will not, so far as her action is concerned, be released from their obligations. But, should she falter in this duty, and in redeeming her own plighted faith to the constitution, how can she expect to preserve the Union, or, that other states, deeply concerned in the observance of her obligations, will remain with her in the confederacy? It would be vain to expect it; and her conduct, in the case supposed, will have rendered her powerless in any attempt to coerce the association. Having broken the compact herself, and cast off her constitutional obligations, she will have rendered herself morally impotent to exact fidelity from others.

Any one conversant with the history of the times, and with the great issue now agitating the country, and in which the perpetuity of this Union is involved, cannot fail to have seen that the result is in the hands of the people of the Northern states. They must determine it, and the responsibility rests upon them. If they abide by the constitution—the whole and every part of it—all will be well. If they expect the Union to be saved, and to enjoy the blessings flowing from it, short of this, they will find themselves mistaken when it is too late.

Case No. 18,263.

CHARGE TO GRAND JURY—FUGITIVE
SLAVE LAW.[1 Spr. 593.]¹District Court, D. Massachusetts. March,
1851.TREASON AGAINST THE UNITED STATES—RESISTANCE
TO THE EXECUTION OF A LAW.

[1. A mere treasonable conspiracy, whether for the purpose of entirely overthrowing the government, or to prevent the execution of any of its laws, is not sufficient to constitute the crime of treason, as defined by the constitution of the United States. In addition to the conspiracy, there must be an actual assemblage of men for the purpose of carrying the conspiracy into effect by force.]

[2. A conspiracy to prevent, by force, the execution of any one law of the United States in all cases, is a treasonable conspiracy; and if there be an actual assemblage of men for the purpose of carrying this intention into effect,—that is, of acting together, and preventing by force the execution of the law generally,—this constitutes a levying of war, and involves the crime of treason.]

[3. The sudden outbreak of a mob, or the assembling of men, in order, by force, to prevent the execution of a law in a particular instance, and then to disperse, without any intention of continuing together or reassembling for defeating the law generally and in all cases, is not a levying of war such as constitutes treason.]

The fugitive slave law, passed in September, 1850 [9 Stat. 462], was received, in Massachusetts, with almost universal regret and disapprobation. With not a few, it produced great excitement and exasperation. Some openly avowed a determination to resist it by violence, declaring that it was a matter of conscience not to permit it to be executed. In the following February, a negro, by the name of Shadrach, was arrested in Boston, as a fugitive slave, and carried into the United States' court rooms for examination before a commissioner. A mob broke into the room, took him by force from the officers of the law, and effected a rescue. At the opening of the next regular term of the district court, in March, SPRAGUE, District Judge, delivered the following charge to the grand jury:

The office you now hold demonstrates that the constitution has established, not a mere confederacy of states, but a government acting directly upon individuals, with a legislature to enact laws, a judiciary to expound them, and an executive to enforce them. Under this government, the people of the United States have enjoyed a greater degree of liberty, prosperity, and happiness, than have been enjoyed by any other people in the history of the world. To preserve this government, it is necessary that its laws should be faithfully executed, and you are now called upon, under the highest sanction, to aid in this indispensable work.

I think it proper, at this time, to call your attention particularly to that part of the Criminal Code, which prohibits and punishes forcible resistance to the laws. Government is so great a blessing, that the highest crime which can be committed, is treason. This is defined by the constitution itself in the following words: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." [Const. art. 3, § 3.] What amounts to levying war? This question arose soon after the adoption of the constitution, in the several trials of Mitchell, Vigol, and Fries, for being engaged in the Pennsylvania insurrection, against the law imposing a duty upon distilled spirits, under the administration of Washington, and subsequently, in the trial of Aaron Burr, in the year 1807, and in the case of U.

S. v. Hoxie [Case No. 15,407], in the year 1808. These were all trials in the circuit court. The only case which has come before the supreme court, was that of *Ex parte Bollman*, 4 Cranch [8 U. S.] 125. In this case it was decided that, "if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose," this is levying war. What is a treasonable purpose? If the object be entirely to overthrow the government, at any one place, by force, as at New Orleans, which is the case mentioned by the supreme court, that is a treasonable purpose. But a conspiracy to do this, and actually enlisting men who never assemble, is not sufficient to constitute the crime of treason. There must be an actual assemblage of men, for the purpose of carrying the conspiracy into effect by force. So also, it is a treasonable purpose, if the object be to prevent, by force, the execution of any one law of the United States, in all cases;—for it is entirely to overthrow the government as to one of its laws. And if there be an actual assemblage of men, for the purpose of carrying such an intention into effect, that is, of acting together, and preventing, by force, the execution of the law generally,—in all cases it will constitute a levying of war. But the sudden outbreak of a mob, or the assembling of men in order by force to defeat the execution of the law, in a particular instance, and then to disperse, without the intention to continue together, or to re-assemble for the purpose of defeating the law generally, in all cases, is not levying war. If war be actually levied, persons may be guilty, although not present with the force actually assembled. "All those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

There are minor offences created and defined by acts of congress alone. By St. April 30, 1790, c. 9, § 22 [1 Stat. 117], it is enacted: "That, if any person or persons shall knowingly and wilfully obstruct, resist, or oppose any officer of the United States, in serving or attempting to serve or execute any mesne process, or warrant, or any rule or order, of any of the courts of the United States, or any other legal or judicial writ or process whatsoever, or shall assault, beat or wound any officer or other person, duly authorized in serving or executing any writ, rule, order, process, or warrant aforesaid, every person so knowingly and wilfully offending in the premises, shall, on conviction thereof," be punished by fine and imprisonment.

Thus you perceive, that, for more than sixty years, indeed, from the foundation of the government, it has been a criminal offence to resist, or oppose, or obstruct the marshal in the execution of a warrant or other legal process; and so plain is the utility and necessity of this provision, that, during all that time, no voice has been raised against it. So far from impairing the energy with which the laws are to be executed, the people, by their legislation, have added new sanctions. Thus by St. March 2, 1831, c. 99, § 2 [4 Stat. 488], it is enacted: "That, if any person or persons shall corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall corruptly, or by threats or force, obstruct or impede, or endeavor to obstruct or impede, the due administration of justice therein, every person or persons so offending, shall be liable to prosecution therefor, by indictment."

This salutary enactment to secure the free course of law has been in force for nearly twenty years without objection. But we have recently heard that not only should the courts be impeded in administering the law, but that the marshal should be obstructed, and even resisted by force, in the execution of legal process, because of a recent statute providing for the

¹ [Reprinted by permission.]

arrest and delivering up of fugitives from labor. It is to be observed that this statute subjects no person to arrest, who was not before liable to be seized and carried out of the state; for, ever since the adoption of the constitution, these same persons have been liable to be taken and carried away, by those from whose service they had escaped. For a pre-existing right created by the constitution and affirmed by the supreme court of the United States, congress has provided a new remedy, by legal process to be executed by a public officer, and has added penal sanctions more effectually to ensure the execution of the law. If it have not all the safeguards we could wish, so neither had the statute of 1793 [1 Stat. 302] passed by the fathers of the constitution, with the approbation of Washington, and sustained by the people for more than half a century.

The constitution commands that fugitives from labor shall be delivered up. The supreme court has decided that it belongs to congress to provide the means. Congress has enacted this law. It is imperative, and will be enforced. Let no man mistake the mildness and forbearance with which the Criminal Code is habitually administered, for weakness or timidity. Resistance must make it sternly inflexible.

Discussion is free. Men of all classes and of every shade of opinion may, by argument or even declamation addressed to the reason or the passions, endeavor to impress new views upon the public mind. But if, in their opposition to the expressed will of society, they pass from words to deeds, and embody mischievous doctrines into criminal acts of resistance to law, whoever they may be, and whatever may be their position or their ultimate purposes, they must sooner or later find that the law is irresistible and overwhelming. The people have been so long accustomed to absolute repose and security under the quiet administration of law, that they are not easily brought to believe that it can be obstructed, much less to contemplate the consequences of its overthrow. But let them be startled by acts of violence and systematic resistance, let it be brought home to them as a practical question, whether they will live under law, administered by responsible public agents, or under the dominion of a mob, impelled by passion, guided by no rule, and subject to no restraint, and they will rush to the support of the constituted authorities, and indignantly repress the spirit of anarchy.

The statute of 1850, c. 60 [9 Stat. 462], after providing that the claimant of a fugitive from labor may have a warrant for his arrest, or seize him without process, proceeds, in the seventh section, to enact, "That any person, who shall knowingly and willingly obstruct, hinder or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her or them, from arresting such a fugitive from service or labor, either with or without process as aforesaid, or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant to the authority herein given and declared; or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforesaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall for either of said offences be subject to" fine and imprisonment.

I have thus, as I proposed, called your attention to certain acts of congress and provisions of the constitution. They are the law of the land, and it is our most solemn duty faithfully to execute them. In the words of the oath which you have just taken, you are to do

this, "without fear, or favor, affection, or hope of reward," presenting "things truly as they come to your knowledge, according to the best of your understanding."

Here I might close; but, as great efforts have been made to convince the public that the recent law cannot be enforced with a good conscience, but may be conscientiously resisted; and an impression may have been made on some of your number, thus presenting an obstacle to the discharge of a plain legal duty, I deem it proper to advert briefly to the moral aspects of the subject.

In this part of the country, the convictions of our understanding, our moral sentiments, and our religious opinions, are adverse to the institution of slavery. Hence some are ready to conclude, in the first place, that the provision of the constitution for delivering up fugitive slaves must be morally wrong; and, in the next place, that laws made to carry it into effect are to be disobeyed and resisted. Neither of these propositions legitimately follows from the premises.

As to the first. The states, without the constitution, would be to each other foreign nations. The first duty of every nation is the preservation and protection of its own citizens. It is for this, primarily, that political societies are formed and their restraints submitted to. If, then, any nation finds that hospitality to foreign fugitives is inconsistent with its own peace and safety, it has a right to refuse such hospitality, and to say, to all such foreigners, we cannot receive you amongst us, and if you come, we must deliver you up to the dominion of your own government; and it may rightfully make a compact with such government for such delivery. Whether the peace and safety of the nation do, in fact, require or authorize such compact, it is for the nation itself to decide, and its decision is to be submitted to and its engagements faithfully performed. Those, therefore, who have the strongest convictions of the immorality of the institution of slavery are not thereby authorized to conclude that the provision for delivering up fugitives slaves is morally wrong, or that our fathers in Massachusetts did not act wisely, justly, humanely, in acceding to the compacts of the constitution.

But, secondly, even those who go to the extreme of condemning the constitution and the laws made under it, as unjust and immoral, cannot, even upon such an assumption, justify resistance. In their views, such laws are inconsistent with the justice and benevolence, and against the will, of the Supreme Law-Giver, and they emphatically ask, which shall we obey, the law of man, or the will of God? I answer, obey both. The incompatibility, which the question assumes, does not exist. Unjust and oppressive laws may, indeed, be passed by human governments. But if Infinite and Inscrutable Wisdom permit political society having the power of human legislation to establish such laws, may not the same Infinite and Inscrutable Wisdom permit and require the individual, who has no such power, to obey them? Can you say that it is His will that we shall rise up in forcible resistance, overthrow the power of the government, and, instead of the peace and security of organized society, introduce the dominion of anarchy and violence? Are such the appointed means for their abrogation? Unjust laws have always existed. Until a recent period, poor and honest debtors were, even here, oppressively imprisoned; and, in England, stealing, to the value of more than a shilling, was punishable with death, and the Code numbered more than one hundred and fifty capital offences. The wise and the good saw that these laws were cruel and unnecessary. They did not rush to arms, or counsel disobedience. But, by the diffusion of knowledge, by reason and persuasion, they changed the public mind, and the laws were peaceably ameliorated. The fruits of justice and benevolence,

like the fruits of the natural world, are to be matured by mild and genial influences. The punishment of death is still inflicted by our laws. Many good men firmly believe that society has no right to take the life of one of its members. With them capital punishment is the highest injustice and the greatest wrong that can be inflicted. But they do not counsel resistance, to convulse society and overthrow the government, but quietly and conscientiously submit to the peaceful execution of the laws.

But we are told by some, that, the law being morally wrong, conscience tells them to resist it. Conscience, indeed, is to be revered and obeyed, but still we must remember that it is fallible, especially where the rights of others are concerned, and may lead us to do great injustice. Some have an impression that it is the divinity within them, an unerring and infallible guide. Hence they cannot believe, or conceive, that opposition to their views can be conscientious. It is this lurking fallacy, this tacit assumption of personal infallibility, that makes them intolerant toward others, and inaccessible to argument.

I speak not of those who believe that they have special inspiration from above; that a miracle has been wrought for their guidance. Such are beyond the scope of human reason, and fit subjects either of consecration, or a mad-house, according as their belief is founded on reality or delusion. But, with those who are under the dominion of the established laws of the moral and intellectual world, conscience is fallible. The annals of the world abound with enormities committed by a narrow and darkened conscience. A man may incur great moral guilt, not indeed by following his conscience, but by neglecting the means of rectifying and enlightening it. Its dictates are varied, not only according to moral constitution, but the intellectual power and extent of information of the individual. The purer the motive, the more extensive the knowledge, and the greater the mental ability, the more enlightened will be the conscience, and the more correct its decisions.

The moral faculty or moral judgment being thus fallible, there may be a conflict of consciences. Let me present an illustration. A ship arrives with sick passengers. One class of men insist that the disease is contagious, and that they shall not be permitted to land and spread a general pestilence. Another class insist that it is not contagious, and that it would be cruelty to compel them to remain on ship-board, aggravating their sufferings and their danger. With both it is a question of humanity—of conscience. Again, certain strangers seek an asylum amongst us. One class of our citizens see in them only fugitives from oppression, whom we can easily and securely receive and protect. Another class believe that they bring with them, not physical but moral contagion, that their presence will endanger the public peace and individual safety, that it may embroil us with other states, and bring upon us the sufferings and horrors of external and internal war and convulsions. The one class urge the obligations of hospitality and benevolence, the other the obligations of self-preservation, and the sacred duty of preserving those whom nature and society have committed to their protection. Both are equally sincere, conscientious, and resolute. Which shall yield? Is there no appeal but to force? I answer, yes. And the arbiter must be society,—organized society,—pronouncing its decision through its regularly constituted agents. This is the moral judgment, the embodied conscience, of the political community. To this not only is each individual bound to submit, but it is a new and controlling element in forming his own moral judgment. An act, which before may have been innocent, is now criminal, and its commission not only opposed to the will, but sub-

versive of the order, peace, existence of the political society.

Submission is a moral duty. This is as certain as that the Creator made man a social being, and designed that he should live, not in perpetual anarchy, but in peace and security; for human government is the only means which Infinite Goodness has provided, for preserving us from unceasing conflict and violence. To submit to the law of the land is, then, to obey the will of God.

It may be asked, is resistance never justifiable? Is there no exception? I answer, yes! When oppression present and prospective is so great as to justify a resort to the ultimate right of revolution. But this is not to be done from impulse or feeling, but from the calm and careful consideration of the dangers and difficulties of the proposed remedy. A wise man will reflect that evils, great evils, must exist under every human government; that a perfect fabric cannot be made of imperfect materials, and that, whatever he may attempt, he must still work by and with fallible man, with all his blindness, weakness and passion. If, after a deliberate contemplation of the convulsions and miseries attending the overthrow of the existing government, and the hazards and uncertainties of establishing a better on its ruins, he firmly believes the permanent happiness of the community requires the attempt, he may conscientiously make it. Under a despotism, such a case may occur not unfrequently, but we can hardly suppose it to exist in a republic, where the laws are made by the people themselves, through agents freely appointed for short periods, by frequent elections.

In our own country, if there be any, who, contemplating the infirmities of our nature, the history of our race, what has been accomplished in all ages that have passed, and what is now the condition of mankind under all other political institutions, and looking at our own government, its history and its hopes, its past performance and future promise, can then desire its destruction, in the vain and desperate hope of establishing a better in its stead, they must be inaccessible to reason or remonstrance, and of that unfortunate class in whose minds judgment is dethroned, and monomania hold usurped dominion.

Case No. 18,264.

CHARGE TO GRAND JURY—NEUTRALITY LAWS.

[5 Blatchf. 556.]¹

Circuit Court, N. D. New York. June 20, 1866.

THE LAW OF NEUTRALITY.

1. The 6th section of the act of April 20, 1818 (3 Stat. 449), forbidding military expeditions by individuals against countries with which the United States are at peace, commented on.

2. The duties of neutrality, enforced.

SHIPMAN, District Judge (charging grand jury). I intimated to you yesterday, at the close of my brief remarks on the general business of the term that would come before you, that I would this morning submit a few observations to you on a single subject. The district attorney has informed me that he intends to lay before you charges against certain individuals alleged to have been engaged in a military expedition against the provinces of Canada, in violation of the neutrality laws of the United States. The particular section of the statute upon which he intends to found the in-

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

dictments is as follows: "If any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a misdemeanor, and shall be fined not exceeding \$3,000, and imprisoned not more than three years." This is the sixth section of an act of congress approved April 20, 1818 (3 Stat. 449), and forms part of a series of provisions enacted for the very purpose of preventing hostile incursions from our own territory into that of governments with which we are at peace, as well as the fitting out or arming vessels to operate by sea. This act is founded upon the highest considerations of justice, peace, and safety, and every person within the limits of the United States is bound to yield obedience to its provisions. It applies not only to citizens of the United States, but to all persons within their territory or jurisdiction, whether permanently or temporarily residing therein. It was the duty of the national legislature to enact this law, and it is the duty of every magistrate and every juror to whom any jurisdiction over the subject matter is committed, to give his aid, under proper legal rules, to the enforcement of its obligations. The duty of a government to restrain its own citizens, and all others within its territorial limits, from engaging in military expeditions against powers with which such government is at peace, arises out of the law of nations, and its faithful observance is of the very highest importance to the peace of the world, the stability and good order of society, and the welfare of mankind. Were individuals, however numerous or respectable, by whatever motives actuated, permitted, upon their own motion, to organize warlike enterprises in their native or adopted country, and engage in incursions into the territory of neighboring friendly nations, governments would no longer have control of the momentous questions of war and peace. A comparatively small portion of the population of a country could effectually embroil it with other nations, and all the calamities of war be precipitated upon a people, at any moment, however unfavorable, without the sanction of their constituted authorities, and against the will of a majority of the people themselves. A country which should permit such a flagrant violation of its national obligations, would soon become a theatre from which hostile expeditions would issue, both by sea and by land. It would inevitably be brought into collision with every respectable government on the globe, whose disaffected citizens might seek its shore, in order to securely prepare and send forth the means of retaliation, revolution, or conquest. The honor and dignity of the United States, the reciprocal duties which rest upon it as one of the nations of the earth, and the welfare of its citizens, both native and adopted, all demand that this act of congress shall be obeyed, or, if violated, that the offender shall be promptly punished. If, therefore, evidence shall be presented to you proving that parties have, within the territory or jurisdiction of the United States, begun or set on foot, or provided or prepared the means for, a military expedition against Canada, it will be your duty to present them to the court for trial. You deal with the fact. You will be governed by the evidence.

I hardly need remind you that many considerations which find a place in appeals to popular feeling are hardly proper for your deliberations. We are at peace with Great Britain. Whether, in the judgment of individuals, the people of England or of Canada have, during our late civil war, said or done things distasteful to us or not, is a matter entirely foreign from our duty to enforce our own laws. I

have said that we are at peace with Great Britain. That is a question of law for the court to determine, and one over which the grand jury have no just control. The only question, therefore, for you to determine is, whether or not the accused parties have, in any invasion, or attempted invasion, of Canada, broken the law which I have read to you; and, in determining that question, you should consider the acts done on both sides of the boundary line, as giving character to those acts which were done exclusively on our own soil. You will say whether, if an expedition started from this country, and actually made war in a neighboring province, the acts done here were not a beginning or setting on foot, within the United States, of a military expedition or enterprise, having for its object that which it actually accomplished.

Neither can the grand jury properly consider any supposed grievances which the offending party may have suffered at the hands of the government against which this military crusade was leveled. With the merits of that question we have nothing to do here. Our laws must be enforced. If men of one nationality, who have sought homes among us, can violate our neutral obligations, men of every other nationality can do likewise; and thus the foreign relations of a great country may be taken out of the hands of its government, and the issues of war and peace be committed to as many irresponsible parties as we have classes of adopted citizens or resident foreigners among us. I need but allude to such an absurd idea, to satisfy you that considerations affected by sympathy with one or another class of adopted citizens, can have no proper place in the inquiry upon which you are about to enter. We live under a government of laws, and, when we cease to administer those laws, and to submit to their requirements, we may prove ourselves unworthy of that safety and dignity which they are designed to secure. You will, gentlemen, retire to your room, and, if you find that the offences to which I have alluded have been committed, you will present the offenders for trial.

Case No. 18,265.

CHARGE TO GRAND JURY—NEUTRALITY LAWS.

[2 McLean, 1.]

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

VIOLATIONS OF NEUTRALITY LAWS — ACCEPTING COMMISSION AND SETTING ON FOOT MILITARY EXPEDITION AGAINST FRIENDLY POWER.

[1. To constitute the offense of accepting and exercising a commission to serve against a foreign prince, state, etc., with whom the United States are at peace, under the first section of the act of congress, some overt act under the commission must be done, such as raising men for the enterprise, collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission was supposed to confer.]

[2. To constitute the offense of beginning or setting on foot a military expedition against a friendly power within the 6th section of the statute, it is not necessary that the expedition shall be actually set on foot; it is sufficient if such preparations are made for it as show an intent to set it on foot.]

[3. To "provide or prepare the means for any military expedition or enterprise," within the meaning of section 6, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition, or add to the comfort or maintenance of those engaged in it, is a violation of this provision.]

[4. A government is justly held responsible for the acts of its citizens; and, if the government of the United States be unable or unwilling to restrain our citizens from acts of hostility against a friendly power, such power may hold this nation answerable, and declare war against it.]

In regard to aiding or favoring unlawful military combinations, by our citizens, against any foreign government, or people, with whom we are at peace.

McLEOD, Circuit Judge (charging grand jury). Your particular and most serious attention is requested to the provisions of an act entitled "An act to punish certain offences against the United States" [3 Stat. 447]. By the first section of this act, it is declared, "that if any citizen of the United States shall, within the territory or jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people, with whom the United States are at peace, he shall be deemed guilty of a high misdemeanor, and be fined not more than two thousand dollars, and imprisoned not exceeding three years." And in the sixth section, it is provided, "that if any person shall, within the territory or jurisdiction of the United States, begin to set on foot, or provide or prepare the means for, any military expedition or enterprise to be carried on from thence, against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person, so offending, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years." There are many other acts prohibited by this law, which relate to foreign powers, and which may be presented for your examination; but the above sections are considered the most important. The offence in the first section consists in "accepting and exercising a commission," to carry on war against any people or state with whom we are at peace. The commission may be conferred by any district of country, or association of people, whose right to confer it shall be recognized by the person appointed. And it is immaterial whether the commission has been conferred by the popular voice, or by the representatives of such district, or association of people. It must have been accepted and exercised, to come within your jurisdiction, within this state, by a citizen of the United States. Some overt act, under the commission, must be done; such as raising men for the enterprise; collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission is supposed to confer. Under the ninth section, the offence consists in beginning to set on foot, or providing or preparing the means for any military expedition or enterprise, to be carried on from the United States, against the territory or dominions of a foreign people or state. To "begin to set on foot a military expedition," is not actually setting on foot such expedition; but it is making such preparation for it, as shall show the intent to set it on foot. To "provide or prepare the means for any military expedition or enterprise," within the law, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition, or add to the comfort or maintenance of those who are engaged in it, is considered to be in violation of the law. These acts must all be done under such circumstances as to show the criminal intent, unless such intent shall be avowed. And it is hardly to be expected, that when an individual is about to violate the laws of his country, he will openly declare his intention to do so. Where the act and the attendant circumstances show the criminal intent, no subterfuges or motives avowed, should screen the citizen from the consequences of such an act.

To come within your cognizance, every violation of this law must have been committed within this state; and by a citizen of the United States. These provisions are highly important, and they should be faithfully executed

against all who violate them. Great excitement is known to exist, at this time, in Canada, from certain hostile movements contemplated by citizens of this country, in conjunction with the disaffected subjects of that country. It is said, on high authority, that associations of citizens of the United States have been formed, along the whole extent of our northern boundary, with the view, at a fixed time, to make a descent upon Canada. That these associations embrace an immense number of individuals, who are known to each other by certain signs and passwords. That they are actively engaged in collecting the materials of war, and raising men. That their military officers are appointed; and that, in anticipation of success, they have appointed civil officers.

I cannot but think these accounts have been greatly exaggerated, and that they may have caused an unnecessary degree of alarm. But that there is ground for apprehension of danger, no one can doubt. During the past winter, many of our citizens were engaged in this lawless enterprise. This is proved by the records of our own courts, and the courts of Canada, and by well authenticated accounts which have been published. Indeed, it is notorious that organized bodies of men, though, perhaps, not bearing arms, were marched through the northern part of this and other states, on our northern boundary, with the known intention of invading Canada, who were permitted to pass without molestation. And, it is believed that, in some instances, they were encouraged in their enterprise by contributions of money, provisions, and other necessaries. This state of things is deeply to be lamented. When our citizens, generally, shall cease to respect the laws, and the high duties they owe to their own government, there is but a slender ground of hope that our institutions can be long maintained.

An obedience to the laws is the first duty of every citizen. It lays at the foundation of our noble political structure; and when this great principle shall be departed from, with the public sanction, the moral influence of our government must terminate. If there be any one line of policy in which all political parties agree, it is, that we should keep aloof from the agitations of other governments. That we shall not intermingle our national concerns with theirs. And much more, that our citizens shall abstain from acts which lead the subjects of other governments to violence and bloodshed. We have a striking instance of the wisdom of this policy in the early history of our government. During the administration of our first president the French Revolution burst forth, and astonished the civilized world. All Europe combined in arms against republican France. That France which had mingled her arms and her blood with ours in our struggle for independence. That this country should deeply sympathize with so noble, brave and generous an ally, in such a struggle, was natural. Bursts of enthusiasm were witnessed in her behalf, in almost every part of our country, and an ardent desire was evinced to make common cause with her in favor of liberty. And this was claimed of our country as a debt of gratitude, and on the ground of treaty stipulations. Had this tide of popular feeling, which threatened to bear down every thing in its course, not been checked, our destinies would have been united with those of France. We might have participated in her military glory, and in the renown of her heroes. And the struggles, in which we would have been involved, might have given birth to a race of heroes in our own country, whose deeds of chivalry would have been celebrated in history. But our country would have been wasted by war and rapine; and the pen of the historian, which recorded the deeds of our heroes, would, also, have told, in all probability, that our country, like France, was driven to take refuge from the turbulence of party

factions, under a splendid military despotism. Fortunately for the country Washington lived, and the veneration in which his name was held, and the authority he exercised, mainly contributed to check the excitement, and preserve the peace and lasting prosperity of the country. The struggles of the people of South America, against the oppressions of their own government, again awakened the sympathies of our country, and produced a strong desire with many to unite our fortune with theirs. But this feeling was controlled, and the neutrality and peace of our country were preserved.

A government is justly held responsible for the acts of its citizens. And if this government be unable or unwilling to restrain our citizens from acts of hostility against a friendly power, such power may hold this nation answerable, and declare war against it. Every citizen is, therefore, bound by the regard he has for his country, by his reverence for its laws, and by the calamitous consequences of war, to exert his influence in suppressing the unlawful enterprises of our citizens against any foreign and friendly power. History affords no example of a nation or people, that uniformly took part in the internal commotions of other governments, which did not bring down ruin upon themselves. These pregnant examples should guard us against a similar policy, which must lead to a similar result. In every community will be found a floating mass of adventurers, ready to embrace any cause, and to hazard any consequences, which shall be likely to make their condition better. And, it is believed, that a large portion of our citizens, who have been engaged in military enterprises against Canada, are of this description. That many patriotic and honorable men were at first induced, by their sympathies, to countenance the movement, if not to aid it, is probable. But when these individuals found that this course was forbidden by the laws of their country, and by its highest interests, they retraced their steps. But, it is believed, that there are many who persevere in their course, in defiance of the law and the interests of their country. Such individuals might be induced to turn their arms against their own government, under circumstances favorable to their success. These violators of the law should not escape with impunity. The aid of every good citizen will be given to arrest them in their progress, and bring them to justice. They show themselves to be enemies of their country, by trampling under foot its laws, compromising its honor, and involving it in the most serious embarrassment with a foreign and friendly nation. It is, indeed, lamentable to reflect, that such men, under such circumstances, may hazard the peace of the country. If they were to come out in array against their own government, the consequences to it would be far less serious. In such an effort, they could not involve it in much bloodshed, or in a heavy expenditure; nor would its commerce and general business be materially injured. But a war with a powerful nation, with whom we have the most extensive relations, commercial and social, would bring down upon our country the heaviest calamity. It would dry up the sources of its prosperity, and deluge it in blood.

The great principles of our republican institutions cannot be propagated by the sword. This can be done by moral force, and not physical. If we desire the political regeneration of oppressed nations, we must show them the simplicity, the grandeur, and the freedom of our own government. We must recommend it to the intelligence and virtue of other nations, by its elevated and enlightened action, its purity, its justice, and the protection it affords to all its citizens, and the liberty they enjoy. And if, in this respect, we shall be faithful to the high bequests of our fathers, to ourselves, and to posterity, we shall do more to liberalize other governments, and emancipate their subjects,

than could be accomplished by millions of bayonets. This moral power is what tyrants have most cause to dread. It addresses itself to the thoughts and the judgments of men. No physical force can arrest its progress. Its approaches are unseen, but its consequences are deeply felt. It enters garrisons most strongly fortified, and operates in the palaces of kings and emperors. We should cherish this power as essential to the preservation of our own government; and as the most efficient means of ameliorating the political condition of our race. And this can only be done by a reverence for the laws, and by the exercise of an elevated patriotism. But if we trample under our feet the laws of our country; if we disregard the faith of treaties, and our citizens engage without restraint in military enterprises, against the peace of other governments, we shall be considered and treated, and justly too, as a nation of pirates.

Punishments, under the law, can only be inflicted through the instrumentality of the judicial department of the government. The federal executive has shown a zeal, worthy of the highest commendation, in his endeavor to check the career of these enemies of social order. He has very properly employed a part of the military force of the country in this service; and he has solemnly warned and admonished these deluded citizens, who seem ready to carry devastation into the neighboring province of a foreign and friendly power. These efforts of the president are in aid of the civil power, which, I trust, will not be found wanting on this, or any other emergency, in the discharge of the great duties which have been devolved upon it by the constitution and laws. But in vain will the civil authority be exerted, unless it shall be aided by the moral force of the country. If the hands of the ministers of justice were not strengthened by public sentiment, how ineffectually would they be raised for the suppression of crime. If the open violator of the law be cherished by society, he may, with impunity, set at defiance the organs of the law. The statute book which contains the catalogue of offences, would then become a dead letter, and would be a standing monument of deeply seated corruption in the public.

I invoke, in behalf of the tribunals of justice, the moral power of society. I ask it to aid them in suppressing a combination of deluded or abandoned citizens, which imminently threatens the peace and prosperity of the country. And I have no fears, that when public attention shall be roused on this deeply important subject; when the laws are understood, and the duties of the government; and when the danger is seen, and properly appreciated, there will be an expression so potent, from an enlightened and patriotic people, as to suppress all combinations in violation of the laws, and which threaten the peace of the country.

Case No. 18,266.

CHARGE TO GRAND JURY—NEUTRALITY LAWS.

[5 McLean, 249.]

Circuit Court, D. Indiana. May, 1851.

VIOLATION OF NEUTRALITY LAWS—SETTING ON FOOT MILITARY EXPEDITION AGAINST FRIENDLY POWER.

[Under the provision of the sixth section of the act of 1818 (3 Stat. 449), making it a misdemeanor to "begin or set on foot, or provide or prepare the means for, any military expedition or enterprise," the overt act is not an invasion of a foreign country, but taking the incipient steps in the enterprise, such as providing the means for the expedition, furnishing munitions of war or money, enlisting men, and in short doing anything and everything that is necessary to the commencement and prosecution of the enterprise.]

Extract from the charge to the grand jury of the United States circuit court:

HUNTINGTON, District Judge (charging grand jury). After adverting to various offenses within the jurisdiction of the grand jury, and which it would be called to investigate, the judge referred to the contemplated invasion of the island of Cuba as a subject of national concern. He observed, the newspaper rumors, and the proclamation lately issued by the president, authorize, if they do not require, the subject to be brought before the grand jury. It seems this nefarious plan is not of recent origin. The late chief magistrate, as well as the present, not only issued a proclamation, but found it necessary to put in requisition a part of the army and navy, to preserve the peace and honor of the country. Doubts have been suggested whether the judicial power had been sufficiently active in bringing to punishment these marauders, who, under the pretence of liberating the oppressed, stand ready to engage in a career of plunder and murder. Whatever motives they may avow, this would be the result of their successful action. Such individuals, with the prospect of success, could easily be induced to turn their arms against their own country. They are reckless of consequences. By the laws of nations, they are justly held to be outlaws and pirates. The act of congress of the 20th of April, 1818, entitled, "An act for the punishment of certain crimes against the United States," etc., applies to these individuals. The first section provides: "If within the jurisdiction of the United States, any citizen shall accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, or people, with whom the United States are at peace, shall, on conviction, be punished," etc. The sixth section provides "that if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide, or prepare, the means for any military expedition, or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person so offending, shall be punished," etc.

You will observe, gentlemen of the jury, that if any one "shall begin or set on foot, or prepare the means for such enterprise," he is within the statute. The overt act is not an invasion of the country, but taking the incipient steps in the enterprise. To provide the means for the expedition, as the enlistment of men, the munitions of war, money, in short, any thing and every thing that is necessary to the commencement and prosecution of the enterprise. In the ages of barbarism, private war was tolerated. Physical power was then the arbiter of right, and a dexterous use of the instruments of death, was the prevailing logic. But this has been long since exploded among civilized nations. The Christian system has engrafted on the laws of nations a better logic—a logic addressed to the mind and conscience, and which conforms more to the principles of humanity. Every government is responsible for the acts of its citizens. They must be restrained from violating the rights of other nations; and any government which has not the power or disposition to do this, subjects itself to a declaration of war by the injured party.

Our physical resources, gentlemen, are in a rapid course of development. In this respect our country has surpassed the most ardent anticipation of its friends. But I wish to impress upon your minds, that this is not the most satisfactory evidence of our national prosperity. How have we made this wonderful advance? Is it not mainly attributa-

ble to that great and fundamental law which made us a nation, and to an observance of the laws, state and federal? These laws emanate from the people, through their representatives, and bear the impress of their will. A perseverance in this course will lead us on to a still higher and nobler destiny. But, gentlemen, no free government can be maintained without moral power. If this be broken down, physical power must be substituted in its place. As in France, we may still have a republic in name, but it will be a republic sustained by bayonets. A government of laws, sanctioned and sustained by the people, is the only guaranty for public and private rights. Whenever the law shall be trampled under foot and contemned, with impunity, there is no hope in the future. And may I not ask the question, whether there is not in the general aspect of our affairs enough to excite a deep solicitude on this subject? We see associations of lawless individuals in different parts of the Union, in contempt of the law, and the honor and peace of the country, ready to embark in a piratical war against a people, with whose government we are at peace. Other combinations have been formed to subvert the government, and others to resist, in an unconstitutional manner, enactments made by the highest authority. These indications are ominous. At an earlier period in the history of our government, an individual of the highest talent, and who had held the second office in the government, was overwhelmed with infamy, and was criminally prosecuted, on the ground that he had set on foot a treasonable conspiracy against the government, by an attempt to divide the Union, and erect an independent western republic. But what do we now see? How painful is the contrast. Is this state of our affairs a matter of indifference to any one? What must be its effect on foreign nations? Will it not shake their confidence in the permanency of our institutions, and weaken the moral force of our government at home and abroad? Who does not feel proud of the high position occupied by our nation, among the nations of the earth? And who does not desire to increase the glory of his country? This can be done only by a devotion to the constitution and laws of our country—laws enacted by the people, through their representatives; and which may be modified at their will. Every good citizen will throw his influence in this direction. It will discourage all unlawful combinations, and restore to this glorious government that harmony and moral power, which shall distinguish it among other nations. Make this government what, in its formation, it was intended to be, a government of the people, and maintain sacredly the great principles on which it was founded, and its blessings will be perpetual.

Case No. 18,267.

CHARGE TO GRAND JURY—NEUTRALITY LAWS.

[5 McLean, 306.]

Circuit Court, D. Ohio. Oct., 1851.

VIOLATION OF NEUTRALITY LAWS—SETTING ON FOOT MILITARY EXPEDITION—INTERNATIONAL LAW.

[1. The acts enumerated in section 6 of the neutrality law of April 20, 1818 (3 Stat. 449), are all in the disjunctive. The offense is consummated by any overt act which shall be a commencement of an expedition, though it should not be prosecuted. Any combination of individuals to carry on an expedition is "setting it on foot," within the meaning of the statute, and the contribution of money or anything else which shall induce such combination may be a beginning of the enterprise.]

[2. A person may be convicted of "providing the means" for such an enterprise, if he furnish munitions of war, provisions, transportation, clothing, or any other necessities to men engaged in the expedition.]

[3. Citizens of the United States, who organize an expedition and invade a province or colony which is part of the dominions of a power with which the United States are at peace, thereby place themselves beyond the pale of civilization, and become pirates and outlaws.]

[4. If citizens of one nation commit depredations against another, and are not punished by their own government or given up to the injured government for punishment, the nation to whom they owe allegiance becomes a party to their wrong, under the principles of international law.]

After presenting to the grand jury certain violations of the laws of congress, which ordinarily come under the consideration of the grand jury, McLEBAN, Circuit Justice, remarked:

A sense of duty requires me to call your special and serious attention to an act of congress of the 20th of April, 1818, which is entitled "An act for the punishment of certain crimes." The first section of that act provides "that if any citizen of the United States shall, within the territory and jurisdiction thereof, accept and exercise a commission to serve a foreign prince, state, colony, district, or people, in war, by land or by sea, against any prince, state, colony, district, or people, with whom the United States are at peace, the person so offending shall be deemed guilty of a high misdemeanor, and on conviction shall be fined not more than two thousand dollars, and imprisoned not exceeding three years." The second section declares "that if any person shall, within the territory or jurisdiction of the United States, enlist or enter himself, or hire, or retain another person to enlist or enter himself, or go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any foreign prince, state, colony, district, or people, as a soldier, &c., shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding one thousand dollars, and imprisoned not exceeding three years." Sec. 6. "That if any person shall, within the territory or jurisdiction of the United States, begin or set on foot, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominion of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, every person so offending shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years." To this section your attention is specially solicited. You will observe that the enumerated acts which constitute the offense are all in the disjunctive. To "begin" the military expedition spoken of, is an offense within the statute. To begin it, is, to do the first act, which may lead to the enterprise. The offense is consummated by any overt act which shall be a commencement of the expedition, though it should not be prosecuted. Or if an individual shall "set the expedition on foot," which is scarcely distinguishable from beginning it. To set it on foot may imply some progress beyond that of beginning it. Any combination of individuals to carry on the expedition is "setting it on foot," and the contribution of money or anything else which shall induce such combination, may be a beginning of the enterprise. "To provide the means for such an enterprise," is within the statute. To constitute this offense, the individual need not engage personally in the expedition. If he furnish the munitions of war, provisions, transportation, clothing, or any other necessities, to men engaged in the expedition, he is guilty, for he provides the means to carry on the expedition. It must be against a nation or people with whom we are at peace. In passing

the above law, congress has performed a high national duty. A nation, by the laws of nations, is considered a moral being, and the principle which imposes moral restraints on the conduct of an individual, applies with greater force to the actions of a nation. "Justice," says Vattel, "is the basis of society, the sure bond of all commerce. Human society, far from being an intercourse of assistance and good offices, would be no longer anything but a vast scene of robbery, if there were no respect to this virtue, which secures to every one his own." "It is still more necessary between nations than between individuals, because injustice produces more dreadful consequences in the quarrels of these powerful bodies politic, and it is still more difficult to obtain redress."

These remarks are made, and the law cited, in reference to the late military expedition against the island of Cuba. That expedition was organized in this country, and was composed, principally, of our own citizens. Its object was to subvert the government of Cuba—a part of the Spanish dominions. With the government of Spain we have a treaty of peace and amity. A foreigner was at the head of the expedition. He seems to have been a credulous and weak man. He was impetuous, but was wanting in sagacity and judgment. His melancholy fate may excite our sympathy, but his memory is loaded with the execrations of thousands. He was instrumental in corrupting the minds, and withdrawing from their allegiance, many of our youth, who have paid the penalty of their temerity and recklessness. Their conduct admits of no other mitigation than that they were misled by falsehoods. They were induced to believe that a considerable portion of the people of Cuba were in arms, with the determination to overthrow their government. Those who were instrumental in creating this delusion have an awful account to render to their country and their God. The invading force, instead of meeting friends, met determined enemies with arms in their hands. At every step the invaders were opposed, and it is not known that a single Cuban joined the enemy. As might have been anticipated, the career of the invaders was short and extremely disastrous. Their sufferings were almost without a parallel; and, with two or three exceptions, those of them who were not taken prisoners and executed, were sentenced to an ignominious imprisonment in Spain. This second expedition terminated more disastrously than the first one. That was fitted out by the same leader, and the force was also raised and organized in our country, in defiance of its laws. The leaders and men were alike guilty in each, but as in the first expedition but few were killed, it created less sensation in the country than the late one. These unlawful enterprises cast a shade upon our national character, in the opinion of the civilized world. They unjustly, more or less, connect our government with the outrage, and they ascribe it to a lust for power and national aggrandizement. The chief executive, by proclamation, from time to time, warned the country of the unlawfulness of the enterprise, and of the punishment to which those engaged in it would be exposed. The executive and ministerial officers of the government were exhorted to be on the alert, to check and defeat the nefarious design. And a part of the navy was charged with the same service. But these efforts were ineffectual; in their madness and folly those who were embodied, trampled upon the laws of their country, and rushed upon their own destruction. To suppose that they could, under such circumstances, have been impelled by any justifiable motive in their own views, is to suppose them to have been laboring under a most extraordinary mental aberration. The duty of giving effect to law devolves upon the judiciary,

and you, gentlemen, for the time being, constitute an important part of that branch of the government. And now that the excitement growing out of the late expedition has subsided, and its fatal results are fully known, it becomes us, from the position we occupy, to take a calm, a considerate, and legal view of the circumstances which led to it, and of the acts of our own citizens. In this respect, your inquiries will be limited to the district of Ohio.

Our own history may show in what light our government has considered those opposed to us, who placed themselves beyond the limits of civilized warfare. Gen. Jackson, while engaged in the subjugation of savages in the South, captured two white persons who were banded with them, and in a great measure controlled their depredations. Arbuthnot and Ambrister were British subjects, who having been taken in arms, fighting on the side of the Indians against our armies, and within our territory, were summarily tried and summarily executed, and the commanding general was sustained by his government. Great Britain was too well acquainted with the laws of nations, and with the justice of the punishment, to make it a subject of serious reprobation. Compare the acts of these unfortunate men with the invaders of Cuba. Arbuthnot and Ambrister united themselves with the weaker party, and took part in the war. They were associated with savages, but savages who, to some extent, were allowed to possess the attributes of a nation. Treaties were made with them, and they had always exercised the right of carrying on war against the whites. These men identified themselves with this people in the war, and in doing so, did not, it is believed, violate any express law of their own country. They incurred the hazards of such a war, were taken, and justly condemned. Our citizens, in the invasion of Cuba, put at equal defiance the laws of their own country, and the laws of nations. They were covered by no flag; protected by no public opinion, governed by no general law. They placed themselves beyond the pale of civilization, and in doing so, became pirates and outlaws. They invaded a nation who were protected from outrage and injustice by the solemn guaranty of a treaty—a treaty in which our national honor was deeply concerned. No nation could be bound by a more solemn or higher obligation than our government is bound to maintain the most friendly relations with Spain. And the expedition was directed against an unoffending people. A people who were content with their government, and not desirous of a change. Neither in the landing of the invading army, nor in its progress through the country, was there found a traitor to the Cuban government. This is a most extraordinary fact. It could scarcely be realized by the invasion of any other country under similar circumstances. The liberating army found no one willing to be liberated. They were everywhere received as enemies. It is not known that any cruelties were perpetrated by the invaders on individuals. It is believed there were none. But their way was marked with blood—blood shed in skirmishes and in more general engagements. There never was an invasion among civilized nations, more atrocious and less excusable.

Let us suppose a similar invasion of our own country. And here it may be premised that if complaints against our government and a determination to overthrow it, in a certain quarter, afford any excuse for the combination of a foreign force against us, a strong case could be made out. But suppose an armed force, acknowledging allegiance to no government or people, should invade any part of our country with an avowed intention of overturning the government, how speedily would it meet destruction. Such an indignity and outrage

would cause the blood to thrill through the veins of every American. Gentlemen, our government must be just to ourselves, and just to other nations. A government is responsible for the acts of its citizens. Not, it is true, in the first instance, where they commit depredations upon a friendly nation. But if such citizens are not punished or given up to the injured government for punishment, the nation to whom they owe allegiance becomes a party to the wrong. This is an acknowledged principle in the law of nations. But the duty we owe to ourselves is of the highest obligation. No free government can be sustained, which does not enforce its laws. A deep and abiding respect for the laws, has heretofore been the glory of our country. In that consists our strength. Those who are unacquainted with the principles of our government, seem naturally to conclude it is wanting in energy and power. But they do not comprehend the secret of its strength. The majesty of the law pervades every part of the nation, and operates unseen; but its effects are visible. It has, heretofore, required no military display of men at arms to carry it into effect. But I am concerned to say that our late history, in this respect, will not compare with the past. There is, I fear, a growing indifference to the laws. When Aaron Burr was suspected of being engaged in an enterprise against the adjacent provinces of Spain, connected, as was apprehended, with a dissolution of the Union, the country was greatly excited, and he was pursued, arrested, and indicted for treason. Does the same deep feeling for the Union and its laws now pervade our country?

If it shall appear from the evidence that shall be given, that any of our citizens have violated the above law, it will be your duty to indict them. Laws that remain upon our statute book should be operative, or they should be repealed. The national standard is lowered, and licentiousness is increased, by a failure to enforce the penalties of the law. Our institutions can be sustained only on a moral basis. This is wanting in France, and they cannot maintain a free government. They may have the form, but the substance will be wanting. At this moment the republic of France, as it is called, is restrained and governed by physical power. And if our government, in our external and internal affairs, shall be so managed as to destroy its moral basis, we may as well attempt to build a structure in the air, as to sustain it. I fear this great fact may not be properly appreciated. On it depends, not only the prosperity of our free institutions, but their existence.

Case No. 18,268.

CHARGE TO GRAND JURY—NEUTRALITY LAWS.

[4 Wkly. Law Gaz. 214.]

Circuit Court, D. Louisiana. Oct. 20, 1859.

VIOLATION OF NEUTRALITY LAWS—PREPARING MILITARY EXPEDITION.

["To provide or prepare the means for" any military expedition or enterprise, within the meaning of the neutrality laws, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contributions, which shall tend to forward the expedition or add to the comfort or maintenance of those engaged in it, is a violation of the law. These acts must all be done under such circumstances as to show the criminal intent, unless such intent shall be avowed. Following Case No. 18,265.]

McCALEB, District Judge (charging grand jury). The general terms providing or preparing means were clearly intended by congress to refer to the usual means for a military expedition. Such expedition cannot be carried

on without men and arms and other munitions of war. To transport these men and arms and other munitions of war, to render them available for the expedition against a foreign territory situated like Nicaragua, there must be provided or prepared vessels propelled by wind or steam or both. This view seems to me to be consistent with reason and common sense, and consonant with the evident design of congress. It is for this reason, gentlemen, that I shall cite to you the opinion of Mr. Justice McLean. What is the language of the judge? "To provide or prepare the means for any military expedition or enterprise within the law, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition, or add to the comfort or maintenance of those who are engaged in it, is considered in violation of the law. These acts must all be done under such circumstances as to show the criminal intent, unless such intent shall be avowed. And it is hardly to be expected that, when an individual is about to violate the laws of his country, he will openly declare his intention to do so. Where the act and the attendant circumstances show the criminal intent, no subterfuges or motives avowed should screen the citizen from the consequences of such an act." [Case No. 18,265.]

We know, gentlemen of the grand jury, that peaceful relations exist between this country and Nicaragua, and that neither government has given any indications of a disposition to have those relations interrupted. What, then, the government of the United States is unwilling to do, it ill becomes small detachments of its citizens, acting independently and upon their own responsibility, to accomplish. Such a course must inevitably produce what the eminent jurist to whom we have already alluded has denominated that "monstrous anomaly in the history of the world, of a nation at peace, while its citizens are at war." And, surely, it is unnecessary for me to depict the calamities attendant upon war, even when waged in its mildest forms. An invasion by an army of an adequate force carries desolation in its path. The unoffending inhabitants of the invaded country endure, without the power of resistance, every species of outrage and suffering. The quartering of troops in their dwellings without their consent; the subsistence of those troops upon provisions which they have accumulated by honest toil; the pillage and plunder to which their farms and plantations are subjected without the hope of compensation for the losses they may sustain,—are but a few of the evils and calamities to which they must submit. And let it ever be remembered that innocent women and children are at all times the sharers in the sufferings which these military invasions never fail to produce in their desolatory progress. If, on the other hand, an invasion is attempted by an inadequate force, the sufferings and dangers of the invaders themselves must be in proportion to their inability to encounter them. Whether or not it be the duty of the government to interfere to avert the dangers to which a portion of its citizens may choose thus to expose themselves is a question which we need not decide. But surely it may be urged as an argument, to show the humanity of the law, that its faithful and rigid enforcement, whether by the government or the courts, may be instrumental in saving deluded persons from the perils into which they would blindly rush under the guidance of their leaders, and under the influence of promises which may never be realized.

With these remarks, gentlemen, I now commit the whole subject to your consideration, confident that you will discharge with fidelity the important duty which now devolves upon you.

Case No. 18,269.

CHARGE TO GRAND JURY—NEUTRALITY LAWS AND TREASON.

[2 Curt. 630.]

Circuit Court, D. Massachusetts. Oct. 15, 1851.

NEUTRALITY LAWS—CONSTRUCTION AND EFFECT—TREASON AGAINST THE UNITED STATES—OPPOSING EXECUTION OF A LAW.

[1. The neutrality law of March 5, 1794 (1 Stat. 381), and the subsequent legislation upon the same subject, rest upon the principle that, until our country has made war, we are at peace with all, by the law of nations, and without any treaty to that effect; and that for the citizens of the United States to combine to kill and rob those with whom they are at peace, and on whom they have no right to make any aggression, is as essentially criminal as to combine to murder and rob our own citizens.]

[2. The duties of impartiality, kindness, and peaceful treatment of other nations, being plainly incumbent on the government of the United States, it is its duty to see that all those subject to its authority do nothing in contravention of these duties. What it may not do in these particulars it may not permit to be done; and, for its own peace and welfare, it cannot suffer individuals, by mingling themselves in the belligerent operations of other nations, or by making war on their own authority, to run the hazard of counteracting the policy, or embroiling the relations of their own government.]

[3. The words "levying war," as used in the constitutional definition of "treason," include not only the act of making war for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, with intent to prevent its enforcement in all cases, if accompanied or followed by an act of forcible opposition to such law in pursuance of such combination.]

[4. If a body of men be actually assembled to effect by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered guilty of treason.]

Extract from a charge delivered to the grand jury in Boston, October 15, 1851, concerning the neutrality laws and the law of treason:

CURTIS, Circuit Justice (charging grand jury). You are aware that the foreign relations of our country are under the exclusive care and control of the government of the United States. To make peace and war, to enter into treaties of amity and commerce, to protect the rights and redress the injuries of our citizens from foreign aggression, are powers confided by the constitution to the general government alone. It is essential to the due exercise and maintenance of these powers, and to the welfare of the whole people, for whose benefit they exist, that they should not be in any way embarrassed or interfered with, by the irregular and irresponsible action of individuals. The public faith, pledged by treaties, could not be kept, if individual citizens were at liberty to act, in contravention of such treaties, as their private interest or passions might dictate. The public peace could not be preserved, if men might be armed and embodied on our soil, to make attacks on a foreign people or government. To permit this, would be to allow the interests or passions of a few, to control the deliberate and organized action of the whole, and to place the peace and welfare of our country at the mercy of strangers, or of needy, or desperate, or enthusiastic men. To guard against this evil, congress has made it a high misdemeanor, within the jurisdiction or territory of the United States, to begin to set on foot, or provide, or prepare the means for, any military expedition, or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace; and has also made specific, and highly penal enactments, to prevent the enlistment of

men, or the fitting out, or arming of any vessel, for any such purpose, by any person within our jurisdiction.

It cannot be doubted that these laws are in conformity with the settled policy of our government. Very early in our history as a nation, this policy was adopted by President Washington, with the concurrence of the wise and eminent advisers by whom he was then assisted. On the 22d day of April, 1793, he issued a proclamation, in which he asserts it to be both the duty and interest of the United States, with sincerity and good faith, to pursue a conduct friendly and impartial towards the foreign powers therein mentioned, exhorting and warning the citizens of the United States carefully to avoid all acts inconsistent with such friendly and impartial conduct, and declaring that whoever should do otherwise, would not receive the protection of the United States. At this time, congress had not legislated on this subject. And in the following December, the president made known to both houses certain facts connected with the then state of public affairs abroad and at home, and after expressing his own opinion, that where individuals shall, within the United States, enter upon military expeditions and enterprises, the offence cannot receive too early or close an attention, he distinctly recommends to congress the extension of the statute law of the country to such cases, which, he says, though depending on principles already recognized, seemed to him to demand some further provisions of positive law. And, accordingly, on the 5th of June, 1794 (1 Stat. 381), an act was passed, one section of which was similar to the law whose substance I have already stated to you. And since that time, by legislation, as well as by the official action of the executive, this duty and policy of our country have been recognized and declared in the clearest terms, and under a great variety of circumstances. The principles on which these laws rest are, that until our country has made war, we are at peace with all, by the law of nature, and without any treaty to that effect; that for the citizens of the United States to combine to kill and rob those with whom they are at peace, and on whom they have no right to make any aggression, is as essentially criminal, as to combine to murder and rob our own citizens; that individual citizens have no prerogative to judge and condemn, and then proceed to execute others, or inflict on them any injury as a consequence of what may be assumed to be their misconduct; that the duties of impartiality, kindness, and peaceful treatment of other nations being plainly incumbent on the government of the United States, it is as plainly its duty to take care that all those subject to its authority, do nothing in contravention of those duties; what it may not do, in these particulars, it may not permit to be done; and that, for its own peace and welfare, and from its own sense of what is due to others, it cannot suffer individuals, by mingling themselves in the belligerent operations of other nations, or making war on their own authority, to run the hazard of counteracting the policy, or embroiling the relations of their government.

It may be added, that the United States was the first of all civilized nations to embody these principles in their municipal law, and enforce them by penal enactments. Having so legislated, it has become the clear duty of the courts of the United States to take cognizance of these offences, and it is to be expected that they will discharge with fidelity and firmness a duty so important to their country and to the peace of the world.

Under the laws of the United States, the highest of all crimes is treason. It must be so in every civilized state; not only because the first duty of a state is self-preservation, but because this crime naturally leads to and in-

volves many other, destructive of the safety of individuals and of the peace and welfare of society. This crime is defined by the constitution itself, and its magnitude, as well as the importance of a fit and rigid definition of it, may be inferred from the fact that it is the only offence defined by that instrument. It is there made to consist in levying war against the United States, or adhering to their enemies, giving them aid and comfort. This language is borrowed from an ancient English statute, enacted in the year 1352 (25 Edw. III.), mainly for the purpose of restraining the power of the crown to oppress the subject by arbitrary constructions of the law of treason. At the time of the introduction of this language into our constitution, it had acquired a settled meaning, and that meaning has been adopted by the courts of the United States when they have had occasion, as unfortunately they have had occasion, to interpret these words. This settled interpretation is, that the words "levying war," include not only the act of making war for the purpose of entirely overturning the government, but also any combination forcibly to oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law in pursuance of such combination. The following elements, therefore, constitute this offence: (1) A combination, or conspiracy, by which different individuals are united in one common purpose. (2) This purpose being to prevent the execution of some public law of the United States by force. (3) The actual use of force, by such combination, to prevent the execution of that law.

These elements require some further explanation, to prevent their true nature from being misunderstood. It is not enough that the purpose of the combination is to oppose the execution of a law in some particular case, and in that only. If a person against whom process has issued from a court of the United States, should assemble and arm his friends forcibly to prevent an arrest, and in pursuance of such design, resistance should be made by those thus assembled, they would be guilty of a very high crime, but it would not be treason, if their combination had reference solely to that case. But if process of arrest issue under a law of the United States, and individuals assemble, forcibly to prevent an arrest under such process, pursuant to a design to prevent any person from being arrested under that law, and with such intent, force is used by them for that purpose, they are guilty of treason. The law does not distinguish between a purpose to prevent the execution of one, or several, or all laws. Indeed, such a distinction would be found impracticable, if it were attempted. If this crime could not be committed by forcibly resisting one law, how many laws should be thus resisted to constitute it? Should it be two, or three, or what particular number short of all? And if all, how easy would it be for the worst of treasons to escape punishment, simply by excepting out of the treasonable design, some one law. So that a combination formed to oppose the execution of a law by force, with the design of acting in any case which may occur, and be within the reach of such combination, is a treasonable conspiracy, and constitutes one of the elements of this crime. Such a conspiracy may be formed before the individuals assemble to act, and they may come together to act pursuant to it; or it may be formed when they have assembled, and immediately before they act. The time is not essential. All that is necessary is, that being assembled, they should act in forcible opposition to a law of the United States, pursuant to a common design to prevent the execution of that law, in any case within their reach. Actual force must be used. But what amounts to the use of force, depends much upon the nature of the

enterprise, and the circumstances of the case. It is not necessary that there should be any military array, or weapons, nor that any personal injury should be inflicted on the officers of the law. If a hostile army should surround a body of troops of the United States, and the latter should lay down their arms and submit, it cannot be doubted that it would constitute an overt act of levying war, though no shot was fired or blow struck. The presence of numbers who manifest an intent to use force, if found requisite to obtain their demands, may compel submission to that force, which is present and ready to inflict injury, and which may thus be effectually used to oppose the execution of the law. But, unfortunately, it will not often be necessary to apply this principle, since actual violence, and even murder, are the natural and almost inseparable attendants of this great crime. It should be known also, that treason may be committed by those not personally present at the immediate scene of violence. If a body of men be actually assembled to effect by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered guilty of treason.

Influential persons cannot form associations to resist the law by violence, excite the passions of ignorant and unreflecting, or desperate men, incite them to action, supply them with weapons, and then retire and await in safety the result of the violence which they themselves have caused. To permit this, would not only be inconsistent with sound policy, but with a due regard to the just responsibilities of men. The law does not permit it. They who have the wickedness to plan and incite and aid, and who perform any part however minute, are justly deemed guilty of this offence, though they are not present at the immediate scene of violence.

The court deeply regrets that it should ever be necessary in this country, and under this government, to instruct a grand-jury concerning the law of treason. But unfortunately, recent events have shown, too clearly, that there is a great misapprehension in some minds concerning this subject, and that it has already become necessary elsewhere, to institute inquiries and make presentments of this offence. With the temper of any portion of the public mind, so far as it manifests itself in discussion of any question, or the formation of opinions, or so far as it affects the political affairs of the country, this tribunal has no concern. But, when it connects itself with the criminal law of the United States, when discussion passes into direct and urgent incitement to crime, when ignorant men are stirred up to form combinations to resist the law by violence, it becomes the duty of this court to apprise you of the true character of these combinations, and the acts which grow out of them, and the responsibility which the law attaches thereto.

I hardly need inform you that it is not material what law of the United States is thus resisted. We can know no distinction between one law of the United States and another. If it were permitted to you, or to me, to be influenced by our own wishes, in determining what laws should be executed, and what might be resisted with impunity, we should live no longer under a government of laws, but under a government of men; the transitory opinions and feelings of men, being substituted for a known and stable rule of action, operating at all times, and operating equally on all; and the citizen would be held innocent or guilty, not according to his wilful violation of a known rule, but according to the caprice of his judges. This is not the nature of the government under which we live. No such government could long exist in this country, or ought to exist in any country.

Case No. 18,269a.

CHARGE TO GRAND JURY.

[3 Phila. 527.]

Circuit Court, District of Georgia. Nov., 1850.

SLAVE TRADE—STATUTES—INTERPRETATION—CONSTITUTIONAL LAW.

[1. A vessel becomes liable to forfeiture because built or equipped in the United States for use in transporting slaves from one foreign country to another (Act Cong. March 22, 1794; 1 Stat. 347) as soon as any preparation of it for such purpose is made, a completion of the equipment not being necessary.]

[2. A vessel is "employed in the transportation of slaves from one foreign country to another" (Act Cong. May 10, 1800; Rev. St. U. S. § 5556), so as to be liable to forfeiture, when it is on a voyage to procure slaves for that purpose, though no slaves have as yet been taken on board.]

[3. Service on a voyage known to be for the purpose of procuring slaves for transportation from one foreign country to another is a violation of Act Cong. May 10, 1800 (Rev. St. § 5331), forbidding citizens and residents of the United States to serve on a vessel used in such transportation.]

[4. Under the power to define and punish piracies (Const. U. S. art. 1, § 8, subd. 10), congress may declare to be piracy the service of a citizen or resident of the United States on a vessel used in kidnapping the inhabitants of a foreign country for the purpose of making them slaves, or the use of a vessel owned in the United States in such kidnapping.]

[5. Congress has power to prohibit citizens and residents of the United States from engaging in the slave trade with or between foreign countries, both under the power to regulate commerce (Const. art. 1, § 8, subd. 3), and because such traffic concerns the relations between citizens of the United States and those of foreign countries.]

WAYNE, Circuit Justice (charging the grand jury).

A circumstance has recently occurred in this city which impresses the larger portion of its people, I may say all, with few exceptions, that the same vessel has been positively taken from this port to be engaged again in the same unlawful trade. This incident, with some exceptions that you may be called upon to act upon it, and upon bills for violation for the slave trade acts, induces me, for the information of yourselves and our people at large, to charge you upon the legislation of congress upon that subject, and to give its history. I shall assert nothing without the documentary annals of our country to sustain what I shall say, with such references to them as will enable any one and every one who hears me to verify or to disaffirm the conclusion of my investigation, if the latter can be done.

I proceed now to give the legislation of congress for the prohibition of the slave trade. It shall be chronological and minute, for instruction generally, and as a warning to such persons who at any time may be seduced by a corrupt avarice to engage in that inhuman trade. These enactments are in conformity with the constitution, and with that clause of it which declares that the "migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." The clause has its place in the enumerated powers of congress.

The first act was passed on the 22d March, 1794 [1 Stat. 347], when General Washington was president. It was intended to prevent any citizen or resident of the United States, from equipping vessels within the United States to carry on trade or traffic in slaves to any foreign country. The *Tryphenia v. Harrison* [Case No. 14,209]. That is, though slaves might be brought into the United States until the year 1808, in vessels fitted out in our ports for that purpose, they could not be carried by

our citizens or residents in the United States in such vessels into any foreign country. The forfeiture of the vessel which has been fitted out, attached when the original voyage was begun in the United States, notwithstanding a pretended transfer of her in a foreign port, and the commencement of a new voyage from such port. *The Plattsburg, 10 Wheat.* [23 U. S.] 133. This act is still in force. The forfeiture attaches, though the equipments of the voyage may not have been completed, it being sufficient that any preparations were made for the unlawful purpose. The act also imposes a penalty of \$2,000 upon any person fitting out such vessel, or aiding or abetting to do so. And as a prevention of such a traffic was the object to be attained, the act was applied to foreign vessels in this particular, that if one of them in our port shall be suspected to be intended for the slave trade, her owner, master, or factor, each and all of them, upon the oath of a citizen of the United States to that intent, may be required to give bonds to the treasurer of the United States, that none of the natives of Africa or negroes of any foreign country, should be taken on board of her, to be sold as slaves in any foreign port whatever, within nine months afterwards. In addition, a citizen of the United States is liable to forfeiture of \$200 for every person he may receive on board of such vessel for the purpose of selling them as slaves. This statute accomplished its purpose for a time. But when it was found that some of our citizens and foreigners residing in the United States, who had been accustomed to traffic in slaves, misused their privilege to bring slaves into the United States, by engaging their vessel for taking slaves from one country to another, congress passed the act of May 10, 1800 [2 Stat. 70]. It subjected to forfeiture any right or property in a vessel so employed, and the owners to pay a sum of money equal to double the value of their interest in her.

The judicial interpretation of this act, is that a vessel caught in such a trade, though it be before she has taken slaves on board, is liable to forfeiture. That a forfeiture was also incurred if slaves were carried as freight from a foreign port to another in the same kingdom; or from one foreign port to another in any other country. The act, too, declares that it shall be unlawful for any citizen of the United States or for any person residing in them to serve on board of any vessel of the United States employed in the transportation of slaves from one foreign country to another; and that for doing so they should be indicted and be subjected to a fine not exceeding two thousand dollars and imprisonment not exceeding two years. That he shall also be liable to the same fine and imprisonment for being voluntarily employed on board of a foreign vessel for the same purpose. The judicial interpretation of this act is, that actual transportation of slaves is not necessary to incur its penalties. It is enough that the vessel was bound to the coast of Africa with the intent to take slaves on board, and that the person charged with violating the act, knew that, and voluntarily served on board of her. *U. S. v. Morris, 14 Pet.* [39 U. S.] 464. It is not necessary to do more than to mention that there are other sections of this act providing for the capture of vessels engaged in such a trade: also for their forfeiture for the benefit of the captors, and precluding all persons interested in such vessel, her enterprise or voyage, from all rights to claim any slave on board of her, and denying to them any damages or retribution on account of her capture. This act further directs the commander of the ship, making the seizure of such a vessel, to take her officers and crew, and any person found on board of her, into custody, and to convey them to the civil authority of the United States, in some of the judicial districts, for prosecution. It had been early

found that some of those persons most concerned in violating the laws, (just as it has been recently attempted,) claimed to be exempt from its penalties, on the ground of being passengers on board of the vessel seized. Congress met the artifice by declaring that all persons making such a declaration should nevertheless be taken into custody for prosecution, and any commander who shall seize such a vessel, with such a person on board of her, and who attempts to exercise his judgment in respect to the validity of such an excuse breaks the law. It was early afterwards decided, by Judge Bee, of South Carolina, that any person might make a seizure of such vessel for condemnation under the act. His ruling was affirmed by the supreme court of the United States in the case of *The Josefa Segunda, 10 Wheat.* [23 U. S.] 331. The act also gives to the president of the United States the naval forces to be employed in enforcing it. It provides for the punishment of the master of the vessel seized, subjecting him to a fine not exceeding ten thousand dollars and imprisonment of not less than two and not more than four years.

The next act of congress was passed on the 2d March, 1807 [2 Stat. 426], when Mr. Jefferson was president. I will hereafter show that it was done upon his official suggestion; and I only do so now from unwillingness to divert your minds into another train of thought from the legislation itself. The act of 1807 begins by subjecting any vessel to forfeiture which shall be found in any river, bay, or harbor, or on the high seas within the jurisdiction or limits of the United States, or which may be hovering on the coast, having on board any negro, mulatto, or person of color for the purpose of selling them as slaves, or with the intent to land them in any port or place within the United States.

The act of 1818 [3 Stat. 450] prohibits the importation of negroes altogether into the United States from any foreign kingdom, place or country, without excluding the return to it of such slaves as might leave the United States as servants of their owners, comprehending such as have been employed as seamen on a foreign voyage. *U. S. v. The Garonne, 11 Pet.* [36 U. S.] 73. The ship in which they are brought is forfeited. It also forfeits any vessel built or equipped for the purpose of bringing slaves into the United States, or for the purpose of transporting them to any foreign country, and any preparation which clearly manifests an intent to prosecute a slave voyage, constitutes a fitting out under the act.

This offence being by the act a misdemeanor, all concerned in it are principals. *U. S. v. Gooding, 12 Wheat.* [25 U. S.] 460. The penalty under the act for fitting out vessels for the slave trade, and all persons in any way concerned, is a fine not less than \$1,000 nor more than \$4,000, and imprisonment which may be extended from three to seven years. It also inflicts other and severe penalties upon citizens of the United States, and other persons residing therein, for being concerned in the slave trade, either on shore or at sea, and it provides, as previous acts did, against carrying slaves from one port to another in a foreign country. *The Merino, 9 Wheat.* [22 U. S.] 391. It takes from the importer of slaves, and from any other person claiming them under him, or who may have bought from his agent, any right, title or interest whatever in the service or labor of any negro, mulatto, or other person of color, so acquired. The purchaser of such slaves may be punished. Those also who may have aided or abetted the importation of such slaves, and all persons are punishable who now hold, sell, or otherwise dispose of any negro, with intent to make him a slave, who shall know that he was introduced into the United States contrary to law. And in the eighth section of the act it is declared that in all prosecutions under it, the defendant shall

be held to prove that the negro, mulatto, or person of color, which he shall be charged with having brought into the United States, or with having purchased, or with having held or sold, or otherwise having disposed of, was brought into the United States five years before the commencement of the prosecution, or that he was not brought into it contrary to the provisions of the act. On failure of neither being done by the person charged, he shall be adjudged guilty of the offence with which he may stand charged under the act. By which understanding that after the prosecuting officer has made out a prima facie case, that a negro or mulatto is in possession of the accused, who has been brought into the United States contrary to law, that the burden of proof is cast upon the holder of the negro to exempt himself from the penalties of the law.

The act of 1819 [3 Stat. 532] authorizes the president in a more particular manner than has been done before, to use the naval force for the prevention of the slave trade, points out the circumstances and the localities in which seizures of vessels may be made, directs the distribution of the proceeds of them after condemnation, requires that negroes found on board of them shall be delivered to the marshal, what that officer's duty then is, and again commands that the officer making the seizure shall take into his custody every person found on board, being of the crew or officers of the vessel seized, and that they are to be turned over to the civil authority for prosecution. A bounty of twenty-five dollars is to be given for the detection of every negro, &c., &c., brought into the United States contrary to law, which the secretary of the treasury is authorized to pay to the informer. The government is also authorized to pay a specific sum to any person who shall lodge information with the district attorney of any state or territory into which negroes have been introduced, contrary to the provisions of this act. It is then made that officer's duty to commence a prosecution, by information, to ascertain the fact of the unlawful introduction, and process is issued against the person charged with holding any such negro. If upon the return of the process executed it shall be ascertained by the verdict of a jury that the negro has been brought into the United States as the informer had alleged, he is entitled to receive fifty dollars for each negro delivered to the marshal or of whom that officer may get the possession. I have been more particular in reciting what should be the proceedings, on account of it not having been pursued, when a number of Africans supposed to be of the Wanderer cargo were in the possession of an officer from whom they were taken, by the intervention of a state officer's warrant, without there being the slightest authority for doing so. I suggest, as the release of the Africans alluded to was a nullity, that proceedings against the persons concerned in it may still be instituted in vindication of the violation of the laws of the United States, and that new proceedings may be brought upon the proper affidavit of any one that any other person was or is in possession of any of the negroes brought in by the Wanderer, for carrying out the United States law to its conclusion, for the benefit of whoever was or may become the informer.

This brings us to the last act upon the subject,—that of the 15th May, 1820 [3 Stat. 600]. It denounces any citizen of the United States as a pirate, and that he shall suffer death who shall become one of the crew of a ship's company of any foreign ship; and that any person whatever becomes a pirate and shall suffer death, who shall become one of the crew or ship's company of any vessel owned in the whole or in parts, or which shall be navigated for or in behalf of any citizen of the United States, or who shall land from such vessel on any foreign shore and shall seize any negro or

mulatto not held to service or labor by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or who shall decoy or forcibly bring or carry or who shall receive on board of such ship any negro or mulatto with intent to make him a slave. The fifth section of the act declares that, if either of the same class of persons in the same classes of vessels shall forcibly confine or detain, or abet or aid, to do so, any negro or mulatto on either of such ships, not held to service or labor by the laws of either of the states or territories of the United States, with intent to make them slaves, or who shall on board any such ships offer or attempt to sell as a slave any negro or mulatto not held to service by the laws of any of the states or territories of the United States with intent to make such persons slaves; or who shall on the high seas or any where on tide-water transfer over to any other ships or vessels, such persons intending to make them slaves; or shall land or deliver such persons with the same intent, or having already sold them, that such persons shall be adjudged pirates, and on conviction, shall suffer death. It was necessary to be minute in the recital of this act, or you could not have had a correct idea of it.

Such, gentlemen, has been the legislation of congress to prohibit and to punish the introduction of slaves into the United States from abroad by our own citizens or by foreigners. It will be found in the history which I shall give of that legislation, that it is the result of an early and continued disapproval by the people of the United States, both north and south, of the African slave trade. In all of which, from the very beginning of our nationality, the distinguished men of both sections took an active part, none of them more decisively than southern statesmen, in every act that has been passed, including the last. There has never been any manifestation of popular or sectional discontent against them on account of their opinions concerning the African slave trade, or their legislation to repress it. The acts for that purpose have never been complained of but by those who had subjected themselves to their penalties, or who feared that they might be so, or by a few gentlemen, the sincerity of whose convictions cannot be doubted, but have not as yet in their speeches or publications commanded much attention for their knowledge of the history of our legislation, or for their expositions of constitutional laws upon the subject. No serious attempt has been made to repeal any one of those acts, and no one in a condition to do so has been found to propose it with an earnest and zealous effort to accomplish that. They have been acquiesced in, and had a popular approval from the first act that was passed to the last, inclusive. The judicial infliction of the penalties of those acts, which has been frequently done, has always been considered the legal and just consequence of the constitutional provision which gives to congress the power to prohibit the importation of slaves into the United States after the year 1807.

The acts of 1818, 1819, 1820, severe as they may seem to be, particularly the last, had the active and marked support of the most distinguished representatives in congress from the state of South Carolina, and that of the ablest representatives of every other state in the Union. There was but one opinion in the senate and house of representatives that the treaty engagement of the United States with Great Britain, the times and the circumstances of it, called for such acts in favor of humanity. They were necessary to vindicate our national sincerity from almost an imputation of connivance at the violations on our coast of our acts for the suppression of the slave trade. What those circumstances were will be shown by the narrative I shall now give you. At no

time has modern commerce been assailed by more extensive or more brutal piracies and murders than it was in the year 1815, and for thirty years afterward.

The general pacification in Europe in 1814, and that of the United States with Great Britain, threw out of employment numbers of men who had been accustomed to the violence of war and to the hazards and gains of privateering. They were unfitted for any quiet social conditions, were without daily occurring or expected causes of excitement, and had not those virtues suited to the pursuits of peace. Their vessels had been built, and equipped and manned for pursuit and for flight, and were unfit for the carrying trade of commerce. Many of them were soon employed in a force trade, and in smuggling on every shore of the Atlantic. The transition to piracy soon followed. I believe (for I speak from the history of that day and from public documents) that there was no nation in Europe some of whose vessels were not so used, and many of those of the United States were navigated by our citizens and by foreigners for the same purpose. In the latter part of the year 1816, and during the following year, vessels of that class were on the coasts of this continent from Cape Horn to the Gulf of Florida. At first they were pirates without combinations, but afterwards became associated and had places of depot for the sale and division of their spoil. Those places were on the uninhabited Atlantic coast of America, and those localities are now known. At length an adventurer, daring and knowing, conceived an idea and executed it, to make the Island of Fernandina their rendezvous. He seized it, declaring it to be no longer a dependence of Spain, and organized a government there, in conjunction with citizens of the United States who were men of broken fortunes at home. They claimed for themselves the privileges of nationality, invited an accession of numbers from every part of the world, recruited them as soldiers, and employed them on board of cruisers which had commissions of their own, with simulated documentary papers of the United States and the nations of Europe. Spain could not dislodge them. Our negotiations were then going on for the purchase of Florida. In a short time the little island (now probably to become a city of note) was filled with the stolen products of commerce. The plan was to smuggle them into the adjoining districts of the United States, overland by the way of Florida, and from points on the St. Mary's river into the interior. Our citizens from the north and the south did not resist the temptation; men from the utmost east of the United States and the nearer south to the locality were there for unlawful purposes, just as they had been a few years before, during the war of the United States and England, to smuggle our cotton into Fernandina on English account, and in return, to smuggle into the United States the fabrics of her manufacturers. In a short time this assumed government opened the island as a depot for slaves from Africa. Two cargoes of them arrived there in the year 1818, in such a condition of misery from long confinement, starvation and scourging, that the representation of it caused all over the United States a deep and indignant sympathy. Those, and there were but few of them who survived, were bought by a citizen of the state of Pennsylvania, and by a resident merchant of Savannah, and were successfully introduced into the United States. A third cargo arrived under like circumstances and with the same results. It was known that others would follow, and with a proper regard for humanity, and the political interest of the nation, Mr. Monroe, then president, determined to take possession of the island. It was done by a military force. The late Gen. Bankhead commanded the expedition. Aury's government and forces, after

a show of resistance, surrendered. Himself and his officers fled, and thus an end was put to their combination for smuggling and piracy. It must not be supposed, however, that a gush of sympathy from such a cause led to the enactments of the act of 1820. It had a deeper and a wider foundation, as you will presently see, in the long standing conviction of the American people, that the African slave trade was wrong in itself.

Your attention will now be called to the history of the legislation of congress to prohibit the African slave trade, with especial reference to the religious, moral, and political considerations on which it rests, and to the constitutionality of the act of 1820, making the trade piracy, punishable with death. The colonial history of the states, in my judicial circuit, North and South Carolina, and Georgia, exhibits the existence of a profound impression among the people that the slave trade was not a legitimate commerce, but that it involved the perpetration of enormous crimes. The same feeling, belief, and opinion had been frequently expressed in Virginia, and Maryland manifested the same sentiments and disposition to abolish it; all of them suggested measures for its discouragement. This sentiment, common indeed to all the colonists, was expressed by the first constitutional congress of 1774, in its adoption, unanimously, by all the colonies, of the non-importation, non-consumption, and non-exportation agreement, and with more emphasis by the congress of 1776. That congress resolved that the importation of African slaves should be abandoned, and for a time there was no state in which the trade was tolerated. The provisions of the federal constitution were settled with much deliberation and care. They were reported by a committee formed by a member from each state, and their report, with amendments, was adopted as the complete and final adjustment of our constitutional arrangement of that subject. This adjustment contemplated that either of the states, "then existing," should retain its power to admit slaves until the year eighteen hundred and eight, and that after the year eighteen hundred and seven, congress should have plenary authority to regulate or prohibit it. Mr. Madison expressed the sense of the federal convention, when he said, in the Virginia convention, "it appeared to him that the general government would not intermeddle with that property for twenty years, but to lay a tax on every slave imported, not exceeding ten dollars, and that after the expiration of that period, they might prohibit the traffic altogether." But the reservation of the power to "the United States" to admit Africans to be held as slaves, was opposed with much earnestness in the federal convention that passed it, and was regarded as a serious objection in many of the conventions assembled in the different states to ratify the constitution. The limitation of the powers of the United States to legislate upon the subject, did not extend to the trade with foreign nations or to the territories.

In the years 1794 and 1800, during the administrations of General Washington and Mr. Adams, American ships and American seamen were prohibited from engaging in or carrying on the slave trade among foreign nations, under heavy penalties. In 1798 and in 1804, the trade was prohibited in the Mississippi and Louisiana territories, comprising, then, all the slaveholding territories of the United States. In the year 1806, President Jefferson congratulated congress upon the approach of that period when its power became plenary, and invited it to pass suitable laws for the final suppression of the trade. The prohibitory sections of the act of 1807 were adopted with unusual harmony of sentiment by congress, and were the result of Mr. Jefferson's recommendations. It was said in the debate that took place upon that bill, that the sentiment was general for the

abolition of the slave trade, and that the only inquiry was, how it could be most effectually done.

In the treaty of peace concluded at Ghent between the United States and Great Britain, the trade was pronounced to be "irreconcilable with humanity and justice," and the contracting parties engaged to use their best endeavors for its abolition. In 1818, 1819, and 1820 the laws of the United States upon the subject were revised, and additional severity given to the enactments. Thus it is seen that during the administrations of the first five presidents, all of whom were concerned in settling the foundations of the government, a series of laws, based upon a common principle, and having a common end, have been adopted by the united and concurring views of the states and the people for the suppression of the African slave trade. The power of congress to suppress the slave trade, by passing all laws necessary and proper for that purpose, is not questioned by any one at all conversant with the constitution and constitutional history of the United States. As a matter of commerce, the power of congress to regulate the foreign slave trade is plenary and conclusive. As it affects navigation and the police of the ocean and seas, the power given to define and punish piracies and felonies on the high seas is without limitation. And in so far as it affects intercourse with the inhabitants of another continent, and the relation which shall exist between our citizens and those inhabitants, the power of congress to determine upon that intercourse, and to control the citizens of the United States in regard to it, is absolute and unconditional.

The acts of congress relating to the slave trade divide the offenders into three classes, and apportion various degrees of punishment among them. I shall speak of but one of them. The class treated as the most criminal, upon whom the denunciation of punishment falls most severely, comprises the crew of the ship's company of the vessel, who are immediately employed in carrying on the trade. The act of congress of May, 1820 [3 Stat. 600] describes this class as the crew or ship's company of any American vessel, or the citizens of the United States employed in any foreign vessel engaged in the slave trade. The supreme court of the United States have said in reference to a similar enactment: "As to our citizens, there is no reason why they should be exempted from the operation of the law of the country, even though in foreign service. Their subjection to those laws follows them every where." The crimes described in this act have been already mentioned in almost the language of it, but in the connection the repetition with greater brevity will be allowable. Those crimes may be committed by landing from any such vessel, and on any foreign shore seizing a negro or mulatto not a slave under any state or territorial law of the United States with intent to make of him a slave; or by forcibly or fraudulently decoying or abducting such a person to such ship or vessel, or forcibly confining or detaining him on board with such an intent, or selling or attempting to sell him as a slave on the high seas, or landing him from the vessel, with such intent. The person transgressing in either of the particulars mentioned is to be adjudged a pirate, and the penalty is death. The crime of kidnapping the inhabitant of another country by a citizen of the United States, or by the employment of an American vessel, is as plainly within the power of congress to define and punish and denominate it piracy as it would be for congress to punish for piracy the crew of any vessel who might land upon the shore of the United States with the intent to kidnap, or who should kidnap, the citizens of the United States, or the negro slaves on plantations situated on the coast of the United States. In either case it belongs to congress to affix the punishment for the offence, upon

its own convictions of its enormity and its mischievous tendency. The denomination applied to the offender is of no importance to the character of the act, though without designation otherwise, it may be as to the punishment of the offence. But there can be no difficulty in vindicating the classification of the offence described in the act as piracy. The acts of 1794, 1800, 1807, and 1818, abolished the slave trade, and prohibited the employment of American seamen and vessels, either in the foreign slave trade or in the importation of slaves to the United States. The American citizen was not allowed to acquire any title to the subject of such traffic, from any person concerned in it. The right of the inhabitants of Africa to their liberty to be inviolable by the inhabitants of the United States. To this limited extent they were placed upon the same conditions as the inhabitants of any other country. From a remote antiquity, the seizure and abduction of men and women, with the intent to dispose of them as slaves, by the crew or ship's company of vessels roaming at large for the purpose of plunder and traffic, have been deemed and always called acts of piracy. It was a capital offence by the Jewish law, and to steal a human being, man, woman or child, or to seize and forcibly carry away any person whatever from his own country into another, has always been considered to be piracy, and is now so considered by all nations enjoying Jewish and Christian instruction, punishable with death. The exclusion of the inhabitants of Africa from such protection, so far as the nations of Europe are concerned, commenced in the early part of the fourteenth century; the Portuguese having then begun the traffic in slaves from the western shores of that continent. But they placed their right to do so, and the exercise of it, upon the Roman law of "Jure gentium, servi nostri sunt qui ab hostibus capiuntur." Nor was it ever recognized in Europe to be allowable trade upon any other principle, until the emperor Charles V. authorized, in 1516, the introduction of Africans into the island of St. Domingo, from the establishments of the Portuguese on the coast of Guinea, to work the mines in that island. It was subsequently sanctioned by the nations of Europe for the same purpose and for agricultural labor, and for the last it was introduced by all of them into their respective colonial possessions in America. But now the sanction of all of them for such a trade having been withdrawn, and all of them having declared it to be piracy, the natural rights of the inhabitants of Africa are secured against the violation of them by their respective citizens and subjects, as to the transportation of them to any port of the world, with intent to make them slaves. A classical writer upon the manners of the ancient Greeks informs us: "The supply by war of slaves, there seldom equalled the demand; in consequence a race of kidnappers sprung up, partly merchants and partly pirates, who roamed about the shores of the Mediterranean, as such miscreants do now about the slave coasts, picking up solitary and unprotected individuals. Greek and Roman authorities tell us that when the Sclesian pirates had the possession of the Mediterranean, as many as ten thousand slaves were said to have been imported and sold in one day." Lord Stowell describes a pirate "as one who renounces every country, and ravages every country on its coasts, and vessels indiscriminately." And it is quite clear, politically and judicially, that a pirate is one who, without a commission from any public and recognized authority, shall ravage the coasts or vessels of any country indiscriminately. Mr. Jefferson, in his draft of the Declaration of Independence, denounces the African slave trade "as a piratical warfare, the opprobrium of infidel nations."

The motives and considerations which induced congress, with scarcely a division, to enact

the law of May, 1820 [3 Stat. 600], are fully explained in the report of the committee of the house of representatives, which recommended the passage of the bill. "Congress," say the committee, "have heretofore marked with decided reprobation the authors and abettors of this iniquitous commerce in every form which it assumes, from the inception of its unrighteous purposes in America, through all the subsequent steps of its progress to its final consummation,—the outward voyage, the cruel seizure and forcible abduction of the unfortunate African from his native home, and the fraudulent transfer and sale of the person so acquired. It may, however, be questioned if a proper discrimination of their relative guilt has entered into the measure of punishment annexed to their criminal acts. Your committee cannot perceive wherein the offence of kidnapping an offending inhabitant of a foreign country, in chaining him down for a series of days, weeks, and months, amidst the dying and the dead, to the pestilential hold of a slave ship; of consigning him, if he chance to live out the voyage, to perpetual slavery in a remote and unknown land, differs in malignity from piracy, and why a milder punishment should follow the one than the other crime. Are there not united in this offence all that is most iniquitous in theft, most daring in robbery, and cruel in murder? If the internal wars of Africa and their desolating effects may be imputed to the slave trade,—and that the greater part of them must, cannot now be questioned,—his crime, considered in its remote as well as its proximate consequences, is the very darkest in the whole catalogue of human iniquities, and its authors should be regarded as *hostes humani generis*." In the year 1823, the house of representatives of congress adopted a resolution to request the president to prosecute, from time to time, negotiations with the several maritime powers of Europe and of America, for the effectual abolition of the African slave trade and its ultimate annunciation as piracy under the laws of nations by the consent of the civilized world. This resolution was adopted by a vote of 139 yeas to 9 nays, and among those who voted for it, were Mr. Buchanan, now our president; Mr. McLane, of Delaware; Mr. Poinsett, Mr. McDuffie, and General Hamilton, of South Carolina; Mr. Reid, of Georgia; Mr. Sergeant, of Pennsylvania; Stevenson, of Virginia, and Williams, of North Carolina. Charles Fenton Mercer, of Virginia, the mover of the resolution, said that technical objections have been urged and sneers have been indulged against the legal accuracy of the application of the term "piracy" to the offence. Such criticism has no sound reason to sustain it. The law of nations is in part natural, in part conventional. Its only sanction is to be found in the physical force; its authority in the express or local consent of nations. The consent of nations may make piracy of any offence on the seas. In seeking a denomination for a new crime, it is not necessary to invent a new term. The object of classing the prohibited act under an old title, is to provide for the former a definite and complete remedy. Piracy, under the law of nations, is alike understood and punished by all nations. And is there no analogy between the African slave trade and the offence of piracy, which would warrant the proposed classification of the former crime under the latter title? It may sometimes be difficult, amidst conflicting authorities, to say what is not piracy, but it cannot be so to determine what is. It is robbery on the high seas without a lawful commission from any recognized authority to take from a vessel, without color of law, a single package of goods. And is it not robbery to seize, not the property of the man, but the man himself; to chain him down, with hundreds of his fellows, in the pestilential hold of a slave ship, in order, if he chance to sur-

vive the voyage, to sell him to a foreign master? By a former law, almost coeval with our constitution, we made murder on the high seas piracy. The seizure of an African by the landing of the crew of a vessel with intent to make him a slave in a foreign land is kidnapping, and its consummation on the high seas is within the power of congress to "define and punish piracies." Search the etymology of the term of "piracy," and its applications to crimes, and nothing restricts it to the injuries to property, or to offences which have their inception and termination on the high seas. The act of violation may begin on the shore and be continued on the ocean for the consummation of its intentions elsewhere, and congress may define it to be either a piracy or a felony, according to its sense of the enormity of the purpose or intention of the persons concerned in it. Congress has defined it to be piracy, and has declared that it shall be punished with death.

The act of 15th May, 1820 [3 Stat. 600], on this subject, was a consummation of its legislation for the complete abolition of the slave trade. It was not passed under any momentary excitement or impulse, but it was the deliberate and considered act of the federal government to carry out a policy that had been disclosed in the first days of our existence as a free and independent people, and which in every stage of its history had been sanctioned by the moral sense of the people. Under the resolution before mentioned, which was so triumphantly passed in the house of representatives, the executive government entered upon negotiations with Great Britain, and in the year 1824 its parliament followed the lead of this country in designating the crime of abducting Africans from their shores to make them slaves as piracy. All the nations of Europe, as well as of America, have followed in the same legislation, and the object of the resolution of 1824 seems to be near its accomplishment.

Upon three occasions since 1824, the subject has been under the consideration of congress, and at each time has a determination been fully expressed to maintain the principles that had been incorporated into the legislation of the country. No part of it has been more explicit in that declaration than the states in my judicial circuit. Georgia declared in her constitution of 1798 that there should be no future importation of slaves into the state, from Africa, or any foreign place, after the first day of October ensuing. South Carolina prohibited negroes and slaves of any color from being brought into the state as early as the 4th November, 1788. That state's act of the 21st December, 1792, is to the same purpose, with this addition, that there should be no importation of slaves or negroes, mulattoes or Indians, Moors or mestizoes, bound to service for a term of years. And her repeated legislation from that time to the year 1803, extended and renewed the prohibition of the importation of slaves into that state. And it is a little amusing too, that the origin of the present African apprentice system was begun in attempts to violate her laws forbidding the importation of slaves or negroes under the pretence that they were only bound to service for a term of years. But the artifice was discovered, and the state has the credit of having accommodated her legislation to the fraud, so as to prevent and punish it. When the constitution was under discussion, the convention of North Carolina had no legislation directly to prohibit the importation of slaves. It only imposed duties upon the introduction of them into that state; but since the ratification of the constitution no state in the Union has more faithfully kept the act of congress prohibiting the importation of slaves, unless it be the state of South Carolina, for from what I have judicially witnessed in that state, I can say, notwithstanding there are

a few there who are active advocates for the renewal of the slave trade, that the people of that state are not at all likely to recede from their long standing policy in that regard. In 1826, in the discussion of the Panama mission, Col. Hayne, a member of the senate from the state of South Carolina, said: "The United States were the first to set their faces against the slave trade, and the first to repress it among her citizens. We are entitled to the honor of having effectually accomplished this great object; not more by the force of our laws than by the omnipotent power of public opinion. In all measures of this character every portion of our fellow-citizens have cordially co-operated, and even in those states where slavery exists, the people have gone heart and hand with the government in every measure calculated to cut up this nefarious trade by the roots. In the state which I have the honor to represent, any man concerned directly or indirectly in this traffic would be indignantly driven out of society." Mr. Johnson, a member of the senate from Louisiana, said: "A general accordance in principle and sentiment prevails throughout the civilized world in regard to the duty and obligation of nations to exterminate the slave trade. It is the prevailing feeling of the age. This inhuman traffic, which fills the world with misery, ought to be effectually suppressed. It belongs to Christian nations to put an end to this infamous practice, with all the crimes and horrors that follow its commission." Judge Berrien, of Georgia, said: "For myself, I abhor the slave trade. It is abhorred by my constituents. Even at the time when it was tolerated by our laws, it was not in the Southern portion of this Union that its practical advocates were found." At a later period in the history of the country, 1853, the United States was called upon to consider the measures for the execution of the treaty of Ghent with Great Britain, relative to the suppression of the slave trade. These measures will be found in the treaty negotiated at Washington with that power, frequently called the "Webster-Ashburton Treaty." That treaty was ratified, and is now a part of the law of the land. The eighth article requires "both countries to prepare, equip, and maintain in service on the coast of Africa a sufficient and adequate squadron to enforce separately and respectively the laws, rights, and obligations of each of the two countries for the suppression of the slave trade." The ninth article recites that notwithstanding all efforts which may be made on the coast of Africa for suppressing the slave trade, the facilities for carrying on that trade and avoiding the vigilance of cruisers by the fraudulent use of flags and other means are so great, and the temptations so strong for pursuing it, while a market can be found for slaves, that the desired result may be long delayed unless all markets be shut against the purchase of African negroes. The parties to this treaty agree that they will unite in all becoming representations and remonstrances with any and all powers within whose dominions such markets are allowed to exist; and that they will urge upon all such powers the propriety of closing such markets at once and forever. This treaty was ratified by the senate by a vote of 39 ayes to 9 nays, three of those who voted in the negative representing slaveholding states. One of those was Col. Benton, and one of the grounds of his objection to the treaty was the clause just recited, but he declared the trade itself diabolical and infamous.

The constitution of the United States, mainly made by slaveholding states, authorized congress to put an end to the importation of slaves by a given day. Anticipating the limited day by legislation, congress had the law ready to take effect on the day permitted. On the 1st day of January, 1808, Mr. Jefferson being president, the importation of slaves became un-

lawful and criminal. A subsequent act following up the idea of Mr. Jefferson in the first draught of the Declaration of Independence, qualified the crime as piratical and delivered up its pursuers to the sword of justice, as the enemies of the human race. Vessels of war cruising on the coast of Africa under our act of 1819 [3 Stat. 532] have been directed to search our own vessels, to arrest the violators of the law, to bring in the ships for condemnation, and the men for punishment. At this time the government is not unmindful of this treaty obligation, for our next squadron for the coast of Africa will consist, I believe, of four steamers and as many sloops-of-war, and four steam ships will probably cruise off Cuba to intercept slaves that may escape the ships on the African coast. Mr. Calhoun voted for the ratification of the treaty, and expressed his clear convictions "that the policy of closing the markets of the world was both right and expedient in every point of view, that we were deeply committed against the traffic, both by legislation and treaty. The influence and the efforts of the civilized world were directed against it, and that too under our lead at the commencement." Still later, in 1855, the house of representatives, by a vote nearly unanimous, decided that it was not expedient to repeal the laws for the suppression of the slave trade.

The leading points in the legislative history of the laws under discussion have been referred to, to show upon what solid foundations of authority and consent on the part of the executive and legislative departments of the government, the laws for the suppression of the slave trade rest. No doubt has been entertained by the long succession of jurists and statesmen who have been concerned in their discussion and enactment of the constitutional power of congress to pass them. There is no question of public morality which has been more clearly and solemnly maintained than that on which this legislation reposes. It would be a retrograde movement of more than a century to consent to abate one line of the condemnation of this trade, or to relax any effort for its extirpation. Many of the clauses of these laws have come before the judiciary department of the United States for interpretation; property has been sentenced to confiscation, and men have been tried and some condemned, for the violation of them. Not a question has been decided in the circuit or in the supreme court which in any manner impugns their validity as constitutional enactments.

Having thus given you, gentlemen, the acts and their legislative history, all of which have hitherto had the support and concurrence of the people of the United States, and by no part of the people more so than by the people of the slave-holding states; should cases of the kind be submitted to you by the district attorney, you will no doubt show yourselves true and faithful to the constitution and laws of our country.

Case No. 18,270.

CHARGE TO GRAND JURY—TREASON.

[4 Blatchf. 518; 1 23 Law Rep. 597.]

Circuit Court, S. D. New York. Jan. 14, 1861.

THE LAW OF TREASON.

1. The provision of the constitution of the United States in regard to treason, explained.
2. What acts constitute treason and misprision of treason, under the act of April 30, 1790 (1 Stat. 112), defined.
3. A mere conspiracy to subvert by force the government, is not treason.

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

4. The combination of a body of men, with the design of seizing, and the actual seizing, of the forts and other public property of the United States, is a levying of war against the United States, and is treason.

5. All persons engaged therein are by the law regarded as levying war against the United States; and all who adhere to them are to be regarded as enemies; and all who give them, in any part of the United States, aid and comfort, come within the provisions of the act of April 30, 1790, and are guilty of treason.

6. What amounts to adhering to the enemies of the United States and giving them aid and comfort, explained.

7. The extent of the jurisdiction of this court in regard to the offences of treason and misprision of treason, defined.

SMALLEY, District Judge (charging grand jury). The court has requested your attendance this morning, in order to call your attention to, and give you some instructions in relation to, crimes which have long been unknown in our hitherto peaceful and happy country, which for more than fifty years the federal courts have not been called upon to investigate, and which are, therefore, very imperfectly understood in the community. Yet one of them is the highest crime known to the laws in any civilized country. It is that of high treason. Recent painful events make it the duty of the court to define to you what constitutes the offence, and also what constitutes the lesser crime of misprision of treason, that you may inquire whether either has been committed by any person or persons within the jurisdiction of this court, and, if you are satisfied that either has, that they may be presented to the court, to be dealt with according to law, and, also, that those who desire to be good and true citizens may be forewarned, and not ignorantly and unwittingly be led into the commission of any acts in violation of the laws of their country, and which would make them guilty of either of these offences. It is unnecessary at this time to enter into an elaborate disquisition on the law of treason. The constitution of the United States clearly defines in what it consists. The third section of the third article provides, that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." Again, the same section provides that "the congress shall have power to declare the punishment of treason."

In pursuance of the power thus conferred, congress passed an act, which was approved April 30, 1790 (1 Stat. 112), which provides, in section one, "that if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort, within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death." Section two provides, "that if any person or persons, having knowledge of the commission of any of the treasons aforesaid, shall conceal, and not, as soon as may be, disclose and make known the same to the president of the United States, or some one of the judges thereof, or to the president or governor of a particular state, or some one of the judges or justices thereof, such person or persons, on conviction, shall be adjudged guilty of misprision of treason, and shall be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars."

It is well known that war—civil war—exists in portions of the Union; and that persons owing allegiance to the United States have confederated together, and with arms, by force and intimidation, have prevented the execution of the constitutional acts of

congress, have forcibly seized upon and hold a custom-house and post-office, forts, arsenals, vessels, and other property belonging to the United States, and have actually fired upon vessels bearing the United States flag and carrying United States troops. This is a usurpation of the authority of the federal government. It is high treason, by levying war. Either one of those acts will constitute high treason. There can be doubt of it. The fact that any or all engaged in the commission of these outrageous acts under the pretended authority of the legislature, or a convention of the people, of any state, or of the officers appointed thereby, or acting thereunder, does not change or affect the criminal character of the act. No man or body of men can throw off their allegiance to their government in that way. Nor can any state, or the people of any state, acting in any capacity whatever, absolve any person therefrom. Neither South Carolina nor any other state can authorize or legally protect citizens of the other states in waging war against their government, any more than can the queen of Great Britain or the emperor of France. If any such power is assumed it is without right, and the deluded individual who acts under it is none the less guilty of treason, and liable to be punished therefor.

That the slaveholding states have just cause of complaint against some of their sister states, is lamentably too true; and that the legislatures of several states have passed acts which are in direct conflict with one of the plainest provisions of the constitution of the United States, which acts were intended to deprive the slaveholding states of rights expressly guaranteed to, and important to them, is well known. This is deeply to be regretted; and it is hoped and believed that the sober second thought of the people of those states will induce them to do justice to themselves, as well as to their Southern brethren, and evince their loyalty to the constitution and the Union by speedily wiping all such acts from their statute books. But the fact that some of the states have passed unconstitutional acts, can afford no justification for rebellion and civil war, or a breaking up of the federal Union, which was formed by the patriotism and wisdom, conciliation and compromise of our fathers, and in which our prosperity as a people has been unparalleled in the history of nations. Such legislative acts, however, are not laws. Being in violation of the constitution of the United States, they are mere nullities, and all who attempt to enforce them are themselves violators of the laws, and can be, and in some instances have been, punished as such.

What overt acts, then, constitute treason? A mere conspiracy to subvert by force the government, however flagitious the crime may be, is not treason. To conspire to levy war, and actually to levy war, are distinct offences. If a body of people conspire and meditate an insurrection, to resist or oppose the laws of the United States by force, they are only guilty of a high misdemeanor; but, if they proceed to carry such intention into execution by force, they are guilty of treason by levying war. In the language of Chief Justice Marshall, in *Ex parte Bollman*, 4 Cranch [8 U. S.] 75, 126: "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

As the court has already said to you, the combination and assemblage of a body of men,

with the design of seizing, and the actual seizing, of the forts and other public property in and near Charleston, South Carolina, and some other states, is a levying of war against the United States. Consequently, any and every person who engages therein is by the law regarded as levying war against the United States; and all who adhere to them are to be regarded as enemies; and all who give them aid and comfort, in South Carolina or New York, or in any other portion of the United States, or elsewhere, come within the express provisions of the first section of the act of April 30, 1790, and are guilty of treason.

What amounts to adhering to, and giving aid and comfort to our enemies, it is somewhat difficult in all cases to define; but certain it is, that furnishing them with arms or munitions of war, vessels or other means of transportation, or any materials which will aid the traitors in carrying out their traitorous purposes, with a knowledge that they are intended for such purposes, or inciting and encouraging others to engage in or aid the traitors in any way, does come within the provisions of the act. And it is immaterial whether such acts are induced by sympathy with the rebellion, hostility to the government, or a desire for gain.

Under the second section of the act of 1790, all who have any knowledge of any such acts of treason, and do not as soon as possible make it known, in the manner therein prescribed, are guilty of misprision of treason, and subject to the punishment therefor. Your inquiries must be confined to offences committed within the jurisdiction of this court, that is, within the Southern district of New York, and upon the high seas. Although there may be a question whether the jurisdiction of the court, in such cases, is not more extended, you will for the present confine your investigations to the limits prescribed. Within this limit it is your right and your duty to inquire whether any person or persons have been, according to the principles of law laid down by the court, guilty of treason or misprision of treason, and, if you are satisfied that either of these offences has been committed, to faithfully and fearlessly present the offenders, that they may be punished. It is the duty, and it will unquestionably be the desire, of all good and true citizens, to do, in their respective spheres, everything in their power to suppress rebellion, expose treason, and bring traitors to justice.

² [Inquiries having been made by the jury in reference to their duties, the court made the following observations: When the grand jury retired, the other day, one of the members of your body submitted on paper, certain questions to the court, which I shall now proceed to answer: "First. Whether it is the duty of the grand jury to inquire into violations of the law which may be incidentally brought to their knowledge, and which have not been presented by the district attorney, and which he had no knowledge of." In reply to that, the court would say, gentlemen, that you are not necessarily confined to offences to which your attention may be called by the prosecuting officer. If any one of you have reason to believe that any of the laws of the federal government have been violated, you are at liberty to inquire into the matter, whether or not your attention has been called to it by the district attorney. Unquestionably you have a right to make the investigation. The second inquiry is: "Whether it is expected of the jury to examine into the detention of felons and witnesses, as to their safety, treatment, and comfort, and as to whether any persons are kept an unwarrantable time before trial." The third inquiry is: "Whether it is expected that the grand jury would present such defects in

² [From 23 Law Rep. 597.]

the practice in the custom-house as render it easy for the clearance of vessels for the slave trade." With respect to that, gentlemen, it may be well to consider, for a moment, what is the jurisdiction of the federal courts. First, then, they can only inquire into violations of the federal laws. The federal courts have no common-law criminal jurisdiction, and they therefore have no jurisdiction over offences that are not created by the constitution, or some act of congress under the constitution. I understand that, in many of the states, it is by express statute made the duty of grand juries to inquire into matters referred to in the second and third interrogatories submitted to the court. English grand juries have also frequently inquired into such matters, and made presentment thereof to the court, and probably it is a part of the common law that they should do so; but the court is not aware of any act of congress, nor of any practice in the federal courts, which renders it your duty to make any of the investigations contemplated by either of these questions. The court does not intend to say that you may not make such examinations and inquiries, only that they are outside of your judicial duties, and, if you make report to the court, it has no power to act, and can do nothing more than to order it filed with its records. Such investigations, therefore, cannot be regarded as a part of the official duties of grand juries in the federal courts. You are at liberty now to retire, gentlemen, and proceed with the business before you.]²

Case No. 18,271.

CHARGE TO GRAND JURY—TREASON.

[5 Blatchf. 549.]¹

Circuit Court, S. D. New York. Nov. 4, 1861.

THE LAW OF TREASON.

1. To constitute the crime of treason, in levying war against the United States, as defined in article 3, § 3, of the constitution, there must be an actual levying of war. A consultation or conspiracy to do so is not an overt act, within the constitutional definition.

2. What acts constitute adhering to the enemies of the United States, giving them aid and comfort, within article 3, § 3, of the constitution, considered.

3. Words, oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason.

4. The extent to which the fact of the use of such words may be used, in finding an indictment, or on the trial of it, considered.

5. There is no law of the United States making the use of treasonable words an offence.

6. In a civil war, persons who adhere to their allegiance, are not, although they reside in an insurrectionary district, regarded as enemies; and trade with such persons in good faith and without collusion with the enemy, is lawful, unless interdicted by the government.

7. The provisions of the act of July 13, 1861 (12 Stat. 255), in regard to trade with territory in insurrection, explained, as bearing on the subject of treason.

NELSON, Circuit Justice, in charging the grand jury, after instructing them in regard to several cases to be brought before them, proceeded as follows:

The unhappy condition of our country, arising out of the unnatural struggle of the people of a portion of the Union to overthrow their government, has created new relations among, and imposed new duties upon, the citizens, which have brought into operation crimes and guilt that, to the great credit of the country, have heretofore been rare; indeed, I may say,

² [From 23 Law Rep. 597.]

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

almost unknown to her laws and judicial tribunals. I refer to the crime of treason against the United States. Although no case of this description has been presented by the district-attorney to be specially submitted to you, it may not be out of place to call your attention, in a general way, to the elements constituting this offence. It is the highest crime known to society, and was deemed by the founders of our government of such importance, both in respect to the government and the citizen, that they specially defined it in the constitution; thus, taking it out of the power of legislative regulation. The definition is found in the third section of the third article, as follows: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." The power to annex the punishment was left to congress, which annexed the penalty of death. This definition of the crime was taken from the statute of 25 Edw. III. of England, and which has been several times reaffirmed, for the purpose of correcting abuses that had grown up in that kingdom in respect to the law, both by acts of parliament and the decisions of courts, under the tyrannical reigns of the Tudors and the Stuarts. Those abuses were well known to the founders of our government, and doubtless led to the peculiar phraseology observable in the definition of the crime, namely, that it shall consist only in levying war against the United States, or in adhering to their enemies, giving them aid and comfort; and to the other equally stringent feature, that no person shall be convicted of the offence except on the testimony of two witnesses to the same overt act. The first prohibits congress from making any other act of the citizen than those specified, treason; and the second prevents the introduction of constructive treasons, which had been engrafted upon this statute of Edw. III. by judicial decisions.

Under the first clause of the provision—levying war against the United States—there can be no great difficulty in determining the facts and circumstances which establish the crime. There must be an actual levying of war. A consultation or conspiracy to do so, is not an overt act, within the constitutional definition.

There is more difficulty in determining what constitutes the overt act under the second clause—namely, adhering to the enemy, giving him aid and comfort. Questions arising under this clause must depend very much upon the facts and circumstances of each particular case. There are some acts of the citizen, in his relations with the enemy, which leave no room for doubt—such as, giving intelligence, with intent to aid him in his acts of hostility—sending him provisions or money—furnishing arms, or troops, or munitions of war—surrendering a military post, &c., all with a like intent. These and kindred acts are overt acts of treason, by adhering to the enemy.

Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime. When spoken, written or printed in relation to an act or acts which, if committed with a treasonable design, might constitute such overt act, they are admissible as evidence tending to characterize it, and to show the intent with which the act was committed. They may also furnish some evidence of the act itself, against the accused. This is the extent to which such publications may be used, either in finding a bill of indictment or on the trial of it. An attempt was made, in the parliament of England, during the reign of James II. to make treasonable words the subject of this crime; but it was resisted by the friends of constitutional liberty

and defeated, and since that time it has not been renewed.

Such publications are misdemeanors at common law, indictable, and punishable by fine and imprisonment. But, as there are no common law offences cognizable in the federal courts, unless made so by act of congress, and as congress has passed no act on the subject, this court has no jurisdiction over them. The only act passed by congress on the subject was the act of July 14, 1798 (1 Stat. 596). The second section of that act provided, that if any person should write, print, utter, or publish any false, scandalous and malicious writing, or writings, against the government, or either house of congress, or the president, with intent to defame the government, or either house of congress, or the president, or to bring them or either of them into contempt or disrepute, or to excite against them or either of them the hatred of the people of the United States, or to stir up sedition within the same, or to excite unlawful combinations therein for opposing or resisting any law, or any act of the president done in pursuance thereof, &c., such person, on conviction, should be punished by a fine not exceeding \$2,000, and by imprisonment not exceeding two years. The act was a temporary one, and expired on the 3d of March, 1801, by its own limitation, and no similar act has since been passed.

On the breaking out of a war between two nations, the citizens or subjects of the respective belligerents are deemed, by the law of nations, to be the enemies of each other. The same is true, in a qualified sense, in the case of a civil war arising out of an insurrection or rebellion against the mother government. In the latter case, the citizens or subjects residing within the insurrectionary district, not implicated in the rebellion, but adhering to their allegiance, are not enemies, nor to be regarded as such. This distinction was constantly observed by the English government in the disturbances in Scotland, under the Pretender and his son, in the years 1715 and 1745. It modifies the law, as it respects the condition of the citizens or subjects residing within the limits of the revolted district, who remain loyal to the government. As it respects those of two sovereign nations in a state of war, all commercial intercourse between them is forbidden by the law of nations, all contracts are unlawful, and any goods or property, the subjects of the illicit trade, are liable to seizure and confiscation. This is true, also, as it respects the citizens or subjects in revolt and making war upon the mother government. But trade with the loyal portion of the people in the disaffected district, in good faith and without collusion with the enemy, is lawful, unless interdicted by the government. The principle is recognized by the recent act of congress, passed July 13, 1861 (12 Stat. 255). The fifth section provides, that the president, by proclamation, may declare that the inhabitants of a state, or of any part of it, are in a state of insurrection, and, thereupon, all commercial intercourse shall cease between the citizens thereof and the citizens of the rest of the United States, and the goods and merchandise, &c., the subject of the illicit trade, shall be liable to seizure and confiscation. Here, the trade and intercourse are interdicted by the proper authority, and the interdiction applies to the loyal as well as the disloyal citizens or inhabitants. The sixth section goes further, and forfeits any ship or vessel belonging, in whole or in part, to a citizen or inhabitant of the interdicted state or district, found at sea or in any port of the rest of the United States. The forfeiture applies to the loyal as well as the disloyal citizens in the disaffected district, probably, from the difficulty of making the forfeiture practical and complete against the latter without making it general. The government, however, having a general control over the subject, can remedy

any injustice as respects the loyal citizen, by releasing the forfeiture. This section, in terms, forfeits the whole of the vessel if part belongs to the citizens of the disaffected district, and would seem to carry with it any interest in the vessel belonging to citizens of the loyal states. This, however, can hardly have been the intention of congress. Trade with the enemy, as I have already said, according to the law of nations, is forbidden, and, the property engaged in it is liable to forfeiture, as is the trade in the particular cases specified in the act of congress referred to. But, this is all. The act is not made criminal; and, until it is made so by congress, no punishment is annexed to it, except the forfeiture of the goods. But, this interdicted trade may be carried on in such a way as to expose the parties concerned to the crime of treason. If carried on for the purpose and with the intent of giving aid and assistance to the enemy in their hostility against the government, the act would furnish an overt act of adhering to the enemy, giving him aid and comfort. Every citizen therefore, engaged in carrying on this illicit trade, will find a much greater peril accompanying the enterprise than the mere forfeiture of his goods.

Case No. 18,272.

CHARGE TO GRAND JURY—TREASON.

[1 Bond, 609.]¹

Circuit Court, S. D. Ohio. Oct., 1861.

TREASON AGAINST UNITED STATES—CONSTITUTIONAL DEFINITION—ACTS COVERED THEREBY—CONSPIRACY TO OVERTHROW GOVERNMENT—RECRUITING INSURRECTIONARY FORCES.

[1. To be employed in actual service in an army raised to oppose the government in its action, or directly or indirectly to aid or assist in the levying or embodying of a military force for the subversion of the government, are plainly acts of "levying war," and involve the commission of the crime of treason. The constitutional definition of treason, however, is of broader signification, and includes all those who join a hostile army after war is begun.]

[2. Treason may be predicated of acts which are not a direct levying of war. The words "adhering to their enemies, giving them aid and comfort," include, in general, any act committed after war actually exists which indicates a want of loyalty to the government and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs. If this be the natural effect of the act, though prompted solely by the expectation of pecuniary gain, it is treasonable in character.]

[3. Thus, after war actually exists, it is treasonable to sell to, or provide arms or munitions of war, or military stores and supplies, including food, clothing, etc., for the use of the enemy; to hire, sell, or furnish boats, railroad cars, or other means of transportation, or to advance money or obtain credits for the use and support of the hostile army; and to communicate intelligence to the enemy by letter, telegraph, or otherwise, relating to the strength, movements, or position of the army.]

[4. The meaning of the words "overt act" as used in the constitutional definition of treason and in the statute, is an act of a character susceptible of clear proof, and not resting in mere inference or conjecture. They were intended to exclude the possibility of a conviction upon proof of facts which were only treasonable by construction or inference, or which had no better foundation than mere suspicion.]

[5. Mere expressions of opinion indicative of sympathy with the public enemy, though sufficient to justify a strong feeling of indignation against the individual, and the suspicion that he is at heart a traitor, are not sufficient, under the constitution and laws, to warrant a conviction of treason.]

[6. The act of August 6, 1861 (12 Stat. 317), making it a high misdemeanor to recruit soldiers or sailors in any state or territory to engage in armed hostility against the United States, or to open a recruiting station for the enlistment of such persons, was intended to reach acts not deemed treasonable under the statute of 1790.]

[7. The act of July 31, 1861 (12 Stat. 284), making it a high crime to conspire to overthrow or destroy by force the government of the United States, or to levy war against the United States, or to force their authority, or to do certain other acts therein specified, was designed to punish the mere act of conspiring, which, under the constitutional definition and the act of 1790, do not involve the crime of treason, unless there is an attempt to consummate the treasonable act.]

LEAVITT, District Judge (charging grand jury). You have been summoned and sworn as a grand jury of the United States for the Southern district of Ohio; and, according to the tenor of the oath you have just taken, it will be your duty to inquire into all crimes against the laws of the United States committed within the district; and, upon sufficient evidence, to return bills of indictment against the persons accused. It is not necessary, on this occasion, that I should refer specially to all the crimes and offenses defined and punished by the various acts of congress, and which are properly within your cognizance as a grand jury. I shall therefore notice such only as you will in all probability be called upon to investigate in the proper discharge of your duties. Among these, I am informed, there will be some involving the charge of treason against the United States.

The constitution declares that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort," and that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." The act of congress of April 30, 1790 [1 Stat. 112], adopts the words of the constitution in defining the crime, and declares that on conviction in accordance therewith the punishment shall be death. Neither the constitution nor the act of congress specifies the precise acts which shall constitute the crime. As it would be impossible for any human intellect to foresee all the circumstances under which it might be committed, the framers of the constitution and of the statute wisely determined not to attempt such a specification. It was, therefore, a necessity that something should be left to the discretion of courts and judges, in determining what facts shall constitute treason. There is, however, a salutary limitation to the exercise of their discretion in the provision that there can be no conviction unless on the public confession of the accused party, made in court, or by the evidence of two witnesses to the same overt act of treason. The object of the provision is to prevent the probability of a conviction for a mere constructive treason. In the earlier periods of English history, the judges were often the pliant tools of the king, and exercised the power of punishing for constructive treasons, under circumstances the most revolting and greatly to the oppression of innocent persons. The wise and sagacious framers of our constitution have effectually guarded against such abuses of power, by declaring there shall be no conviction for this high crime on mere suspicion or on proof of any fact which is not an overt act of treason established by two witnesses. This provision applies as well to the legislative as to the judicial department of the government, and an act of congress, therefore, in conflict with it would be a nullity.

It would be a vain effort to attempt to designate every act, which, in its legal import, would be levying war against the government, or giving aid and comfort to the public enemy after a war is actually begun. Under the first division of the constitutional definition of treason, there are some acts, the treasonable character of which is apparent to the mental consciousness of every one. To be employed in actual service in an army raised to oppose the government in its action, or directly or indirectly to aid or assist in the levying or embodying a military force for the subversion of

¹ [Reprinted by permission.]

the government, are plainly acts of levying war, and involve the commission of the crime of treason in its most aggravated form. But the words referred to have a broader signification. As remarked by Chief Justice Marshall, in the trial of Burr, those who join the hostile army after the war is begun, are equally guilty of levying war within the meaning of the constitution and the act of congress. That learned judge states the law in these words: "If a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are in the general conspiracy, are to be considered as traitors." [Case No. 14,693.]

But without stopping to specify more fully what acts may be understood as a direct levying of war, I will notice briefly what are included in the words, "adhering to the enemies of the United States, giving them aid and comfort." This language leaves no room to doubt, that treason may be predicated of acts, which are not a direct levying of war according to the construction of that phrase, as just indicated. The words in the definition, "adhering to their enemies," seem to have no special significance, as the substance is found in the words which follow—"giving them aid and comfort." As before remarked, it is not an easy task to classify or specify the acts, which bring a party within the range of this branch of the definition. In general, when war exists, any act clearly indicating a want of loyalty to the government, and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs, gives them aid and comfort. Or, if this be the natural effect of the act, though prompted solely by the expectation of pecuniary gain, it is treasonable in its character. Without going into details on the subject, I will briefly notice some things clearly involving the guilt of treason. Thus, to sell to, or provide arms or munitions of war, or military stores, or supplies, including food, clothing, etc., for the use of the enemy, is within the penalty of the statute. And to hire, sell or furnish boats, railroad cars, or other means of transportation, or to advance money, or obtain credits, for the use and support of a hostile army, is treasonable. It is equally clear that the communication of intelligence to the enemy, by letter, telegraph, or otherwise, relating to the strength, movements, or position of the army, is an act of treason. These acts, thus briefly noted, show unequivocally an adherence to the enemy, and an unlawful purpose of giving him aid and comfort.

It has been already noticed, that to justify a conviction for treason, unless the crime is confessed in open court, there must be the evidence of two witnesses to an overt act. The plain meaning of the words "overt act," as used in the constitution and the statute, is an act of a character susceptible of clear proof, and not resting in mere inference or conjecture. They were intended to exclude the possibility of a conviction of the odious crime of treason, upon proof of facts which were only treasonable by construction or inference, or which have no better foundation than mere suspicion. In its benign caution on this subject, the law requires not only proof of a treasonable act, but that it should be established by the oaths of two witnesses. Hence, it will be obvious that however strong may be the grounds of suspicion or belief, that an individual is disloyal to his country or his government, until his disloyalty is developed by some open and provable act, he is not legally guilty of the crime of treason. And it follows, also, that mere expressions of opinion indicative of sympathy with the public enemy, will not ordinarily involve the legal guilt of that crime. They may well justify a strong feeling of indignation against the individual, and the suspicion that he is, at heart, a traitor, but will not be a sufficient basis for

his conviction in a court of law. Whether, on the principle of self-preservation in times of great public danger, the summary arrest of such a person, under the military authority of the government, may not be both necessary and proper, is a different question, not in any way connected with the discharge of your duties as grand jurors. There may be circumstances justifying the exercise of such a power as a military necessity. But the constitution and laws of the United States are your guides in the performance of your duties. You, as a grand jury, and this court, as a court of the Union, derive all their powers from this source. Neither can willfully overleap the limits prescribed for its action without a sacrifice of integrity and of all claim to the respect and confidence of every right-minded American citizen.

Without detaining you by any further exposition of the law of treason, I will call your attention to the offense of misprision of treason, defined and punished by section 2 of the act of 1790. This section provides, in substance, that if any person having knowledge of the commission of an act of treason shall conceal it, or not make it promptly known to the proper authority, he shall be liable to punishment by fine and imprisonment. The section is so clear in its terms as to render any comment unnecessary. It will be obvious to you that the concealment of treason may involve the most serious consequences to the public, and, on sufficient proof, should be visited with the severest penalty of the law.

It is my duty also to call your attention to two other acts of congress, passed at the recent special session of that body, the provisions of which have some connection with the present state of our national affairs. The first to which I shall refer is the act approved August 6, 1861, which provides, "that if any person shall be guilty of the act of recruiting soldiers or sailors in any state or territory of the United States, to engage in armed hostility against the United States, or who shall open a recruiting station for the enlistment of such persons, either as regulars or volunteers as aforesaid, he shall be guilty of a high misdemeanor, and upon conviction in any court of record, having jurisdiction of the offense, shall be fined a sum not less than two hundred dollars, nor more than one thousand dollars, and confined and imprisoned for a period not less than one year nor more than five years." The second section subjects the person enlisted to a fine of one hundred dollars and to imprisonment, not less than one year nor more than three years. In reference to this statute, I may remark, it seems to have been the view of the congress by which it was enacted, that recruiting or enlisting soldiers or sailors for the service of the enemy, or opening a recruiting station for that purpose, or the act of being enlisted, were not treasonable within the law of 1790, and that further legislation was therefore needed to warrant their punishment.

It is also proper to call the attention of the grand jury to another statute, approved the 31st of July last, "to define and punish certain conspiracies." This statute has but one section, which provides, "that if two or more persons within any state or territory of the United States shall conspire together to overthrow or put down, or to destroy by force, the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States, against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office of trust or place of confidence, under the United States; each and every person so offending shall be guilty of a high crime." The

punishment is by fine not less than five hundred and not more than five thousand dollars, or by imprisonment not less than six months nor more than six years, or by both fine and imprisonment. The jury will notice that this statute punishes a conspiracy by two or more, to do any of the unlawful acts which it specifies. Under the act of 1790, defining and punishing treason, it has been held by the courts, that to conspire to overthrow the government, or to do any hostile act against it, did not invoke the crime of treason, unless there was an attempt to consummate the treasonable act. Hence the necessity of the late statute, to meet the case of a treasonable conspiracy. And it is perhaps to be regretted that this provision had not been a part of the act of 1790. With such a provision of law, properly enforced, there is reason to believe many persons who have been prominent in our national affairs, and once high in the confidence of the people, would have been the subjects of its penalties; and thus the great rebellion now in progress may have been prevented.

It may also be worthy of the notice of the grand jury, that by the act just referred to, it is declared to be a crime to conspire "by force to prevent, hinder, or delay the execution of any law of the United States." For many years a law has been in force, affixing punishment to any forcible opposition to the execution of an act of congress, but a mere conspiracy for that purpose was not criminal until the passage of the act of last July. There can be but little doubt, that if the provisions referred to had been earlier in force, it would have subjected to deserved punishment some individuals who were parties to unlawful conspiracies, but who directly avoided any active participation in executing their purposes, and who were not therefore within the reach of the law.

It does not occur to me that there are any other statutory provisions, having any direct bearing on the present state of our national affairs, or your duties in connection with the conflict now in progress, to which it is necessary to call your attention. It is a time when grand jurors should be vigilant and faithful in the discharge of their duties. Every loyal citizen, whatever may be his position or place in the community, is required to stand up fearlessly in defense of the government. It can not be disguised or concealed that our once happy and united country is encompassed by perils that must excite the deep solicitude of every patriotic heart. We are called upon to confront and put down a rebellion of formidable aspect and dimensions, and which for the unmitigated atrocity of its designs, and the madness and infatuation of those who began, and are now engaged in it, has no parallel in history. Its object is no less than the total subversion of a government devised and founded by the far-reaching wisdom of our fathers, in every part of the structure of which they have legibly inscribed their deep devotion to the great principles of constitutional liberty, and evinced a philanthropy co-extensive with the whole human race. And rightly administered, the constitution they have given us is suited to promote, beyond any ever devised by mere human intelligence, the happiness and prosperity of those who live under its benign sway. It is truly gratifying to know that among the citizens of the loyal states, as also in the minds of many of those now in rebellion, there is a prevalent conviction that the preservation of a government founded in such a spirit and for such exalted purposes is worth every conceivable sacrifice. And there is the most unmistakable indications of an unalterable determination to perpetuate it, in its integrity and purity, at every hazard. With this wide-spread and elevated patriotic feeling, and steadfast devotion to the Union, we are hopeful for the future of our country. We may

meet with reverses, and be called upon to endure many fiery trials, but we can not doubt that these will be met with heroic firmness and a unity of purpose altogether invincible. There is nothing extravagant in the belief that, though dark clouds now hang upon our horizon, we may look forward to a time when the present rebellion shall be effectually suppressed, and the government ordained and established by our patriotic fathers shall come out of the conflict, not only uninjured, but strengthened and purified by the trial to which it has been subjected, and with an increased capacity for extending and multiplying the blessing it has already so largely conferred. But the occasion is not suitable for an extended discussion of our national affairs. I have adverted thus briefly to the subject for the sole purpose of reminding you of the solemn responsibility resting on you as grand jurors, in the present crisis of the country, and of exhorting you to a careful inquiry into any charges which may be brought to your notice, involving the crime of treason or any of the kindred offenses to which I have referred. I shall not detain you with a reference to the specific accusations which you may be required to investigate. While in the discharge of your duties you will be impressed with the necessity of due vigilance; it will be equally obvious to you that you should act with a proper measure of caution and deliberation. Treason is justly considered the highest crime against society. Having for its object an assault by violence on the government, and thus to effect its overthrow, it may imperil the happiness and lives of millions. The crime is, therefore, odious in the view of those who are thus liable to suffer as the result of its perpetration. The mere suspicion of guilt often brings down upon its object a strong feeling of public indignation, attended perhaps with the most serious consequences to the suspected person. Such results are not uncommon when there is a high state of excitement in a community. Facts may be misrepresented, or so distorted, as to induce this suspicion without any real cause; or a vindictive personal enemy may fabricate statements to the prejudice of another for the base purpose of bringing odium upon him. Thus, it may happen that a citizen of the purest character, and the most patriotic heart, may be a grievous sufferer. Let me, therefore, suggest to the grand jury, that in their investigation of charges involving the high crime of treason, they should carefully exclude from their minds all influences originating in mere popular excitement or which may be supposed to be the result of personal enmity. If, after a calm inquiry into the facts, the jury believe that the accused person is guilty of treason, they ought not to hesitate in returning a bill according to their convictions, whatever may be the result to the party implicated. But in regard to treason, and indeed all other crimes, the jury should reach a rational conclusion, from the law and the evidence, that the person accused is guilty, before returning a true bill against him.

A grand jury has only the evidence which the government can adduce, without reference to what the defendant may have in his power to bring forward, in proof of his innocence. They ought, therefore, to be able to say under the solemnity of their oaths, that there is reasonable ground for the inference of guilt. And, as before intimated as to all crimes, it must appear that the act charged was committed within the limits of the Southern district of Ohio. If treason is the crime charged, there must be a distinct allegation in the indictment of the overt act or acts; and although a grand jury return a true bill for this crime, there can be no conviction unless an overt act is proved by two witnesses. And it may well be doubted, whether it is expedient to indict for this crime in cases where it is certain the evidence re-

quired by law can not be produced before a traverse jury, and where consequently there can be no conviction.

Case No. 18,273.

CHARGE TO GRAND JURY—TREASON.

[1 Spr. 602; 23 Law Rep. 705.]¹

District Court, D. Massachusetts. March, 1861.

CONSTITUTIONAL LAW — SUPREMACY OF NATIONAL GOVERNMENT — RESISTANCE BY STATES TO ENFORCEMENT OF LAWS—WHAT CONSTITUTES TREASON—JURISDICTION OF NATIONAL COURTS—MODES OF PROCEDURE—QUALIFICATIONS AND SELECTION OF JURORS.

[1. The government of the United States is not a mere confederacy. It is, on the contrary, a government possessing the highest attributes of sovereignty, embracing a legislature to enact laws, a judiciary to expound them, and an executive to enforce them. These laws, within the sphere of their operation, act directly upon individuals, and are of paramount authority over all the territory of every state. They cannot be annulled, nor the force of any of them be in any degree impaired, by any state law, constitution, ordinance, or resolve.]

[2. The Criminal Code of the United States is in full force over all persons and places within every state of the Union, notwithstanding any attempt to invalidate it by any organization, whether in the form of state legislatures, conventions, or other voluntary associations.]

[3. If a body of men be actually assembled for the purpose of effecting a treasonable purpose by force, that is levying war. But it must be an assemblage in force, a military assemblage in a condition to make war.]

SPRAGUE, District Judge (charging grand jury). It is the duty of the court to give you some instructions upon the criminal jurisprudence of the United States.

The times invite especial attention to that branch which relates to resistance to the laws, and endeavors to subvert the national authority.

The government of the United States is often spoken of as if it were a mere confederacy. This is a fundamental and dangerous error. We had a confederacy during the Revolution, but when the external pressure of a foreign war was removed, its inherent weakness was such as to render it indispensable that a government should be substituted in its stead. This was achieved by the constitution of the United States. It emphatically established a government with the highest attributes of sovereignty, embracing a legislature to enact laws, a judiciary to expound them, and an executive to enforce them. These laws operate directly upon individuals. The several states also have a power of legislation within their respective limits.

Thus, in our complex system, we have two governments, each with a power of legislation over the same territory, and acting upon the same persons. The danger of a conflict of laws from these two sources was palpable, and our fathers wisely and carefully provided against it. They marked out the sphere of the general government with all practicable clearness and precision, and within that sphere made its power supreme. This supremacy was not left to inference, but is provided for in the most explicit terms.

Article 6 says: "This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges, in every state, shall be bound thereby, anything in the constitution

or laws of any state to the contrary notwithstanding."

Thus the constitution and laws of the United States extend and are paramount over all the territory of every state, and cannot be annulled, nor the force of either of them be in any degree impaired by any law of a state, no matter in what form or with what solemnity, such law may have been enacted, or by what name it may be designated; whether it be a constitution, an ordinance, a statute, or a resolve. So far as it conflicts with the constitution, or with any valid law of the United States, it is utterly nugatory, and can afford no legal protection whatever to those who act under it. The Criminal Code of the United States is, therefore, in full force over all persons and places within the limits of the thirty-four states, notwithstanding any attempt to invalidate them by any organization, whether in the form of state legislatures, conventions, or other voluntary associations.

The highest crime known to our law is treason. This offence is defined by the constitution itself in the following words:

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." [Article 3, § 3.]

These terms, "levying war," "adhering to enemies," "giving them aid and comfort," were not new. They had been well known in English jurisprudence at least as far back as the reign of Edw. III. They had been frequently the subject of judicial exposition, and their meaning was to a great extent well settled.

The question what amounts to levying war, arose soon after the adoption of our constitution, in the several trials of Mitchell [Case No. 15,788], Vigol [Id. 16,621], and Fries [Id. 5-127], for being engaged in the Pennsylvania insurrection against the law imposing a duty upon distilled spirits, under the administration of Washington, and subsequently in the trial of Aaron Burr, in the year 1807 [Id. 14,693], and in the case of U. S. v. Hoxie [Id. 15,407], in the year 1808. These were trials in the circuit court.

The only case which has come before the supreme court, was that of *Ex parte Bollman*, 4 Cranch [8 U. S.] 125. It is settled that if a body of men be actually assembled for the purpose of effecting a treasonable purpose by force, that is levying war. But it must be an assemblage in force, a military assemblage in a condition to make war. *U. S. v. Burr* [Case No. 14,693]. A mere conspiracy to overthrow the government, however atrocious such conspiracy may be, does not of itself amount to the crime of treason. Thus, if a convention, legislature, junto, or other assemblage, entertain the purpose of subverting the government, and to that end pass acts, resolves, ordinances or decrees, even with the view of raising a military force to carry their purpose into effect, this alone does not constitute a levying of war.

What is a treasonable purpose? If the object be to prevent by force the execution of any public law of the United States, generally and in all cases, that is a treasonable purpose, for it is entirely to overthrow the government as to one of its laws. And if there be such an assemblage as I have already described, for the purpose of carrying such an intention into effect by force, it will constitute levying war.

But the sudden outbreak of a mob, or the assembling of men in order, by force, to defeat the execution of the law, in a particular instance, and then to disperse, without the intention to continue together, or to re-assemble for the purpose of defeating the law generally, in all cases, is not levying war.

If the purpose be entirely to overthrow the government at any one place, by force, that is a treasonable purpose.

This was the well known law before the adoption of our constitution, and has been affirmed by the supreme court of the United

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States in *Ex parte Bollman* [supra]. The place to which that case had reference was New Orleans.

And if a body of men be actually assembled in force, in a condition to make war, in order to overturn the government at any one place by force, that is levying war. Nor is it necessary that the assemblage should be with military arms and array—numbers may supply the requisite force.

If any such assemblage for the purpose of subverting the government at any place, take forcible possession of any fort, arsenal, or other property of the United States, it is a still more flagrant act of levying war.

If such acts have been committed anywhere within the United States, it may become a material inquiry, how far persons, who are not present with the body of men so assembled, may, although distant, be involved in the guilt, and subject to the penalties, of treason. If war be actually levied, "All those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors." *Ex parte Bollman*, 4 Cranch [8 U. S.] 126.

Thus far the law has been decided by the highest authority. I do not think it necessary, on this occasion, to go farther and inquire to what extent the English doctrines are to be followed under our definition of treason.

Thus if a person in league with those who are levying war send them arms, provisions, money or intelligence for the purpose of aiding them, he may be a traitor, however distant from the place of their assemblage.

Therefore, if the actual assemblage be at Charleston or at New Orleans, any person owing allegiance to the United States, however distant he may be, may become a traitor by being in conspiracy with them, and rendering them assistance. It is possible, therefore, that such acts may be within the jurisdiction of this court, so far as to be proper subjects for your investigation.

The constitution has not only defined the crime of treason, but prescribed a rule of evidence: "No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

The reason of these extraordinary safeguards is to be found in the nature of the offence, and in the pages of history. An attempt to overthrow the government excites the deepest indignation in great numbers, especially in those who are imbued with a warm and devoted patriotism, the cherished sentiment of a life-time, strengthened by a matured conviction of the vastness of the interests which are wrapped up in the inviolability of the sovereign power, that power which is the guardian of their safety, the daily dispenser of blessings, and the object of their prayers. A traitorous assault upon it arouses the strongest passions, and in the keenness of their resentment, and the eager pursuit of the guilty, they are apt to break down the barriers which are essential to the protection of innocence. Our fathers, therefore, endeavored to render some of these safeguards impregnable, by imbedding them in the fundamental law.

By the constitution, treason, or other crime committed within the limits of the United States, can be tried only within the state and judicial district within which it was committed; and the accused has the right to a trial by jury in such state and district.

If, therefore, treason has been committed at Charleston or at New Orleans, it can be tried only by a jury in South Carolina or Louisiana.

And if the condition of either of those states be such that the judicial tribunals of the United States cannot or will not perform their functions, crimes there committed, however atrocious, cannot be punished by the regular administration of justice.

The laws themselves are equally valid and equally paramount, notwithstanding the recency of the agents by whom they should be enforced.

Congress may provide a more efficient judicial system than that which now exists.

They have heretofore adopted some of the state laws and modes of procedure, and especially those which prescribe the qualifications of jurors, and the mode in which they shall be elected or summoned. This is wise, as conducive to harmony and convenience, so long as justice can thus be duly administered.

But the United States are under no necessity of conforming to state law, or of using any part of its machinery.

It is competent for the national legislature to prescribe the qualifications of jurors, and the manner in which they shall be selected and summoned. They may even authorize the marshal himself to select suitable persons. Indeed, congress may make their judicial system complete for the independent exercise of all its functions.

As we have seen, treason may be committed at places remote from the seat of the rebellion, by co-operating with the rebels and sending them arms, intelligence, or intentionally rendering other assistance, and the trial of such offence will be had in the state and district where committed.

As to offences committed without the limits of the United States, it is left to the national legislature to determine in what place they shall be tried, and this power they have exercised by St. 1790, c. 9, § 8 [1 Stat. 113], and St. 1825, c. 65, § 14 [4 Stat. 118], which provide that the trial of all offences which shall be committed upon the high seas, or elsewhere, out of the limits of any state or district, shall be in the district where the offender is apprehended, or into which he may be first brought.

Congress may alter these statutes, and provide other places for the trial of such offences, whenever the public safety or welfare may, in their judgment, render it proper; but as the law now stands, when a crime has been committed on the high seas, or in any place not within any state or district, if the offender has been legally arrested without the limits of the United States, and brought in custody into any judicial district, he is to be tried in such district.

But if he has not been so brought into the United States, he must be tried in the district in which he is apprehended.

Any person owing allegiance to the United States, may subject himself to the penalties of treason. St. 1790, c. 9, § 1.

Allegiance is of two kinds: that due from citizens, and that due from aliens resident within the United States. Every sojourner who enjoys our protection, is bound to good faith toward our government, and although an alien, he may be guilty of treason by co-operating either with rebels or foreign enemies.

The allegiance of aliens is local, and terminates when they leave our country. That of citizens is not so limited—although the European doctrine of indissoluble and perpetual allegiance has not been accepted in this country.

There are minor offences created by acts of congress.

Misprision of treason is defined by St. 1790, c. 9, § 2, which declares that if any person having knowledge of the commission of any treason, "shall conceal, and not, as soon as may be, disclose and make known the same to the president of the United States, or some one of the judges thereof, or to the president or governor of a particular state, or some one of the judges or justices thereof," such person, on conviction, shall be subject to fine and imprisonment.

By section 22, of the same statute, it is made a criminal offence knowingly and wil-

fully to obstruct, resist, or oppose any officer of the United States, in serving or attempting to serve or execute any order of any court of the United States, or any legal or judicial writ or process whatever, or to assault, beat, or wound any officer or other person duly authorized in serving or executing any such order or process.

By St. 1831, c. 99, § 2 [4 Stat. 488], it is enacted that, if any person shall corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall corruptly, or by threats or force, obstruct or impede, the due administration of justice therein, every person so offending shall be liable to prosecution therefor by indictment.

Such are the criminal offences which have been created by the constitution and acts of congress, for the preservation of the government and the effectual execution of its laws.

It has been, at a former period, and is now a momentous question, whether, under our complex system, there is any power extrinsic to that of the national government by which its laws can be rightfully resisted, or their obligation impaired. There is no such power.

As I have already said to you, the authority of the United States, within their sphere, is supreme. This is a vital principle. It was so regarded by the framers of the constitution, and they have secured it in the most explicit and emphatic terms. This constitution, and the laws made pursuant thereto, shall be the supreme law of the land. And to render this effectual, they provided that the government which they created should be the final judge of the extent of its own powers and the meaning of its own laws. And to this end, they established a judicial department as a co-ordinate branch of the government, to expound and enforce the provisions of the constitution and the acts of congress. Nor is this all. In order that the laws of the United States should be practically as well as theoretically supreme, they created an executive department, clothed with full power to enforce the laws. And thus a government, paramount in all its departments, was established.

This supremacy has not always been acquiesced in. The legislation of a great country can never meet with universal approbation. And it has sometimes happened that acts of congress have been adverse to the opinions or supposed interests of many persons, sometimes constituting a majority in particular states.

And in such cases, unwilling to submit, they have eagerly sought for some mode of resistance which should wear the semblance of legality, and to this end have invoked state interposition, and the cover of state authority.

Such was nullification. That doctrine did not deny the paramount obligation of laws constitutionally enacted, but it arrogated for a state the right to determine, in the last resort, whether a law was constitutional or not. It sought to overthrow the judicial power by denying its supremacy, and claimed for every state the right to judge of the extent of the powers of the general government, and of the validity of its laws, and to limit, restrain, or annul them, according to the views of each state.

This doctrine, once formidable, has now few adherents.

Some of the adversaries of national legislation, while conceding the supremacy of the legislative and judicial departments, have sought to render their decrees nugatory by impairing the executive power, by which alone they can be carried into practical effect. And to this end also they have invoked state interference, or assumed the garb of state authority. Some believe that the attempt thus to impair the action of the executive officers of the United States has not been wholly without success.

It seems now to be admitted, that if an United States marshal hold a legal precept, commanding him to arrest a person, or take an article of property, if such person or property be in the custody of a sheriff under a state process to enforce even a subordinate right, the marshal cannot execute his precept, but that the person and the property, although within his district, are beyond his reach, so long as the custody of the sheriff shall continue. This I understand to be the decision of the supreme court of the United States, in the absence of any act of congress upon the subject. *Taylor v. Carryl*, 20 How. [61 U. S.] 583.

This conclusion has been reached by assuming that the governments or jurisdictions under which the marshal and sheriff respectively act, are not only distinct, but in this respect have equal and co-ordinate authority, and thence inferring that the one who first gets actual possession, under his precept, is to retain the custody against the other, without regard to the character of the laws under which they respectively act. And it has also been held, that if a writ of habeas corpus, from a state magistrate or tribunal, be directed to an United States marshal, he is to make return stating the authority by which he holds his prisoner. He is not to produce the body, but to state the reason why he declines to do so. *Ableman v. Booth* and *U. S. v. Booth*, 21 How. [62 U. S.] 506.

This conclusion has been adopted as a measure of peace, and as a plain and practical mode of preventing contest and violence between executive officers holding conflicting precepts from their respective superiors.

The adoption of such a rule manifests moderation and abstinence on the part of the national authorities. And yet there are those who think that this is not conceding enough, but that a prisoner held by a marshal, under a legal precept of the United States, may be taken from his custody by a sheriff holding a state process. Some have supposed that this could be accomplished by putting into the hands of the sheriff a *capias* writ, commanding him to take the prisoner therein described, and giving such writ the name of habeas corpus.

Again, it has been supposed that the custody of the marshal could be divested, and all his power ended, by handing to the sheriff a warrant to arrest the person upon some criminal charge. As if the name or nature of a state law could make it potent enough to defeat the execution of a valid law of the United States.

The constitution, in the positive language already quoted, makes such laws supreme, without limitation or exception. This of itself is sufficient.

But it does not stop even there, but in anticipation of attempts to set up adverse state authority, it adds these emphatic words, "anything in the constitution or laws of any state to the contrary notwithstanding." And thus every law of a state, civil or criminal, organic or ordinary, is rendered subordinate to the legitimate legislation of congress, and must recede before the action of the general government in its appropriate sphere.

The disaffected, at different times, and in various sections of the Union, have earnestly sought for some legal mode of resisting legitimate authority. But it has been in vain. There is no such anomalous middle ground between submission and rebellion; and this last extreme has at length been reached. Secession is but another name for revolution; for it is vain to contend for a constitutional right to overthrow the constitution, and a legal right to destroy all law.

It is often said, that the constitution does not contemplate making war upon a state. If by this is meant only that a state, as a political body, is not to be compelled to execute the laws of the United States, it is true, because those

laws act directly upon individuals, and are not to be enforced by state authority, but by national instrumentalities.

In other words, we have a government, and not a mere confederacy.

But if, by the proposition that the constitution does not contemplate war upon a state, is meant that the authority of the United States cannot be maintained, or its laws enforced, if a state organization interpose to annul them, or protect its citizens in doing so, nothing can be more erroneous. The constitution unquestionably contemplates this very contingency of adverse state interposition or legislation, and provides against it, and for the national supremacy, in the clear and imperative language which has already been quoted. This supremacy may be maintained by the whole physical force of the nation, and whoever offends against the law, is subject to its penalties, in whatever official robes or insignia he may be clothed, or whatever state parchments he may hold in his hand.

Congress has the right to declare war. With this high prerogative they are invested in express terms, and without limitation or condition. Its exercise is left to their uncontrolled discretion.

The national legislature, therefore, may make war whenever that dread calamity is an appropriate means of sustaining the rights of the nation.

I have endeavored, gentlemen, to give you a judicial exposition of some laws to which the attention of a jury has rarely been called. In explaining their validity and extent, I have necessarily said something of the powers of the government for the maintenance of their own authority. I have confined myself to vindicating the existence of those powers, and your duty to inquire into and present offences under them. And I wish to say with emphasis, that I have not intended to indicate any opinion as to the time or manner in which they should be exercised by other departments, much less to stimulate any action. It is for them, in their wisdom, to decide when and how the high trust confided to them shall be executed. It is for the legislature and the executive, upon their grave responsibility, to determine when the great and permanent interests of the nation require them to put forth their strength, and when to exercise the more difficult virtue of a firm forbearance.

Case No. 18,274.

CHARGE TO GRAND JURY—TREASON.

[2 Spr. 292.]¹

District Court, D. Massachusetts. March, 1863.

TREASON AND KINDRED CRIMES.

[1. Until the year 1861 there were no provisions in the criminal legislation of the United States to punish any measures that had not ripened into an overt act of levying war or actual interference with the administration of the law. All the incipient and preparatory measures, leading to the overthrow of the government, were left without punishment or reprehension.]

[2. After the commencement of the war of the Rebellion congress endeavored to secure the fidelity of officers and employes of the United States by various acts requiring an oath of allegiance from them.—Act Aug. 6, 1861 (12 Stat. 326); Act March 6, 1862 (12 Stat. 354); Act July 2, 1862 (12 Stat. 502); Act July 17, 1862 (12 Stat. 593); and to punish conspiracies to effect treasonable objects, and other acts of disloyalty, or of opposition or interference with the government, falling short of the crime of treason.—Act July 31, 1861 (12 Stat. 284); Act July 17, 1862 (12 Stat. 593); Act March 3, 1863, § 24 (12 Stat. 735).]

[3. A mere conspiracy to overthrow the government does not of itself amount to the crime of treason.

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Thus, if a convention, legislature, junta, or other assemblage entertain the purpose of subverting the government, and to that end pass acts, resolves, ordinances, or decrees, even with the view of raising a military force to carry their purpose into effect, this alone does not constitute a levying of war.]

[4. A purpose to prevent, by force, the execution of any public law of the United States, generally, and in all cases, is a treasonable purpose, for it is entirely to overthrow the government as to one of its laws; and, if there be an assemblage of men for the purpose of carrying this purpose into effect by force, this will constitute a levying of war.]

[5. The sudden outbreak of a mob, or the assembling of men in order, by force, to defeat the execution of a law in a particular instance, and then to disperse, without any intention of continuing together, or of reassembling for the purpose of defeating the law generally, and in all cases, is not levying war.]

[6. If a body of men be actually assembled in force, in a condition to make war, in order to overturn the government at any one place by force, this is levying war. It is not necessary that the assemblage should be with military arms and array; numbers alone may supply the requisite force.]

[7. If any such assemblage for the purpose of subverting the government at any place take forcible possession of any fort, arsenal, or other property of the United States, this is an act of levying war.]

[8. If war be actually levied at one place, and any person in league with those actually engaged therein send them arms, money, provisions, or intelligence for the purpose of aiding them, he is guilty of treason, however distant he may be from the place of their assemblage. Following *Ex parte Bollman*, 4 Cranch (8 U. S.) 126.]

[9. Under the constitution, treason or other crime committed within the limits of the United States can be tried only within the state and judicial district within which it is committed, and the accused has the right to a trial by jury in such state and district. If, therefore, the condition of such state or district be such that the federal courts there cannot or will not perform their functions, crimes committed there cannot be punished by the regular administration of justice.]

[10. Although congress has heretofore adopted some of the state laws and modes of procedure, especially those which prescribe the qualifications of jurors and the mode of summoning them, there is no necessity for so doing, or for using any part of the state machinery. The national legislature has constitutional power to prescribe the qualifications of jurors and the manner in which they shall be selected and summoned; it may make the judicial system of the United States complete for the independent exercise of all its functions.]

[11. If a crime has been committed on the high seas, or in any place not within any state or district, and the offender has been legally arrested without the limits of the United States, and brought into any judicial district, he must, under the existing statutes, be tried in that district. If he has been arrested within the United States, he must be tried in the district in which he was apprehended.]

[12. Every person owing allegiance to the United States may subject himself to the penalties of treason. Allegiance is of two kinds,—that due from citizens and that due from aliens resident within the United States. Every sojourner who enjoys our protection is bound to good faith towards our government, and, though an alien, he may be guilty of treason by cooperating either with rebels or foreign enemies.]

[13. Under our complex system of government there is no power extrinsic to that of the national government by which its laws can be rightfully resisted or their obligation impaired.]

[14. The theory, or opinion, that the constitution of the United States does not contemplate making war upon a state, is true only in the sense that a state, as a political body, is not to be compelled to execute the laws of the United States; for those laws act directly upon individuals and are to be enforced by national instrumentalities. But the constitution does contemplate and provide for the contingency of adverse state interposition or legislation to annul or defeat the execution of national laws; for it expressly declares that the national law shall be supreme, "anything in the constitution or the laws of any state to the contrary notwithstanding."]

SPRAGUE, District Judge (charging grand jury). It is your duty to inquire into all offences against the United States within the jurisdiction of this court. The greatest crime known to the law is treason; self-preservation being the highest duty of government. Without it,

there can be no administration of law, civil or criminal. This crime is defined by the constitution itself. It declares that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. A person may be guilty of treason without himself taking up arms, and even while at a distance from any military assembly. That crime may now be committed within this state, by co-operating with rebels who are in arms, in distant parts of the country; the rule being that "all those who perform any part, however minute or however remote from the scene of action, and who are actually leagued in the conspiracy, are to be considered as traitors." Any person who, knowing that treason has been committed, shall "conceal, and not, as soon as may be, disclose and make known the same" to certain high officers, is guilty of a criminal offence denominated misprision of treason.

Until the year 1861, these were the only provisions of the criminal law for the suppression of acts directly tending to the destruction of the government.

There were indeed statutes making it criminal to obstruct, resist, or impede the execution of legal process, or to assault, beat, or wound any officer or other person duly authorized, in serving such process, or to endeavor corruptly, or by threats or force, to influence any juror, witness, or officer in any court of the United States, or by threats or force to impede, or endeavor to impede, the due administration of justice therein. But these were regarded as minor offences, subjecting the offender only to moderate punishment, by fine and imprisonment.

Under these laws, a marshal of the United States might be forcibly resisted, and he and his aids actually murdered, while in the execution of lawful process within a state, and yet the courts of the United States could sentence the offenders to no higher punishment than imprisonment for one year, and a fine of three hundred dollars. The state law might or might not prohibit such acts, and affix an adequate penalty.

Such was the condition of our criminal jurisprudence for the protection of the life of the government, and to secure the enforcement of the laws, up to the time of the breaking out of this Rebellion. How far it fell short of the duty of congress, is now seen by the light of the conflagration which was permitted to be kindled.

The Criminal Code touched no measure that had not ripened into an overt act of levying war, or actual interference with the administration of the law. All the incipient and preparatory measures, leading to the overthrow of the government, were left without punishment or reprehension.

Since the commencement of this Rebellion, congress has, by penal enactments, endeavored to secure the fidelity of officers and employes of the United States.

There are several statutes prescribing new oaths of office, and affixing the penalties of perjury to their violation. The first was passed in August, 1861 (Acts 1861, c. 64; 12 Stat. 326), and requires, that every officer, clerk, or employe in the several departments of the government, or in any way connected therewith, shall take an oath to support and defend the constitution and government of the United States against all enemies, whether domestic or foreign, and to bear true faith, allegiance and loyalty to the same, any ordinance, resolution, or law of any state convention or legislature to the contrary notwithstanding. Here, you will observe, is a most important and striking provision, unknown to any previous official oath. It requires not only fidelity to the government, but the support and defence thereof against all enemies, domestic as well as for-

eign. Nor is this all; there is added this emphatic language: "Any ordinance, resolution, or law of any state convention or legislature to the contrary notwithstanding." This, gentlemen, is a most explicit renunciation and abjuration of the deadly heresy of a paramount state sovereignty,—that heresy which has been so persistently and successfully inculcated for many years past, especially in the Southern states, and has at length produced the bitter fruit of open rebellion. This doctrine of paramount state sovereignty, and of paramount state allegiance, has taken possession of the minds of tens of thousands; nay, has become public opinion in several states, and this not only against the whole spirit of the constitution, but in the face of its most express and emphatic language.

Our fathers foresaw this danger, and most carefully guarded against it. They meant to create a government with the highest attributes of sovereignty, and with the power of self-preservation. They marked out the sphere of that government with all practicable clearness and precision, and within that sphere made it supreme.

They took especial care that this supremacy should not be left to inference. The sixth article of the constitution declares, in express terms, that "this constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

This seems to be sufficiently positive and unequivocal. But the framers of the constitution did not stop even there, but added these words: "any thing in the constitution or laws of any state to the contrary notwithstanding;" thus pointedly and laboriously, in words as apt and expressive as our language affords, guarding against and repelling the idea, that a state could by any act, however solemn, even by its organic or fundamental law, resist or interfere with the constitution and laws of the United States, in their operation over the whole country. And yet the doctrine that the laws of the United States, constitutionally enacted, are not supreme, but that the law of a state may override them, and even authorize its inhabitants to rise up in resistance and overthrow the government, has been not only theoretically maintained, but carried into actual and direful practice. The disastrous consequences of this heresy of paramount state allegiance cannot be measured. We have seen some of them, but the end is not yet. Under its influence, we have seen the government, in the incipient stages of a great rebellion, when its life was threatened and its very existence at stake, stand as inactive as if struck with paralysis. At such a time, we have seen the chief magistrate of this great country looking on as if in utter helplessness, taking no efficient measure, either of prevention or repression, but declaring, in a solemn message, that the constitution did not contemplate making war upon a state,—a declaration which, in its application to the then condition of the country, meant that if a state saw fit to make a law to overthrow the government of the United States, and resist the execution of its laws, the government has no right, in order to enforce the laws and maintain its authority, to put down such resistance by using the requisite force; that is, that the state law is to be supreme, and practically triumphant over the constitution and laws of the United States.

Under the influence or pretence of this doctrine, we have seen high functionaries and officials, of almost every grade, guilty of the most appalling perfidy. We have seen them plotting and taking actual measures for the destruction of the government, while trusted and paid to preserve and protect it. We have seen even

officers of the army and navy, of almost every grade, who had been educated, supported, cherished, and honored by the United States, and with whom we had supposed that loyalty and devotion to their country and their flag was both a sentiment and a principle,—we have seen such men, not only deserting their country and their flag in the hour of approaching peril, but plunging into the crime of treason, and actually joining, and some of them leading, the forces of the rebel enemy. Surely it was time that congress should take more effectual measures for the suppression and prevention of such atrocious perfidy. This statute of August 6, 1861, so far as it went, was well adapted to that end. It is limited, as we have seen, to employés in the executive departments, or persons connected therewith. By statute of March 6, 1862, the same oath is required of ship-masters, on clearing for a foreign country, or for any port in the United States. Acts 1862, c. 38; 12 Stat. 354.

By the act of July 17, 1862, persons making claims against the United States are required to take the same oath. Acts 1862, c. 205; 12 Stat. 610.

By statute of July 2, 1862 (Acts 1862, c. 128; 12 Stat. 502), every officer, civil, military, and naval, is required to take an oath that he has not voluntarily borne arms against the United States, or voluntarily given aid, counsel, or encouragement to persons engaged in armed hostility thereto; that he has neither sought, accepted, nor exercised any office under an authority hostile to the United States, nor yielded a voluntary support to any such authority within the United States; and, further, to support and defend the constitution of the United States against all enemies, foreign and domestic, and to bear true faith and allegiance to the same, and that this obligation is taken without any mental reservation or purpose of evasion; and that he will well and truly discharge the duties of his office. This oath does not contain the special clause against state assumptions which is found in those I have before mentioned. It does not in terms name the ordinance or law of any state, but its comprehensive language clearly embraces them. The falsely taking this oath of office is made a criminal offence, which not only subjects the party to the penalties of perjury, but ever afterwards disqualifies him from holding any office under the United States.

I have called your special attention to these recent statutes, because they create new offences. There are two others of great importance.

By an act passed in July, 1861 (Acts 1861, c. 33; 12 Stat. 284), it is provided that if two or more persons within any state or territory of the United States shall conspire together to overthrow by force the government of the United States, or to levy war against it, or by force to oppose the government, or to prevent, hinder, or delay the execution of any law of the United States, or to seize any property of the United States, against its authority, every person so offending shall be guilty of a high crime.

The statute of July 17, 1862 (Acts 1862, c. 195, § 2; 12 Stat. 590), makes it a criminal offence to incite, set on foot, assist or engage in, any rebellion or insurrection, or to give aid and comfort thereto. These statutes reach the incipient steps which lead to resistance and rebellion.

Previous to their enactment, any person might, by words or acts, stir up and incite others to rebellion, or actually enter into conspiracies, and take preparatory measures for the destruction of the government, without being subject to any legal penalty. Those who were plotting and preparing treason were not compelled to secrecy or concealment. They were not driven to cellars or caverns, the appro-

prate scenes for such dark and nefarious machinations. But they were carried on in open day, in public buildings and halls of legislation. We have seen incitements to rebellion by every art that could mislead the mind, or inflame the passions. We have seen conspiracies in almost every form. Even legislative bodies and public conventions have assembled for the purpose of devising plans and carrying out measures for the overthrow of the government, and they have prosecuted their work by public ordinances and declarations, and made preparations for actual hostilities; and all this with legal impunity, there being no statute of the United States by which any one of these conspirators could be arrested as a criminal. And yet congress has always had the power to pass statutes of prevention. It was given to them by the people for the preservation of the government. This power was vested in congress to be exercised; and it is not too much to say, that, if congress had performed that duty by passing these statutes thirty years ago, and they had been faithfully executed, the dire catastrophe in which our country is now involved would probably have been prevented. This forces upon us the pregnant inquiry, why was this duty so long neglected? Why, for more than seventy years, was the life of the government thus left exposed to the machinations of its enemies? The cause is to be found in excessive jealousy of the power of the federal government, and apprehension, real or pretended, of danger to the states. The fear that the states might be overwhelmed, or encroached upon by the national government, although sometimes feigned, has no doubt been actually felt by many persons. Although most prevalent in the Southern states, it has not been confined to them. This jealousy and apprehension have greatly affected the practical working of our political system from a very early period. They have persistently magnified the sovereignty of the states, and belittled that of the nation. They have been reluctant to admit that the constitution established a government, but have chosen rather to call its work a confederacy, a compact, or a league. They have not only sought after such construction of the constitution as would pare down the powers conferred by it, but have prevented the exercise by congress of many unquestionable powers which were vested in it for the public safety. The criminal legislation which I have referred to, is but one example of omission and neglect by the national legislature in executing the high trust which has been confided to it.

Upon a superficial view, there seems to be some reason for this apprehension of danger from the great powers vested in the national government. It may raise money to an unlimited amount by imposts and taxation, both direct and indirect. It may raise and support armies and navies without restriction. It creates offices at will, and determines the compensation of thousands of public officers and agents; and the chief executive power is vested in the hands of a single magistrate. Without further enumeration, this seems, at first view, to constitute a great and formidable central power, which may be antagonistic and dangerous to the several states.

But let us see how this Colossus is constituted and sustained. The house of representatives is the most important branch of congress in matters of legislation. There all bills for raising revenue must originate. Without its concurrence, no revenue can be provided or funds raised, no money can be appropriated, no armies or navies can be raised or maintained, no offices be created, or compensation provided for, and paid. In fine, without its assent, there can be no act of legislation.

The house of representatives is composed wholly of members from the several states. They have there had their birth and education.

There are their families, friends, associations, and homes. Nearly all of them have held state offices, or been members of the legislature, and become imbued with the predilection for state authority and devotion to state aggrandizement which such positions are likely to generate. At the expiration of the term for which they were elected, they must generally return to the mass of the people from which they were taken. But what is still more effective in controlling their action is the power which the people of the state hold over their future political existence. They are chosen for only two years, and they cannot be re-elected without the favor of the people. This power was deemed by the authors of our institutions a sufficient security against any encroachments upon the rights of the people of the several states.

It has been found even more potent in its practical operation than they had contemplated. They secured to members perfect freedom of debate, and certain means of information, that they might be able to form a correct judgment, and gave to them personal immunities and a certain tenure of office, that they might independently and conscientiously follow the dictates of their own informed understandings. But, in practice, almost every representative holds his own judgment in entire subjection to the will of his constituents. No matter how cogent the facts, or unanswerable the reasoning for or against any measure, he deems it a sufficient answer to say, "My constituents think otherwise." He takes an official oath, and those who have taken no such oath control his action. He hears the discussion, receives information and light from all parts of the country upon great measures affecting the whole nation; and others, at their distant homes, who have not heard the discussion, nor received that information, nor obtained that light, decide the question. Thus, instead of acting as a member of a deliberative assembly, he becomes in effect an ambassador, or diplomatic agent, with instructions in his pocket, and is constantly watching for indications of the will of a distant power, to which he yields implicit obedience.

The members of the senate have the same antecedents and predilections, and are equally devoted to state interests and submissive to state will. They are elected by the legislatures of the several states; and those bodies claim the right to give instructions to senators which shall be absolutely binding upon them. In nearly all the states, this asserted right has been freely exercised, and rarely indeed has a senator hesitated to render the most implicit obedience. Their term of office is six years; but the senate is divided into three classes, so that one-third may go out at the end of every two years, a number which may often be sufficient, in the division of parties, to change the political majority. In four years, two-thirds of the whole body may be changed by new elections.

The president and vice-president of the United States are taken from among the people, by popular vote in the several states, the interposition of electors being now merely a formal mode of declaring the popular will. No other officers, except the judges of the courts, have any constitutional tenure of office, and almost all are removable at the pleasure of the chief executive. Upon a change of president, the whole catalogue of these officers may be displaced. Thus the people of the states, by frequent elections, added to the moral influence of education, habit, and local ties and associations, hold the most effective control over public officers and the whole legislative and executive action of the government. Indeed, our whole system rests upon the states. Archimedes could not move the world because he had no fulcrum beyond its surface. And our great national government has no place beyond the limits of the states, upon which it can stand to wield its power to their

injury. It may be formidable to foreign nations, because it has a position without and independent of them.

The "Federalist," a work written by three of the most eminent statesmen and jurists of their age, declares that "it will always be far more easy for the state governments to encroach upon the national authorities, than for the national government to encroach upon the state authorities." The Federalist, No. 17. This prediction has been verified by experience. Many portions of our history might be cited. Three events only can now be adverted to.

The first is the Virginia Resolutions of 1798. These celebrated resolutions assert that in case of the exercise by congress of a dangerous power, not granted to them, a state has a right to interfere, and arrest the progress of the evil. How it may interfere is not explained. Some have insisted that the resolutions intended to assert a right to interpose by forcible resistance. Others, and among them Mr. Madison, the most eminent constitutional lawyer who participated in those resolutions, always understood them to intend only peaceable interposition, as by remonstrance, argument, or solemn declarations of opinion. The language of the resolutions is vague and indefinite, and probably left so by design, to secure the assent of persons holding widely different opinions. There can be no doubt that these resolutions have generated opinions and measures adverse to the legitimate authority of the federal government.

The next event to be now noticed is nullification. This also professed to touch such acts only as are unconstitutional. The doctrine was, that, if a state deem any law of congress to be unconstitutional, it may nullify it by its own declaration, and then resist it by force. It did not deny that enactments made pursuant to the constitution were the supreme law of the land throughout its whole extent, and of universal obligation; but it arrogated for a state the right to decide, in the last resort, whether a law was constitutional or not; thus denying the supremacy of the judiciary of the United States, and overthrowing one of the great departments of the national government. More than thirty years ago, this heresy had obtained such prevalence as to be formidable. The intelligence and patriotism of the country were aroused, and it was examined, exposed, and exploded.

We next come to the secession of the present day. The advocates of this doctrine deny that the United States has any sovereignty, or can claim any allegiance; although the constitution confers the highest powers of sovereignty, and makes its authority supreme, and defines the crime of treason, which can be committed only by those who owe allegiance. In the face of the whole purpose of the constitution, and of its positive and express provisions, they deny that it created a government. They delight to call our political system a compact, and assume that, if it be so, they may, of course, destroy it at pleasure: as if to violate compacts was an inalienable right. They do not rest upon the ultimate right of revolution, to throw off intolerable oppression, but claim a legal right to resist all law, and overthrow the constitution itself. And the question now is, whether our government can withstand this last most desperate and atrocious assault, or whether it must fall, and bury us and the hopes of mankind in its ruins.

There are other recent enactments to which I would call your attention. The statute of July 16, 1862 (Acts 1862, c. 180; 12 Stat. 577), makes it a criminal offence if any member of congress, or any officer of the government of the United States shall receive, or agree to receive, any valuable consideration for procuring or aiding to procure any contract, office or place from the United States, or any department or

officer thereof, or for giving such contract, office or place; also, if any person shall give, or offer, or agree to give, any valuable consideration for promising or aiding to procure any contract, office, or place as aforesaid. The same statute provides, that, if a member of congress shall receive, or agree to receive, any valuable consideration for his attention to, services, action or vote, on any question, matter, or proceeding which may be then pending, or may, by law, or under the constitution, be brought before him in his official capacity, he shall be liable to indictment, and to be punished by fine and imprisonment in the penitentiary. And any member of congress, or officer of the United States, who shall be convicted of any such offence, is moreover disqualified from holding any office under the United States.

The statute of August 6, 1861 (Acts 1861, c. 56; 12 Stat. 317), makes it a criminal offence to recruit soldiers or sailors to engage in armed hostilities against the United States, or to open a rendezvous for such enlistment. And every person who shall be so enlisted or engaged shall also be liable to fine and imprisonment.

By a statute passed on the third day of the present month (Acts 1863, c. 75, § 24; 12 Stat. 735) it is made a criminal offence to procure or entice, or attempt to procure and entice, a soldier in the service of the United States to desert; or to harbor, conceal, or give employment to a deserter; or to carry him away, or to aid in carrying him away, knowing him to be such; or to purchase from any soldier his equipments, or clothing, or any part thereof. And if any commanding officer of any ship or vessel, or any conductor of any railroad, or any other public conveyance, shall carry away any such soldier as one of his crew or otherwise, knowing him to have deserted, or shall refuse to deliver him up to the orders of his commanding officer, such person also is liable to be punished by fine and imprisonment.

The same statute provides, that if any person shall resist a legal draft of soldiers into the service of the United States, or shall counsel or aid resistance thereto, or shall assault or obstruct any officer in the performance of any service in relation to such draft, or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted men not to appear at the place of rendezvous, or wilfully dissuade drafted men from the performance of military duty as required by law, such person shall be liable to indictment.

We have seen it stated in such form as to arrest attention, that unauthorized individuals have entered into communication with members of parliament and foreign ministers and officers, in order to influence their conduct in controversies with the United States, or to defeat the measures of our government. It ought to be known that such acts have long been prohibited by law. By a statute passed in the year 1799, c. 1, it was enacted: "If any person, being a citizen of the United States, whether he be actually resident, or abiding within the United States, or in any foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly, commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States; or if any person, being a citizen of, or resident within the United States, and not duly authorized, shall counsel, advise, aid or assist in any such correspondence, with intent, as aforesaid, he or they shall be deemed guilty of a high misdemeanor," and punished by fine and imprisonment. 1 Stat. 613.

Case No. 18,275.

CHARGE TO GRAND JURY—TREASON.

[1 Story, 614.]

Circuit Court, D. Rhode Island. June 15, 1842.

TREASON AGAINST THE UNITED STATES AND AGAINST A STATE—CONSTITUTIONAL DEFINITION OF TREASON—OPPOSING EXECUTION OF LAWS.

[1. To constitute treason against the United States by levying war, there must be a levying of war against the United States in their sovereign character, and not merely a levying of war exclusively against the sovereignty of a particular state.]

[2. To constitute a levying of war, within the meaning of the constitutional definition, it is not sufficient that there should be an assembly of persons merely to meditate and consult about the means of levying war at some future time, or upon some future contingency, without any present force. This would be a mere conspiracy to levy war. To actually levy war, there must be an assembly of persons, met for a treasonable purpose, and some overt act done, or some attempt made by them, with force, to execute, or towards executing, that purpose. The assembly must be in a condition to use force, and must intend to use it, if necessary, to further, aid, or accomplish the treasonable design.]

[3. If the assembly is arrayed in a military manner, if they are armed and marched in military form, for the express purpose of overawing and intimidating the public, and thus attempt to carry into effect the treasonable design, this will, of itself, amount to a levy of war, although no actual blow be struck or engagement take place.]

[4. It is not necessary to a treasonable design that there should be a direct and positive intention entirely to subvert or overthrow the government. It is sufficient if there is an intention by force to prevent the execution of any one or more of the general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity.]

[5. If there be an assembly of persons, with force, with an intent to prevent the collection of lawful taxes or duties levied by the government, or to destroy all customhouses, or to resist the administration of justice in the courts of the United States, and the assemblage proceed to execute this purpose by force, this is treason against the United States.]

[6. There may be treason against a state by levying war which is aimed altogether against the sovereignty of the state, as would be the case if the object of an assembly of persons, met with force, were to overturn the government or constitution of the state, or to prevent the due exercise of its sovereign powers, or to resist the execution of any one or more of its general laws, without any intention to intermeddle with the relations of the state with the national government, or to displace the national laws or sovereignty therein.]

[7. Treason begun against a state may be mixed up or merged in treason against the United States. If the treasonable purpose be to overthrow the government of the state, and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the state, this would be treason against the United States.]

[8. If the troops of the United States should be called out by the president, upon the application of a state legislature or executive, to protect the state against domestic violence, and there should be an assembly of persons with force to resist and oppose the United States troops, this would be treason against the United States, although the primary intention of the insurgents may have been only to overthrow the state government or the state laws.]

STORY, Circuit Justice, after some preliminary observations upon the late alarming crisis of the public affairs in Rhode Island, and paying a just tribute to the excellent institutions and past history of the state, proceeded to say to the grand jury: This is the first occasion, for many years, in which it has become necessary for me, in addressing the grand jury, to state the doctrines of law applicable to the crime of treason. Happily, there is at the present moment a pause in the public mind, which I trust may be the harbinger of a speedy return to a permanent course of peace, prosperity, and general confidence among the

citizens of your state. It is impossible for me not to feel a deep sense of the dangers, through which you have so recently passed, and of the painful duties, which might have devolved upon this court in certain contingencies, which seemed at one moment about to be fearfully realized. It may not, therefore, be without some use, to call your attention to the law of treason, and to distinguish between the cases, where the crime is properly a crime against the United States, and the cases, where it properly constitutes a crime exclusively against the state. Both may be, indeed (as will be presently shown), mixed up in the same transaction; or rather, the treason against the state may, under certain circumstances, be merged in the treason against the United States. Still, there is a broad and clear line of distinction between them in many cases, which I will endeavour briefly to explain and illustrate.

The constitution of the United States has declared that "treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." [Article 3, § 3.] There must, then, to constitute the crime, be a levying of war against the United States in their sovereign character, and not merely a levying of war exclusively against the sovereignty of a particular state. What, in the sense of the constitution, is to be deemed a levying of war? I take it to be clear, that it is not sufficient, that there should be an assembly of persons, who are met merely to meditate and consult about the means of levying war at some future time, or upon some future contingencies, without any present force. That would amount to a conspiracy to levy war. But a conspiracy to levy war, and an actual levy of war are distinct offences. To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. There must be a present intention to proceed in the execution of the treasonable purpose by force. The assembly must now be in a condition to use force, and must intend to use it, if necessary, to further, or to aid, or to accomplish the treasonable design. If the assembly is arrayed in a military manner,—if they are armed and march in a military form, for the express purpose of overawing or intimidating the public,—and thus they attempt to carry into effect the treasonable design,—that will, of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place. This is a clear case; but it is by no means the only case (for many others might be stated), in which there may be an actual overt act of levying war. I wish to state this only as one case, upon which no doubt whatsoever can be entertained. In respect to the treasonable design, it is not necessary, that it should be a direct and positive intention entirely to subvert or overthrow the government. It will be equally treason, if the intention is by force to prevent the execution of any one or more general and public laws of the government, or to resist the exercise of any legitimate authority of the government in its sovereign capacity. Thus, if there is an assembly of persons with force, with an intent to prevent the collection of the lawful taxes or duties, levied by the government,—or to destroy all customhouses,—or to resist the administration of justice in the courts of the United States, and they proceed, to execute their purpose by force,—there can be no doubt, that it would be treason against the United States. But it is not every act of treason by levying war, that is treason against the United States. It may be, and often is, aimed altogether against the sovereignty of a particular state. Thus, for example, if the object of an assembly of persons, met with

force, is to overturn the government or constitution of a state,—or to prevent the due exercise of its sovereign powers, or to resist the execution of any one or more of its general laws, but without any intention whatsoever to intermeddle with the relations of that state with the national government, or to displace the national laws or sovereignty therein, every overt act done with force towards the execution of such a treasonable purpose is treason against the state, and against the state only. It is in no just sense a levying of war against the United States. But treason may be begun against a state, and may be mixed up or merged in treason against the United States. Thus, if the treasonable purpose be to overthrow the government of the state, and forcibly to withdraw it from the Union, and thereby to prevent the exercise of the national sovereignty within the limits of the state, that would be treason against the United States. So, if the troops of the United States should be called out by the president, in pursuance of the duty enjoined by the constitution, upon the application of the state legislature, or the state executive, when the legislature cannot be convened, to protect the state against domestic violence, and there should be an assembly of persons with force to resist and oppose the troops so called out by the president, that would be a levy of war against the United States, although the primary intention of the insurgents may have been only the overthrow of the state government or the state laws. These cases sufficiently point out the distinction, to which I have alluded, and it is not necessary, upon the present occasion, to go into more minute details.

Case No. 18,276.

CHARGE TO GRAND JURY—TREASON.

[2 Wall. Jr. 134; 4 Am. Law J. (N. S.) 83; 5 Pa. Law J. R. 55; 9 West. Law J. 163.]

Circuit Court, E. D. Pennsylvania. Sept. 29, 1851.

TREASON AGAINST THE UNITED STATES—WHAT CONSTITUTES—INDICTMENT—PROOFS BEFORE GRAND JURY.

[1. The expressions "levying war" and "adhering to their enemies, giving them aid and comfort," in the constitutional definition of treason, were borrowed from the ancient law of England, and are to be understood in the sense which they bore in England when the constitution was adopted.]

[2. The expression "levying war" embraces not merely the act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination.]

[3. Direct proof of the combining may be found in declared purposes of the individual party before the actual outbreak, or it may be derived from proceedings of meetings in which he took part openly, or which he either prompted or made effective by his countenance or sanction, commending, counseling, or instigating forcible resistance to the law.]

[4. Direct proof of the purpose, however, is not legally necessary; the concert of purpose may be deduced from the concerted action itself, or it may be inferred from facts occurring at the time, or before or afterwards.]

[5. To complete the crime of treason, there must be some act of violence as the result or consequence of the combining. But it is not necessary to prove that the person accused was a direct personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, or if, though absent at the time of its actual perpetration, he yet directed the act, or devised or knowingly furnished the means for carrying it into effect, and instigated others thereto, he is guilty of the crime. Successfully to instigate treason is to commit it.]

[6. The constitutional provision that "no person shall be convicted of treason, unless on the testimony

of two witnesses to the same overt act, or on confession in open court" (article 3, § 3), applies, it seems, only to the proofs on the trial, and not to a preliminary hearing before a committing magistrate, or the proceedings before a grand jury.]

[7. Treason against the United States may be committed by any one residing or sojourning within its territory and under the protection of its laws, whether he be a citizen or an alien.]

On the 18th of September, 1850 [9 Stat. 462], congress, in order to give effect to a provision of the constitution, passed a law to enable the owners of fugitive slaves to recover them when found in the states to which they had fled. Slavery, the abolition of slavery, this law, or any law for the recovery of slaves, had been for some time prior to the passage of the act, the themes of passionate and fanatical debate by extreme factions in the Northern and Southern states. The country was convulsed by party rage, and that "unity of government which constitutes us one people," had itself become endangered. Not content with resisting the passage of the act, the northern part of the faction, immediately after its passage, set themselves to work through the pulpits, the press, through public harangues and secret engines of every kind, to bring about resistance to the law, and to destroy the power of executing it through the force of public opposition. In this circuit, everywhere, owing to the energy of this court, and of the commissioners and officers appointed by it to execute the provisions of the act, the law was generally enforced with integrity. "As the Lord liveth, and as my soul liveth,"—declared Mr. Justice Grier, just after its passage, and in the midst of an assemblage whose murmurs of violence were disturbing his administration of justice,—“this court will administer this law in its full meaning and genuine spirit till the last hour that it remains on the statute book.” In one of the interior counties, however, it was successfully resisted. Mr. Edward Gorsuch, a citizen of Maryland, who had come to Christiana, in Lancaster county, Pennsylvania, to reclaim his slaves, was met by a body of armed men, assaulted, beaten and murdered. His son who was with him, was at the same time, beaten, robbed and stabbed, and his life endangered. An officer of the United States was driven back by menaces and violence while proclaiming his character and exhibiting his warrant. The time and the manner of these outrages, their asserted object, the denunciations by which they were preceded and the concerted action of the persons, evinced, it was thought, a combined purpose forcibly to resist the statute. And it was stated that for some time before this, gatherings of people had been held from time to time at West-Chester, a town near the place of the outbreak, at which denunciations of the law were made as unconstitutional and of no obligation against “the higher law of every man’s conscience:” the judges of the United States who would enforce it denounced as Scroggses and Jefferieses, and exhortations made and pledges given to defy its execution to the last. The murder of Mr. Gorsuch, under such circumstances, caused a deep feeling throughout the whole country; and it being stated to the court that several bills of indictment for treason against the United States would be laid before the grand jury, that body was thus charged on the law of treason, by

KANE, District Judge. Treason against the United States is defined by the constitution (article 3, § 3, cl. 1) to consist in “levying war against them, or in adhering to their enemies, giving them aid and comfort.” This definition is borrowed from the ancient law of England (St. 25 Edw. III., St. 5, c. 2), and its terms must be understood of course in the sense which they bore in that law, and which obtained here when the constitution was

adopted. The expression “levying war,” so regarded, embraces not merely that act of formal or declared war, but any combination forcibly to prevent or oppose the execution or enforcement of a provision of the constitution or of a public statute, if accompanied or followed by an act of forcible opposition in pursuance of such combination. This in substance has been the interpretation given to these words by the English judges, and it has been uniformly and fully recognised and adopted in the courts of the United States. See Foster, Hale, and Hawkins, and the opinions of Iredell, Paterson, Chase, Marshall, and Washington, J.J., in the supreme court, and of Paterson, C. J., in *U. S. v. Mitchell* [Case No. 15,788]; *U. S. v. Fries* [Id. 15,170]; *U. S. v. Bollman* [4 Cranch (8 U. S.) 75], and *U. S. v. Burr* [Id. 14,692a].

The definition, as you will observe, includes two particulars, both of them indispensable elements of the offence. There must have been a combination or conspiring together to oppose the law by force, and some actual force must have been exerted; or the crime of treason is not consummated. The highest, or at least the direct proof of the combining may be found in the declared purposes of the individual party before the actual outbreak; or it may be derived from the proceedings of meeting, in which he took part openly, or which he either prompted, or made effective by his countenance or sanction,—commending, counselling or instigating forcible resistance, to the law. I speak, of course, of a conspiring to resist a law, not the more limited purpose to violate it, or to prevent its application and enforcement in a particular case, or against a particular individual. The combination must be directed against the law itself. But such a direct proof of this element of the offence is not legally necessary to establish its existence. The concert of purpose may be deduced from the concerted action itself, or it may be inferred from facts concurring at the time, or afterwards, as well as before. Beside this, there must be some act of violence, as the result or consequence of the combining. But here again, it is not necessary to prove that the individual accused, was a direct, personal actor in the violence. If he was present, directing, aiding, abetting, counselling, or countenancing it, he is in law guilty of the forcible act. Nor is even his personal presence indispensable. Though he be absent at the time of its actual perpetration, yet if he directed the act, devised or knowingly furnished the means, for carrying it into effect, instigating others to perform it, he shares their guilt. In treason there are no accessories. There has been, I fear, an erroneous impression on this subject among a portion of our people. If it has been thought safe, to counsel and instigate others to acts of forcible opposition to the provisions of a statute,—to inflame the minds of the ignorant, by appeals to passion, and denunciations of the law as oppressive, unjust, revolting to the conscience, and not binding on the actions of men,—to represent the constitution of the land as a compact of iniquity, which it were meritorious to violate or subvert,—the mistake has been a grievous one; and they who have fallen into it may rejoice, if their appeals and their counsels have been hitherto without effect. The supremacy of the constitution, in all its provisions, is at the very basis of our existence as a nation. He, whose conscience, or whose theories of political or individual right forbid him to support and maintain it in its integrity, may relieve himself from the duties of citizenship, by divesting himself of its rights. But while he remains within our borders, he is to remember, that successfully to instigate treason, is to commit it.

It is declared in the article of the constitution which I have already cited, that “no person shall be convicted of treason, unless on

the testimony of two witnesses to the same overt act, or on confession in open court." This and the corresponding language in the act of congress of April 30, 1790 [1 Stat. 112], seems to refer to the proofs on the trial, and not to the preliminary hearing before the committing magistrate, or the proceeding before the grand inquest. There can be no conviction until after arraignment on bill found. The previous action in the case is not a trial, and cannot convict, whatever be the evidence or the number of witnesses. I understand this to have been the opinion entertained by Chief Justice Marshall [Case No. 14,692a], and though it differs from that expressed by Judge Iredell, on the indictment of Fries [Id. 15,170], I feel authorized to recommend it to you, as within the terms of the constitution, and involving no injustice to the accused.

I have only to add, that treason against the United States may be committed by any one resident or sojourning within its territory and under the protection of its laws, whether he be a citizen or alien. 1 Hale, P. C. 59, 60, 62; 1 Hawk. P. C. c. 2, § 5; W. Kel. 38.¹

Case No. 18,277.

CHARGE TO GRAND JURY—TREASON AND PIRACY.

[2 Spr. 285.]²

Circuit Court, D. Massachusetts. Oct. 16, 1861.

TREASON AND TREASONABLE CONSPIRACIES—PIRACY—CONSTITUTIONAL AND INTERNATIONAL LAW—REGULATION OF COMMERCE.

[1. If war be actually levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be regarded as traitors. Such part may be performed, not only by giving permission or other direct aid to the rebels, but also by acts which tend and are designed to defeat, obstruct, or weaken the arms of the United States.]

[2. Offences committed without the limits of the United States, upon the ocean, must be tried in the judicial district into which the offender is first brought, or into which he shall have been first apprehended.]

[3. Pirates are sea robbers or highwaymen of the sea, and all civilized nations have a common interest, and are under a moral obligation, to arrest and suppress them; and the constitution, in express terms, confers upon the United States the power to perform this duty, as one of the family of nations.]

[4. If a number of persons associate together, and undertake to establish a new government, and assume the character of a nation, and, as such, to issue military commissions, any other nation may, according to its own view of policy or duty, either utterly refuse to recognize the existence of such government, and treat all, who, acting under it, commit aggressions upon the ocean, as mere pirates, or it may fully recognize such new government, or may adopt the intermediate course between these two extremes, and, to some extent, and for some purposes, recognize the existence of a new government, while in other respects, and for other purposes, it rejects its pretensions to be deemed a nation.]

[5. The constitutional power to regulate commerce, and to pass all laws necessary to carry that power into effect, vests in congress the right, not merely to preserve and protect commerce, but to foster, strengthen, and extend it; and this authority is sufficient to sustain the validity of the legislation whereby congress has declared certain acts committed upon the high seas to be piracy, and punishable as such, even if those acts do not strictly constitute the crime of piracy as known to international law. Act 1790, c. 9, §§ 8, 9 (1 Stat. 113); Act 1820, c. 113, § 3 (3 Stat. 600); Act 1847, c. 51 (9 Stat. 175).]

¹This charge was delivered in the absence of GRIER, Circuit Justice. On a subsequent occasion, however, he referred to it as containing a correct statement of the decisions on the subject, and he expressed his full concurrence in the doctrines and sentiments which it expressed.

²[Reprinted by permission.]

[6. It is an offence punishable by fine and imprisonment, under the act of 1799 (1 Stat. 618, c. 1), for a citizen of the United States, at a time when a part of the inhabitants of the United States are in rebellion against the government, to write letters to a member of the British parliament, urging that body to acknowledge the independence of the insurgents.]

[7. Prior to the act of July 31, 1861 (12 Stat. 284), there was no law for punishing treasonable combinations or conspiracies which were not consummated by an overt act. The statute of that date, however, makes criminal not only combinations to overthrow the government, but conspiracies or mutual agreements, whether by few or many, whether public or private, forcibly to resist, or even to delay the execution of, any law.]

SPRAGUE, District Judge (charging jury). The two great offences which now force themselves upon the attention of courts and juries are treason and piracy. Upon both of these I have heretofore charged grand juries at some length. As those instructions can be laid before you, I do not think it necessary to repeat them at length, and I shall now make but few remarks upon these subjects.

The constitution declares that "treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." [Article 3, § 3.] This crime, like other offences, when committed within the limits of the United States, can be tried only in the state and district within which it is committed. Flagrant war being now carried on in other parts of the country, it becomes an important inquiry how far persons here, within your jurisdiction, may incur the guilt, and be subject to the penalties, of treason by co-operating with distant rebels. The law in that respect is this: if war is actually levied, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy are to be considered as traitors. Such part may be performed, not only by giving information or other direct aid to the rebels, but also by acts which tend and are designed to defeat, obstruct, or weaken our own arms.

If any such offence should be presented for your investigation, I doubt not that you will without hesitation enforce this law, as just and reasonable; for a seeming friend in New York or Massachusetts may, by various means, do more injury to our country, and more effectually aid its enemies, than he could by actually joining the rebel army; and while we are sending forth thousands of our friends and neighbors to the dangers of the field, to fight our battles and preserve our government, we cannot permit their dangers to be increased, and their lives to be sacrificed, by the practices of traitors at home, who are enjoying the protection of our laws. Offences committed without the limits of the United States upon the ocean must be tried in the judicial district into which the offender is first brought, or in which he shall be first apprehended.

There are two distinct provisions of the constitution, by which congress is empowered to punish certain kinds of piracy. By the first article of the constitution, congress is authorized "to define and punish piracies and felonies committed on the high seas, and offences against the law of nations." Pirates are generally described as sea-robbers. They are deemed "hostes humani generis," enemies of mankind, warring against the human race. The ocean is the common highway of nations, over which every government has criminal jurisdiction. Pirates are highwaymen of the sea, and all civilized nations have a common interest, and are under a moral obligation, to arrest and suppress them; and the constitution, by the provision I have referred to, enables the United States to perform this duty, as one of the family of nations. Pirates are called and recognized as enemies. They carry on war, but it is not natural war; and they

are not entitled to the benefit of the usages of modern civilized international war. There being no government with which a treaty can be made, or which can be recognized as responsible for the acts of individuals, the individuals themselves are held amenable to criminal justice, and liable to be put to death for the suppression of their hostilities. If a number of persons, large or small, associate together, and undertake to establish a new government, and assume the character of a nation, and as such to issue military commissions, any other nation may, according to its own view of policy or duty, either utterly refuse to recognize the existence of such assumed government, and treat all who, acting under it, commit aggressions upon the ocean, as mere pirates; or each nation may fully recognize such new government; or it may adopt any intermediate course between these two extremities,—to some extent, and for some purposes, recognize the existence of the new government, while in other respects, and for other purposes, it rejects its pretensions to be deemed a nation. Some of the nations of the earth, and particularly Great Britain, have taken this intermediate course in relation to the self-styled "Southern Confederacy." As there has been much sensibility manifested upon this subject, it is desirable that it should be well understood. Great Britain has merely declared that she will not ignore the existence of a Southern Confederacy, and treat those holding naval commissions under it as pirates; but that she recognizes the existence of civil war between the United States and the Southern Confederacy, and that she will take no part in such war. She in no degree interferes with the manner in which we shall treat either our own citizens or foreigners who may be engaged in this conflict, even although such foreigners be British subjects. She leaves us to deal with them as traitors or pirates, according to our own sense of justice and policy. Against this her position, we have nothing to urge under the law of nations or treaty stipulation.

Believing ourselves to be fighting the battle of human liberty and free institutions, and having heretofore cherished strong sympathy for others, the attitude assumed by Great Britain was not regarded as one merely of chilling indifference, but rather as an indication of unfriendly, if not hostile, feelings, exciting emotions of surprise and resentment. All, however, must admit that we cannot of right claim the assistance of any foreign government in the execution of our own laws or the suppression of rebellion. But we may justly claim that it shall not give aid to our enemies, or interfere with the manner in which we shall suppress a flagrant armed rebellion. It has been sometimes contended that some of the acts which are denominated piracy by congress are not such by the law of nations; and hence it has been inferred that such legislation is unauthorized. But it is to be observed that the constitution confers upon congress the power, not only to punish piracies under the law of nations, but also to define that offence. This approaches so near to a right to determine what shall constitute the offence, that it is not easy to subject it to precise limitations. But I do not dwell upon this source of authority, because our attention at the present time is called only to aggressions upon our own commerce; and that congress has ample power to repress these by penal legislation, there can be no doubt. The constitution, in express terms, gives authority to regulate commerce, and to pass all laws necessary to carry that power into effect; and this gives the right, not merely to preserve and protect commerce, but ever to foster, strengthen, and extend it. The criminal jurisprudence of the United States has extended to our commerce ever since the organization of our government, and this has been expressly sanctioned by the supreme court in *U. S. v.*

Coombs, 12 Pet. [37 U. S.] 72, and tacitly affirmed in a great number of criminal cases. The authority thus conferred upon congress has been exercised by a great variety of legislative enactments. By these acts, various offences are denominated and punished as piracy. By St. 1790, c. 9, § 8 (1. Stat. 113), "if any person or persons shall commit, upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall * * * yield up such ship or vessel voluntarily to any pirate," he shall be deemed a pirate, and, on conviction, shall suffer death. By section 9: "If any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and, on being thereof convicted, shall suffer death." Accessories before the fact are also punishable with death.

By St. 1820, c. 113, § 3 (3 Stat. 600), "If any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or lading thereof; * * * and if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate: and on conviction thereof * * * shall suffer death." By St. 1847, c. 51 (9 Stat. 175), "Any subject or citizen of any foreign state, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted, and punished * * * in the same manner as other persons charged with piracy." By St. 1846, c. 98, § 5 (9 Stat. 73), the punishment for piratically running away with any vessel, or delivering her to any pirate, is fine and imprisonment.

Whether any, or all, of the acts which by these statutes are denominated piracy, or piratical, be deemed such by the law of nations, is clearly immaterial, so far as the protection of our own commerce is concerned; and congress, having unquestionably the power to make such acts criminal when committed against our own commerce, and to punish them with any degree of severity, may adopt any nomenclature they see fit. The offence described is to be prosecuted, and punished in the manner directed, whatever name may be affixed to it, or if no name be given it. Thus in the statute of 1790, which declares that, if any person shall, upon the sea, commit murder or robbery, he shall be deemed a pirate or felon, and suffer death, an offence would have been completely described, and the punishment effectually denounced, if the words "shall be deemed a pirate and felon" had been wholly omitted. We have no occasion, therefore, to inquire, at least at the present time, whether the offences to which congress has seen fit to give the name of piracy or piratical, be deemed such by other nations or not.

There are other offences to which our attention is called by the present condition of our country. A few months since, a member of

the British parliament declared, in the most public manner, that he had received many letters from the Northern states of America, urging parliament to acknowledge the independence of the Southern Confederacy. Such an announcement ought to arrest the attention of grand juries; for, if any such communication had been made by a citizen of the United States, it is a high misdemeanor. St. 1799, c. 1 (1 Stat. 613), was especially designed to prevent such unwarrantable interference with the diplomacy and purposes of our government. It declares: "That if any person, being a citizen of the United States, whether he be actually resident, or abiding within the United States, or in any foreign country, shall, without the permission or authority of the government of the United States, directly or indirectly, commence, or carry on, any verbal or written correspondence or intercourse with any foreign government, or any officer or agent thereof, with an intent to influence the measures or conduct of any foreign government, or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or defeat the measures of the government of the United States," he shall be liable to punishment by fine not exceeding five thousand dollars, and imprisonment not less than six months nor exceeding three years. And the same penalties are incurred by any person who, being a "citizen of, or resident within the United States, and not duly authorized, shall counsel, advise, aid or assist in any such correspondence, with intent as aforesaid."

The last session of congress made two important additions to our Criminal Code. The statute of the 31st July last (Acts 1861, c. 33; 12 Stat. 284), declares: "That if two or more persons within any state or territory of the United States shall conspire together to overthrow, or to put down, or to destroy by force, the government of the United States, or to levy war against the United States, or to oppose by force the authority of the government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force, to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States; each and every person so offending shall be guilty of a high crime, and upon conviction thereof * * * shall be punished by a fine not less than five hundred dollars and not more than five thousand dollars, or by imprisonment, with, or without hard labor, as the court shall determine, for a period not less than six months nor greater than six years, or by both such fine and imprisonment." Levying war against the United States, and resisting or obstructing the execution of the laws of the United States, have, from the origin of the government, been criminal offences; but heretofore the criminal law has waited until treason or resistance has been consummated by an overt act. Conventions, associations, combinations, or conspiracies, however atrocious even for the purpose of levying war and subverting the government, were not subject to criminal prosecutions; but now we have a statute of prevention which reaches one of the initiatory steps. Not only combinations to overthrow the government, but conspiracies of mutual agreements, whether by few or many, public or private, forcibly to resist or even to delay the execution of any law, are high crimes, subject to severe punishment. The statute of the 6th August last (Acts 1861, c. 64; 12 Stat. 326) prescribes a new oath of allegiance, and fidelity to be taken by every officer, clerk, or employé in the several departments, or in any way connected therewith. It is in the following form: "I do solemnly swear (or affirm, as the case may be)

that I will support, protect, and defend the constitution and government of the United States against all enemies, whether domestic or foreign, and that I will bear true faith, allegiance, and loyalty to the same, any ordinance, resolution, or law of any state convention or legislature to the contrary notwithstanding; and further, that I do this with a full determination, pledge, and purpose, without any mental reservation, or evasion whatsoever; and further, that I will well and faithfully perform all the duties which may be required of me by law. So help me God." The violation of this oath is denounced and punished as wilful and corrupt perjury. What shall be deemed a violation, is not defined, but the very general and comprehensive language is left to judicial interpretation. This oath is wisely framed for the purpose of upholding the paramount authority of the national government, and recognizes allegiance to the United States as the highest political duty. It emphatically repels the deadly heresy of a paramount state allegiance.

Official oaths have heretofore generally been left without penal sanctions, their observance being secured only by the conscience of the officer; but we are admonished by recent atrocious examples, that the moral sense is no adequate security against the most appalling perfidy in officers of every grade, and it is wise therefore to affix to such crimes the palpable temporal penalties of perjury.

These two acts passed by the national legislature, at their recent session, to uphold the constitution and the government, are highly important. Looking at the powers and duties of congress by the light of the conflagration which has threatened to desolate our country, we see that such enactments ought to have existed from the beginning. If they had, and had been faithfully executed for the last twenty years, the catastrophe in which we are now involved would probably have been prevented.

Case No. 18,278.

The CITY of WASHINGTON.

[Cited in *Bartlett v. Spicer*, 75 N. Y. 530. Nowhere reported. Opinion not now accessible.]

CIVIL CASES, FEES AND COSTS IN CIVIL CASES. See Case No. 18,284.

CIVIL RIGHTS ACT, Charge to Grand Jury in relation to the CIVIL RIGHTS ACT. See Cases Nos. 18,258, 18,259 and 18,260.

Case No. 18,279.

CLARKE et al. v. CLARKE et al.

[2 Hayw. & H. 114.]¹

Circuit Court, District of Columbia. May 30, 1853.

ASSIGNMENT TO ATTORNEYS OF INTEREST IN CLAIM
— LIEN OF.

1. Where a claim was presented and prosecuted by attorneys in the name of a bankrupt who had purchased it at a sale made by his assignee, in bankruptcy, but which sale was subsequently declared void. An assignment in a power of attorney of so much of the fund as the attorneys were to receive as compensation for their services will be carried out.

2. Such an assignment is a lien on the fund, and will be preferred to the judgment creditors of the bankrupt.

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

In equity, for an injunction and distribution of funds in the treasury in the defendant's name. The bill in substance states: That the claimant [Benjamin C. Clarke] was a judgment creditor of the defendant [Ferdinand N. Clarke]; that the defendant at the time the judgment was entered against him was wholly insolvent. That on the 15th of April, 1851, an award was made by the board of commissioners on claims against Mexico, in favor of said Ferdinand N. Clarke for \$86,786.24, and that it is the only assets of the said Ferdinand to which the creditors can have any recovery for the payment of their claims against him. That he left the city of New York and proceeded to New Hampshire, and filed his petition to be declared a bankrupt; he was duly declared a bankrupt. That an assignee was appointed to dispose of the effects. That pursuant to the schedule filed he sold all Clarke's interest in the property, and the rights of property, for the sum of two dollars; Clarke himself bidding at the sale, but ordered the title to be made by the assignee to his (Clarke's) sister, who relinquished to him by a formal deed on the next day. By virtue of this purchase, Clarke claims to be bona fide owner of all the property, and rights of property he had in or indicated in the schedule. That the assignee, John Palmer, is dead. That the complainant prays for a writ of injunction against the said Ferdinand not to receive the amount of the award, and that another assignee duly appointed may come in and make himself party complainant.

The defendant answered the bill, said notwithstanding the creditors had due notice of the proceedings in bankruptcy in this case, none of the creditors filed any proof of debt in the case of the defendant, or any objections to the proceedings, or to the doings of the said assignee until after the filing of this bill, insisting that if any loss has accrued to the complainant in consequence or on account of the management of his assets in bankruptcy by said assignee, it has been through the laches and negligence of said complainant, that he was the bona fide purchaser of said claim, and is entitled to the sole benefit of the award. That the complainant, if any claim existed at the time of the proceedings in bankruptcy had no claim upon the award, or any part thereof, as was intended to be protected and secured by the 8th section of the act entitled "An act to carry into effect certain stipulations of the treaty between the United States and the republic of Mexico, of February 2d, 1848" [9 Stat. 922]; and therefore is not entitled to relief, and that said complainant did not file the notice and bond required by said section within the time specified in said section.

The allegation of fraud in the bill was put in issue by the answer. William H. G. Hackett was appointed assignee of the estate of the defendant Clarke, in the place of John Palmer, deceased, and was made party complainant in

this suit; and stated in his position that there was no evidence put into the possession of the original assignee to enable him to recover the claim, but that such information and evidences were fraudulently withheld by the said bankrupt; that because of the assignee's ignorance of its value it could not be sold; and that no title to the said Mexican claim passed out of said assignee to any person whatever, or in any manner averted to or became the property of the bankrupt.

The following auditor's report of the claim of F. T. Lally and James S. Thayer, with the accompanying decree, will explain the claim of said Lally and Thayer to a portion of the fund awarded.

By the reference in the above cases the auditor is directed to ascertain and report: (1) Whether the commissions claimed by Lally and Thayer are due to them under the agreement set up? (2) Whether the agreement was bona fide made by them at the time it bears date? (3) Whether the fund in controversy was recoverable by them under said agreement? and, (4) To state the account, &c.

The papers have been perused, and under the above reference the following report is respectfully submitted:

By W. RIDDEN, Auditor:

"The petition of F. T. Lally and James S. Thayer states that Ferdinand N. Clarke, being entitled to a claim against the Mexican government, executed on the 24th of Feb., 1851, a power of attorney, constituting said Lally his attorney, to present and prosecute said claim before the board of commissioners on claims against Mexico. That said power of attorney contained, in consideration of his professional services rendered, and to be rendered, an assignment and transfer to said Lally of 20 per centum of such amount as might be awarded to said Clarke, and a power to said Lally to draw the same from the treasury department; that said Lally engaged the services of said Thayer to aid him in the prosecution of said claim; that they prosecuted said claim, and obtained an award in favor of said Clarke for \$86,786.24. The answer of the defendant, Clarke, to the petition, does not deny the allegations in the petition, but admits them.

"I find, therefore, that Lally was employed to prosecute the claim; that 20 per cent. of the amount was assigned to him for his services; that the agreement and assignment were bona fide made at the time they bear date; that \$86,786.24 were recovered and awarded; and that the same were recovered by said Lally, and the agents employed by him, under the said agreement and assignment as averred in said petition, and admitted by the said answer of said F. N. Clarke. I find the amount due to said F. T. Lally, under said agreement and assignment, and which he is entitled to have paid out of said sum awarded, to be \$17,357.20.

"Several bills and petitions have been filed claiming the fund. Wm. H. Y. Hackett

claims it as assignee under F. N. Clarke's bankruptcy; Benjamin F. Clarke and W. C. Pickersgill as judgment creditors of said F. N. Clarke prior to his bankruptcy, and Stanton, Barclay and Boothe also as creditors of said F. N. Clarke prior to his bankruptcy. The claim was presented and prosecuted by said Lally and Thayer, in the name of said F. N. Clarke alone, and the award was made in his name. All the parties now claiming the fund claim under or through him, and ought, and it is supposed, must take, if they establish their claims, subject to the burthen created and imposed by Clarke, upon the fund in favor of his attorneys for their services in recovering it.

"The court has established and carried out these agreements, where the power of attorney has contained an assignment of so much of the fund as the agent was to receive as compensation for his services. As in Betsy McIntosh's Case (McElrath v. McIntosh [Case No. 8,781]), one-half, in Fuller v. Clarke's Adm'r (not reported) one-half, and in Baldwin v. Wylie [Id. 18,228], on an agreement to be paid five per cent. out of the fund. Twenty per cent. is not an unusual commission on claims of this kind. The agreement, however, of Mr. Clarke is specific, and binds, it is supposed, those who claim through him, in favor of the agents who obtained the claim. All the claimants and the defendant are represented in this agreement to refer, viz.: Benjamin F. Clarke, Barclay and Hackett by Mr. Carlisle; Stanton by Mr. Abert; Chester and Fleming, et al. by Mr. Hall; Boothe by Mr. Bradley. The defendant by Mr. Hays and Mr. Lawrence, and Pickersgill by Mr. Hall."

J. M. Carlisle, for complainants.
John L. Hayes, for defendants.

Before CRANCH, Chief Judge, and MORSELL and DUNLOP, Circuit Judges.

THE COURT decided that the commission of said Lally agreed to be paid by the said Clarke out of this fund, and assigned to said Lally by said Clarke, is a lien upon the said fund, ratifying and confirming the auditor's report; decreeing that the sum of \$17,357.20, with interest thereon, from the 21st day of June, 1851, and that the injunctions granted in the causes be dissolved as to the said sum and interest.

The following is the decree of THE COURT in the cause under consideration:

This cause having been set for hearing by consent of parties and by order of the court, on bill, petitions and exhibits, and on answers and exhibits, and on general replications and testimony on both sides, and having been fully argued by counsel. It is now this 30th day of May, 1853, by the court ordered, adjudged and decreed that the fund in controversy in this cause, to wit: the sum of sixty-nine thousand four hundred and twenty-nine dollars and four cents, which is remaining in the treasury of the United States, of the amount of the award

to Ferdinand N. Clarke, mentioned in the bill, petitions and answers, deducting therefrom the complainant's costs, here to be taxed by the clerk, be paid over to the complainant, William H. Y. Hackett, assignee in bankruptcy of said Ferdinand N. Clarke, for distribution in the bankrupt court, where the proceedings in bankruptcy are pending, to wit: the district court of the United States, for the district of New Hampshire, under the orders of the said court, according to the respective rights of the creditors of said bankrupt, to whom the said court may order the same to be distributed.

On appeal, the court was sustained. See 17 How. [58 U. S.] 315.

Case No. 18,280.

CLARKE v. OLARKE.

[Nowhere reported. Opinion not now accessible.]

CLARKE (JOHNSTON v.). See Case No. 18,303.

CLARKE v. SECRETARY OF THE TREASURY. See Case No. 18,279.

CORCORAN (JUDSON v.). See Case No. 18,304.

Case No. 18,281.

CORPORATION OF GEORGETOWN v. UNITED STATES.

[2 Hayw. & H. 302.]¹

Circuit Court, District of Columbia. Aug. 25, 1858.

MUNICIPAL CORPORATIONS—REPAIRING ROADS OUTSIDE OF CORPORATE LIMITS—INDICTMENT FOR NEGLIGENCE.

1. A municipal corporation has no authority to take upon itself the burden of repairing a road or turnpike, in which the public as well as the corporation are interested, when the same is outside the limits of said corporation.

2. Where it is the duty of the levy court to keep in repair all the roads in the county, outside the corporate limits of Georgetown, an ordinance passed by the corporation, stipulating that the corporation should repair a certain road leading to said corporation, does not make the corporation liable on an indictment for not repairing said road, neither would it be the case where the act of congress of 1826 [4 Stat. 183] makes the corporation liable for one-half of the expense of keeping the county roads in repair. In other words the corporation has no authority for any purpose beyond its own limits.

At law. Writ of error from the criminal court. On an indictment for a nuisance in not repairing a highway, etc.

P. Barton Key, U. S. Atty. for the District of Columbia, for the United States.

J. M. Carlisle, special counsel with U. S. Dist. Atty.

Robert Ould, for the corporation.

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

The object of this prosecution being to ascertain judicially whether the corporation of Georgetown is bound to keep in repair the road mentioned in the indictment, and there being no dispute about the matter of fact, but only in matter of law, touching the obligation to repair and liability to this indictment, the case is submitted to the court under the statute, subject to the opinion of the court as to the liability of the corporation, upon the following facts agreed:

On the 2nd of March, 1833, congress passed and approved an act to improve the navigation, &c. 4 Stat. 646. The corporation passed the following ordinances of March 11, 1833; of 19 and 20 March, 1833; of May 11, 1833; of 19 June, 1833, and of September 16, 1833. It is agreed that a majority of the voters of Georgetown did, at the election referred to in the ordinance of Sept. 16, 1833, duly declare their preference for making such "free turnpike road from some point of the upper part of the town," &c., but no application was made to congress in that behalf. And afterwards the said corporation passed the following ordinances, to wit: the ordinances approved March 15, 1834, June 7, 1834, October 21, 1834, February 21, 1835, April 16 and 18, 1835, May 16 and 23, 1835, and also the following ordinances, to wit: the ordinances approved November 9, 1835, December 22, 1835, April 23, 1836, June 15, 1836, and October 1, 1836, and afterwards passed the following ordinances, to wit: the ordinances approved December 4, 1838, November 22, 1839, February 12, 1840, and July 18, 1840. And it is agreed that the road mentioned in the indictment was contracted by the corporation under the contract approved by said ordinance of April 16, 1835; and that the said road is the same road which is referred to in the said ordinances as the "Upper Route" of the free turnpike road aforesaid, and which enters the said town at Seventh street.

It is agreed that the road mentioned in the indictment, and as aforesaid constructed by the corporation, has and is from the time of constructing the same, and hitherto a public highway, convenient for the interests of the upper or northern section of the town, and lies without the corporate limits of the said town, and wholly within the county of Washington, District of Columbia, extending from Seventh street in said town; and has been, from time to time, repaired and kept in repair by the corporation from the time the same was contracted until within two years last past, since when the corporation has not kept the same in repair or in a condition fit for a public highway; but the same has been and is wholly unfit for travel, and by reason of the decay and dilapidation of certain culverts, part thereof, and by reason of the condition of the roads generally, the same is a public nuisance, as being impassable as a public highway, and as causing damage by overflow, &c., to the private property bordering thereon. It is agreed that if upon the whole case the court shall

be of opinion that the corporation is bound to keep the said road in repair, and is indictable for the nuisance created by the failure to do so, judgment shall be entered accordingly, or such form (either upon plea of guilty or otherwise) as may be deemed regular by the court; but if the court shall be of the contrary opinion a nolle prosequi shall be entered, the object of the prosecution being to determine judicially the right of the matter.

OPINION OF THE COURT. The present case grows out of an indictment in the criminal court against the corporation of Georgetown for not keeping in repair a road in the county of Washington, outside the limits of the corporation, which is described in the indictment as "a certain common public highway leading from Seventh street, in the town of Georgetown, at the county aforesaid, to the stone house situate on the common and public highway leading to the Little Falls bridge, and known and designated as the 'Upper Road to the Little Falls Bridge.'"

It is admitted on all hands that the duty of repairing a highway outside its territorial limits does not rest, at common law, upon any parish, corporation or county; and that to create a liability to repair an extraterritorial highway some special legal obligation must be shown. If, therefore, the corporation of Georgetown is liable under this indictment that liability must be sought in some legislation of congress or on some permanent obligation assumed by the corporation within the scope of the corporate powers which have been confirmed by law upon the authorities of the town. With the most limited powers, among the chief of which was the right of the commissioners to hold semi-annual fairs in April and October. Georgetown within what were then the limits of Frederick county, was erected into a town by the act of assembly of 1751, c. 25. Its streets, lanes and alleys were defined by the commissioners and by successive acts of assembly of 1783, c. 27, and 1784, c. 45, the boundaries of the town were extended. The town was first incorporated by Act 1789, c. 23, then being in Montgomery county, and certain additional powers were granted to it by Act 1797, c. 56, and 1799, c. 85. Congress extended the chartered powers by the act of 1805, c. 32 [2 Stat. 332], and by the 12th section conferred upon the corporation power to "open, extend and regulate streets within the limits of said town," and by further amendment of the charter, Act 1809, c. 30, § 4 [2 Stat. 537], that power is defined as follows: "The said corporation shall have power to lay out, open, extend and regulate streets, lanes and alleys within the limits of the town under the following regulations," &c., &c. And connected with these special powers our streets, &c., &c., within the limits of the town; congress conferred upon the levy court of Washington county, by the act of 1812, c. 117, § 2 [2 Stat. 771], "full powers to lay out, straighten and repair public roads within said county, ex-

cept within the corporate limits of the cities of Washington and Georgetown." By the 8th section of this law the levy court was empowered to lay an annual tax upon all the real and personal property within said county, (except the city of Washington,) for the purpose of defraying the annual charges, (expenses of repairing roads included.) Afterwards by Act 1826, c. 111 [4 Stat. 183], the power of the levy court to assess and collect taxes within Georgetown was abolished, but with regard to county expenses the corporation was bound to contribute certain proportion amongst others, one-half the expense of opening and repairing roads in the county of Washington, west of Rock Creek and leading to Georgetown. From an inspection of these several statutes, it is manifest that the corporation of Georgetown has no general powers whatever on the subject of roads outside of the limits of the town to which all its functions and authority are by the statutes studiously limited, and that the whole power to open roads as well as the duty to repair is devolved by express terms upon the county, the corporation paying only to the treasury of the county, one-half the expenses incurred by the levy court for roads opened or repaired west of Rock creek.

This being the relation of the corporation to the county in regards to its road system, the special act of congress, of March 2, 1833, c. 66, and the several ordinances of the corporation mentioned in the agreed statement which taken together are supposed to create the liability to repair in the case were enacted. In order to understand their full bearing it is deemed necessary to refer to some other special legislation of Maryland, by Act 1791, c. 81, incorporated the Georgetown Bridge Company, for the purpose of erecting a toll bridge at the Little Falls of the Potomac and subsequently by Act 1795, c. 44, on petition of that company authorizing them to construct a road from the bridge to Georgetown, which said road was declared to be "a public highway forever, and kept in repair by said company." Afterwards upon the destruction of the bridge, Feb. 22nd, 1811, congress authorized the company to make a new assessment upon its stockholders to rebuild the bridge and to keep the same in repair together with the road leading thereto from Georgetown. The bridge and road then were constructed by the same company, owned by the same company, chargeable upon and to be kept in repair by the same company and made subservient to the uses of the public, to citizens of Georgetown and others going to and returning from that town. It was under this state of circumstances that congress, in pursuance of its general policy to make the roads and bridges leading to and through the District of Columbia, free to all, passed the act of 1833, c. 66, appropriating a sum of money to enable the corporation of Georgetown among other things "to make a free turnpike road to the District line on the Virginia side of the river, and to purchase of the present

proprietors and make forever free the bridge over the Little Falls of the Potomac river," coupling with its bounty the condition "that before the said sum be paid over to said corporation it shall pass an ordinance to make said road and bridge free, and to be kept in repair by said corporation forever." In consequence of the act of congress, the corporation passed an ordinance on the 11th of March, 1833, accepting the condition imposed, and on the 20th of March, another ordinance in more explicit terms than the first, declaring "that the bridge across the Potomac river at the Little Falls and the road to the District line west of the river, be and the same are hereby declared to be free, and the corporation of Georgetown engages that the said bridge and road shall be kept in repair by the corporation forever."

Looking to the preceding legislation of Maryland and congress, it would seem that the ordinances fulfilled the meaning of the law, and determined upon the then existing road and bridge as the road they were to turnpike and make free as far as the Virginia line, and in connection with the bridge keep in perpetual repair; and that having accepted that particular road the power of the corporation conferred by the act of congress was to that extent satisfied and exhausted. It is true, indeed, that by an intermediate ordinance of the 19th of March, 1833, the corporation seemed to contemplate an unrestricted power in itself to select any route for a turnpike road without any reference to the site of the old road of the bridge company, and by other ordinances of May and June of that year they look to an alternative selection.

Afterwards, in September of the same year, 1833, they passed an ordinance, the title of which is: "An ordinance fixing and establishing the route of the free turnpike road from the town to the Chain bridge, and making provision for the construction thereof, and for other purposes," and by that ordinance they adopted substantially the same road mentioned in the ordinances of the 11th and 20th of March, to wit: the old road of the bridge company, with certain alterations which were particularly specified in the first section of the ordinance.

It is perhaps not necessary to examine over-critically, how far it was competent for them to modify the selection of a route previously designated and which in this ordinance is substantially re-announced, for if the corporation had no power whatever over the subject, so as to make needful, perhaps indispensable, variations in the course of the route so as to make it fit for turnpiking, there could be no shadow for the operation of the further power over the matter necessary to impose the obligation which must exist to sustain the present indictment.

Conceding then, for the purpose of this case, the power to vary the location of the line where the reasonable convenience or economy of constructing the turnpike required the mod-

ification, it remains that the ordinance of September the 16th, in connection with those of March 11th and 20th, amounted to a final adoption of a route for a turnpike, coupled with an obligation under the sanction of the act of congress for perpetual repair of the road designated in the ordinance as "the present road or canal route." It also made provision for constructing the road and appropriating a portion of the funds derived from congress to carry out that object.

Having done thus much the corporate authorities went further. In the same ordinance of the 16th September, 1833, by the 7th section, they proposed to apply to congress for authority to appropriate \$35,000 of the monies derived under the act of March preceding, either to the purchase of the turnpike from Georgetown to Rockville or making a free turnpike road from some point of the upper part of the town to intersect the road designated in the ordinance, as a majority of the voters might prefer, their preference to be ascertained at the next March election. The voters did declare a preference for the road described in the indictment.

No act of congress was, however, passed, and the corporation in October, 1834, passed an ordinance entitled, "A supplement to the ordinance of September 16th," providing for an additional inlet into the town and for the construction thereof; in which they declared "that the upper section of the town are fairly entitled to an equal participation in the advantages resulting from the expenditure of funds for the benefit of all its citizens, which could only be extended to those sections by means of a part of said road leading into said sections, and as the public convenience required it," they therefore authorized certain commissioners to lay out and construct the same, and declared that when located it should be forever taken as part of the free turnpike road provided for in the act of 2nd of March, 1833. This road, being the same described in the indictment, was located and the contract for its construction ratified contemporaneously with the contract for the road provided in ordinance of 16th September, 1833, and by the ordinance of October certain portions of the funds derived from congress were appropriated to this upper route, and by an ordinance of April 23, 1836, a fund of \$15,000 was set apart and pledged as a perpetual fund for the repair of both roads. The two roads have thenceforth continually been kept in repair by the corporation of Georgetown until some short period before the filing of this indictment.

In constructing this new road, nearly or quite one-half the length of the original road, did the authorities of Georgetown bring themselves within the powers conferred by the act of congress, by connecting it with the original road, and at the same time declaring it to be a part thereof? Could a form of words adopted in a corporation ordinance make that

a part of a road, which was to all intents a separate road, connecting with it?

It was not essential to the other which was capable of use without it, and although doubtless of great value and utility to a portion of the citizens of the town it could not in legal comprehension be a part of that which was an entirety without its being constructed, and had substantial existence many years before it was located; neither could the appropriation to the purpose of a portion of the funds derived from the bounty of congress by the individuals who happened at the time to fill the corporate offices, raise a perpetual obligation upon the corporation to redeem a pledge with which its officers had accompanied an expenditure of those funds. For the protection of the rights and property of the inhabitants who constitute the citizens of any municipality the law has wisely provided that they shall be bound by no act of their agents which is not within the scope of the delegated powers of those agents, and however the pledge of public faith may be attempted, it will not avail unless warranted by a legal delegation of authority. The public convenience and manifest advantage to a portion of the citizens of Georgetown which the ordinances recite as these inducements are alike insufficient to support a legal obligation upon the corporation to repair this road.

In one of the cases referred to in the argument of this case: *Rex v. Inhabitants of St. Giles*, 5 Maule & S. 266, 267; *Holroyd*, Justice, gives the very reason which fits the present enquiry, "It has been said that it might have been for the convenience of the parish of St. Mary, that this land was dedicated to the public for the purpose of a highway, and that in consideration of this boon the parish might have taken on themselves the burden of its reparation, but I think upon reflection that this could not be a legal consideration binding on the successors, because a burden might thereby be imposed on them beyond the benefit which they were to receive, for they would have to repair the highway not only for their own use, but also for the public." And as in this case, although the convenience of the people of Georgetown may be promoted by the road in question; and in view of that and to equalize the advantages springing out of the liberality of congress, the then inducements of the corporate officers honestly stipulated that through all time the corporation should repair the road; in so doing they transcended their authority and attempted to impose a burden beyond the benefit which the law contemplated that the citizens received in stipulating for them to repair a highway in which the whole public as well as the citizens of Georgetown are interested. If the road in question be a public highway, as is assumed in the indictment and the agreed statement, then the corporation not being liable under the above mentioned ordinances, the burden of repair will fall upon the county. In that

event Georgetown is not entirely exempted but according to the equitable apportionment determined by the act of 1826, one-half of the expense must be contributed by the corporation to the levy court, which body by the policy of the law is primarily charged with the duty of repairing public roads within the county of Washington.

If this view of law be correct, it is needless to inquire whether, as was strenuously denied by the counsel for the corporation, an obligation to repair a highway may be incurred by contract for a pecuniary consideration, which will render the party so contracting liable to indictment for not repairing. No such contract could be made by the corporation of Georgetown under the powers conferred by its present charter. Neither is it necessary to consider any question growing out of the form of the indictment. For the reason above given, it is the opinion of the court that the indictment cannot be sustained upon the case agreed, and the judgment of the criminal court must therefore be traversed and judgment of not guilty entered for the traverser.

COSTS.

See Case No. 18,282.

Case No. 18,282.

COSTS AND FEES.

[1 N. B. R. 24; 1 Bankr. Reg. Supp. 6; 6 Int. Rev. Rec. 53.]

District Court, D. Wisconsin.

BANKRUPTCY — COSTS, FEES, AND DISBURSEMENTS.

Semble, 1. That a regular taxation by the clerk should be made of all the fees and disbursements in each bankrupt case.

2. The sum of \$50, deposited with the clerk, is not a fund in court for general distribution among creditors, but is to be disbursed under the supervision of the court.

3. The sum, or such portion of it as may be necessary, may be appropriated to the register in the first place.

4. Where a bankrupt is relieved by order of the court from further payment of fees, the \$50 deposit will be distributed pro rata to the register, clerk, and marshal.

5. Printers' fees are chargeable according to the United States fee bill.

MILLER, District Judge. The subject of costs and fees for services, under the act to establish a uniform system of bankruptcy throughout the United States, approved March 2, 1867, being brought up almost daily, I have prepared the following for the consideration of persons interested: Section 47 of the act relates exclusively to the subject of costs and fees. The section is so unskillfully drawn as to cause uncertainty in its construction. In the first place it provides: "That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court, as now established by law, or as may be established by general order, under the provisions of this act, the following fees, which shall be applied to the payment for the services of the registers." The fees of the clerk of the court are here allowed as now established by law,—that is, by the general fee bill for similar services, or as

may be established by general order, under the provisions of this act. Then follows a specification of fees, "which shall be applied to the payment for the services of the registers." Following the specification of the register's fees is the provision, "Such fees (that is, the register's fees) shall have priority of payment over all other claims out of the estate, and before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk (by rule 36 of the General Orders in Bankruptcy, with the clerk), to be delivered to the register, \$50 as security for the payment thereof. And if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued shall pay the same, and the court may issue an execution against him to compel the payment to the register." It is here provided that the register's fees shall have priority of payment out of the estate. Then \$50 shall be deposited with the clerk of the court, to be delivered to the register as security for the payment of his fees, and the petitioner is rendered liable to an execution on the part of the register in case of deficiency of assets for the payment of his fees. It is apparent that the compensation of the register is abundantly secured. The clerk and marshal do not appear to be so well provided for. The 47th section further provides that, "before any dividend is ordered, the assignee shall pay out of the estate to the messenger (that is, the marshal) the following fees, and no more," as there specified. And "for cause shown, and upon hearing thereon, such further allowance may be made as the court in its discretion may determine." I presume this is in reference to the marshal's fees alone. The section concludes with this provision: "The enumeration of the foregoing fees (that is, all the fees enumerated) shall not prevent the judges (of the supreme court), who shall frame general rules and orders in accordance with the provisions of section 10 from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in the rules and orders." The act classes registers with clerks and marshals as officers of the courts. In pursuance of said last provision of the section, the judges ordered, by rule 30, that additional fees should be allowed clerks and registers for services not enumerated in the act. And by rule 29 it is ordered that "the fees of the register, marshal, and clerk shall be paid or secured in all cases before they shall be compelled to perform the duties required of them by the parties requiring such service." The fees of the register, as before seen, are to be secured by a deposit of \$50 with the clerk; but there being no security provided for in the law for the payment of the fees of clerks and marshals, no doubt, induced the judges to adopt rule 29. It is claimed that registers are entitled to be paid in advance the \$50 directed to be deposited with the clerk in each case. The act does not direct the manner or the time of disbursing the \$50, but expressly directs the deposit to be made for the security of the register's compensation. In a great majority of cases register's fees cannot approximate the sum of \$50. Where there is no estate for distribution, there will be but few, if any, debts proven, and no meeting of creditors to appoint assignees, and no examination of the bankrupt. The appointment of an assignee and subsequent proceedings will be mere matters of form. The legislature did not contemplate that registers should be paid in advance the whole amount of \$50, in cases where, by the fee bill, not half, or, probably, not the quarter, of that sum could be earned. Rule 12 orders that "every register shall keep an accurate account of his traveling and incidental expenses, and those of any clerk or other officer attending him in the performance of his duties, in any case or number of cases

¹ [Reprinted from 1 N. B. R. 24, by permission.]

which may be referred to him, and shall make return of the same under oath, with proper vouchers (where vouchers can be procured), on the first Tuesday in each month; and the marshal shall make his return under oath, of his actual and necessary expenses in the services of any warrants addressed to him, and for custody of property, publication of notices, and other services," &c. If the \$50 were payable to the register, or any part of it, in advance of services performed, this rule would be unnecessary, unless to enable him to have execution or an order for payment out of the estate, for excess of fees over the \$50.

In pursuance of the concluding sentence of section 47, that the enumeration of the foregoing fees shall not prevent the judges from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders, by rule 30 the following order is made: "In cases where the debtor has no means, and makes proof to the satisfaction of the court that he is unable to pay the costs prescribed by the act and these orders, the judge, in his discretion, may direct that the fees and costs therein shall not exceed the sum of (fifty dollars) required by the act to be deposited with the clerk." This rule is a reduction of fees, and contemplates a distribution of the sum deposited with the clerk amongst the register, marshal, and clerk; otherwise, the marshal might be required to advance money to pay for advertisements, notices, and postage, and he and the clerk might be compelled to perform their official duties without compensation. I think the law and the orders contemplate a regular taxation of all the fees and disbursements in each case by the clerk, under the direction and control of the court or judge. The sum deposited with the clerk as security for register's fees, or such portion as may be necessary, will, in ordinary cases, be appropriated, upon such taxation, to the register, in the first place. In cases where a bankrupt is relieved by order of the court from making further payment of fees, the \$50 will be distributed pro rata to the register, marshal, and clerk. In ordinary cases any surplus of the \$50 will be ordered returned to the party, as applicable to any unpaid fees of marshal or clerk. The sum of \$50 is not a sum in court, but is deposited with the clerk, an officer of the court, where it will remain until disbursed under the supervision of the court. This is not a fund in court for general distribution amongst creditors. By rule 29 "the court may order the whole or such portions of the fees and costs to be paid out of the fund in court in such cases as shall seem just. Upon a taxation of the costs and fees, after a final discharge or decree in any case, the court may order the whole or a portion thereof advanced by the party to be paid or refunded out of the fund made of the estate, which is required to be paid into court and deposited in a bank according to the rules." Printers' fees are chargeable according to the United States fee bill.

Case No. 18,283.

COSTS, FEES AND COMPENSATION IN PRIZE CASES.¹

[Blatchf. Pr. Cas. 206.]

District Court, S. D. New York. Aug., 1862.

BETTS, District Judge. Bills of costs are laid before me for taxation in behalf of the district attorney, the marshal, the prize commissioners, and the counsel for captors, made up in prize suits which have been adjudicated in the court.

The following principles of allowance will be applied in the taxation of costs in prize cases:

¹[Reported by Samuel Blatchford Esq.]

1. No specific tariff of fees having been appointed to the suits by statute, the costs fixed by the statute for similar services in admiralty will be allowed in this court, except as otherwise directed by acts posterior to the fee bill of February 26, 1833.

2. The compensation directed to be made by the act of March 25, 1862, to the officers therein named, will be computed and adjusted as nearly as may be conformably to allowances by the laws of the United States to employes for like services under the government, or in accordance with established rules and usages of the courts in regard to their officers rendering like services. In cases of doubt or difficulty, evidence may be taken on the question of quantum meruit.

3. The gross costs taxed to any of the officers of the court for services in prize suits will be, in collection or payment, subject to all limitations as to amounts or periods of payment, under the acts of congress in force at the time of such taxation.

4. The method of ascertaining the compensation of any of the officers of court for their services in prize suits, by a percentage on the value of the property coming officially into their possession or under their charge, will not be adopted by the court without express authority of law, or the assent thereto, in writing, by the parties whose interests are to be affected thereby.

Case No. 18,284.

COSTS IN CIVIL CASES.

[1 Blatchf. 652.]¹

Circuit Court, S. D. New York. May, 1852.

COSTS IN CIVIL CASES.

1. The right of the prevailing party to recover costs is recognized in the judiciary act of 1789, and in numerous acts of congress passed since down to the present day.

2. All of them assume that the costs which have been taxed and usually allowed by the practice of the courts are to be recovered.

3. The usage and practice of the circuit courts of the United States in taxing costs have uniformly been to apply the general rule prescribed in the act of September 23, 1789 (1 Stat. 49, § 2), which act is not now in force, namely, to fix the rate according to the fee bill of the state, altering the rate from time to time by rule of court, to correspond with it as altered by state legislation.

4. This has been the usage for fifty years in the circuit courts in the Second circuit.

5. Taxing officers in the circuit courts in New York must look to the fee bill of the state of New York, as found in chapter 386 of the Laws of 1840, as amended by chapter 273 of the Laws of 1844 (2 Rev. St. N. Y., 3d Ed., pp. 722-725), as the rule to guide them in the taxation of costs in the circuit court in cases at common law, and to the equity fee bill (2 Rev. St. N. Y. pp. 629, 630) in cases in chancery.

6. If there are any items of service not provided for in those bills, the practice is to refer to some previous fee bill, in which an allowance is found for a service corresponding with the one in this court.

[Cited in The Advance, 60 Fed. 423.]

7. The act of the legislature of New York, abolishing all costs and fees to attorneys and counsel (Laws N. Y. 1849, c. 433, § 303), does not affect the question of costs in the federal courts.

8. But the rate of those costs is limited to that prescribed by the fee bills of the state, as they existed at the time of such abolition.

9. The thirty-fourth section of the judiciary act of 1789 (1 Stat. 92) has no application to the proceedings or practice of the courts, but relates to the rules of decision as to the rights of persons and of property, in the trial of civil causes at common law.

10. Semble, that congress has no power to abrogate the distinction between actions at law and suits in equity, which is recognized by article 3, § 2, of the constitution.

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

The question of the proper rate of costs to be allowed and taxed for the services of attorneys, solicitors, and counsel, in civil suits, at law or in equity, in the circuit courts of the United States, having been submitted to Mr. Justice NELSON, in May, 1852, he delivered the following opinion:

NELSON, Circuit Justice. The act of September 29, 1789 (1 Stat. 93, § 2), provided that the rates of fees in the circuit and district courts of the United States, in suits at common law, should be the same as were allowed in the supreme court of the state, and the rates of fees in equity cases should be according to those allowed in the chancery court of the state. This act was to continue only until the end of the next session of congress.

The act of May 26, 1790 (1 Stat. 123), continued the act of 1789 until the end of the succeeding session, and no longer. It was again continued by the act of February 18, 1791 (1 Stat. 191), until the end of the next session. This last act was repealed by the eighth section of the act of May 8, 1792 (1 Stat. 278).

The act of March 1, 1793 (1 Stat. 333, § 4), provided that there should be allowed and taxed in the circuit courts of the United States, in favor of the parties obtaining judgments therein, such compensation for their travel and attendance, and for attorneys' and counsellors' fees, "as are allowed in the supreme or superior courts of the respective states." The duration of this act also was limited to the end of the next session of congress. It was continued another year by the act of February 25, 1795 (1 Stat. 419), and was again continued by the act of March 31, 1796 (1 Stat. 451), for the term of two years, and from thence to the end of the next session of congress thereafter. It then expired.

Since this last act I have not been able to find any one prescribing the rate of fees to attorneys and counsel in the circuit courts of the United States. The right of the prevailing party to recover costs is, however, recognized and admitted in the judiciary act of 1789, and in numerous acts of congress that have been passed from time to time since that period down to the present day. All of them assume that the costs which have been taxed and usually allowed by the practice of the courts are to be recovered. A collection of these acts will be found in Mr. Law's recent work, which contains much useful information in a succinct form, entitled "The Jurisdiction and Powers of the United States Courts," etc., at page 255, and by Mr. Justice Woodbury, in *Hathaway v. Roach* [Case No. 6,213]; and the usage and practice of the circuit courts in taxing costs have uniformly been to apply the general rule prescribed in the act of September 29, 1789, namely, to fix the rate according to the fee bill of the state. This has also been done from time to time by the rules of the circuit courts, as the rates of fees were altered by state legislation so as to conform to the existing regulations. This usage has prevailed for the last fifty years in the circuit courts of the United States in the Second circuit, and, as I understand, in the other circuits also, where a fee bill exists in the state courts. See case above cited.

The last rule on the subject in the circuit court for the Southern district of New York was adopted June 28, 1845. That rule applies to cases at common law and in equity, between parties, the same principle as it respects the fees of attorneys, solicitors, and counsel, that had been applied to the attorney of the United States by the acts of 1841 and 1842—Act March 3, 1841 (5 Stat. 427); Act May 18, 1842 (5 Stat. 484)—in respect to the rate of fees allowed to him; and which is the same rate that is allowed to attorneys, solicitors, and counsel, in the highest courts of law or equity of original jurisdiction of the state, according to the na-

ture of the proceedings for like services rendered therein. And where, according to the course of practice in the circuit court, a service is rendered for which no fees are appointed specifically by act of congress, or by the state law, the same rate of compensation is taxable as is allowed therefor by the usage or adjudication of the circuit court or of the supreme court of the United States. The above is the substance of the rate of fees as prescribed in the acts of congress of 1841 and 1842, before named. See, also, *District Attorneys' Fees* [Case No. 18,290].

The taxing officers, therefore, must look to the fee bill of the state of New York, as found in chapter 386 of the Laws of 1840, as amended by chapter 273 of the Laws of 1844 (see this fee bill in 2 Rev. St. N. Y., 3d Ed., pp. 722-725), as the rule to guide them in the taxation of costs in the circuit in cases at common law, and to the equity fee bill (2 Rev. St. N. Y. pp. 629, 630) in cases in chancery.

As the pleadings and practice in the circuit court of the United States conform substantially to the pleadings and practice in the supreme court of the state, as they existed at the time those state fee bills were established, there can be but few items of service that are not provided for in those bills. If there happen to be any, the practice has been to refer to some previous fee bill, in which an allowance is found for a service corresponding with the one in this court. But such instances are comparatively few, and the state fee bills which have been referred to will, therefore, furnish, in most cases, a fixed guide for the taxing officer.

Since the fee bills, as found in the third edition of the Revised Statutes, were enacted, the legislature of the state have abolished all costs and fees to attorneys and counsel, leaving the measure of compensation to an agreement between them and their client. *Laws N. Y. 1849, c. 438, § 303*; *Blatchford's Ed. St. N. Y. 265*. This, however, does not affect the question of costs in the federal courts. The right to costs, as recognized and admitted by the several acts of congress to which I have referred, still remains, but the rate of the fees is necessarily limited to that prescribed by the fee bills of the state, as they existed at the time of the abolition of all costs to attorneys and counsel.

The right of the prevailing party to recover costs generally in all cases, at law and in equity, is given by acts of congress, either expressly or by necessary implication; and, for some ten years, the rates of fees were prescribed by a statute adopting the state fee bill. But, by some oversight, this act was allowed to expire: since which time the principle of the statute has been recognized and applied by the usage and practice of the courts, by allowing the rates of fees for like services in the supreme courts and courts of equity of the states, as the case may be. This seems to have been necessary, in order to carry out practically the right given to the prevailing party to recover costs. The rate of fees allowed to attorneys, solicitors, and counsel, in cases at law and in equity in the courts of the United States, has stood on this footing for more than fifty years. I take the rule, therefore, as to their compensation, as I found it on coming into this court, and shall administer it accordingly. I do not think the thirty-fourth section of the judiciary act of 1789 (1 Stat. 92) can be invoked in aid of the view that the question of costs in the federal courts is affected by the statute of New York abolishing all costs, as that section has no application to the proceedings or practice of the courts, but relates to the rules of decision as to the rights of persons and of property in the trial of civil causes at common law.

The legislature of New York have also abolished the distinction between actions at law and suits in equity, as well as the forms of all such actions and suits, and blended them into

one. Laws N. Y. 1849, c. 438, § 69; Blatchford's Ed. St. N. Y. 222. This distinction is recognized in the constitution of the United States (article 3, § 2), and I suppose, therefore, that congress possesses no power to abrogate it. And, from the lights of experience thus far under the new system, so far as I am advised, the policy of any such change would be even more than doubtful. The pleadings are more voluminous, the issues of fact more complicated and confused, and the adjudications rest more upon the arbitrary discretion of the courts, than in proceedings according to the course of the common law.

Even if costs, therefore, had been given under the new system of the administration of justice in the state of New York, of which I have been speaking, there would be great difficulty in the application of the rates of compensation to the proceedings in the federal courts. The pleadings and practice, and indeed the whole course of proceeding, in these courts, are so diverse and variant from those in the state courts that the services rendered in a cause by the attorneys and solicitors would possess very little in common with those rendered by the same officers in the state courts.

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**COUNTERFEITING—CHARGE TO
GRAND JURY IN RELATION TO
COUNTERFEITING.** See Cases Nos.
18,248 and 18,251.

CRAWFORD (FIELDS v.). See Case No. 18,296.

CRAWFORD (LATTON v.). See Case No. 18,296.

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Case No. 18,285.

CROMPTON v. BELKNAP MILLS et al.
[3 Fish. Pat. Cas. 536.]²

Circuit Court, D. New Hampshire. May, 1869.

PATENTS—"LOOMS"—OATH—PRESUMPTION—SURRENDER—REISSUE—CONSTRUCTION OF CLAIM—ASSIGNMENT—COMMISSIONER'S DECISION—CONCLUSIVENESS—FRAUD—INFRINGEMENT—COMBINATION—EQUIVALENTS.

1. To warrant a patent, the invention must be useful; that is, capable of some beneficial use, in contradistinction to what is pernicious, or frivolous, or worthless.

2. The fact that a blank form of oath not executed is found among the papers cannot overcome the direct recital of the letters patent that the oath was taken, or the presumption that the requirements of the law were complied with in issuing the patent. The taking of the oath is not a condition precedent, failing which the patent must fail. Whether the oath be taken or not, or the fee paid, the omission would not render the patent void when granted.

[Cited in Hartshorn v. Eagle Shade-Roller Co., 18 Fed. 91; Hancock Inspirator Co. v. Jenks, 21 Fed. 914; Tonduer v. Chambers, 37 Fed. 338. Quoted in Holmes Burglar Alarm Tel. Co. v. Domestic Telegraph & Telephone Co., 42 Fed. 222.]

3. Differences of description or specification between the original and reissue are consistent with the identity of the thing patented. To correct a description or claim, or both, is one object of allowing a surrender.

4. In the reissued patent the patentee need not claim all that was claimed in the original patent. He may retain whatever he deems

proper. A claim in a reissue for the use of a pattern chain, or any other device for determining the design to be woven, is not a claim for all subsequent improvements, nor does it enlarge the patent. It is limited to the pattern chain described, or one substantially the same, or some well known substitute.

[Cited in Chicago Fruit-House Co. v. Busch, Case No. 2,669.]

5. A reissue granted to an assignee may be extended to the patentee. In judgment of law, a reissue is only a continuation of the original patent.

[Cited in Washburn & Moen Manuf'g Co. v. Griésche, 16 Fed. 671.]

6. A notice of an application to extend the original patent is a sufficient notice of an application for the extension of a reissue.

7. The functions of the commissioner in extension cases are judicial, and his judgment settles conclusively all questions of notice.

[Cited in Railway Register Manuf'g Co. v. North Hudson C. R. Co., 23 Fed. 595.]

8. If there was fraud practiced in obtaining the patent, that is a matter between the patent office and the patentee. The patent, although obtained by fraud, must be respected and enforced until reversed or annulled by some proceedings directly for that purpose. It is not exposed to the attacks of strangers or third persons for such reason.

9. The claim of Crompton is for a combination of five elements, to wit, the jacks, the lifter, the depresser, the pattern chain and the holding mechanism; and any machine combining substantially the same elements, or well-known substitutes for the same, must be regarded as an infringement. Such a claim would not be infringed by a combination which dispensed with one of the elements, and substituted therefor another element substantially different in construction and operation, but serving the same purpose. Nor by any and every combination of the same elements which may produce the same result, but only by the peculiar combination of the elements described, or one substantially the same.

10. The elements combined being old and the patent being for the peculiar combination, the doctrine of mechanical equivalents does not apply.

[Cited in Yuengling v. Johnson, Case No. 18,195.]

11. The identity or diversity of two machines depends, not on the employment of the same elements or powers of mechanics, but upon producing the given effect by substantially the same mode of operation, or substantially the same combination of powers.

12. One device can not be said to be a well-known substitute for another which can not be used for it.

13. A patent for a combination of three distinct things is not infringed by combining two of them with a third, which is substantially different from the third element described in the specification.

14. The loom manufactured under letters patent granted to S. T. Thomas, July 3, 1855, and February 11, 1862, and to Thomas and Everett, July 25, 1866, does not infringe the patent granted to Moses Marshall, December 11, 1849, as reissued and extended.

This was a bill in equity [by George Crompton against the Belknap Mills and others] filed to restrain the defendants from infringing letters patent [No. 6,939] for "an improvement in looms for weaving figured fab-

¹ [Corrected report of Case No. 3,406.]

² [Reported by Samuel S. Fisher, Esq., and here reprinted by permission.]

rics," granted to Moses Marshall, December 11, 1849, assigned to complainant May 5, 1859, reissued to complainant April 24, 1860 [No. 974], and extended to the inventor for seven years from December 11, 1863, and assigned to complainant for the extended term, December 19, 1863. The claim of the original patent was as follows: "What I claim as my invention, and desire to have secured to me by letters patent, is the improvement herein above described in the machinery for operating the harness, so that any proper number of heddles may be used or changed as desired without taking the loom to pieces; said improvement consisting, first, in providing the movable spring rests for supporting the jacks of the harness when they are not in use, and which are sprung back by the bevel face on the shoulders of the jacks when they are kept in play by the cams on the pattern chain, the whole arrangement being substantially as herein above set forth; and second, in the 'eveners,' constructed and operating as herein described, for assisting in moving the upper heddle levers and keeping them even, so that the cams or rollers on the pattern chain will operate accurately on the jacks as specified; meaning to claim the exclusive use of said spring rests and 'eveners,' in a loom, the invention of which is entirely original with me. I also claim the combination of rotating, lifting, and depressing bars, arranged in endless chains, so as to revolve, as described, with the forked jacks, having internal shoulders, as specified." The claim of the reissue was as follows: "I claim combining with the jacks that operate the series of leaves of heddles, and with the lifter and depresser, and pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position, when not required to be operated, substantially as and for the purpose specified. I also claim imparting an irregular motion, substantially such as herein described, to the jacks, by means of eccentric cog wheels, substantially as and for the purpose specified." The defendants claimed to manufacture looms under letters patent granted to Samuel T. Thomas, July 3, 1855, and February 11, 1862, and to Samuel T. Thomas and Edward Everett, July 25, 1866.

Causten Browne and B. R. Curtis, for complainant.

Joshua D. Ball and T. A. Jenckes, for defendants.

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

OLARK, District Judge. December 11, 1849, a patent was granted to Moses Marshall for "an improvement in looms for weaving figured fabrics." He described his improvement to consist in this, to wit: "Providing the movable spring rests for supporting the jacks of the harness when they are not in use, and which are sprung back by the bevel face on

the shoulders of the jacks when they are kept in play by the cams on the pattern chain," "substantially as set forth;" and, second, "the eveners," as described. "Meaning to claim the exclusive use of the rests and eveners in a loom, the invention of which is entirely original with me." He also claimed a combination of rotating, lifting, and depressing bars, which are not material in this case. The complainant alleges: That before May 5, 1859, the patentee, Marshall, assigned to him, the complainant, all right, title, and interest in, to, and under said letters patent; and that, on said 5th day of May, 1859, he covenanted and agreed with the complainant to convey to him all right, title, and interest whatever in, to, and under any extension of said patent which might be obtained. That afterward, and before the 24th day of April, 1860, said letters patent were surrendered for a defect in the specification, and new letters were issued on said 24th day of April, 1860, to the complainant for the remainder of the term of fourteen years, from the date of the original patent, to wit, the 11th day of December, 1849. On the 8th day of December, 1863, this reissued patent was extended for the further term of seven years from the 11th day of December, 1863, and on the 19th day of December, 1863, said Marshall sold and assigned all his right and interest under said extension to the complainant. Under the reissued patent, the patentee, or assignee, stated his claim as follows: "What I claim as my invention, and desire to secure by letters patent is, combining with the jacks that operate the series of leaves of heddles, and with the lifter and depressor, and pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position, when not required to be operated, substantially as and for the purpose specified." He also claims imparting an irregular motion to the jacks, which is not here material. This reissued patent the complainant alleges the respondents have infringed. His bill of complaint is dated the 1st day of October, 1864, and prays that the Belknap Mills may be decreed to account for and pay over to the complainant all such gains and profits as have accrued to them in that behalf, and may be restrained from making, using, or vending any looms embracing in their construction the invention of said Marshall, and for general relief.

The respondents in their answer deny the validity of the original patent to Moses Marshall, December 11, 1849. They also deny the validity of the reissue, April 24, 1860, and of the extension, December 8, 1863. And they also deny any infringement of the complainant's patent, if he has any, and say that they have never manufactured or used any looms involving the invention of Marshall, but that their looms have been manufactured under letters patent issued, two of them to Samuel T. Thomas, and one of them to Samuel T. Thomas and Edward Everett, and that they were

essentially different in principle, construction, and mode of operation. These letters patent they produce in evidence. The first are dated July 3, 1855, and are for an "improvement in looms." Among other things, the patentee claimed the combining with each rocker, lever, and lifter, an arm, cam, and sector, or equivalents, the whole being applied together, and made to operate substantially as described. Also the combining with the series of lifters and pattern prism, a series of bent levers, or their equivalents, and imparting to the pattern prism vertical, or up and down, movements as described. This patent, and that to Moses Marshall and the reissue, had in view the accomplishment of the same object, to wit, the production of an "open-shed loom." And the question of infringement arises between this patent mainly, and the Moses Marshall patent, as reissued and extended. The next patent to Thomas is dated February 11, 1862, and that to Thomas and Everett, July 25, 1866. The respondent objects to the Marshall patent of December 11, 1849. That the invention was neither new nor useful, and that the patentee did not, before the granting and issuing of the letters to him, take the oath prescribed by section 6, of the act of July 4, 1836, that he verily believed he was the original inventor or discoverer of the art, machine, etc., for which he solicited a patent. 5 Stat. 119.

A patent is deemed prima facie evidence that the patentee has made the invention. Philadelphia R. Co. v. Stimpson, 14 Pet. [39 U. S.] 448. There is, in this case, no sufficient evidence to overcome that presumption, or prima facie case. There is evidence that "open-shed" fancy looms were used prior to Marshall's invention, but not involving the combination of Marshall. His invention must, therefore, be taken to be new. Precisely how useful it may be, the court have not undertaken to decide; but that it is sufficiently so to support a patent, we have no doubt. Other looms may have been preferred by different persons, or may have found a readier sale; but that good cloth can be woven by Marshall's loom and invention there is sufficient evidence. To warrant a patent, the invention must be useful, that is, capable of some beneficial use, in contradistinction to what is pernicious, or frivolous, or worthless. Dickinson v. Hall, 14 Pick. 217; Whitney v. Emmett [Case No. 17,535]; Many v. Jagger [Id. 9,055].

These objections to the patent can not, therefore, avail. Nor can the other, that the oath required by section 6 of the act of 1836 was not taken, for two reasons: First. We are not satisfied the oath was not taken. The letters patent recite that it was. The respondent finds among the papers on file in the case in the patent office a blank form of the oath, with the jurat not signed by any magistrate, and hence he argues the oath was not taken. But the oath may have been taken for all that; and this negative testimony can not overcome the direct recital of the letters patent that the oath was taken; or the presump-

tion that the requirements of the law were complied with in issuing the patent. But suppose it were so. Suppose the oath was not taken; would the patent be void on that account? It was held otherwise by Justice Story, in the case of Whittmore v. Cutter [Case No. 17,600]. The taking of the oath, though to be done prior to the granting of the patent, is not a condition precedent, failing which, the patent must fail. It is the evidence required to be furnished to the patent office, that the applicant verily believes he is the original and first inventor of the art, etc. If he takes this oath, and it turns out that he was not the first inventor or discoverer, his patent must fail and is void. So, if he do not take it, and still he is the first inventor or discoverer, the patent will be supported. It is prima facie evidence of the novelty and originality of the invention until the contrary appear. Parker v. Stiles [Case No. 10,749]. So the act says, on payment of the duty, that is, fees, the commissioner shall make an examination, and, if the invention shall be found useful and important, shall issue a patent. Suppose the fees should not be required or paid, would the patent therefore be void? Yet the one requirement appears to be as much a condition precedent as the other. Both directory, not to be dispensed with; but neither involving the validity of the patent when granted.

The next objections are to the reissued patent, and they are two: First, that the original patent was void, and the reissue was therefore so; and, second, that the reissue was not for the same invention as the original. The first of these objections has already been disposed of. It was maintained in the argument, that the original patent was void for want of the proper oath, and that the defect could not be cured by the reissue. But, whether the oath were taken or not, we are of opinion as already expressed, that such an omission would not invalidate the patent, nor would it affect the reissue. The second objection to the reissue is a more serious one, and for its proper determination requires a careful examination and comparison of the original patent to Marshall, and the reissue to Crompton. The presumption of law is, that the reissued patent is for the same invention as the original. O'Reilly v. Morse, 15 How. [56 U. S.] 62; French v. Rogers [Case No. 5,103]; Hussey v. McCormick [Id. 6,948]; Hussey v. Bradley [Id. 6,946]. Differences of description or specification are consistent with the identity of the thing patented. To correct a description, or claim, or both, is one object of allowing a surrender. Id.

The original patent to Marshall claimed the improvement therein described, consisting, first, "in providing the movable spring rests for supporting the jacks of the harness, when they are not in use, and which are sprung back by the bevel face on the shoulders of the jacks when they are kept in play by the cams on the pattern chain, the whole arrangement being substantially as herein above set

forth;" and, second, "the evener constructed and operating as herein described, for assisting in moving the upper heddle levers, and keeping them even, so that the cams or rollers on the pattern chain will operate accurately on the jacks as specified, meaning to claim the exclusive use of said spring rests and evener in a loom, the invention of which is entirely original with me." "I also claim the combination of rotating, lifting, and depressing bars, arranged in endless chains, so as to revolve as described, with the forked jacks, having internal shoulders as specified." In the specification the elementary features of the improvement are said to consist in a series of stationary rests, which support the jacks of the harness, when the sheds operated by them are not in use; the chain shafts, and lifting and depressing bars for operating the jacks and harness; and the evener, which is composed of two rollers, set in a frame having a reciprocating rectilinear motion, which rollers press against the beveled ends of the harness levers, and assist in shifting the sheds of yarn, and, what is more essential, operate always to keep the levers even, for the proper operation of the cams on the pattern chain. The specification then describes the parts referred to, among others the jacks, the rests, the elevator and depressor arranged upon two endless chains, the method of connecting the jacks and heddle levers, the operation of the cams, the shafts, which carry the elevating and depressing bars, eccentric gear, the pattern chain, and the evener. In the reissued patent the claim is stated to be, the "combining with the jacks that operate the series of leaves of heddles and with the lifter and depressor and pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks, either in their elevated or depressed position, when not required to be operated, substantially as and for the purpose specified." "Also imparting an irregular motion, substantially such as herein described, to the jacks, by means of eccentric cog wheels, substantially and for the purpose specified." The specifications described the object of the first part of the invention to be, to avoid moving any of the leaves of the heddles, which are not required to be moved for the production of the design, during any part of the operation, that is, to produce an open-shed loom, and of the second part of the invention, to consist in imparting an irregular motion to the lifters and depressors by means of eccentric cog gearing, etc. They then go on to describe the levers, jacks, the elevators and depressors, the cams and motions and forms of the jacks, the spring latches or catches, the pattern chain, and the evener, sometimes in the same words, sometimes more minutely, but always substantially, as in the original Marshall patent.

The most important difference, so far, is in the statement of the claims. In the original patent the claim is, first, for the movable spring rests; second, for the evener; and,

third, for the combination of rotating, lifting and depressing bars, arranged in endless chains, so as to revolve, as described, with the forked jacks having internal shoulders. In the reissued patent the claim is, combining with the jacks that operate the series of leaves of heddles, and with the lifter and depressor, and pattern chain, or any equivalent apparatus for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position, when not required to be operated, substantially as and for the purpose specified. It *Battin v. Taggart*, 17 How. [58 U. S.] 74, it was held, that whether the defect be in the specification, or the claim, of a patent, the patentee may surrender it, and by an amended specification, or claim, cure the defect. In that case, which was for an improvement for breaking and screening coal, the claim was for the manner, in which the party had arranged and combined the breaking rollers with each other and the screen; and the amended specification described, in the reissued patent, substantially the same machine, but claimed the breaking apparatus only; it was held a dedication to the public did not accrue in the interval between one patent and the other. It has been repeatedly decided that the reissued patent must be substantially for the same invention as the original patent. Under such circumstances a new and different invention can not be claimed. *Battin v. Taggart*, 17 How. [58 U. S.] 74; *French v. Rogers* [supra]. In the reissued patent the patentee need not claim all that was claimed in the original patent. He may retain whatever he deems proper. *Carver v. Braintree Manuf'g Co.* [Case No. 2,485].

We think that substantially the same invention is described in the two patents. It was urged in the argument that the reissued patent was not for the same but for a greater invention, because the patentee had inserted in the specification these words: "It will be obvious that this part of my invention is not dependent upon the use of the pattern chain, as it can be used in connection with any other device for determining the design to be woven, by shifting the jacks or their equivalent into position to be elevated or depressed." This is said to be done for the purpose of making it embrace all improvements afterward invented. But it certainly can not have that effect, nor can it enlarge the patent. If it could do any such thing it would render the patent void for uncertainty. But in the specification the patentee has described a pattern chain; in his claim he has claimed a pattern chain, or any equivalent apparatus for determining the pattern, in combination with other things, and to that pattern chain, or one substantially the same, or some well-known substitute, the patent must be limited. The same remarks will also apply to another interpolation, to wit: "Nor is it dependent upon the use of chains for carrying the lifting or depressing bars in a continuous circuit; as it is equally applicable

to looms in which jacks are elevated or depressed by the well-known reciprocating lifters and depressors, as in the well-known Crompton loom," and to others of like character. They do not enlarge the invention or the patent. We think, therefore, that the invention described and patented in the reissued patent is substantially the same invention described in the Marshall patent of December 11, 1849. The claim is in a different form, but for substantially the same invention. It may be open to the objection, so pointedly stated in the cases of *Burr v. Duryee*, 1 Wall. [68 U. S.] 535, and *Case v. Brown*, 2 Wall. [69 U. S.] 320, that there is an attempt to make the new specification more elastic, and to cover more than the old, but it does not enlarge the invention.

But if it should be held that the original patent to Marshall, and the reissue to Crompton, assignee, were valid, it is contended that the extension to Marshall was not, for three reasons, to wit: (1) That as Marshall never had any interest in the reissued patent, it could not be extended to him; (2) that no sufficient notice was given to the public of the application for the extension of the patent; and (3) that the extension was obtained by fraud.

To the first objection, to wit, "that as Marshall never had any interest in the reissued patent, it could not be extended to him," it is a full answer, that, in judgment of law, the reissue is only a continuation of the original patent. So held in *Read v. Bowman*, 2 Wall. [69 U. S.] 604. And as Marshall was the original patentee, the extension was legally and properly to him. *Wilson v. Rosseau*, 4 How. [45 U. S.] 646. The extension enuring, under the statute, to the assignees and grantees to the extent of their respective interests. 5 Stat. 125 [Act 1836] § 18.

The second objection is that there was no notice ever ordered, or given, of any application to extend the reissued patent. There was of the application to extend the original patent, and the objection stands upon the supposition, or idea, that they are two distinct patents while in judgment of law they are one. If the reissue was only a continuation of the original patent, then a notice to extend the original would seem to have been sufficient. Again, under the act of 1836, the secretary of state, the commissioner of patents, and the solicitor of the treasury were a board of commissioners to "hear and decide upon the evidence produced before them, both for and against the extension." It has been held that the functions of this board were judicial, and that their judgment settled conclusively all questions of notice. *Brooks v. Jenkins* [Case No. 1,953]. The statute of May 27, 1848 (9 Stat. 231, § 1), provided that the power to extend patents then vested in the board of commissioners should be vested solely in the commissioner of patents; and in *Clum v. Brewer* [Case No. 2,909], it was held that the act of the commissioner in extending a patent was conclusive of the facts, which he is required to find, in order

to grant such extension, in the absence of fraud or excess of jurisdiction.

But here, third, it is said that the extension was procured by fraud. We do not, however, think this objection is open to this respondent. He stands before the court accused of infringing the complainant's patent. He may, undoubtedly, show that the invention claimed by the complainant was not new or useful, or that it had been dedicated to the public, or that there was no sufficient specification or description, and so that there was in fact no infringement for which he should answer, but we think he cannot attack the granting and validity of the patent in this collateral manner. If there was fraud practiced in obtaining the patent, that is a matter between the patent office and the patentee; and can, perhaps, be inquired into by some proper proceeding of the officers of the government to vacate the patent. But, in this particular, like a judgment, it must be respected and enforced, until reversed or annulled by some proceedings directly for that purpose. It is not exposed to the attacks of strangers or third persons for such reason.

The next, and only question remaining, is that of infringement. The respondents admit they have on hand, with intent to sell, the Thomas loom, manufactured under the patents to Thomas and to Thomas and Everett. But they deny that either of the respondents ever at any time, before or since the date of said alleged reissued letters patent, or before or after the alleged extension of the said alleged patent, have manufactured, used, sold, or continued to manufacture, use, or sell any loom or looms embracing the said alleged improvement, or any mechanism substantially the same.

The question then is, whether the Thomas loom, as it is called, infringes the Marshall patent as reissued and extended? The original patent to Marshall, December 11, 1849, claimed the movable spring rests to hold the jacks of the harness, and the "evener," and the combination of the rotating, lifting and depressing bars, so as to revolve, etc. As reissued to Crompton, the claim was for combining with the jacks and with the lifter and depresser and pattern chain, or any equivalent mechanism for determining the pattern, a mechanism for holding the jacks either in their elevated or depressed position when not required to be operated, substantially and for the purpose specified. The language is "a mechanism for holding the jacks." This is broad enough, upon its face, to cover any mechanism, and if it stood alone and unaided it would be so general and uncertain as to be entirely void, but in the specification the holding mechanism is described particularly and precisely, and the claim is limited by such specification. Here, then, are combined five elements, to wit, the jacks, the lifter and depresser, the pattern chain, and the holding mechanism; and any machine combining, substantially in the same manner, substantially the same ele-

ments, or well-known substitutes for the same, must be regarded as an infringement of this reissued patent. *Gorham v. Mixter* [Case No. 5,626]. But it would not be infringed by a combination which dispensed with one of the elements and substituted therefor another element, substantially different in construction and operation, but serving the same purpose. *Eames v. Godfrey*, 1 Wall. [68 U. S.] 79; *Vance v. Campbell*, 1 Black [66 U. S.] 427. Nor by any and every combination of the same elements, which may produce the same result, but only by the peculiar combination of the elements described, or one substantially the same. *Case v. Brown*, 2 Wall. [69 U. S.] 320. The elements here combined are old, the patent is for the peculiar combination, and the doctrine of mechanical equivalents does not apply. *McCormick v. Talcott*, 20 How. [61 U. S.] 405. The identity or diversity of two machines depends not on the employment of the same elements or powers of mechanics, but upon producing the given effect by substantially the same mode of operation, or substantially the same combination of powers. *Odiorne v. Winkley* [Case No. 10,432]; *Evans v. Eaton* [Id. 4,560].

Following these principles and adjudications, we proceed to the examination and comparison of the Marshall and the Thomas looms. In both we find, substantially, the same jacks, differing in form, but performing, substantially, the same office. In both we find, substantially, the same elevator and depresser. Arranged in the Marshall loom is a rotating, endless chain, so that the same bar in going up is an elevator, but in rotation or revolution going down, becomes a depresser. These three elements are substantially the same, but when we come to the holding mechanism, we find a marked and substantial difference in the two machines.

In the argument of the respondents' counsel, it was contended that the holding mechanism of the Marshall loom was not only the "series of horizontal spring latches or catches," and the shoulders on the two prongs of the jacks, but that it included the connecting mechanism of the jacks with the heddle lever, the pattern mechanism, and the "evener." Now, although it be true that the connecting mechanism and pattern mechanism of the jacks hold the jack securely upon the spring latches as upon a seat, until they be forced or allowed to come off by the pattern mechanism, and although in the operation of the machine there is a point of time after the jacks are forced off the springs, when the heddle levers are firmly held by the evener, so that the jacks can not move nor the sheds close until allowed to do so by the removal of the evener, yet we have considered the holding mechanism to be as decided in the patent, to wit, the series of horizontal spring latches, or catches, and the notches on the prongs of the jacks, and still we find the holding mechanism of the two machines to be substantially different. In the Marshall ma-

chine the elevator carries upward a particular jack, the beveled face on the projecting notch on the prong of the jack meets the beveled face of the spring, presses it back and passes it. Then the spring flies out under the shoulder of the jack and the jack rests upon it in a manner similar to a window-sash raised and resting on the old and familiar window-spring. Here it sits or is held until the pattern mechanism forces it off the spring and allows it to descend. When a jack is carried down by the depresser, it is held by a similar spring; being kept on its seat by the pattern mechanism, until allowed to be drawn off by the oblique connecting mechanism.

Now, in the Thomas loom there is a very different mechanism or device. There is a jack which is carried up and down by an elevator and depresser. On one side of this jack there is a gearing connecting it with and operating a sector. As the jack goes up and down, it rolls or rocks this sector forward and backward, as if you should turn a wheel part of the way round, say one-fourth, and then bring it back again, and so continue. In or near the circumference of this sector, there is a cam groove, and playing in this cam groove, forward and backward, as the sector moves, a projecting stud or friction roller connected with an arm of the heddle lever. This heddle lever rocks upon its fulcrum, and as the arm, guided and controlled by the projecting stud in the cam groove, is carried upward or downward by the cam groove, the ends of the rocking heddle lever are carried backward and forward, elevating or depressing, or holding stationary the harnesses. In the one end of the cam groove is a concentric into which the projecting stud or roller falls, which it is contended by the complainant's counsel is a substitute for the spring latch or catch of the Marshall loom; but we are of the opinion it is not so; but that the whole cam groove, of which the concentric makes a part, is more correctly a substitute for the cam; and that this device of the Thomas loom much more resembles in principle and operation the old Middlesex cam loom than it does the Marshall loom. It can not be conceded that the Marshall and the Thomas holding devices are the same, because the operation in both cases is performed by a surface of metal passing under or over another surface, and that, therefore, one infringes the other. In the old Middlesex cam loom one surface passed over another, to wit, over the cam, and was elevated, depressed, or held stationary by it; yet it was very different from the Marshall device. We can not give the Marshall holding device any such latitude of construction. There is also in the Thomas loom a brake connected with and operating upon the periphery of the sector, retarding, regulating, and governing its motion. And whether we regard this brake as a part of the holding mechanism or not, we think and conclude that these two elements are substantially different, and that one is not a well-known substitute for the other.

We come now to the last element or device, to wit, the pattern mechanism. Had the patent to Marshall not been surrendered, and a new one issued, the question of infringement, if it arose at all, must have arisen between the holding mechanism of the two looms; but that patent having been surrendered, and a new one issued, claiming a combination of elements, that new one is liable to be avoided by showing that the Thomas loom uses a substantially different element from any one of those combined.

To return to the pattern devices. These two mechanisms or devices are very different in their construction and in their operation. H. B. Renwick, one of the complainant's experts, says: "I think the pattern chain in model B (the Thomas loom) is, considered by itself, a substantially different species of pattern chain from that specially described and represented in the drawing of the Marshall reissue, and differing from it in the fact that it requires motion in two directions in order to cause it to operate upon the jacks, while the chain represented in the drawings of Marshall requires motion only in one direction." Precisely in the sense mentioned by this expert we are now considering these two devices or mechanisms,—that is, by themselves; and in that view they are substantially different in principle, construction and operation. But if we consider them in regard to the functions they perform, we shall find as great and substantial difference. Both select the jacks to be operated; but the pattern chain, in addition to this, in the Marshall loom, forces the jacks off the upper series of spring catches, and holds them on to the lower series, in both instances in opposition to the force supplied by the oblique connection of the jacks with the heddle levers. Both these devices are said to be old. That is true in a limited sense. The Marshall chain is old. The Thomas mechanism is old in the fundamental principle. It is that of the Jacquard pattern; but Thomas has made two improvements upon it, which are not old. They are also said to be well known substitutes for one another; but it is very evident, both from the testimony of the experts and an examination of the machines, that, though the Marshall pattern mechanism might be applied to the Thomas loom, there is no apparent practical mode of applying the Thomas pattern mechanism to the Marshall loom, with its present method of holding the jacks. Can one device be said to be a well-known substitute for another which can not be used for it? Thus much for the elements of the Marshall combination. We now pass to the combination itself. Is the combination in the two machines substantially the same? It may be said they can not be, if the elements are not the same, as gold and copper is not the same combination as silver and copper. But the inquiry is to another point. Is the method or manner of the combination the same? We think not. Indeed, there seems to be as wide and substantial a difference in

the mode of combination as in the things combined. Take, for instance, the combination of the jacks with the holding mechanism in the Marshall loom. By the lengthening of the lower heddle lever, giving an oblique direction to the connection of the jacks with the upper lever and lower, the protuberances upon the prongs of the jacks are held upon the upper series of spring catches. There is no such connection, device, office performed, or combination, that we can discover, in the Thomas loom.

Again, take the combination of the pattern mechanism in the Marshall loom with the jacks. It is so arranged as to hold the protuberances of the jack upon the lower series of spring catches, there performing substantially the same office that the oblique connection of the jacks with the heddle levers does in regard to the upper catches. There is nothing like this in the Thomas loom. Again: take the combination of the holding mechanism with the pattern mechanism and jacks, and there we find a substantially different combination, or mode of combination, in the two looms. In the Marshall loom the jacks are combined with the holding catches by their oblique connection with the heddle levers, keeping the jacks seated upon the upper catches until forced off by the pattern cams, and pulling the jacks off the lower catches when not held on by the cams. Is there any such arrangement in the Thomas loom? We do not find it, nor anything nearly approaching it. In the Thomas loom the jack is connected with the rocking sector by a gearing, rocking the sector backward and forward as the jack goes up and down. In the circumference of this sector is a cam groove or slot; in this groove plays a stud or friction wheel attached to an arm of the heddle lever. This stud is guided and held by the cam slot, thus elevating, depressing, or holding the heddle lever as it comes into one or the other part of the slot. The pattern mechanism has nothing whatever to do with this holding, elevating, or depressing, farther than to select the particular jack. We leave out of this combination the brake, purposely, though that device in the Thomas looms, and the "evener" in the Marshall, plays very important parts, both in holding the shed open and in preventing its closing too quickly.

We might pursue this examination and comparison further, but we have gone far enough to warrant the conclusion to which we have come, that the respondents have not infringed the complainant's reissued patent. See Brightly's Dig. p. 612, §§ 84, 96, 89. To constitute an infringement of a patent for a combination, the defendant must have used the same combination, constructed and operated substantially in the same way. *Gorham v. Mixer* [Case No. 5,626]. A patent for a combination is not infringed unless all the essential parts of it are substantially imitated. *Bell v. Daniels* [Case No. 1,247]. The patentee of a combination can not treat another as infringer

who has improved the original machine by the use of a substantially different combination, though it produce the same result. *Union Sugar Refinery v. Matthiessen* [Id. 14,399]. A patent for a combination of three distinct things is not infringed by combining two of them with a third, which is substantially different from the third element described in the specification. *Prouty v. Ruggles*, 16 Pet. [41 U. S.] 336; *Silsby v. Foote*, 14 How. [55 U. S.] 219; *McCormick v. Talcott*, 20 How. [61 U. S.] 402; *Vance v. Campbell*, 1 Black [66 U. S.] 427; *Eames v. Godfrey*, 1 Wall. [68 U. S.] 78; *Brooks v. Jenkins* [Case No. 1,953]; *Brooks v. Bicknell* [Id. 1,945]; *Parker v. Hayworth* [Id. 10,738]; *Latta v. Shawk* [Id. 8,116]; *Lee v. Blandy* [Id. 8,132]; and other cases. In *Morris v. Barrett* [Id. 9,827] it was held that in an action for an infringement the machines themselves, as shown by the models, were evidence entitled to the highest credit.

We have examined the models in this case very carefully and repeatedly, and they have very materially aided us in coming to a satisfactory conclusion, particularly in determining how much weight was to be given to the opinions and explanations of the experts, two of which appeared on each side swearing with equal confidence and apparent intelligence in opposite directions. The complainant's bill must be dismissed, with costs.

Case No. 18,286.

CROSS v. UNITED STATES.

[2 Hayw. & H. 290.]¹

Circuit Court, District of Columbia. Dec. 12, 1857.

RESISTING ARREST—WARRANT NOT EXHIBITED.

Where a defendant has knowledge that the officers of justice are in pursuit of him for an offence committed by him against the law, he will not be justified in resisting such officers, even though such officers do not exhibit to him the warrant or inform him of the particular cause of his arrest.

[Writ of error to the criminal court.]

At law. Indictment [of Robert Cross] for assault with intent to kill. The case being closed for the defence, the counsel for the prisoner prayed the court to give the following instructions to the jury:

If the jury believe from the evidence that the defendant Cross called upon the officers, who were seeking to arrest him to show to him, or to inform him for what cause he was to be arrested, and said officers, including Robinson, refused to show or inform him of the cause of his arrest, that the defendant had a right to resist said officers, including Robinson, with the force that he did employ. That if the jury should find from the evidence that the officers, including Robinson, who ar-

rested Cross had refused to show their authority at the request of Cross, &c., then the prisoner was illegally arrested and not culpable; to which Mr. Key objected, saying that it was a hypothesis based upon supposed facts, of which there was not a particle of evidence, and referred to the testimony which had been adduced to show that a direct opposite state of facts was shown, and contended that the instruction was inapplicable to the case and should not be given. The court refused the prayer of the defence, after which Mr. Key offered the following for the adoption of the court, as instructions to the jury: If the jury believe from the evidence that the defendant on 7th street asked certain officers if they had a warrant, &c., or to be informed of the cause of his arrest, which inquiry they refused to answer, it does not in any way justify the violence used by the defendant at another place, to wit: two squares off; if the jury believe from the evidence that none of the persons on 7th street were present, and the violence used was on different persons.

After occupying a short time in preparing the instructions, the court delivered the following to the jury: First. Was there a bench warrant? if there was (and you may collect this fact from the evidence,) in the hands of Deputy Marshal Philips—if you believe that, having such warrant, he called upon the bailiffs in court to aid him in arresting the defendant, against whom the bench warrant was issued on an indictment found, it is not necessary that the officer holding the warrant should be in the sight of the others called on by him as aforesaid whilst making the arrest, provided they were all out at the time in pursuit of the defendant. *Com. v. Field*, 13 Mass. 321; 1 Chit. Cr. Law, c. 49, § 6. If you believe that these officers were known to the defendant, (which you may infer if you think proper from the circumstances in evidence) the drawing of the pistol with which he inflicted the wound, carrying it openly exposed and threatening to shoot any of the persons in pursuit that came within ten feet of him; his flying and finally using the weapon; if you believe these circumstances show that defendant knew that the officers of justice were in pursuit of him for an offence against the laws of the country, and that the men then before him were such officers. It was unnecessary to show the warrant or inform him of the particular cause of his arrest before he was arrested, it follows as a necessary consequence that the defendant had no right "to resist said officers, including said Robinson, with the force he did employ." Second. The instruction on behalf of the United States it is perhaps unnecessary to answer, the above answer to the defendant's prayer includes a reply to it, but as it is before the court it is granted.

The instructions allowed by the court were in substance such as had been asked by the district attorney. The jury brought in a ver-

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

dict of guilty. The sentence of the court was that the prisoner suffer imprisonment at labor in the penitentiary for the term of eight years. The counsel for the prisoner excepted to the instructions given by the court.

Mr. Chilton, for the prisoner.
Mr. Key, for the United States.

THE CIRCUIT COURT affirmed the instructions as given.

D.

Case No. 18,287.

DARRELL v. BROOKE.

[2 Hayw. & H. 329.]¹

Circuit Court, District of Columbia. May 31, 1859.

WILLS OF PERSONAL PROPERTY — EXECUTION — QUESTION FOR JURY.

It is not necessary to the validity of a will of personal property that it should have a date, or that it should be in the handwriting of the testator, or signed by him, or have any subscribing witness, provided it was drawn at his request, and according to his dictation; he being then of sound and disposing mind, and capable of executing a valid deed or contract, which the court held was a question for the jury to decide.

At law. Issue from the orphans' court as to the validity of a paper purporting to be the last will and testament of the late Benjamin E. Brooke, of the marine corps.

Petition of Lucy M. Darrell: That whereas her uncle, the late Captain Benjamin E. Brooke, United States marine corps, recently deceased, leaving an instrument in the nature of a last will and testament, which testamentary paper is here shown to the court, and by which she, the said Lucy M. Darrell, is made the legatee of her said uncle, she therefore prays this honorable court to place the said testamentary paper upon file, and to afford her further time to procure the attendance of her witnesses for the purpose of fully establishing the validity of said testamentary paper. Also that Walter T. Brooke, as next of kin, be summoned to show cause, if any he has, why this petition should not be granted, &c.

Answer of Walter T. Brooke: That the paper referred to in the petition (of Lucy M. Darrell) is not the last will and testament of the late Benjamin E. Brooke, and is not an instrument in the nature of a last will and testament of the said Benjamin E. Brooke, and is not a testamentary paper, or any paper whatever of the said Benjamin E. Brooke. That he objects. That the said paper ought not to be admitted to probate, and he prays that an issue or issues in the premises may be framed and sent to the circuit court to be tried, &c.

Issue: "Whether the paper writing propounded by the said Lucy M. Darrell be the

last will and testament of the said Benjamin E. Brooke, deceased."

The words of the will are as follows: "To Wm. S. Darrell, clerk in the general post office, Washington, D. C., for Lucy Martha Darrell, his daughter, to whom I wish all my effects to be given, except my gold watch, which is to go to my brother Walter T. Brooke, clerk in the general land office, Washington, D. C." It was not written by the testator, nor signed or sealed by him, nor was it witnessed.

Fendall, Davidge & Booker, for propounder.
Bradley, Carlisle & Maury, for caveator.

THE COURT decided: 1. That it is not necessary to the validity of a will of personal property that it should have any date; that it should be in the handwriting of the testator, or signed by him, or have any subscribing witnesses, provided it was drawn at his request, and according to his dictation, he being then of sound and disposing mind, and capable of executing a valid deed or contract, and that it had not been revoked.

2. That if the decedent was a lunatic, having lucid intervals, and the will was made during a lucid interval, it was valid.

3. That if, at a time subsequent to the making of such will, the testator, being then of sound and disposing mind, &c., referred to and described it as his last will and testament, and it had not been revoked, he thereby adopted it as his last will and testament, and this adoption made it his last will and testament; provided, that at the time of the adoption he was of such sound and disposing mind, &c., whether or not he was of sound and disposing mind, &c., when the paper purporting to be a will was originally made.

4. That if the will is consonant to the testator's declarations, conduct and feelings towards the person in whose favor it was made (his niece) and towards the objector (his brother) such consonance is entitled to weight with the jury in determining whether it was made in a lucid interval, &c.

5. That if the testator, for some time before the making of the will, had been subject to a bodily disease, attended by great depression of spirits, causing particular hallucinations of mind amounting to morbid delusion on those subjects, but that on all other subjects the testator was entirely sane, and that the will-

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

had no connection with such morbid delusion, then it is a question for the jury, whether or not, under all the facts and circumstances in evidence in the cause the testator was of sound and disposing mind and capable of executing a valid deed or contract.

The verdict of the jury was that the paper was the last will and testament of the testator.

DAVIS (BIBBS v.). See Case No. 18,235.

Case No. 18,288.

DE KRAFT v. BARNEY.

[2 Hayw. & H. 405.]

Circuit Court, District of Columbia. Jan. 25, 1862.

CONSTITUTIONAL LAW—EFFECT OF JUDGMENTS OF OTHER STATES — GUARDIAN AND WARD — JURISDICTION OF ORPHANS' COURT.

[1. A personal judgment or decree obtained in one state against a nonresident, who has not been served with process in the state, or who has not voluntarily appeared and subjected himself to the jurisdiction, has no extraterritorial validity, and does not come within the operations of the fourth article of the constitution declaring the effect which the judicial proceedings of one state shall have in other states. Therefore a decree of divorce awarding the custody of children to the wife, and declaring the husband and father an unfit person to have them in charge, obtained by default against a nonresident served by publication only, is not conclusive, or even admissible, in a proceeding in another state or in the District against the father to have him declared an unfit custodian for his children and to procure the appointment of another guardian.]

[2. A direction by a testator that his estate shall be held in trust for his daughter and her heirs, free from the control or disposal of any husband she might have, and exempt from his debts, contracts, or engagements, are directed solely to the exclusion of the husband from the absolute right of property which the marriage confers over all personal property of the wife, and from the usufruct for life of the real estate with its rents and profits, and does not refer to the right of guardianship of the husband over the children after the death of the wife.]

[3. The orphans' court of the District of Columbia has no jurisdiction, by virtue of the act of Maryland of 1789 (subchapter 12, § 3, and subchapter 15, § 12) or otherwise, to inquire whether a father be a fit person to be intrusted with the personal custody and education of his children. Its jurisdiction, as to him, extends only to the due care and management of the infant's estate.]

Appeal from orphans' court.

Petition [by John W. De Kraft] for the appointment of a guardian to the minor children of Samuel Chase Barney and Mary E. De Kraft (formerly Barney) deceased.

The following is the opinion of the orphans' court (PURCELL, Judge):

"The above named, John W. De Kraft, filed his petition some months since in this court, praying that some competent person should be appointed guardian to such children. That their father, the said Samuel Chase Barney,

was disqualified and unfit to act as such, and offered in evidence in support of the charges, amongst other facts, a record duly certified, purporting to be a divorce granted by the district court of Jasper county and state of Iowa, on the 18th day of Sept., 1860, in favor of the said Mary E. De Kraft Barney, against the said Samuel Chase Barney, her husband. The said Samuel Chase Barney, in his answer to the above petition, denies the allegations in said petition, and insists that he is not disqualified from acting as guardian to said children, and has offered the evidence of several witnesses in his favor, stating that he was not in their opinion addicted to intemperance. Without special reference to all the facts in the above cause, there is enough in the said decree of divorce of the district court of Jasper county, Iowa, so far as this court has jurisdiction to determine this cause.

"The sentence pronounced by the court granting the said decree was clear and emphatic. It stated that it was a court of competent jurisdiction; that it had jurisdiction of the parties; and of the subject matter, the law having been fully complied with by publication, and that notice had also, with a copy of the petition, been sent to the said Samuel Chase Barney's residence, and that he had been duly and timely served with notice as required by law; that the charges in her petition, which was proved, were others than adultery, and that the said defendant, Samuel Chase Barney was in default; that the said Mary E. De Kraft Barney, born Mary E. De Kraft, was entitled to a divorce from the bonds of matrimony from Samuel Chase Barney, her husband, to whom she was married in the year 1847. The said sentence further stated that the acts, conduct and character of the said defendant, Samuel Chase Barney, had been of such a character as to render him unfit to have the custody of the minor children of the said marriage, and that they be placed under the control of their said mother during their minority.

"If the said court of Iowa had erred, this court has no power to give him, the said Samuel Chase Barney, redress; that his remedy is before another tribunal, the regular appellate court. The above decree cannot be impeached or inquired into collaterally by this court, according to the authorities which are binding upon it. And it is binding also on the said Samuel Chase Barney until reversed. Raborg's Adm'r v. Hammond's Adm'r, 2 Har. & G. 42; Fishwick's Adm'r v. Sewell, 4 Har. & J. 393; Dimond's Adm'r v. Billingslea, 2 Har. & G. 264; Hammond v. Ridgely's Lessee, 5 Har. & J. 245; Comegys v. State of Maryland, 10 Gill & J. 175; House v. Wiles, 12 Gill & J. 338; U. S. v. Bender [Case No. 14,567].

"The fourth article of the constitution of the United States (section 1), and the acts of congress of the 26th of May, 1790 [1 Stat. 122], and March, 1804 [2 Stat. 298], passed in pursuance thereof, expressly declares that full faith and

credit shall be given to all the judicial acts rendered in the different states. Chief Justice Marshall held in the case of *Dartmouth College v. Woodward*, 4 Wheat. [17 U. S.] 629, that the legislatures of the different states had the right to legislate on the subject of divorce. That the constitution of the United States, which prohibits the states from passing laws impairing the obligations of contracts, was never understood to restrict the general right of the legislature to legislate on the subject of divorce. Those acts enable some tribunals not to impair marriage contracts, but to liberate the parties, because it had been broken by the other. There is another fact in the case, which is entitled to much consideration: Edward De Kraft, the father of said Mary E. De Kraft Barney, deceased, the mother of the above children, by whom the entire estate, belonging now to the said minor children, came, expressly declared in his will that no husband of his daughter should ever control any part of the estate so devised. It appears from satisfactory evidence in this case that Doctor Harvey Lindsley is a gentleman of high integrity in the community, and the court in the exercise of its discretion, believes him under all circumstances, a proper person to be the guardian of the said minor children."

From which decision the respondent, Samuel Chase Barney, appeals.

Walter S. Davidge, for appellant.
Richard S. Coxe, for appellee.

MERRICK, Circuit Judge. The present appeal has its origin in one of those conditions of family embroilment always painful and distressing, which rarely come to the notice of courts of justice, and which still more rarely are investigated by courts with either moral or material advantage to the parties involved. The legal aspect which the present controversy assumes will relieve this tribunal from a critical balance of the criminations and re-criminations with which the record abounds. Simple justice requires us, however, to observe that the most flagrant charge against the appellant is utterly unsupported and unwarranted by the evidence which has been adduced in that behalf. The appellee, as *prochein ami* and near relative, filed his petition against the appellant in the orphans' court, praying that court to refuse to the appellant the guardianship of the persons and estates of the appellant's four children, alleging that he was an unfit and improper person for the office, and charging that he had been divorced from his wife, Mary De Kraft Barney, now deceased, by a decree of the district court of Jasper county, in the state of Iowa, and by that decree the appellant had been deprived of the custody of his children, and that his moral obliquity also was there fully adjudged. The appellee made sundry specific charges in addition, and offered to sustain them by proof. The cause was heard and

proofs taken at great length before the orphans' court. That court finally adjudged that inasmuch as the court in Iowa had divorced the wife from the appellant, and had decreed his acts, conduct and character to have been such as to render him unfit to have the custody of the minor children of the marriage, and had committed the custody to the mother, the appellant was conclusively bound by that decree, and while unreversed it furnished an answer to his claim for the custody of the persons and estate of his children. The court also determined that the claim of guardianship of the father ought to be controlled by the fact that the estate of the children was derived under the will of the late Edward De Kraft, the maternal grandfather of the children, and he had by his will declared that his estate should be held by trustees in trust for his daughter and her heirs, free from the control or disposal of any husband she might have, and exempt from his debts, contracts or engagements. In both of these conclusions we think there was error in the decision of the orphans' court.

It appears from the record that the appellant was married to his late wife in the District of Columbia in 1847, and continued to reside here for many years; that some years prior to her decease they went to Paris, in France, and there sojourned, he being all the while a lieutenant in the navy of the United States; and that private difficulties having arisen between them, proceedings were instituted in a French tribunal, which decreed temporary custody of the children and a temporary separation of the parties, with leave to the wife to come to America to prosecute a petition for divorce. In the spring of 1860 Mrs. Barney came to the United States, unattended by her husband, and proceeding to the state of Iowa, where neither she nor husband had ever resided, she then filed in the district court of Jasper county her petition for divorce, causing publication to be made against her husband as an absent defendant, and procured a decree of divorce against him by default in September following, containing the allegations and determinations above referred to, and which are now relied upon as irrefragably conclusive against the appellant, not only as touching the marital relation, but also of the facts and charges recited as the basis of the decree, and of the paternal rights of the father over his children.

What might or might not be the effect within the state of Iowa of an *ex parte* decree of divorce obtained as was the present, and whether all the statutory requirements of the law of Iowa were complied with, so as to vest the district court of Jasper county with a jurisdiction entitled to consideration within the territorial limits of that state, we need not here inquire, it being conclusively settled by the supreme court of the United States in repeated adjudications that a personal judgment or decree obtained in any state of the Union over a non-resident, who has not been served with

process within the state, or who has not voluntarily appeared and subjected himself to the jurisdiction of the court, has no extra-territorial validity and does not come within the operation of the fourth article of the constitution, declaring the effect within one state of judicial proceedings had in another state. Among other authorities, see *Shelton v. Tiffin*, 6 How. [47 U. S.] 143; *Boswell's Lessee v. Otis*, 9 How. [50 U. S.] 336; *Landes v. Brandt*, 10 How. [51 U. S.] 348; *D'Arcy v. Kitchen*, 11 How. [52 U. S.] 165; and *Webster v. Reid*, Id. 437; and that a case of divorce is embraced within the principle. See *Vischer v. Vischer*, 12 Barb. 640; *Hill v. Hill*, 28 Barb. 23.

Controlled by these authorities, as well as by the dictates of manifest justice, we are of opinion that the record of the court of Iowa was not admissible evidence for any purpose against the appellant in the present controversy.

The provisions of the will of Edward De Kraft, which were relied upon as the second ground of exclusion, when examined, have no relation to guardianship; indeed it cannot be deduced from the terms of the instrument that the matter of guardianship was at all in the mind of the testator. The provisions of the will are directed solely to the exclusion of any husband from that absolute right of property which the marriage confers over all the personal property of the wife, and from the usufruct for life of the real estate, with all its rents and profits. The terms of the will debar him from these, during the marriage, and also from his right of survivorship and curtesy: according to the doctrine of the cases of *Marshall v. Beall*, 6 How. [47 U. S.] 70, and *Ward v. Thompson*, 6 Gill & J. 349; but the strict terms of this settlement no more militate against the right of guardianship of the surviving husband than would the terms of a deed in fee simple from a total stranger to the children for a house and lot in this city.

The foregoing considerations dispose of the grounds of judgment relied upon by the court below, but as the act of assembly requires this court, on appeal, to go further (see section 18, subc. 15, Act Md. 1798), the question remains whether upon the testimony of the living witnesses produced by the petitioner, the court below was authorized to refuse to accept from the appellant a sufficient bond if tendered under the statute as natural guardian to his infant children? In other words, has the orphans' court jurisdiction to inquire into the character and conduct of a father, to exclude him from the care and custody of his infant children, and to commit their persons as well as their estates to a stranger?

The power is an inquisitorial power of a most delicate and difficult sort which must inevitably in its exercise bring to light numerous family differences, family difficulties and family misfortunes which it were better for the honor of humanity to cover with the thick-

est veil of charitable silence. For such investigations the machinery of courts of justice is ill adapted, especially the orphans' courts, whose interference with parental discipline could rarely be exerted usefully. The Vice-Chancellor in *2 De Gex & S. 474*, says: "The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the children, and in a sense on condition of performing those duties, but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance, nor could a court of justice usefully attempt it. A man may be in narrow circumstances; he may be negligent, injudicious and faulty as the father of minors; he may be a person from whom the discreet, the intelligent, and the well disposed, exercising a private judgment would wish his children to be for their sakes and his own removed; he may be all this without rendering himself liable to judicial interference, and in the main for obvious reasons it is well that it should be so."

Such being the nature of the power claimed, and such being some of their objections to its exercise, it must be apparent to every one (independently of the injunctions of the act of 1798, "that the orphans' court shall not under pretext of incidental powers or constructive authority exercise any jurisdiction whatever not expressly given,") that its possession by that tribunal should be denied unless beyond all reasonable doubt the terms of the law vest it or the spirit of the law requires it to be comprehended in certain language which seems broad enough to include it.

Prior to the act of 1777 (chapter 8), the courts of the commissary-general and his deputies had jurisdiction only in testamentary affairs, the exclusive cognizance of matters of guardianship being confided to the county courts who were authorized only to appoint guardians to infant orphans who had no natural guardian. The county courts supervised the management of their estates and had it in charge by the act of 1715 (chapter 39, §§ 21, 22), annually to inquire by a jury "whether the orphans be kept, maintained and educated according to their estates," and to remove their guardians upon default found by the jury. This jurisdiction was for the first time transferred to the orphans' court by the act of 1777 (chapter 8). Before that statute the ordinary never exercised, either under the laws of England or the laws of Maryland, any jurisdiction in the matter of the appointment or removal of guardians. See *Macph. Inf. 74*; *Rex v. Delaval*, 3 Burrows, 1436; *Mouro v. Ritchie* [Case No. 9,312]. Upon the revision of our testamentary system by the act of 1789 the orphans' jury was abolished, and in lieu of its functions the orphans' court was authorized by the twelfth section of subchapter 15, upon application suggesting improper conduct in any guardian.

whatever, either in relation to the care and management of the property or person of any infant, to inquire into the same, and at their discretion remove such guardian and make choice of another who shall receive the property and custody of the said ward.

It will scarcely occur to any one who will advert to the history of the orphans' jury, and there read the language I have quoted, that the legislature had in contemplation when using the words "any guardian whatever" to confer upon the orphans' court the jurisdiction to enter every family in the land, upon suggestion from a child or some person on his behalf, investigate its private history and discipline, drag all its painful memories before the public attention, and record private shames and private griefs, to the scandal of future as well as the present generation, and yet such is the result of the argument in this case, for it is said that the father is the natural guardian of his children, and as the statute says "any guardian whatever," a natural guardian is included in the expression. This argument has its vice in an inversion of the force of language. The aspect in which the father is viewed by the law is that of parent, and not of guardian; the latter is the subordinate, the former the paramount relation; the less to be controlled by the greater, and not the greater curtailed by the less.

In the language of Blackstone, the relation of guardian is derived out of that of the parent, the guardian being only a temporary parent. Indeed, the loose manner in which the term natural guardian is used has given rise to much perplexity in the law books, and confusion in drafting and interpreting statutes. Its original and proper significance and energy arose out of the conflict between the claims of tenure and of parental right in the matter of lands held under the feudal tenure or knight's service or in chivalry. In that case the right to the custody of the person of the infant heir belonged to the father in exclusion of the lord in chivalry, who nevertheless retained the wardship of the lands, and was entitled also to the custody of the person as against mother, grandfather, and every other relative except the father, whose paramount parental right was acknowledged by the feudal lawyers under the scholastic designation of guardian by nature. It is the character of parent which the law has in view, and its sacredness at common law is admirably illustrated in this, its triumph over the iron exigency of military tenure. Whenever, therefore, our statutes use the term guardian, the father, although in one sense the natural guardian is never to be included, unless there be something more which imperatively demands that he should be embraced by the expression. But it is said that the father is to be embraced by the language of the section, because by the third section of subchapter 12, in case an infant becomes entitled by descent or devise to land or to legacy or distributive share, his natural guardian may be called upon to give

bond for the performance of his trust, and upon his neglect or refusal the court may appoint another guardian. Does it follow from this section that if a father be poor, and by any of the contingencies enumerated his child should receive a large portion, for which he could find no one willing to go his surety, that therefore the court shall deprive him of the care and custody, the training, education and social consolation of his child, and confide not only the estate but the person of his child to some wealthier or better known stranger; and yet this conclusion must be reached before the interpretation claimed can be given to the twelfth section of subchapter 15.

It is obvious that the other guardian, contemplated by the third section, is a guardian of the estate only and not of the person. Repeated adjudication in England has established that a father cannot be deprived of the custody of his child, by a devise or legacy accompanied by the designation of guardian, and what is there held to be repugnant to natural right, we must not impute to the legislation in the construction of a statute, admitting a different meaning.

Chancellor Kent says (2 Comm. 221, note c): "Attempts have been made to control the father's right to the custody of his infant children by a legacy given by a stranger to an infant, and the appointment by him of a guardian in consequence thereof. But it is well settled that a legacy or gift to a child confers no right to control the father's care of the child, and no person can defeat the father's right of guardianship by such means."

In the case of Vanartsdalen v. Boyer, 14 Pa. St. 384, the court on appeal from the orphans' court, held that a devise by a grandfather of lands, &c., to grandchildren, containing a clause, "my executors hereinafter named to be guardians for the children of my said daughter, during their minority, and I do hereby nominate and appoint them for that purpose," meant merely a devise of the guardianship of the property, but was not intended to interfere with the natural right of the father to the custody and care of the children.

Upon these considerations the sound rule of construction would seem to limit the power of substitution to the trust, which the legislature for the first time subjected to the jurisdiction of the orphans' court, by the third section of subchapter 12, to wit: the security and control of the infant's estate, and that being the case, when we apply the provisions of section 12, subc. 15, we should in like manner limit the terms to the subject matter, to wit: the conduct of the father to the management of the property of his child. The case of Fridge v. State, 3 Gill & J. 113, is relied upon as adjudicating this question. Upon looking at the case it will be found that the present inquiry was not by the remotest hint brought to the minds of the court. The point before the court there was whether, it being shown in a suit upon a guardian's bond, collaterally that the mother as natural guard-

ian was living at the time of appointment, that fact did not of itself show that the orphans' court transcended its jurisdiction in appointing a third person guardian. And in meeting that objection, the court of appeals said: "Unless the natural guardian had failed or neglected to give bond for the performance of her trust on being called upon to do so, in pursuance of the third section of the twelfth subchapter of the act of 1798, c. 101, or had been removed for cause under the provisions of the twelfth section of subchapter 15, it would not have been the case of an erroneous judgment," &c.

This chance expression in the course of a judicial opinion is relied upon as settling the claim of jurisdiction to the extent insisted on by the appellee. The case before the court was a case purely involving the estate of the infant and not relating to its custody; and the court, in speaking of "the removal for cause," does not say for what cause, nor what shall be the extent of the removal, and the language is perfectly consistent with the idea that the cause for which the natural guardian shall be removed must be some misconduct or dereliction touching the estate; and that the removal so to be made is a removal from the control of the estate. Nor do I think the concluding words of the section given any additional force to the claim, for as I have endeavored to show, that from the third section the statute contemplates a separation of the custody of the person and the estate in certain contingencies, and when we come to construe the twelfth section we must adopt the plain rule of rendering consequents according to their antecedents, giving to those cases where the property and persons have both come under the control of the court the right to transfer both; and where the property alone has come under its dominion, the right to transfer the property only. The foregoing limitation of the power of the orphans' court is necessary to harmonize the act of 1798 with the act of congress of February 20, 1846 (9 Stat. 4, c. 8, § 1). By its provisions, when an infant whose father is living shall, by gift or otherwise, become entitled to property separate from the father, the court may compel him to give bond to account for it, as other guardian, and if he fail or refuse, the court "shall have power to appoint a special guardian to take charge of said property, who shall give bond and security as in other cases, but with conditions to suit the case." Here we have a legislative declaration that the separate property of the infant shall, upon the father's default, be given in charge to a special guardian.

Now what reason can be shown why an infant having property by gift should be left to the personal control of his father, while he who has a legacy or distributive share, in the discretion of the orphans' court be committed to the charge of another. For the foregoing reasons we think the orphans' court precluded from inquiring whether a father be a fit per-

son to be entrusted with the personal custody and education of his children, and that its jurisdiction as to him extends only to the due care and management of the infant's estate. It does not appear in this case that the father was permitted to tender a good and sufficient bond for the management of his children's property, nor is there anything in the testimony to show him to be incompetent for that task. We think him entitled to that privilege for aught disclosed upon the record. Should it appear that it is in some very material and important respects essential to the well being and welfare of children, either physically, intellectually or morally that the rights of a father "should be suspended or interfered with, the chancery jurisdiction is ample to afford remedy." *Curtis v. Curtis*, 5 Jur. (N. S.) 1147. In a proper case that tribunal may be invoked, and the interests of society protected without resorting to dangerous rules of construing statutory grants. It is therefore ordered that the decree of the orphans' court rejecting the application of the appellant to be permitted to give bond for the performance of his trust as natural guardian of the estate of his infant children, and that appointing Dr. Harvey Lindsley guardian of the said infants, be reversed, and said letters of guardianship issued to said Lindsley are hereby annulled, and the cause is remanded to the orphans' court with directions to cite the said Samuel Chase Barney for the purpose of entering into bond with good and sufficient security, to be determined by said court, for the execution of his trust as aforesaid, &c.

DE KRAFT (BARNEY v.). See Cases Nos. 18,230 and 18,308.

DE KRAFT (LINDSLEY v.). See Case No. 18,308.

DELAWARE, The (BOUKER v.). See Case No. 18,243.

Case No. 18,289.

DERMOTT v. FOWLER.

[2 Hayw. & H. 124.]¹

Circuit Court, District of Columbia. Sept. 27, 1853.

PARTY-WALLS—COST OF REPAIRS.

Where the defendant uses a party-wall in the erection of his adjoining store, and is put to necessary expense in making the party-wall fit for his use, the jury, in assessing the damages, may take in consideration such extra expense, unless the party, or those under whom he claims, waived the defects.

At law. Action of debt. The declaration states that the defendant was indebted to the plaintiff in the sum of \$449.92, for material furnished and work and labor performed and bestowed on the party-wall, being the north wall of the warehouse owned by the plaintiff,

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

and being between the plaintiff and defendant, agreeable to the 4th section of Regulation No. 1, entitled "Terms and conditions declared by president of the United States, the 17th October, 1791, for regulating the material and manner of the building, and improvements on the lots in the city of Washington." The following, after giving in detail the contents of the wall between the parties, is the certificate of the measurer: "According to the building regulations Mr. Fowler is required to reimburse one-half the value of said wall to Miss Dermott. Samuel Fowler to Miss Anne R. Dermott, Dr. To one-half value of so much of the party-wall as is designed to be used by him in the erection of his adjoining store, as per above measurement and valuation, \$449.92. John C. Harkness, measurer."

John Carrol Brent, for plaintiff.

Joseph H. Bradley, for defendant.

On the trial of the case the following remarks were made by THE COURT: We think the jury, in estimating the cost of the wall to be paid for by the defendant, may take into consideration such expense as the defendant was necessarily put to to make the part of the wall so used by him fit for that purpose, unless the jury shall find from the evidence that the defendant waived such defects, or those under whom he claims waived them. It must be considered that the defendant, when he purchased, did so with a view to the condition in which it was at that time, and whatever damage was done by it placing the wall there, claimed for in this case, might have risen in relation to the freehold. This defendant cannot have a right to recover therefor. There seemed to be a claim for set-off against the plaintiff's account for ground used by the plaintiff, although she denied the claim.

The jury brought in a verdict of damages \$365, with interest from November 10, 1851, the time when the defendant commenced to use the wall.

DILWORTH (BLOOMER v.). See Case No. 18,242.

Case No. 18,290.

DISTRICT ATTORNEYS' FEES.

[1. Blatchf. 647.]¹

Circuit Court, N. D. New York. 1852.

DISTRICT ATTORNEYS' FEES.

1. Under the provisions of the act of May 18, 1842 (5 Stat. 434), which are made permanent by the act of March 3, 1845 (5 Stat. 764), the district attorneys for the Northern and Southern districts of New York are entitled to the same fees that are allowed to attorneys, solicitors, and counsel in the supreme court and court of chancery of New York, according to the nature of the proceedings, for like services rendered therein.

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

2. For services rendered to the United States by those officers in civil and criminal cases, their fees must be taxed according to the latest fee bill in the supreme court of New York, in which the rate of fees is prescribed for attorneys and counsel in that court, and which will be found in chapter 386 of the Laws of 1840, as amended by chapter 273 of the Laws of 1844. 2 Rev. St. N. Y. (3d Ed.) pp. 722-725.

3. The act of the legislature of New York abolishing all attorney and counsel fees (Laws N. Y. 1849, c. 438, § 303) does not affect the right of those district attorneys to the rate of compensation allowed to attorneys and counsel in the supreme court of New York, as it stood at the time of the passage of that act.

4. Where there is an allowance in the supreme court or court of chancery of New York, according to the nature of the proceedings, for a corresponding service, the district attorney can have no other or greater fee.

5. But it is not necessary, in order to entitle the district attorney to fees for a given service, that a corresponding fee for a like service should be given to attorneys, solicitors, and counsel, by an existing law of the state.

6. Where no such corresponding fee is given by any existing law of the state, the usage and practice is to refer back to some previous law of the state regulating the fees of attorneys and counsel, wherein may be found an allowance for a corresponding service.

7. The proper fees for subpoena tickets and for drawing indictments.

8. The practice prescribed for the commitment of prisoners by the marshal to the custody of the jails of the state, and for bringing them up for trial or other cause after such commitment.

9. The mittimus and the habeas corpus, in such cases, discussed.

The bills of James R. Lawrence, Esq., district attorney for the Northern district of New York, for services rendered to the United States in civil and criminal cases, at the October term, 1851, of the circuit court for that district, at Albany, having been submitted to Mr. Justice NELSON, he delivered the following opinion:

NELSON, Circuit Justice. The act of congress of March 3, 1841 (5 Stat. 427), provided, among other things, that, in lieu of all fees, emoluments, etc., it should and might be lawful for the district attorney to demand and receive "the same fees that now are, or hereafter may be, allowed," by the laws of the state where the courts are held, to the attorneys and counsel in the highest courts of the state in which the service was rendered, and no other fees or emoluments; and that he should receive for every day's actual attendance at any court, five dollars per day; and for any services, including the compensation for mileage, performed by him in the discharge of his official duty, for which no compensation was provided by the laws of the state, he "may receive such fees as are now allowed by law according to the existing usage and practice" of the courts of the United States. Then followed the limitation of the amount to be retained, which was not to exceed the sum of six thousand dollars per annum, over and above allowances to deputies and for office expenses. The above is the substance of the act, as it respects compensation to this officer. It was a proviso to the appropriation act of that year, and, therefore, would seem to have been of a temporary character.

The act of congress of May 18, 1842 (5 Stat. 434), forbids any per diem allowance to the district attorney, for attendance when the district or circuit court is sitting in bankrupt cases, unless his attendance is required by the court or the solicitor of the treasury, and also, in the Southern and Northern districts of New York, restricts the fees and emoluments of this officer to such as "now are or hereafter may be allowed by the laws of the state of New York" to attorneys, solicitors and counsel "in the highest courts of law or equity, of original jurisdiction," of the state, "according

to the nature of the proceedings, for like services rendered therein."

The act of 1841 adopted the fees and emoluments allowed to attorneys and counsel by the state laws, in the highest courts of the state, as the rate of compensation for like services of the district attorney in the district and circuit courts of the United States. The act of 1842 modifies the clause, as it respects the Northern and Southern districts of New York, by restricting the allowance to the rate in the highest courts of original jurisdiction. Under the act of 1841, the rate of fees to which the district attorney was entitled in New York was the fees allowed to attorneys and counsel in the late court for the correction of errors, that being the highest court of the state. Under the act of 1842, he is entitled to the rate allowed in the supreme court and court of chancery, according to the nature of the proceedings, these being the highest courts of law and equity in the state, of original jurisdiction.

The act of May 8, 1792 (1 Stat. 277, § 3), had adopted the same rule of compensation, namely, "such fees in each state respectively as are allowed in the supreme courts of the same." The same rule was given in the act of February 28, 1799 (1 Stat. 625, § 4), and which, as far as I have been able to find from an examination of the acts of congress, continued down to the passage of the provision of 1841.

The bills before me must, therefore, be taxed according to the latest fee bill in the supreme court of New York in which the rate of fees is prescribed for attorneys and counsel in that court, and which will be found in chapter 386 of the Laws of 1840, as amended by chapter 273 of the Laws of 1844. See this fee bill in 2 Rev. St. N. Y. (3d Ed.) pp. 722-725. Since the third edition of the Revised Statutes was published, all attorney and counsel fees in the supreme court of New York have been abolished by an act of the legislature, and the measure of compensation has been left to an agreement between them and their client. Laws N. Y. 1849, c. 438, § 303; St. N. Y. (Blatchf. Ed.) 265. I am of opinion, however, that this act does not affect the question of taxation, or the right of the district attorney to the rate of compensation allowed to attorneys and counsel, as it stood at the time of its passage.

The act of 1842 provides, that he shall not receive any greater or other fees, etc., for services rendered, than "now are or hereafter may be allowed by the laws of the state of New York" to attorneys, solicitors, and counsel "in the highest courts of law or equity," etc., "for like services rendered therein." This act virtually adopts the laws existing in the state at the time, prescribing fees to attorneys and counsel in the supreme court, and also any subsequent law modifying them, either by increasing or diminishing the rate. The rate of fees allowed by the laws of the state, when adopted, became a part of the act of congress; and so, in respect to any modification. The modification, however, must be a modification of the rate of the allowance, not an abrogation of all allowance of fees and compensation, in order to bring it within the fair meaning of the act of 1842. It was the fees that were then allowed to attorneys and counsel in the state, or that might thereafter be allowed, that was referred to as constituting the general rate of allowance to the district attorney. If no alteration took place, the rate continued as it stood in 1842. If the allowance was subsequently varied by the state law, that would govern. But there must be, in the subsequent change, an allowance for the corresponding services, before it can be made applicable. Any other interpretation of the act of congress would not only be unreasonable, but uncalled for by the terms of the provision. The law

of the state, therefore, abolishing all fees and compensation to attorneys and counsel, left the rate as adopted by force of the act of 1842 untouched. This provision of the act of 1842 seems to have been virtually re-enacted by the act of March 3, 1843 (5 Stat. 639, 640), by the act of June 17, 1844 (5 Stat. 690), and to have been made permanent by the third section of the act of March 3, 1845 (5 Stat. 764).

A criticism may be made upon the language of the act of 1842, the effect of which, it might be claimed, would lead to the conclusion that the district attorney is entitled to no fees since the passage of the law of the state abolishing them. I refer to the clause, "Any greater or other fees and emoluments, * * * for services rendered," etc., "than now are or hereafter may be allowed by the laws of the state of New York to attorneys, solicitors, counsel," etc., "for like services," etc. It may be said that this excludes all compensation for services, whatever they may be, by the district attorney, unless a corresponding fee for a like service can be found in an existing law of the state. But this is obviously not the meaning of the clause. The term "greater or other fees," in the connection in which it is found, means no greater or other fees shall be allowed this officer for a service rendered than are allowed to attorneys or counsel by the state law for a like service rendered by them. In other words, where there is an allowance in the supreme court or court of chancery of the state, according to the nature of the proceedings, for a corresponding service, the district attorney shall have no other or greater fee. This is all that the clause means, and not that, if no allowance can be found for the service in the state law, nothing shall be allowed this officer for the service.

The usage and practice in such cases (and which was recognized in the act of congress of 1841) is to refer back to some previous law of the state regulating the fees of attorneys and counsel in which may be found an allowance for a corresponding service. The object of this part of the provision of the act of 1842 was to change the rate of the fees from that of the highest court of the state, to that of the highest court of original jurisdiction, as has already been explained.

There are few items in the bills which have been erroneously charged:

1. Dr. subp. ticket is charged by the folio. The allowance for these tickets is twenty cents each, and this whether drafts or copies.

2. The indictment is charged by the folio. The rates of fees for a declaration in the supreme court should, I think, govern. This charge is \$2.50 for the draft, and \$1.25 for each copy. It is an inadequate compensation; but it seems to be a corresponding service in the supreme court, or so nearly such, that it must be held to apply, and it is the only one in any fee bill in that court which is analogous.

The practice in respect to the commitment of prisoners by the marshal to the custody of the jails of the states seems unsettled, and not uniform in the different states. The resolution of congress of September 23, 1789 (1 Stat. 96), recommended to the several states to pass laws making it the duty of the keepers of their jails "to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof, under the like penalties as in case of prisoners committed under the authority of such states respectively." The state of New York passed a law in pursuance of this recommendation. Act Jan. 28, 1790; 2 Greenl. Comp. p. 292.²

The mittimus must, of course, be directed to the marshal, commanding him, in the name of the president of the United States, to convey

² [See note at end of case.]

and deliver the prisoner to the keeper of the jail, and it should, I think, also contain a command to the keeper to receive him. The original mittimus, or a copy of it duly certified by the marshal or his deputy, should be left with the keeper of the jail, as his authority for the detention. And, when it is necessary to bring the prisoner up for trial, or other cause, a writ of habeas corpus, directed to the marshal, and containing a clause directing the keeper to deliver him, would seem to be necessary, the marshal leaving, at the same time, a copy, certified by him, with the keeper, for his security. The writ in this form would afford a justification to both officers. This writ, or some equivalent authority, seems essential for the protection of the keeper in delivering the prisoner to the marshal, as he is responsible for him after the commitment, until discharged by due course of law; and the writ is also authority to the marshal to receive and bring up the prisoner. Whether some simpler mode might not be devised for bringing up the prisoner and committing him *de die in diem*, pending the trial, I cannot at present say. It is clear that the officers must be clothed with proper authority at all times to justify the custody of the prisoner, and to resist any attempt at escape or rescue.

The practice in the First circuit, as I am advised, is to commit by a regular mittimus, and to bring the prisoner up by a writ of habeas corpus, thereby furnishing the keeper of the jail and the marshal with the proper authority at all times to justify the execution of their duty.

NOTE. This act was as follows: "Be it enacted, etc., that it shall and is hereby declared to be the duty of the sheriffs of the several counties within this state, to receive him into the several gaols within their respective bailiwicks, and safely keep, all prisoners who shall be committed to the said gaols, by virtue of any process to be issued under the authority of the United States, until they shall be discharged by the due course of the laws thereof; the United States supporting such of the said prisoners as shall be committed for offences against the said United States. And in case any prisoner or prisoners shall escape out of the custody of any sheriff to whom he or they shall or may be committed as aforesaid, such sheriff shall be liable to the like actions and penalties as he would have been, had such prisoner or prisoners been committed or charged in custody, by virtue of any process issuing under the authority of this state; and such sheriff or sheriffs respectively, into whose custody any such prisoner or prisoners shall be as aforesaid committed, is hereby authorized to take and receive to his own use such sum or sums of money as shall be payable by the United States, for the use of the said gaols."

The following are the provisions of the Revised Statutes of New York upon the same subject:

"Section 1. It shall be the duty of the keepers of the respective county prisons, to receive into their prisons any person duly committed thereto for any offence against the United States, by any court or officer of the United States, and to confine such person in their prisons, until he shall be duly discharged; the United States supporting such person during his confinement.

"Sec. 2. It shall be the duty of the respective keepers of each of the county and state prisons, to receive into the said prisons and safely to keep therein, subject to the discipline of such prison, any criminal convicted of any offence against the United States, sentenced to imprisonment therein, by any court of the United States, sitting within this state, until such sentence be executed, or until such convict shall be discharged by due course of law; the United States supporting such convict, and paying the expenses attendant upon the execution of such sentence.

"Sec. 3. In case any such prisoner shall escape, or attempt to escape out of the custody of any keeper to whom such prisoner may have been so committed, he shall be liable to the like punishment as if he had been committed by virtue of a commitment or conviction under the authority of this state.

"Sec. 4. The keeper of any prison to whom any such prisoner may have been committed, shall be liable to the like penalties and punishment, for any neglect or violation of duty in respect to the custody of such prisoner, as if such prisoner had been committed by virtue of a commitment or conviction under the authority of this state."

2 Rev. St. pp. 773, 774.

Case No. 18,291.

DIXON et al. v. WALKER.

[2 Hayw. & H. 316.]¹

Orphans' Court, District of Columbia. March, 1859.

ALIENS—DESCENT AND DISTRIBUTION.

1. Under the Maryland act of December, 1791 (section 6), no alien can take by descent the real estate of an alien or naturalized citizen, but they can take real estate by deed or will.
2. The personal property of an alien or naturalized citizen dying intestate will be distributed according to the law of the domicile of the deceased.

For the distribution of the estate of a naturalized citizen, who died intestate. Proceeding by James Dixon and others, heirs of James Dixon, deceased, against James Walker, administrator of the estate of James Dixon, deceased, to recover the estate of decedent.

J. M. Carlisle, for the heirs.

PURCELL, J. James Dixon, a native of Scotland, emigrated to the United States and located in Washington City about 30 years ago, and became a citizen by naturalization, after which he acquired property, both real and personal, in the District of Columbia. He has recently departed this life intestate, and the administration of his estate has been committed by this court to James Walker.

It appears, as stated by the administrator, that deceased left no issue, but as next of kin he left three sisters, viz. Jennette, Elizabeth and Margaret, and the children of a deceased brother William, all being aliens. The sister Margaret has two sons in this District who have been naturalized.

The question before this court is, who are the parties entitled to the estate in controversy? An act was passed by the legislature of Maryland, in December, 1891, which had reference to this District, and is now in force here, in section 6 of which it was provided: "That any foreigner may, by deed or will, to be hereafter made, take and hold lands within that part of said territory (of the District of Columbia) which lies within this state, in the same manner as if he was a citizen of this state; and the same lands may be conveyed by him and transmitted to and be inherited by his heirs or relatives as if he and they were citizens of this state." The above section enables a foreigner to take and hold lands in this District and to convey and transmit them to his foreign relatives, but it only extends to such lands as may be acquired before naturalization. As soon as the foreigner becomes a citizen of the United States by naturalization he relinquishes all allegiance to a foreign power, and landed property acquired in this District subsequent to such naturalization, cannot be transmitted to foreign heirs or relatives. See the opinion of Chief Justice Marshall in

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

Spratt v. Spratt, 1 Pet. [26 U. S.] 343. But can the two nephews of the deceased, who have been naturalized, inherit? They must claim through their mother, who is a foreigner, and it is well settled that at common law no person can claim lands by descent through an alien, since he has no inheritable blood. In the case of *McCrery's Lessee v. Somerville*, 9 Wheat. [22 U. S.] 350, Justice Story held that the statute of 11 & 12 Wm. III. c. 6,¹ which is in force in this District, removes the common-law disability of claiming title through an alien ancestor, but does not apply to a living alien ancestor; consequently the claim of the two naturalized sons of the sister of the deceased is invalid. The personal estate, however, over which this court has exclusive jurisdiction, rests upon different principles. This will be distributed according to the law of the last domicile of the deceased, that being in this case the District of Columbia.

The principles which govern the court will be found well established in the case of *Ennis v. Smith*, 14 How. [55 U. S.] 400. This estate will be decreed to the nearest of kin, no matter in what country they may reside. When the heirship in the case shall be legally established, the orphans' court will pronounce a decree of distribution of the said personal estate in accordance with the foregoing opinion.

¹ Whereas, &c., that all and every person or persons, being the king's natural-born subject or subjects, within any of the king's realms or dominions, shall and may hereafter lawfully inherit, and be inheritable, as heir or heirs, to any honours, manors, lands, tenements or hereditaments, and make their pedigrees and titles by descent from any of their ancestors, lineal or collateral, although the father and mother, or fathers or mothers, or other ancestor of such person or persons, by, from, through or under whom he, she or they shall or may make or derive their title or pedigree, were or was, or is or are, or shall be born out of the king's allegiance, and out of his majesty's realms or dominions, as freely, fully and effectually, to all intents and purposes, as if such father or mother, or fathers or mothers, or other ancestor or ancestors, by, from, through or under whom he, she or they shall or may make or derive their title or pedigree, had been naturalized or natural-born subject, or subjects, within the king's dominions; any law or custom to the contrary notwithstanding.

DOBSON (GOODRICH v.). See Case No. 18,297.

DOUGLAS (BLOOMER v.). See Case No. 18,242.

Case No. 18,292.

DOVE v. BLAIR.

[2 Hayw. & H. 200.]¹

Circuit Court, District of Columbia. Jan. 25, 1856.

JUDGMENT—MOTION IN ARREST—TIME FOR.

A motion in arrest of judgment will be dismissed if made after judgment is rendered and execution issued thereon.

At law. Motion in arrest of judgment [in an action by William T. Dove, to the use of Richard Halleck, trustee, etc., against J. H. Blair].

The clerk will please enter a motion in arrest of judgment in this case, on the ground that there are errors appearing on the face of the record.

Carlisle & Shehan, for plaintiff.

Bradley & Shelton, for defendant.

And thereupon the said motion in arrest of judgment coming on regularly to be heard, the plaintiff, by his counsel, objected to the same being heard by this court, on the ground that the said motion was not filed in time, according to the usage and practice of this court, and on the further ground that said motion was filed after judgment was rendered, and a fieri facias issued thereon, said judgment having been rendered on the 23d of April, 1855, and said fieri facias having been issued on the 8th of May following, and THE COURT, having heard and considered the said objection, refused to consider the said motion in arrest of judgment, and order and direct the same to be dismissed. Motion dismissed.

DRAHER (BLOOMER v.). See Case No. 18,242.

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

E.

Case No. 18,293.

EASBY et al. v. EASBY.

[2 Hayw. & H. 207.]¹

Circuit Court, District of Columbia. June 13, 1856.

EXECUTORS—RENOUNCING.

An executor could renounce his right as executor after acting as such, and be relieved from his responsibility.

At law. This was an appeal from the orphans' court, growing out of the will of William Easby. Among the questions decided by Judge Purcell was that the widow of William Easby and executrix, associated with others as executors of her husband's will, could join in letters testamentary with the executors, and after acting with them for several months renounce her right as executrix and be released from her responsibility as such.

Webb & Carlisle, for appellant.
J. H. Bradley, for appellee.

THE CIRCUIT COURT affirmed above decision.

ELECTION LAWS—CHARGE TO GRAND JURY IN RELATION TO ILLEGAL VOTING. See Case No. 18,254.

ELLSWORTH v. BANK OF WASHINGTON. See Case No. 18,294.

Case No. 18,294.

ELLSWORTH v. GUNTON et al.

[2 Hayw. & H. 21.]²

Circuit Court, District of Columbia. Dec. 11, 1850.

BANKS—DEMANDING PAYMENT OF NOTES—BURDEN OF PROOF.

In an action against a bank on a promissory note taken for collection, the burden of proof rests with the bank to show that the notary made the proper demand on the maker of the note, either at his place of business or at his residence.

At law. Suit on a promissory note [by Erastus L. Ellsworth against William Gunton and others, under the name of the Bank of Washington].

The following is the note on which action was brought: "Washington, January 15th, 1845. Sixty days after date I promise to pay M. N. Falls, or order, two hundred and fifty dollars for value received, with interest

from date. Thomas B. Addison." Endorsed by M. N. Falls and Erastus L. Ellsworth.

Declaration: "Whereupon the plaintiff, by Joseph H. Bradley, his attorney, complains that whereas, heretofore, to wit: on or about the first day of March, in the year 1845, at the county aforesaid, he being the true owner and holder of a certain promissory note, bearing date at Washington, to wit, at the county aforesaid, the 15th day of January, 1845, made by a certain Thomas B. Addison, whereby sixty days after the date thereof the said Thomas B. Addison promised to pay Moore N. Falls, by the name of M. N. Falls, or order, two hundred and fifty dollars for value received, with interest from date, and delivered the same to said Moore N. Falls, and the said Falls endorsed and delivered the same to the plaintiff before it became due and payable; and the said plaintiff being the owner and holder as aforesaid of the said note, and wishing to collect the same, and being desirous to have the payment of the said note duly and lawfully demanded of said Addison, according to the law and the usage and custom of merchants, and in event of the failure of said Addison to pay the same on such demand being made, to have due notice of the non-payment thereof given to the said Moore N. Falls, according to law and the usage and custom aforesaid; and the said defendants being then and there engaged in the business of banking in the said city, the said plaintiff requested said defendants, in the due and ordinary course of their business, to receive the said note from said plaintiff and collect the same for the use and benefit of said plaintiff, and to demand the payment thereof from the said Addison as aforesaid, and to give notice as aforesaid to said Falls, in the event of said Addison failing to pay the same; and the said defendants in consideration thereof, and in the usual course of their said trade and business, did agree with said plaintiff to receive and collect the said note, and duly and lawfully to demand the payment thereof from said Thomas B. Addison, and on his failure to pay the same on such demand to give due notice thereof to said Moore N. Falls; and the plaintiff in fact saith that relying on the said promise and undertaking of said defendants, he did then and there to wit, on the first day of March, 1845, deliver the said note to the said defendants, and the said note was not paid at the maturity thereof. Yet the said defendants, not regarding their said promise and undertaking, did not, nor would when the said note was and became due and payable, to wit: on the 19th day of March, 1845, at the county aforesaid, lawfully and duly demanded payment of the same of the said Thomas B. Addison, but

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

² [Reported by John A. Hayward, Esq., and Geo. C. Hazleton, Esq.]

utterly failed and neglected so to do, and did not give due notice of the non-payment thereof to the said Moore N. Falls, whereby the said plaintiff utterly lost all remedy against and demand upon the said Moore N. Falls as endorser on said note, and the said sum of money hath not been paid to the said plaintiff to this day; to the damage of the plaintiff \$500, and therefore he sued. Joseph H. Bradley, Plaintiff's Attorney."

On the 19th day of March, 1845, the note was presented at the maker's last place of business in Washington, and demand was made there for payment, and the notary was answered, "Mr. Addison has left this office and it cannot be paid here." The usual plea was made by the counsel for the defendant.

The following instructions appear to have been given to the jury in the case: "If from the whole evidence aforesaid the jury shall find that the note in the said declaration mentioned was made upon a full consideration by said Thomas B. Addison and delivered to M. N. Falls, and was endorsed by said M. N. Falls, and was the property of the plaintiff at the time it fell due, and was deposited by him with the defendants, through their agent, William Fuller, for col-

lection, that the maker of said note resided in Georgetown, that when the same became and fell due the defendants did not present the same, neither at the place of business or abode of the maker of said note, and made no enquiry as to his place of business or abode the plaintiff is entitled to recover, and the burden of proof to show that the notary did make such enquiry is on the defendants, and there is no evidence in this cause that he did make such enquiry."

Verdict for the plaintiff. The following motion was made to set aside the verdict: "Because the jury have rendered a verdict for damages, with interest thereon, which defendants, by their attorney, objected to as illegal."

Joseph H. Bradley, for plaintiff.
I. Hellen, for defendants.

Motion overruled, and judgment rendered on the verdict for the amount of the note, with interest, from January 15, 1845, and costs.

ENFORCEMENT ACT, CHARGE TO
GRAND JURY IN RELATION TO EN-
FORCEMENT ACT OF MARCH 31, 1870.
See Case No. 18,252.

F.

FEES. See Cases Nos. 18,282-18,284, 18,290, 18,295.

Case No. 18,295.

FEES FOR REGISTERING.

[10 N. B. R. 141.]¹

District Court, E. D. Michigan. June 27, 1874.

FEES OF REGISTER IN BANKRUPTCY.

1. The fee of the register for taking an ordinary proof of debt, since the recent amendment went into operation, is one dollar and eighty-seven and a-half cents.

2. For examining and filing a proof of debt taken before any other officer, fifty cents is the proper fee to be charged.

When the bankrupt act first went into operation, the tariff of fees for proving debts was construed to authorize the charge of about one dollar to the officer who took the proof, and twenty-five cents in addition to the register by whom it was received and filed, making the usual charge, for proofs of the usual length, one dollar and twenty-five cents, or thereabouts. This tariff was changed by the supreme court about two years ago, so as to authorize a charge for the same service of at least double that existing before. The change was so great that very few, if any, registers in bankruptcy charged the whole amount allowed by the law. Some made no change at all in their charges; others advanced at varying rates, with so little uniformity, that, in some places, more than

twice as much was charged as in others. The recent amendment of the bankrupt act, by which certain fees are to be reduced to one-half, has made it necessary to ascertain what fees are now allowable for taking and filing proofs of debt in bankruptcy. The register of bankruptcy in Detroit submitted to Judge Longyear, for his consideration and determination, the following question and opinion thereon: "What fees are taxable for taking proofs of debt in bankruptcy, assuming that the deposition which presents the proof contains more than five hundred and fifty words, and that not to exceed one hour was consumed in taking the proof?"

Opinion by HOVEY K. CLARKE, Register in Bankruptcy:

Proofs of debt in bankruptcy must be "verified by a deposition in writing." Section 22 of the act as originally enacted. Section 47 provides "for taking depositions the fees now allowed by law." The fees "allowed by law," were fixed by the act of 1853, under the head of "Commissioner's Fees." "For administering an oath, ten cents," and "for taking and certifying depositions to file, twenty cents for each folio of one hundred words;" and the same act provides that an excess of fifty words shall be counted as one folio. The fees, then, for taking a proof of debts, as fixed by the act, for a deposition containing more than five hundred and fifty words, would be one dollar and twenty cents, and for administering the oath, ten cents,—one dollar and thirty cents. By general order 30, as promulgated by the supreme court at the December term, 1871, it is provided that, "in addition to the fees expressly allowed by the bankrupt act, there shall be

¹ [Reprinted from 10 N. B. R. 141, by permission.]

allowed the following: * * * To registers * * * for each examination in proof of debt, under section 22, twenty cents for each folio, and one dollar for each hour actually engaged, and for certifying each affidavit or deposition in proof of debt as satisfactory, twenty-five cents." These fees are expressly declared to be cumulative to those allowed by the act, and for the assumed six folios of the deposition, amount to one dollar and twenty cents, for the time consumed in taking, one dollar, and for the certificate, twenty-five cents, making the fees allowed "in addition," by general order 30, two dollars and forty-five cents, which, added to the fees allowed by the act, one dollar and thirty cents, make the whole sum, before the passage of the recent amendatory act, for taking a proof of debt of over five hundred and fifty words, and not consuming over an hour in taking and approving it as satisfactory, three dollars and seventy-five cents; which sum, by section 18 of the amendatory act, which requires certain fees to be "reduced to one-half," must be divided, making one dollar and eighty-seven and a-half cents as the sum now taxable for taking a proof of debt in bankruptcy, when taken before the register to whom the cause is referred and by whom it is filed.

In the case of a deposition sworn to before some other officer than the register to whom the cause is referred, the proof of debt is not complete until the deposition has been presented to such register and accepted as satisfactory, and filed by him. This supervisory power is plainly implied in the form of the notice to creditors to prove their debts in a court of bankruptcy (section 11), at which a designated register must preside (section 13); but it is expressly conferred by the amendatory act of July 27, 1868, which subjects all proofs taken by commissioners, etc., to the revision of the register. General order 34 prescribes certain duties to the register on the presentation of such proofs to him, and, moreover, expressly authorizes him to decline to file any deposition until the fee for filing the same is paid. What is this fee? This must be answered by reference to the duty involved in the filing of a proof of debt, and the inquiry whether that duty is fairly within any descriptive terms for which a fee is provided. For, of course, no such thing as a quantum meruit allowance can be made, unless the service is within the terms which allow fees. The service must be rendered without compensation. The register is allowed "for each examination in proof of debt * * * \$1 for each hour actually engaged." Such an examination the register must bestow upon any proof of debt offered to him to file, whether sworn to before him or not. This duty is not only an obvious one, but the supervision expressly contemplated by general order 34 shows that it was this service which is complete on the filing of the proof, the payment for which was contemplated by the supreme court when it was provided that, until this fee was paid, the register might decline to file the proof. The fee, therefore, for this examination, when the proof is not taken before the register in charge of the case, before the recent amendatory act, was one dollar, and now, by the reduction provided for by that act, fifty cents.

It is proper to bear in mind that, although this fee is nominally for the service rendered in filing the proof of debt, it is really the only provision made for all other services which are involved in the filing of such proof: such as entering the proof on the register's docket, computing the amount due upon it, certifying it to the assignee in the list of creditors, etc., besides the clerical care of all proofs of debt, for convenient reference by assignee or creditors, as occasion from time to time demands. These latter services are in exact proportion in each case to the number of proofs of debt

filed, and for which no other compensation is provided.

Detroit, June 27, 1874.

Approved: JNO. W. LONGYEAR, District Judge.

Ordinary proofs of debt contain usually six folios. For such proofs it is therefore established in this district one dollar and eighty-seven and a-half cents may be charged by a register in bankruptcy for taking a proof of debt, and for examining and filing a proof taken before any other officer, fifty cents.

Case No. 18,296.

FIELDS et al. v. CRAWFORD et al.

[2 Hayw. & H. 256.] 1

Circuit Court, District of Columbia. April 4, 1857.

EXECUTION—LIEN—WHEN FORFEITED—REPLEVIN.

1. An officer leaving property levied on in the hands of the defendant, subjects it to be seized upon by subsequent creditors of the defendant.

2. An officer of another state forfeits any lien he may have on property levied on, by allowing it to be taken out of the jurisdiction of the state.

3. The only judgment that can be issued in favor of the defendant in replevin is one cent damages and a retorno habendo; he must rely upon a suit on the replevin bond for his damages.

At law. Action of replevin. The following rules were adopted March 25, 1857, by the court, in compliance with the provisions of an act of congress on the subject passed at the last session: "Three terms of this court shall be held in every year, commencing on the respective days following, viz.: On the third Monday of October, on the third Monday of January and on the first Monday of May. The first term under this rule shall be held on the third day of October next." The sheriff had levied an execution in his county on a horse and buggy, the property of one Johnson, to satisfy certain judgments recovered in that county; but he allowed the property, after being thus levied upon, to remain in the possession of Johnson, and while in such possession was brought by him (Johnson) to the city of Washington. While here the same property was levied upon, by virtue of an execution from a justice of the peace, to satisfy a debt due Willard Brothers, hotel keepers, and at the sale under said execution was purchased at public auction by the defendant Crawford. Some days after the sale and purchase the sheriff of Montgomery county replevied the property from Crawford.

Kennedy & Swann, for sheriff.

Chas. Lee Jones, for defendant.

These facts being submitted to the court, and being argued by counsel, the court decided that the sheriff, in leaving the property in Johnson's possession, subjected it, even in the

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

state of Maryland, to be seized upon by any subsequent creditors of Johnson in that state; but even if the levy and execution created a valid lien on the property in that state, yet the bringing of the property out of the jurisdiction of the state forfeited any lien the sheriff might have upon it. The court instructed the jury to find for the defendant.

A question then rose as to the form of the judgment to be rendered. Mr. Jones contended that the jury were not to assess the damages for the unlawful taking and retention of the property by the plaintiff, and a returno habendo awarded. The court decided that the only judgment the defendant in replevin could receive was one cent nominal damages, and a returno habendo, and the defendant must rely upon a suit on the replevin bond for his damages. Mr. Jones, in reply, did not see why, if one cent damages could be given, more could not, and took exception. The counsel for the plaintiff, however, agreed that the case might at once be submitted to the jury to as-

sess both the value of the property and damages. The jury gave a verdict for the defendant to the amount claimed, viz., \$125, with interest from the date of the replevin.

FIELDS v. RAINBY. See Case No. 18,296.

FISH (BLAKELY v.). See Case No. 18,240.

FITZHUGH (HINES v.). See Case No. 18,302.

FOWLER (DERMOTT v.). See Case No. 18,289.

FRAUDS—CHARGE TO GRAND JURY IN RELATION TO FRAUDS OF OFFICERS OF NATIONAL BANKS. See Case No. 18,246.

FRAUDS—CHARGE TO GRAND JURY IN RELATION TO FRAUDS ON THE REV-ENUE. See Cases Nos. 18,247 and 18,251.

FUGITIVE SLAVE LAW—CHARGE TO GRAND JURY IN RELATION TO FUGITIVE SLAVE LAW. See Cases Nos. 18,261, 18,262, and 18,263.

G.

GANSEVOORT (UNITED STATES v.). See Case No. 18,313.

GEORGETOWN, CORPORATION OF, v. UNITED STATES. See Case No. 18,281.

Case No. 18,297.

GOODRICH et al. v. DOBSON.

[43 Conn. 576.]

(District Court, D. Connecticut. April 22, 1876.)

BANKRUPTCY—MUTUAL CREDITS—SET-OFF.

[One to whom a bankrupt is indebted for money advanced, and who, before the bankruptcy, has purchased a note of the bankrupt, having in his possession at the time of the bankruptcy goods of the bankrupt, consigned to him for sale, may sell the goods, and, as against a claim for the proceeds, set off his claims against the bankrupt, under Rev. St. § 5073, providing "that in all cases of mutual debts or mutual credits between the parties, the accounts between them shall be stated and one debt set off against the other, and the balance only shall be allowed or paid; but no set-off shall be allowed of a claim in its nature not provable against the estate" of the bankrupt.]

Submission to arbitration of controversy between Goodrich & Lockwood and John S. Dobson, assignee in bankruptcy.]

H. C. Robinson, for plaintiffs.

A. P. Hyde, for defendant.

SHIPMAN, District Judge. E. Crosby & Sons were manufacturers in Connecticut, who were in the habit of consigning their goods to Goodrich & Lockwood, merchants in New York, for sale. The manufacturers were ad-

judicated bankrupts upon their own petition, and John S. Dobson was appointed assignee upon their estate. Goodrich & Lockwood proved a debt against the bankrupts which amounted to \$16,595, the same being for cash advances by the consignees to the bankrupts on merchandise consigned for sale, and \$3,935 for notes of E. Crosby & Sons, purchased by Goodrich & Lockwood for value, before any act of bankruptcy by said bankrupts, and without collusion, and without suspicion of insolvency of the makers, and at a rate fairly predicated upon their solvency, and without the knowledge of the makers. Goodrich & Lockwood held at the time of the bankruptcy, and at the time of making said proof, merchandise on hand then estimated as of about the value of \$15,750, which has since been sold by them for a sum sufficient to pay both said advances and said notes. They now retain the amount of the advances and of said notes, claiming a right so to do, in payment therefor, and by way of set-off and mutual credit. The assignee denies their right to retain the proceeds of said sales beyond the amount of said advances, and the parties have submitted the question of such right to my arbitrament.

The question which is at issue between the parties depends upon the meaning of the term "mutual credits," contained in section 5073 of the Revised Statutes, formerly known as the twentieth section of the bankrupt act, which section is as follows: "That in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid."

but no set-off shall be allowed of a claim in its nature not provable against the estate: provided that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition, or, in cases of compulsory bankruptcy, after the act of bankruptcy, or in respect of which the adjudication shall be made, and with a view of making such set-off." No question is made that the notes are not provable against the estate of the bankrupt, and it is also admitted that if, prior to the bankruptcy, the goods had been converted into money, the assignee could not properly claim any sum beyond the balance due from Goodrich & Lockwood upon their entire account. But it is claimed, inasmuch as the goods were in specie at the time of the bankruptcy, and as no lien existed thereon except for the advances, and as no contract had been made by which they were to be sold to pay any and all indebtedness, that these goods did not constitute a "mutual credit," within the meaning of the section which has been quoted. The sole question is whether, under the circumstances which have been stated, the goods were a "credit," so that their avails can be applied in payment of the notes of the bankrupt.

The term "mutual credits" is one which is not generally used in the statutes of the different states relating to set-off, and is peculiar to the bankrupt laws of England and of the United States. It has a more extensive meaning than the term "mutual debts," and has received a liberal construction in England for the benefit of trade and commerce. The twenty-eighth section of 5 Geo. II. c. 30, provided: "That where it shall appear to the commissioners, or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, at any time before such person became bankrupt, the commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side, on the balance of such account, or the setting such debts against one another, and no more, shall be claimed on either side respectively." In *Rose v. Hart*, 8 Taunt. 499, Gibbs, C. J., defines "mutual credits" as follows: "Something more is certainly meant here by 'mutual credits' than the words 'mutual debts' import; and yet, upon the final settlement, it is enacted merely that one debt shall be set against another. We think this shows that the legislature meant such credits only as must in their nature terminate in debts; as where a debt is due from one party, and credit given by him on the other for a sum of money payable at a future day, and which will then become a debt, or where there is a debt, on one side, and a delivery of property with directions to turn it into money, on the other, in which case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on

the two debts, and the words of the statute will in all respects be complied with; but, where there is a mere deposit of property without any authority to turn it into money, no debt can ever arise out of it, and therefore it is not a credit within the meaning of the statute."

As thus expounded, the familiar doctrine of the right to set off mutual debts is enlarged by the addition of the term "mutual credits"; so that, if one party owes a debt which is due at the time of the bankruptcy to a person who is indebted to the other in a sum payable in futuro, the one debt may be set off in bankruptcy against the other; and if, at the time of the bankruptcy, A., a bankrupt, owes B. a debt, and has also placed goods in his hands with directions generally to turn into money, though not on account of or in payment of that particular debt, the goods are a mutual credit, and their avails, when sold, which avails have then become a debt due to A.'s assignee, may be set off against the debt which is due from the bankrupt. It will be observed that this principle has no reference to any legal or equitable lien which has been created by contract or custom between the parties, but rests entirely upon the statute. It is also to be remembered that it was never supposed that goods or choses in action which had been deposited by the bankrupt with a person for a particular purpose, as a collateral security for a specific debt, or upon pledge, or upon trust, were a mutual credit; nor that the avails of such property, if it was sold after the filing of the petition, could be used as a set-off against any other debt or general balance due to such person from the bankrupt. The decision in *Rose v. Hart*, which was carefully considered, and which was a modification of previous decisions, has ever since been regarded of paramount authority by the English courts. Subsequent decisions have somewhat varied from each other as to the exact meaning of that part of the opinion which states that "the credits must in their nature terminate in debts"; and it has been insisted by eminent judges that those goods only could be considered a mutual credit "when, from the nature of the transaction, and according to the terms of the contract or contracts between the parties, the demands arising on the one side and on the other must necessarily result in mutual pecuniary debts." Dissenting opinion of Kelly, C. B., in *Astley v. Gurney*, L. R. 4 C. P. 724. As this distinction is one of great importance in this case, and, if it is supported by the weight of authority, is decisive against the claim of the consignees, an examination of the later English decisions becomes necessary.

The three important decisions upon this subject are *Young v. Bank*, 1 Deac. 622, *Naoroji v. Bank of India*, L. R. 3 C. P. 444, and *Astley v. Gurney*, L. R. 4 C. P. 714.

The facts in *Young v. Bank*, which are substantially taken from the syllabus of the case, are as follows: *Palmer & Co.*, having

borrowed a large sum of the Bank of Bengal, deposited the promissory notes of the government of Bengal (commonly called the "company's paper") as a collateral security, accompanied with an agreement, in writing, authorizing the bank, in default of repayment of the loan by a given day, to sell the company's paper for the reimbursement of the bank, rendering to Palmer & Co. any surplus. Before default was made, Palmer & Co. were declared insolvent, under the India insolvent act, which contains a provision in regard to set-off similar to the section of the act of Geo. II. which has been cited. At the time of the adjudication in insolvency, the bank were also holders of two notes of Palmer & Co., which they had discounted for them before the transaction of the loan and the agreement as to the deposit of the company's paper. The time for repayment of the loan having expired, the bank sold the company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a surplus. "In an action by the assignee of Palmer & Co. against the bank to recover the amount of this surplus, held, that the bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the bankrupt act." It will be perceived that the paper which was deposited by the bankrupt with the bank was as collateral security for the repayment of a particular loan. Lord Brougham, who gave an elaborate opinion in the case, does not rest his decision entirely upon that ground, however, but substantially holds that the doctrine of mutual credit only applies where the person who had given the credit "had placed the other party in a situation which he himself could not alter, had given him funds of which he could not dispossess him, or, which is the same thing, a power over funds which he could not revoke"; and that Palmer & Co. had not placed themselves in this position, because they could at any time, by repaying the moneys advanced, have regained possession of the deposit, and determined the power of sale, and thus have prevented the bank from ever receiving the surplus. The court considered the decision in *Rose v. Hart* to be "that such a set-off is only competent to the pawnee where the thing alleged to be a giving of credit either constitutes a present cross debt or must end in one." If the opinion of Lord Brougham, though not necessary to the decision of that case, was now the law of England, it would follow that in the case now under consideration no mutual credit existed, for the assignee could probably have compelled the consignees to deliver up the goods at the time of his appointment, by the repayment of their cash advances, and have determined their power of sale.

In *Alsager v. Currie*, 12 Mees. & W. 751, the court of exchequer pointed out the facts upon which *Young v. Bank* really turned;

and in *Naoroji v. Bank of India*, L. R. 3 C. P. 444, Byles, J., bluntly declares that "the case is a very doubtful authority." In the *Bank of India Case* "the plaintiffs were in the habit of drawing bills upon merchants in Bombay, and handing them to the defendants, bankers in London, for collection by the defendants' Bombay branch; the proceeds, when received, being remitted by the Bombay branch to the plaintiffs through the defendants' house in London. The plaintiffs executed a deed of inspectorship under the bankrupt act." The defendants had then in their hands bills of the plaintiffs to the amount of £3,248, which were subsequently collected. "At the same date the plaintiffs were indebted to the defendants on certain bills of exchange in the sum of £3,335." The plaintiffs insisted, upon the authority of *Young v. Bank*, that the deposit of the bills for collection was not a mutual credit, because, at the time of the bankruptcy, the assignee could have revoked that authority, and recalled the bills. The court held the case one of mutual credit. The importance of the decision to the present discussion consists in the definitions which the judges give to the expression "mutual credit," and in their disregard of the rigid construction which Lord Brougham had placed upon the language of Chief Justice Gibbs. Byles, J., says: "'Mutual credits' I conceive to mean simply reciprocal demands, which must naturally terminate in a debt. It seems to me that the transaction described in this case would naturally terminate in a debt." Montague Smith, J., says: "To bring a case within the act, it is not necessary that the credits should be dependent the one upon the other, nor that there should have been any agreement beforehand. The object of the enactment seems to me to have been that where merchants have had mutual dealings, each giving credit to the other, relying upon each other's solvency, in the event of the bankruptcy of one of them the account shall be taken between them of all such credits and dealings as in the natural course of business would end in debts, and the balance shall be the debt due from the one to the other."

Astley v. Gurney, L. R. 4 C. P. 714, next came before the court of common pleas. The facts as stated in the syllabus were that on March 30, 1865, Joyce & Co. indorsed and deposited with the defendants bills of lading for cotton and coffee valued at £7,048, as collateral security for the defendants' acceptance for £5,000. On April 5th, Joyce & Co. indorsed and deposited with the defendants bills of lading for other cotton, valued at £4,280, and four bills of exchange, amounting to £2,400, as collateral security for a further acceptance of the defendants for £5,000. Joyce & Co. were at this time already largely indebted to the defendants upon bills which the defendants had discounted for them, and which were

subsequently dishonored; and, on May 19th Joyce & Co. became bankrupt. Before their bankruptcy, Joyce & Co. gave their assent that the defendants should sell the cotton and coffee, and receive the proceeds. The cotton was sold, and the proceeds received by the defendants, before the bankruptcy of Joyce & Co. The coffee did not arrive until after the bankruptcy. It was then sold by the defendants. The four bills deposited with the defendants were duly paid. The securities deposited on March 30th and April 5th realized £11,816. 12s. 3d., thus leaving, after payment by the defendants of two acceptances of £5,000 each, a balance of £1,816. 12s. 3d., which the defendants claimed to set off against the debt due to them from Joyce & Co. Held by the court of common pleas, upon the authority of *Naoroji v. Bank of India*, a case of mutual credit as to the cotton and coffee; aliter as to the bills, upon the authority of *Young v. Bank*; and judgment was given for the plaintiffs for £1,816. 12s. 3d. The exchequer chamber (Kelly, C. B., dissenting) reversed the judgment. The court of exchequer seem to have supposed that the common pleas held that the coffee was not a mutual credit, and base their decision upon the fact that Joyce & Co., before their bankruptcy, gave their assent to the sale by the defendants of the cotton and coffee, and to their receiving the proceeds. Cleasby, B., giving the opinion of the court, says: "It appears to us that this authority altered the relation of the parties, and that, so soon as it was given, credit was given to Overend, Gurney & Co. for the proceeds of the sale, and the case is brought within the authority of the case in the common pleas of *Naoroji v. Bank of India*."

The facts of that case and of the present bring them within the second rule laid down by Gibbs, C. J., in *Rose v. Hart*. Kelly, C. B., in his dissenting opinion, did not fail to point out that the authority to sell did not take away from Joyce & Co. the power to provide themselves for the acceptances, and to take back the bills of lading, and thus that the coffee was not necessarily to be converted into money, and ought not to have been treated as money. The majority of the court, however, clearly held with the court in the *Bank of India* Case, that, where the natural result of the arrangement between the parties in the ordinary course of business would be the conversion of the property into money, such a delivery constituted a mutual credit. It can therefore now be considered that so far as *Young v. Bank* is an authority for holding that, to constitute a mutual credit, the authority to sell must be irrevocable, the authority is overruled in England. It may be added that the dicta in *Murray v. Riggs*, 15 Johns. 571, and *Ex parte Caylus*, Low. 550, Fed. Cas. No. 2,534,—the American cases which are directly upon this point,—are in conformity with *Rose v. Hart*. The remark of Judge Woodruff in

Clark v. Iselin, 10 Blatchf. 211, Fed. Cas. No. 2,825, that "any collections in excess of the advances for which they [the assets of the bankrupt] were specifically pledged, made after the filing of the petition, were collections for the account of the consignees, and as to them no such right of set-off exists," refers to collections of assets which were pledged as collateral security for a specific debt, which assets, while they existed in specie, did not constitute a mutual credit, and the avails of which, unless collected before the filing of the petition, could not therefore be used as a set-off. It is true that Lord Brougham's rule is one which relieves assignees from responsibility, and does not cast upon them the burden of deciding whether they will or will not raise the money to pay the consignees cash advances, and take possession of the goods; but upon principle, if a consignee who has at the time of the bankruptcy in his possession goods of the bankrupt, which must necessarily be sold by the terms of the contract, can retain the avails as a set-off against any debt of the bankrupt, it would seem that he could also, with as much propriety, retain the avails of goods which he was directed to sell, and which at the time of the contract of the unsecured debts must be sold in the ordinary course of business, and which, therefore, naturally constituted the basis of the credit given to the bankrupt, and which goods had been sold without objection. The factor has no higher equitable title to the money in the one case than in the other. In each case the effect of the sale is to give him an advantage over the other creditors, and an advantage to which he has no more superior equity in a case where the property must necessarily be converted by him into money, than where it must be sold unless the assignee prevents the sale by paying the liens upon the property.

If the notes of E. Crosby & Sons had been directly given to Goodrich & Lockwood for moneys loaned to the former, though without reference to the goods, or for property purchased by the bankrupts from Goodrich & Lockwood, the merchandise would clearly have been a mutual credit, under all the decisions except *Young v. Bank*. It is, then, to be considered whether the fact that the notes were purchased of these persons without the knowledge of E. Crosby & Sons, though with no suspicion of their insolvency, varies the rights of the parties. The notes are a debt provable against the bankrupt estate, and, if the goods constitute a credit given by the bankrupts to the consignees, the avails of the goods may be set off against any provable demand which Goodrich & Lockwood have against the bankrupts; and it is not material whether that claim consists of purchased notes of the bankrupts or of money directly loaned to them. *Alsager v. Currie*, 12 Mees. & W.

757. The important question to be determined is, were the goods deposited under such circumstances that they constitute a credit? And, if they were a credit, the only remaining question to be decided by the assignee and the creditor, under the twentieth section, is, what is the balance of money due to or from the consignee upon the final statement of his account with the bankrupt estate? In cases of involuntary bankruptcy, it would not seem, under the amendment of June 22, 1874, to be important where or for what purpose the claims against the bankrupt were purchased, provided they were not purchased after the filing of the petition. As has been suggested, the material question in cases of this class is, were the goods delivered under such circumstances as to constitute a mutual credit? The conclusions which are sanctioned by the authorities are that where a known debt is due from the bankrupt, and goods have been deposited with the creditor, not as a pledge, for sale under such circumstances of dealing between the parties that a conversion into money is, in the ordinary course of business, the natural result of the transaction, such goods constitute a mutual credit given by the bankrupt to the other; and when they are sold, either before or after the filing of the petition, the avails may be set off against any unsecured claims due from the bankrupt, under the restrictions provided in section 5073 of the Revised Statutes. Goods deposited as a pledge or as collateral security are not a mutual credit; but if sold before the filing of the petition, in good faith, the excess above the debt for which they are security becomes a debt of the consignee to the bankrupt, capable of being set off like any other mutual debt. If such goods are sold after the filing of the petition, the excess belongs to the assignee.

Upon the foregoing principles, it follows that nothing is due from Goodrich & Lockwood to the estate of E. Crosby & Sons.

GORDON (HINES v.). See Case No. 13,302.

Case No. 18,298.

GORMLEY v. SMITH.

[2 Hayw. & H. 202.]¹

Circuit Court, District of Columbia. April 17, 1856.

CONTRACTS—DAMAGES FOR BREACH—PROSPECTIVE PROFITS.

1. On a contract with the defendant to haul all the stone which the defendant had contracted to supply for the capitol extension, the plaintiff hauled about one-half, and was forbidden by the defendant to proceed further.

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

2. In an action on the contract it was held: That the plaintiff is entitled to the contract price for the stone he had hauled, and the gain or profit he would have made if he had been allowed to complete the contract.

At law. Action for work and labor. This action of trespass on the case was brought on the following bill of particulars:

Bartlett Smith, to Philip Gormley, Dr.	
Aug., 1851,	To hauling 15,664 perches of gneiss rock for the extension of the U. S. Capitol, at 40 cents per perch. . . . \$6,265 60
May, 1852.	To profit on hauling 17,976 perches of gneiss rock for same, said profit being 18 cents per perch. 3,495 37
Dec., 1852.	By cash to this date. \$9,760 97
Dec., 1852.	By cash to this date. 3,370 00
	Balance due \$6,390 97

On the trial of the case the following instructions were prayed for by the respective counsel. On the trial of this cause, the plaintiff, to maintain the issue on his part, gave in evidence the proposition in writing from the plaintiff to the defendant, and proved by Samuel Strong, a witness on his part, produced by him, that the witness was the superintendent of the work of the extension of the capitol; and that he received from the defendant the said paper, and that the defendant in his presence accepted the said proposition, and the witness then and there noted the said acceptance at the bottom of the said paper. That the plaintiff thereafter promptly proceeded to perform the said contract on his part till he was forbidden from proceeding further by the defendant, who rescinded the contract, without expressing any reason for so doing. That the plaintiff had in part discharged his duty under said contract faithfully till then, and was prepared and able, and offered to complete it. And that the fair gain which he would have made thereon was 18 cents per perch, and that the whole amount of the stone hauled for the said work, from the said canal, was 33,640 perches, of which the said plaintiff hauled 15,664. That while the said work was progressing, the said Smith assigned his contract for the north wing to one O'Neal. That the plaintiff offered and was ready to proceed, notwithstanding said assignment, but that the defendant, aforesaid, assigned the same so as to cut off the plaintiff's right, and that he was notified by the plaintiff that he should claim the hauling of the whole and hold him responsible; but the defendant nevertheless forbade the plaintiff from further proceeding.

The witness further proved that the contract between the plaintiff and the defendant was for the hauling of all the stone which should be required for the capitol extension both wings, for the supply of all of the stone the defendant held a contract with

the government. And thereupon the defendant prayed the court to instruct the jury that the plaintiff is only entitled to recover in this action the balance of the account for stone actually hauled at the rate proven, and not for any gain or profit which he would have made if he had hauled all the stone required for the said work. Which instruction the court (DUNLOP, MORSELL and MERRICK), refused to give, to which refusal the defendant, through his attorney, excepted.

Verdict for the plaintiff. Damages \$6,399.97, with interest, from Dec. 1, 1852. Motion for new trial.

W. D. Davidge and Mr. Ennis, for plaintiff.
J. M. Carlisle, for defendant.

Motion overruled and judgment on the verdict.

Case No. 18,299.

GREENHOUGH v. KEYWORTH.

[2 Hayw. & H. 9.]¹

Circuit Court, District of Columbia. June 11, 1850.

BILLS AND NOTES—ENDORSEMENT FOR COLLECTION
—SUIT BY ENDORSER.

Where a note payable to the plaintiff or order was endorsed over to a bank for collection, and the bank was unable to collect it, the endorser may bring his action against the maker without regard to the endorsee for collection, and may erase the cashier's or endorser's name from the note without affecting his right to recover as against the maker.

At law. Suit on two promissory notes.

The following are the notes on which the action was based: "Washington, June 4, 1841. Sixty days after date I promise to pay to the order of B. F. Greenhough two hundred and thirty-five $\frac{81}{100}$ dollars, value received, payable at the Bank of the Metropolis, Washington, D. C. \$235 $\frac{81}{100}$. Robert Keyworth. August 3 to 6." Endorsed by B. F. Greenhough: "Stanley Reed & Co. Pay J. M. Houston, cash or order. T. Duron, Cashier. Credit ac. I. Solono. J. M. Houston, Cashier." The other note was for ninety days, drawn by the same party to the plaintiff's order, for the same amount, with the same endorsers, due September 2d to 5th. The former was presented at the Metropolis Bank August 6th, and the latter September 4th. Notices of protest to each endorser were deposited in the post office, enclosed to J. M. Houston, Esq., Cashier, Philadelphia, Pa. The names of "T. Duron, Cashier," and "J. M. Houston, Cashier," were erased.

The declaration is as follows: "District of Columbia, Washington County—To Wit: Robert Keyworth, late of the county aforesaid, was attached to answer Benjamin F. Greenhough, in a plea of trespass on the case, and so forth. And whereupon the said plaintiff,

by Jos. H. Bradley, his attorney, complains that whereas, heretofore, to wit, on the 4th day of June, A. D. 1841, the said defendant made his certain note in writing, commonly called a promissory note, his own proper handwriting being thereunto subscribed, bearing date the day and year aforesaid, and thereby sixty days after the date thereof promised to pay to the plaintiff, by the name of B. F. Greenhough or order, the full and just sum of two hundred and thirty-five dollars and eighty-one cents, current money of the United States, for value received at the Bank of the Metropolis, Washington, D. C., and then and there delivered the said note to the plaintiff. And whereas, afterwards, to wit, on the 4th day of June, A. D. 1841, at the county aforesaid, the said defendant made his other promissory note, &c., ninety days after date, &c. By reason thereof, and by force of the statute in such case made and provided, the defendant became liable to, by the said sums of money, in the said notes mentioned, to the plaintiff (according to the tenor and effect of the same), and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the plaintiff, according to the tenor and effect thereof, whenever afterwards he should be thereto requested. And whereas, the defendant afterwards, to wit, on the 5th day of September, 1841, at the county aforesaid, was indebted unto the plaintiff in another sum of six hundred and fifty dollars, like money, for the like sum, by the plaintiff to and for the use of the defendant before that time paid, laid out and expended, at the special instance and request of the defendant; and for other money by the plaintiff before that time lent and advanced to the defendant at his special instance and request; and for other money by the defendant before that time had and received to the use of the plaintiff, and being so indebted the defendant in consideration thereof afterwards, to wit, on the same day and year last aforesaid, at the county aforesaid, undertook and promised the plaintiff to pay him the last mentioned sum of money when afterwards he should thereunto be required. And whereas, the defendant afterwards, that is to say on the 5th day of September in the year aforesaid, at the county aforesaid, accounted with the plaintiff of and concerning divers sums of money from the said defendant to the said plaintiff before the time due owing then in arrear and unpaid, and upon such accounting the said defendant was then and there found in arrear and indebted to the said plaintiff in the further sum of six hundred dollars; and being so found in arrear and indebted, the said defendant afterwards, that is to say, on the day and year last mentioned, at the county aforesaid, in consideration thereof, undertook and then and there faithfully promised to pay to the plaintiff, when thereto afterwards required, the said last mentioned sum of money. Yet the defendant, the said several sums of money herein mentioned, or any part thereof, (although often

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

thereto requested, to wit, on the day and year last aforesaid, at the county aforesaid, and often afterwards) hath not paid, but the same or any part thereof, to pay hath hitherto wholly refused, and still doth refuse to the damage of the plaintiff in the sum of one thousand dollars, current money, and therefore he brings suit, and so forth."

Verdict for the plaintiff for the amount of the notes and interest until paid.

Motion in arrest of judgment: (1) Because the second count upon one of the notes set forth a day of indebtedness different from the day when it became due, to wit, it sets forth the 5th day of September, 1841, whereas the note to which it refers did not become due until the 7th day of September, 1841, and therefore the obligation is premature,—citing *Sheehy v. Mandeville*, 7 Cranch [11 U. S.] 208. (2) That the declaration does not aver any non-payment of either of the notes, but relies upon the insimul computassent on the 5th September, 1841, which was before the second note was due. (3) That the action is upon neither entirely as notes; and when the declaration does not set out the written contract correctly, the plaintiff cannot recover upon the count erroneously framed on the contract, and he cannot recover upon the money counts, because there is a written contract,—citing

Page's Adm'rs v. Bank of Alexandria, 7 Wheat. [20 U. S.] 35.

Motion for a new trial, because, that the verdict was against the evidence. Action on two promissory notes, specially endorsed and stricken out.

Points reserved by the counsel for the defendant for the opinion of the court: That a special endorsement, or endorsement in full, cannot be stricken out, so as to give the endorser a right of action, unless he shows how he reacquired the note. *Craig v. Brown* [Case No. 3,327]; *Burdick v. Green*, 15 Johns. 247. A payee of a note, who has specially endorsed it, cannot recover in his own name without proof of payment to the endorser. *Georgerat v. McCarty*, 2 Dall. [2 U. S.] 145. Possession of a note is not evidence of ownership without a reassignment. *Welch v. Lindo*, 7 Cranch [11 U. S.] 159.

Jos. H. Bradley, for plaintiff.

Henry M. Morfit, for defendant.

Motion in arrest of judgment, and new trial overruled, and judgment rendered on the verdict.

GUNTON (*BELLSWORTH v.*). See Case No. 18,294.

H.

HALLACK v. BLAIR. See Case No. 18,292.

Case No. 18,300.

HANCOCK v. WILMINGTON & R. R. CO.

[Cited in Case No. 11,563. Nowhere reported; opinion not now accessible.]

Case No. 18,301.

HICKERSON v. UNITED STATES.

[2 Hayw. & H. 228.]¹

Circuit Court, District of Columbia. Dec. 18, 1856.

NUISANCE—PUNISHING SLAVE—QUESTION FOR JURY.

1. It is an indictable offence to inflict punishment on a servant or slave, to the annoyance or nuisance of citizens, whose pleasure or business carry them near the scene of infiction.

2. The question of nuisance or no nuisance is one of fact exclusively for the jury to decide.

At law. Writ of error to the criminal court. Indictment for an assault on a slave. The following is the indictment: That William

Hickerson, late of the county aforesaid, laborer, on the 2nd day of June, 1856, with force and arms, at the county aforesaid, in and upon one negro, James, the said James being then and there a slave, the property of one Mary A. Dodson, in the peace of God and the said United States, then and there being near a public street and highway in the county aforesaid, did make an assault and battery; and him, the said James, did then and there beat and ill treat, and other wrongs and injuries to the said James then and there did, to the great damage of the said James, to the terror and disturbance and annoyance and common nuisance of the good citizens of the United States, then and there passing and repassing on and near the said public street and highway, and there and thereabouts being and abiding and against the peace and government of the United States.

The defendant, by his counsel, moved the court to quash the indictment, because the offence charged is not an indictable offence.

THE COURT overruled the motion.

The defendant's counsel prayed the court to instruct the jury as follows: If the jury believe that the negro James, mentioned in the indictment, was a slave of Mary

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

A. Dodson, and was hired to Mr. Burch, the keeper of a livery stable, and that the defendant was the manager for said Burch, with authority from him to correct and manage his servants; and that the assault and battery charged was a mere whipping inflicted by said defendant in the said stable, then the jury must acquit the defendant of the offence charged.

THE COURT refused to give the instructions, but gave the following: "The court cannot say to the jury that the fact of the defendant having inflicted the whipping in a stable entitled him to acquittal. If they believe it to have been so from the evidence in the case, it is necessary that they should believe from the evidence that the whipping took place near a public street or highway, and that it was to the terror, disturbance, annoyance and common nuisance of the good citizens of the United States, for it is so charged in the indictment. It must amount, and you must believe that it was a nuisance, for a technical assault and battery on a slave is not indictable. A master or hirer of a slave, or his manager, has a right to correct a slave that belongs to him, or to whose services he is entitled by hiring, but if he does so in a cruel or inhuman manner in such a place, whether it be in a street, a house or stable, as to be an annoyance or nuisance to the citizens, whose pleasure or business carry them near the scene of the infliction, he is indictable. The question of nuisance, or no nuisance, is one of fact exclusively for the jury to decide." To which ruling and instructions of the court, the defendant, by his counsel, excepts, and prays that this bill of exception may be signed, sealed and enrolled, which is done accordingly.

Charles L. Jones, for petitioner.
P. B. Key, for the United States.

Judgment of criminal court affirmed.

HILL (BLOOMER v.). See Case No. 18,242.
HINES v. FITZHUGH. See Case No. 18,302.

Case No. 18,302.

HINES v. GORDON et al.

[2 Hayw. & H. 222.]¹

Circuit Court, District of Columbia. June 20, 1856.

HUSBAND AND WIFE — DISPOSAL OF PROPERTY BY WILL — ABANDONMENT.

1. In the absence of consent on the part of her husband, a wife cannot dispose of her personal property by will during his lifetime.

2. Judge Morsell *held*, that where a husband voluntarily abandoned his wife and neglected to provide for her, she may dispose of any prop-

erty she may have subsequently acquired in such manner as she may please.

At law. This is an issue from the orphans' court between Jacob Hines and John Gordon and John Fitzhugh to try the validity of a will executed by Mrs. Rachel Hines, the mother by a former husband of the defendants' wives. The following is the caveat of Jacob Hines in the matter of the will of Rachel Hines, deceased: "(1) Your caveator respectfully represents that the paper propounded as the last will and testament of Rachel Hines, deceased, is not the last will and testament of said Rachel. (2) That at the time prior to the making of the alleged will, said caveator intermarried with said Rachel, which said marriage was never annulled or vacated till the death of said Rachel; and that no consent was given by said caveator to the making of said alleged will, or any will or testament or disposition by the said Rachel. Wherefore the said caveator respectfully prays that the said will may not be admitted to probate, and that the court may direct an issue to be made up and sent to the circuit court, to try whether the said alleged will is the last will and testament of said Rachel Hines." The issue as prayed was sent up to the circuit court.

Bradley & Bradley, for the will.
Carlisle & Maury, for the caveator.

The defendants, through their counsel, asked the court to give to the jury the following instructions: "If from the whole evidence aforesaid the jury shall find that the said Rachel Hines was, in the year 1837, the widow of Thomas Taylor, then late of the city of Washington, the administratrix of the personal estate of said Thomas, and guardian of her three children by said Thomas: to wit, (one name not given) since deceased, unmarried and intestate; Martha Ann, the wife of the defendant Fitzhugh, and Rachel, the wife of the defendant Gordon. That as administratrix and guardian as aforesaid, she had possession and control of the real estate and personal estate of said Thomas, and kept the same undistributed, and undivided, and so managed the same for the common benefit of herself and her said children until the year 1850. That in the year 1850 the personal estate of said Thomas, and the accounts of said guardian were settled, and by the said settlement the negro woman and her children in said will named were passed to the testatrix as part of her share in said estate, and in settlement of her account as guardian for the maintenance and education of her said children, then in the year 1850, and not before, in law, she became the purchaser of said negro woman and children, and until then she had no separate estate in them which would have enabled her to dispose of them in her own right. And if they shall further find that in the year 1837 the said Rachel

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

intermarried with the said Jacob Hines, she still retaining the said control, possession and management of the estate of said Thomas; and that in the month of December, 1841, he deserted and abandoned her, refused to provide for her support, and told her in effect to provide for herself, went to the state of Ohio, and ever after to the day of her death remained and continued to live separate and apart from her, and afforded her no aid, protection or support; that to support herself and her said children, she was obliged to open and keep, and did in fact open and keep, and provide for, and furnish a boarding house, and entertain boarders therein in the city of Washington, from the year 1842 to the year 1847, when the said Fitzhugh was married, and for that purpose did from time to time rent divers houses in said city, and did thenceforth, to wit, from December, 1841, to her death in 1852, deal, trade and carry on business in the said city in her own name, on her sole credit and responsibility, assisted by the means so as aforesaid derived from the estate of said Thomas Taylor, and was enabled thereby to maintain herself and said children, and to purchase the said negroes as aforesaid in the year 1850, then she had a right in law to dispose of the same as her separate property, either in her life-time, or by her last will." The court refused to give the above instructions.

The caveator, through his counsel, asked the court to give to the jury the following instructions: "If the jury believe from the evidence that the slave Henny, mentioned in the alleged will, is the same slave mentioned in the inventory of the estate of said Thomas Taylor, and that the other slaves in said will mentioned are the issue of the said Henny, born while she was held by the said Rachel Hines, after the death of said Taylor, and before her marriage with said Hines, or after said marriage, then the alleged will being made only as to the said property, is null and void." Which said instruction the court gave as prayed.

To the granting of said instructions, as prayed for by the caveator, as also to the refusal of the instructions prayed for by the defendants, the defendants excepted.

The following prayers were offered by the counsel for the caveator, and, the court being divided in opinion, were refused: "If the jury believe from the evidence aforesaid that the separation between the caveator, Jacob Hines, and his wife Rachel, in the year 1841, was not intended by the said Jacob to be a final abandonment of his said wife, but was with the intention of returning to live with his said wife; or if the jury shall find from said evidence that the said separation was continued only in consequence of the said Rachel's determination and declaration, that she would never live with her said husband again; in either case they must find for the caveator, Jacob Hines, on this issue. If the jury believe from the evidence aforesaid that the deceased, Rachel Hines, at the time of executing the paper writing so as aforesaid propounded as a will, and at the time of her death was the lawful wife of the caveator, Jacob Hines, and that the said Jacob Hines did not assent to the making of the said paper writing, then the said paper writing is not the will of the said Rachel Hines, but is utterly null and void, and they must render their verdict for the caveator on this issue."

MORSELL, Circuit Judge, agreeing with his colleague, DUNLOP, Chief Judge, on general principles, but making an exception in this case, expressing himself to the effect that where a husband voluntarily abandons his wife, and neglects to provide for her, the wife may dispose of any property she may have subsequently acquired in such manner as she may please.

At the March term, 1855, the verdict of the jury was for the caveator.

Motion was thereupon made for a new trial by the defendants. At this, the March term, 1856, the court dismissed the motion for a new trial, and certified the verdict to the orphans' court.

I.

ILLEGAL VOTING—CHARGE TO GRAND JURY IN RELATION TO ILLEGAL VOTING. See Case No. 18,254.

INTERNAL REVENUE LAWS—CHARGE TO GRAND JURY IN RELATION TO FRAUDS UPON THE REVENUE. See Case No. 18,251.

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INTERNAL REVENUE LAWS—CHARGE TO GRAND JURY IN RELATION TO INTERNAL REVENUE LAWS. See Case No. 18,248.

J.

JOHNSON (ARMSTRONG v.). See Case No. 18,226.

Case No. 18,303.

JOHNSTON v. CLARKE et al.

[2 Hayw. & H. 258.]¹

Circuit Court, District of Columbia. April 6, 1857.

BUILDING ASSOCIATIONS—USURY—DEALING WITH PARTNERSHIP FUNDS—INJUNCTION.

A number of persons enter into mutual agreement to subscribe and pay into a common fund by regular instalments, say \$1 per month for each share a member may take, until the fund has accumulated so as to divide \$200, or any given amount, to a share; at which period the partnership is to cease; and to secure punctuality, each member neglecting his monthly payments is subjected to a fine, say of 10 cents upon every dollar he fails to pay at the regular monthly meetings. The period of distribution is hastened, and the common fund made productive by authorizing any member to make a composition sale of his interest in the ultimate distribution, to the other members of the association. Thus, whenever there are funds enough in the treasury for the purchase of one or more shares at any regular meeting of the association, the member who bids the highest premium, or in other words, agrees to take the lowest price, is paid the price so bid by him for his ultimate share. He remains, however, a member of the society until the close, paying thenceforth a double instalment on his shares, \$2 per month on each, instead of \$1, and subject to all the regulations of the society, liable to attend its meetings and to do any duties which might be devolved upon any other member, and liable to the regulated fines, in default of punctual payment of monthly contributions or any other default under the rules. To secure a compliance with his contract to the company, the member making such composition of sale executes his bond in the penalty of the ultimate value of the share sold, conditioned for the faithful payment of the monthly dues thereafter to accrue, and all fines and forfeitures which may under the rules be imposed on him for any defaults. He also executes a deed of trust, conveying real estate, to secure a compliance with the condition of the bond. There is in the bond and deed no stipulation for the return of the principal sum advanced to the member, nor is it at all in the power of the society to compel its return if he fulfill the conditions of the bond and deed of trust.

Held: 1. Such stipulations entered into are not, on their face, a device to cover a usurious loan; and such a transaction is not usurious upon its face.

2. This was a dealing with the partnership funds, in which the complainant had an interest in common with the members of the society, and was not a loan; the complainant was interested in the money when it was advanced and when it was repaid.

3. An injunction to restrain a sale under the deed of trust ought to be refused.

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

[Bill] in equity for an injunction [by John Johnston against Richard H. Clarke and Daniel Ratcliffe, trustees of the Potomac Building Association].

Johnston filed a bill praying for a special injunction of the court to release him from the payment of certain bonds and forfeitures due the Potomac Building Association, for money advanced by the society on certain shares of stock held by Johnston in the society, on the ground that the contract between the association and the applicant was illegal, and the action of the association usurious. The complainant gave a deed of trust to secure a loan of \$260. That since making the loan he had paid \$239. That the association claims there is due \$203.50, and on default of the payment are about to make a sale of the premises, north half of lot 24, in square 732. That the contract and transactions between the complainant and the association are usurious. That he may be credited with the sum paid, and that the interest may be adjudged according to equity, and that the trustees be enjoined from selling the property. Advance was purchased by the complainant on his two shares of stock at a premium of 35 per cent. May 3d, 1851.

Carlisle & Maury, for complainant.

Bradley & Bradley and others, for defendant.

MERRICK, Circuit Judge, delivered the opinion of the court as follows:

The complainant is a member of one of those voluntary associations, with the principles and modes of operation of which the public has long been familiar, under the denomination of building associations, and brings his bill into this court against the trustees of the association, to restrain the enforcement of the stipulations he has entered into with them in the usual conduct of the business of the association, and in furtherance of the objects for which he, and all its other members enter into the co-partnership, upon the ground that those stipulations are usurious, unconscionable and oppressive. This case is understood to raise the question, presented by several of like character on the docket, of the lawfulness of the operations of this class of associations, and of a large number of kindred societies which are known as benefit societies, and have as their ostensible object the accumulation of a fund for each of their members by the periodical contribution of small savings, which are made productive by being advanced in certain amounts to individual members in the form of composition sales of their interests. All these societies combine two leading features, viz: hoarding savings, and making profits by compounding interest

on the savings, on substantially the same principles as savings banks and mutual insurance companies, by the following simple process: A number of persons enter into a mutual agreement to subscribe and pay into a common fund, by regular instalments, say one dollar per month, for each share the member may take, until the fund shall have accumulated so as to divide \$200, or any other given amount to each share, at which period the partnership is to cease, and the share of each member thus accumulated will be a fund for him to purchase a small freehold tenement, or to be applied to any other prudential use he may determine; and to secure punctuality each member neglecting his monthly payments is subjected to a fine, say of ten cents upon every dollar he fails to pay at the regular monthly meetings. The period of distribution is hastened and the common fund made productive by authorizing any member to make a composition sale of his interest in the ultimate distribution to the other members of the association. Thus, whenever there are funds enough in the treasury for the purchase of one or more shares at any regular meeting of the association, the member who bids the highest premium, or in other words agrees to take the lowest price, is paid the price so bid by him for his ultimate share. He remains, however, a member of the society until the close, paying thenceforth a double monthly instalment on his shares, \$2 per month on each instead of \$1, and subject to all the regulations of the society, liable to attend its meetings and to do any duties which might be devolved upon any other member, and liable to the regulated fines in default of punctual payment of monthly contributions, or any other default under the rules. Whenever a sale of this kind is effected, it is manifest that unless some arrangement is made the society has no security that the member who has been advanced by his sale his ultimate share of profits will continue to bear his proportion of the burden of mutual contribution; therefore a bond in the penalty of the ultimate value of the shares sold and a deed of trust upon real estate is executed to the society, conditioned for his faithful payment of the monthly dues thereafter to accrue, and all fines and forfeitures which may, under the rule, be imposed on him for any defaults. There is in the bond and deed no stipulation for the return of the principal sum advanced to the member, nor is it at all in the power of the society to compel its return if he fulfill the conditions of the bond and deed of trust. Should the member fail to comply, the bond and deed of trust become forfeit, and the society may direct a sale of the property conveyed by the deed to raise the amount of damages which are ascertained and liquidated by the deed of trust, and which are usually the return to the society of the advance paid upon the bid of the member, with interest thereon,

all the monthly dues and fines which may be in arrear; and the member is then and thereby reinstated in the condition of a member who has had no advance, and has paid his dues and fines, &c.

The facts in the present case conform to the general scheme I have mentioned. John Johnston is a member of the Potomac Building Association, consisting of 176 members. On the 5th of May, 1851, he received from the society \$260, bid on 2 shares of the ultimate value of \$400. In other words, he sold to the members at 35 per cent. discount, and gave bond and deed of trust for the payment of double monthly dues thenceforth, or \$4 per month, and for such fines and forfeitures as he might incur; and falling in arrear for dues and fines in December, 1856, the trustees under the deed of trust advertised the property for sale, and he has filed his bill charging that the stipulations he entered into were only a device to cover an usurious loan, and praying to be discharged from his contract on payment of the principal sum of \$260, with interest from May 5th, 1851, and to be released from the fines incurred by him as a member of the society, and to enjoin a sale of the property by the trustees. The trustees in their answer deny that there was any corrupt intent or secret agreement to effect an usurious loan under the forms of stipulations entered into by parties, and sets out the bond, deed of trust, articles of association, &c., and aver that the contract was bona fide entered into and made and intended to be what it appears on the face of the papers, and none other. In the present stage of the cause the answer must be taken as true, that the contract between the parties was whatever it appears to be, and there was no other and different agreement behind the ostensible arrangement. Were there another secret agreement to make an usurious loan, to which the stipulations here shown were but an outward covering, and it were so charged in the bill by proper averments, it would become necessary, before a final hearing, to send down a case to a jury to ascertain whether there be in fact a secret, corrupt, usurious agreement for a loan; for whatever form parties adopt to hide usury, if they have secretly made a corrupt loan, the law will drag away the veil and penetrate the motive. But I do not understand the bill to charge any different agreement from that disclosed by the answer, and the question before us is therefore not one of intention, but one of construction upon the face of the articles of association, bond and deed of trust exhibited with the answer. As a question of construction it seems to me, both upon principle and authority, that stipulations like those we are considering are not usurious. To constitute usury, there must be a loan of money in which the principal sum is not hazarded, and is to be repaid at all events with more than legal interest. There was a time in the his-

tory of the law when the taking of any interest for the use of money was an heinous offense; but "usury has long since lost that deep moral stain which was formerly attached to it, and is now generally considered only as an illegal or immoral act, because it is prohibited by law." *Lloyd v. Scott*, 4 Pet. [29 U. S.] 224. With this high warrant for a lenient construction of a penal law, no court should pronounce a contract usurious in which any of the elements of the definition are wanting, or which is within the exemption of adjudicated cases; but, on the contrary, should seek to enforce the principle that every man has a right to make what contracts he pleases, if not restrained by some law, and that justice and equity require that such contracts should be executed if fairly made. The very point involved in the present case was decided in *Silver v. Barnes*, 6 Bing. N. C. 180 (decided in 1839, after the act of Geo. IV.) *Tindall*, Chief Justice says, "The question was whether the transaction was a loan of money or a dealing with the partnership funds. If it was a loan, it was usurious. We think it was a dealing with the partnership funds, in which the defendant had an interest in common with the other members of the society, and that it was not a loan; the defendant was interested in the money when it was advanced and when it was repaid. The rules of the society are in effect a mere agreement by the partners that their joint contributions shall be advanced for the use of one or other, as occasion requires, and the transaction was not a borrowing by the maker of the note from the payees."

In a later case (*Burbidge v. Cotton*, 8 Eng. Law & Eq. 62) Sir J. Parker says, "The case of *Silver v. Barnes* was a direct authority, that an advance out of the funds of an association of this kind, made pursuant to its rules, to one of its members, having in common with other members an interest in the fund out of which the advances were made and in the money to be repaid to him, was not a loan of money, but a dealing with the partnership funds, and was not usurious. He was not aware that the authority of that case had ever been doubted. It had been approved by Parker, Baron, in *Cutbill v. Kingdom* [1 Exch. 494], and he considered that a decision of a court of law on such a subject was binding in this court." To the same effect are the cases of *Seagrave v. Pope*, 15 Eng. Law & Eq. 480; *Mosley v. Baker*, 6 Hare, 87, and other cases. It has been supposed that the cases of *Silver v. Barnes*, *Burbidge v. Cotton*, and all the others rest the principles of their decision upon the late English statutes of 7 Wm. IV., and 7 & 8 Vict., and also a previous statute of Geo. IV., for the regulation of certain joint-stock associations. But this is a total mistake, as may be found by consulting *Wadsworth on Joint Stock Companies*, as well as the cases

themselves. They do not profess to rest upon a statutory privilege, but upon common law principles. These statutes had their origin with the statute of 6 Geo. I., c. 18, passed in 1719, which was made to restrain the creation of associations with shares transferable at pleasure, which after the introduction of the South Sea bubble were used as means for the wildest forms of stock-gambling, and indulged to such a mad and ruinous extent as to require the check of legislative prohibition. When mutual benefit and aid societies having funds accumulated from small monthly subscription, were adopted about the beginning of the present century, it was much doubted whether they did not fall within the prohibitions of the stock-gambling statutes, the provisions of which are numerous and very complicated. To remove these doubts, and to reduce into a system the manner of conducting these and other joint-stock associations having legitimate and beneficial objects, and to give greater facilities for the management and enforcement of the rights of these companies, the statutes of Geo. IV., superseded by 7 Wm. IV., and 7 & 8 Vict., were passed. These statutes are in no sense enabling statutes, but are in the nature of restraining enactments, requiring certain formalities, not at common law necessary, to give vitality to the association coming within their purview, and subjecting them to a certain inquisitorial control by boards of justices, &c. But these statutes, although none of them in force in this district, may be invoked for one purpose, viz.: to show the sense of the people and parliament of Great Britain that associations of this sort are of most beneficial tendency; and, pruned of abuses to which some of them are liable, are of great utility to the public, especially to the poorer classes, by encouraging thrift and supplying them with advantageous agencies for the accumulation and management of the savings of their daily labor.

But, altogether outside of any decisions, touching joint-stock associations, it is well settled that if profit be derived through a bona fide partnership, the dealing with money is not usurious. *Gilpin v. Enderbey*, 5 Barn. & Ald. 954; *Fereday v. Hordern*, Jac. 144. The reason running through all these cases is, that the principal sum is in hazard by the liability of the partners for the debts of the concern to third persons; and the principle is not varied by the fact, that under the particular arrangements of the business any loss is highly improbable. An inspection of the scheme in this case will make apparent to any one, without pausing to illustrate it, that each member is interested in every dollar belonging to the concern; the greater the profits the less will be the amount of his weekly contribution to raise the common fund to the distribu-

tive amount; and if no profit be made, he will contribute all that he ultimately withdraws, and will only derive the benefit, a substantial one indeed, of the saving process. On the other hand, in payment of officers' salaries, rent, and all other expenses, he is liable individually for all the debts of the concern; and therefore, to all legal intents and purposes, is a partner.

Independent of the partnership view of the case, as was argued at the bar, the contract may be likened to the purchase by the society from its member of an annuity. For the amount advanced or paid to him he agrees to pay double the monthly instalment on the shares represented during the life of the association. The duration of the society is altogether uncertain; it may, and probably will, expire before the monthly payments amount in the aggregate to the price he receives with simple interest, or it may continue until these exceed that amount. The purchase and sale of annuities and rent charges differ from a loan at interest in this: that in case of a loan the principal sum, as such, is to be repaid at all events. In the case of annuities and rent charges, redeemable, it may be repaid at the will of the purchaser, nor does it make any difference that the annuity is dependent upon a contingency other than the duration of a human life. Both in annuities and rent charges purchased the stated payments may amount to much more than the interest upon the price paid, and be so great as in all human probability before the termination of an annuity largely to exceed both principal and interest; yet the validity of the purchase is not thereby affected. The case of *Lloyd v. Scott*, decided in 4 Pet. [29 U. S.] 224, and afterwards tried in this court upon procedendo [Case No. 8,434], on an issue of usury before the jury, was the purchase of an annuity or rent charge, very like in its practical results to the present case; and in that case the court held that the covenant that a party might re-purchase within a given period at the same price, and upon the repayment of that price, with all arrears of instalments of the annuity which was equivalent to 10 per cent. per annum, to be entitled to re-conveyance of the premises charged, did not give the transaction in law the character of a loan so as to taint it with usury, provided the original purchase was in good faith. But it is further said, that although the sale of the shares upon a discount, coupled with an agreement to pay the double monthly instalment, may not be usurious, considered in the light of a partnership dealing, or an annuity sale, or a contract in which the principal sum is not, at all events, returnable, together with more than legal interest, yet the imposition of fines of ten cents for each dollar of monthly dues not punctually paid is usurious interest upon the monthly dues. This does not

appear to me to be either a just construction of that part of the regulations of the society; nor if it were meant to be a reservation of interest, as interest would it be usurious. The cases of *Roberts v. Trenayne*, Cro. Jac. 509; *Floyer v. Edwards*, Cowp. 113; and *Wells v. Girling*, 4 Moore, 78; same case, 1 Brod. & B. 447; all deciding that, where the party may relieve himself from any interest at all by payment at a day certain, the reservation of more than legal interest in case of default is not usurious within the statute. But the fair construction of this part of the regulations of these societies seems to be that, in as much as punctuality and exactitude are essential to the just and profitable conduct of the business of the concern, the reservation of legal interest on non-payment of monthly dues being so inconceivable, hard to compute and next to impossible to collect and account for, it would be no compensation to the society for these defaults, nor any security against their frequent recurrence. Hence their rules fix as a measure of liquidated damage for each default, under the name of a fine, a certain small sum, in this and most other societies 10 cents on every dollar. The 16th rule of the articles in the case of *Silver v. Barnes*, already cited, calls these fines by the name of "liquidated damages."

Now, if the contract in this case was not usurious, was it an unconscionable and oppressive bargain, which a court of equity ought to relieve against? By reference to the tables of calculation which are published in the explanatory treatise on these subjects, or which, with a little trouble, may be calculated by any person for himself, it will appear that the average duration of these societies is from eight to nine years, dependent upon the range of premium which their advances command. A society with an average premium of 35 per cent., which the complainant in this case paid, will wind up in eight years and a fraction. What does an advance at thirty-five per cent. discount cost the member during eight years, as compared with the admitted standard of moderation, a loan at six per cent.

\$400 at thirty-five per cent. discount is..	\$260 00
Interest at six per cent. for eight years	is
	124 80
	\$384 80
Double monthly dues for eight years at	
\$2.00 per share.....	384 00
Balance in favor of an advance	
over an ordinary loan at six per	
cent. is	\$ 80

Thus it appears in point of fact, that if the complainant were faithfully to comply with the terms of his contract, and be in no default for monthly dues, instead of paying more than legal interest he would get the advance and use of \$260 for eighty cents less than simple interest, while the profit to the co-partnership

would be the active employment of his and other weekly dues in the interval. Suppose the contract be terminated, and the complainant released from his connection with the society, and he claims in his bill:

By payment of the advance.....	\$260 00
Legal interest thereon for five years and seven months.....	87 10
	<u>\$347 10</u>
Crediting the account with dues paid as per answer.....	209 00
	<u>Balance due to the society.....\$138 10</u>

Suppose, on the other hand, the complainant be released upon the terms offered by the respondents in their answer, the account will stand:

Debtor to amount advanced..	\$260 00
To amount of fines, as per detail statement	14 00
Whole amount of dues prior to and after advance.....	282 00
	<u>\$556 00</u>
Crediting him by estimated value of his shares.....	\$200 00
And by monthly dues already paid	209 00
	<u>409 00</u>

The balance claimed by them is... \$147 00
—Or \$8.90 more than by calculation of simple interest.

Suppose, on the other hand, that the advance be restored to the society, and the complainant restored to the condition of a member having received no advance, which, under the terms of the articles of association, is all that the society can insist upon without his consent to a dissolution of their relations, the account would be stated thus:

Debtor to advance.....	\$260 00
To amount of fines incurred.....	14 00
Total dues prior to and since his ad- vance	282 00
	<u>\$556 00</u>
And crediting the dues already paid in..	209 00
	<u>Leaving an apparent balance of...\$347 00</u>

But to show the true attitude of the parties it will be remembered that this balance of \$347 represents within itself his remaining interest in the association and the value of his ultimate distributive share. This share he may sell to any third person or to the society, as they offer by their answer, at its market value of \$200, and the balance against him will be exactly as before, \$147, or less than \$9 above legal interest for the use of the advance for five years and upwards. Suppose the member resorts to the other alternative of voluntarily quitting the society after having enjoyed the benefit of his advance for five years and seven months. He has a right to do it without the assent of the association, as provided in their constitution, by returning the money advanced, with interest thereon, paying all fines incurred, and being credited with the dues already paid in. The account would then be:

Advance	\$260 00
Interest for five years and seven months	87 10
Fines incurred	14 00
	<u>\$361 10</u>
Amount of dues paid in.....	209 00

Balance due the association.....\$152 00

—Or \$14 more than simple interest for the use of the advance during five years and seven months.

No man who will give a thought to the subject can call a contract voluntarily entered into, which presents these results, unconscionable or oppressive.

But suppose that the forfeitures and fines imposed upon a defaulting member were much larger than those claimed in the present case, would it be the province of this court, upon the bill of the defaulter, to relieve him from the consequences of his own contract and his voluntary acts? The distinction must always be remembered between calling upon a court of equity to relieve against a forfeiture or to enforce a forfeiture. In the latter case they may refuse to interfere. But the doctrine of relief has been restored from confusion of the oldest decisions and narrowed to this, that unless the court can clearly see that full compensation can be made, and the forfeiture was not voluntarily and persistently incurred, it will not relieve, but let the party abide by the contract he has formed. In 2 Story, Eq. Jur. § 1323, it is thus summed up: "The doctrine seems now to be asserted in England, that in all cases of forfeiture for breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud or surprise, although the breach is capable of a just compensation." And in section 1325 he gives the special phase of reasoning, which fits the present and like cases, viz.: "It is upon grounds somewhat similar, aided by considerations of public policy, and the necessity of a prompt performance in order to accomplish public or corporate objects, that courts of equity, in cases of non-compliance by stockholders with the terms of payment of their instalments of stock at the time prescribed by which a forfeiture of their share is incurred under the by-laws of the institution, have refused to interfere by granting relief against such forfeiture."

In the case of Sparks v. Liverpool Water Works, 13 Ves. 433, which was a case of purely accidental forfeiture of stock in a corporation, under one of its by-laws requiring instalments to be paid at a certain time, the master of the rolls uses language precisely adapted to the business and objects of societies organized upon the principles we are considering. He says: "It is essential that the money should be paid, and that they should know their situation. Interest is not an adequate compensation even among individuals, much less in these undertakings. In particular cases

interest might be a compensation, but in a majority of cases it is no compensation from the uncertainty in which they may be left. The effect is the same whether the money has been paid or not. They know the consequence." I agree with those enlightened judges and chancellors of England, Lord Eldon, and a host of others, who have always regretted that courts of equity had ever undertaken to relieve against forfeitures and breaches of private contract. They have all admitted it to be "delicate and dangerous," and some have denounced it as "mischievous and arbitrary." See *Eaton v. Lyon*, 3 Ves. 693; *Sanders v. Pope*, 12 Ves. 291; cases of *Hill v. Barclay*, 16 Ves. 403, and 18 Ves. 58; *Bracebridge v. Buckley*, 2 Price; 206; *Rolfe v. Harris*, Id. 210, note; and other cases cited in 2 Story, Eq. Jur. §§ 1320, 1325. For myself, I adopt the maxim laid down by Cranch, C. J., in *Lloyd v. Scott* [supra], on motion for a new trial: "Every man has a right to make what contracts he pleases, if not restrained by some law; and justice and equity require that such contracts should be executed, if fairly made." I am of the opinion that upon the case made by the answer the special injunction should be refused.

MORSELL, Circuit Judge, concurred in the foregoing opinion.

DUNLOP, Chief Judge, dissented, and delivered a separate opinion as follows:

A voluntary, unincorporated association, called the Potomac Building Association, was formed in Washington in the year 1850, by the complainant and others. The constitution of the society provided that a monthly subscription of \$1 should be paid by the members in respect of each share held by them until the joint contributions were of an amount to enable each member to receive \$200 in respect of each share. Power was given to the society to advance to any member his share at a discount, such member paying an additional \$1 monthly on each share, as aforesaid, and executing a bond and deed of trust to defendants to secure the due payment of his future subscriptions. The complainant took an advance upon his two shares at a discount of 35 per cent. per share; that is to say, on his two shares, estimated as worth \$400, \$140 was deducted for discount, and he received in cash from the company \$260, and executed to the defendants, the trustees of the building association, the bond and deed of trust set out in the proceedings in this cause for securing the payment of the future subscriptions. The deed of trust contained no covenant for the payment of the advance. The complainant having failed to pay his dues, &c., for more than 60 days, the defendants, as trustees, advertised to sell for the amount claimed by the building association in their account filed, which is in the following terms:

Jno. Johnston, to Potomac Building Association.

Dr.

1851. May 5. To cash advanced on two shares of stock.....	\$260 00
Monthly dues for two shares of stock for seven months, prior to taking advances, at \$1 per share	\$ 14 00
Dues from May, 1851, to Dec., 1856, five years and seven months, at \$2 per month each	268 00
	<hr/>
	282 00
Fines to Dec., 1856, as per statement in detail	14 00
	<hr/>
	\$556 00

Cr.

By amount of dues paid in, as per statement in detail here-with	\$209 00
By estimated value of his two shares of stock, by actual sales made Dec. 1, 1856.....	200 00
	<hr/>
	409 00
Balance due by Johnston.....	\$147 00

Johnston, the complainant, filed his bill in this case, charging usury in the contract, and claiming to set it aside and to avoid the deed of trust on payment of principal and interest on the advance, and for an injunction to stay the sale by the trustees. The defendants, in their answer deny usury, and assert their right to sell for the balance claimed by them in the foregoing account. The complainant was a stockholder in the company to the amount of two shares, and had signed the constitution. The shares at the winding up were to be made worth \$200 each. Johnston's two shares, \$400 less \$140, the premium bid by him for the advance, would be worth \$260 at the winding up of the association, and to be accounted for to him in his settlement with the company at that value.

The articles of the constitution of the building company, which bear on this case, are as follows: Article 2, § 3: "Each and every stockholder, for each and every share of stock that they hold in this association, shall pay the sum of \$1 in bankable funds, on the first Monday of each and every month, to the treasurer, or such other person or persons as shall from time to time, by the laws or regulations of the association, be authorized to receive the same, until the value of the whole stock shall be sufficient to divide to each share of stock the sum of \$200, at which time the association shall determine and close." Article 8 ("Advances") §§ 1, 2, 3, and 7: Section 1: "Every stockholder, for each share, entitled to purchase an advance of stock of \$200, to be paid from the funds of the association," &c. Section 2: "When the funds of the association warrant it, one or more advances shall be disposed of by the secretary to the highest bidder, at regular meetings of stockholders, not under par," &c. Section 3: "Whenever a stockholder shall purchase an

advance, he shall pay, or cause to be deducted, the premium offered by him or them for the same, and shall secure the association by bond, deed of trust, and policy of insurance, the policy to be assigned to the trustees upon the trust for such amount as the board of directors may deem sufficient to cover the amount advanced, with all fines, costs, and charges which may accrue thereon." Section 7: "Stockholders taking an advance from the funds of the association shall, from the time of purchasing such advance, pay to the treasurer \$2 per month for every share of stock on which such advance may have been made, (instead of \$1, as hereinbefore provided, for those who have received no advance) and if the same shall be suffered to remain unpaid more than two months, the board of directors may compel payment by ordering proceedings on the bond and deed of trust according to law."

This additional \$1 per month on each share to a stockholder buying an advance is \$12 per year, or 6 per cent., the legal rate of interest, valuing the share at \$200, which is its computed value on the close of the concern. Johnston bought an advance on his two shares at 35 per cent. premium, received \$260 in money, paid or had deducted \$140 premium, gave his bond to the treasurer for \$400, conditioned to pay monthly dues of \$2 per share on each share, and all fines, until the value of the whole stock shall be sufficient to divide to each share of stock \$200, and also a deed of trust to Messrs. Ratcliff and Clark to secure these dues and fines, &c.

The condition of the bond is worthy of special notice, and shows plainly the nature of the contract, and together with the deed of trust, makes apparent the rights of the association and the duties and obligations of the borrower, and, as I construe them, are designed to carry into effect the true meaning of the constitution of the building company. The bond of date 15th May, 1851, is in the sum of \$400. The condition of the bond is in these words: "Whereas the said John Johnston, a stockholder to the extent of two shares in said association, has, by virtue of and in accordance with the provisions of the constitution and obligation attached thereto of the said association or joint-stock company, received advances from the funds of the said association, advances on said stock; now if the said John Johnston, or his heirs, executors and administrators, shall well and truly pay, or cause to be paid unto the said Ephraim Wheeler, treasurer as aforesaid, or to his successor in office, the sum of \$2 on each of the shares of stock on which he has received advances as aforesaid, monthly, and every month, commencing with the first Monday in June, 1851, and continues to pay the same on the first Monday of each and

every month thereafter, together with any fines and forfeitures for the non-payment of said monthly dues, as is provided in said constitution and obligation as aforesaid, until the funds of the said association shall divide to each share of stock the sum of \$200, then this obligation to be void, or else to remain in full force and virtue in law." And the deed of trust to Messrs. Ratcliff and Clarke, of the date the 2nd of June, 1851, under which they now claim to sell complainant's house and lot, after reciting said bond and its condition, in substance as above set forth, and that said deed was to secure the said monthly dues, fines, and forfeitures, conveyed to them the property described in said deed upon the following trusts, that is to say: "If the said Johnston, his heirs, executors and administrators shall fail to pay the said monthly payments and the fines and forfeitures aforesaid, so that any one or more of the same shall be due and unpaid for the space of sixty days, then the said writing obligatory shall be deemed and taken as forfeited, and upon request in writing, &c., the trustees shall sell, &c., and convey to the purchaser, &c., and out of the proceeds of the sale pay first the costs and charges attending said sale; secondly, pay to the treasurer whatever sum or sums of money shall then be found due by the said John Johnston to the said association, on an account to be stated by the treasurer, in which the said Johnston shall be charged with the sum of money received by him from the said association, and the monthly payments, fines and forfeitures intended to be secured by these presents, and the said writing obligatory, and credited with the amount of dues paid by him, and the residue, if any, pay over to the said Johnston, his heirs and assigns," &c. It is evident that the account herein to be stated, and the whole terms of the bond and deed of trust contemplate Johnston, to whom the advance has been made on the two shares, as still a partner, and to continue to be so till the final close of the association, when the two shares will be of the value of \$200 each, and so to be estimated in the final settlement between him and his co-partners, less the premium bid by him at the time of the advance, and it is on the assumption only that he is so to continue a partner that he can be made to pay dues up to the close of the concern, when each share is to be made of the value of \$200. As such partner and contributor he is to share in the profits, present and to come, of the partnership.

The English cases referred to in the argument, clearly the transaction of usury are based upon the assumption that the party to whom the advance is made is a partner at the time of the advance and when the advance is repaid, and so a sharer in the profits then and to the close of the concern. It can in no other sense be said to be a dealing in partnership

effects by the partners inter se. In the case of *Silver v. Barnes*, 6 Bing. N. C. 180, Tindal, C. J., says: "A motion has been made for a new trial, on the ground of misdirection, but we think the case was properly left to the jury. The question was whether the transaction was a loan of money or a dealing with the partnership. If it was a loan it was usurious. We think it was a dealing with the partnership fund, in which the defendant had an interest in common with the other members of the society, and that it was not a loan. The defendant was interested in the fund when the money was advanced and when it was repaid. The rules of the society are, in effect, a mere agreement by partners that their joint contributions shall be advanced for the use of the one or the other, as occasion requires, and the transaction in question was not a borrowing by the maker of the note from the payees. In a case before Alexander, chief baron, in the year 1828, he held an advance, from a similar society to one of its members, to be a partnership transaction and not a loan." If the partner receiving the advance is turned out of the concern and dispossessed of his profits by an arbitrary valuation of the two shares, as is claimed in the account presented with the defendants' answer, who value and take the shares to the use of the association at \$100 each, when they are to be made worth \$200 each, less the premium bid on them in part by the complainant's monthly contributions to the end and winding up of the association, then he is no longer a dealer in partnership effects, having a common interest with his co-partners in all profits to the close, but an outsider and a borrower of funds owned by strangers, and in that light the contract is clearly usurious. I refer to the case of *Bechtold v. Brehm*, 26 Pa. St. 269, decided by the supreme court of Pennsylvania in 1856.

The additional monthly payments of \$12 a year on a computed \$200 share, greatly exceeds the legal rate of interest on the advance of \$130 on that share, deducting 35 per cent. premium bid by the complainant and retained by the association when the advance was made. If the complainant is not a partner, and is subject to be ousted before the concern closes, he is not receiving his share by anticipation; he is not a sharer of profits present and to come. In that sense, by whatever name the transaction is called, it is a mere loan of money. It is a loan at a higher rate of interest than the law allows for the forbearance or giving day of payment, and the bond and deed, to secure the repayment of the principal, in which aspect the defendants treat said bond and deed in their account rendered (as I think, wrongfully), being securities tainted with usury, are both void by the statute. I entertain some doubt whether the contracts of this building association, as to advances, even when executed in good faith, according to the

terms of their written constitution, are free from usury. Some of the English cases certainly go to that extent. The doubts there have been removed by statutory provisions, which legalize these advances and provide for the imposition of fines on members for failure to pay monthly dues within prescribed limits; the legislature of that country thinking such societies of beneficial tendency, and calculated to elevate the social condition of men, having no other means than the fruits of their daily labor. Their expediency and utility is not so certain here, where any laboring man, with the high rate of wages prevailing in this country, can, with the exercise of ordinary prudence and carefulness, soon secure a homestead without involving himself in the expensive machinery of a building association, the articles of which are not easily understood by unlearned people, and very liable to be perverted to their oppression. These considerations, however, belong to the legislature, and not to the courts of justice, and if such associations are deemed beneficial, they ought to be regulated and protected by statute, as has been done, it is believed, in some of our states.

The fines which, by their constitution, the members agree to pay in default of punctuality in the monthly dues, are in the nature of forfeitures, and are, in fact, sometimes so called by the society itself. If they were called liquidated damages their nature would not be changed. All the courts in this country, as I understand Kent, Story and Marshall, both at law and in equity, are unwilling to enforce forfeitures and lean against them. In England they have been sanctioned by the statutes to which I have referred. In the absence of any statutes here, I think we ought only to enforce payment of the dues by directing our auditor to allow interest on them from the periods when they accrue and fall due. As the trustees in this case claim to sell the complainant's property upon an account stated, and for a sum not warranted by law, nor even by the constitution of the building society itself, I think the injunction ought to be granted, and to have effect till the cause is fully heard. Notes to the case.

As to fines, penalties and forfeitures, the following cases are to the point: *Skinner v. Dayton*, 2 Johns. Ch. 535; *Livingston v. Tompkins*, 4 Johns. Ch. 431; 2 Story, Eq. Jur. §§ 1313-1316; *Hill v. Barclay*, 16 Ves. 403, 405, and 18 Ves. 58; *Sparks v. Liverpool Water Works*, 13 Ves. 428; *Taylor v. Sandiford*, 7 Wheat. [20 U. S.] 13; *Reynolds v. Pitts*, 19 Ves. 140.

JOHNSTON v. POTOMAC BLDG. ASS'N.
See Case No. 18,303.

JOHNSTON v. RATCLIFF. See Case No. 18,303.

JOSLIN (BENTLEY v.). See Case No. 18,232.

Case No. 18,304.

JUDSON v. CORCORAN et al.

[2 Hayw. & H. 146.]¹

Circuit Court, District of Columbia. Dec. 17, 1853.

ASSIGNMENT—LOSS OF CLAIM BY LACHES.

A previous assignment will not be allowed where the assignee has through laches allowed his claim to go by default, especially where he has given no notice, as required by law, to establish his claim, thereby allowing his assignor to perpetuate a fraud by reassigning the same to another.

[Bill] in equity for an injunction [by William Judson against William W. Corcoran and others and the secretary of the treasury].

The bill of complainant states that on the 1st of January, 1845, Bradford B. Williams assigned to him an interest of \$6,000, of the amount of a claim pronounced valid by the American members of a mixed commission, under a convention between the United States and Mexico, of April, 1839 (8 Stat. 527), with interest from the date of the assignment, amounting in all to \$7,887.50. That an award was made upon said claim by the board of commissioners under the act of March 3, 1849 (9 Stat. 393), to carry into effect certain stipulations of the treaty between the United States of America and the Republic of Mexico, in favor of Wm. W. Corcoran, as assignee of Bradford B. Williams and Joseph H. Lord, for the amount of \$15,051, in which amount is included the sum due to said Williams, and previously assigned to the complainant. That such assignment is null and void as against his claim, praying that defendant Corcoran be restrained from collecting, &c., the money due the complainant, and that the secretary of the treasury be enjoined from paying said reward, or so much thereof belonging to the complainant, out of the treasury of the United States.

The defendant in his answer says: That it is true that he claims to be legally and equitably entitled to receive the whole of the amount of the said award as his own. That he has no knowledge or belief that the said claimant has any right or interest therein whatsoever. That if any assignment, as charged, have been executed at any time prior to the execution of the instruments under which the respondent claims that it was without any valuable consideration, or that it was of any force, validity or effect in law or equity, to vest any right or title in the said complainant in the premises, or in any manner to affect the right and title of the respondent. That for the purpose of ascertaining whether any other person besides the assignor (Hart) of the defendant, had any interest or claim, or pretence of title in the premises, an investigation of the files and records of the department of state was had, and nothing was discovered in any de-

gree inconsistent with the title of Hart, nor any thing which could give him any notice, knowledge or suspicion that the said complainant, or any other person or persons had or claimed any right or title or interest adverse to or in any manner affecting the title claimed by the said Hart. That he purchased from said Hart all his rights and interest therein, without any knowledge or suspicion, and without any reason to know or suspect that the said complainant, or any person other than said Hart had any right, title or interest to the said claim; that said complainant never set up or pretended any interest therein, nor gave any notice or intimation to your respondent that he claimed any such interest until after the promulgation of the judgment of the board of commissions, under the act of 30th March, 1849; that said claim was valid and allowed, thereby fraudulently withholding and concealing all knowledge or notice thereof from the respondent, and suffered the respondent to devote and expend a large amount of money, time and labor to and in the prosecution of the said claim; that he is a bona fide purchaser of the said claim, for a full and valuable consideration, without notice, knowledge or suspicion of any pretence or right or title of the complainant in the premises, and do hereby insist that even if the said complainant had any such right or title or interest therein as now pretended, in and by his said bill of complaint, he has by his laches and culpable neglect and misconduct in the premises wholly lost the right to assert and give effect to the same, as against your respondent. The respondent states in substance as follows the chain of title on which he founds his claim: On the 11th of June, 1845, Bradford B. Williams assigned one-half of his interest in the claim to E. H. Warner; August 15th, 1845, Warner assigned the same interest to Wm. B. Hart; October 15th, 1846, Williams assigned to Hart the residue of his interest; October 3d, 1846, Joseph H. Lord assigned to Hart all his interest in the claim; June 18th, 1847, Hart assigned the whole of the claim to William B. Corcoran. In conclusion the defendant prays that the said injunction be dissolved, and that he be dismissed with his reasonable costs, &c.

A. H. Lawrence and R. H. Coxe, for petitioner.

J. M. Carlisle and P. R. Fendall, for defendants.

THE COURT, on the cause being duly argued, and the various exhibits and deposition being read, dismissed the bill with costs.

On appeal to the supreme court the decree dismissing the bill was affirmed. See 17 How. [58 U. S.] 612.

JUDSON v. SECRETARY OF TREASURY.
See Case No. 18,304.

JURORS—CHARGE TO GRAND JURY IN RELATION TO THE DUTY OF JURORS. See Case No. 18,257.

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

K.

Case No. 18,305.

KEENAN v. UNITED STATES.

[2 Hayw. & H. 341.]¹

Circuit Court, District of Columbia. May 19, 1860.

RAPE—AIDING AND ABETTING.

The aiding, abetting, and assisting others to commit rape is punishable under the penitentiary act of March 2, 1831 [4 Stat. 448].

Writ of error to the criminal court.

At law. Indictment for rape, and aiding and abetting, and assisting to commit rape. The indictment consisted of two counts. The first, that Patrick Keenan, &c., did make an assault, and her, the said Laura Swingman, then and there forcibly and against her will feloniously did ravish and carnally know against, &c. The second, that the said Patrick Keenan, &c., was present aiding, abetting and assisting (certain persons mentioned) the felony and rape aforesaid to do and commit against, &c. The jury brought in a verdict of guilty on the second count.

The United States, by their attorney, prayed judgment upon the verdict. And the prisoner, by his attorneys, saith that the court ought not to proceed to render judgment because: First. It does not appear from any law in force in this District that the prisoner is punishable under the second count of the indictment, and upon which alone he was found guilty by the jury. Second. The penitentiary act of March 2, 1831 [4 Stat. 448], and under which the indictment seems to have been formed, punishes parties who commit rape and such as are accessories before the fact but is silent as to abettors of a rape. Third. There is nothing in such act, or any other act in force in this District which embraces the charge upon which the prisoner was convicted.

Daniel Ratcliff and Thomas W. Berry, for prisoner.

Robert Ould, for the United States.

On appeal to the circuit court, THE CIRCUIT COURT affirmed the judgment of the criminal court, that Patrick Keenan suffer imprisonment in the penitentiary of the District of Columbia for the period of ten years.

Case No. 18,306.

In re KELBY'S WILL.

[2 Hayw. & H. 149.]¹

Orphans' Court, District of Columbia. April 15, 1854.

NUNCUPATIVE WILL—CANNOT PASS REAL ESTATE—WITNESSES.

1. From 1676, when the act of 29 Car. II. was enacted, no nuncupative will can, under any circumstances, pass real estate.

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

2. That by 29 Car. II. c. 3, §§ 19, 20, 22,² and the act of Maryland of 1798, c. 101, subc. 2, § 13,³ in force in this district, there must be not less than three witnesses to a nuncupative will, where the amount of personal property exceeds thirty pounds.

PURCELL, J. From the 29th of Charles II. in force in this District and the statute of Maryland of 1798, a nuncupative will, under no circumstances, can pass real estate; there must be not less than three witnesses where the amount of personal property exceeds \$300. Nuncupative wills are viewed with distrust in the ecclesiastical court, and the making of one requires to be proved by evidence more strict and stringent than that of a written one, in every particular. That is requisite in consideration of the facilities with which frauds, in setting up nuncupative wills, are obviously attended; facilities

² Sec. 19. (1) And for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury. (2) Be it enacted by the authority aforesaid, that from and after the aforesaid 24th day of June, no nuncupative will shall be good where the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses* (at the least) that were present at the making thereof; (3) nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; (4) nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprised or taken sick, being from his own home and died before he returned to the place of his or her dwelling.

Sec. 20. And be it further enacted that after six months passed, after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after making of the said will.

Sec. 22. And be it further enacted, that no will in writing concerning any goods or chattels, or personal estate, shall be repealed, nor shall any clause, devise or bequest therein, be altered or changed by any words, or will by word of mouth only, except the same be in the life of the testator committed to writing, and after the writing thereof read unto the testator, and allowed by him, and proved to be so done by three witnesses at the least. 29 Car. II.; British St. at Large, 387 (A. D. 1676).

³ And no nuncupative will shall be proved within fourteen days after the death of the testator, unless his widow (if any) and some one of the next of kin have been summoned to contest the same, if they please. Section 13, subc. 2, c. 101, Act Md. 1798.

* Explained by 4 Anne, c. 16, § 14. It is here declared that all such witnesses as are and ought to be allowed to be good witnesses upon trials at law, by the laws and customs of this realm, shall be deemed good witnesses to prove any nuncupative will, or anything relating thereto (A. D. 1705).

which essentially require for their suppression the utmost vigilance on the part of the court. The testamentary capacity of the deceased, and the animus testandi at the time of the alleged nuncupation, must appear by the clearest and most indisputable testimony.

KELLY (BLOOMER v.). See Case No. 18,242.

KEYWORTH (GREENHOUGH v.). See Case No. 18,299.

KOSCIUSKO (ARMSTRONG v.). See Case No. 18,226.

L.

Case No. 18,307.

Case of LANGE.

[13 Blatchf. (1877) 546.]¹

Supreme Court of New York, General Term.

FALSE IMPRISONMENT—ILLEGAL SENTENCE—PERSONAL LIABILITY OF JUDGE.

[1. Where a sentence imposed by a district court is held illegal by the supreme court of the United States on a writ of habeas corpus, but by a divided court, and only after a most thorough investigation into the state of the law upon the subject, it cannot be said that the act of imposing the sentence did not require the exercise of judicial functions, or that the propriety of the sentence was not, at least, doubtful. Under such circumstances, therefore, the judge cannot be held civilly liable for inflicting an unlawful imprisonment.]

[2. When a party has been brought before a court of justice in a legal manner, and circumstances are presented requiring a decision to be made, the tribunal making it cannot be deprived of protection from personal liability therefor because it may afterwards, upon fuller investigation, turn out to have been erroneous. This is especially true where the action of the judge is in accordance with a previous decision of an appellate tribunal from which he is bound to receive the law, and his actions were subsequently held illegal only by a decision of that tribunal which modifies or limits such previous decision.]

Action by Edward Lange against ———
Benedict for false imprisonment.

Edward Lange was indicted in the circuit court of the United States for the Southern district of New York, for stealing mail bags belonging to the post office department of the United States, under section 290 of the act of June 8, 1872 (17 Stat. 320), which provided as follows: "Any person who shall steal, purloin, or embezzle, any mail bag, or other property in use by, or belonging to, the post office department, or who shall, for any lucre, gain or convenience, appropriate any such property to his own or any other than its proper use, or who shall, for any lucre or gain, convey away any such property, to the hindrance or detriment of the public service, every such person, his aiders, abettors and counsellors, shall, if the value of the property be twenty-five dollars, or more, be deemed guilty of felony, and, on conviction thereof, for every such offence, shall be imprisoned not exceeding three years; and, if the value of the property be less than twenty-five dollars, the party offending shall be imprisoned not more than one year, or be fined not less than ten nor more than two hundred dollars." The indictment contained twelve counts, and charged three different offences. Upon a trial, at the October term, 1873, before the honorable Charles L. Benedict and a jury, he was convicted. The verdict rendered was a general verdict of guilty. Thereupon, on November 3d,

1873, he was sentenced to be imprisoned for the term of one year, and to pay a fine of \$200. Thereafter, and at the same term, he procured a writ of habeas corpus, and, upon the return thereof to the circuit court, held by Benedict, District Judge, showed to the court that \$200 had been deposited with the assistant treasurer of the United States, at the city of New York, to the credit of the treasurer of the United States, as the fine imposed by such sentence, and claimed to be discharged from imprisonment upon the ground that the fine had been paid, and that he was, therefore, not liable to be imprisoned, inasmuch as the statute aforesaid, creating the offence, did not warrant a sentence of both fine and imprisonment. The court held that the facts shown did not entitle the defendant to be released, and the writ was dismissed. After that, and on the 8th of November, 1873, at the same term, the court, still held by Benedict, District Judge, directed that the sentence pronounced on the 3d day of November be vacated and set aside, and thereupon proceeded to pass judgment anew, and sentenced the defendant to be imprisoned for the term of one year. A second writ of habeas corpus was then applied for, and, a hearing being had before Woodruff, Circuit Judge, and Benedict and Blatchford, District Judges, holding the circuit court, under section 2 of the act of February 7, 1873 (17 Stat. 422), the application for the writ was refused. Subsequently, a third writ of habeas corpus was issued by the supreme court of the United States, and the prisoner was released by that court. The opinion of the court, delivered by Mr. Justice Miller, is reported in 18 Wall. [85 U. S.] 163. Mr. Justice Clifford and Mr. Justice Strong dissented, and the dissenting opinion of Mr. Justice Clifford is reported at page 173. After the release of the defendant he brought a suit against Judge Benedict, in the supreme court of the state of New York, to recover damages for false imprisonment. The imprisonment set forth as the cause of action was that resulting from the sentence pronounced November 8th, 1873. In that suit, upon a demurrer to the complaint, the special term, (Van Brunt, J.,) overruled the demurrer. The general term, in October, 1876, (Davis, Brady and Daniels, JJ.,) upon appeal, reversed the order of the special term, and dismissed the complaint. An appeal to the court of appeals was taken by the plaintiff.

The case was argued before the general term by Benjamin F. Tracy, Esq., on behalf of Judge Benedict, and the points taken by him were as follows:

I. The complaint shows the plaintiff charged with several offences against the United States, and his conviction of all the offences charged. The conviction is conceded to have been lawful. Upon such conviction the plaintiff became liable to the punishment imposed upon him by either or by both the sentences

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

set forth in the complaint. There was, therefore, no false imprisonment.

(1) The indictment set forth in the complaint, on its face, shows to this court that the plaintiff was not put on trial for a single transaction. The indictment necessarily covers three separate and distinct offences, committed on different days and in respect to different lots of mail bags. These charges against the plaintiff were required by statute to be joined in one indictment. Section 1024 of the United States Revised Statutes, provides as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offences, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts; and, if two or more indictments are found in such cases, the court may order them to be consolidated." So far as is known, under this statute, it has been the constant practice, in courts of the United States, to include several offences in a single indictment, and, upon a conviction, to inflict punishment for each offence.² There can be no doubt that this statute is applicable to the plaintiff's case, and it was, therefore, charged in the indictment, that the defendant, at the various times stated in the several counts, stole and appropriated to his own use the mail bags described. Conceding that the same transaction is charged in different forms in the 1st, 3d, 5th, 8th, 10th and 12th counts, and conceding, also, that but one other offence or transaction is charged in the 2d, 4th, 6th and 11th counts, there can be no doubt that the 7th count charges an offence separate and distinct from that charged in any other count of the indictment. The 9th count was quashed. There were, then, three separate and distinct offences charged. The plaintiff was, therefore, convicted of at least three distinct and separate

offences, and could be lawfully sentenced for them all. Otherwise, his conviction upon different offences required by statute to be joined, would work an acquittal of all but one.

(2) No objection arises from the form of the verdict. The verdict was a general verdict of guilty. Such a verdict is a conviction upon every count in the indictment. It is not necessary to designate the counts in a verdict. A general verdict may always be rendered, which in law attaches to each count in the indictment. Such is the established effect of a general verdict of guilty; and this effect is the foundation of the rule, that, when some counts are bad, a general verdict of guilty is supported by one good count. In the indictment against the plaintiff all the counts, except the 9th, are good. If the verdict rendered against the plaintiff does not in law attach to each count in the indictment, to which of the counts is it to be attached, and by whom? Certainly this court cannot attach the verdict to any particular count, or to any set of counts; nor can it say, as matter of law, that the plaintiff was not found guilty of every offence set forth in the indictment. It is settled law, in this state, that a general verdict of guilty, rendered upon an indictment containing several counts, convicts the accused upon every count in the indictment (*People v. Davis*, 56 N. Y. 100), and the defendant may be sentenced on all counts that are valid (*Com. v. Birdsall*, 69 Pa. St. 482).

(3) The sentence may be general and need not specify any particular count. It is for the court that tried the cause to say, upon such a conviction, on how many counts of the indictment sentence shall be passed. When the sentence imposes a greater punishment than is prescribed by law for a single offence, it is presumed that the judge who tried the cause intended to sentence him on more than one count of the indictment. This precise question came before the supreme court of Massachusetts, in two different cases, at the same term. In *Carlton v. Com.*, 5 Mete. (Mass.) 532, there were two counts in the indictment, charging separate offences. The judgment sentenced the prisoner to one day's solitary imprisonment, and confinement afterwards at hard labor, for the term of five years, in the state prison. The offence charged in the first count was punishable "by imprisonment in the state prison not more than five years." It was assigned for error that "said judgment is excessive and illegal, in the matter of the one day's solitary imprisonment;" and it was contended that the judgment was erroneous because distinct offences ought not to be included in the same indictment, and because, if they could be so included, there should have been separate sentences. The court held that two distinct offences could be included in the indictment, and affirmed the judgment, saying, (*Shaw, C. J.*): "We are of opinion that it is not necessary, in such cases, to award separate sentences, when they are so far alike that the whole of the judgment is but the sum of the several sentences to which the convict is liable." See, also, *Booth v. Com.*, Id. 535; *U. S. v. Boverman* [supra]. "Judgment is continually passed upon a record containing many counts, without adverting to any count in particular." *O'Connell's Case*, Parke, Baron, 11 Clark & F. 301. "In criminal cases, where each count is, as it were, a separate indictment, one count not having been disposed of no more affects the proceedings with an error than if it were two indictments." *Latham v. Reg.*, 5 Best & S. 641.

(4) There is nothing in the language of the statute creating the offences in question, to prevent a conviction and sentence for separate and distinct offences committed on different days and with respect to different articles. If it be suggested that the statement added to the verdict, "and the value of the bags to be less than

² *U. S. v. Mills* [Case No. 15,777], Massachusetts district. The case was tried before Shepley, Circuit Judge. The indictment contained sixty-nine counts. The defendant was convicted on seven counts, for seven different transactions. Sentence was passed imposing a fine of \$3,000 for each offence, in all, \$21,000. *U. S. v. Crane* [Id. 14,886]. Vermont district, March, 1875, before Shipman, District Judge. Two separate indictments were found by the grand jury, one for embezzlement, the other for making a false entry. The court ordered the indictments to be consolidated. The defendant thereafter pleaded guilty, and was sentenced to pay \$1,000 and be imprisoned one year for one offence, and, for the other offence, to pay \$1,000 and be imprisoned one year after the expiration of the imprisonment first imposed. *U. S. v. Eckel* [Id. 15,022], Southern district of New York, before Blatchford, District Judge, January 25th, 1869. Indictment contained eight counts. Conviction on six counts. Sentence as follows: "Alyah Blaisdell, upon the first count of the indictment, to be imprisoned in the state prison at Sing Sing for the period of three years, and judgment and sentence suspended upon the 2d, 4th, 5th, 6th, and 8th counts of the indictment, until after the full execution of this judgment." In *De Puy* [Id. 3,814], Southern district of New York, before Blatchford, District Judge. The prisoner, in this case, being convicted of two offences on one indictment, was sentenced, for one offence, to be imprisoned one year and pay a fine, and, for another offence, to pay a fine and be imprisoned for six months, this imprisonment to commence on the termination of the imprisonment first imposed. Great efforts were made to secure from Judge Blatchford a release of the prisoner by habeas corpus, but the legality of the sentence was not questioned and the discharge was refused. *U. S. v. Boverman* [Id. 14,630], Maryland district, before Giles, District Judge. An indictment against a deputy collector for embezzlement. There were five counts. The court directed the jury to acquit on the 5th count. The verdict was guilty on the first count as to \$1,120; on the second count as to \$996.72; on the third count as to \$50; on the fourth count as to \$180; on the fifth count, not guilty. Sentence as follows: "Sentenced by the court to pay a fine of \$2,346.72 and costs, and to be imprisoned in the jail of Baltimore city for the term of four years."

twenty-five dollars," confines the verdict to a single count, the question again arises—to which count is it confined? This statement, if it be considered a portion of the verdict, must, like the rest of the verdict, be presumed to refer to each charge, and attaches to each count. If it be considered as giving the aggregate value of all the mail bags taken, the result is the same for some parts, and it is wholly immaterial what part is to be deemed applicable to each count. But, the statement in respect to value forms no part of the verdict. The statute under which the plaintiff was indicted does not make the nature of the offence depend upon the value of the property taken. In a prosecution under this statute, value becomes important only when necessary to justify an imprisonment exceeding one year. Imprisonment for one year may be imposed without regard to the value of the property. In criminal cases, as distinguished from civil cases, the court, and not the jury, determines the kind and the amount of the judgment; and the statement of value, in question, should be considered as a statement made simply for the information of the court in passing sentence. It is analogous to the statement that the accused is under 18 years of age, a fact which, in some cases, changes entirely the character of the punishment to be imposed.

(5) The circumstance that the first sentence, which inflicted punishment for two offences, was vacated, and thereafter a sentence pronounced which inflicted the punishment prescribed for a single offence, does not tend to show that the plaintiff was not liable to the punishment imposed by the first sentence; while the fact that, upon the return of the first habeas corpus, the court dismissed the writ before vacating the judgment, shows that the court adjudged the first sentence to be lawful. Reasons for vacating the first sentence, in no way connected with the idea of illegality, can easily be suggested. Such action is not infrequent in inflicting punishments for crime.

(6) There being three distinct offences charged in the indictment, and the punishment imposed by the sentences pronounced being lawful punishment for these offences, the presumption must be that these punishments were imposed for three offences proved; in which case, there was no false imprisonment.

(7) The sentences pronounced upon the plaintiff are in no way affected by the time of rendition. Being pronounced at the same term, they were in law pronounced upon the same day. No statute of the United States fixes the time within which sentence is to be pronounced. Unquestionably, it would have been lawful to have detained the plaintiff in prison, after conviction, until the last day of term, and then to have sentenced him to one year's imprisonment for every offence for which he stood convicted.

The reasons above stated are sufficient to show that this case, as it stands before this court, affords no room to assert the proposition that the second sentence of the prisoner was unlawful because "it was an attempt to enforce a judgment which the judge knew to have been satisfied." Van Brunt, J. None of the foregoing points were considered or passed on at the special term, Judge Van Brunt being of the opinion that it would not be decorous in him to declare an imprisonment lawful, from which the supreme court of the United States had released the prisoner upon habeas corpus. But good law is always decorous. This defendant is not bound by a judgment to which he was no party, nor can he be adjudged liable in this action upon ideas of decorum. Respectful consideration will, of course, be given to the opinion delivered by the supreme court upon discharging the plaintiff from imprisonment, but it does not conclude this court, nor prevent due effect being given here to the point

now made. Certainly, no breach of decorum can be charged upon this court if it adopts, from the opinion of the supreme court in *Ex parte Lange*, the language used by that court in regard to a decision of its own (see point VII., below), found standing in the way of what the dissenting opinion designates as "a pre-determined unsound judicial conclusion." Opinion of Clifford, Circuit Justice, *Ex parte Lange*, 18 Wall. [85 U. S.] 201. This court, therefore, may well say, in respect to the discharge of the plaintiff upon habeas corpus, that, "in general terms, without much consideration," the supreme court declared the plaintiff not liable to the punishment inflicted upon him. If it was intended to raise the question whether the plaintiff was not under conviction for several offences and liable to be punished for each offence, "that point was not presented so as to receive the attention of the court, and certainly was not considered or decided." Opinion of the Court, *Ex parte Lange*, 18 Wall. [85 U. S.] 167.

II. If the record can be held to show a conviction of only one offence, then the first sentence was a nullity; in which case, the second sentence was, of course, lawful.

(1) It does not follow, says the supreme court of the United States (opinion, *Ex parte Lange*, 18 Wall. [85 U. S.] 176), because the court had jurisdiction of the person of the prisoner and of the offence, that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. On an indictment for libel, a judgment of death or confiscation of property would be void.

(2) If the first sentence be deemed a sentence for a single offence, then it inflicts a punishment not authorized by law; and, whether void or voidable, the error affects equally each part of the sentence. How can it here be said, that that portion of the sentence which imposes the fine is valid, while that which inflicts the imprisonment is invalid? And how can it be left to the prisoner to determine for himself which part shall become valid and which remain invalid? The sentence is an entirety, and must stand or fall as a whole, unaffected by the subsequent action of the prisoner. It cannot be avoided in part and affirmed in part, and that by the prisoner instead of the court.

III. This is an action for false imprisonment. The imprisonment complained of is from the 8th of November, 1873, to the 29th of January, 1874. This period is embraced within the term of imprisonment as fixed by both sentences. The first sentence, therefore, if not vacated, renders the imprisonment lawful. The first sentence was vacated, or it was not. If, as the plaintiff contends, the first sentence was valid and beyond the power of the court to vacate it, then that sentence stands as the sentence of the circuit court; and, whether justified by the conviction or not, it subjected the plaintiff to imprisonment for one year. Consequently, there could be no false imprisonment by reason of the second sentence, inasmuch as, during the period of his imprisonment, the plaintiff was within the scope of the first sentence as well, and subject thereto. In order to maintain this action, therefore, it must be conceded by the plaintiff that the first sentence was lawfully vacated.

IV. The first sentence was vacated. That sentence having been expunged from the record, the second sentence, when pronounced, was the only sentence. The record, therefore, shows to this court a lawful conviction, and a sentence pronounced at the same term, imposing a punishment lawful for a single offence. It is by this record that the plaintiff's case must stand or fall, and the record shows the imprisonment complained of to have been lawful.

(1) The first sentence, whether incomplete, or irregular, or void, was within the control of the court during the entire term, and might be

vacated or modified for any error or irregularity therein, and a new sentence be pronounced in conformity with the law. Writs of error, in criminal cases, are not allowed in the courts of the United States, but such courts are authorized, by statute, to grant new trials for reasons for which new trials have usually been granted in the courts of law. The power to vacate a sentence is implied in the power to grant a new trial, and is necessary to the proper administration of justice. Suppose gross misconduct on the part of the jury should be discovered the day after sentence—does the fact that sentence has been pronounced deprive the court of the power to set aside or vacate the judgment, that it may grant a new trial? "It is, also, equally well settled, that the power of a court over its judgments, to set aside, modify or annul, is unlimited during the entire term at which such judgments are rendered." *Union Trust Co. v. Rockford R. R. Co.* [Case No. 14,401], *Blodgett and Drummond, District Judges.* "The court certainly had full power to amend their records, and are the sole judges of the correctness of the entries made therein." *Sheppard v. Wilson*, 6 How. [47 U. S.] 277. See, also, *Doss v. Tyack*, 14 How. [55 U. S.] 312. As no writ of error is allowed in the courts of the United States, in criminal cases, to hold that such courts have not the power to vacate a sentence would often deprive the accused of all power to vindicate his innocence.

(2) The first sentence was imperfect and incomplete. It was necessary that it be perfected or vacated, and it was, therefore, not only competent for the court, but incumbent upon it, to perfect or to vacate the sentence, as advised. It contained no directions to docket judgment for the fine, nor any order for execution, and there was no order to stand committed until the fine be paid. So far as the fine was concerned, the sentence was wholly ineffective, as it stood, for want of an "award of the proper process to carry into effect the sentence of the court." *Kane v. People*, 8 Wend. 215. Fines imposed by the courts of the United States are to be docketed as judgments and collected by execution, as in civil cases. Payments may also be enforced by imprisonment, when so ordered by the court.³ Here, no commitment was ever directed or issued.

V. The exercise of the power to vacate a sentence, in cases where the sentence is in part executed, does not violate the constitutional provision which forbids that one shall be twice punished for the same offence.

(1) The application of the constitutional principle relied upon by the plaintiff was rejected by the supreme court in the plaintiff's case, where the court declares, that it is not necessary to say, that, "when a party has had a fair trial before a competent court and jury, and has been convicted, any excess of punishment deprives him of liberty or property without due course of law." 13 Wall. [35 U. S.] 170. It was also considered and rejected by the court of appeals of New York, in *Ratzky v. People*, 29 N. Y. 124. There, a sentence, passed upon a good conviction, and when in part executed, was set aside as unlawful, whereupon the power to pass a new sentence was questioned, and the constitutional protection was invoked. The power to sentence anew was upheld. *Denio, C.*

³ "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant, in like manner as judgments in civil cases are enforced: Provided, that, where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid." Act June 1, 1872 (17 Stat. 193, § 12); Rev. St. U. S. § 1041.

J., says (page 135): "The case is not within the constitutional provision which forbids a person being twice put in jeopardy for the same offence. A person is said to be put in jeopardy only when he is a second time tried upon a criminal accusation; but, the term has no relation to the reversal of an erroneous judgment and pronouncing a legal one, pursuant to one legal conviction." So, in the case of *Foote v. People*, 56 N. Y. 321, where the court below pronounced a sentence for a fine and ninety days' imprisonment, which, on appeal, was declared illegal, the court of appeals directed a new punishment to be imposed. In *Harris v. People*, 59 N. Y. 599, the defendant was convicted upon an indictment supposed to charge burglary in the second degree, and was sentenced to be imprisoned in the state prison, at hard labor, for the term of seven years and six months. It was held by the court of appeals, that the charge in the indictment was burglary in the third degree, and, consequently, that the punishment imposed was greater than that fixed by law for the offence charged. The court thereupon affirmed the conviction and remanded the case to the court below, with directions that the proper sentence be imposed.

(2) No sound distinction can be made between the plaintiff's case and other cases of sentences partly executed, by declaring that the payment of the fine expiated his crime, because it was a suffering of "one of the alternative punishments to which alone the law subjected him." There is no such thing as an "alternative punishment." The statute makes none, and this sentence made none. The conviction of the plaintiff rendered him subject to such punishment as should be fixed by the court. The statute creating the offence does not fix the punishment, much less an "alternative punishment;" nor does it declare that suffering a fine shall expiate this crime. The statute simply limits the power of the court to certain kinds of punishments and within certain bounds as to extent. What would expiate the crime, in this case, rested in the conscience of the court, and is only shown by the sentence of the court in the case. The only punishment to which the plaintiff ever became subject, must, therefore, be found in the sentences pronounced upon him; and the punishments there imposed he has never suffered.

(3) A sentence is a judgment of the court, but the judgment in a criminal case differs from the judgment in a civil case, in that it must contain a determination in respect to the kind as well as the amount of punishment, made not by the jury, nor by the convict, but by the court. It sounds strange to say that, when a court, in pronouncing sentence, leaves unperformed the duty imposed upon it by the statute, of selecting between two kinds of punishments, then the convict may determine that question himself, and, by electing to be punished by fine, deprive the court of all power to proceed further in the premises. The picture of a person whipped in pursuance of an erroneous sentence, has been alluded to with feeling, to show the necessity for a restriction of the power of courts. But there must be power somewhere. The court of appeals has power, by statute, in case of reversal, to direct as to the sentence to be imposed, and whipping might appear in a sentence so directed. Prisoners convicted of crime may escape just punishment, by means of the writ of habeas corpus. But such suggestions afford slim reason for an abrogation of the statute, in the one case, or the denial of the power to discharge upon habeas corpus, in the other.

VI. The proposition that the second sentence imposed upon the plaintiff was void, is made to depend upon the fact that the fine which formed a part of the first sentence had been paid. Payment of the fine has, it is said, expiated the crime. But, the fine was never

paid. This appears by the complaint; and it was also apparent at the passing of the second sentence. The facts relied on to show payment of the fine are set forth in the complaint. They show, on the contrary, that no legal payment of the fine was ever made. The facts stated are as follows: The first sentence was on November 3d. On November 4th, two hundred dollars was handed to the clerk, and retained by him until November 7th, when it was deposited with the assistant treasurer, "to the credit of the treasurer of the United States;" and, on the same day, the plaintiff obtained the first writ of habeas corpus, returnable November 8th, upon the return of which writ, the deposit made the day previous with the assistant treasurer was proved on the part of the petitioner, as ground for his discharge.

(1) The defendant was in the custody of the marshal. In order to pay the fine he must either pay the money to the marshal, directly, or obtain leave to pay the money into court, and, upon such payment, obtain an order of the court directed to the marshal, authorizing his release. The plaintiff pursued neither of these courses, but caused \$200 to be deposited with the assistant treasurer, to the credit of the treasurer of the United States. It is true, that the clerk gave a receipt stating that the money was in the registry of the court on November 4th, but the receipt of November 7th shows that the money remained on that day undeposited in the registry. It was never deposited to the credit of the court, as required by law,⁴ but, on November 7th, was still subject to the control of the plaintiff who, on that day, caused it to be deposited with the assistant treasurer. The clerk had no authority so to deposit it in behalf of the court. Such a deposit was, indeed, contrary to law; and the clerk, in making it, must be deemed to have acted as the agent of the plaintiff. The plaintiff, in his application for discharge on the first habeas corpus, made such deposit to appear, and thus shows that he relied on that deposit as his payment of the fine. The records of the circuit court, in the case of the plaintiff⁵ show, also, to this court that no money was ever paid into court by the plaintiff.

(2) The \$200 was never intended to be paid into court. On the contrary, it was deposited in Wall street, without the knowledge of the court, in order to place it beyond the reach of the court. If this money had been paid

into court, by the rules and by statute it would have been deposited in the Central National Bank, in the name and to the credit of the court, to be drawn therefrom only upon a check showing upon its face the order of the court so to draw it, and bearing the signature of the judge.⁶ If so paid, it would have been within the power of the court to direct its return, by the clerk, to the person from whom he received it. It was not so paid, but was deposited to the credit of the treasurer of the United States, in order to prevent the possibility of a direction to return it.

(3) Money cannot be paid into court without leave of the court. No permission or direction to pay this money into court was ever given, and none is averred. The clerk is but the amanuensis of the court. He acts only by rule or direction of the court, and he cannot bind the court except as directed. A court is not, at the option of any one, to be made responsible for the custody and disposition of money, simply by the fact that a clerk may be willing to receive it. "The clerk had no right to receive the money without a rule of the court." *Baker v. Hunt*, 1 Wend. 103. The case is not that of an ordinary judgment regularly entered and an execution issued directing money to be made and returned to the court.

(4) The deposit of the money with the assistant treasurer cannot be relied upon as showing a payment of the fine to the United States. A payment of money, to be effective as a payment to the United States, must be made in the mode required by law. The delivery of money to the president, the secretary of the treasury, or the treasurer of the United States, amounts to nothing, unless authorized by some statute. The fine in question was imposed for the violation of a postal law. By statute, the money belonged to the post office department, as part of the postal revenue, and was to be deposited "for the use of the post office department." Rev. St. U. S. § 4059. "Unclaimed money in dead letters for which no owner can be found; all money taken from the mail by robbery, theft, or otherwise, which may come into the hands of any agent or employee of the United States, or any person whatever; all fines and penalties imposed for any violation of the postal laws, except such part as may by law belong to the informer or party prosecuting for the same; and all money derived from the sale of waste paper or other public property of the post office department, shall be deposited in the treasury, under the direction of the postmaster general, as part of the postal revenue." Act June 8, 1872 (17 Stat. 290, § 42); Rev. St. U. S. § 4050. In order to effect a payment to the United States of the fine in question, the money must go to the postmaster general to be deposited, under the direction of the postmaster general, in the treasury of the United States "to the use of the post office department." When so deposit-

⁴ "Section 1. That all moneys in the registry of any court of the United States, or in the hands or under the control of any officer of such court, which were received in any cause pending or adjudicated in such court, shall within thirty days after the passage of this act, be deposited with the treasurer, an assistant treasurer, or a designated depository, of the United States, in the name and to the credit of such court. And all such moneys which are hereafter paid into such courts, or received by the officers thereof, shall be forthwith deposited in like manner: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties, under the direction of the court. Section 2. That no money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts, respectively, in term or in vacation, to be signed by such judge or judges and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn." Act of March 24, 1871 (17 Stat. 1, §§ 1, 2); Rev. St. U. S. §§ 995, 996.

⁵ "The United States vs. Edward Lange. For stealing and embezzling mail bags. 1873. Oct. 7. Filed bill of indictment. Oct. 8. Arraigned. Plea—not guilty. Oct. 15. Motion to quash eighth, ninth, and eleventh counts of indictment. Ninth count quashed. Other counts stand. Trial commenced. Oct. 23. Trial concluded. Verdict—guilty; and the value of the property to be less than \$25. Nov. 3. The prisoner, Edward Lange, is sentenced to one year's imprisonment, and to pay a fine of \$200. Nov. 7. Filed petition for habeas corpus. Nov. 7. Issued writ of habeas corpus. Nov. 8. Writ discharged. Nov. 8. Sentence pronounced Nov. 3d, 1873, vacated and set aside, and the prisoner sentenced to one year's imprisonment."

⁶ "At a stated term of the circuit court of the United States of America, for the Southern district of New York, in the Second circuit, held at the United States court rooms in the city of New York, on Monday, the fifth day of June, in the year of our Lord one thousand eight hundred and seventy-one: Present—The Hon. Lewis B. Woodruff, Circuit Judge. In the matter of the deposit of moneys in the registry of the court. In obedience to an act of congress entitled 'An act relating to moneys paid into the courts of the United States, approved March 24th, 1871,' it is ordered, that all moneys in the registry of this court, or in the hands or under the control of any officer of this court, which were received in any cause pending or adjudicated in this court, be forthwith deposited in the Central National Bank of the city of New York, a designated depository of the United States, in the name and to the credit of this court; and that all such moneys, which shall hereafter be paid into this court, or received by the officers thereof, shall be forthwith deposited in like manner: Provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of this court."

ed it would form part of account No. 7, "Fines and Penalties" (Rev. St. U. S. § 4049), and be available to the post office department as a part of the postal revenue; otherwise, not. Had it been paid into court, it would have been accounted for to the post office department. It would have been deposited in the Central National Bank, in the name and to the credit of the court, whence it would have been drawn under the order of the court for payment to the postmaster general, or, under his direction, into the treasury, to the credit of the post office department. What the plaintiff did was, to deposit two hundred dollars with the assistant treasurer, to the credit of the treasurer of the United States. So deposited, the money can never reach the post office department. Like "conscience money," it passed to the credit of the treasurer of the United States, but it balanced no account and discharged no debt.

(5) A sentence of the character of the first sentence passed upon the plaintiff, when made perfect, would assume the form of a judgment against the plaintiff for two hundred dollars, to be collected by the marshal upon execution; and the money, when received by the marshal, would be returned with the execution to the court, to be disposed of by the court in the manner before stated. The payment made by the plaintiff must, therefore, be deemed a voluntary payment. It was not made in pursuance of the sentence, and had no effect. The case, therefore, in every aspect, shows that the plaintiff has never expiated the crimes of which he stands convicted.

VII. So far as the liability of the defendant is concerned, the legality of his acts must be determined by the law as it then stood declared. According to that law, as declared by the supreme court of the United States, the legality of the second sentence would not be affected by the fact that a previous valid sentence, under which the accused had suffered punishment, had been made and set aside.

In *Basset v. U. S.*, 9 Wall. [76 U. S.] 38, it was decided, that it is competent for a court, for good cause, to set aside, at the same term at which it was rendered, a judgment of conviction, though the defendant had entered upon the imprisonment ordered by the sentence. The same court that discharged Lange on habeas corpus, in 1874, declared, in *Basset's Case*, in 1869, that "this control of the court over its own judgment, during the term, is of every day practice." This language was used by the supreme court, in a case where, in execution of the sentence, the defendant was taken to prison and imprisoned several days, and then, on habeas corpus, issued on motion of the district attorney, brought from the prison into court, and then, likewise on motion of the district attorney, the judgment was vacated and set aside. The defendant then withdrew his plea of guilty and gave a recognizance for his appearance for trial at a future term of the court. Failing to appear for trial in pursuance of his recognizance, an action was brought against the sureties upon the bond. To this action the sureties answered, in substance, that, *Basset* having been once tried, convicted, and sentenced to imprisonment on the indictment, and having been taken in execution of such sentence and imprisoned, such imprisonment was an expiation of the offence, and that the action of the court in holding him to bail to again answer upon the same indictment was in excess of the power of the court, and was illegal and void. This case is directly in point, and is so conceded to be by the supreme court in *Ex parte Lange*. It furnished, then, the law binding upon the circuit court of the United States at the time Lange was sentenced. It is, indeed, now said by the supreme court, that the decision in *Basset's Case* was made "in general terms, without much consideration, for no counsel appeared for the

sureties," and that, for that reason, it is now to be disregarded. But, how could the defendant know that a case which the supreme court of the United States had decided and caused to be reported as an authority, had not received the attention of the court, and that the court had not considered what it had decided? He was bound to take the law as he found it declared; and, in sentencing Lange, the circuit court exercised precisely the same power exercised in *Basset's Case*, and approved by the supreme court. What was lawful for the court to do in *Basset's Case*, was lawful for the court to do in the plaintiff's case. It is, indeed, true, that what in *Basset's Case* was declared to be lawful, has since, in *Lange's Case*, been declared unlawful. But, the defendant is to be judged by the law in force at the time he acted. For the future, the later decision may furnish the rule in courts of the United States, unless, on some other day, the supreme court should say that, having been decided without much consideration, for no counsel appeared for the judge, it is to be disregarded.

It has now been shown that neither the first sentence, nor the second sentence, nor both together, imposed upon the plaintiff a greater punishment than the law allowed. It has also been shown, that the first sentence was lawfully vacated, and that the record shows but a single sentence, imposing lawful punishment for a single offence. It has also been shown, that, by the law as it was at the time, and as it now is, except as modified by the decision in *Ex parte Lange*, the first sentence having been set aside on objection taken by the accused, no previous payment of the fine, if made, would deprive the court of power to proceed in the cause, and to sentence anew. It has also been shown, that the fine was never paid. It is submitted, that, under the circumstances, the defendant is entitled to a determination of these questions at the hands of this court, notwithstanding it be plain that, for other reasons, the action cannot be maintained.

VIII. The act of the defendant, in pronouncing the judgment of the circuit court of the United States, upon the conviction of the plaintiff then standing on the records of the court, was a judicial act, and affords no right of action against the judge who happened to be holding the court. Neither malice nor corruption is here charged or suggested.

(1) Suits have frequently been brought against judges, and, whether maintainable or not, will continue to be brought from motives more or less creditable to the promoters thereof. They do not call for any stretching of the law in order to uphold them. Says *Hale, C. J.*: "I speak my mind plainly. Habeas corpus, although it doth make void the judgment, it doth not make the awarding of the process void to that purpose; and the matter was done in a course of justice. They will have but a cold business of it." *Bushell's Case*, 1 Mod. 119.

(2) As early as in the reign of Charles II. it was held by the court of king's bench, that an action will not lie against a magistrate for false imprisonment in consequence of acts done by him in the character of a judge. That rule has never been departed from by the English courts. *Hawkins* says (book 1, c. 72, § 6): "The law has freed the judges of all courts of record from all prosecutions whatsoever, except in the parliament, for anything done by them openly in such courts, as judges. For, the authority of a government cannot be maintained unless the greatest credit be given to those who are so highly intrusted with the administration of public justice; and it would be impossible for them to keep up in the people that veneration of their persons and submission to their judgments, without which it is impossible to execute the laws with vigor and

success, if they should be continually exposed to the prosecutions of those whose partiality to their own causes would induce them to think themselves injured." This principle was asserted as early as the Book of Assize (27 Edw. III. pl. 18), where A. was indicted, for that, being a judge of oyer and terminer certain persons were indicted before him of trespass, and he had entered upon the record that they were indicted of felony, and judgment was demanded if he should answer for falsifying the record, since he was a judge by commission; and all the judges were of opinion that the presentment was void. The same protection was, at this early period, extended equally to grand jurors. In 21 Edw. III. Hil. pl. 16, a writ of conspiracy was sued in king's bench, and the question was, whether it would be a good plea to the action, that the defendants were indictors in the case complained of; and it was held to be a good plea. Staunford, in his Pleas of the Crown, first published in 1567, says (page 173) that no prosecution for conspiracy lies against grand jurors, for it shall not be intended that what they did by virtue of their office was false and malicious; and that the same law applied to a justice of the peace, for he shall not be punished as a conspirator for what he does in open session, as a justice. In *Floyd v. Barker*, 12 Coke, 23, the subject was considered by Lord Coke and all the judges, and they resolved, that no grand juror was responsible for finding an indictment, and that no judge, who tries and gives judgment in a criminal case, or does any act in court, shall be questioned for it at the suit of the party against whom judgment was given. And it was observed, that, if the judges of the realm, who have the administration of justice, were to be drawn into question, except it be before the king himself, it would tend to the slander of justice, and those who are the most sincere would not be free from continual calumniation. In *Aire v. Sedgwick*, 2 Rolle, 199, Noy, Judge, said that "no action lay against a judge for anything which he did as judge." But, the case of *Hamond v. Howell*, 1 Mod. 184, 2 Mod. 218, is directly in point. The defendant was a recorder of London, and, as one of the judges of oyer and terminer, had fined and imprisoned the plaintiff because he brought in a verdict, as petit juror, contrary to the direction of the court and the evidence. This case was brought after the Case of *Bushell*, who was another juror fined with the plaintiff for the same cause, and who had been discharged on habeas corpus, upon the ground that his imprisonment was illegal and a usurpation. The act of the judge was admitted to be illegal and void, and the effort was made to except the case from the general principle, by arguing that what the defendant did was not warranted by his commission, and that, therefore, he did not act as judge. But, the court held the action to be without authority or the semblance of authority, and they declared that the bringing of the action was a greater offence than the imprisonment of the plaintiff, for it was a bold attempt both against the government and justice in general. A warrant granted by the chief justice of the queen's bench, in chambers, returnable into that court, to arrest a party for breach of the peace, is such a judicial act as will protect him against an action for false imprisonment, although, from the want of proof before the chief justice, of the facts recited in the warrant, his act of issuing the warrant was declared to be without authority and illegal. *Taaffe v. Downes*, 3 Moore, P. C. 41, note. In *Sutton v. Johnstone*, 1 Term R. 493, it was held, that no action lies against a judge for acts done in that capacity; that the law raises a presumption in favor of a judge, and will not (as in ordinary cases) suffer that presumption to be rebutted; and that, if otherwise, it would deter them from doing their duty. Many other English cases could be cited.

(3) The rule, so early established and so uniformly adhered to in England, has, without an exception, been followed in this country. The case of *Yates v. Lansing*, 5 Johns, 282, is among the earliest cases, and is the leading case upon this subject. Chancellor Lansing committed *Yates* for contempt of court. He was discharged, on habeas corpus, by Chief Justice Spencer, of the supreme court. After his discharge he was rearrested and imprisoned, by order of the chancellor. This imprisonment was declared to be illegal by the court of errors, and the plaintiff was discharged. He then brought his action against the chancellor, to recover the penalty given by statute. The defence rested, mainly, on the ground that the act complained of was done by the defendant in his judicial capacity, while sitting in the court of chancery, and that, for such an act, no action would lie. In the opinion delivered by Chief Justice Kent, the English authorities were all reviewed, and the ruling there established was affirmed in its broadest terms, as the law of this state; and it was asserted that judges of all courts of record, from the highest to the lowest, are exempt from prosecution, by action or indictment, for what they did in their judicial character. The supreme court of the United States, in *Bradley v. Fisher*, 13 Wall. [80 U. S.] 335, affirmed the doctrines of *Yates v. Lansing*, in the following language: "In this country, the judges of the superior courts of record are only responsible to the people or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office." "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." The circuit courts of the United States are courts of record, and have general jurisdiction of all offences committed against the United States.

(4) The act here complained of was a judicial act. The circuit court of the United States for the Southern district of New York had jurisdiction of the offences charged against the plaintiff. It also had jurisdiction of his person, acquired by due process of law, and not terminated by any discharge. The sentence complained of formed a part, and appears in the record as a part, of a lawful criminal prosecution then pending before that court. The defendant was before the court, in custody, upon a good conviction theretofore had, and upon that conviction he was sentenced by the court. How, then, can it be said that the pronouncing the sentence of the court was not a judicial act? Certain inferior officers sometimes act ministerially and sometimes judicially. For errors or mistakes committed when they act ministerially, such officers are liable to the party injured, but they are never liable for errors of judgment when they have jurisdiction of the subject-matter, and the acts complained of were in their nature judicial. *Barhyte v. Shepherd*, 35 N. Y. 251. Acts done by judges of courts of record are classified as judicial and extra-judicial. Their acts pertaining to the causes pending in their courts are always judicial. *Vin. Abr. tit. "Judges"*; *Floyd v. Barker*, 12 Coke, 23. A judicial act, when performed by a judge of a court of record, may be defined to be whatever he does in his judicial capacity, and which he cannot do in any other. To this rule there are a few exceptions, such as refusing writs of habeas corpus, and settling and signing bills of exceptions. These are exceptions to the general rule, made such by statute. As to all other acts of a judge, whether in court or out of court, if they cannot be done in any other than the judicial capacity, they are judicial acts. An extra-judicial act is one done by a judge in his private capacity, and which any citizen may do. If the act is one which none

but a judge can do, then it is judicial and not extra-judicial. All acts done by a judge in furtherance of a case depending in court, the issuing of writs, making orders, and passing sentence, &c. are acts which can only be done by a judge and no other person, and must be done in a judicial capacity. The act here complained of was an act of judgment, where the defendant, being judge, at the end of an important criminal prosecution, where the plaintiff had been legally indicted, tried and convicted, exercised the proper functions of a judge, and, from the bench, in open court, at a regular term thereof, assisted by the clerk and marshal, in the presence of the party, upon discussion, in view, subject to public observation, in presence of the bar, and when the party had been heard by counsel, pronounced the solemn judgment of the circuit court of the United States, which judgment was then and there entered upon the record, and was executed by the marshal as a judgment. For, mark, no execution or commitment was issued by the defendant to the marshal. The plaintiff was imprisoned by no personal direction of the defendant, but by virtue of the sentence, as a judgment of the court, executed as such by the marshal. That record still stands, and must ever stand, as the judgment of the circuit court of the United States, for there is no tribunal empowered to reverse it. It may be called irregular—it may be called illegal; but the judgment still remains the judgment of a court having general jurisdiction over all offences committed against the United States, and which, beyond all question, had acquired jurisdiction of the person of the plaintiff. It is said that the court had lost jurisdiction of the person of the plaintiff by reason of the payment of the \$200, and that, therefore, the sentence of the court was simply the act of a private person in regard to a bystander. But, the court having once acquired jurisdiction of the person, whether such jurisdiction had been lost, must, in its very nature, be a judicial question. It was one which a judge, as judge, was not competent to decide. It was a question to be decided by the court, in court. The plaintiff was before the court, in the custody of the marshal. That he had been legally committed to the custody of that officer, upon conviction, was not disputed; but, it was insisted that something had occurred, since he was thus legally committed, which entitled him to be discharged. This question the court was called on to adjudicate. Whether he should be discharged or be sentenced was then to be decided. The court decided that he was not entitled to be discharged and passed sentence; and that decision was final, from which no writ of error lay. The determination thus made involved the questions—whether the first sentence was valid or void; whether, valid or void, it could be vacated at the same term; whether, if the first sentence were vacated, the court had power to pronounce a second sentence; whether the power of the court to pronounce the second sentence was affected by the alleged payment of the fine; and whether the plaintiff had, in fact, paid the fine. All these questions the circuit court was forced to consider and determine. The defendant presiding, as judge, pronounced the judgment of the court thereon; and now it is sought to hold him liable upon the ground that, in so doing, he did not perform a judicial act.

IX. The judgment should be reversed, and judgment be given for the defendant.

DANIELS, J. This action has been brought to recover for the unlawful imprisonment of the plaintiff by the defendant, who is the United States district judge for the Eastern district of New York. It appears by the complaint and the copies of the papers annexed to it, showing the proceedings had, that the plaintiff was indicted, tried, and convicted at a term of the

circuit court of the United States for the Southern district of New York, held by the defendant, of the crime of larceny committed by stealing mail bags of the value of less than twenty-five dollars. By the act of congress defining the offence and its punishment, that rendered the plaintiff liable to be sentenced to pay a fine not exceeding two hundred dollars, or to be imprisoned not exceeding one year. In finally disposing of the case, the defendant imposed both these punishments upon him. The plaintiff paid the fine and applied to be released from custody by means of the writ of habeas corpus, because he had suffered one of the alternative punishments provided for the offence. That was denied, and the court, by order entered, directed the sentence which had been pronounced to be vacated, and then sentenced the plaintiff to one year's imprisonment upon his conviction. He had then been in custody five days, and afterwards applied to the circuit court of the United States, where the circuit judge, Lewis B. Woodruff, the district judge of the Southern district, Samuel Blatchford, and the defendant, were upon the bench, presiding, for a writ of habeas corpus to discharge him from further imprisonment, because of its illegality. The application was heard, and, after being considered, was denied. He then applied for another writ of habeas corpus, which, together with a writ of certiorari, was issued by the supreme court of the United States, and, upon the hearing had on the return made to both writs, the plaintiff was discharged from custody, the court holding that he could not lawfully be sentenced to imprisonment after what had transpired in the case. *Ex parte Lange*, 18 Wall. [85 U. S.] 163. After that this action was brought against the defendant, for false imprisonment; and a very able argument has been made by the learned counsel for the plaintiff in favor of maintaining it. But the report of the case itself, as it was considered and decided by the supreme court of the United States, would seem to be sufficient to negative the assertion that such an action can be maintained, upon the facts in the case. The sentence was changed by the same court, at the same term during which the first sentence was pronounced; and a learned and extended examination by the court of last resort was found necessary for the purpose of maintaining the position that the change was improperly and unlawfully made. The opinion in which that view was sustained—and it was done by one of the ablest judges of the present time—proved unsatisfactory and unconvincing to two members of that learned court; and its conclusions were controverted by one of those two, in an opinion rarely if ever excelled in the thoroughness of its investigations and researches, or the vigorous logic tracing and exhibiting their results. Under these circumstances, it cannot with the least propriety be held that the point presented to the defendant was not a doubtful one, or that its decision and determination did not require the exercise of judicial functions. The examination and discussion which it received when it was finally decided, most conclusively establish the contrary; and that of itself should be deemed to be sufficient to shield the defendant from personal liability. The law was, to say the least, in such a condition as to afford ostensible support to each side of the proposition presented, and to render the development of a satisfactory and consistent conclusion intricate and difficult. Different minds could very well, and would very naturally, be led to different results concerning the propriety of the course pursued in the disposition of the case by the circuit court. Two other judges of great learning and experience in that court held with the defendant, that the proceedings were not invalid; and the plausibility of their decision was finally corroborated by the opinion of Mr. Justice Clifford. If, with

that weight of authority in support of the action that was taken, a judge could be held personally liable for its consequences, judicial protection would be at once wholly destroyed, and the utility of the courts practically subverted. For, the result would finally be, that all unauthorized determinations arising out of misapprehensions of the law, or of miscalculations of the true weight of authority, affecting the person or property of the defeated party, would furnish a cause of action for trespass or false imprisonment. And no court could possibly be protected against such liability; for, even those of last resort not unfrequently find it necessary to re-examine, distinguish, and finally overrule their own decisions. And it certainly is no discredit to the learned tribunal by whose mandate the plaintiff was set at liberty, to say that it has not always found itself at liberty to disregard that alternative. The law is the most complicated of all practical sciences; and it cannot fail to become more so as the intricacies of business and enterprise increase and advance. Differences of opinion upon legal subjects cannot be avoided, even by the most patient attention and laborious investigation; and, when they do arise, erroneous conclusions are required to be excused, as the natural consequences of human fallibility. When a party has been brought before a court of justice in a legal manner, and circumstances are presented requiring a decision to be made, the tribunal making it cannot be deprived of protection because it may afterwards, upon further and fuller investigation, turn out to have been erroneous. That was the case of the plaintiff. He had been convicted of a crime punishable by fine or imprisonment. The court inadvertently imposed both. When its consideration was directed to the misapprehension under which the sentence had been pronounced, an effort was made to correct it in such a manner as to comport with what was considered to be just in the case; and that correction it was held could be and was designed to be made. The emergency which had arisen required a decision to be made. The judge could neither avoid it nor escape from it. His duty required him to act, and he had the power to decide, and he did so, according to the best of his judgment; and for that he cannot, upon any sound principle of accountability, be held to be personally liable. He had, for that purpose, jurisdiction of the person and the subject-matter. Both were before him, and his decision was necessary. He could not avoid making it if he would, and, as it turned out, he decided erroneously.

The rule by which judicial officers have been exonerated from liability for the consequences of their decisions has gone much further than is required for the protection of the defendant. In *Yates v. Lansing*, 5 Johns. 282, the assertion was approvingly mentioned, "that no authority or semblance of an authority" had been urged for an action against a judge of record, for doing anything as judge; that this was never before imagined, and no action would lie against a judge for a wrongful commitment any more than for an erroneous judgment. *Id.* 294. That principle was affirmed afterwards, in the same case, by the court of errors (9 Johns. 395), and to the same effect are *Jenkins v. Waldron*, 11 Johns. 114; *Vanderheyden v. Young*, *Id.* 150; *Wilson v. Mayor of New York*, 1 Denio, 595; *Weaver v. Devendorf*, 3 Denio, 117; *Bradley v. Fisher*, 13 Wall. [80 U. S.] 335. In the case of *Rochester White Lead Co. v. City of Rochester*, 3 Comst. [3 N. Y.] 463, it was said that, "whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment, he is exempt from all responsibility by action, for the motives which influence him and the manner in which such duties are performed." *Id.* 466. To secure this immunity, it is sufficient that a case requir-

ing judicial action is presented to the judge. *Harman v. Brotherson*, 1 Denio, 537; *Landt v. Hilts*, 19 Barb. 233.

The defendant's right to exemption from personal liability in this case rests upon still more cogent circumstances than those already relied upon. For, the decision of the United States supreme court, to which he was bound to subordinate his action, had previously affirmed the existence of the authority which he exercised in changing the punishment. *Cheangkee v. U. S.*, 3 Wall. [70 U. S.] 320; *Basset v. U. S.*, 9 Wall. [76 U. S.] 38. In the last case, the person proceeded against had pleaded guilty to an indictment, and had been sentenced to imprisonment, and was actually sent to prison, in pursuance of the sentence. A few days after that he was brought again into court by means of a writ of habeas corpus, and, on the district attorney's motion, the judgment was set aside and the prisoner had leave to withdraw his former plea of guilty. This was all done during the same term, as it was in the case of the plaintiff, and the court unanimously held it to be proper. That was not done because the proceeding was favorable to the defendant, but for the sole reason that, during the same term, the court had full power to control and change its judgments. That subject was very fully discussed and the authorities cited upon which the principle rested, by Mr. Justice Clifford, in his opinion in *Ex parte Lange*, 18 Wall. [85 U. S.] 191-195. A decision of the same nature was made after the execution of the sentence had commenced, by reducing the term for which transportation had been provided, in the case of *Rex v. Price*, 6 East, 323, 327. The circuit court had no power, even if it had the disposition, to gainsay or deny the accuracy of the legal principle sanctioned by the case of *Basset v. U. S.*, *supra*. It not only had the power, but it was bound to conform its action to the principle maintained by that authority. That was as obligatory upon the defendant at the time as positive legislation would have been; and he appears to have acted under its sanction. At that time his action was strictly lawful, and it cannot be denied that the authority of that case then afforded him complete protection for the change made in the sentence, and it would probably be conceded to continue to do so, had it not been since impaired as authority by the final decision made in the plaintiff's favor. Under the doctrine of that case, he was vested with clear jurisdiction over the subject-matter brought before him, and it at the same time indicated the manner in which it should be exercised by him. That it was, as the learned justice stated in his opinion in the plaintiff's favor, decided "in general terms, without much consideration" (*Ex parte Lange*) 18 Wall. [85 U. S.] 167), could not change its effect as authority, where it was followed by the circuit court. The defendant presiding there could not then, with the least propriety, have assigned that as a reason for disregarding it as authority. The decision was then in full force, as it had been made. It was promulgated by the court, in its published reports, as a proper exposition of the law; and it would be exceedingly unjust, under such circumstances, to render the defendant's protection dependent upon the views afterwards taken to correct it, by the court that had pronounced it. That tribunal could correct it, as it has, when it was discovered to be wrong, but he had no such power over it. It was his duty to conform his official action to it, and for that it cannot be that he can be held personally liable because the authority of the decision has since been superseded by another. His conduct, on the other hand, should be so far sustained as to secure him immunity, the same as it would have been if a statute had existed in favor of it, which the legislature afterwards repealed. For future purposes the repeal obliterates the law, the same as though it had

never been enacted. But acts previously performed are still maintained by force of the law which sanctioned them at the time of their occurrence. This principle is too familiar to require the citation of authorities for its support, and all its reasons are applicable to the case now before this court.

The principle invoked for the support of this action would sanction suits against judges for their official acts, in a large class of cases, if it should receive the approval of the courts. It would be difficult to exclude from its comprehension any cases where imprisonment should be pronounced or continued which might afterwards be declared to be not warranted by the final view taken of the law. No authority has gone so far as that, and it is not probable that any will be hereafter so widely extended. The settled principle, on the contrary, is, that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. *Bradley v. Fisher*, 13 Wall. [80 U. S.] 347.

The defendant cannot be held liable for the consequences of the imprisonment following the change made in the sentence. He acted judicially in making it. The exigency required him to decide, and that included the power to decide wrongly, without liability to himself, particularly as it practically required the abrogation of an existing and, for the time, controlling authority, to render the error apparent. It is entirely evident that he was actuated solely by the motive of performing his duties, for the best interests of the public, by subjecting the plaintiff to what was believed to be no more than a proper measure of punishment for the offence of which he had been convicted. That he considered his acts to be fully warranted by the decision of the tribunal from which he was bound to receive the law, is clearly shown by what the case shows to have transpired; and in that view he was supported by other eminent judges. To hold him liable for a change afterwards made in it, would seem to be hardly less than a positive perversion of justice. That he cannot be held liable for the five days' imprisonment under the sentence as it was at first pronounced, follows from the view which was adopted in the decision of the habeas corpus. For, it was there distinctly held, that "the judgment first rendered, though erroneous, was not absolutely void. It was rendered by a court which had jurisdiction of the party and of the offence, on a valid verdict. The error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void." *Ex parte Lange*, 18 Wall. [85 U. S.] 174. And, as the defendant had the same jurisdiction over the subject when the plaintiff's first sentence was vacated and the last one was pronounced, he is equally entitled to the same protection as to this portion of the case. The sentence, under the circumstances, was not void. It was simply voidable, by the operation of the restriction subsequently imposed upon the principle established by the case of *Basset v. U. S.*, supra, and that effect was first given to it long after the power of the defendant's court had been exhausted.

The order should be reversed, and an order entered sustaining the demurrer, with the usual leave to the plaintiff to amend, on payment of costs.

LATTON v. CRAWFORD. See Case No. 18,296.

LATTON v. RAINEY. See Case No. 18,296.

LEGAL PROCESS—CHARGE TO GRAND JURY IN RELATION TO THE OBSTRUCTION OF LEGAL PROCESS. See Case No. 18,250.

LEWIS (BELL v.). See Case No. 18,231.

Case No. 18,308.

In re LINDSLEY.

BARNEY v. DE KRAFT.

[2 Hayw. & H. 430.]¹

Orphans' Court, District of Columbia, March 21, 1863.

INFANTS—WARD OF CHANCERY—EXCLUSIVE JURISDICTION OF COURT.

In all cases where an infant is a ward of chancery, no act can be done affecting the person, property or estate of the minor, unless under the direction expressed or implied of the chancery court itself.

Overruling a mandate of the circuit court.

[Proceeding for the appointment of a guardian for Samuel C. Barney, Jr., and others, minor children of Samuel Chase Barney.]

PURCELL, J. In the above cause this court, on the 25th day of January, 1863, pronounced a final decree appointing Dr. Harvey Lindsley, (at discretion,) guardian to the above minor children, the court being of the opinion that Samuel Chase Barney had lost his marital rights as husband and natural guardian by the decree of divorce of Jasper county, in the state of Iowa, in equity in the district court. By that decree he was forever separated from his wife, and the custody of the said minor children was taken from him and given to the mother. It appears on the face of the decree that the court was a tribunal of competent jurisdiction both over the parties and the subject matter, and that said decree was duly and properly authenticated according to the act of congress in such cases made and provided, and this court held that the divorce was sufficient to exclude Samuel Chase Barney from the guardianship of the property of the said children, without reference to the other facts against him in the case. Also that inasmuch as the said decree of divorce declared that Samuel Chase Barney had received timely notice of the pending of the suit, by the proper publication required by law, and notice sent to his residence; it could not be inquired into collaterally by this court, and authorities were cited to that effect, and that such a decree was not ex-parte. This court at the same time stated another fact, which was entitled to much consideration, to wit, that the will of Edward De Kraft, by whom the whole estate in question was devised, the father of Mary E. De Kraft, who intermarried with the said Samuel Chase Barney, and who was the mother of said minor children, expressly declared

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

that "no husband of his daughter should ever at any time control the estate so devised." From this decision the said Samuel Chase Barney appealed to the circuit court of this district, and by that court the decision of this court was reversed. [Case No. 18,230.] An appeal was then taken by J. W. De Kraft, next friend of the children, to the supreme court of the United States, and was dismissed by that tribunal for the want of jurisdiction. [2 Black, 704.]

The circuit court (the opinion delivered by Judge Merrick) in reversing the decision of this court, made and elaborately discussed three points: 1st. That the decree of divorce rendered in Iowa could not be received in evidence for any purpose in the present controversy. 2nd. That the will of Edward De Kraft did not apply to the personal custody of the minor children, but only to the property, and that although the language of said will was clear and explicit that "no husband" of the daughter should at any time control the estate, yet as natural guardian, Samuel Chase Barney, the father, was entitled to preference in the control of said property, provided he gave sufficient bond and securities as natural guardian. 3rd. That the statute of Maryland, of 1798, in reference to the removal of guardians by the orphans' court, did not apply to Samuel Chase Barney as natural guardian.

In reference to the points thus considered by the circuit court, and upon the soundness of their decision, it would perhaps be unbecoming for this court to comment, although it may not be amiss to quote the express language of the sections of the statute of Maryland of 1798, which was held by the circuit court (in their 3rd and last point) not to apply to the present case. In subchapter 12, c. 101, of that statute, different classes of guardians are mentioned: "natural guardians" and "testamentary guardians." Then subchapter 15 provides that "the court (orphans) may upon application of an infant, or any person in his behalf, suggesting improper conduct in any guardian whatever, either in relation to the care and management of the property and person of the infant, inquire into the same, and at their discretion remove such guardian and make choice of another, who shall give security and conduct himself in the manner herein before prescribed, and shall receive the property and the custody of the ward." Could language be more comprehensive or explicit? This statute is in force in this district, and it expressly provides that the orphans' court may remove "any guardian whatever" for improper conduct, either in regard to the person or property of the ward, clearly embracing all guardians; and this has been the opinion of one of the ablest jurists, both of this District and the state of Maryland. On the 2d of March, 1863, the circuit court issued their mandate from their clerk's office, directing this court to cite Samuel Chase Barney, to give bond with sufficient securities to be approved by this

court, &c., &c. Said mandate was delivered to the clerk of this court on the 4th of March, 1863, the day after the circuit court was abolished by congress.

The circuit court was the proper appellate tribunal, and this court would feel bound to respect its mandate, but it appears from this certificate, under seal of the clerk of that court, who was also clerk of the court of chancery, that on the 24th of February, 1863, a bill in equity had been filed in behalf of said minor children, who were then in the custody of Dr. Harvey Lindsley, their duly appointed guardian by this court, the property being also in his possession. Said bill alleging unfitness of said Barney, because gross immorality and incompetency rendered him unfit to have the custody of the said minor children, or to have the management of their property, consequently the said minor children became "wards in chancery" from the filing the said bill, and the issuing the process thereon and service on said Samuel Chase Barney, on the 26th of February, which proceedings operated as a supersedeas to the action of all other courts and persons. (It was stated to this court and not denied by the opposite counsel, that the circuit court had agreed to hear an argument, and examine authorities as to the propriety of having ordered the mandate, but did not, owing to some misunderstanding between the court and counsel, R. S. Coxe, Esq.) The above doctrine is very clearly stated by Judge Story in his very able work upon Equity Jurisprudence. Volume 2, §§ 1352, 1353. He says: "Wherever a suit is instituted in the court of chancery relating to the person or property of an infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court, and as being under its special cognizance and protection."

In all cases where an infant is ward of chancery, no act can be done affecting the person or property, or state of the minor, unless under the express or implied direction of the court itself. Every act done without such direction is treated as a violation of the authority of the court, and the offending party will be arrested upon proper process for the contempt, and compelled to submit to such orders and such punishment by imprisonment as are applied to other cases of contempt. See, also, *Wellesley v. Duke of Beaufort*, 2 Russ. 20, 21. In this case the rights of the father as natural guardian were involved, and he was by the court adjudged unfit to have the custody of his children. *Goodall v. Harris*, 2 P. Wms. 561; *Butler v. Freeman*, Amb. 302; 2 Bligh (N. S.) 137.

Thus it will be seen that by the foregoing high authorities should this court regard the mandate issued by the late circuit court, or "do any other act affecting the person, property or state of the minor" from the time they became "wards of chancery," it would be guilty of contempt of the court of chancery, and may not the late circuit court have ren-

dered themselves liable, the mandate having been issued subsequent to the filing of the said bill in behalf of the minor children? "Filing a bill in chancery on behalf of infants makes them wards of court." says Maddox in his Chancery Practice. Volume 1, p. 432. See, also, the many authorities referred to in the margin by the learned author. Indeed, the circuit court, in their opinion already referred to, say that the court of chancery affords ample relief in the case of minors, when properly invoked. But if any doubts existed as to the principle in chancery, as above stated from the foregoing authorities and facts, they were removed on the awarding of the injunction on yesterday, the 20th of March, by the Hon. D.

K. Carter,¹ chief justice of the supreme court of the District, which was filed by John W. De Kraft, as next friend of said minor children, which arrested the said mandate ordered by the late circuit court, and which was brought officially to the view of this court. It is therefore ordered and decreed from the foregoing authorities and facts, that the direction contained in the mandate above referred to of the late circuit court, to cite Samuel Chase Barney to give bond and security as natural guardian to said minor children, within a reasonable time, is overruled.

¹ This appears to have been the first adjudication in which Chief Justice Carter took part upon entering upon his term of office.

M.

MACKENZIE (UNITED STATES v.). See Case No. 18,313.

McQUEWAN (BLOOMER v.). See Case No. 18,242.

MADDOX (ASHLEY v.). See Case No. 18,227.

Case No. 18,309.

MANIER v. TRUMBO.

[Monroe, C. C. (Ky. Dist.) 67.]

Circuit Court, D. Kentucky. Sept., 1855.

JURISDICTION OF COURTS—COLLATERAL ATTACK—ATTACHMENT FROM STATE COURT—WRONGFUL SEIZURE BY SHERIFF—REPLEVIN IN FEDERAL COURT.

[1. The question of jurisdiction over any particular case must be decided, in the first instance, by the court whose judicial action is first invoked. The question arises immediately upon the application for the original or first process in the action, and is necessarily decided in favor of the jurisdiction at the time when the process is issued, whether issued by the judge or the clerk. And it is thereafter also necessarily decided, by implication, preliminary to every order, sentence, or mandate of the writ; and every order and process exhibits on its face a decision of the court that it is made and awarded by competent authority.]

[2. When it is within the general jurisdiction of a court in a proper case to issue a writ, or make an order, which it has issued or made, but, in the particular case, the facts were not such as confer jurisdiction, such writ or order must be taken as valid and effectual, until quashed, reversed, or otherwise superseded by a tribunal competent to review and correct the error.]

[3. An order for the attachment of the property of the defendant in a personal action, in order to have it brought into the custody of the court, and subjected to whatever, after due proceedings, may be adjudged against the defendant, being within the general jurisdiction of the Kentucky circuit courts, under the Code of Practice of that state, the validity of such an attachment cannot be questioned by a federal court, in an action brought therein to replevy the property from the possession of the sheriff. The Kentucky court having necessarily decided, in issuing the writ, that a proper

case was presented for the exercise of its jurisdiction, the federal court has no authority to review that decision, and consequently must respect and give full effect to the writ.]

[4. An order for the attachment "of the property of" a defendant named, issued as a provisional remedy, prior to judgment, under the provisions of Code Prac. Ky. § 223, gives the sheriff no authority to seize property, which has been conveyed to another, on the ground that such conveyance was in fraud of creditors; and such a seizure, if made, does not carry the property into the custody of the court.]

[5. Where a sheriff, under the authority of a writ of attachment issued by a state court, seizes property not within the command of the writ, a third person, not a party to the suit, may (when the other requisites of federal jurisdiction exist) maintain a suit in replevin in a federal court to recover the property from the possession of the sheriff; and this notwithstanding the fact that the state laws provide a mode in which he may intervene in the state court for the purpose of asserting his right to the property.]

At law.

J. Harlan, Atty. Gen., for plaintiff.

Morehead & Brown, for defendant.

MONROE, District Judge. 1. Plaintiff's action: This action is replevin by the plaintiff, a citizen of the state of Illinois, against the defendant, a citizen of Kentucky, to recover five slaves of the plaintiff's of the aggregate value of \$2,300.

2. Defendant's possession of the property: It appears that, some time prior to the commencement of this action, Henry G. Poston and Wm. Winn had commenced a suit by petition in equity in the Clarke county circuit court against John Manier, Sr., John Manier, Jr., and some other defendants. It is alleged in the petition that the plaintiffs had some time before instituted an ordinary action in that court against the defendant John Manier, the elder, and Miller Cooper, on a demand for about \$720; that this suit, on the application of the defendant Manier,

had been removed to the Fayette circuit court, where it remained undetermined; but that they, the plaintiffs, had recovered a judgment against this defendant John Manier, Sr., for about twenty-five dollars for their costs of a continuance of the suit. It was represented that the defendant Cooper was without property, and that since the last term of the Fayette circuit court John Manier, the elder, had sold, conveyed, and otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; that among other fraudulent transfers thus made by him was a pretended sale of a negro woman and children to his (the defendant's) son, John Manier, Jr., who was then trying to sell said slaves as his own property. They prayed the court to grant them an attachment against the property of John Manier, Sr., or so much thereof as would be sufficient to satisfy their original demand for the seven hundred and odd dollars, and the judgment and execution for costs they had obtained at the last term of the Fayette circuit court. The plaintiffs represented that the other defendants were indebted to the defendant Manier, the elder, and asked an attachment of the debts due by them to him, and that they be enjoined from paying the same to him until the further order of the court. The petition is concluded with a prayer that the rights of the petitioners be protected, and for all proper relief. On this case the plaintiffs obtained an order of the court for "an attachment and injunction in accordance with the prayer of the petition," and the process was issued accordingly. The attachment commanded the sheriff to "attach the property of John Manier, Sr., not exempt from execution, in your county, or so much thereof as will satisfy the claim of the plaintiffs in this action," etc.; and to summon the garnishees, etc. It was directed to the sheriff of Bath county. David Trumbo was that sheriff, and, it having come to his hands, he, by the directions of the plaintiffs, and the supposed command of the writ, seized the slaves which it had been alleged in the petition had been fraudulently sold and transferred by the defendant John Manier, the elder, to his co-defendant John Manier, Jr., and thus Mr. Trumbo took and had the slaves in his possession.

3. Plaintiff's replevin: But a stranger to all this proceeding asserts that he was the owner of the slaves, and the question will be, what was the predicament of the property in the hands of Mr. Trumbo? Wesley H. Manier, a citizen of Illinois, no party to the suit in the state court, nor mentioned in the attachment or other process, in this state of things instituted in this court the present ordinary action of replevin against David Trumbo for these slaves. The plaintiff in his declaration, filed before the impetration of this writ, after the statement of his ownership of the property in the ordinary form,

alleged that David Trumbo, the defendant, not adding his quality of office, wrongfully took and detained his slaves, described by their individual names and value, and still detained them; and thereupon, without showing how or under what color the wrong was committed, prayed the replevin of the property and for his damages. The writ having been issued accordingly, the marshal, after having taken the proper bond for the security of the defendant, took and delivered the slaves to the plaintiff. Whereupon,—

4. Plea to jurisdiction, and retorno demanded: Mr. Trumbo returned the attachment to the state court with his answer thereto, that by the direction of the plaintiff he had seized these slaves, without saying whose property or in whose possession found, but that they had been taken from him by the marshal on this writ of replevin; and, having thus answered the state court, he appeared here with its record, and pleaded these matters to the jurisdiction of this court; concluding with a prayer for the return of the property. The plaintiff demurred.

5. Defendant's position on demurrer: It was assumed in the argument by the counsel of the defendant that immediately on the seizure of the slaves by the defendant in his quality of sheriff, by his supposed authority under the attachment, they were in the custody of the state court, and thence inferred that this court had no cognizance of this action, afterwards commenced here to disturb such custody of that court. If the premise is true, the conclusion necessarily follows. It may be premised that the circumstances that this is a court of the United States and the Clarke circuit court a state tribunal is in no wise material to the question. If this action had been in the state circuit court of Bath, and this plea had been there pleaded, the question would have been exactly the same with this which is now here presented. But is it true that such was the predicament of the property? This must depend upon the answer to the question, was the seizure by the order of the court or the command of its process? If it was, then the act of the sheriff was the act of the court, and his apparent possession of the property thereby obtained was but as the custos for the court; and, in such case, the court not being subject to an action, he was not. But, if the sheriff acted without such command, his act of seizure was his own wrongful act, and the possession his own wrongful possession, which subjected him to the action of the party injured in any court having cognizance of such wrong. It would seem to follow that the jurisdiction of this court of the present action depends upon the interpretation of the terms of this writ of attachment, and upon this exclusively.

6. Question of jurisdiction retorted: There was a preliminary question suggested. The

counsel of the defendant was asked whether the question of jurisdiction might not be retorted, and the defendant required to maintain that the Clarke circuit court had cognizance of the cause in which it had awarded this writ returnable before itself. It had been agreed by the counsel that it should be considered that the record of the case on which that court acted was fully set forth in the plea, the question is therefore fairly presented and will be disposed of first in order. This question depends upon the law of Kentucky which prescribed the jurisdiction of the state court and regulated, or ought to have regulated, the proceedings found in this record.

7. Code of Kentucky Practice: But this class of law had been, shortly before these proceedings were commenced, all broken up, essentially altered, new modeled, in short codified, and by one act of the legislature compressed into a book. It will therefore be necessary to understand what is this new system. To this end we must recognize the preliminary dispositions of the Code, and comprehend its general provisions; and when this shall have been done, and not before, its particular provisions may be intelligibly applied to the subject of discussion. The act of legislation which enacted the book declared that it should be known as the "Code of Practice in Civil Cases in This State"; and it does direct every proceeding allowed in every class of case within its title. The only object of all proceeding in every such case is immediately mentioned by a term of the utmost extension, and thereupon a division thereof made which entirely exhausts the subject. "Section 1. This act shall be known as the Code of Practice in Civil Cases in this state. Sec. 2. Remedies in civil cases in the courts of this state are divided into two classes: (1) Actions; (2) special proceedings. Sec. 3. A civil action is an ordinary proceeding in a court of justice, by one party against another, for the enforcement or protection of a private right, or the redress or prevention of a private wrong. It may be brought for the recovery of a penalty or forfeiture. Sec. 4. Every other remedy in a civil case is a special proceeding."

There is here a division of remedies into two classes, but the subject of our discussion will be found in the first class, and in this only. All the wrongs suffered and apprehended by the plaintiff in this attachment are redressed or prevented by certain conservative or provisional orders and process in the ordinary action for the principal demand, specially provided as incident thereto, and significantly denominated "Provisional Remedies," for the accomplishment of the object of such action, and not by any of the species of procedure denominated "Special Proceedings," and classed in this second division of remedies. It is therefore with this action only we are here concerned.

"The forms of all actions and suits" theretofore in use were abolished, and a new form of action established "for the enforcement and protection of private rights, and the redress and prevention of all private wrongs," regardless of all former distinctions between either legal or equitable rights or remedies.

This is an action by petition to the court, and a summons thereon for the defendant or person concerned in the defense in every case, whether the proceedings be in personam or in rem, or both a person and thing are the reus. There are two forms of proceeding, one called an "ordinary" the other the "equitable." In one the petition is headed "Petition" merely; in the other, "Petition in Equity." But the plaintiff has his election which of the two he will adopt, except when his case has been before exclusively cognizable in equity or was of common-law jurisdiction, and the defendant appears and interposes his objection to the mode adopted; and on this objection a singular preference is given to the equity docket. If the proceeding had been erroneously commenced in the ordinary or common-law mode, the defendant has a right on his mere motion to have it transferred to the equity docket, but if, on the contrary, the plaintiff had erroneously elected the equitable mode of proceeding, the defendant cannot have the mode of procedure changed, but must submit unless he present in his answer, on oath, a defense on which he is entitled to a trial by jury. So that in every case one party or the other may elect the equitable mode of procedure unless the defendant shows that he has a right to trial of an issue by a jury, and insists on such right. And where the action has been commenced by ordinary proceeding, and remains on that docket, the plaintiff may have every issue, which before the adoption of the Code was exclusively cognizable in chancery, tried in the mode prescribed in cases of equitable proceedings. And where in such case all the issues are such as had been theretofore cognizable in chancery, though none of them were exclusively so, the defendant may have them tried in this mode.

It is manifest that it was the plan to give to the equitable mode of proceeding the preference where ever it was possible. The constitution had reserved the right of trial by jury, and a method had to be provided for such trials; but in prescribing this method the equitable mode of proceeding is departed from so far only as was absolutely necessary to accomplish this object, and, that the provisions of the law for this purpose might not have a more extended effect, it is declared that where the issues of fact theretofore cognizable in equity occurred in a cause commenced by ordinary proceeding, such issues might be tried in the mode of equitable proceeding on the mere motion of the plaintiff or defendant, without having

the cause transferred to the equitable docket, or changing the form or mode of proceeding in any other respect. And this seemed to produce something like a common-law suit tried by the court of equity; but the fact is, this change of the mode of the trial, divested the case of its only common-law characteristic, and made it a purely equitable cause. It thus appears that the trial by the court is not peculiar to the equitable mode of proceeding, and therefore it cannot distinguish such mode of proceeding into a class of actions. It is elsewhere provided that the court may whenever it thinks proper—as theretofore practiced—order an issue in an equitable cause to be tried by a jury. So that the trial by jury is neither universal nor simply peculiar to the action by ordinary proceeding; therefore it does not necessarily even contribute to constitute a class, and other material differences must be found before such a class can be formed. The fact is that this action of the Code, on whatever form of proceeding commenced, or conducted, or the trial is had, is essentially a suit in equity founded on the principles of the modern civil law. It is thus distinguished—by the number, complication, and shifting of the parties which is allowed—by the fact that the allegations of the several parties are all cast broad before the court, whereupon the proofs are immediately taken, after which the facts in dispute are contained by retrospection, and the proofs applied to the questions thus found—by the machinery employed—by its interlocutory orders, conservative acts, and process—by its trials by the court and its mode of trial by jury; and, finally, by its mode of relief, specific or remuneratory, remedial or protective, adapted to every case and every party. The parties to the action, plaintiffs and defendants, primary and secondary, or the rules in respect to them, are those of the court of equity, or civil law forum; and different—even in respect to the principal and indispensable parties—from the rules which govern absolutely the parties to the common-law action.

The plaintiff may be one who has either a legal or equitable right; and such plaintiff may have for the reus all the persons and things he may choose to have convened and arrested to answer his action, without the hazard of his cause by a misjoinder of parties. The defendants may be not only the thing demanded by the action and all the persons and things directly bound for the plaintiff's demand, but all the persons and property, in possession and in action, he expects to subject to the judgment he hopes to recover; and these defendants are all convened or brought before the court or into its custody, and consequently made subject to its action by the personal service of the summons, or an order entered on the record, warning the persons to appear and defend their rights, or by an attachment of the

property itself by an officer of the court, or its delivery to such officer according to an order made in the cause. The process—actual or constructive and common to all cases, or principal and conservative and therefore only employed when necessary in consequence of the circumstances of a particular case—is exactly the same whether the mode of proceeding be equitable or ordinary. There is a diversity in the terms in which the defendant is required to appear and answer after the service of the process, but that is here unimportant. The persons thus made defendants on appearing to the action, thereupon defend themselves or the property in their possession or which they have an interest in defending, in the same mode on whatever docket the cause may stand. We have seen that all actions are commenced by the petition of the plaintiff. Every action whilst single is defended by either demurrer or the answer of the defendant. The plaintiff makes no express replication to the defendant's answer. He is understood to deny its affirmative allegations, and thus is made the issue. Plaintiff may demur to defendant's answer, which corresponds to setting down a cause in equity on bill and answer. But the defendant may turn on the plaintiff with his demand in reconvention or set-off, and whenever necessary call in other persons; and, making them defendants to such demands, have them brought before the court in the same mode the original defendants had been convened. In such cases the answer of the defendant, where no new party is introduced, and his petition when a third person is made a defendant, are in the nature of a cross-bill in equity. The cause is then double, and the plaintiff in the original action and the parties thus made defendants make their defense to this incidental action in the same mode a principal action is defended. What the plaintiff files is called his reply, but it is no other than an answer to the cross-bill. Thus are the issues made in every cause, however complicated it may become. The only altercations between any of the parties in respect to the facts is by petition and answer. Either may be amended.

Third persons still outstanding, whose rights are involved in the controversy, or whose possession of property is affected by any act of an officer under color of an order or process of the court, may intervene, assert their right, and submit it for discussion and decision; or oppose the actions had or threatened against their possession. The constituents of either class of such parties may be changed whenever found necessary, either from an error in the commencement of the proceedings or a casualty in the progress of the cause. Defendants may be added, struck out, and dismissed, and new persons or things substituted and added. An original plaintiff—even a sole plain-

tiff—may retire and a new actor be introduced in his stead; and yet the cause may be all conducted on what is called the ordinary mode of proceeding in opposition to the equitable. And in whatever mode the suit may have been commenced, on whatever docket it may stand, every order, process, and judgment, found in all the formulas of either the courts of equity or law, or their equivalents, may be entered and awarded either by the court, the clerk or a judge in each and every stage of the proceeding, from its institution to the final trial.

By these means every provisional remedy is afforded. The property in litigation or sought to be subjected to a demand is secured from waste or damage, and from being aliened or eloiend, and may when necessary be sold and its proceeds held subject to the disposition of the court. The mode of proof is not material before us; but it is substantially the same in either mode of proceeding. Every party has the right to examine his adversary either on interrogatories or on the trial in open court, touching the like facts, and the only diversity between the modes of obtaining testimony is that in the ordinary the witness must be produced and testify before the jury when within the county or an adjacent county, and able to attend. Either the jury or the court may have a view of the premises, or the object in litigation referred to in the proofs, subjected to its inspection. The same machinery is employed by the court indiscriminately—the auditor, the master, the expert, the depository, the receiver, or commissioner, as may be demanded by the circumstances of the litigation.

The several branches of the cause may be decided at different periods, either provisionally or finally. And in the final dispositions of the cause every form of judgment, decree, injunction, interdict, mandamus, or prohibition found in either the common-law court or civil-law forum may be adopted; or new forms hitherto unknown, may be devised, and all carried into execution by whatever order of process the exigency of the case may demand. These general dispositions of the Code will be sufficient.

It is manifest this action, announced at the opening of the work, is a suit in equity. It has all the distinctive characteristics of this class of proceedings in court. There is assigned in to all the remedies, provisional and final, afforded by the common-law actions, and every species of procedure known to courts of equity, and therefore it is in some sense mixed or compound; but it may be more properly said that the action at law has been merged and lost in the comprehensive equity action. The circumstance that the right of trial by jury, when demandable at common law, is preserved and a mode of proceeding prescribed for this purpose, does not make it neces-

sary to qualify this conclusion. This amounts to only the introduction of the jury into the machinery of the court of equity in certain classes of cases, and making its employment necessary when demanded by a party, whereas it was before discretionary with the chancellor. We have seen that nothing more was done.

But to proceed and apply what we have collected to our question. It is found that the idea of two courts (or a court with two sides to it), one with cognizance of one class of rights and wrongs, and with power to afford one species of remedy, and the other with jurisdiction of another sort of rights and wrongs, and with power to afford other remedies, is totally abolished. It follows that it is impossible that there can remain any such thing as an ancillary equity jurisdiction of one court, to be exercised to secure or promote the object of an action in another tribunal. Not only is there no occasion left for such jurisdiction, but it will be found that it is directed that every provisional remedy which a chancellor could afford in the exercise of his ancillary jurisdiction shall be allowed in not only the same court but in the very action whose object the proceeding is intended to conserve and promote, whether this action is conducted in the mode of an equitable or ordinary proceeding.

There are six several classes of provisional remedies prescribed in the Code,—arrest of the defendant, claim and delivery of personal property, attachment of property, injunction, appointment of receiver, and deposit of property. These it is supposed extend to all the cases provided for by the conservative acts of the civil law, accomplish all the objects of the coercive process in an action at common law, and include every provisional remedy afforded by a court of equity in the exercise of either its ancillary, or principal jurisdiction; and all these remedies are incidental to every action in which an occasion for them can occur; all may be had at the institution of a suit, or at any time before judgment, and therefore constitute a part of the proceedings in the action. We shall however have occasion to mention again the attachment only. It is allowed in several different cases and on a number of grounds; but we need mention only one—it will be sufficient to say of the others that they are all issued out of the court in which the action is being or has been brought, to which they are provisional.

The provisions in respect to this case are to this effect: "Sec. 221. The plaintiff in a civil action may at or after the commencement thereof have an attachment against the property of the defendant in the cases and on the grounds hereafter stated. (1) In the case of an action for the recovery of money." "Sec. 222. An order of attachment shall be made by the clerk of the court in which the action is brought." Whenever in the case just mentioned there is filed in his office an affidavit of the plaintiff showing the "nature of his claim,

that it is just, and the amount the affiant believes the plaintiff ought to recover"; that the defendant "has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder, or delay his creditors." This attachment is against the defendant's property generally, and is executed against every species thereof not exempt from execution, corporeal or incorporeal. It is executed on a debt or demand by delivering to the debtor a notice thereof, and summoning him as garnishee to the action.

8. Code applied to defendant's case: Now it is manifest that the case of the plaintiffs in this attachment was simply the case which has been started out of the Code, and that their remedy against both the property of John Manier, the elder, and the debt owing to him by the other defendants was an attachment in the action by ordinary proceeding depending in the Fayette circuit court. There was no occasion whatever for an injunction forbidding the payment of the debt to Manier by the garnishees. Notice of the attachment to the debtors and citation of them to appear and answer in the action is an effectual seizure of the debt. The question then is, we have seen, had the Clarke circuit court jurisdiction to entertain this petition in equity—constituted of nothing but the materials for a mere provisional remedy incidental to the action by ordinary proceeding in the Fayette circuit court—and to thereupon award this process returnable before itself, and thereby constitute a second suit.

9. Question of jurisdiction retorted back: But that court did take cognizance of the cause and awarded the attachment—and the question occurs, was there not included in that act a decision that the court had jurisdiction?—which must be reviewed before the main question can be reached. If there was, then the question is, has this court the power to reverse that decision; and the question of jurisdiction is retorted back. This seems to be the case and it is proper that the preliminary question be first decided.

10. Province of courts: Every superior court of general jurisdiction has prima facie power to act upon all the persons and things within the territorial limits, and subject to the legislative power, of the government of which it is the organ. There is generally a local sphere of action prescribed for each tribunal; and the objects or subjects of the jurisdiction of each class of courts are designated in some mode by their organic law, and the jurisprudence they administer. But the question here occurs, how is this law to be applied to each case presented to the tribunals for judicial action and the jurisdiction of the court determined? There can be but one answer. The law must be applied and the question decided in the court where the judicial action is first invoked; and provisionally decided, even at the threshold of the court of the first instance. The ques-

tion of the jurisdiction of the particular court occurs on the application for the original or first process in every action; whether such application is to the court or its clerk and is decided on by the clerk or the judge. It is afterwards necessarily decided preliminary to every order, sentence, and mandate of the court; a judgment upon it is implied in every such act, and every order and process exhibits on its face a decision of the court, that it is made and awarded by competent authority. It is not material whether the process is issued by the clerk on the direct and immediate order of the court or not: it is always as if by the court. In every case of the award of the process or the entry of an order which has such effect, it is either all right, in some respects wrong, or all wrong. It is only with the middle class we are concerned. If any writ or process is sued forth or prosecuted in any court of the United States or a particular state, whereby the person of an ambassador or other public minister of a foreign state received by the president of the United States may be arrested or imprisoned, such writ or process is null to all intents and constructions. This nullity of the writ is the consequence of the fact that no court had jurisdiction to award such process against a foreign minister in any case whatever which it is possible to present. In such and the like cases where the court has no jurisdiction to consider whether a sufficient case has been made out for its action or not, its whole action is all wrong and null for every purpose. But the order or process may be what the court had no jurisdiction to make, and send out for execution—on the facts or case before it—but which it had jurisdiction to make or award on a case which might have been presented for its action: in such cases the act of the court is not a nullity, nor its process void.

A *capias* in the common form issued on an indictment which charged no offense within the jurisdiction of the court, nor punished by any law, and which, if you choose, had never been found by the grand jury. "A true bill," will justify a sheriff or marshal in the arrest of the defendant. A writ of *fiat facias* issued in a cause wherein the plaintiff had shown neither the jurisdiction of the tribunal nor a cause of action in any court, to which the defendant had either appeared or been cited, and in which there had been in fact no form of judgment rendered, will justify the marshal or sheriff in not only seizing the goods of the defendant, but enable him to pass a good title to an innocent purchaser: and the reason in both these and all the like cases is, that the officer has no jurisdiction to review the decision of the court, made either by itself or its clerk, upon the case on which it acted in making the order and issuing the process; and therefore need not know what was such case; and all strangers must be allowed to

trust to the validity of such process. Every such process must be allowed its full operation until quashed, reversed, or otherwise superseded by a tribunal competent to review and correct the errors of the court whence it issued, and even after such reversal, and the writ has been quashed, what has been performed according to its command remains justified and in general valid and effectual. This tribunal is the court itself, under certain limitations, which made the order, or whose clerk issued the process without an express order in the particular case; or it is an appellate court with power to review the decisions of such court, not only for its errors in assuming jurisdiction in cases of which it had not cognizance, but for its errors committed in cases of which it had unquestionable jurisdiction.

No other tribunal, whether of the same or another government, can with any propriety review such decisions or hold for nought such an order or such a writ. It is said a court can act only on the persons and things before it, and that its judgments against the absent reus are null and ineffectual. The ancients supposed it was necessary for the parties to be in fact before the tribunal and in the physical power of its officers; and it is still supposed with us that all the parties to be acted on, whether persons or things, must be in some wise before the court. Hence, when this does not appear nor can be made out by any construction, the judgment may be ineffectual. But this nullity of the action of the tribunal results from an entirely different principle from that involved in this case: in the case supposed it is assumed there was no reus in the power of the court in any mode, and thence inferred that the court, having nothing within its power, had not acted, and therefore there was no judgment. Whereas, the present question is not upon the effect of a judgment against property: which might raise the question whether it had been effected in a mode or was in a position which subjected it to the jurisdiction of the court. The question is upon an order of the court for an attachment of the property of a defendant in a personal action, in order to have it brought into the custody of the court, and there, after due proceedings, subjected to what might be adjudged against the defendant; and the jurisdiction of the court to award such process in a proper case is unquestionable: therefore it can be objected against the attachment, only that the court had not jurisdiction of the cause, and therefore had not competent power to award the process. But it was adjudged by that court that it had jurisdiction of the cause. It had jurisdiction to make that decision, and this court has no jurisdiction to reverse that decision, and consequently must respect and give full effect to the process thereby awarded.

11. Aggression of courts and its consequence: It is supposed that this conclusion

is sufficiently apparent on the direct argument, and that it is hardly worth while to state any other form of argument to confirm it; but a very few words will show that its contradictory would not only defeat the uniformity in the administration of justice to the extent of its operation, but would, if carried out, lead to consequences altogether intolerable. If this court can discuss and thereupon hold for nought, such an order and process of a state court, it might determine that the act of its officer in its execution had been a mere trespass, not only whilst the propriety of the process had remained unquestioned, or, when it might be afterwards adjudged in the state tribunal that it was not merely void, but only voidable, and was therefore a full justification of the officer, and that all he performed under it was valid and effectual, but even when it might be subsequently held by the state courts that the process was in all respects valid and regular.

This is however but a small portion of the evils which might result from the operation of such a principle. If it be necessary to show that the state court had jurisdiction of the case on which it awarded its process, pronounced its judgment, and directed its execution, actions might be maintained in this court by every alien and citizen of other states against the officers of the state on every case of an execution upon them or their property of a state process whether original, mesne, final, collateral, or incidental, where this court might be of opinion that the proceeding had been had on a case of which such court had not jurisdiction. This might be done notwithstanding the acts of such state magistrate were irreversible in any superior tribunal. This court might have before it actions by the convicts of the state prisons, common jails, and work houses, against their keepers, even by a person committed for a contempt of the court, and be called upon to examine the record of the judgment pronounced against them at the bar of the state tribunal, and thereupon to decide whether, on the case thus shown, such court was authorized by law to pronounce sentence. And if the courts of the United States considered such questions, the state courts might on the same principle have brought before them any person in the custody of the marshal arrested on a *capias* or warrant from a court or commissioner of the United States, on a charge of an offense against the United States, and if in its opinion the indictment or case otherwise shown on which the process issued was not sufficient, he might be discharged and set at large. And on the same principle a state court might have brought to its bar the criminal in a state prison suffering the penalty of his public offense, adjudged against him by a court of the United States on a full trial at its bar, and if in its opinion an error had

been committed in the construction of the constitution or an act of congress, the criminal might be set at large to defy the government and its tribunals. In the end, even persons committed for open contempt, resistance, and obstruction of the orders and process of the courts of the United States might be discharged from its custody, and thus maintained in their rebellion against all government and order. It cannot but be perceived that such cases would raise the question whether any color of office would exempt persons thus obstructing the process and defeating the judgments of the courts of the United States from the penalties denounced by the acts of congress against such offenders. But the subject will not be pursued. It had been supposed that the principle we have laid down was everywhere practically recognized: it is acted upon a thousand times every day, and it is impossible that its converse can ever obtain whilst men have common sense and judges are lawyers.

12. Term "defendant's property" in attachments: The only question then is, did the attachment command the sheriff to take these slaves? It did not do so by a term which designated them directly, and therefore the proposition, that it was done at all, can be established only by argument. The property only of John Manier, the elder, was what the sheriff was commanded to attach. If these slaves were the property of this Manier, then the sheriff was commanded to seize them—otherwise, not. The question then is, can this hypothesis be maintained? It is not averred in the plea, and nothing is found in the record which will supply the omission and warrant the assumption of the fact. It had been affirmed in the petition on which the attachment was obtained, in effect that the slaves had been the property of John Manier, the elder, and though it was averred that he had transferred them to the young Manier, yet it was charged that the sale was fraudulent against them, the creditors of the vendor; and, this record was not only referred to in the plea, but it was agreed by the counsel that this question, on the plaintiff's demurrer, should be considered exactly as if the record had been fully transcribed in the plea. The averments in the pleadings in a record which is set out in a plea are not averments in such plea. But in order that all the objects of the counsel in their liberal agreements may be fully attained, it will be supposed that this matter was all set forth in the plea in exactly the words it is alleged in the petition. The question then is, were the slaves, in this predicament, the property of John Manier the elder, in the sense of these words in the attachment? It is plain that if they, having been his property, were sold and transferred with the fraudulent intent to cheat, hinder, and delay his creditors, they did in some sense re-

main his property. That the property thus situated is the property of the fraudulent vendor in the sense of the terms of the writ of fieri facias against the estate, is unquestionable.

In such case the judgment creditor is allowed fictitiously to allege that no sale of such property has been made—in other words, that the sale was void and on this hypothesis a sale of it under execution will pass the title: the sheriff is therefore bound to seize and sell it as the property of the defendant. But such is not the rule in the case of this sort of attachment. It is a process before judgment, and such was never the effect of such process, whatever was its particular purpose—and the reason is that the term creditor in the rule of the common law and in the statutes which declare void donations, sales, and other transfers of property to the prejudice of creditors, signifies judgment creditors.

The sheriff was not authorized to seize such property on the ordinary mesne process of attachment prescribed by the common law. It was for the purpose of compelling the appearance of a defendant in order that the plaintiff might obtain a judgment; and the same was the rule in the execution of the mesne process of attachment prescribed by the former statute law of Kentucky. It was provided by this law, an act of 1797, that when the sheriff returned the writ to answer any civil action that the defendant was "not found," the plaintiff might have an alias, or, at his election, sue out an attachment against his estate, and if the sheriff returned that he had attached any goods of the defendant, the plaintiff should be entitled to judgment. Here the object was not exactly to compel the appearance of the defendant, but to warn him to appear and defend the action. It had been before concluded that an appearance of the defendant was not indispensable, and the execution of the attachment of his property having been substituted for the personal service of the citation, it entitled the plaintiff to judgment and in personam. Now, it was the settled rule in such cases that the return of the marshal must be positive that the goods attached were the property of the defendant. It never was imagined that under this law the sheriff could assume that the goods the defendant had transferred by donation or otherwise to the prejudice of his creditors, was still his property and that he could by its seizure entitle the plaintiff to such a judgment against an absent defendant.

There was in this case, it is true, a peculiar reason for confining the sheriff to the seizure of the property owned and claimed by the defendant. It is the disturbance of such property only the defendant is presumed to notice. But this reason was only accidental. The essential foundation of the rule in every species of this class of process is that no one but the judgment creditor has any right to question the validity of such transfers of property, and therefore no party in directing, nor any offi-

cer in the execution, of process prior to judgment, can assume that such sales and transfers are null and void. The attachment in this case is not in all respects the same with the two we have mentioned, but it is a process before judgment. It is a provisional remedy allowed to secure effects to satisfy a judgment expected to be thereafter recovered, and is therefore within the principle stated: There is a judgment for \$25, recovered for costs for the continuance of the action for the debt in the Fayette circuit court, mentioned in the petition; but there had been no execution issued thereon and returned "No property found," as required by the Code to entitle the creditor to maintain such suit, and have such process, in another court; and it is not supposed the sum was sufficient to give such court jurisdiction: therefore it is not supposed this matter was any portion of the grounds on which the attachment was ordered; nor that it having been inserted in the petition, had any influence on the effect of the process.

13. "Defendant's property," in the Code: But this particular writ and proceeding was allowed and directed by a new law, and we must ascertain whether in its provisions there has been any alteration made in the general rules which have determined the effect of such process. It is allowed in every civil action, whether in equity or at common law, in eight several cases, and may be had either at the commencement of the suit or at any time before judgment. It is not intended as a substitute for personal or constructive notice. We have seen that the law required the defendant to be summoned personally, or constructively warned to appear exactly as if no such process had issued. But its object is for the satisfaction of a judgment when obtained and to this end it directs the sheriff to attach an amount of the property of the defendant, or sufficient for this purpose, and authorizes the seizure in one mode or another of every species of effects movable or immovable, corporeal or incorporeal, in possession, expectancy, or in action, not exempt by law from execution. It will not be necessary to state the several directions for the execution of the process, or the proceedings upon it, because none of them has the slightest appearance of a departure from the principles mentioned except one. It declares that "an order of attachment binds the defendant's property in the county, which might be seized under an execution against him, from the time of the delivery of the order to the sheriff; and the lien of the plaintiff is completed upon any property or demand of the defendant by executing the order upon it in the manner directed in this article." Section 223. And it might be at first supposed that the object here was first to declare in what category or predicament of the property, in what mode of its relative ownership, in respect to the parties, it was

subject to this process of attachment and to establish for the rule, that wherever it was in a condition of relative ownership which rendered it subject to seizure under a fieri facias on a judgment against a defendant, it was subject to the attachment against his property. But a very brief examination of the words and the context of the law will show that the purpose was altogether different. It had been just before declared that where there were several attachments against the same person they should be levied according to the order in which they had come to the hands of the sheriff and thereupon directions had been given how the seizure should be made of every species of property, effects, and demands. It was then intended—it appears—to recognize the established principle that every attachment had its effect upon the property attached from the date it was seized, and to make this the general rule. But it was designed that one class of property, consisting of goods and lands wherein the defendant had certain legal estate, and other such property within the county, should be affected and bound from the time the sheriff received the process which commanded him to make the seizure—wherefore, in order to define this class of property without a tedious enumeration of the articles or other such inconvenient mode, it was declared that the attachment should bind such property of the defendant as might be seized and sold under execution from the day the sheriff received the process. In other words that the seizure, whenever made, should relate back to that day as in case of the execution. The object, it is manifest, was not to define the property nor the predicament of the property which was subject to be seized under the attachment, but merely to define the property which when attached was to be bound from the day when the sheriff first received the writ: and might have made the seizure. There is in fact no ambiguity in the enactment. But if it were subject to two constructions, it is an axiom that an ancient and well-established rule is not abrogated by adopting a doubtful construction of a new enactment which is not necessary to accomplish the manifest object of the law; and here there is no such necessity.

This Code of Practice provides a mode most facile in which the creditor in such cases may recover his debt and have his money levied with the greatest celerity, without at all departing from the rule in question. In his "ordinary" or common-law action against his debtor he is allowed, when necessary, to make defendants all the fraudulent vendees of his debtor's property, together with the debtors of his debtor; and thereupon have his injunction, attachment, or provisional seizure; and having thus had his debts secured by bonds for the forthcoming of the property or the delivery of it to a receiver of the court, he may

proceed in the same time to prepare for the trial of his principal and all the incidental actions, bring them all on for trial at once, thereupon have both a judgment for his debt and an order for it to be levied or paid out of the attached objects. It might even happen that the court having in the meantime had the attached property sold by the receiver and its proceeds brought into court, the creditor would receive his money the same hour the judgment was recorded. Now there is certainly nothing in these provisions which favors the supposition that it was intended to alter the common law which had determined the effect of such an attachment or to afford an apology for an officer's seizing property not within the terms of the writ. The plaintiff has a right, on a proper case, to have an order for process against the property of any defendants, for the conservation of the specific or determinate objects of property he seeks to subject to his demand.

These plaintiffs might have had an order enjoining John Manier, Jr., from selling or removing these slaves, with the requirement of a bond for the observance of the injunction, and an order that if such bond should not be given that the slaves should be seized and consigned to a receiver of the court. But they took an order for an attachment of the property of their debtor only, and which gave the sheriff no authority to seize the slaves sought to be subjected unless they were his property. But it was alleged—and it is now supposed and averred in this plea—that these slaves were his property, except that they had been sold and transferred, with intent to delay and defraud his creditors, to John Manier, the younger. But on this fact they were—as between the two parties—exactly as much the property of the younger Manier as if they had been born his property. No one had a right to question the validity of such sale but a judgment creditor. And there was no judgment. It follows that the seizure of them by the sheriff was not commanded by the attachment, and therefore did not carry the property into the custody of the court.

14. Rights affected by an action: But was the property otherwise so situated as to be exempt from the jurisdiction of this court? The suit in the state court was among other things to set aside a sale of the property by one defendant to the other, and to subject it to the demand of the plaintiff against the vendor. But the plaintiff in the action here was no party to that suit and therefore cannot be affected by its pendency, nor by any judgment that may be rendered in it, unless he derived his title to the property from one of the parties subsequent to the institution of that suit; and no such deduction of title is alleged. The plaintiff stands here affirming that he was himself the owner of the property, and complaining that it was wrongfully taken from him without the authority of any process of that action, demands his remedy. Has the court jurisdiction? or must it refer him to the

court where these other persons are in controversy about their rights in or upon the property between themselves on grounds which it does not appear in any wise involve either him or his title? The statement of the question ought to be sufficient to suggest the answer.

15. Intervention and opposition, elective: The plaintiff had, no doubt, the right to go into the Clarke circuit court and there on his "Third Person's Opposition" to the seizure and detention of his property under color of its process ask its surrender; or by intervention in the controversy there pending in respect to it, have its title established against the parties to that action. But had he not his election to bring his action elsewhere? The owner is not necessitated to intervene in an action between other persons concerning his property, but may institute his own action elsewhere against any of the parties who had taken or detained it from him, and on recovering a judgment have it specifically executed immediately, unless the property be in the custody of the other court—and in such case he may rest on his judgment until the determination of such suit: when if a defendant to his judgment shall have prevailed and obtained, or been restored to the possession, he may have the specific execution. This of course he might not be able to do if a party against whom he had not obtained such judgment prevailed; and in such case it might be necessary for the owner to commence a new action—hence the convenience of the intervention.

But here the defendant was no party to any such suit, nor was the property in the custody of any court. This is the whole case: The plaintiff's slaves were sold by one man to another; a third party, alleging this sale was fraudulent as to him, brought his action against the vendor and vendee, did not obtain an attachment against the slaves but against the property of the vendor: under this process the slaves were seized and detained by the sheriff. Was his only remedy by appearing in a court which had no custody of his property, and there opposing the wrongful actions of its officers, or intervening in a cause where his rights were not in litigation? He had his election, and this court has jurisdiction. The demurrer is sustained. The defendant may answer over.

MATSON (BLOOMER v.). See Case No. 18,242.

MERCHANT SERVICE—CHARGE TO GRAND JURY IN RELATION TO THE MERCHANT SERVICE. See Case No. 18,249.

MILLIGAN (BLOOMER v.). See Case No. 18,242.

MILLS, BELKNAP (CROMPTON v.). See Case No. 18,285.

MOREHOUSE (ARCHER v.). See Case No. 18,225.

N.

Case No. 18,310.

NATIONAL BANK OF COMMERCE v.
NATIONAL BANK OF MISSOURI.

[The Public (N. Y.) Oct. 10, 1878, p. 229.]

Circuit Court, D. Missouri. Oct., 1878.

NATIONAL BANKS — POWER TO BORROW MONEY —
LOANS TO DIRECTORS.

[A national bank may borrow money for the purpose of lending the same again to others with a view to making a profit. It may lend money, in good faith, without any fraudulent intent, to its directors as well as to others, provided the amount so loaned does not exceed the limitation of one-tenth of the capital stock actually paid in. Therefore one national bank, which loans money to another, knowing that the latter intends to loan the same to its directors, may recover the same from the borrowing bank, if it had no knowledge of any fraudulent intent in making the loans to the directors, even though the directors failed to repay the same.]

[Cited in brief in *Seligman v. Charlottesville Nat. Bank*, Case No. 12,642.]

This was an action at law by the National Bank of Commerce, of New York, against the National Bank of Missouri, of St. Louis, which suspended in June, 1877, to recover \$400,000 and accrued interest, the remainder of a loan of \$1,000,000 made by the plaintiff to the defendant. In 1866 James B. Eads, James H. Britton, John J. Roe, Charles K. Dickson, Amos Cotting, Barton Bates, and John A. Ubsdell, the directors of the National Bank of Missouri, borrowed \$1,000,000 of the circulating notes of the National Bank of Commerce. The claim for the unpaid balance was presented to the receiver of the defunct bank, and he declined to allow it, on the ground that the bank had not borrowed the money, but that it was borrowed by the above-named directors, and used by them for their individual benefit, and that the bank did not enjoy the advantage of the loan. An attempt was also made to show that the defendant had no right to borrow money to loan again, and that a loan of this character was illegal, and known to the plaintiff to be illegal when made. It was shown, in effect, that when the negotiations with the Bank of Commerce were opened, Mr. Eads and the other gentlemen named were not directors of the State Bank, but by large purchases of the stock became possessors of a majority and elected themselves directors October 31, 1866, and that the loan was completed in the name of the bank by contract dated December 26, 1866, by the newly-elected directors. Testimony was given to show that the loan was made only for the use of the directors, because the bank itself had at the time \$1,000,000 in cash and \$680,000 in bonds on deposit with the Bank of Commerce, and it was part of the contract that this deposit should remain as security until the loan was paid.

30 Fed.Cas.—71

The testimony adduced in the case shows that the \$1,000,000 loan was made by the defendant a special account entered in a book entitled "Bank of Commerce, No. 3." The directors gave their check on the funds of the pool and drew out money till it was all exhausted except \$3,000, which stands to-day to their credit on the books of the suspended bank. These directors returned to the pool the amount that was paid back to the New York bank,—namely, \$600,000,—but had paid back none of the balance of \$400,000.

DILLON, Circuit Judge (charging jury). Under the pleadings, the defendant's counsel conceded at the opening of the trial that the plaintiff was entitled to the sum of \$400,000 with 6 per cent. interest, amounting in all to the sum of \$445,582.10, unless the defendant established one or both of its special defences to the action, and accordingly the defendant assumed the burden of proof to make out such defences. The defendant has accordingly produced its evidence, and at its close the plaintiff's counsel moves the court for a direction to the jury that such evidence has failed to establish these, or either of them, and that, notwithstanding the defendant's evidence, and all inferences which the jury can legitimately or properly draw from it, the plaintiff is entitled to a verdict.

The defences relied on are two:

1. That the contract of December 26, 1866, between the defendant bank and others, and which is the basis of this suit, and under which the \$1,000,000 was lent by the plaintiff bank, is ultra vires the lawful power of the defendant bank; that is to say, that this contract was one which the defendant bank had no power, under its charter, to make under any circumstances, or, at all events, had no power to make except in case the situation and exigency of its affairs required it to borrow money, and that its situation was such that it did not need to borrow this large sum of money, or any other sum of money, and that knowledge of this fact is, by the evidence, fairly brought home to the plaintiff bank. I am of opinion that a national banking association has, under the national banking act [13 Stat. 99], the power to borrow money, and that the defendant bank, in the absence of fraud brought to the knowledge of plaintiff bank, had the power to enter into the contract of December 26, 1866, which is the foundation of this action. The legal power of the bank to borrow money does not depend upon any exigency or upon the existence of a critical condition of its affairs, or upon an actual necessity for the immediate use of the sum borrowed. It may borrow money to conduct and carry on the business of banking, and it may borrow for the express purpose of lending the

same, either by discounting the notes, bills, etc., of others or on personal security, with a view to profit by the transaction. The loan of money to a national bank is not invalid because the lender may know or have reason to believe that the borrowing bank intends to lend it, when received, to others. A national bank may lend its money to its directors as well as to other persons, provided it acts in good faith and does not exceed the limitation to any one person or director of "one-tenth part of the amount of the capital stock of the association actually paid in." There is no claim that this limitation was exceeded in this case, as the capital stock of the bank was \$3,410,000 actually paid in. If the law were that a national bank could not borrow money for the purpose of lending the same again to its directors, and that if the lender knew that such was the purpose of the borrowing bank, the transaction would necessarily be invalid. I admit that the evidence in the case is such as to justify the court to submit the question of the plaintiff's knowledge of such a purpose to the jury. But I am of opinion that where no fraud is intended a national bank may lend its money to its directors, and the fact that the lender knows, or has reason to believe, that when the money he lends is received it will be lent to the directors, does not, unless he knows, or has good reason to believe, that a fraudulent use or disposition of it is contemplated by the directors when received, invalidate the transaction. The directors had no more power over the \$1,000,000 obtained under the contract in suit than they had over the \$1,000,000 which the defendant bank had on ordinary deposit with the plaintiff bank, or over the \$3,000,000 of capital actually paid in. A lender cannot knowingly aid an intended fraud, but he is not required not to lend because the borrowing bank may misuse their powers.

2. The second defence is that the money was procured by the defendant's directors (who

signed the contract in suit professedly as sureties), not for the bank, but for their own purposes, and that they fraudulently made use of the name of the defendant bank as principal, intending all the time illegally to appropriate the money, when received, to their own use, and that the plaintiff bank had knowledge of such intended illegal appropriation of the money. These facts, if established, would constitute a defence, but after carefully considering all of the evidence touching this matter, I think that while it would justify the jury in finding that the directors of the defendant bank, when the money was received, intended to borrow the same from the bank of which they were directors, and thus get the use of it, I can see no basis in the evidence which would justify the jury in finding that the plaintiff bank knew that the directors of the defendant bank, when the money was received, intended to make any fraudulent use or disposition of it. If the jury should so find, I shall deem it my duty to set aside their verdict, and hence there is no propriety in uselessly submitting this question to them. I therefore instruct you, gentlemen of the jury, that the defences relied on have failed, and that you shall return a verdict for the plaintiff.

The jury brought in a verdict in favor of plaintiff for \$445,582. The case has been appealed to the United States supreme court, the receiver of the National Bank of Missouri having been made a party defendant.

NATIONAL BANK OF MISSOURI (NATIONAL BANK OF COMMERCE v.).
See Case No. 18,310.

NATIONAL BANKS—CHARGE TO GRAND JURY IN RELATION TO FRAUDS OF OFFICERS OF NATIONAL BANKS.
See Case No. 18,246.

NEUTRALITY LAWS—CHARGE TO GRAND JURY IN RELATION TO NEUTRALITY LAWS. See Cases Nos. 18,264-18,269.

O.

OFFICERS—CHARGE TO GRAND JURY IN RELATION TO FRAUDS OF OFFICERS OF NATIONAL BANKS. See Case No. 18,246.

P.

Case No. 18,311.

Case of PEA PATCH ISLAND.

[1 Wall. Jr. Append. ix.]¹

Arbitration at Philadelphia. Jan. 15, 1848.

BOUNDARIES—DELAWARE AND NEW JERSEY.

The territory of the state of Delaware within the "twelve miles circle" extends across the Delaware river to low water mark on the Jersey shore.

About the year 1783-84, there appeared at low tide in the Delaware river, about five miles below New Castle, a small muddy exposure of the soil, "about the size," as was testified, "of a man's hat." By the force of alluvion and deposit the exposure became larger and larger, until, by degrees, it formed an island of about 87 acres, which in consequence of a tradition that a vessel laden with peas had once sunk on the spot where the island afterwards rose, got the name of the "Pea Patch Island." In 1784, the proprietaries of West Jersey granted this island, describing it as situate in Salem county, New Jersey, to persons whose title became afterwards vested in Dr. Henry Gale of that state; and in 1831, the same state, by an act of its legislature, relinquished to Dr. Gale whatever interest it might have in the island. It had previously declared that its west boundary, at this place, came to the middle of the main channel of the Delaware river, a location which, as the main channel was then supposed to run, included the Pea Patch Island as within the territory of New Jersey. In 1813, the state of Delaware, by an act of its legislature, conveyed the island to the United States, who soon after took possession of it and began to erect a fortress upon it. In consequence of these two grants, a controversy as to the right to the island began between Dr. Gale, claiming under the title of New Jersey, and the United States claiming under that of Delaware. In the ordinary case of a dispute as to title between an individual and the government, the matter would not have attracted public notice; but this case differed in several respects from an ordinary case. In the first place, it brought in question the boundary between the states of New Jersey and Delaware; and to common apprehension it brought, moreover, some disparagement to one state or the other, both of which had apparently treated the island as within its own limits; and both of which, it was asserted, had granted it away, as its own property. Public attention was moreover directed to the matter from the accidental position of the island itself. Above it lie many principal towns or cities of the three states of Delaware, Pennsylvania and New Jersey, which could be readily devastated by an enemy's fleet unless the river was protected from below; while it so happens, from the width, the course, or the shifting character of the Delaware channel, that there is scarcely any point either above or below, that offers a place where adequate defences could be erected for any of them. This island, however, constitutes the key of defence of the whole river. It stands just in the centre of its entrance and commands its two channels, of which the deepest runs close along its side, and the other is so curved as to lie for a great distance directly and most favourably exposed to its guns. A fortress had been partially erected on the island by the United States during the war of 1812, but was destroyed by fire some

years after. And all the towns along the Delaware river, lying, as already stated, naked to attack from any enemy who might pass up it, were kept in great uneasiness during those many years in which the "Maine Boundary," the "French Indemnity," the "McCleod Arrest" and the "Oregon Boundary" had kept our relations with the two great naval powers of France and England in uncertainty, and put them, at times, in danger of immediate rupture. Of course, they were constantly imploring congress to complete or rebuild the fortress upon this island, the only place, as all agreed, where an adequate defence could be erected; while at the same time the New Jersey claimants would appear with assertions of title to the island, fortified by written opinions from the law officers of the government itself,² and by remonstrances from citizens of New Jersey against such an unlawful invasion of their territory as was contemplated by assuming possession of the island, except under grant of the individual proprietor. In addition to this, the matter had attracted attention from a great number of unsuccessful attempts—necessarily public ones—by the departments and by congress to settle it; from an uncommon number of opinions of directly opposite conclusion, from lawyers of public name, both those connected with the government and those in private station; and finally from two judgments in two different circuits of the United States, which were in like conflict, and under which, in a suit between the same parties, the harmonious operation of the federal courts was made the witness of a marshal of one district turning out of possession the tenants who had lately been put in by the marshal of another! It would unnecessarily incur this preliminary history of the case to record the various presidential recommendations, the reports of committees, the opinions of district attorneys, solicitors of the treasury and attorneys general of the United States, the congressional debates, and the various abortive agreements entered into by the departments with a view to settle the question. It would be the history of litigation and claim diligently pursued for three and thirty years; and which at last, by opinions and agreements, verdicts and legislation, had knotted and tied itself into such a complication of tangles, that it seemed past the possibility of any ordinary process of justice ever to unfold and draw it straight. And when it was remembered that opinions of directly opposite conclusion on the title, had been given by Messrs. Rodney and Geo. Read of Delaware, by Messrs. Richard Stockton, McIlvaine, Southard, G. D. Wall and J. S. Green of New Jersey, by Mr. Willis Hall of New York, by Messrs. Penrose and Gilpin, solicitors of the treasury, and finally by Messrs. B. F. Butler and Légaré, attorneys general of the United States, it was not wonderful that both congress and claimant should nearly give over in despair, all hopes of coming to any satisfactory conclusion; that the petitioner should have been weary of invoking the attention of congress, and that congress should have been impatient in listening to the prayers of the petitioner!

In this state of long protracted litigation and treaty, on the 8th of August, 1846, when the Oregon boundary had lately been giving to our relations with Great Britain a men-

² Hon. G. D. Wall, D. A. U. S. for New Jersey, J. S. Green, Esq., holding at a later date, the same office, and Mr. B. F. Butler, A. G. U. S., had all given opinions in favour of the right of Mr. Humphrey, claiming under the state of New Jersey.

¹ [Reported by John William Wallace, Esq.]

cing aspect, congress passed an act [9 Stat. 67], authorizing the president of the United States "to take such steps as he may deem advisable for adjusting the title to the Pea Patch Island." In pursuance of this authority, communications were had between the president, in behalf of the United States, and the Hon. John H. Eaton, counsel of the New Jersey claimant, by which it was agreed to submit the question of the title to the arbitration of some professional gentleman, in whose ability, learning and honour both parties should have such implicit confidence, as to be willing to accept, as final and conclusive, whatever award he might make upon the question. Mr. Eaton having nominated to the president four gentlemen of this character from the District of Columbia, the states of Maryland, Pennsylvania, and New York, President Polk made choice of the Honourable John Sergeant of Pennsylvania, one of the persons named; a selection which was at once responded to by the other side as eminently acceptable. Accordingly on the 27th February, 1847, articles of agreement under seal were concluded between the Hon. W. L. Marcy, secretary of war of the United States, acting with the approbation of the president of the United States, of the one part, and James Humphrey, in whom Dr. Gale's title had become vested, of the other, by which they mutually appointed John Sergeant, Esquire, of Philadelphia sole arbitrator, with full power and authority, at such times and places as he might appoint, to examine witnesses and receive evidence according to the rules of law and equity, and to decide the question of the title to the said Pea Patch Island, as derived by the United States from the state of Delaware and by the said James Humphrey, claiming through Henry Gale, deceased, from the state of New Jersey. His decision and award made in writing to be final and conclusive.

The matter being one to which publick attention in Eastern Pennsylvania, in New Jersey and Delaware had long been directed, Mr. Sergeant readily complied with the wish, very generally existing, that the case should be heard publicly; and the county of Philadelphia having offered to the arbitrator its principal judicial chamber, and the city of Philadelphia having likewise placed at his disposal the hall in which Independence was declared, the case, which occupied twenty-one days in the trial, was heard partly in the former room and partly in the latter, to which it was found convenient after a certain time to adjourn. The United States, were represented by special counsel, to wit, the Honourable John M. Clayton of Delaware, formerly chief justice of that state, and now its representative in the senate of the United States, and by James A. Bayard, Esq., of the same state, formerly district attorney of Delaware, for the United States. Mr. James Humphrey was represented by the Honourable George M. Bibb of Kentucky, successively a judge, chief justice and chancellor of that state, also, at one time, its representative in the senate of the United States, and more lately the secretary of the treasury of the United States under President Tyler: and by the Honourable John H. Eaton, of Tennessee, secretary at war under President Jackson, and subsequently minister plenipotentiary of the United States at the court of Spain. The case was learnedly and deliberately argued on both sides; and Mr. Sergeant, after taking several weeks consideration of it, having delivered a written opinion setting forth very fully the grounds of his award, it has been thought worth while thus to preserve some record of the proceeding. Of the value of the opinion, the reporter cannot speak more appropriately than in language which he finds in a contemporaneous publication: "Mr. Sergeant's opinion it is true," said one of the journals

of Philadelphia (the North American and United States Gazette of January 17, 1848), in speaking of its delivery, "is not the judgment of a supreme court, and therefore is not authority in the technical sense of that word; but as the well reasoned opinion of a very able lawyer—whose greater distinction in his profession has made him unsolicitous about judicial station—and as having been formed after full and grave publick argument before him for many days together by other very able lawyers, it is far more authoritative than any opinion merely professional, and has all the intrinsic weight of the highest judicial opinion. It can scarcely be reversed in any case which may again involve the question of this boundary, and will take its place, of course, among the most enduring historical monuments of the states of New Jersey and Delaware.

The case as it appeared on both sides was as follows:

Title of Mr. Humphrey: On the 12th March, 1663-64, England being at that time at war with the Dutch, Charles II. by letters patent, granted in fee to his brother James, Duke of York, all that part of the main land of New England, beginning at St. Croix next adjoining New Scotland in America, &c. &c., and also all that island called Matowacks or Long Island, situate to the west of Cape Cod and the narrow higansetts, abutting upon the main land between the two rivers called Connecticut and Hudson rivers, "together also with the said river called Hudson's river, and all the lands from the west side of the Connecticut to the east side of Delaware Bay," with certain islands, and with all the lands, islands, soils, rivers, harbours, mines, minerals, quarries, woods, marshes, waters, lakes, fishings, &c., and all other royalties, profits, commodities and hereditaments to the said islands, lands and premises belonging and appertaining, with their and every of their appurtenances, and all our estate, &c., of, in and to the said lands and premises or any part or parcel thereof, with powers of government in extenso, and to exercise them, "not only within the precincts of the said territories and islands, but also upon the seas in going and coming to and from the same," as the duke and his assigns, &c., should think "for the good of the adventurers and inhabitants there:" with further power to admit any persons "to trade and traffique unto and within the said territories and islands," and to encounter, expulse, repel and resist by force of arms, "as well by sea as by land," all persons who without the duke's leave, "should attempt to inhabit within the several precincts and limits of our said territories and islands." Leaming & S. Laws N. J. 3-8.

The object of this grant was to enable the duke to dispossess the Dutch, who were then in possession of much of New York, New Jersey and Delaware, under the name of New Netherlands.

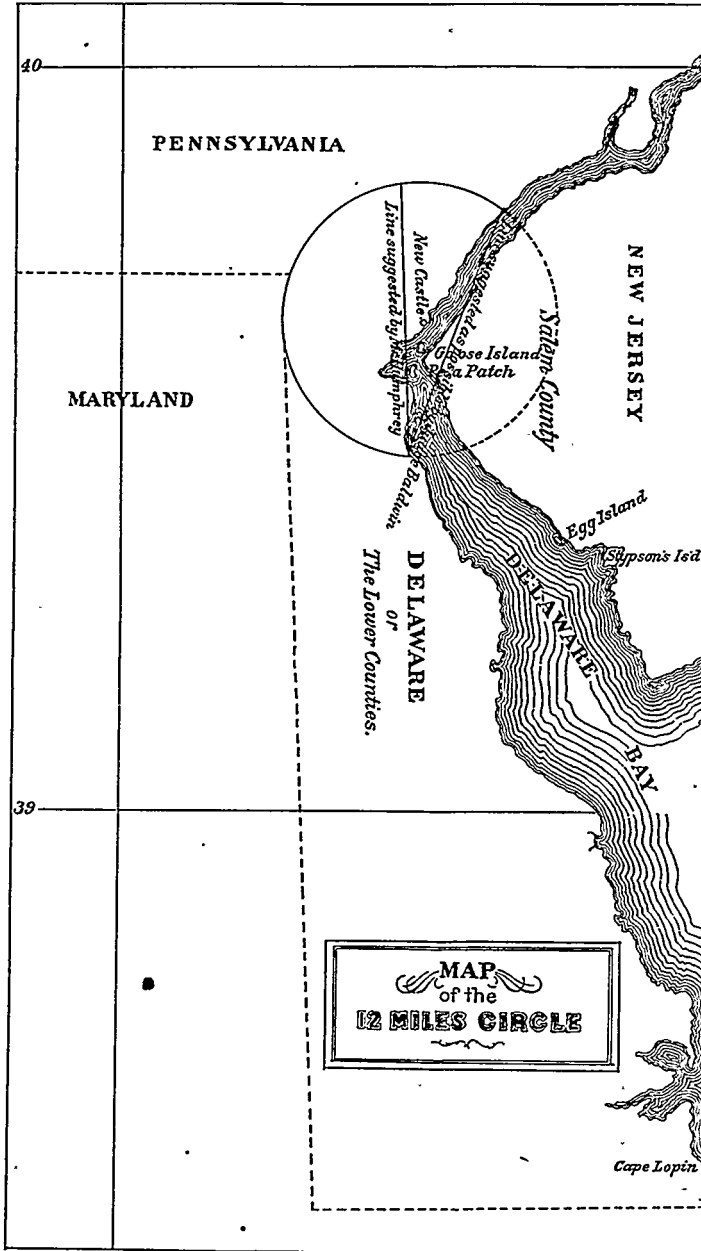
The Duke of York on the 23d and 24th June, 1664, reciting the king's grant to him, conveyed to Lord Berkeley and Sir Geo. Carteret the territory now known as New Jersey, describing it as bounded on the east, part by the main sea, and part by Hudson's river, "and hath upon the west, Delaware bay or river:" with all rivers, fishing, &c. and all other royalties, &c. to the said lands and premises belonging or in any wise appertaining, as fully as the duke himself had them. Leaming & S. Laws N. J. 8-11.

The object of this deed was the colonization of New Jersey, and under it Berkeley and Carteret entered and colonized that state accordingly.

It is unnecessary here to recite the various mesne conveyances and undisputed early historical facts through which Mr. Humphrey formally deduced his title; or to state more than

that on the 7th November, 1743, the proprietors of West Jersey—in which portion of the state the Pea Patch Island was admitted to be, if in any—directed their surveyor to survey, &c., “600 acres of unappropriated land,” any where in that division, and, on the 7th August, 1782, to survey 5000 acres of like land, in the same division: and that two persons named Hall, having acquired 126 acres of the warrant

and a half miles and about south half a point west from the Tile house at New Castle; containing one hundred and seventy-eight acres of marsh land, bank and mud flats and allowance for roads.” This survey was returned on the 27th of the same month, and being approved by the council of proprietors, was recorded accordingly. At the date of this survey the Pea Patch was just visible at low water, “about



of 1782, and 521/20 acres of that of 1743, caused a survey to be made on the 8th October, 1784, on an “island,” as appeared by the return of survey, “called the Pea Patch, situate in the county of Salem, about one mile west from Finn’s Point, in Penn’s Neck, and is about west of the mouth of Salem creek, a little above Reedy Point; also nearly south-east and by east from Hamburg, about two

the size of a man’s hat.” As the tide rose it was covered by water, and even in 1815, when the government of the United States took possession of it and embanked it, it was not unfrequently under water at high tide. In February, 1813, the title of the Halls was vested in Dr. Gale, through whom Mr. Humphrey claimed by a regular chain. On the 24th November, 1831, the Pea Patch, having become, in the

meantime, by alluvion, deposit and embankment, a large island, and entirely above the point to which the tide rises even in its highest elevation, the state of New Jersey passed an act of assembly, "vesting in Henry Gale, his heirs and assigns, all the right and title of the state of New Jersey of, in and to an island called the Pea Patch, situate in the river Delaware, in the county of Salem, and state of New Jersey." The act after reciting that "it hath been suggested that the state of New Jersey hath some title" to the island, and that by reason thereof doubts have arisen concerning the title of the said Henry Gale, enacts that "all the right and title of the said state of New Jersey to the said island called the Pea Patch, situate in the river Delaware, in the township of Lower Penn's Neck, in the county of Salem, in the state of New Jersey," &c., as mentioned in the original survey of the island, be granted and conveyed to the said H. G., his heirs and assigns, and be vested in him and them "in as full and ample a manner as the state of New Jersey hath right and title to grant and convey the same," reserving jurisdiction and sovereignty, &c. 2 Harrison's Laws N. J. 366.

In order to show that the deeds from the king and duke had always been considered and acted upon from early times as not limiting the state of New Jersey to low water mark in the Delaware bay and river, or at any rate that the state had never been so bounded de facto, Mr. Humphrey's counsel adduced several statutes and public facts and records of that state, as follows:

March 3, 1676, the proprietaries of West New Jersey—William Penn himself being one of them—by certain articles of concession and agreement, which constituted a sort of charter or fundamental law, grant convenient portions of lands for wharves, keys and harbours; and that all lands laid out for the said purposes shall be exempt from taxes; and that the inhabitants of the province have free passage through or by any seas, bounds, creeks, rivers, rivulets in the said province, through or by which they must necessarily pass to come from the main ocean to any part of the province aforesaid. And, further, that all the inhabitants within the said province have liberty of fishing in Delaware river. Leaming & S. Laws N. J. 390; also, to the same effect, *Id.* 409.

In 1679 and 1680, Sir Edmund Andros, the governor for the Duke of York, of the colony of New York, which had been conveyed (*inter alia* with New Jersey) to the duke, by King Charles II. imposed a duty of ten per cent. upon all European goods imported into the Delaware, which was collected at the Hoar Kills, or Lewistown, as it is now called. But it was discontinued at the instance of the proprietors of New Jersey, who, in their remonstrance, insist that they have a right to land any where in the Delaware Bay, as the bounds of the country they bought; that the right of colonizing was part of their bargain; that they bought the soil and right of government together; and that the powers of government limited them to erect no polity contrary to the laws of England; and that, with this restriction, they had the right of making laws for the good of the adventurer and planter; that if the duke claims it by the *ius regale*, that power over the territory constituting New Jersey is vested in his alienees. Smith, *Hist. N. J.* 116.

In 1682, the legislature of New Jersey resolved that the land and government of West New Jersey were purchased together. Smith, *Hist. N. J.* 163.

On the 3d October, 1693, the assembly of West New Jersey passed an act reciting that the whalery in Delaware Bay has been in so great a measure invaded by strangers and foreigners, that the greatest part of the oil, &c., got by that employ, has been exported out of

the province, &c.; and enacting that all persons not residing within the precincts of this province, or within the province of Pennsylvania, who shall kill or bring on shore any whale or whales "within Delaware Bay or elsewhere within the boundaries of this government," shall pay one-tenth of the oil, &c. to the governor, &c. Leaming & S. Laws N. J. 519.

In 1701 or 1702, the proprietors of East New Jersey, treating with the lords of the council of trade and foreign plantations about a surrender to the crown, of the powers of government of the state, which was then contemplated, request the king to confirm to them certain rights and privileges, among which is that of having all "wrecks and royal fish that shall be forfeited, found or taken within East New Jersey or by the inhabitants thereof, within the seas adjacent" (Leaming & S. Laws N. J. 588, 590, 591), as they had the same under a then existing grant. Though the answer of the commissioners does not give them a fully satisfactory answer, it does not deny that these rights and privileges were then lawfully enjoyed by the proprietors (*Id.* 596).

On the 23d August, 1725, the legislature of New Jersey passed a revenue act, laying taxes upon eight different ferries along the Delaware river, from Trenton to Gloucester across to the other shore: and for the effectual compelling of the said boats, flats or wherries belonging to the neighbouring colonies to pay such taxes as aforesaid, it enacts that "all boats, flats or wherries, that carry goods or passengers for hire as aforesaid, that shall not first pay unto the collector of his majesty's customs, &c. and get a certificate that he has paid the tax aforesaid, shall forfeit for every offence," &c. Wm. Bradford's Laws N. J. 1717, pp. 129, 130.

In 1765, the legislature of New Jersey passed "An act to regulate the method of taking fish in the river Delaware, and to prevent obstructions in the navigation thereof, and for other purposes therein mentioned." This act, which was limited to five years, and was to be dependent for its force upon the passage of a similar act by Pennsylvania, was revived conditionally, with a supplement to it passed in 1768, in the year 1771. Allinson's Laws N. J. 279, 313, 367. Pennsylvania did not pass any similar act, and the act of New Jersey not having become operative, nothing beyond its title is given in the volume referred to.

On the 21st December, 1771, the same legislature passed "An act declaring the river Delaware a common highway, and for improving the navigation in the said river." Allinson's Laws N. J. 347. It recites that the improving the navigation on rivers is of great importance to trade and commerce; that the river Delaware may be rendered much more navigable than it now is; that many persons, desirous to promote the publick welfare, had subscribed large sums of money for the purpose aforesaid, and that it was represented others will do the same if commissioners are appointed to receive subscriptions. It then enacts "that the river Delaware shall be and it hereby is declared to be a common highway for the purposes of navigation up and down the same." It then appoints commissioners to collect subscriptions, and "so much of the said moneys as may be necessary for that purpose, to lay out and apply for, and towards improving the navigation in the said river Delaware, from the lower part of the falls near Trenton, to the river Lehigh at Easton: and the residue thereof to lay out and apply for and towards improving the navigation in that part of the said river, above the said river Lehigh." It next enacts (section 3) that the commissioners, &c., shall have "full power and authority to clear, scour, open, enlarge, straighten, or deepen the said river, wherever it shall to them appear useful for improving the channels; and also to remove any obstructions whatsoever, either natural or artificial, which may or can in any manner hinder or impede

the navigation in the said river: and to make and set up in the said river any dams, pens for water-locks, or any other works whatsoever, and the same to alter and repair as they shall think fit: and also to appoint, set out and make near the said river, paths or ways, which shall be free and open for all persons having occasion to use the same for towing, hauling or drawing any vessels, boats, small craft and rafts of any kind whatsoever; and from time to time to do and execute every other matter or thing necessary or convenient for improving the navigation in the said river." It afterwards (section 5) "makes it penal to hinder the commissioners or to obstruct the navigation of the river;" and, by section 6, that "every offence committed in or on the said river, against this act, shall be laid to be committed, and may be tried and determined as aforesaid in any of the counties opposite to or joining on that part of the said river, on which such offence shall be committed."

On the 28th November, 1822 the legislature of New Jersey passed an act relative to certain of its boundaries, in which it was enacted that the west boundary of certain counties, including Salem county, in which the Pea Patch was said to be, should be "the main ship channel of the river Delaware." 2 Harrison's Laws N. J. 39, § 4.

On the other hand, there were certain public acts of New Jersey which looked as if the state had considered that its west boundary came but to low water mark in the river.

Thus, in 1674 and in 1680, New Jersey having been conquered by the Dutch since the deeds of the Duke of York, 23d and 24th June, 1664, and restored again to England—the duke, by two new deeds, made after a regrant by the crown to him, and with a view, it is probable, to prevent any question of title, regrants the same territory previously granted, describing it on its west boundary, not as in the former deed, as "having on the west, Delaware river," but, in one deed, as extending "along," and, in another, as running "up" the Delaware. Leaming & S. Laws N. J. 47, 414.

So in February, 1681, the commissioners for settling and regulating lands in West Jersey agree, with the approbation of the governor and council, that the surveyor shall measure the front of the river Delaware, beginning at Assispink creek, (a creek which empties into the Delaware at Trenton,) and "from thence down to Cape May," and that every ten proprietors shall have their proportion of front "to the river." Leaming & S. Laws N. J. 436.

So in July, 1683, the assembly of West Jersey enact that the proprietary of the province of Pennsylvania be treated with in reference to the rights and privileges of this province "to or in the river Delaware." Leaming & S. Laws N. J. 480.

So on the 21st January, 1709, the general assembly of New Jersey passed "An act for dividing and ascertaining the boundaries of all the counties in this province;" which recites that by the uncertainty of the boundaries of the counties of the province, great inconveniences have arisen, so that the respective officers of most of those counties cannot know the limits of them: For preventing which in time to come, and the better ascertaining the boundaries, it enacts, &c. (after having settled the boundaries of other counties as running "to" or "by" or "up" or "down" the Delaware bay or river,) that Salem county begins "at the mouth" of a certain creek which empties into Delaware Bay. The act then carries the boundary round by that creek and certain lines "to Delaware river, then down Delaware river and bay to the place of beginning."³ It is to be remarked, however, that where counties are divided by creeks

or rivers, this act frequently brings the boundaries of such counties only to those creeks or rivers on both sides, without extending the boundary into the stream; so that many of those creeks and rivers were left beyond any county jurisdiction whatever, until that matter was changed by an act of March 7, 1797, "declaring the jurisdiction of the several counties in this state, which are divided by rivers, creeks, bays, highways or roads." Id. 180.

On the 26th April, 1783, commissioners having been appointed by Pennsylvania, for the purpose of settling the jurisdiction of the river Delaware and islands within the same, New Jersey made an agreement, regulating the jurisdiction, &c., and treating the rights of the two states in the river as about equal, down to the upper portion of the twelve miles circle; which agreement was soon after ratified (by New Jersey, May 27, 1783; by Pennsylvania, September 20, 1783, Id. 41) by these two states and has regulated the matter ever since.

Title of the United States: At the date of the letters patent of March 12, 1663-64, already mentioned, from Charles II. to the Duke of York; the Dutch were in actual possession of New York, a portion of New Jersey and much of both sides, and particularly of the west side of Delaware bay and river; all which they held under the name of New Netherlands. To put the Duke of York in possession of his newly acquired estates, an English fleet was sent out under the command of Col. Richard Nicolls, who styles himself "principal commissioner for his majesty in New England, governor general under his royal highness, James Duke of York and Albany, &c., of all his territories in America and commander in chief of all the forces employed by his majesty to reduce the Dutch nation and all their usurped lands and plantations under his majesty's obedience." 4 The Dutch surrendered New York, August, 1664, and within a week afterwards Col. Nicolls sent Sir Robert Carre round into Delaware bay and river, to dispossess the Dutch there. 1 Hazzard, Pa. Reg. 37. This Dutch settlement appears to have been an appendage to the government of New York, or Manhattans, as it was then called, from which it originally sprung, and to which, as a superintending and protecting power, it appears to have constantly referred. Thus the original Dutch purchase of Delaware from the Indians in June, 1620, was concluded by the Indians in person at New York, and recorded there. 4 Hazzard, Pa. Reg. 82. So when the Swedes began to build a fort on the Delaware, about the year 1638, the director general of the New Netherlands, resident at New York, and appointed by the states general, advertises the Swedish commander, that the "whole South river has been many years in our possession, and above and below settled by our forts and also sealed by our blood." Id. So in 1646, the director general, allowed certain persons to settle upon the South river, on condition that they acknowledge the director and his council "for their lords and patrons," and submit to all taxes which they have laid or may lay. Id. 119. And there was produced before the arbitrator, ancient records of five Dutch patents for lands in Delaware, emanating from Governor Stuyvesant at New York, between the years 1664 and 1665, and recorded there (Id. 119, 120), which titles, Mr. Clayton informed the arbitrator, are recognized as valid in Delaware up to this day. Other Dutch records from New York shewed that in 1665 instructions were issued from the director general there, "for the vice director in the South

³ Statutes of New Jersey Revised and Published under the Authority of the Legislature. Trenton: Printed by Phillips & Boswell, 1847, p. 161.

⁴A. D. 1667; 4 Hazzard, Pa. Reg. 74. Several of the documents of which evidence was given on the trial, are found in this valuable repository; but more legal evidence of them was given before the arbitrator. Ancient records were produced, being the identical ones, apparently, which were given in evidence before Lord Hardwicke in 1750, on the hearing of Penns v. Ld. Baltimore. 1 Ves. Sr. 444.

river and the commissioners joined with them," in which minute directions are given as to the places in which lands are to be granted and streets laid out there (Id. 82), with various other instructions shewing that that district had a very close and depending relation upon the government at New York as a principal.

In this condition of things, the Delaware country apparently stood in regard to the Dutch government at New York, when the latter surrendered to the English: And with the surrender of the principal government at New York, Sir Robert Carre had no difficulty, on the 1st October, 1664, in procuring a surrender of the settlement on the Delaware.

New York continued to be, under the English, as it had been under the Dutch, the seat of principal government; the English governours there, acting under a sort of double or mixed authority derived partly from the king and partly from the Duke of York. A variety of commissions and other publick documents, for example, were produced from Col. Nicolls, and other English governours there, granting lands in Delaware, constituting justices there, appointing collectors of customs, and doing various publick acts not necessary to be stated. In eight of them, including several grants of land,⁵ there was no recital of the authority under which the act professed to be done. In ten others, being most of them commissions to judicial office, there was a reference to "his majesty's service," or to power derived from "his majesty;" the act being sometimes done in "his majesty's name." In eleven others—including a grant of land, of which however the rent was reserved to the king—the power under which the act was done professed to be derived from the Duke of York. Two others recited a joint or double authority; being "by virtue of his majesty's letters patent, and the commission and authority given unto me by his royal highness." And a third one, a proclamation by Governour Andros, one of the British governours—on the re-conquest of New York from the Dutch—went as follows: "Whereas, it hath pleased his majesty and his royal highness, to send me with authority to receive this place and government, and to continue in command thereof under his royal highness, who hath given me his command for securing the rights and properties of the inhabitants, and that I should endeavour by all fitting means the good and welfare of this province and dependencies under his government, &c." 4 Hazzard, Pa. Reg. 55-57, 73-75, 81, 82. So again, when the Delaware country surrendered to Sir Robert Carre, Oct. 1, 1664, protection was to be afforded to all who "shall take the oath of allegiance to his majesty." While in directions from Gov. Nicolls and his council at New York, in 1663, "for the better settlement of the government on the Delaware," the newly appointed counsellors are to take the oaths to his royal highness; whose laws as established by him, are ordered to be shewed and frequently communicated to them, the said counsellors, and others." Id. 37, 38. A fact is also mentioned by the arbitrator in his opinion, as illustrative of some title in the duke, to wit, that after Mr. Penn, March 4, 1680-81, had obtained letters patent from Charles II. for the province of Pennsylvania, he took a release, August 21, 1682, from the Duke of York for the same premises.

But notwithstanding the great research of the counsel of the United States, aided by several other persons connected with historical societies and curious in archæology—whom the interest of the case had induced to study it—nothing precise was shewn as to the source from which the duke claimed to derive the

power which it was in evidence that he actually exercised over the district now known as Delaware. Whether the duke was under the same mistake as Lord Baltimore, who, as late as 1737, in his answer to the bill of Penns v. Baltimore, swears that country is "on the east side" of the bay; which would have brought it strictly within the terms of the king's patent of March 12, 1663-4: Whether—taken in connection with the known object of the grant, which was the dispossession of the Dutch from all this region—he supposed that it passed under the clause of the patent, which gave him power to encounter and expulse, as well by sea as by land, any persons who should attempt to "inhabit within the several precincts and limits" of the territories granted with full appurtenances and with power to govern them: Whether he thought that the Dutch settlement on the Delaware, having been at all times, and at the very date of the conquest of New York, a part, "appendix," and dependency of that latter place, necessarily followed its course and fortune, and so passed into his hands by the terms of his patent, which gave him New York, and all powers of government over the country conveyed and all its appurtenances: Whether there might have been something, in some commission, or some instructions from the king to the English commander, which two centuries now rose up to hide from view, and by which a title by conquest might have enured to the duke and not to the crown: Whether the duke considered that he had no title in law, and took possession only as a successful conqueror, meaning to procure or make at some future time, a confirmation of what he did: Or whether, finally, he exercised the more usual privilege of royal and noble blood, and did not undergo the fatigue of thinking any thing about the subject: This was all matter on which speculation might exercise its ingenuity, but on which the case itself exhibited no direct evidence.⁶

However, possessing either a good title, an imperfect one, or no title at all, the Duke of York did, on the 24th of August, 1682, by a deed of feoffment with livery of seizin, convey to William Penn, in fee, "all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the river Delaware, in America; and all the islands in the said river Delaware, and the said river and soil thereof,

⁶ It would appear probable that no very precise notion was had by the duke himself or his governours, perhaps, as to the nature and extent of his right here: but Sir John Werden, his intelligent secretary, seems to have regarded it as a sort of pre-emption right rather than as a perfect title. When Mr. Penn was applying for a grant of Pennsylvania, the board of trade on the 14th June, 1680, refer his petition, before acting on it, to Sir John Werden, to know whether such a grant as Mr. Penn wanted, "would any way intrench upon the patent of his royal highness or otherwise prejudice the same." Sir John replies: "By all which I can observe of the boundaries mentioned in Mr. Penn's petition, they agree well enough with that colony or plantation which hath been hitherto (ever since the conquest of New York by Col. Nicolls,) held as an appendix and part of the government of New York, by the name of Delaware colony, or more particularly New Castle colony, that being the name of a principal place in it; the whole being planted promiscuously by Swedes, Finlanders, Dutch, and English; all which hath been actually under the government of his royal highness' lieutenants at New York hitherto. But what are its proper boundaries, (those of latitude and longitude being very little known, or so ill observed, as experience tells us in all the West Indies,) I am not able to say. If this be what Mr. Penn would have, I presume the right honourable the lords of the committee for trade and plantations, will not discourage his pretensions to it, because of what is mentioned, which plainly shew the duke's right preferable to all others (under his majesty's good liking) though it should not prove to be strictly within the limits of the duke's patent; but if it be, &c. &c." Letter of June 23, 1680. 1 Hazzard, Pa. Reg. 274.

⁵ In the Breviate, p. 42, mentioned post, there is a very long list of grants of land in Delaware, made by the English governours. These were referred to generally by the United States, but they are imperfect abstracts of the patents, and not material to be here copied.

lying north of the southernmost part of the said circle of twelve miles about the said town, together with all rents, services, royalties, franchises, duties, jurisdictions," &c. &c. and all the estates, &c. "to have and to hold the said town and circle of twelve miles of land about the same, islands, and all other the before mentioned," &c. &c. The duke for himself, his heirs and assigns, then covenants and grants with and to Penn, his heirs and assigns, that he or they will, any time within seven years from the date of the deed, "do, make, execute or cause to be made, done, executed, all and every such further act and acts, conveyances and assurances in the law whatsoever, for the further conveying and assuring the said town and circle of twelve miles of land about the same, and islands and all other the premises with the appurtenances" to Penn in fee: after which he constitutes John Moll and Ephraim Herman, "jointly and either of them severally," his attorneys, and so gives them full powers for him and in his name and stead to enter into the premises granted, and every part of them, and to take quiet and peaceable possession or seizin of them, or any part or parcel in the name of the whole: And after taking such quiet and peaceable possession and seizin, to deliver the same to William Penn, his heirs and assigns, or to his and their lawful attorney. Ratifying, approving, &c.⁷

The duke, on the same day, by a second deed of feoffment with livery of seizin, conveyed to William Penn, in fee, "all that tract of land upon Delaware river and bay, beginning twelve miles south from the town of New Castle, otherwise called Delaware, and extending south to the Hoar Kills, otherwise called Cape Henlopen, together with free and undisturbed use and passage into and out of all harbours, bays, waters, rivers, isles and inlets, belonging to or leading to the same; together with the soil, fields, woods, underwoods, mountains, hills, fens, isles, lakes, rivers, rivulets, bays and inlets situate in, or belonging unto the limits and bounds aforesaid, together with all sorts of minerals, and all the estate, interest, royalties, franchises, powers, privileges and immunities whatsoever of his said royal highness therein or in or unto any part or parcel thereof." Then there was a covenant for further assurance, and an appointment of Moll and Herman to be attorneys to deliver possession and seizin to Penn exactly as in the former deed.

It further appeared from an ancient record in the rolls office at Philadelphia, made 28th August, 1701, that on the 28th of October, 1682, as they certify under their hands and seals, Arnoldus de La Grange and eleven other persons, "being inhabitants of the town of New Castle upon Delaware river, having heard the indenture read, made between his royal highness, James Duke of York and Albany, &c., and William Penn, Esq., governor and proprietor of the province of Pennsylvania, &c., wherein the said duke transferreth his right and title to New Castle and twelve miles circle about the same, with all powers and jurisdictions and services thereunto belonging unto the said William Penn, and having seen by the said duke's appointed attorneys, John Moll and Ephraim Herman, both of New Castle, possession given, and by our Governour William Penn, Esq., possession taken, whereby we," says the record, "are made subjects under the king to the said William Penn, Esq.: We do hereby, in the presence of God, solemnly promise to yield him all just obedience, and to live

quietly and peaceably under his government."

It appeared further from an ancient record, made at the same time, in the same office, that the same Arnoldus de La Grange and eight other persons made a memorandum under their hands, October 28, 1682, that on that day and year "William Penn, Esq., by virtue of an instrument of indenture, signed and sealed by his royal highness, James Duke of York, &c., did then and there demand possession and seizin of John Moll, Esq., and Ephraim Herman, gentlemen (attorneys constituted by his said royal highness), of the town of New Castle, otherwise called Delaware, with twelve miles circle or compass of the said town: that the possession and seizin was accordingly given by the said attorneys to the said William Penn, according to the usual form, by delivery of the fort of the said town, and leaving the said William Penn in quiet and peaceable possession thereof, and also by the delivery of turf and twig, and water and fowl of the river Delaware, and that the said William Penn remained in the peaceable possession of the premises."

Next an ancient record, made at the same time and place, the original of which was made in Delaware river, under the hands of Luke Wattson and ten other persons, November 7, 1682, which, after reciting the duke's deed to William Penn for the territory beginning twelve miles south from the town of New Castle, the power of attorney to Moll and Herman, and that Mr. Penn had substituted Captain William Markham, as attorney to receive seizin for him of that said tract, proceeds to testify and declare that livery of seizin was delivered of it also; that the persons whose names are subscribed to the document, on the day of the date thereof, "have been present and seen, that they the said John Moll and Ephraim Herman, in pursuance of his royal highness' command, and by virtue of the power given them by his said royal highness, James Duke of York and Albany, etc., by and in the above mentioned instrument of indenture, bearing date as above, have given and delivered actual possession unto the said Captain William Markham, to the sole use and behoof of the said William Penn, (of part in the name of the whole,) of the land, soil and premises in the said instrument of indenture mentioned, and according to the true intent and meaning of his said royal highness mentioned in the same."

Next came another ancient record, without date, however, from the office for recording of deeds, &c., at New Castle, Delaware; being an account by John Moll, himself, one of the persons named in the duke's deeds as attorneys for delivering seizin of both tracts to Mr. Penn, of the mode in which he did this duty. As this quaint document has not perhaps been in print, and may not be without interest to the historian, it is here inserted in the same form in which it was given in evidence.

"These are to certify all whom it may concern that William Penn Esqr. Proprietor and Govr. of the provinces of Pennsylvania and the territories thereunto belonging at his first arrival from England by the Town of New Castle upon Delaware River in the month of October anno 1682 did send then and there our messenger ashore to give notice to the Commissioners of his desire to speak with them aboard (I being then left the first in Commission by Sr. Edmund Andross Governour Genl. under his Royal highness James Duke of York and Albany etc. of all his Territories in America) did go aboard with some more of the commissioners at which time Esqr. Penn did show me two sundry Indentures or Deeds of Enfeoffment from under the hand and seal of His Royal Highness granted unto him, both bearing date the 28th day of August Anno 1682 the one for the county of New Castle with twelve miles distance North and South thereunto belonging and the other beginning twelve miles

⁷ There were produced two original leases for 10,000 years from the duke to Wm. Penn, his executors, &c. one dated Aug. 24, 1682, but not sealed or delivered in the presence of witnesses; another just like it only sealed and delivered, and dated three days after it, Aug. 24, 1682. The descriptions in both were the same as in the deed of feoffment. There was also a similar lease, 24th August, 1682, for the country south of the circle.

below New Castle and extending South unto Cape Henlopen together with the mills and waters of the said River, Bay, Rivulets and the Islands thereunto belonging &c. underneath both which sd. Indentures of deeds of Infeoffment were added his Royall highness letters of attorney directed unto me and Ephraim Herman deceased with full power and authority for to give in his Royall highnesses name unto the sd. William Penn Esqr quiet and peaceable possession of all what was Inserted in the sd. Indentures as above briefly is specified. But the sd. Eph. Herman happened to be gone from home so that he was not at that time aboard with me of the sd. ship, I therefore did desire from Esqr Penn four and twenty hours consideration for to communicate with the sd Herman and the rest of the Commissioners about the premises. In which compass of time we did unanimously agree to comply with his Royal Highnesses orders whereupon by virtue of the power given unto us by the above mentioned letters of Attorney We did give and surrender in the name of his Royall Highness unto him the said William Penn Esq actual and peaceable possession of the fort of New Castle by giving him the key thereof to lock upon himself alone the door which being opened by him again We did deliver also unto him one turf with a twig upon it a porringer with River water and Soyle in part of all what was specified in the sd. Indenture or Deed of Infeoffment from his Royal Highness and according to the true intent and meaning thereof. And few days after that we went to the house of Capt. Edmund Caulwell at the south side of Apokenimizing Creek by Computation above twelve miles distance from the Town of New Castle as being part of the two Lower Countys here above mentioned and specified in his Royal Highnesses other Indenture or Deed of Infeoffment and after we had shown unto the Commissioners of these Countys the power and orders given unto us as aforesaid we asked them if they could show us any cause why and wherefore we should not proceed to act and do there as we had done at New Castle, and finding no manner of obstruction We made then and there in his Royal Highnesses name the same manner and form of delivery as we had done at New Castle Which acting of us was fully accepted and well approved off by Anthony Brockhold then Commander in chief and his Council at New York as appears by their Declaration bearing date the 21st of November 1682, from which Jurisdiction we had our Dependance all along ever since the Conquest untill we had made the above related delivery unto Governour William Penn by virtue of his Royall highnesses orders and Commands &c.

“Jno. Moll.”

The declaration of November 21, 1682, referred to in the foregoing certificate, was a circular letter (3 Hazzard, Pa. Reg. 34) by Captain Brockhold, &c., to the several justices of the peace, magistrates and other officers of Delaware, which, after reciting the two deeds of August 24th from the Duke of York to William Penn,—mentioning one of them as granting “all that town of New Castle otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, with all islands and the river and soil thereof lying north of the southernmost part of the said circle,”—which deeds are spoken of as having been “here produced and shewn to us, and by us well approved and entered in the publick records of this province,”—proceeds to say that “we being fully satisfied of the said William Penn’s right to the possession and enjoyment of the premises, have therefore thought fit and necessary to signify and declare the same to you to prevent any doubt or trouble that might arise or accrue, and to give you your thanks for your good services done in your several offices and stations during the time you remained under his royal highness’ govern-

ment. Expecting no further account than that you readily submit and yield all due obedience and conformity to the powers granted to the said William Penn in and by the said indenture, in the performance and enjoyment of which we wish you all happiness.”

So far as to the title derived to Mr. Penn from the grants of 24th August, 1682, prior to certain letters patent now to be mentioned, from King Charles II. not to Mr. Penn—but to the Duke of York—granting, March 22, 1683, to him, the same property which the duke had granted about seven months before to Mr. Penn. 2 Hazzard, Pa. Reg. 27. The letters patent describe the territory as “all that the town of New Castle otherwise called Delaware, and fort therein or thereunto belonging, situate, lying and being between Maryland and New Jersey, in America. And all that tract of land lying within the compass or circle of twelve miles about the said town, situate, lying and being upon the river of Delaware. And all islands in the said river of Delaware. And the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the said town. And all that tract of land upon Delaware river and bay, beginning twelve miles south from the said town of New Castle otherwise called Delaware, and extending south to Cape Lopin. Together with all the lands, islands, soil, rivers, harbours, mines, mineral, quarries, woods, marshes, waters, lakes, fishings, hawkings, huntings, and fowlings, and other royalties, privileges, profits, commodities and hereditaments to the said town, fort, tracts of land, islands and premises, or to any or either of them belonging or appertaining, with their and every of their appurtenances, situate, lying and being in America. And all our estate, right, title, interest, benefit, advantage, claim and demand whatsoever, of, in or to the said town, fort, lands or premises, or any part or parcel thereof. And the reversion and reversions, remainder and remainders thereof, together with the yearly and other rents, revenues and profits of the premises and of every part and parcel thereof. To have and to hold the said town of New Castle otherwise called Delaware, and fort, and all and singular the said lands and premises, with their and every of their appurtenances hereby given and granted, or hereinbefore mentioned to be given and granted, unto,” &c.

These letters patent gave powers of government in the same way as those of March 12, 1683–84, to which, except in the description of the property granted, their language almost exactly conformed.

The original of this patent from the king to the duke⁸ for Delaware, and of the Duke of York’s grant to Penn for the twelve miles circle were produced before the arbitrator; having both, with the original charter of Pennsylvania and two leases of August 24th to Mr. Penn, mentioned ante, p. 1129, note, been brought to Philadelphia, about the year 1834, by Mr. Coates of that city, an agent of the estates in Pennsylvania belonging to Mr. Penn’s descendants in England. Mr. Coates got possession of them on a visit to his principals in England. Being at their seat of Stoke Pogis, he was shewn by them into the charter-room of their house, where he was told that he might find some old deeds &c. that would interest him as an American, and to which he was welcome. Happening to find the patents and deeds just mentioned, he brought them to Philadelphia, where those relating to Delaware still were, on the hearing of this case.

It appeared also, by an original “Breviate” of the Hon. Mr. Murray, A. G. and Sir Dud-

⁸ Besides the original, there was, (1) an exemplification from the Rolls in England under the great seal, July 16 (6 Vict.); (2) a copy sworn to before the Lord Mayor of London, Feb. 4, 1735; (3) a printed copy in The Pennsylvania Votes of Assembly, published in 1754. Volume 3, p. 590.

ley Ryder, S. G. solicitors for the sons of William Penn in their suit with Lord Baltimore—(1 Ves. Sr. 444) before Lord Hardwicke, A. D. 1750; the bill was filed June 21, 1735—that these identical parchment letters patent were in evidence before Lord Hardwicke in that case as the complainants' exhibit. And were put in evidence by them to shew their possession of them, and so repel an objection of Lord Baltimore's, that "the duke obtained this grant for himself and not for Mr. Penn, and never made any subsequent conveyance to Mr. Penn." Breviate.

The counsel of the United States, in order to shew that the title of the Penns as thus derived, had been subsequently recognized and confirmed by the crown, and had been asserted also by the state of Delaware just at the time of the American Revolution, then referred to certain facts of history as follows:

Penn was the intimate friend of James II. and in favour at the English court until the accession of William and Mary. In 1692 his government in America was taken from him, and Benjamin Fletcher appointed in his place. Fletcher gave dissatisfaction, and Penn was restored to his government again, in 1694, by letters from William and Mary. 1 Proud's Hist. Pa. 377, 403.

Charles I. having granted to Lord Baltimore in 1632, a tract of land between the Chesapeake and Delaware Bays, a dispute arose between Penn and him as to the extent of the king's grant and the situation of the line between them. Lord Baltimore's grant, reciting that the earl, being desirous to extend the Christian religion as well as the English empire to certain parts of America, hitherto savage, and inhabited by people having no knowledge of the Divine Being, had asked the king for that region—gave to him all the country being between the Chesapeake and Delaware Bays. An application having been made to the crown for a grant to the Duke of York, "of the parts adjacent to the Delaware Bay," Lord Baltimore, by his agent Mr. Burk, applied, May 21st, 1683, praying that the grant might not pass until the king should be satisfied as to the extent of the grant already made to the earl. The minute then proceeds (1 Votes Pa. Assem. xiv), May 30, 1683: "Counsel learned, in behalf of his royal highness, together with an agent from Mr. Penn, who solicits the passing of this grant; as also the petitioner, Mr. Burk, and his counsel learned, are called in: whereupon the counsel for my Lord Baltimore, affirming that the tract of land in question, lies within the limits of the charter granted to the Lord Baltimore, and that his lordship has always continued his claim thereunto; Mr. Penn's agent, and the counsel in behalf of his royal highness, endeavoured to make out, that the territory was never possessed by my Lord Baltimore, but originally inhabited by Dutch and Swedes; and that the grant to my Lord Baltimore, was only of lands not inhabited by Christians; so that a surrender having been made to his majesty in 1664, the Lord Baltimore can have no rightful claim thereunto; and that it having been ever since in the possession of his royal highness, the Lord Baltimore can receive no injury by the grant that is desired. Upon the whole matter, Mr. Penn's agent undertaking to prove within a short time, that this country was possessed by the Dutch and Swedes, in the year 1609, or at least before the date of the Lord Baltimore's patent, their lordships agreed to meet again as soon as the proofs shall be ready for making out the same." After numerous hearings, in which it appears that the Duke of York, the earl and Mr. Penn, all took part, a final order was made November 7, 1685, as follows (1 Votes Pa. Assem. xviii): "My Lord Baltimore and Mr. Penn, attending concerning the boundaries of the country of Delaware, are called in; and being heard, their lordships resolve to report their opinion to his maj-

esty, that, for avoiding of further differences, the tract of land lying between the river and Bay of Delaware and the eastern sea on the one side, and Chesapeake Bay on the other, be divided into two equal parts, by a line from the latitude of Cape Henlopen to the fortieth degree of northern latitude; and that one-half thereof lying towards the Bay of Delaware, and the eastern sea, be adjudged to belong to his majesty, and that the other half remain to the Lord Baltimore, as comprised within his charter."

This being done, articles of agreement were concluded in 1732, between the Earl of Baltimore and the sons of William Penn, upon which the Penns, in 1735, filed their bill in chancery in England, praying for a specifick performance and the running and settlement of the boundaries. This bill set forth title in the Penns; the Duke of York's and the king's deeds, (giving their dates and the description of the property conveyed, including the river, soil, and islands north of the southernmost part of the twelve miles circle,) the delivery of seizin by Moll, the circular letter by Captain Brockhold, the covenant in the duke's deed for further assurance, and alleged that "immediately after the said last recited letters patent had passed the great seal, the said Duke of York, who was no other than a trustee for the said William Penn therein, and had obtained them in pursuance of his covenant for further assurance, did deliver over the same original last recited letters patent under the great seal to the plaintiff's father;" that after this, and when the duke was soliciting from the king a more beneficial grant for Penn, which was then preparing in order to pass the great seal, the same was stopt by Lord Baltimore, whose petition caused the matter to be referred by the king to the committee of trade and plantations, where both parties were heard for nearly two years and a half; that it is continually taken notice and expressly mentioned in the minutes made by the said committee thereon, that the dispute was a dispute between Baltimore and Penn, though the latter did sometimes use the Duke of York's name, and though the duke himself did by his counsel and other agents sometimes assist and interpose in the suit: which latter fact the Penns rely on as a manifest proof that the duke held the king's letters patent, for the benefit of Penn and not of himself. And finally, that, November 7th 1685, the committee made the adjudication already mentioned.

That notwithstanding this, Lord Baltimore in Jan. 1708, brought the matter before Queen Anne, who, after a counter-representation from Penn, dismissed the petition in the same month; that not yet satisfied, the earl, in May 1709, presented the matter again to the queen, who ordered it to be heard before her in council, where both Penn and Baltimore were heard, and where it was ordered that the earl's petition be dismissed, and that the order of November 7th 1685, be ratified and confirmed in all its points and put in execution.

The case, which is the well known case reported in 1 Ves. Sr. 444, under the name of Penn v. Lord Baltimore, was heard before Lord Hardwicke who, May 15th 1750, decreed in favour of the Penns, but "without prejudice to any prerogative, power, property, title or interest of his majesty, his heirs and successors in or to the said territories, &c." (Belt, Supp. Ves. Sr. 198), with liberty, in case the king should insist on any power, &c. for any of the parties to apply. Subsequent articles of 1760, and another chancery decree, twelve years later, terminated the dispute between the parties.

In 1767, the Penns and Lord Baltimore presented a joint petition to George III. reciting the before mentioned articles and decrees, and setting forth that the commissioners to run the line were proceeding in their work, and praying the king to give his allowance, ratification and confirmation of the articles and de-

crees already mentioned; whereupon the king, January 11, 1769, by order in council, signified his approbation of the proceedings mentioned in the petition.

On the 8th April, 1775, John Penn, then governor of Pennsylvania and Delaware, or the lower counties as they were then called, made a proclamation making known the premises, and on the 2d Sept., 1775, it was enacted by the legislature of the lower counties, in an act reciting the articles of agreement, decrees and proclamations, that certain lines which were then fixed, should be the divisional lines of the counties. The act does not profess to fix either the eastern or the western bounds of the province. 1 Booth's Laws Del. 567, 569.

The paper title of the United States was completed by an act of assembly of the state of Delaware, May 27, 1813; by which it was enacted, that "all the right, title and claim, which this state has to the jurisdiction and soil of the island in the Delaware commonly called the Pea Patch, he and the same is hereby ceded to the United States of America, for the purpose of erecting forts, batteries and fortifications for the protection of the river Delaware and the adjacent country," &c. &c. reserving jurisdiction, &c. Dig. Del. Laws (Ed. 1829) p. 673.

The same counsel, in order to show, more specifically, that absolute control over the whole river within the twelve miles circle, had been, at least, claimed from early days by the lower counties, proved that about the year 1707, a law was passed at New Castle, whereby a tax of half a pound of powder for each ton of measurement, was laid upon every vessel bound up or down the river; that the lower counties proceeded to enforce the tax by firing upon vessels which would not pay it; that although the general assembly of Pennsylvania strongly remonstrated against the matter, the law was never repealed, though its execution was stopped by defiance and resistance from Pennsylvania vessels. 1 Votes Pa. Assem. pt. 2, p. 170.

So far as to the paper title of the respective parties, as the same was proved by original deeds or early legislative action.

As to the jurisdiction exercised, de facto, in the river, it appeared on behalf of New Jersey that Egg Island, a small island low down in Delaware Bay, and Stypson's Island, whose position could not be found by counsel, but both of which were admitted to be without the circle, were held under New Jersey, though how, or for how long, did not appear. Further, that some time since 1832, a boat-man having committed an assault upon some person on the river within the circle, a constable of New Jersey pursued the criminal to the Pea Patch and arrested him. "The constable had process," that is, said the witness, a military person, "he had a pistol; he shewed no process but that." The boat-man refused to go to New Jersey, said he would go on lawful process; process from Delaware; and did not go with the constable, who went away and never came back after him. On the part of Delaware, the evidence was more full. Reedy Island and Bombay or Boonprie Hook, the only island within the circle, had always, so far as appeared, been considered as part of Delaware, to which state the people also were considered as belonging. Both these islands, however, lie close to the Delaware main land; the latter being within its profile, and separated from it only by an artificial cut or canal.

Twelve persons were examined from the state of Delaware, most of them aged, and likely, it was said, from their professions or pursuits to be acquainted with the fact of what jurisdiction generally had been exercised over the circle by Delaware, for the last seventy years or more.

Among them was the Hon. Thomas Clayton, aged seventy years and upwards, sometime a member of the legislature of Delaware, after-

wards attorney general and then chief justice of that state, and more recently its representative in the senate of the United States. "It has been held," said this witness, who had resided all his life in Delaware, "it has been held, as far back as my memory goes, by the courts, publick officers, and lawyers of Delaware, that the title and jurisdiction of the state of Delaware extended to a circle of twelve miles around New Castle, to low water mark on the New Jersey shore. I never heard the title or jurisdiction of the state doubted, over that part of the river Delaware, by any one, until the claim of Doctor Gale was set up to the Pea Patch; and since that, I have heard no one in the state of Delaware, lawyer or other, doubt it. Writs have been issued by the courts of Delaware to seize vessels and persons in all parts of the river indiscriminately, within the twelve mile circle, and I never knew such a seizure to be disputed in any court of Delaware, on the ground of want of jurisdiction over all such parts of the river."

James Rogers, Esquire, sixty years old, for most of his life a resident in or near New Castle, and for twenty years attorney general of Delaware, testified as follows: "It has been uniformly considered by the courts, publick officers and lawyers of the state of Delaware, that her title and jurisdiction extended within a twelve mile circle around New Castle, to low water mark on the Jersey shore. I have never heard her title or jurisdiction over that part of the river Delaware doubted by any court, publick officer or lawyer in Delaware. I know that writs have been often issued from the courts in Delaware for New Castle county, and that by virtue of such writs, persons, vessels and cargoes have been arrested and seized within the jurisdiction above alluded to; and in no instance, within my knowledge, was the jurisdiction ever disputed, or any question made as to the jurisdiction of the state, when such persons were arrested or vessels and cargoes seized. I have in many cases caused writs to issue and persons to be arrested, and vessels and cargoes to be attached and seized upon the river Delaware, and within the aforesaid jurisdiction, and have been concerned in cases where process of attachment has been issued by other members of the bar. I recollect one case, in the supreme court,—Richards v. Duser. I was counsel for the defendant, and every defence was set up that was considered available, but no plea to the jurisdiction was set up." (The record of this suit was attached to Mr. Rogers' deposition, and showed that four pleas had been put in.)

"With respect to lands held by warrant, survey and patent, from William Penn and his heirs, the title has been universally held as good title. It has been always held by our courts that the Penn title, under the Duke of York, was the true title to the lands and waters in Delaware, so far as my knowledge extends. I know no other title than the Penn title, a few titles held by grant from the aborigines and from the state excepted."

The Honourable James Booth, chief justice of Delaware, aged fifty-seven years, who was born in New Castle, and, with the exception of four years had resided there all his life, testified to the same effect, essentially, as to the jurisdiction, though in language more qualified than Mr. Rogers. On the subject of the Penn title he added: "There never was any doubt or question, so far as my knowledge and information extends, of the justice and legality of the Penn title, under the Duke of York, to the lands within the state of Delaware. It was always considered, in this state, the true title to the lands and waters in the state of Delaware; although I have seen on record some old title papers for lands from the aborigines of the country, and from Sir Edmund Andross, before the date of the deed from the Duke of York to William Penn. I have seen many titles in-

cepted in court by the Penn warrants, surveys, and patents, and have always understood and believed that all lands and waters in the state of Delaware, within the twelve miles circle, are held under the Penn title."

The testimony of Kensey Johns, Esquire, was particularly relied on by the counsel of the United States, as well from the venerable age to which this witness had attained, as from his most respectable understanding, attainments and character, and from the great opportunities which he had had of becoming acquainted with the subjects on which he spoke. "I was eighty-eight years and four months old," said this witness, "on the fourteenth day of last month, (October, 1847.) I reside in the town of New Castle, in the state of Delaware. I have resided here since the year 1780. My business has been a practising lawyer for twelve years; afterwards, chief justice of the supreme court of the state of Delaware for thirty-eight years; afterwards, chancellor of the state: since that time and at present living a private gentleman."

"I have known the island since the year 1780. At first it appeared about the size of a man's hat. In 1813, when the United States took possession of it, it had grown to be a large island. It was not worth a cent to any private citizen. The expense of banking would have been more than it was worth. It has always been considered and held," continued the ex-chief justice and chancellor, "by the courts, public officers, and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the state of Delaware extended to a circle of twelve miles around New Castle to low water mark on the New Jersey shore. I have never heard the title and jurisdiction of the state of Delaware over that part of the river Delaware doubted by any court, public officer, or lawyer in Delaware on any occasion whatever. Within my knowledge and remembrance, writs have been often issued out of the courts of Delaware to seize vessels and persons in all parts of the river Delaware within the circle of low water mark on the New Jersey shore; and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware against the title and jurisdiction of Delaware over all such parts. The state of Delaware, for the whole period of my remembrance, and as far as my researches extend, has claimed and exercised title and jurisdiction over the Delaware river and soil thereof, within the circle to low water mark on the Jersey shore, and the state has never failed to exercise this jurisdiction when called upon or asked to do so."

"The lands in Delaware generally are held under the title of William Penn and his heirs. The Penn proprietors granted title by warrant, survey, and patent. In action of trespass or ejectment, the plaintiff incepted his title by the warrant and survey. I never heard of any doubt, in the courts of Delaware, of the justice and legality of the Penn title to the lands in the state of Delaware. It has always been held as the settled maxim within the Delaware courts, that the Penn title, under the Duke of York, was the true title to the lands and waters in Delaware. I have seen a great many (I can't say how many) titles incepted in court by the Penn warrants and surveys. The lands and waters generally in Delaware within the twelve mile circle, are held under the Penn title."

In addition to the above testimony which, so far as it spoke of the circle generally, was corroborated to some extent by records, there were three or four well attested instances of process which issued from the state of Delaware having been served close upon the Jersey shore.

Mr. Thomas Janvier, aged seventy-five, a resident of New Castle, and for some years engaged in trade there, said: "It is within my memory that R. C. Dale, who was sheriff of New Castle county from 1803 to 1806, after

summoning a posse, boarded a ship on her outward passage, and arrested a person on board of the ship after she had been run ashore on the Jersey side, nearly opposite the town of New Castle; the names of the parties and the minute detail of the affair, I do not now remember. About twenty-five years since, I accompanied the deputy of the sheriff of New Castle county, and with him boarded a sloop then between the Pea Patch Island and the Jersey shore, and was with the deputy sheriff when he arrested the captain of the sloop by virtue of a writ, issued out of one of the courts of Delaware. The matter was compromised with me, the captain of the sloop paying the demand; and we let him go."

Mr. Wm. Robinson, aged sixty-five, residing all his life in New Castle county, stated that about the year 1834, he "accompanied the deputy sheriff, in a boat, for the purpose of arresting a person on board a schooner that was coming down close on the Jersey shore; the deputy sheriff boarded the vessel in that situation, and arrested the captain. The matter was compromised, and the captain was discharged from the arrest, on his paying some amount of damages claimed of him for running into a sloop laying at anchor off this town."

Mr. John Steel of Philadelphia, aged sixty-seven, who kept a shop in New Castle in 1800, gave the following account of an arrest made within his knowledge: "While residing at New Castle, I had occasion, in July or August 1800, to serve process on a man who was boat-swain of the United States ship Scammon. I took the advice of George Read, Esq., district attorney of the United States, a lawyer of eminence in Delaware. He told me to follow the man as far as low water mark on the Jersey shore, but no further. I went over after the man, and caught him at the end of the wharf in his boat as he was going ashore. He was outside of low water mark at the wharf. I brought him back to New Castle, and he gave me an order to the officer at Washington for his back wages. I sent this order on to Washington, and got the money for it. There were people who professed to know how to keep clear of process from Delaware; they would steer close to the Jersey shore. Our custom was, in suing people, always to take process from Delaware. We never got any from Jersey. I was on terms of intimacy with the sheriff; boarded in his house a part of the time. Our instructions were never to go beyond the Jersey low water mark. I never knew any dispute about the jurisdiction. It was the well settled opinion in them days that the jurisdiction extended to low water mark on the Jersey shore. The man whom I arrested never sued me for trespass. He had a lawyer with him; Mr. Brown, perhaps, of Philadelphia, then a young man; or it might have been a student of Mr. Bayard's."

It further appeared that one Cockrin, in the employ of the United States and residing on the Pea Patch as tenant or agent, had been regularly assessed, had paid taxes and voted from 1836 to 1847, in Red Lion hundred, New Castle county, Delaware, and that his vote had never been challenged.

Touching the position of the island in regard to "the main channel," twelve persons, river pilots or captains of small vessels, testified that the western or Delaware channel was the main channel, that it was always so considered by all navigators, "always had been and always would be," said one witness; and that large vessels almost invariably took it, whether the wind was fair or adverse. They stated, however, that when the tide was high, and the wind fair, large vessels, if well navigated, could pass on the other side, as it was admitted that the United States ship of war, Pennsylvania, the largest which ever floated in the

waters of the United States, had done in 1836, under those circumstances: but that vessels which could beat through the other, could not do so at all through this. The Jersey channel, it appeared was broad and very deep for a few rods just opposite the island, but at its head, in consequence of the Bulk-Head shoal, grew narrow, and therefore less safe. The Delaware channel was soft; the Jersey one hard. The statement received by consent, of Mr. Wilson M. C. Fairfax, of the United States coast survey, which had been recently made, was thus: "The main and deepest channel of the Delaware river opposite the Pea Patch is on the Jersey side. The greatest depth of water in the channel on the Jersey side is 40 feet, and on the Delaware side 25 feet. The average depth of water in the channel of the Jersey side is 32 feet, and on the Delaware side 23 feet. But to take the entire channel on either side of the island, no vessel drawing more than 19 feet water at low water of spring tides can pass through. The Jersey channel is the shortest and widest, and both about equally curved."

Touching the position of the island in regard to the two shores, it appeared that the Jersey shore had been constantly washed away within the last half century, and so receding from the island; that drawing a line midway between the shores, $21^{\circ}/_{10}$ acres of the island were on the Delaware side, $65^{\circ}/_{10}$ on the New Jersey side; that the north extremity of the island would be 2090 yards from the Delaware shore, and 2130 yards from the New Jersey shore; the south extremity 2197 yards from the Delaware shore, and 1875 yards from the Jersey shore. And that the area of the island is $87^{\circ}/_{100}$ acres.

With respect to the possession of the island, it appeared that in the spring of 1813, Dr. Gale having acquired the right of the Halls under the survey of 1784, went down there from Trenton, with fifteen or sixteen persons as fishermen, and built a fisherman's hut on piles. It was built of rough boards, was about 12 by 15 feet, had a stove in it, and the fishermen cooked and slept there. Dr. Gale fished here one season, leaving it in August, 1813. The place was not a good fishery, owing to the strength and course of the currents, which swept the nets into deep water where the fish escaped. While he was there, Gen. Bloomfield of New Jersey, who was entrusted by the United States with selecting a site for a fortress, came there, saw him fishing there, and apparently claiming the island; rowed round the island with him and asked him what he would take for it. In December, 1814, the United States sent a corps of engineers there under Capt. Clark of that service, to begin the fortress. No building of any sort, nor the vestige of one, was then on the island, which was occupied by hundreds of thousands of crows, who made it a roosting place. Captain Clark remained there till 1816, from which time till the present, with the exception of a certain term in 1836-7-8, when Mr. Humphrey was in possession under a judgment hereafter mentioned, the possession was in the United States.

The following miscellaneous facts were also put in evidence.

By Delaware:

I. That on the 7th December, 1682, Penn, styling himself proprietary and governour of Pennsylvania and the lower counties, passed, with the advice and consent of the freemen of the province and counties aforesaid, "An act of union for annexing and uniting of the counties of New Castle, Jones and Whorekills, alias Newdale, to the province of Pennsylvania, and of naturalization of all foreigners in the said province and counties annexed." 1 Booth's Laws Del. 8, Append. where this act follows the two deeds of feoffment. The preamble of this act recites the patent for

Pennsylvania, and the release from the Duke of York: It then sets forth the two deeds from the Duke of York for the three lower counties, giving in full, and accurately, the description in each, and in the first, the words, "as also the said river of Delaware, and soil thereof and islands therein;" and states that the freemen of those counties have desired to be annexed to Pennsylvania. The enacting part provides for the union, and for the naturalization of such of the inhabitants as were foreigners. Then follow other acts of legislation in the same year, constituting the body of laws known by the name of "the great law."

This act Judge Baldwin, in his opinion, hereafter mentioned, supposes to have remained in force until the American Revolution.

II. That in the year 1702, the proprietaries of East and West Jersey surrendered all the royalties and powers of government which they had derived under the charters of Charles II. to Queen Anne, who accepted the surrender: and that from 1702 till 1776 New Jersey was governed, not by the proprietaries, but by governours appointed by the crown, who with the provincial legislature constituted the royal government of the colony. Leaming & S. Laws N. J. 606, 607, 614, 628, 629.

III. That in 1796, an order was given in Delaware for a warrant for "two hundred acres of marsh, to be laid on an island situated about five miles below New Castle in the river Delaware, called and known by the name of the Pea Patch." There was no evidence, however, that the warrant had issued or been laid or that any survey had ever been made. It appeared that the warrantee had abandoned the matter because he supposed that the necessary cost of reclaiming and embankment would be more than the island, when reclaimed and embanked, would be worth.

By New Jersey:

I. That King Charles I. had granted to Lord Baltimore many years before the grant to the Duke of York, all the territory between the Chesapeake and Delaware Bays. Kilty's Laws Md. 4to, Annapolis, 1799.

II. That a carefully engraved map in the breviate (or paper book as it was called by counsel,) already mentioned, being an exhibit of the Penns in their suit with Lord Baltimore, the circle was drawn but to the Delaware shore, on both the north and south parts of the circle; stopping at the river and not running into it; and that among hundreds and nearly thousands of maps of the United States and Delaware, published in all parts of the country and in the state of Delaware itself, this circle had never been brought further.

III. That on February 7, 1794, the state of Delaware passed a supplement to an act for opening and establishing a land office, and for the sale of all vacant and unlocated lands (2 Booth's Laws Del. 1174), which recites "that whereas, the right to the soil and lands within the known and established limits of this state, was heretofore claimed by the crown of Great Britain: And whereas by the definitive treaty between his Britannick majesty and the United States of America, his said majesty relinquished all rights, proprietary and territorial, within the limits of the said United States, to the citizens of the same, for their sole use and benefit, by virtue whereof the soil and lands within the limits of this state became the right and property of the citizens thereof, and who at the time of passing the act to which this is a supplement, had, and now have, full power and authority, by their representatives, to dispose of the same for their sole benefit, emolument and advantage: And whereas the claims of the late and former pretended proprietaries of this state, to the soil and lands contained within the same, are not founded either in law or equity; and it is just, right, and necessary,

that the citizens thereof should be secured in the enjoyment of their estates, rights and properties." It then confirms all patents, warrants and grants, by James, heretofore Duke of York, or the pretended proprietaries of the state, made at any time before January 1st, 1760; discharging them from all manner of rents, fines and services, and then goes on to authorize the issue of patents by the state.

But the case as it came before Mr. Sergeant did not come upon the foregoing paper title, and the facts already stated which might be supposed to vary or control it. It was embarrassed by two judgments upon the title; one in 1836, in the New Jersey circuit (*Gale v. Behlin* [Case No. 5,189]), in favour of the New Jersey title; the other in 1838, in the Delaware circuit (*U. S. v. Cockrin* [Id. 14,822]), in favour of the state of Delaware. The former judgment was preceded by a trial by jury, of three days, and by a long and very laboured charge in favour of the New Jersey title from the presiding judge, the late Henry Baldwin of the supreme court of the United States; a gentleman who had enjoyed considerable reputation while at the bar of Western Pennsylvania, was admitted to possess, at all times, uncommon activity of mental action, and to bestow occasional research upon his cases that nearly passed credibility. The judgment in the other case was for default of appearance. On the present trial, however, the case was presented in a different aspect from what it then appeared in. No evidence was given before Judge Baldwin of the deed from King Charles II. to the Duke of York, the non-existence of which was asserted by the New Jersey counsel, and taken for granted by all present.⁹ The coast survey not having yet been made, the existence of any considerable channel east of the Pea Patch was unknown; the western being considered the main channel. The island was assumed to be, and at that time probably was, in all its parts, nearer to New Jersey than to Delaware, and no evidence was given like that on pp. 1132, 1133, of any exercise or belief of jurisdiction over the circle by the courts of the latter state.

The judge, in his charge, admitted fully that prior to the American Revolution the western limits of New Jersey came only to low water in the Delaware. His argument then was, that the Duke of York had no title, inasmuch as his conquest enured to the benefit of the crown alone: that accordingly Penn and his privies in estate, could have no title under those grants. He admitted that Penn and his privies did have a right in virtue of long possession, improvement and colonization, but held that the limits of their estates were designated, not by the metes and bounds set forth in the Duke of York's deeds, but only by actual claim and possession or government; and said that upon the evidence before him it was clear that Delaware had never set up rights in the Delaware,

⁹ The history of this deed is quite singular. It is not printed in any of the ancient books of Delaware Laws, though the Duke of York's are in all of them. It does not seem to have been put on record in either New York, Pennsylvania or Delaware. It appears, moreover, that when the Earl of Sutherland applied, about the year 1716, for "a charter of certain lands lying upon Delaware Bay in the three lower counties, which he represents he is ready to prove do belong to the crown," and where the persons concerned for Mr. Penn, and several mortgagees and purchasers under him, and their agents were heard before the attorney and solicitor general, Northey and Thompson, that after much search of publick offices the existence of this deed was not discovered: and that too in a case where there is so obvious an impression on the minds of the attorney and solicitor general, that there must be some other title, that they say, "they presume the said Duke of York might have some other grants thereof, which Mr. Penn might give an account of, but cannot, being under a lunacy;" and which made them therefore submit, whether it would not be reasonable that the king's title should be established in chancery before any grant should be made of the premises. 1 Chalm. Op. 39-57.

while it rather appeared that New Jersey had. Considering that the natural language of the deed for the circle, gave Mr. Penn a right to a complete circle of twelve miles round, the learned judge said he was unable to give effect to it, inasmuch as such a construction would have given to Penn a large portion of Salem county, New Jersey; a district which the duke had granted many years before to Berkeley and Carteret. He therefore thought it might be construed so as to make its boundaries agree with those which he supposed were settled by possession, which boundaries came, as he supposed, to the water and not into it, or at any rate not further than the middle of the main channel. And to support this construction, he relied on the fact that the deed for the country south of the circle—a deed for contiguous territory, between the same parties and made on the same day—did not profess to convey the river or subaqueous soil: facts which he considered authority enough for him, to explain the latter deed by the former, and to hold that this former deed could not have meant to do so either. He suggests that by the largest construction the deed for the circle could be held "to include only such islands and such parts of the river as lie between a direct line drawn from the north and south points where the circle strikes the Delaware."

But admitting that the deeds of the Duke of York might have described the true boundaries of Delaware, Judge Baldwin ruled that at the Revolution, the state of Delaware "repudiating the grants of the duke as usurpation on the acknowledged prerogative of the king," might "elect to hold the lands of the proprietaries, in the original right of the crown." And he thought that the state had made this repudiation and election by the act of February 7th, 1794, reciting that "the claims of the late and former proprietaries of this state to the soil and lands contained within the same, are not founded either in law or in equity;" that her title thenceforth became founded on the Treaty of Peace; that in this condition of facts, the two states, by the Declaration of Independence, stood on an equal footing, and were equally invested with the rights of the king to all that part of Delaware river and its islands which the king had not previously granted: and therefore that this island, being to the eastward of the "main channel," and nearest to New Jersey, belonged to that state and not to Delaware. Independently of these grounds, he relies on the doctrine of adverse possession, and says that as the Halls held the island under a survey made in 1784, and so had possession without adverse possession or claim under the state of Delaware, until 1815, a term of thirty-one years, the right of entry by that state was barred: and connected with what his honour called "the general claim of the proprietaries of New Jersey to the islands in the Delaware from 1739, would make the title good by a prescription of seventy-four years of quiet enjoyment adverse to the right of the Penns: and this idea it was supposed might derive strength from a recital in the act of the New Jersey assembly of November 24th, 1831, which says it has been represented to the assembly, that by virtue of the warrant and survey of 1784, the Halls had "become seized and possessed of the island," and assumes that by mesne conveyance, Dr. Gale had "become seized and possessed."

Under the judgment in New Jersey, the marshal of that circuit delivered possession to Mr. Humphrey, to whom all the persons on the island made themselves tenants at will.

And on the judgment in the Delaware circuit, the marshal of that circuit delivered possession to the United States.

Each party offered that judgment which was in its favour, as conclusive on the title: but as the jurisdiction of the courts which gave them, depended entirely upon the fact whether the island was within their territorial circuit, that

is, whether it was within Delaware or New Jersey, and as this point was the very one here to be decided and could not be decided without hearing the whole case, the parties consented, on the recommendation of the arbitrator, to give both judgments in evidence, without prejudice, and to waive a decision of the case upon a point of mere evidence, and in a preliminary stage.

Mr. Clayton and Mr. Bayard for the United States.

Before the argument in this case, the counsel of the United States said that they begged to join with their learned friends on the other side, in acknowledging the kindness which had been extended to all the counsel who had been concerned in this trial, by the civil authorities of the city, and especially for the honour of being allowed to conduct the argument of the case in the Hall of American Independence. It seemed to be an appropriate place for the discussion of the means of defending this noble city, which was, in truth, the birth place of American freedom. They tendered the hearty thanks of themselves, their opponents and all concerned, to the city authorities for the accommodations which had been freely furnished for the hearing of the case. Those thanks were also due to the Historical and Philosophical Societies, to the Athenæum, and to the Law Association of this city, all of which had munificently furnished their books, documents, and charts, many of them being no where else to be found. On both sides, we have the benefit of libraries, yielding more information on the peculiar subject we have to discuss, than could be found in any other city of the Union. Our thanks are also due to many gentlemen of the profession in this city, and to antiquarians for the information furnished by them. With the aids thus afforded us on both sides, we are all satisfied that we have had a fair and full trial, and that the testimony in the case is so full as to develop the entire merits of the controversy.

The question is, whether Delaware has the exclusive right to all the Delaware river with the islands in it, and all the subaqueous soil contained within that circle whose centre is New Castle and which has a radius of twelve miles extending from that place as a centre. Delaware claims no right in the river above the circle, and none greater than New Jersey below it. We say 1. Mr. Humphrey has no title. 2. The United States has a good title.

On that first branch of the matter, we contend:

1. Mr. Humphrey's grant is bad in form: He claims under a proprietary warrant authorizing the survey of land; a warrant which does not authorize a location upon the bed of a great navigable river, as this place was in 1784, and in part is still. Then the surveyor, who returns this survey, certifies that he surveyed an island in the Delaware containing 178 acres. We know, from the actual measurement by the coast survey, that the island contains but $87^{60}/_{100}$ acres at this day, and the testimony has proved that about the year 1783 the island first appeared above low water, not larger than "a man's hat." It is apparent therefore, that there was no actual survey made by virtue of these fragments of warrants, and that the statement of the surveyor was made because the fragments of the warrants, when added together, made that number of acres, within an insignificant fraction. It was a fictitious survey, and no title founded on such a foundation can be good. But waving this class of objections, and admitting that Mr. Humphrey has a proprietary grant good in form, we say,

2. That New Jersey never had any title. The territory known as New Jersey was limited by its original charter to low water mark. The language of that grant and of all subsequent grants indicates an exclusion of the river. They all grant land bounded by the river,

with many easements in the river; but the river itself or its soil is conveyed by none of them. The original charter grants the Hudson river. The maxim of "expressio unius" applies strongly. This natural construction of the charter is sustained by authority. In 1721, the lords commissioners of trade and plantations sent to Sir Robert Raymond and Sir Phillip Yorke, then attorney and solicitor general, the clauses of the Pennsylvania and New Jersey charters which fixed the boundaries of those provinces, and desired their opinion "whether Delaware river or any part thereof, or the islands therein lying, are by said clauses conveyed to either of the said provinces, or whether the right thereunto doth still remain in the crown?" "We have perused the said clauses," says the opinion of these great lawyers, "and have been attended by the agents of the parties who claim the province of Pennsylvania, and their counsel, who laid before us a copy of the letters patent granting the provinces, and have heard what hath been alleged on both sides. And upon consideration of the whole matter, are of opinion that no part of the Delaware river or the islands lying therein, are comprised within the granting words of the said patent, or of the said annexed extract of the grant of New Jersey but we conceive that the right to the same still remains in the crown." 1 Chalm. Op. 59.

In 1820, Virginia having granted to the United States many years before, her "right to territory northwest of the river Ohio," it was conceded by the supreme court of the United States that her title still extended all across the river. Chief Justice Marshall says: "When a river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state (Virginia) is the original proprietor, and grants the territory on one side only, it retains the river within its own dominion; and the newly created state extends to the river only, and the low water mark is its boundary." *Handly's Lessee v. Anthony*, 5 Wheat. [18 U. S.] 375-379.

This case and the opinions of Raymond and Yorke were cited, and the principle just mentioned was recognized as true, by Judge Washington in 1823 (*Corfield v. Coryell* [Case No. 3,230]) in its application to the boundary of New Jersey, now before us. "We think," says this judge, "the claim of New Jersey under these grants, to any part of the bay or river Delaware, below low water mark cannot be maintained. * * * Neither do we conceive that the limits of the state can by construction be enlarged in virtue of the grant of all rivers, fishings and other royalties; which expressions ought, we think, to be confined to rivers, fishings and royalties within the boundaries of the granted premises." It is true he thought that the enactments now cited in behalf of Mr. Humphrey, "prove beyond a doubt that the proprietaries of West New Jersey, from a very early period, asserted a right to the river Delaware or to some part thereof below low water mark and along its whole length," yet "how far this title in New Jersey may be affected by the grants of the Duke of York to William Penn in 1682, of the tract of country which now forms the state of Delaware," was a question, he says, which in the case before him, "it would be improper to decide." Though neither of these two cases was a decision on the point, they both concede what we here labour to establish. That the state was limited by its charter to low water mark was admitted in 1830, by counsel on both sides, in *Bennett v. Boggs* [Case No. 1,319], and asserted by Judge Baldwin, who truly says, that though the proprietaries of New Jersey might claim to own and dispose of the fisheries in the Delaware, "their claiming beyond the limits of the charter could give them no title."

3. But admitting that the charter of New

Jersey extended over the whole river, Mr. Humphrey has not got the New Jersey title. None passed by either the proprietary grant of 1784, or the legislative act of 1831.

As to the proprietary title: In 1702 the proprietaries of New Jersey surrendered all their royalties and powers of government, and from that time ceased to govern the territory of New Jersey; reserving to themselves only what Lord Hale and other writers denominate the *jus privatum*—nothing more than the private right to the soil, which they held then and hold still. From 1702 to 1776, the beds of all the navigable rivers within her charter, being part of the regalia, were out of their reach and beyond their control. The royal government alone could grant them away. The Declaration of Independence transferred all the regalia and powers of government to the state of New Jersey, in her sovereign capacity: the proprietaries after the surrender, held neither the *jus regium* nor the *jus publicum*. Any grant by them of subaqueous soil was void. *Waddell v. Martin*, 16 Pet. [41 U. S.] 367, being a case upon this identical charter, has decided the question. The supreme court of the United States there held a proprietary grant for subaqueous soil in the waters of the Raritan Bay and river to be void, and sustained the holding of the defendant in that case, who claimed the submerged soil under a grant from the state legislature. The ground of the decision was, that the regalia were in the state, and not in the proprietaries.

As to the state title: The legislature said truly that "doubts" had arisen as to the proprietary title. But has it cured them? In 1815, this island was reclaimed by the United States. It rose above the flow of the tides. It was no longer part of the regalia. It became vacant land, for which none but the proprietaries could make title. Mr. Humphrey then, by the largest concession of facts, is in this predicament, that when the proprietaries conveyed, in 1784, the title was in the state, and when the state conveyed in 1831, the title was in the proprietaries. We say now, arriving at our second great position:

II. The United States has a good title:

The existence of a grant by the crown cannot be doubted here. We have given all sorts of evidence of it. It can as little be doubted that it was made for Mr. Penn's benefit and not for the duke's. The *brief* shows that it was in the possession of Penn's sons in their suit with Lord Baltimore, brought in 1735, and heard in 1750; and other testimony here, that it was found at the seat of the Penns in 1837-8. With such evidence we incept our title. We need not re-state it. Such a title proved by original deeds, found, far onward in two centuries, in their proper places, perfected by livery of seizin most formally delivered, and confirmed by the royal and ducal government in New York is impregnable. Its exhibition is conclusive.

A question will probably be raised on these deeds as to the right of the king of England, since *Magna Charta*, to grant a river and the subaqueous soil to a subject so as to pass the islands subsequently arising in the river: but it is a question which is settled by authority. *Maritima incrementa*, says Hale (*De Jure Maris*, 14, 17, 18), belong, of common right, to the king, but may become the property of a subject by grant or prescription; and among these *maritima incrementa*, he speaks of those which come *per insulæ productionem*, the sort we are now considering. It is true that in such grants the *jus privatum* of the grantee is always subject to the *jus publicum*. The right of navigation and passage and repassage, unobstructed by nuisances and unimpeded by exactions, has always been admitted as a *jus publicum*, belonging to the people, and from which no grant by the crown could derogate. It is called a *servitute* belonging to the people. *Id.* 6.

Whether the common right of fishing in navigable streams is in the people at large, as part of the *jus publicum*, so as to prevent a grant by the crown excluding it, since *Magna Charta*, is a question yet open for discussion, but it has no bearing on this case. That the crown might grant a navigable river and the soil thereof, subject to the *jus publicum*, has never been doubted, and the propriety of islands arising in the river, cannot, be a part of the *jus publicum*, because that refers solely to common rights, and islands must, from their nature, be the subject of exclusive appropriation. The common right of navigation is now in all the people of the United States, and no state can control it; but the common right of fishery is in the people of each state, and to the extent of her jurisdiction, and within her territorial limits, the state may control or grant it. In this case, however, it is unnecessary to determine whether the right of fishing in the river Delaware, within the twelve miles circle, is exclusively within the jurisdiction of Delaware. Admitting, however, a common right of fishery in the people of the colony of New Jersey in 1682-3 and subsequently, this would not grant the river or its soil, whether the right arose from grant or prescription. A prescription, extending to a liberty, profit à prendre, or jurisdiction, such as liberty of free fishery, &c. is not an acquiescence of the soil or water, but leaves them where it found them. *Id.* 32.

The argument which will also be made, that the duke had no title to the property conveyed, until after the royal conveyance was made, and that therefore Penn's title was void, is not quite as "old as creation," but it was made more than a hundred years ago by Lord Baltimore in his suit with the Penns, was then answered by Lord Hardwicke himself, and, till now, answered beyond all power of renewal. The earl says: "I will lay aside the question of estoppel, which is a nice consideration; for the Duke of York, being then in the nature of a common person, was in a condition to be estopped by a proper instrument. In 1683, the Duke of York takes a new grant from the crown, and having granted before, was bound to make further assurance; for the improvements made by Penn were a foundation to support a bill in equity for further assurance. The Duke of York, therefore, while a subject, was to be considered a trustee; why not afterward as a royal trustee? I will not decree that in this court; nor is it necessary, but it is a notion established in courts of revenue, by modern decisions, that the king may be a royal trustee. And if the person from whom the king takes by descent was a trustee, there may be grounds in equity to support that. And if King James II. after coming to the crown was a royal trustee, his successors take the legal estate under the same equity; and it is sufficient for the plaintiffs if they have an equitable estate." Nothing can be more sensible; nothing better founded both in the justice of the law and in the justice of morals. The duke, no doubt, was "estopped," and the estoppel, working on the interest in the land, ran with the land. *Hermitage v. Tomkins*, 1 *Id.* Raym. 729, is in point as to the duke's being estopped. Lord Holt there ruled, "that if A, not having any thing in certain land, demises it by indenture to B, and afterwards A purchases the land, this will be a good lease by estoppel." And the second resolution in *Palmer v. Ekins*, 2 *Id.* Raym. 1550, 1551, is equally in point as to the operation of this estoppel upon any second grantee of the duke, if there ever had been such a grantee, which there certainly never was. That resolution, which makes no exception in favour of the crown, is thus: "Privies in estate, as the feoffee, lessee, &c. shall be bound by, and take advantage of, estoppels. If A lease by indenture to B lands in which he hath nothing, and afterwards A purchases the lands in fee, and sells them to D and his heirs, D shall

be estopped. And where the estoppel works on the interest in the land, it runs with the land into whosoever hands the land cometh."

This doctrine is assumed as true in *Trevivan v. Lawrance*, 1 Salk. 276, of which case the marginal abstract (made probably by Knightly D'Anvers or Sergeant Wilson) is this: "Where estoppel works on the interest of the land it runs with it, and is a title." It may be admitted that in general the crown is not bound by estoppels; that is to say, no estoppel can arise from any grant or act of the king so as to bind the crown. But if the king acquires by descent, or otherwise, lands which are bound by estoppel as against the person under whom he claims, the estoppel will continue even against the crown.

The language in *Reg. v. Delme*, 10 Mod. 200, which will be cited on the other side, is the language, not of the court, for the case concludes with an "adjournatur," but of counsel in argument. The authorities referred to in support of it are 1st Siderfin, (a doubtful authority for any doubtful position) p. 412, and that is a short note deciding that the king may bring an action where he pleases; and *Hobart*, p. 339, where the ruling is "warranty collateral binds not the king without true and actual assets, nor by estoppels of his own recitals ex certa scientia." This is in accordance with the distinction contended for, and it is believed that no case can be found contrary to that distinction. Even if the duke was not thus technically "estopped," so to pass a title at law,—of which, when coming by estoppel, it is said in one of the preceding cases "an ejectment is maintainable upon the mere estoppel"—he surely was estopped in equity. His covenants for further assurance made him a trustee, whether a common or a kingly person; and what more is wanted here?

But however imperfect Mr. Penn's title may have been in its origin, it was made perfect in various ways by confirmation from the crown. The letter from Queen Mary in 1694, is confirmation. It was a restoration in all things; in rights of soil and in powers of government. Then, how could the sons of Penn have sustained their bill in equity before Lord Hardwicke, 1 Ves. Sr. 444., without a title and a good title. The bill in the curious *breviate* here produced, shews that they set out their title very fully. The act of September 2d, 1775, shews, moreover, that after being settled by Lord Hardwicke, Penn's title, as thus set out in the bill, was confirmed by Geo. III. in 1769, and by the state of Delaware on the very eve of her declaration of independence. The legislature which passed the act of September 2d, 1775, appointed the delegates who attended in this hall, and declared her independence ten months thereafter. She thus came into the Union, claiming the Penn boundaries; and the principle established by the supreme court of the United States is, that each state, on the Declaration of Independence, became invested with all the sovereign power within her colonial limits.

It has had indirect confirmation of a very strong kind. At the commencement of the eighteenth century the country was greatly excited by contests about the royal powers of government, in all the colonies, but especially those of New England. New Jersey surrendered them in 1702, and continued under a crown government from that day until the Revolution. The ministry of England procured the passage of the statute of Anne which prohibited the crown from granting charters with royal powers within the kingdom; and after that day no charter with such royal powers appears to have been granted among the colonies. But Penn's continued to be a proprietary and charter government, with royal and sovereign powers, subordinate to the crown, and in many respects resembling the government of a county palatine in England. He was never displaced

but once, and then only to be restored. It derived further confirmation in 1717 when a powerful nobleman at the English court, the Earl of Sutherland, petitioned the king, without success, for a grant of Penn's three lower counties. The privy council referred the matter to Northey and Thompson, the attorney and solicitor general. The deed from the king was not before these officers: its existence was unknown to them. Penn, they say, was unable to appear, "being under a lunacy." The case was less strong than that here presented, yet the attorney and solicitor general conclude their report as follows: "On the whole matter, we humbly submit it to your majesty's consideration, whether it will not be reasonable that your majesty's title should be established by the court of chancery before any grant should be made of the premises." 1 Chalm. Op. 39-56. Was any such effort at establishing the title in chancery ever made by the Earl of Sutherland, by the king or by any one? It was not. Penn's title derived further confirmation from the decree of Lord Hardwicke (Belt, Supp. Ves. Sr. 198), which saved the rights of the crown, and gave liberty to either party to move to alter the decree in case the crown should ever disturb the possession. But no such motion was ever made that we have heard of, and we must infer that the crown never did disturb the title. Indeed, there is an opinion of Northey, attorney general, expressly in favour of Penn's title to the three lower counties. The opinion was given in consequence of a contemplated agreement between the crown and William Penn, to purchase from Penn his right of government of the province of Pennsylvania and the three lower counties. Its date is 1711, and it is stated that William Penn waited upon him with his title papers, both of the province and three lower counties, and had made out his title thereto. 1 Chalm. Op. 32.

But it is said, or will be said, that in 1685, in the controversy with Lord Baltimore, the title was decided to be in the crown. Let us look at the history of that case. At that time Lord Baltimore contested Penn's title before the privy council. He claimed that his own patent from Charles I. for wild and uncultivated land, extended to the Delaware river. The privy council decided against his title, on the ground that the territory in dispute was not a savage country, (the only sort of country granted to Lord Baltimore to settle and civilize,) but was settled by a Christian people, to wit, the Swedes and the Dutch, who had been located on the Delaware before Lord Baltimore received his patent at all. Penn's title was not before the privy council. It was not necessary for him to show it. It was sufficient for his purposes to show that the crown had never granted it to Lord Baltimore, who, having petitioned the king on that occasion for a hearing on his title, stood before the privy council like a plaintiff in ejectment, bound to show a title; and he failed to do it. Penn, being heard before the council, in behalf of the crown, like a defendant in ejectment, folded his arms, and relied on the insufficiency of his opponent's title. The decree was in favour of the king, and properly so, because, as against Lord Baltimore his claim was good. But the king's claim, which was thus adjudged good against Lord Baltimore, was, as against Penn, good to this extent only, that he was "royal trustee" for Penn, who held all the beneficial proprietary interest.

We maintain the Penn title, because it is the true title; and we are instructed by the concurring testimony of the best professional men in Delaware, that with one or two exceptions, the inception of title to land there is by a proprietary warrant and survey, whenever it is necessary to trace a Delaware title back to its origin. But whether Penn had the title or not from the Duke of York, the duke had the title from the king. So the title was out of the crown; and the boundaries in the king's patent, which

are nearly identical with those in the deeds from the duke to Penn, are the proper boundaries of Delaware, even on the supposition that Penn had not the title. For, suppose the deeds from the duke to Penn to be void, still the fact appears that the Penns held possession of the country, and governed it, for nearly one hundred years. They either held under their own title, or under that of the Duke of York, or by his acquiescence; and they held by the metes and bounds in the king's deed, which have always been the metes and bounds of the colony and the state. In this aspect of the case the title is just as clear as if the Penn title were indisputable. With regard to the jurisdiction exercised since the memory of men now living, we need not enlarge. The venerable Kensey Johns, whose high character for learning and integrity, and whose great opportunities for judging, must be well known to the arbitrator—he, and all the other professional gentlemen who have been examined, swear positively that, so far as they have ever heard or known, the state of Delaware has exercised exclusive jurisdiction within the circle, and that they have never heard her right to do so questioned in Delaware, except in the single instance of these claimants under this Jersey title. Many of the witnesses give in evidence acts of jurisdiction by Delaware up to low water mark on the Jersey shore, her officers seizing vessels and persons, debtors, and offenders against the law, in all parts of the river within twelve miles of New Castle, without question of the Delaware right. On the other hand, the only evidence of the exercise of judicial jurisdiction by New Jersey, within the circle was, that a constable came to the Pea Patch to arrest a man who had assaulted another between the island and the Jersey shore. He showed no process but a pistol. The fisherman denied the jurisdiction of New Jersey and refused to go with the constable, who had to return without him; but the fisherman told him that if he would go to Delaware and get regular process from one of her courts, he would go with him! The fisherman understood the common law of the country; and the people there understood no different rule.

Without particularizing them, we need only say of the various legislative enactments of New Jersey, that none of them are of sufficient force to control the clear language of the charter, nor indeed to do more than countervail other enactments of the same state. The act of January 21st, 1709, which brings the western limits of the counties but to the river, is strongly against them all, even if the state had a right to give herself, of her own mere motion, rivers and territories which belonged to others.

As to the adverse possession, the evidence has been already stated. Was this such a *pedis possessio* as will constitute an adverse holding against the state of Delaware? Even if adverse possession made a title against that state; which the learned counsel on the other side, who come from states where the law may be different, will allow us to inform them that it does not. The state had no knowledge of it. It was an insignificant thing at best, which, if noticed, would not have been resisted. It proved to have been an unprofitable speculation, and because they knew that it would prove so, is the reason why the fishermen from New Castle never attempted any similar enterprise. You might as well go about to prove title to a whole forest, by showing that you had hunted the bear and the panther, or any other animals *feræ nature*, there, as to set up a title to an island under water at high tide, by proof that you had, at some time, fished for shad and herring on its margin. We say nothing of the absurdity of attempting to prescribe for a shoal beneath the flow of the tide. The proof of the case renders it unnecessary to discuss the law of prescription, or its application to such an object. It is said that Stypson's Island and Egg Island were held under grants from New

Jersey. The islands were in the bay near the Jersey shore, and outside of the circle. We know nothing of either, or of the grants for them. In Smith's History of New Jersey (page 415), it is mentioned that as late as 1738, the Indians claimed title to "Stypson's Island, near Delaware river." If this be true, we may doubt perhaps the existence of any state grant for it prior to the Revolution. But we enter our protest against any attempts to establish a prescriptive right to either lands or waters within the limits of Delaware, by showing a trespass on what the law writers call "an unguarded possession," a trespass of which the state had no notice, or which was too insignificant to attract attention or resistance. If it could be proved that any citizen of New Jersey had built a temporary shantee on the little sand flat called Goose Island, or even pastured a cow there, would it not be ridiculous to set up an adverse holding within the circle for the state of New Jersey, when the people on the opposite shore had either not noticed the fact, or, through charity for the poor man, had not driven him away?

The object of Penn, in obtaining the grant of the river and soil of the Delaware may be readily conceived. It was to command the door and entrance to his favourite colony of Pennsylvania, including the intended city of Philadelphia. He wished to protect that colony from the exactions on its commerce to which it would be liable, in case the country on the right bank of the river, below Pennsylvania, and the river itself, should fall into unfriendly hands. The historian Ebeling, of Hamburg, tells us that the object was the safety and security of Pennsylvania (1 Haz. Pa. Reg. 34); not only the security of the navigation and commerce of the river, as necessary to the prosperity of his colony, but also the safety and defence of that colony against an invading foe. The power of establishing marshal law for the suppression of insurrection, mutiny, and rebellion, and the power of repulsing and expelling all invaders, were expressly conferred upon him by the duke's deed, as explained by the subsequent deed from the king. Without the river, he could not erect a fort on an island within it, nor plant a *chevaux-de-frise*, to repel a hostile fleet; for, in his prior grant of the colony of Pennsylvania, of 1680, his whole colony was bounded on the east by the low water mark on the western side of the Delaware river. Observe the language of the deeds, connected with the circle. So far as they convey the land, it is only that lying within the circle; but when they convey the river it is different. They convey all the islands in the river, "and the said river (i. e. the whole river) and soil thereof lying north of the southernmost part of the said circle." Penn had already the province of Pennsylvania, stretching its broad side for nearly two hundred miles along the river. He next gets twenty-four miles of a small sterile country below, and all the river. Can it be doubted that he meant the grant principally for the benefit of the larger tract as well as of the small one? With the policy of the compact of April 26th, 1783, by which Pennsylvania surrendered one-half the river above the circle to New Jersey, we have nothing to do. But we think it clear, from the evidence before us, that there was some mistake about the Pennsylvania title, and that Penn was as great a statesman as some who have succeeded him. The opinion of York and Raymond, in 1721, that neither Pennsylvania nor New Jersey had title to the river and its soil, by virtue of their respective charters, was true, but this opinion would have been changed by the production of the deeds under which Penn acquired his title to the three lower counties, and all the river and soil thereof north of the southernmost part of the circle.

Those deeds could not have been known, we think, to the commissioners who negoci-

ated the compact of April 26th, 1783. There is ground to believe that islands in the Delaware were granted by Pennsylvania prior to the Revolution. See *Fisher v. Carter* [Case No. 4,815].

As to the value of Judge Baldwin's opinion. The case was tried on the most imperfect information, and the charge is inconsistent and confused. But the doctrines of the court, as we read them, were unsound even upon the case as it there appeared. The doctrine of adverse possession we have disposed of. The line suggested as possible, from the two points where the circle touches the river, it will be seen by the chart, would actually give us the island which we claim, as well as a part of New Jersey which we don't claim. That part of the opinion in which he construes one of the duke's deeds by the language of the other, merely because they were both executed between the same parties and on the same day, though for different tracts of territory, is an example of judicial license for which our law books furnish no parallel. Then Judge Baldwin considers the act of February 7th, 1794, a disclaimer of the Penn title. We need not explain the true objects of the act, which are well known to the profession in Delaware. But whatever it may mean, or whatever it may do, it is apparent that one of its great objects was to confirm all the titles in Delaware which had ever been lawfully issued, either by the Penns or the Duke of York. The judge calls the recital in the preamble of this act of Delaware her "repudiation" of the proprietary title. What he means by repudiation our law books do not advise us. Is it that the state is estopped to assert the truth by a mere preamble in one of her legislative enactments? But New Jersey could not take advantage of such an estoppel, if there were any, because she is a stranger to the act. There can be no estoppel which is not mutual. The holding of the judge amounts to this, that Delaware, through her act of 1794, had, by way of estoppel, or, as he calls it, by "election and repudiation," ceded away a part of her territory to New Jersey. If so, New Jersey must have agreed to accept this portion of territory from Delaware, before she could become entitled to it. There must, therefore, have been some compact or agreement between the two states, the one to cede away a part of her territory, and the other to receive it as a part of hers. To this the reply is, that the constitution of the United States declares (article 1, § 9), that "no state shall, without the consent of congress enter into any agreement or compact with another state." The doctrine that Delaware, on coming into the Union, had her "election" either to affirm or repudiate the proprietary title, is a new doctrine, never heard of before. Who had the right to put her upon her election? What principle, or what rule of duty, demanded such a thing of her? If the legislature of Delaware had asserted in a thousand preambles, that the Penns, in 1794, had no title to the vacant lands in Delaware, the whole of them would not have shaken the great fact established by all history, that William Penn was the owner of the vacant lands in the territories comprising the three lower counties.

There yet remains another view of this case; and, if we are right in it, the title of the United States is good, although the utmost pretensions of New Jersey, which are that her title extends to the middle channel of the river, should be sustained. If she holds to the middle of the channel, where is that channel? Mr. Fairfax, of the coast survey, proves that the Jersey channel is the widest, deepest, shortest and most central channel. The inference must be that the volume of water which daily passes on the Jersey side, is greater than that which passes on the Delaware side. We have no definition in the books of what the "main channel" of a river is, but we

suppose* that such a channel is that one through which the greatest volume of water passes, and which is nearest to the centre of the river. Indeed Mr. Fairfax says in so many words, that the Jersey channel is "the main channel." It is true that pilots, and common watermen who navigate but small craft, consider the western channel to be the "main channel;" by which they have meant, generally, that it has been more navigated by vessels than the other. But they appear to have been ignorant of the depth of water in the eastern channel, and their testimony reminds us of the refusal of some of the New York pilots to believe in the existence of Gedney's channel, long after the coast survey had published its soundings to the world. Our Delaware pilots, although among the best in the world, were unacquainted with the existence of Blake's channel, on the western side of the bay, before the coast survey disclosed its course and depth. In 1836 the Pennsylvania line-of-battle ship, the largest vessel that ever floated on the waters of the Delaware, passed down the Jersey, not the Delaware, channel. It is admitted that the bottom of the Delaware channel is soft, and the channel itself better known, which is the reason why it is preferred; as an injury from grounding on mud bottom would be less than an injury from grounding on a bottom of sand or gravel.

It has been said that in ancient days the depth of water in the eastern channel was much less than it is at present, and that the river has been constantly gaining for a number of years upon the New Jersey bank. That does not alter the relative rights of the two states. In such a case, what is lost by one of two coterminous states is gained by the other; and if it had been proved that the main channel was formerly on the Delaware side, but that it had insensibly changed its course and passed through the Jersey channel while forming the island, the law of nations would, in that case, clearly give all the alluvia and all the islands westward of the new channel to the state lying on that side of it. The distinction is between alluvion and avulsion. A state loses or gains by the former, but not by the latter.

Mr. Bibb and Mr. Eaton, for the United States. The grant of the king to the Duke of York, 12th March, 1663-64, was of an immense region extending from St. Croix in the state of Maine, to the southernmost extremity of the state of New Jersey. Its object, after dispossession of the Dutch, was colonization. It conveys all waters, fishings and royalties appertaining to the granted premises. The duke, in 1664, conveys a very large portion of the tract to Berkeley and Carteret, with the same extensive estates, rights and privileges. Colonization was the sole object of this grant. Upon such grants, made with such objects, it is difficult to presume that a right to a natural portion of the river was withheld. If not essential to the purposes of the grant, it was largely conducive to them, and all presumption must be in its favour. The river was in early days the only mode of passing from the northern part of the colony to the southern; the colonists were constantly upon it passing up and down. It would have been inconvenient, in the highest degree, that crimes committed below low water mark should have been without the limit of any cis-Atlantic jurisdiction; amenable only to courts more than three thousand miles away. The briefs produced on the other side, shews that in their suit with Lord Baltimore, the Penns actually adduced as part of their title to Delaware, this grant of 12th March, 1663-64. "It is pretended," says the briefs (page 37), "that as this grant to the Duke of York, when coming from the eastward, extends only to the east side of Delaware Bay, so that it did not by express words

include the three lower counties which are on the west side of that bay. But it was a very large and extensive grant, of several very large tracts and territories in America, and passed as we say all lands appertaining to those extensive tracts." And by this the Penns claimed Delaware. This was carrying the matter certainly very far, and the intelligent counsel of the Penns properly admit, that so carried, it is a weak point in their case. It would have passed half a continent. But even in this extent, it was the doctrine of the Penn proprietaries of Delaware in 1735; and the state of Delaware cannot complain of that argument if, in 1847, we lay hold of what is but a hem of its garment.

How does the case stand upon authority?

We have no knowledge of the circumstances under which the opinion of the crown lawyers was given in 1721. 1 Chalm. Op. 59. It is probable that it was upon the application of some person for a grant of those islands. There could not well have been any other occasion for it. Crown lawyers understood the proprietaries of their office, and, as might have been predicted, the opinion is in favour of the crown. But was any grant ever made in accordance with it? any act done in consequence of it? Certainly none ever was; and considering the zeal with which these grants were asked for, we may well oppose the action of the crown, to the abstract opinion of its counsel. Looking only at "clauses extracted out of the charters of New Jersey and Pennsylvania," the crown lawyers may have been right; looking at the whole charters, their objects, the colonization under them, and the interpretation which had been made upon them, by fifty-seven years of practice and action, they were certainly wrong.

It is certain that in *Handly's Lessee v. Anthony*, 5 Wheat. [18 U. S.] 374, 385, the doctrine we oppose was but conceded, not decided. The judgment went on another point. But even the concession was upon a very different case. Virginia, a populous state, having a people living on its river, grants to the United States, out of pure liberality, "the territory northwest of the river Ohio." It grants territories, nothing else. It conveys no powers of government, nor appurtenances, nor privileges, nor rights, nor estates whatsoever, connected with, or appertaining to the original territory. The gift is limited "to territory northwest of the river:" the bare territory. Compare the language of the grant by Virginia with that of the grant by Charles II. ante, p. 1124. One carries every thing; the other, land, and land alone. The difference between them is as wide as the poles. They are grants, and that is the only point of resemblance between them. *Corfield v. Coryell* [Case No. 3,230] is no authority either; for the case was decided upon the form of action alone; and though Judge Washington, referring to the grants of Charles II. and the Duke of York, does say, that *under these grants* (italicizing the words) the claim of New Jersey below low water mark cannot be maintained, he yet says, after looking at but a portion of the early New Jersey legislation produced here, that "these acts prove, beyond a doubt, that the proprietaries of West New Jersey, from a very early period asserted a right to the river Delaware or to some part thereof, below low water mark and along its whole length." It is unimportant for our case, as we shall shew hereafter, whether the right arose on a nice interpretation of the charter, or whether it arose from claim de facto. We beg to say too, that Judge Washington's limitation of the rivers, fishings and royalties granted, to those "within the boundaries of the granted premises," is a limitation different from that of the charter, which gives not those "within" the premises—but those "belonging and appertaining to them, with their and every of their appurtenances." Who can doubt that the river Delaware is to

some extent naturally "appurtenant" to New Jersey? It washes her shores along her whole western length. It receives the waters of her streams and rivers. The products of her soil are shipped directly upon it. Her people drink its water, and take its fish for their sustenance. They erect their mansions upon its margin, and contemplate, with the pride of ownership, the broad and beautiful expanse which gives to the landscape its crowning grace. It has always been so; so let it ever be! You might as well tell the people of New Jersey that their title papers were blanks, and their estates "air, thin air," as tell them that the mud which the receding tide exposes, is all their right in this noble stream; this stream so nearly connected with their present enjoyment, their future wealth and their ancient glory. Of *Bennett v. Boggs* [Case No. 1,319] we need not speak. It was decided upon the last two cases, neither of which is authority for its doctrine. Much better authority on this particular subject is that of Chief Justice Tilghman. *Kean v. Rice*, 12 Serg. & R. 203, 209. In a case before him, a defendant of Pennsylvania being prosecuted by an inhabitant of New Jersey for taking oysters in Delaware Bay below low water mark of the Jersey shore, set up, among other defences, that New Jersey had no jurisdiction. "Very laborious researches into ancient records have been made, to shew that New Jersey was bounded on the west by the Bay of Delaware, and therefore could have no jurisdiction below the low water mark. Such a doctrine," says the chief justice, "would come with an ill grace from the courts of Pennsylvania, which is bounded on her charter, on the east, by the river Delaware, and yet has always claimed and exercised jurisdiction at least to the middle of the river, and finally settled, by a solemn compact with New Jersey, the right of navigation and jurisdiction as to the whole river. In the construction of the colonial charter, ancient claim and usage, are entitled to very great weight. Not long before the American Revolution, Lord Rochford attempted to obtain a grant from the crown of England of some valuable islands in the Delaware, opposite and near to the Pennsylvania shore, under pretence that the charter to William Penn was bounded on the east, by the river. The argument seemed plausible. But the proprietaries of Pennsylvania, having obtained a hearing before the king in council, and proved that they had always exercised jurisdiction on the river, always claimed those islands, and granted some of them for a valuable consideration, which had been improved at great expense by the purchasers, and were then very valuable, the claim of Lord Rochford was relinquished."

We have to regret that while this case is argued on one side by lawyers of Delaware, who are intimately acquainted with all her local and juridical history, who know instinctively where to apply for evidence of all that she has ever claimed; it should be argued in behalf of New Jersey by those who have scarcely any knowledge of what relates to her peculiar history or claims at all. There are many islands in the Delaware which lie nearest to her shore; some of them have been held under title prior to the Revolution, and no doubt the records of her land office would shew that they are held under warrants from her, as those nearer Pennsylvania are affirmed by Chief Justice Tilghman to be held under warrants from that state. It would appear from Smith, the historian (*Hist. N. J.* 445), that New Jersey claimed Stypson's Island, which is believed to be in the Delaware; and we are credibly informed that Egg Island is held under a New Jersey warrant. It is not important that these islands are without the circle; for according to the argument of the other side, New Jersey did not come, any where along her whole extent, below low water mark. If she came below that mark without the circle, the same charter or the same usurp-

ation would take her below within it. As for Reedy Island and Bombay Hook, nothing can be inferred from the claim of them by Delaware, though within the circle, for they both lie much nearer to Delaware than to New Jersey. Here, let it be remembered, was New Jersey, a great state, with soil and powers of government granted away; remote from the parent country; its people stretching themselves, as is usual in a new country, along the water's margin. How naturally would they by degrees usurp rights beyond those granted by their deed! Pennsylvania we see did it; and the usurpation was admitted by the crown. New Jersey had been there sixteen years before Pennsylvania, and having no opposite neighbours, was still more likely to do it. Individuals may not be able to prescribe against the crown, but a distinction in favour of colonies—of nations as these truly were—seems entirely natural. "I am of opinion," says Lord Hardwicke in his opinion upon the disputes between the Penns and Baltimore (1 Ves. Sr. 444, 453), "I am of opinion that full and actual possession is sufficient title to maintain a suit for settling boundaries: a strict title is never entered into in cases of this kind, neither ought it. * * * I will say once for all, that long possession and enjoyment, peopling and cultivating countries, is one of the best evidences of title to lands in America that can be; and so I have always thought in all cases since I have served the crown; for the great beneficial advantages arising to the crown from settling, &c. is that the navigation and commerce of this country is thereby improved. The persons, therefore, who make these settlements ought to be protected in the possession as far as law and equity can." Now, with even our imperfect evidence we can shew, that in all probability the state of New Jersey did never consider herself as bound by low water mark. Pennsylvania, bounded just like her, we see did not. Why should New Jersey be presumed to have done so? It was against her convenience. It was no where so directly prescribed to her. *Handly's Lessee v. Anthony* had never raised doubts upon the question, and the general law of nations was in her favour. We find, accordingly, that six years before the Duke of York's grant to Penn for the circle, New Jersey actually grants "convenient portions of land for wharves, keys and landings." There was no limitation to their extent. A break-water to the middle of the bay and wharves to an indefinite extent in the river, were both within the right. In 1693, she declares Delaware Bay "within the boundaries of her government," and in the strongest way treats its whalery as within her jurisdiction. In 1725, she taxes the ferries across the river, and enacts such laws as shall compel the neighbouring colonies to pay the tax. In 1771, she treats the soil of the river as well as its waters completely as her own property, giving to commissioners "authority to clear, scour, open, enlarge, straighten or deepen" the river; to remove any obstructions in it; and provides for the trial of any offence against the act, committed upon the river. All these acts, with others not very unlike them, are public acts of her legislature, which it must be presumed were known, and which, so far as the evidence goes, it is certain were never opposed nor questioned by any body, least of all by Delaware. We repeat, it is of no moment that they are not specifically applied within the circle. The whole of the western boundary of New Jersey, so far as the charter limits give it, is the same: and in construing the charter as coming below low water mark, there is no limitation to those portions above and below the circle, nor exception of that part within it. Now what on the other hand is the title of Delaware? The deeds to Penn from the Duke of York certainly convey no title of themselves. But it is said that the royal charter of 22d March, 1683, to the Duke

of York made good, "by estoppel" or some other operation of law, a title which, of itself, is conceded to be bad. But to this position there are objections:

I. That charter could convey nothing which had been previously granted to Lord Baltimore, as all the land between the Chesapeake and Delaware Bays had been. It is of no use to say that Penn finally established a title to the Delaware half of that same territory, in *Penn v. Lord Baltimore*. He did so as the report of the case shews, principally in virtue of the articles of agreement of 1732, coupled with long possession and colonization. The order in council of November 7, 1685, which was made after the charter to the duke, gave this territory to the king, not to Penn; and that order, so far as Lord Baltimore was concerned, deprived him of no right under the charter;—which could not be repealed, it is submitted, by any order of council, nor otherwise than by *scire facias* to repeal the charter for deception, or as having been improperly granted. What motive Lord Baltimore had for entering into the articles of 1732, by which he surrendered a portion of his territories, we need not inquire. That he thought them unjust is clear, since he strongly resisted their execution. It is enough for our purpose that on them the Penns' bill was filed, and that on them with possession and colonization he got the decree.

II. That if the charter did convey to the Duke of York, the estate which he, having nothing in, had previously granted to Penn, and if the duke had been bound, as a private person, by the estoppel which, in virtue of the two deeds, might make a title to Penn, yet the duke was freed from it so soon as he ascended the throne. "There is no arguing," said counsel in *Reg. v. Delme*, 10 Mod. 200, as if stating a well settled doctrine, "from proceedings at law between subjects, to suits where the crown is a party, because the crown has several privileges; as the crown may waive their demurrer, take issue and waive that issue. The crown may change their own venue. The queen may amend her pleadings at any time, nor will any estoppel bind the crown."

There is another inquiry to be made. Could the king of England, in his prerogative right, grant the beds of navigable streams where the tides ebb and flow, and which are thus reckoned arms of the sea? Does not *Magna Charta* prevent him, and does he not hold them in trust for the benefit of all the subjects of his realm, and not to be bestowed in monopoly or for individual benefit? *Martin v. Waddell*, 16 Pet. [41 U. S.] 411. Delaware then has no paper title; and what is the evidence of any claim, or exercise of exclusive right upon the river beyond the middle line; claim, it is meant, anterior to the Revolution. That of the fort tax was met by resistance as soon as it was made, and abandoned by Delaware as soon as it was resisted. This case shews that Delaware was ready not only to assert her rights, but to assert much more than her rights. Though Delaware incepts her title in a way which Penn always knew to be irregular, which the Earl of Sutherland asserted before the commissioners for trade and plantations, in 1717, was void, and which the crown lawyers thought was very doubtful; though she was in dispute with the Maryland proprietaries for seventy-eight years, and through two generations of both the Penns and the Baltimores; and had, on these accounts, great motive to recur to her boundaries frequently, and to define them with precision; where is the act by which she has asserted that she owned all the river, its soil and its islands clear to the Jersey shore? The decree in chancery (*Penn v. Lord Baltimore*, 1 Ves. Sr. 444), in 1754, had reference to the western boundary. It went upon articles of agreement between the parties. No one pretends that Lord Baltimore ever owned or even ever claimed either the river, river-soil or islands, within the twelve

miles circle. His claim was to the river not over or in it; and the Penns contended that he did not even come to the river by many miles. Is it not then absurd to say that by a suit against Lord Baltimore for a specific performance, Penn could acquire the property now in question. Besides, neither William Penn nor Lord Baltimore, in their agreement of 1732, had any power to contract for New Jersey; nor to compromise the rights of the colony of New Jersey by a bill and answer, and decree of the court of chancery in England, for specific execution of a contract to which New Jersey was not a party contracting, nor a party in the suit. Lord Hardwicke, in his opinion and decree, states the case as a matter between the parties to the suit, and as not binding the tenure of the planters, nor the rights of the crown, nor the rights of any person not a party to the suit. While on the subject of Lord Hardwicke's decree, it is to be observed that so far from resting the Penns' Case on their deeds, the earl puts it upon possession and settlement as perhaps its strongest grounds.

But admit that the deeds of the duke and the king gave Delaware a right to the whole river and its soil, we think that the non-assertion of any title by herself, the constant counter-assertion and action by New Jersey,—both taken in connexion with the anomalous, ungeographical and unnatural character of the boundary—its variance, in the same continuous stream, from the boundary above and below it; its total want of definition, and the impossibility of giving it any, as to place of either beginning or ending; the uncommon facility, not to say the irresistible necessity for usurpation and encroachment; all urge to the conclusion, if the conclusion be any way possible, that she did in point of fact abandon the Jersey half. Many witnesses, of whom we need say nothing except—that they all came from Delaware—tell us that since the Revolution, Delaware has always claimed and exercised jurisdiction over the river within the circle; that they never heard it denied or doubted in the state of Delaware. Both may be admitted. As to the first, the matter depends upon ante-revolutionary claim, not upon claim since the Revolution. We all agree that whatever boundary New Jersey had in 1776, that she has still. Respecting the second, lawyers of Delaware were not in a position where they were likely to hear much of the claims of New Jersey. Of course they never heard the Delaware title doubted in Delaware, any more than they would have heard it suspected in New Jersey. They knew what they knew, but not what they did not know. They did not know what happened before they were born, nor what happened in places from which they were absent and remote. New Jersey was not heard by them, and they did not speak loud enough to be heard by New Jersey. The exclusive jurisdiction of the state of Delaware, attempted to be proved, is in its nature a negative; it amounts to nothing more than this, that they, these witnesses, men of a single generation, living in one state of Delaware, did not know every thing which, in the long track of time, had taken place in another state of New Jersey. The legislative enactments given by us in evidence rebut the negative evidence of ante-revolutionary "exclusive jurisdiction," attempted to be set up for Delaware. We have not brought the sworn testimony of the profession in New Jersey, but it is clear that Mr. Wall and Mr. Green, both of them holding office under the United States, have considered that Delaware did not have such rights as she claims; for they have both given opinions in favour of Mr. Humphrey and against the United States under which they were acting. All the trials referred to by our opponents have been in Delaware; and there is no evidence in any one of them, on which side of the middle line of the river the process in them was served. In a river so broad as the

Delaware here is, having close to the Delaware shore the channel universally supposed to be the main one, and almost universally navigated; the large majority of the few cases where process appears to have been served on the river, would be on the Delaware and not on the New Jersey side of the line. They give, therefore, but little support to the Delaware claim. In no instance where the process is shewn to have been served on the Jersey side of the middle line, was there either resistance or trial. Of what judicial value—of what weight as precedents—the opinions of bound-bailiffs or of common sailors are worth, may be discovered, if it requires to be searched for, in the testimony of Mr. Janvier, taken by the United States. This gentleman who is brought to show practical illustrations of theoretical jurisprudence of more learned men, informs us that within his memory R. C. Dale, who was sheriff of New Castle county from 1803 to 1806, boarded a ship, with his posse, and arrested a person on board of her, after she had been run ashore on the Jersey side!

(The counsel then went into an argument upon the facts already stated, in order to shew that Mr. Humphrey had acquired a title to the island by possession: his warrant and survey were in 1784, from which time he was in possession until 1815, when dispossessed by a military force of the United States. This disseizin was a tortious one, and gave no title to the disseizor. Even if Delaware had a title to the island, she was not in possession in 1813, when she conveyed to the United States; and the counsel therefore assumed, that the transfer, being the transfer of a "pretence title," was illegal. The doctrine of election and repudiation under the act of February 7, 1794, was also urged, with other points which were of less importance.)

Then again, in 1784, when the survey was made for the Halls, the island was much nearer to the Jersey shore than now. That shore has been continually washing away since the formation of the island. The main channel of the river, the greatest volume of water, and greatest depth of water, then, was next the Delaware shore, however it may be at present. Now although the publick jurisdiction between two states on opposite sides of the river, having the river as their common arcifinious boundary, changes with the channel of the river, yet private rights acquired under the proper jurisdiction, before the change in the channel, are not annulled by the change of the current, nor transferred as publick domain to the other jurisdiction. The private right of property remains valid and secure through all changes of the channel of the river, if the land be not submerged or washed away. Whether therefore the island be, at this time, in New Jersey or in Delaware, it is still the property of Mr. Humphrey. It may have changed its sovereign: its owner is still the same.

But finally, the language of the duke's deed to Penn cannot be followed with the literality which a lawyer is disposed to give to every deed. "Land lying within the compass or circle of twelve miles about" the town of New Castle, would include land on the east just as much as on the north, south and west and therefore would include land in New Jersey, which the duke could not grant, as well as that in Delaware which he could. It can only grant that "land lying within the compass or circle," which the duke had a right to grant, that is to say land in Delaware. By this grant of "land," neither the river nor soil of it passes. This the counsel of the other side have themselves asserted in regard to our proprietary warrant of 1784. Besides which there is an express grant of whatever islands, river and river-soil are conveyed. The circle, then, stops with the river edge. There is nothing to carry it to "land" across. The facts of the case force us to bring it but to this margin; and it is clear

from the Penns' own map, which is prefixed as an exhibit to the briefs of their solicitors in Penn v. Lord Baltimore, that this was the construction which the Penns themselves gave to it. Now throwing aside all other questions, it will be seen, by looking at the chart, that by even giving to Delaware what the duke's deed professes to grant her, that is to say, "all islands in the said river Delaware, and the said river and soil thereof lying north of the southernmost part of the said circle," she will not get the Pea Patch Island. A line drawn northward from the point where "the southernmost part of the said circle" touches the river, leaves this island on the outside. Give her, then, all she claims and she leaves us all we ask for.

OPINION.

Mr. SERGEANT, the arbitrator, having heard the evidence and arguments, and taken due time to examine and consider the matter, delivered the following opinion on the 15th January 1848, in one of the rooms of the capitol at Washington, in the presence of the counsel of the respective parties, and also of a considerable assemblage of persons who thought fit to attend:

The question submitted by the United States on the one side, and James Humphrey on the other, is thus stated in the submission: "To decide the question of the title to the Pea Patch Island, as derived by the United States from the state of Delaware, and by the said James Humphrey, claiming through the said Henry Gale, deceased, from the state of New Jersey."

The importance of the case consists chiefly in this; that it involves the question of the boundary for nearly twenty-five miles, between the two states just named. It is true that the settlement of that boundary is not submitted, nor to be decided in the arbitration; New Jersey and Delaware not being parties to the submission, nor having agreed so to submit their rights. But it is also true that in conveying, the one to the United States, and the other to an individual, the island in controversy, they have necessarily communicated to the grantees the right to assert the title respectively conveyed to them, and to dispute the adverse title: and it is very manifest that this controversy turns mainly, if not entirely, upon the question of the limits and jurisdiction of the respective states. If the Pea Patch Island is within the state of New Jersey, the title is in Mr. Humphrey. If within the state of Delaware, the title is in the United States.

The consideration and respect due to these states, as members of the Union, in whatever may touch their rights and interests, seemed to require that as much publicity as possible should be given to the proceedings; and an intimation to that effect was promptly acceded to by the city and county of Philadelphia, in liberally granting to the arbitration the use, first, of the supreme court chamber, and afterwards, of the venerable Hall of Independence. The arbitrator was attended by the counsel of the parties, who had laboriously searched out the evidence wherever it could be found, and followed its production with an able and learned, as well as interesting, discussion on both sides. It is believed that nothing has been omitted in either respect; and that there is no reason to suppose that any thing in the shape of evidence or argument remains unexplored, which could throw additional light upon the subject. It remains for the arbitrator, after careful deliberation, and with the aids just mentioned, having come to a conclusion satisfactory to himself, to make his award. In ordinary cases his duty would be performed by simply executing the needful paper, and giving it the direction which is required, in order to render it, as demanded by the submission, "final and conclusive between the United States

and the said James Humphrey, claiming under the said Henry Gale, deceased."

But the same motives of consideration and respect, already stated, for giving the utmost publicity to the proceedings; the nature of the controversy; the length of time it has been pending; the names that have been connected with it, from whom he will feel himself bound to differ in his views, or at least to appear to differ; and, he must add, the great confidence reposed in him by the parties in leaving the matter so long litigated to his sole determination—a confidence which forbids him to doubt his ability to decide it, but by no means relieves him from an anxious sense of the responsibility of the task he has, by their invitation, undertaken—all these things concur to impose upon him the duty, as it is also his desire, to present, in an intelligible and somewhat permanent form, the grounds of his decision, for the satisfaction of the parties, and the examination of those who may feel any curiosity about the case, or any interest in it. He is fully aware that his opinion is of no authority whatever, except for the single purpose as to which the agreement of the parties has made it conclusive; that is, the question of title between them. He will, therefore, proceed to state these grounds as briefly as may be consistent with perspicuity.

The island in controversy, called the "Pea Patch," lies in the river Delaware, rather less than five miles from New Castle, in a south-eastwardly direction. The most satisfactory evidence respecting it was given by Wilson M. C. Fairfax, Esq. of the United States coast survey, being from actual and careful survey and measurement. It was in writing and not under oath, but was received by consent of both parties; and there is no reason to doubt its accuracy. According to this witness, the length of the island is 1,033 yards, its average breadth 461 yards, and its area $87^{\frac{60}{100}}$ acres. The mid-line of the island, at its north extremity, is 2,090 yards from the Delaware shore, and 2,130 yards from the New Jersey shore. The mid-line at the southern extremity is 2,197 yards from the Delaware shore, and 1,875 yards from the Jersey shore. The middle line of the river Delaware, he says, run through the island, would throw $21^{\frac{9}{10}}$ acres on the Delaware side, and $65^{\frac{7}{10}}$ acres to the New Jersey side. Such a line, he states, would pass through the island 46 yards north-east of the southwest extremity of the wharf at the lower end of the island which projects towards the Delaware shore, and 20 yards eastward of the middle point of the upper end of the island. With respect to the water, the witness says, the main and deepest channel of the Delaware river opposite the Pea Patch is on the Jersey side. The greatest depth of water in the channel on the Jersey side is 40 feet, and on the Delaware side 25 feet. The average depth of water in the channel of the Jersey side is 32 feet, and on the Delaware side 23 feet. But to take the entire channel on either side of the island, no vessel drawing more than 19 feet water, at low water of spring tide, can pass through. The Jersey channel is the shortest and widest, and both about equally curved.

Witnesses have been produced to show which is the main channel of the river, as to which they have differed in opinion. The greater part, probably, have thought the western or Delaware channel to be the main channel. They have stated that the bottom on that side is softer and safer, as well as better holding ground than on the east, though they state, also, that the eastern channel has undergone changes at different periods. Some of them have stated, too, and no doubt truly, that the shore on the Jersey side, opposite the Pea Patch, has been wearing away considerably for some years past. And, finally, some of them, judging only from sight, have asserted the island to be nearer to New Jersey than to Dela-

ware. As to this, however, the evidence from survey and measurement, already referred to, is much more to be relied upon than opinions like these.

In the view to be taken of the case, and with reference to the grounds upon which it will be decided, it is not necessary to go into the particulars of the testimony just adverted to. The material facts, about which there can be no dispute, are these: The island is in the river Delaware, with a deep channel on each side; is far below the low water mark on both sides; is not connected with the land either of New Jersey or Delaware; and is at all times of tide surrounded by water. There is a shoal, called the "Bulk-Head Shoal," from the northern end, towards the northward and eastward, but it is never bare; and is, besides, pierced by a channel of such width and depth, that vessels of heavy draught of water can pass through it. The only question raised about it, and that not at all material, is, whether large sized vessels can beat through it from the western channel to the eastern, or in the opposite direction, against a head wind. The fact is, that vessels can pass entirely round the island, upon the waters of the river, at all times of the tide. The island is in the waters of the Delaware.

It is proper further to state, that this island is of comparatively recent formation. Maps and charts, as late as the middle of the eighteenth century, do not mention it. Kensey Johns, Esq. who was eighty-eight years and four months old at the time of his examination (Nov. 2d, 1847), a witness not more venerable for his years than for the high stations he has held, and the uniform excellence of his character and conduct through his long life, states that he had resided in New Castle from the year 1780 till that day. He then says, "I do know it, (the Pea Patch,) and have known it since the year 1780. At first it appeared about the size of a man's hat. In 1813, when the United States took possession of it, it had grown to be a large island. It was not worth a cent to a private citizen; the expense of banking would have been more than it was worth." The general conclusion seemed to be on both sides, that it had not made its appearance earlier than 1780, which in the argument, seemed to be an agreed time of its beginning to be visible, and was probably nearly correct. It would seem, with some allowance for what must be measurably hypothetical, to have sprung up from the bottom, in the deep channel of the river, dividing that channel into the two channels, whose respective titles to the dignity of the "main channel," have been so much controverted in the evidence and the argument. From other evidence it appears that, until the United States made some embankment, the island was nearly, if not entirely covered with water at every tide.

The main point, however, is that before mentioned, which will not be affected by any error in the conjecture just stated. From its first appearance, the island has always been where it now is, that is to say, in the deep river, below the low water mark, surrounded by navigable water, and separated at all times from the land on both sides.

The description and account thus given of the subject of controversy, are deemed to be sufficient for the present, to introduce and render intelligible the several questions to be considered and decided. They are indisputable, it is believed, and stand as facts beyond the reach of the conflicts in the evidence as to other matters, not deemed to be important, and therefore laid aside.

We are thus brought, after stating what the thing in controversy is,—enabling us to judge by what kind of title such a thing can be claimed and held,—to the examination of the case made out by the respective parties. And it is proposed to begin with the case of Mr. Humphrey, as most conducive to the right un-

derstanding of the questions to be considered.

Has Mr. Humphrey made out a title?

He begins, taking the evidence in chronological order, with the copy of the record of two warrants from the proprietaries of West New Jersey, one dated November 4th, 1743, for 600 acres of unappropriated land in West New Jersey, the other dated August 7th, 1782, for 5,000 acres: a return of a survey under them for Edward and Clement Hall, October 8th, 1874, "of an island in the river Delaware, called the Pea Patch, situate in the county of Salem, about one mile west of Finn's point, in Penn's neck, and is about west of the mouth of Salem creek, &c. containing 178 acres of marsh, sand bank, and mud flats; New Castle distant about $4\frac{1}{2}$ miles." The record adds: "November 3d, 1784, inspected and approved by the council of proprietors, and ordered to be recorded."

This record, authenticated as it was, was good evidence by the laws of New Jersey, and therefore was good evidence in the arbitration. It was accordingly admitted.

Many objections were made to the warrants, and especially to the survey, which need not be stated. The answer to them all was this, that if the proprietaries of West New Jersey were the owners of the island, and had power to grant it, it was for them, and for them only, where there was no interfering right, to object to irregularities in the warrants or in the surveys under them. By accepting and approving the return of survey, and ordering it to be recorded, they waived all such objections, and no one else could make them, unless he had a right which was interfered with. The survey must, therefore, be taken to be good, and to have vested the title in the Messrs. Hall, if the proprietaries had a right to grant. From Messrs. Hall, the title, by mesne conveyances, was regularly derived to Mr. Humphrey, so as to vest in him all the right they had, which, as we have seen, was all the proprietaries could give, neither more nor less.

The question then is, what right had the proprietaries? When Judge Baldwin gave his charge to the jury in the case of Gale's Lessee v. Behlin [Case No. 5,189], in the circuit court of the United States for the district of New Jersey, (which will be more particularly noticed hereafter,) the case of Martin v. Waddell, 16 Pet. [41 U. S.] 367, had not been decided by the supreme court of the United States, where it was brought by writ of error to the circuit court just mentioned, upon a judgment there rendered, Judge Baldwin presiding. The decision of the supreme court was in 1842. Being upon a question within the jurisdiction of that high court, it is deemed to be of the highest authority in all inferior tribunals, and, of course, in this, in point of authority, the most humble of all. The point there decided—to say nothing of the learned and satisfactory reasoning of the chief justice (Taney) in delivering the opinion of the majority of the court—the very point decided is, that after the surrender to the crown in 1702, by the proprietors of East New Jersey, of the powers of government, they had no right in the navigable rivers within the charter limits of New Jersey, nor to the soil under them, and have had none since. In this respect, the West New Jersey proprietaries stand upon the same ground precisely. Both surrendered the powers of government at the same time, and, it is believed, in the same terms. The decision of the supreme court equally settles the law for both. It follows, that the West New Jersey proprietors, at the date of the warrants and survey, and acceptance of the survey, had no right in the river Delaware, even though it had been within the charter limits of New Jersey, (which will be hereafter examined,) and could give no right in the island to Messrs. Hall. For, upon the survey itself, it appeared

that the island was "in the river Delaware," and that it was "about one mile" from Finn's point, the nearest land on the Jersey coast.

The same point was decided in the same way by the highest judicial tribunal of the state of New Jersey. *Arnold v. Mundy*, 1 Halst. [6 N. J. Law] 1; *Shepard v. Leverson*, 1 Penn. [2 N. J. Law] 391. The first of these cases is said to have been upon a location made to try the right. In the other it came up incidentally.

The concurring judgments of the supreme court of the United States, and of the judges of the highest court of New Jersey, in such a matter, certainly do amount to binding authority. In accepting them as such, however, it is not to be understood that any doubt is entertained of the solidity of the grounds upon which they were made. It may be deemed presumptuous, perhaps, even to suggest that they are approved, where approval is of so little consequence, indeed so entirely valueless, in comparison with the proper and intrinsic weight of the judgments of these high courts, and especially of the supreme court of the United States. It may be allowable, nevertheless, to add, in vindication only of the effort to fulfil the whole duty confided to the arbitrator, that if the question were new, and to be examined without the aid of the great light thrown upon it by the opinion of the supreme court of the United States, having fully and deliberately examined the question, he should, upon original grounds, come to the same conclusion that he most willingly yields to the rightful authority of the judgment. It seems contrary to reason, and against the spirit of our institutions, that great public rights, in which all have an interest and concern in common, should be without a public guardianship, disinterested enough to regard all with impartiality, and powerful enough to protect them in the enjoyment of their privileges. Government is the proper trustee, everywhere existing with the consent or allowance of the people, and, in our representative republics, by free election, with the power of change. If, in the discharge of such trust, portions might be disposed of, so as to diminish the common fund, still there would be no contradiction, as is supposed, of one or more of the grants by the state of New Jersey, for it must be presumed that such disposition is itself in some way for the common benefit, and on terms the least injurious to the publick. A private proprietor, on the contrary, looks only, and rightfully looks only to his own advantage.

The conclusion upon this point is, that the survey was merely void, that it gave no title, and that no title can be derived from it, the proprietors themselves having no right in a navigable river, nor any power to grant.

The next evidence of title exhibited and relied upon by Mr. Humphrey, is an act of the legislature of the state of New Jersey, dated November 24th, 1831, granting to Henry Gale, his heirs and assigns, "all the right and title of the said state of New Jersey to the said island called the Pea Patch, situate in the river Delaware, in the township of Lower Penn's Neck, in the county of Salem and state of New Jersey, as mentioned and described in the before mentioned survey," meaning the survey of 1784.

This act, it will be seen, was passed about seventeen years after the present controversy began, and during the time the United States were in actual possession of the island. The counsel of Mr. Humphrey, in the course of the argument, objected to the cession of the island to the United States by the state of Delaware, on the ground that the state was not in possession, but it was adversely held and possessed, and therefore could not be lawfully conveyed. The same objection applies to New Jersey. Whether such is the law of

New Jersey or Delaware, is not known. It is believed not to be so. But it is not material to inquire into the matter, nor to examine particularly the evidence of possession, for a reason which seems to be a sufficient answer. Both acts of the respective legislatures, besides operating as grants, being passed with all the forms and sanctions of the constitution, were also acts of legislation, and, no third right intervening, could pro tanto repeal the general law, and give the required ability. Such would be their effect. If, then, the Pea Patch Island was within the limits of New Jersey, and subject to her jurisdiction, there is no doubt of the sufficiency of the grant to pass the title of the state. The same may be said of the state of Delaware, whether they had champerty laws or not. It remains, too, to be shown that a sovereign state can be affected by adverse possession, unless so long continued as to found a presumption of grant.

It may be further remarked, that in this act the state of New Jersey does not assert a right or title. In the preamble the act recites the survey of 1784, the mesne conveyances to Henry Gale, and then proceeds as follows: "And whereas, it hath been suggested that the state of New Jersey hath some title thereto, and by reason thereof doubts have arisen concerning the title of the said Henry Gale," and then goes on to grant "all the right and title of the said state of New Jersey." This remark, it must be observed, does not affect the legal sufficiency of the grant to pass all the right of the state, and entitle Mr. Humphrey to claim under it. It is good between him and the state of New Jersey, and entitles him to vouch in his own behalf all the well founded claims of the state. But the grant is not in the ordinary form of a conveyance of land. It is only a quit-claim, which one may give to quiet doubts, whether he has a right or no right. The value of the fact is only as it shows, that as late as 1831, when the island, by great expenditures upon it by the United States government for works of publick defence, had become an object of general attention and interest, the state of New Jersey made no assertion of right. The act, for a mere nominal consideration, simply relinquishes whatever right, if any, the state may have. And this remark may be further extended. It is believed that there has been no evidence to show that the state of New Jersey ever has claimed the title to be in her. It may be admitted that the proprietors of West New Jersey did assert a right by the acceptance and approval of the survey. But they did so, in their own behalf, adversely to the state, under a claim which is now settled to have been unfounded.

In the recital, however, there is a statement entitled to some attention, in connection with a part of the charge of his honour the late Judge Baldwin, in the ejectment tried in the circuit court for the district of New Jersey. The recital is, that, by virtue of the survey, "Edward Hall and Clement Hall became seized and possessed," and that, by divers mesne conveyances, Henry Gale "hath become seized and possessed." The natural and the legal import of this language is only this, that the constructive legal possession of vacant land follows the right, and it must be admitted that, if the survey had given the right, he would have been, in this sense, in possession. But the proprietors themselves having no right or possession, could give none to their warrantee.

Judge Baldwin, in the latter part of his charge, comes to the following conclusion: "In the year 1784, this island was surveyed for Edward and Clement Hall on a West Jersey proprietary warrant, under which it was held until their title became vested in the plaintiff. From this time, he stood in place of the West Jersey proprietors, entitled to all their rights by prescription against the crown, against

the Penns and the state of New Jersey; and, in his own right, by his possession, such as it was, entitled to the benefit of any limitation which had commenced or begun running from the date of the survey. As there was no adverse possession or claim, his legal seizin or possession continued till his dispossession by the United States in 1815, a period of thirty-one years, which would bar the right of entry of any adverse claimant; and, connected with the general claim of the proprietaries of New Jersey to the islands in the Delaware from 1739, would make the title good by a prescription of seventy-four years of quiet enjoyment, adverse to any right under the deeds of the Duke of York to William Penn." He then concludes that the title under Gale is derived from the proprietors and is good, and, as has been seen, adverse to the state of New Jersey.

Unnecessary criticism upon the charge of Judge Baldwin, is forbidden by the respect due to the memory of a learned and able man, who so long filled an eminent judicial station. The several legal principles contained in the paragraph just quoted are neither affirmed nor disaffirmed. Nor is it required to point out the one great error which vitiates the whole of the charge. It has already been done authoritatively. The case of *Martin v. Waddell*, 16 Pet. [41 U. S.] 367, had not then been decided. The decision since has established a different doctrine from that of Judge Baldwin, upon full discussion and deliberate consideration, and in concurrence with the judgments of the courts of New Jersey, that from 1702, the proprietors never had any right in navigable rivers, and, as there will be occasion to consider more fully hereafter, the right of the state did not come into existence until July 4th, 1776. Its origin is thus distinctly marked, being connected with the great public event of that day, which will never be forgotten, as it was the birth-day of a nation, and registered with an exactness of which there is probably no other example in the annals of the world.

This then leads directly to the inquiry, whether the Delaware river was ever within the charter limits of New Jersey, in that part of it where the Pea Patch Island has since grown up. If it were, the right would have become vested in the crown by the surrender of 1702, would have so continued until July 4th, 1776, and then would have passed to the state of New Jersey as a part of her sovereignty, acquired on that day by severing her connexion with Great Britain, and assuming to herself all the powers of government. The derivation would thus have been from the crown, though not by grant.

To maintain that the part of the river in controversy was within the charter limits of New Jersey, the counsel for Mr. Humphrey have produced the following deeds and papers: Patent, March 12th, 1663-4, from Charles II. king of England, to his brother the Duke of York, his heirs and assigns, for a large tract of territory, including what is now the state of New Jersey, the last boundary of which (now the west boundary of New Jersey) is as follows: "and all the lands from the west side of the Connecticut, to the east side of Delaware Bay."

Lease and release, June 23d and 24th, 1664, the Duke of York to John, Lord Berkely, and Sir George Carteret, reciting the grant from the king to the Duke of York, grant and convey "all that tract of land adjacent to New England, and lying and being to the west of Long Island, and Manhitas Island, and bounded on the east part by the main sea, and part by Hudson's river, and hath upon the west Delaware bay or river."

Patent, June 29th, 1674, Charles II. to the Duke of York, for New Jersey by the same description as before. Between this patent and the former one, New York had surrendered to the Dutch, and it is stated that the people of New Jersey sent deputies to New York, and

swore allegiance to the states general and the Prince of Orange. In February, 1674, a treaty of peace was signed between England and the states general, by which New York and New Jersey were restored to the English. This deed is supposed to have been made to remove all doubts which might arise from these occurrences.

There is no necessity for tracing the conveyances further. The title is regularly derived to the proprietors of East New Jersey, and West New Jersey, between whom the province was held in the portions it had been divided into by a partition theretofore made, and by the lines and boundaries then fixed.

In 1702, the proprietors of New Jersey surrendered to the crown the powers of government, and thenceforth were only private proprietors.

Returning, then, to the question, whether the Delaware river at the part of it now in controversy was within the charter limits of New Jersey, there can at this time of day be no question. It was not within the grant, and as far as is known, there has never been a dissentient opinion.

In 1721, the question was submitted to the law officers of the crown by the commissioners of trade and plantations. The opinion of Robert Raymond, attorney general, and Philip Yorke, solicitor general, will be found in the first volume of Chalmers' Opinions (page 59). They say as follows: "We have perused the said clauses," (in the charters of New Jersey and Pennsylvania,) "and have been attended by the agents of the parties who claim the province of Pennsylvania, and their counsel, who laid before us a copy of the letters patent granting the said province, and have heard what hath been alleged on both sides; and, upon consideration of the whole matter, are of opinion that no part of Delaware river, or the islands lying therein, are comprised within the granting words of the said letters patent, or of the said annexed extract of the grant of New Jersey; but we conceive the right to the same still remains in the crown." The opinion seems to have been acquiesced in, for there appear to have been no further proceedings before the commissioners of trade and plantations, nor before the king in council, whom the commissioners were sometimes employed to aid in colonial investigations; and if it should be suggested that there were no agents present on the part of New Jersey, the answer is, the question was one and the same as to both, for Pennsylvania was bounded by the Delaware on the east, just as New Jersey was on the west.

Some stress might, perhaps, be laid upon the nature of this opinion, partaking, as it does, of the character of a judicial proceeding, and some, too, upon the names of the eminent men by whom it was given, and the high stations they afterwards adorned. But this is needless. The law of nations furnishes the same rule of decision. Here was the crown owning a large territory on both sides of a navigable river, (for, at the time of the latest of the patents to the Duke of York, neither the grant of the three lower counties nor of Pennsylvania, had been issued,) and it makes a conveyance of territory on one side of the river, bounding on, or bounded by, the river. Is the river, or any part of it, included in the grant? This is the very question which came before the supreme court of the United States in *Handly's Lessee v. Anthony*, 5 Wheat. [18 U. S.] 375-385, in the year 1820. The decision of the court was delivered by Chief Justice Marshall, that the grantor retains the river within his own domain, and the grantee extends to the river only, and the low water mark is his boundary. The same point was decided, in the same way, by the supreme court of New Jersey, in *Arnold v. Mundy*, 1 Halst. [6 N. J. Law] 1, in 1821, with only this difference of expression, "the grant is to the edge of the river only," leaving a doubt

whether it is a line shifting with the rise and fall of the tide. The same point, as to the limits of New Jersey on the Delaware river and bay, namely, that it was bounded by the low water mark on the west side, was decided by Judge Washington, in *Corfield v. Coryell* [Case No. 3,230], in 1823; by Judge Baldwin, in *Bennett v. Boggs* [Id. 1,319], in 1830; and it was approved by him in *Gale's Lessee v. Behlin* [Id. 5,189], in 1833-4. It must, therefore, be considered as settled that, by her charter limits, the territory of New Jersey extended only to the low water mark of the Delaware river on the east side, and included no part of the river. It is, accordingly, so considered.

The states of Pennsylvania and New Jersey, as has been seen, being both bounded by the low water mark on their respective sides, and the river itself belonging to the crown, upon the Declaration of Independence, a new state of things arose. The right of the crown was extinguished, and the river lay vacant, a boundary between them. "When," says Chief Justice Marshall (Handly's Lessee v. Anthony, 5 Wheat. [13 U. S.] 375-379), "a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream." The states of Pennsylvania and New Jersey adopted this rule. In 1783, a compact was made by commissioners mutually chosen, which was ratified by acts of their respective legislatures, in 1785. By this compact, concurrent jurisdiction upon the water was given to both states, with some restrictions not necessary to be detailed; some islands were specifically allotted to each state, probably from motives of convenience; and it was agreed that the rest should belong to the state to which they lay nearest, and that all the islands which should thereafter be formed in the river, should be governed by the same principle. This agreement was limited, southerly, to "where the circular boundary of the state of Delaware toucheth upon the same." (Delaware river.) As between Pennsylvania and New Jersey, this compact was formed upon great deliberation, and with a full knowledge of the subject, as must be believed from the high character of the commissioners on both sides, and is in conformity with the principles afterwards laid down by the supreme court of the United States in the case, before cited, of *Handly's Lessee v. Anthony*.

If, then, that part of the river Delaware lying between the states of New Jersey and Delaware, which includes the Pea Patch Island, was in the crown on July 4th, 1776, "the original property not being in either," it would, on that day, have become vested in the two states. In that case, New Jersey would be entitled to the eastern portion of the river, though not within her charter limits; succeeding to that extent to the rights of the crown, which had been divested by the Declaration of Independence. Delaware, in the same case, would be entitled to the western portion. Both would commence their right from that day. How the line would be drawn, or whether it would place the island on the side of the one state, or of the other, it is not material to inquire; for the view to be taken renders it unnecessary.

The question, having already shown that the "original property" was not in New Jersey, is thus reduced to the single inquiry, whether on the eventful day referred to, the right to that part of the river was in the crown of England, or whether the "original property" was not in the province or colony which then became the state of Delaware. The "original property" of Delaware, that is, her title previously acquired and continued up to that day, becomes, therefore, the subject of examination, and has been accordingly examined, carefully and deliberately. The evidence, as far as necessary, will now be stated.

The title begins with two deeds of August

24th, 1682, commonly termed the deeds of feoffment, from James, Duke of York, to William Penn. The first of these deeds grants and conveys to Mr. Penn, his heirs and assigns forever, as follows: "all that the town of New Castle, otherwise called Delaware, and all that tract of land lying within the compass or circle of twelve miles about the same, situate, lying and being upon the river Delaware, and all islands in the said river Delaware, and the said river and soil thereof, lying north of the southernmost part of the said circle of twelve miles about the said town." The deed then covenants for further assurance, and appoints John Moll, Esquire, and Ephraim Herman, gentleman, his attorneys, jointly and severally, to enter into and take possession and seizin of the premises, and to deliver possession and seizin to Mr. Penn, his heirs and assigns.

The second of these deeds conveys to Mr. Penn all the territory from the south line of the preceding deed, that is, from "twelve miles south of New Castle, and extending south to Capin Lopin," meaning Cape Henlopen. In this deed, there is no grant of "islands in the said river Delaware, and the said river and soil thereof."

These two deeds, it will be perceived, embrace the whole of the territory of what were called the "Three Lower Counties," now the state of Delaware.

On October 28th, 1682, the attorneys appointed in the deeds of the Duke of York, made livery of seizin to Mr. Penn of the first of the tracts, of which a record is made and is still preserved, and is, in all respects, exact and particular. On November 7th, 1682, as also appears of record, livery was made of the tract in the second grant to Captain William Markham, Mr. Penn's attorney. The declaration is signed by twelve witnesses, "in Delaware river," probably on their passage up from below the twelve miles. Of both a record was made, and still remains, in all respects exact and particular.

There is this remarkable difference in respect to the two grants; that, in the first, the livery is stated, besides "twig and turf," to be of "water and fowl of the river Delaware;" in the other, it is of "the land, soil and premises" in the indenture mentioned.

They state, also, that Mr. Penn remained in quiet possession. John Moll, the attorney appointed by the Duke of York to deliver seizin, in his certificate, also recorded, is still more precise. Of the livery, under the first deed, he says, they did give and surrender to the said W. Penn, Esq. actual and peaceable possession of the fort at New Castle, by giving him the key thereof, to lock upon himself the door; which being opened by himself again, "we did deliver also unto him one turf, with a twig upon it, a porringer, with river water, and soil, in part of all what was specified in the said indenture," &c. As to the other, he says that a few days after, they went to the south side of Apoquinimig creek, by computation beyond the twelve miles, and there made livery of seizin of the lower part. The distinction thus made, it may be necessary hereafter to refer to.

From a book kept in the government at New York, begun in 1682 and ending in 1683, a copy has been produced of an entry or paper, of course made during that period, from the commander and council, beginning thus: "The record of the commander and council; declaration on Esquire Penn's grant for New Castle, St. Jones and Whorekills, by the commander and chief, in council." It then proceeds to recite the two deeds from the Duke of York to Mr. Penn, of August 24th, 1682, setting out, at large, and accurately, the description in each; states the appointment of attorneys to deliver free and actual possession, and adds: "as by the said indentures here produced, and shown to us, and by us well approved and entered in the publick records of this province, doth and

may more at large appear; and we being thereby fully satisfied of the said William Penn's right to the possession and enjoyment of the premises." The paper which is addressed "to the several justices of the peace, magistrates and other officers, at New Castle, Saint Jones, Deale, also Whorekill, at Delaware," or within any of the bounds and limits above mentioned; and then after thanking them for their good service, during the time they had remained under his royal highness' government, dismisses them, "expecting no further account than that you readily submit and yield all due obedience and conformity to the powers granted to the said William Penn, in and by the said indentures, in the performance of which we wish you all happiness."

John Moll, in the certificate before mentioned, after stating the livery of seizin already referred to, adds this statement: "Which acting of us was fully accepted and well approved by Anthony Brockhold, then commander in chief, and his council at New York, as appears by their declaration, bearing date November 21st, 1682, from which jurisdiction we had our dependence all along, ever since the conquest, until we had made the above related delivery unto Governour William Penn, by virtue of his royal highness's order and commands."

On October 28th, 1682, as appears from evidence of record, sundry inhabitants of the town of New Castle, upon Delaware river, having heard the first of the two deeds read, and having seen the possession delivered by the Duke of York's agents, "whereby we are made subjects under the king to the said William Penn," make a solemn promise, in the presence of God, to yield him obedience, and to live quietly and peaceably under his government. Soon after, an act of naturalization was passed.

The objection to these two deeds, however, is, that the Duke of York himself had, at that time, no grant for the premises from the crown, and therefore had no title to convey. It is certain that no such grant has been produced, and it is assumed, as a fact, that no formal grant had been made to him by the crown. But, if the question were open, there would be grounds for believing that the Duke of York was some how empowered to deal with the territory on the west side of the Delaware river, and the river itself, as connected with the operations he was conducting to protect or recover it from the Dutch. Not that being a subject, he could acquire any right for himself by conquest, which cannot be pretended, but that in such a war, for enabling him to quiet the inhabitants, or strengthening the defence of the country, it was not unnatural nor unreasonable to suppose that he might be entrusted with a large discretionary power, and even with rights in himself for its better execution, especially considering the relation he stood in to the king, and that he was himself the heir presumptive to the crown. John Moll says, they always "had their dependence from the jurisdiction of New York," which was the Duke of York's government, and it was by that jurisdiction we have seen that the actual transfer of the powers of government was made to William Penn, which he began immediately to exercise. There is other evidence to the same effect. The Duke of York and his governours did make grants along the Delaware, and did confirm titles derived from the Dutch and Swedes. There are instances of titles beginning with the Swedes, confirmed by the Dutch, afterwards confirmed by the Duke of York and his officers, and always treated with respect. But there is another transaction of those times, of publick notoriety, more important than any of these, not only on account of its magnitude, but also for the judicial interpretation it has received. In 1681, William Penn obtained his charter for the province of Pennsylvania, bounded on the east by Delaware river, from twelve miles north of New Castle town, and on the south by a circle

drawn twelve miles north of New Castle. On August 21st, 1682, the Duke of York gave him a release of all his claim upon the province. In the recital it is stated that he "is willing and pleased to confirm and make any further assurance of the said tract of land and premises unto the said William Penn and his heirs." This deed has always been deemed a part of William Penn's title; and, furthermore, it has been held that he took subject to grants previously made or confirmed by the Duke of York's government. The Swedes held a large body of land immediately below the city of Philadelphia. The titles derived from them are still respected. They owned also the land now occupied by the city of Philadelphia. William Penn obtained it from them by exchanging lands on the Schuylkill. And yet there was no formal grant from the crown to the Duke of York.

But it is unnecessary, for a reason that will presently appear, to pursue this inquiry further. Perhaps, indeed, the Duke of York, by subsequently accepting a patent from the crown, and those deriving from him, if they claim under that patent, must be deemed to be concluded by it from setting up any prior title in the Duke of York.

Be that as it may, the important fact deduced from what has been stated, and leading to consequences in law which will be more fully developed as the history advances, is this: that it was under these deeds, by the description and boundaries contained in them, and none other, and with the possession and seizin then delivered, that the three lower counties became, at least de facto, a province or colony, and acquired a name and identity which they maintained thenceforward for a century, less only six years, and then, of their own will, exchanged for the higher title of a sovereign and independent state. The same community still exists after nearly three quarters of a century more, with only such modifications as it has chosen to make in the mode of its existence, and as it rightfully might make, but still preserving its identity as the same corporate body which first had its being in the year 1682. The province was, and always continued to be, an unit.

Immediately after, the freemen began their work of government by acts of legislation. The first act (7th December, 1682) was the "Act of Union." In the volume of laws referred to, this act is immediately preceded by the two deeds from the Duke of York to Mr. Penn, set out at large. The preamble recites the patent for Pennsylvania, and the release from the Duke of York. It then goes on to set forth the two deeds from the Duke of York for the three lower counties, giving in full, and accurately, the description in each, and especially in the first, the words "as also the said river of Delaware, and soil thereof, and islands therein;" and states that the freemen of those counties have desired to be annexed to Pennsylvania. The enacting part follows, providing for the union, and for the naturalization of such of the inhabitants as were foreigners. Then follow sundry other acts of legislation in the same year, constituting the body of laws well known by the name of the "Great Law." They profess to be enacted by the deputies of the freemen of the province (Pennsylvania) and the counties aforesaid (the three lower counties.) The legislature was, indeed, constituted of equal numbers from the province and counties. To understand the whole bearing of this evidence, it must now be remembered that these laws were to be transmitted and delivered to the privy council in England, and, if disapproved by the crown within six months from the delivery, and so declared, were to become void; otherwise, to remain and stand in full force, "according to the true intent and meaning thereof." The "Act of Union" was, of course, submitted to the council, and approved by the crown. Looking at the recital and enactments

of that act, and its preamble, it is impossible to avoid saying that the crown assented to them, thus acknowledging the validity and legal operation of the two deeds from the Duke of York, the boundaries defined in them, the possession and right of possession according to those boundaries, and the rightful exercise of the powers of government under them. An existing colony was thus acknowledged as rightfully created, and lawfully enjoying the powers and privileges of a colony by known and settled boundaries; and this acknowledgment was by all who had an interest. New Jersey had none, Pennsylvania had none, the Duke of York had none. The new province encroached upon none of them; Lord Baltimore asserted a claim on the land, but it was afterwards decided to be unfounded. The crown alone could object, and the crown assented. This assent, let it also be borne in mind, was not an informal and hasty one, nor upon insufficient knowledge. The king was in the exercise of his royal power, was aided by his privy council, and had full information before him of all the facts necessary to enable him to understand what he was doing. That he could, if so minded, have retracted his assent, it would be difficult to maintain. But he never did retract his assent, nor intimate any disposition to do so.

On March 22d, 1682-3, Charles II. made a grant by patent to James, Duke of York, of the same premises which had about seven months before been conveyed by the Duke of York to Mr. Penn. This deed in its description is the same as in the two deeds of August 24th, 1682. It describes separately and grants separately, the two parts of the lower counties as in those deeds. The only difference is, that in the former, there are two instruments; in the latter, only one.

The original patent was here produced—brought from England some years ago by the late J. R. Coates, Esq. (who was an agent of the Penns.) where it was given to him by John Penn, Esq. a lineal descendant of William Penn, from among the title papers of the Penn family; rather, it was understood as a thing no longer of use to him, which might gratify curiosity in Pennsylvania and Delaware, than for any other purpose. At Mr. Coates's death it went into the hands of J. G. Morris, Esq. who has carefully preserved it, and now comes to us from the possession of Mr. Penn, with a presumption that it has been there accompanying his possession as a part of his title.

Of this deed there have also been produced various exemplifications; one from the rolls in England, one from the records in Delaware, a copy, sworn to be a copy, before the lord mayor of London, in 1735, and perhaps others. It is referred to, also, in the Votes of the Assembly. The original, or a sworn copy or exemplification of it was an exhibit accompanying the bill of the complainants in the case of Penn v. Lord Baltimore, filed in the high court of chancery of England, in the year 1735, and was in evidence in that case, and the original was offered to be, and probably was, produced.

If this deed had preceded the deeds of the Duke of York, the regular derivation of the title from the crown to the lower counties could not have been disputed, and there would have been no question open but upon the construction of the terms of the patent, as to what was conveyed. But above a century ago, in the case just cited of Penn v. Lord Baltimore, the defendant set up the argument against the Penns, supposed to be derived from this order of the instruments, "that the grant to the duke being made after the deed by the duke to Penn, this grant must have been for the duke's use, and not for Penn's." The answer on the other side was, "We have a fact that will determine that case; for we have the very original charter itself, under the great seal, in our custody, ready to produce, which if the duke

had intended for himself, and to defeat our title by, he would have kept, and not Mr. Penn, who was at this time of passing it, and for a considerable time longer, over in America." These things are gathered from a large folio printed book, (belonging to Thomas Gilpin, Esq.) produced on the part of the United States, which contains the pleadings and evidence in the case, and is called in the statement the "Breviate." The case was decided by Lord Hardwicke, in 1750, and is reported in 1 Ves. Sr. 444. As the decision is deemed to be of great weight in every aspect, and made a final end of all controversy in England, (for there never has been a dispute since,) and thus fixes a new epoch in the history of the province, it will be conducive to the right understanding of its proper bearing upon the immediate subject of controversy, to look back upon the earlier evidence which has been produced upon the hearing of the present case.

The foundation of the new province upon the basis of the deeds from the Duke of York, the exercise of legislative power, the declaration of allegiance in New Castle, and the union with the province of Pennsylvania, all approved by the crown of England, have already been seen. The union appears to have been only a sort of league, betraying a want of cordiality in the beginning, and leading very soon to uneasiness and dissatisfaction; and after a few years of restlessness and irritation, they finally separated, with Mr. Penn's consent, in 1703. In the following year an attempt was made to bring them together again, and the people of the lower counties would appear to have been willing; but the people of Pennsylvania would not consent. From 1703, therefore, they became separate provinces, to all intents and purposes, (except that the government powers and right of property in both were in Mr. Penn,) and so continued till the Revolution. In this respect Judge Baldwin was misinformed, and supposed the union to have remained uninterrupted.

Very soon after the deeds, Lord Baltimore set up a claim to a large part of Pennsylvania, and to the whole of the lower counties, quite to the Delaware river, upon the allegation that they were embraced in his patent. In 1685, the council, to whom the jurisdiction belonged, decided against him, directing a line to be run north and south, which is the present western line of the state of Delaware. Soon after, an agreement was entered into between Mr. Penn and Lord Baltimore, for settling all disputes between them.

In 1692, Mr. Penn was removed from his government, and Benjamin Fletcher was appointed by the crown. The alleged ground for this measure was, that disorder had occurred in his government. There was no question about title, nor was either province disturbed. They went on as before. In 1694, Mr. Penn was restored, and the government descended to his children. There has been a very general belief, that the real offence of Mr. Penn was his supposed regard for the Stuart family, and particularly for James II. then banished from the throne and kingdom.

In and about the year 1711-12, a surrender of his government powers to the crown was contemplated by Mr. Penn, and it is understood that a negotiation for the purpose was considerably advanced, when his capacity to proceed further was arrested by illness, which prostrated his mind and memory for the remainder of his life. Pending the treaty, the crown consulted the attorney general, Edward Northey, and his opinion, as reported by him, is in Chalmers' collection (volume 1, p. 32), dated February 25th, 1711-12. Mr. Northey, among other things, says, "and he has made out to me his title thereto," that is, to the government of Pennsylvania, and of the "town or colony of New Castle, alias Delaware." This was in the time of Queen Anne.

In 1717, the Earl of Sutherland, alleging that he was a creditor of the crown to the amount of £20,000, applied for a grant of the three lower counties. It was referred to the attorney and solicitor general, Edward Northey, before mentioned, and W. Thompson. They made an elaborate report, which is published by Chalmers (Id. p. 39), dated October 28th, 1717. They heard the parties, who were before them—the Earl of Sutherland on one side, and on the other, “Mr. Penn’s mortgagees and other purchasers under him.” Mr. Penn took no part. They state, also, that no deed from the crown was produced. For both these things they give a very sufficient reason, when they say (page 45): “But they presume the said late Duke of York might have some other grants thereof, which Mr. Penn might give an account of, but cannot, ‘being under a lunacy.’” Mr. Penn died in the following year, 1718. They conclude their report by submitting for consideration, “whether it will not be reasonable that your majesty’s title should be established by the court of chancery, before any grant should be made of the premises.” This was in the reign of George I. The application does not seem to have been further pursued, nor was any use made of the hint about chancery on that application. The title, therefore, passed undisturbed by the crown, through five reigns and a revolution, and the province continued as it was founded in 1682, though it was always in view of the authorities of England, and as has been seen, frequently subjected to the examination of the king’s legal advisers.

In 1735, William Penn being dead, a bill was filed in the high court of chancery, in England, by John Penn, Thomas Penn and Richard Penn, his sons, against Charles Calvert, Lord Baltimore, to enforce the performance of the agreement made in the preceding century, for fixing the boundaries between Pennsylvania and Maryland, and between Maryland and the lower counties. Recurring now to the advice of Mr. Northey and Mr. Thompson to the crown, to have the question of title determined in chancery, there is no reason to doubt that this suit was allowed, if not directed, by the privy council. “It is certain,” says Lord Hardwicke, replying to an objection to his jurisdiction, “that the original jurisdiction in cases of this kind, relating to boundaries between provinces, the dominion, and proprietary government, is in the king and council.” “The king, in council, is the proper judge of the original right.” He adds, that the king, in council, might look upon the agreement, and allow it as evidence of the original right, but he could not decree it as an agreement. “And therefore,” he says, “the lords of the council have remitted this matter, very properly, to be determined in another place, on the foot of the contract.” Lord Hardwicke was well aware of the questions to be decided finally in this case, as appears in the striking exordium of his judgment, “it being for the determination of the right and boundaries of two great provincial governments and of three counties, of a nature worthy of the judicature of a Roman senate, rather than a single judge;” adding, “and my consolation is, that, if I should err in my judgment, there is a judicature equal in dignity to a Roman senate, that will correct it.” 1 Ves. Sr. 444, 445. No appeal was ever taken to the house of lords.

In the decree, liberty was reserved to either party to apply to the court, if, by “any act or right of the crown,” execution of it should be obstructed. This liberty was never used. No act or right of the crown was interposed.

One of the objections, among many, made by Lord Baltimore, was upon the order of the deeds—that is, that the deed to the Duke of York was subsequent to his two feoffments. Lord Hardwicke lays aside the doctrine of estoppel, evidently not because it was inap-

licable or insufficient in law for answering the objection, but because the expression of it was unnecessary, and perhaps inconsistent with the deference due to the crown. What his opinion was, is evident enough; for he says, “the duke being in the nature of a common person, was in a condition to be estopped.” Being liberated from the restraints of the lord chancellor, we are at liberty to say, that the duke, at the date of the deeds, being a subject, was, in this respect, only “a common person,” and as much bound by estoppel as any other subject. He did not succeed to the throne till two years after. Admitting it to be true (which cannot be admitted for reasons it would take too much time now to enter into) that the king is not bound by estoppel, it would be an unreasonable and most unjust stretch of the prerogative to suppose that, when a man ascends the throne, he is liberated from all estoppels he had previously incurred as a private person. It might as well be contended that he is freed from all grants he had previously made; for the real equity of an estoppel, in such a case as this, is neither more nor less than to make the two deeds operate as one grant, and thus do plain justice between the parties. It is no subtlety nor refinement of law, but the natural dictate of common sense and common honesty. There may, perhaps, be instances of estoppel, such as from recitals and the like, which would affect a private man, and do not touch the king; and, on this account, what is now said is limited to the very case in question. The conclusion is, that the deed of 1683 was an estoppel.

But there is another answer to the objection which satisfied Lord Hardwicke, and is fully satisfactory. If there were no estoppel, and the deed of 1683 vested the legal right in the Duke of York, where it remained when he became king, he was a trustee, a royal trustee, and the equity would be in Mr. Penn, or in the people of the province, it matters not which. That the king can be a trustee, would seem to be settled, whatever may have been formerly thought from a supposed analogy to the doctrine of uses. Lord Hardwicke is authority for this, in *Penn v. Lord Baltimore*, 1 Ves. Sr. 444. So is the Earl of Kildare *v. Eustace*, 1 Vern. 439. So is *Burgess v. Wheate*, 1 Eden, 223. Trusts have, in equity, a sort of independent existence for their own preservation. With reference to the trustee, actual confidence in the person is not essential. Hence, a corporation may be a trustee, and so may the king. Indeed it is an established maxim of equity, that a trust shall not perish for want of a trustee. The real difficulty, in the case of the king, is about the remedy. “The arms of equity,” says Lord Northington, in *Burgess v. Wheate*, “are very short against the prerogative.” Chancery, the appropriate forum of trusts, is without power, because it is said “it has no jurisdiction over the king’s conscience: for that it is a power delegated by the king to the chancellor to exercise the king’s equitable authority betwixt subject and subject.” So said by counsel in *Pawlett v. Attorney General*, Hardr. 468. Hence, the caution of Lord Hardwicke, in *Penn v. Lord Baltimore*, “I will not decree a trust against the crown in this court,” though he did not hesitate to declare his opinion that the king was a royal trustee. The right of the *cestui que trust*, however, is not questioned; nor is it questionable. There has been a suggestion that, in such cases, perhaps relief might be obtained through the exchequer, and the subject may certainly prefer a petition of right. But that is not material to the present purpose. If the right be established, no remedy is wanted; and that the equity is sufficient to raise a trust is clear, as well from what has been stated, as also from the covenant for further assurance in the deeds of 1682. There was, at all events, therefore, an equitable estate, which is quite as available as a legal estate.

This decree of Lord Hardwicke settled the validity and legal sufficiency of these deeds, the right of the province under them, and, of course, its boundaries, as described in the deeds. No appeal was taken, nor did either party ever apply, under the reservation in the decrees, to set up any "act or right of the crown." It was universally acquiesced in, and became, by its own force and common consent, the law of the land from that time forth, till the crown of England ceased to have power either to confirm or to dispute the rights about which it was made. Now, this was the same province which had been founded, as we have seen, in 1682; these were the deeds under which it was founded; and these were the boundaries by which it had been defined from the beginning.

Twenty-four years more elapsed, without controversy or question in England, its boundaries acknowledged by the crown, (the crown, in truth, had never disputed them,) when the delegates from "New Castle, Kent, and Sussex, on Delaware," on September 5th, 1774, met the delegates from the several colonies and provinces in North America, assembled at the Carpenter's Hall, in the city of Philadelphia. Journals of Congress 1774. New Jersey had also delegates there, and so had Pennsylvania and Maryland, all immediate neighbours, by whom they were bounded.

As a province or colony they were received, having a definite existence under the crown of England. Such as this province was under the crown of England on that day, such was she acknowledged to be by being received into that congress. On that day, we have seen this colony's rights under the crown, and her boundaries, which were part of them, had stood the shocks of twenty years of controversy, and finally were settled by a solemn decree in chancery, and rested securely and quietly upon the foundations laid in 1682. In the struggles and hazards which ensued this province took her full share. On July 4th 1776, she declared herself a sovereign and independent state, by the name of "Delaware," and by the united efforts of herself and her sister states was enabled to maintain it. But this state was the same that was a feeble colony in 1682, with the same metes and bounds; the same that in her more advanced age had had her metes and bounds judicially established by the high court of chancery, and, let it be added, whose boundaries had never been even questioned by the crown from the beginning, but in every way sanctioned. Could such a state, after all this, be called upon to vindicate her original rights? Lord Baltimore had a long controversy with her, because their grants interfered. But it was settled in England before the Revolution. The state of Maryland has never claimed to revive it. With New Jersey there was no interference, nor is there now. New Jersey has had no controversy with Delaware, and has none at present, so far as is known. When Delaware became a state there was no subsisting controversy with any body as to her boundaries. The change which then took place was from the condition of a dependent province of the crown of England to that of an independent sovereign state, achieved by conquest. Allegiance to England was thrown off; the royal rights reserved by charter were ended, and with them the government powers of the proprietaries derived from the crown, and all their incidents. They fell together, at the same time. The blow was not struck at the proprietaries. It was aimed at the crown, and when it took effect there, the subordinate government gave way with the head it depended upon, and ceased to exist. As far as there was any derivation in the case it was, in this sense, from the crown of England; and if there had been (as there was not) an outstanding royal claim of any sort, that, according to *Martin v. Waddell*, would have instantly become

vested in the new sovereignty. From this view it follows, unavoidably, that if the deed from the king to the Duke of York had never existed, but only the two deeds from the Duke of York, still—as the province had been founded under them, had existed upon its original foundation for nearly a century, was de facto a province or colony, and received as such into the union of the colonies, and was by them all declared to be a state of the Union, has been so ever since, and still is—it would be very difficult indeed to maintain that her limits and boundaries were not incontestably proved by those deeds, unless they interfered with some superiour and better right. The de facto existence became a legal one, to all intents and purposes, by the affixing of her own sovereign seal, which had superseded the great seal of England, and acquired all its virtue and power. If necessary, this view might be carried even further. A colony or province, without any deed at all, would, under the like circumstances, have become a state; and if, from July 4th, 1776, to the present day, she has been, and still is, a state of this Union, with the same rights and privileges as the other states, and there were any authentick document to prove her boundaries, (though not a royal patent or grant,) and they interfered with no other rights, it would be very difficult to impeach her title. But even if the royal consent or recognition were indispensable, it is surely to be found in the treaty of peace, for Delaware as clearly as for any other state. And now, it is proper to remark, that all the arguments urged against her upon the very question to be decided, namely, her rights in the river, the islands, and the soil, however they may profess to be restricted, have one common fault; they go too far; they prove too much. They would take away the whole right of Delaware, land, river, islands, and all. For example, one of the learned counsel has produced the charter or patent to Lord Baltimore, and insisted that it went entirely to the river Delaware. If so, and it is in force now, the whole territory of Delaware on the main land would be taken away, and nothing left but the river right, if, indeed, that could stand alone. Whereas, as has been shown, the right between them was decided in council, November 13th, 1685, by fixing the present line; they entered into an agreement between them in conformity, and the specifick performance of that agreement was decreed in chancery in 1750. The original right has never been open since. Judge Baldwin, on the other hand, allows her title to the main land to be good by possession, which, it is respectfully submitted, is a low and precarious ground to place the title of a state upon; but he seems to deny any right but possession, and altogether to deny it as to things which were not of a nature to be actually possessed. These objections are now too late, if they ever had any foundation at all. They were long ago decided and settled in England. They were decided and settled at the Revolution; and, as to her boundaries, they stood defined and authenticated in the deeds of the Duke of York, in the patent of the king, in the proceedings of council, and in the high court of chancery, never having undergone a change from what they were at the beginning.

This course of observation, however, must here be suspended for a moment to examine the construction of the deeds, as respects the immediate question upon original grounds, lest it might be supposed that they were doubtful or insufficient, or stood in need of aid, to give them a meaning they do not of themselves properly import. Upon a careful and deliberate consideration of the whole subject, and of the arguments urged against the right of Delaware, it is believed that the deeds are quite clear. The question is, did the boundaries of the province go into the Delaware within the twelve miles circle, or did they not? The

first great rule in regard to such inquiries is, that there is to be no interpretation where there is nothing that requires to be interpreted. If the words be clear in themselves, they are to be accepted. "Words," says Rutherford (Inst. Nat. Law, bk. 2, c. 7, § 2), "are the common signs that mankind make use of to declare their intention to one another; and when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation." And for this he cites the support of Grotius. Book 2, c. 16, § 1. This is the same rule that is laid down by Blackstone. 1 Comm. 59. They all agree, too, that words are to be taken in their most usual and known signification; and technical terms and terms of art, according to the interpretation of the learned in each art, trade, or science. And how can it be otherwise? Words make contracts between parties, which are to be understood in one sense by both. How can that be, unless there be a standard to be resorted to, as nearly fixed as possible, especially, in the more important transactions of life? Now, if with this single rule, any man, learned or unlearned, will read the Duke of York's deed for the upper part of the province, and that part of the king's deed which is for the same, he will be at no loss to say what it is that they grant. They are the appropriate legal words for the purpose, and evidently used skillfully and upon deliberation, and with comparatively accurate knowledge, for the New Jersey grant and the grant to Lord Baltimore, and the charter of Pennsylvania, were all prior, and there had been a long contest with the Dutch and Swedes, who had settlements and forts on the west side of the Delaware river, from Cape Henlopen to the north line of the city of Philadelphia, where they had been in possession for nearly sixty years. Two of the principal were within the twelve miles circle; that is, one at New Castle and one at the mouth of the Christina. Besides, the words employed are the appropriate legal terms for making the grant. When the same subject comes up for judgment, the same terms are employed for describing what was granted, as may be seen in *Martin v. Waddell*, and *Munday v. Arnold*. The same terms were used, substantially, in patents and grants which conveyed or intended to convey navigable rivers, as in the patent to the Duke of York, the grant to Lord Berkeley and Sir George Carteret, and from them to the proprietaries of New Jersey. There is still another test. If the object was to grant the river, islands and soil, could any lawyer or conveyancer have devised, or can any one now devise, a better or even as good a form of words to accomplish it? Strike them out, and all the other purposes of the deeds, it is true are effectuated without them. They are thus rendered surplusage. This would be an offence against another established rule of construction, which requires that all the words of an instrument should, if practicable, be allowed to have some sense and operation. But while these words stand, it seems to be impossible that now, after more than a century and a half, any one, and particularly any third person, and, above all, a third person without right, power or interest in the subject matter of the grant at the time it was made, and for nearly a century after, can claim to have them stricken out or disregarded.

The intimation by Judge Baldwin, in his charge, that the two grants are to be construed together as that one may control the other, so as to give them the same eastern boundary, with all respect for his learning and ability, cannot be admitted. In a legal estimate, they are not one deed, because they are two deeds; and they are not the same, because they are different. Why were they two, and why should they differ? The grantor so willed it, and he did as he willed, and as he had a right to do,

in language evidently framed by learned advisers. They can well stand together, for there is no contradiction between them. If a man were to give estate A. in fee simple, estate B. in fee tail, and estate C. for life or years, it would seem extraordinary to say that he gave the same estate in all.

Nor is the difficulty overcome when the first step is taken. Admit (if it be possible) that the deeds are thus to be construed, which of them is to have the controlling power? the one that carries the boundary over to the low water mark, on the Jersey shore, or the one that stops at the low water mark on the Delaware side? It is apprehended that there is no legal principle to aid in deciding that question, and that in the apparent search for reasons, we should find ourselves in the region of fancy and imagination. Of what consequence can it be what were the reasons of the king and the Duke of York, or whether they had any reasons at all? Their will decided them to give what was their own, and they had a right to give. If they were not deceived in the grant, (as certainly there is no reason to believe they were,) it is wholly immaterial whether the act commended itself to other men's reason or not; whether it was wise or unwise. Neither of them has had much credit with posterity for wisdom. But this act has never been imputed to them as a crime or folly. In the most sober judgment, it must rather be deemed reasonable and meritorious. The three lower counties, at New Castle, had a width on the land of but twelve miles, being cut off to the westward by the line between them and Lord Baltimore. They had no great navigable rivers. That line, probably running upon the summit between the Delaware and Chesapeake, where the heads of the streams were turned in opposite directions, probably left them no water communication with that great estuary and its tributaries. Their neighbours, New Jersey, Pennsylvania and Maryland, all with extensive territories on the land, abounded also in great navigable rivers within their limits. Was it then, it may be inquired, so unreasonable to allot them, as a part of their possession, a little addition to their width, by giving them a part of the river, reserving only the publick rights (navigation for instance) which were free and common to every subject, and now are to every citizen of the United States? Was it so unreasonable as of itself to condemn the grant, and compel a construction against the clear words to secure its condemnation? From the circle downwards, the breadth of the land increased, and did not so much demand enlargement. Besides, at the southern point where the circle strikes the water, the river begins to widen rapidly and becomes the bay, which there might be good reasons for not granting. There is nothing which seems at all unreasonable in the grant. It was made to freemen, capable of holding and enjoying it, of transmitting it to their descendants, who, in due time, asserted and maintained their right to independence; and in the conflict which ensued, and in all the duties of its more intimate union with the other states under the constitution, Delaware has contributed its full proportion of what was required for the publick welfare and honour. So has New Jersey. In this respect they are equal. But who can say that it was more unreasonable or less conducive to the well being and happiness of our country, or of mankind, that it should have fallen to the lot of Delaware rather than of New Jersey, or been left to be equally divided between them?

But this can hardly be called legal argument. There is too much in it that is apart from the real question. What is the construction of the grant? Is it in any respect wrongful? These are the true questions. Both are believed to be with the state of Delaware.

Returning to the point digressed from, when the question of construction of the deeds was

taken up, it is only necessary to observe that the colony of the three lower counties having been received into the congress, became in due time a state. This was a great change. But, great as it was, it was the whole change. No one ever thought that by becoming a state, the territorial rights and possessions previously belonging to it, were reduced or altered. Where was there a power to do either? Not, surely, in any other state. As surely, not in the congress of the United States; and these two descriptions embrace the whole circle of acknowledged authority. When the charters of some of the states were found to include large masses of vacant land, which might be dangerous to the peace of the Union, did congress, or either or all of the states, attempt to define or limit their boundaries? Congress invited them to make cessions, which they freely and patriotically did, by compact, and with the conditions they thought fit to insist upon and congress to accept. The Declaration of Independence, from the day it was made, is thenceforth the title of every state.

What remains, then, to be considered, may be embraced in this general inquiry: Has the state of Delaware, by any act or default of her own, parted with or lost the right she then had, or any part of it?

The examination of this question must, however, be preceded by an observation no one will refuse his assent to, which, nevertheless, when fairly carried out, will be found to meet and conclusively to answer most, if not all, the objections alleged to the title of the United States, derived from the state of Delaware. It is this: that the inquiry is to be understood as applied to a sovereign state, with all the attributes of sovereignty, except such as have been yielded to the United States. Whoever would claim from her, or would claim against her, must, therefore, make out such a case as will be available against a sovereign. More clearly must it be so, if the claim be to take from her a portion of her territory, and a part of her boundaries; not to come in under her and be one of her community, but to transfer them to an alien jurisdiction; in other words, to make them part and parcel of another state. Such is the claim made by Mr. Humphrey. The right he asserts is not under the state of Delaware, but adverse to her.

As long as the discussion was upon the boundaries of the respective states, every argument which conduces to show the right to be in one rather than the other, is fairly applicable and entitled to respectful attention, which they have accordingly received. But the moment that point is settled, and the boundaries established, all within the line on the respective sides is part of the territory of the one it is adjudged to, and it is subject to her exclusive sovereign jurisdiction. To her alone belongs the rightful power to govern and make laws for it, without interference by the United States, or by any state. That there was a dispute about boundaries, was a good reason for settling it; but none for holding it less the territory of the state after the dispute is settled, than any other part of her possessions. No one, for example, would affirm that what fell into Maryland or Delaware by fixing the line between them, or into Pennsylvania or Maryland, or into Pennsylvania or Virginia, by fixing their lines, is less within their jurisdiction than any other portion of the territories of these states. Wherever their limits are, up to that line, their law making power extends and governs. This principle, believed to be undeniable, applies in full force to the present case. If it has been necessary, for the purpose of deciding the controversy about the Pea Patch, to determine, incidentally, the question of the boundaries of the two states at that part of the river, (and it has been so argued on both sides,) and it has been determined that the island is within the territory of Delaware, it must follow that the

island is also within her sovereignty; and whoever puts his foot upon it, is subject to her laws just as much as if he resided in New Castle or in Wilmington. Whoever would seek to recover it at law, must go into her courts, including in that description the circuit court of the United States, where there are proper parties; a court established for administering the laws of the state, in civil cases, where one of the parties is an alien, &c of another state, or otherwise entitled to the aid of an United States tribunal: but still to administer those laws. In regard to the Pea Patch, there has been a conflict of jurisdiction. Dr. Gale brought an ejectment in the circuit court of the United States for the district of New Jersey, recovered a judgment, and obtained an execution. The United States brought an ejectment in the district of Delaware, got a judgment, issued an execution, and the marshal of Delaware was authorized to turn out those whom the marshal of New Jersey had been authorized to put in. Records of both were produced. Both were necessarily disregarded as affecting the question now under consideration. The only thing certain about them was, that both could not have jurisdiction; and which of them had, depended upon exactly the same point as the present case turns upon, namely: whether the island was in New Jersey or Delaware. And it may also be remarked, that in one of them (Delaware) the judgment was by default; in the other, it was upon a trial essentially ex-parte, with a very imperfect exhibition of evidence, by no means to be compared with what has been produced in this arbitration.

Considering it to be established that the island is within the limits of Delaware, Mr. Humphrey is to make out a title to it in one of two ways: by showing that he has himself acquired it, in which case he must show that his acquisition of it has been under or according to the laws of Delaware; or that New Jersey has acquired it, and that her title enures to his use.

As to the first, nothing has been alleged but possession. By the laws of Delaware, possession does not avail against the state. The statute of limitation, between individuals, is truly said to be a law of peace. An exception to it, in favour of states, or a considerable extension of time in their behalf, may be as truly said to be a law of necessity; for states cannot occupy, as individuals, so as to have an actual manifest possession, which is notice; nor can they apply the same vigilance which is reasonably required of private proprietors. It is not necessary to dwell on this. Actual possession there has not been. His honour, the late Judge Baldwin, says, that by the survey of 1784, and its acceptance by the proprietaries, the Messrs. Hall, and Dr. Gale under them, stood in the place of the West New Jersey proprietaries, with all their rights. "His legal seizin or possession," continued for thirty-one years, till 1815, would bar the right of entry of any adverse claimant. Had the right been in the proprietaries, and the island within New Jersey, the legal seizin or possession, as before stated, would have accompanied the grant. But neither part of the postulate is correct. The proprietaries had no right, as has been seen, and the island was not within New Jersey. When Dr. Gale, or some one claiming under him, obtained the title of the state, in 1831, he could get no legal seizin, for one of the reasons already stated; and for this additional one, that the United States were then in actual adverse possession.

Thus, then, there was no legal seizin or possession. That there was no actual possession under the survey, worthy to be so called, or to found a right upon, seems to be an unavoidable inference from the evidence. The survey could not have been made on the ground. Its date, 1784, is near the time when the island was about the size of "a man's hat," and over-

flowed every high tide. There was no resting place upon it for the surveyor's foot or his instrument. But there is something else, much more conclusive. The surveyor returns the contents to be 178 acres. More than fifty years afterwards, when the island had been growing all the time, it contained by accurate measurement, only 87.60 acres. The surveyor, therefore, did not begin a possession, though he made a sufficient survey if the proprietaries accepted it, as they certainly did. No survey, indeed, was necessary, for an island is sufficiently defined by the waters. The only other evidence of possession is, that in the spring of 1813, April or May, Dr. Gale took down a large party of men. The witness who proved it was one of the company. He said they went there to fish, and it was stated that Dr. Gale had in view to make a fishery, but it did not answer, on account of the strength and direction of the currents, which swept the nets into deep water and let the fish escape. They found upon the island a rough frame house, recently erected, (probably by Dr. Gale,) of one story in height, with one room in it, and no chimney or fire-place. They used, for cooking, a stove they carried down in a boat and brought away with them. They left the island in August, and, as far as appears, never returned. What became of the house is not in proof. The occurrence just related was after the military officers of the United States had fixed their attention upon the spot as a site for the defence of the river. About the same time, General Bloomfield, who was in command of the military district, went to Delaware to negotiate a cession of the island to the United States, being himself a citizen of New Jersey, and having been her governor and ex-officio chancellor, and it is reasonable to suppose acquainted with her rights. In December 1814, Captain Clarke, of the United States topographical engineers, under orders from the war department, taking with him one hundred soldiers and some thirty or forty workmen, and the frame of a block house, went upon the island to commence the work of a fortification, and remained there till June, 1816. He states that there was nobody on the island when he went there, nor any building or "vestige" of one, and that nobody was there during his stay but those under his command. From the survey, then, until 1816, there was no possession, and from that time the United States have been in possession. The fishing visit of 1813, cannot be called a possession, and if, connected with Dr. Gale's claim of title, it might be so termed for the time, still it was abandoned, leaving no mark of ownership. There was no actual possession, therefore, even if that could have been available. The evidence is that the island was occupied only by crows, selected by them as a lodging place for its solitude and security.

Has the state of New Jersey acquired any right under which his claim could be covered? If a case were established, in point of fact, it would be necessary to inquire how such a right could be acquired by New Jersey, the territory in question being within the state of Delaware, and subject to her laws and government. But it does not seem requisite to enter upon that inquiry, inasmuch as the proofs are deemed to have made out no such case. The controversy, it will be seen, embraces two descriptions of rights, namely, the river and the soil under it, and islands in the river. The former is not susceptible of actual possession—the latter are. To begin with the latter. The evidence is, that within the twelve miles circle, before the Pea Patch made its appearance, there were only two islands, (so called,) Reedy Island and Bombay Hook. They have both been in the possession and under the jurisdiction of Delaware. Bombay Hook, it is believed, cannot with propriety be called an island in the river. It lies within the line of the main land of Delaware, above the low water mark of the river, and has

been surrounded by water only by reason of an artificial outlet being cut for Duck creek into the bay. There remains then, only Reedy Island. It may be said that it lies nearest to the Delaware shore. But it was in the river, and if the right to the river and islands was in the crown, while Delaware was a province, Delaware could have no right in Reedy Island, whether it was on one side or the other of the channel. Her possession, as of right, is thus a strong proof that her title was prior to that which would have accrued to her by the divestiture of the right of the crown, and the leaving of the river vacant between two states. New Jersey had no island within the twelve miles circle.

A passage in Smith's History of New Jersey, it was thought, disclosed some right of New Jersey to an island there called Stuyppson's Island. The author, in giving an account of a negotiation with the Indians, says: "Also Stuyppson's Island, near Delaware river. Tom Store claims thirty acres," &c. The island was not found upon the map during the investigation, being searched for in the river, though Smith's language, "near Delaware river," indicated that the distance was not from the land into the river, but from the river into the land. A close examination since, has shown that it is what may be called an "inland island," formed by small streams, with, perhaps, the river on one side, but above the low water mark, and within the outline of the land, as "Bombay Hook," is on the other. It is far below the twelve miles circle, and is undoubtedly a part of New Jersey, by her original right; but not an island in the river or bay.

Something was also said about Egg Island, but no evidence given. From the map it appears to be a very small island, low down in the bay, out of the circle, lying near the main land of New Jersey. Whether it is separated from the main, or adjoins it, by whom it is held, if by any body, and under what tenure, there is no proof in the case. New Jersey, or those claiming under her, had no island within the twelve miles.

As to the Pea Patch Island, New Jersey had at no time possession, and cannot be said to have set up a right to it. The contrary is quite clear. The right asserted was that of the West New Jersey proprietaries, which, as has been seen, was adverse to the state, and could not in any way enure to her use. So of the right of Dr. Gale and those deriving from him. And when, at last, it came to be doubted whether the proprietaries had any right at all, and when the United States were in actual possession, and New Jersey was asked for an act, that act did not assert any title, but only released her right and interest, whatever it might be. Delaware, on the other hand, was in possession, as far as a state could be. There is satisfactory evidence as to one individual residing on the island after the United States entered upon it; that he was assessed and voted in Red Lion hundred.

So much for the islands. Now as to the jurisdiction. There is no evidence to establish a single instance of its exercise by New Jersey over that part of the river and islands, and there is no reason to believe that there was one. One witness was called, to show that process from New Jersey had been once served upon the Pea Patch Island, in recent times; but it failed entirely. There was no process; there was no arrest, and all that was made out was that a constable from Salem county came with a pistol, and went away without a prisoner. The ejectment in the circuit court of the United States for the New Jersey district, is of no weight. It was brought by an individual, of his own authority; it was after this controversy had begun, and for the purpose of determining this controversy.

On the part of Delaware, the evidence is full and complete of the exercise of jurisdiction over

that part of the river and islands, as far back as evidence can be expected to go. The process of her courts, and of the courts of the United States sitting in that district, for the arrest of persons and property afloat, has been issued and executed, and continues so to be, quite over to the low water mark on the Jersey side; and this, not occasionally, but habitually, without doubt or question, as a matter of course, whenever applied for. Such arrests have been made of persons and property escaping from above. The cases have been contested upon every ground that ingenuity could suggest, or the zeal of parties prompt; but there never has been an instance of any one disputing the jurisdiction in the courts either of the state or of the Union. This must be admitted to be very persuasive evidence. In the absence of proof to the contrary, it must be deemed conclusive.

Now, this evidence comes from numerous witnesses, of great intelligence and unquestionable credit, well informed upon the subject they speak of, by their pursuits in life, and it coincides (for it did not require support or corroboration) with the proof of particular instances, both by parol and exemplifications of records here produced. The exhibition of the evidence at large, or even a considerable part of it, would be tedious and unnecessary. The whole was carefully reduced to writing, and will be preserved.¹⁰ But it is quite impossible to look at the list of witnesses without feeling unbounded confidence that, from their own experience, and from the traditions and other sources of information of the past, which lawyers and judges are obliged to explore, and to follow as their guide, we have the whole knowledge of what has been held and done from an early, perhaps the earliest, period, concentrated and condensed in this body of testimony. With nothing to contradict it, (and there is nothing,) one might safely say, such has always been the law of Delaware. Kensey Johns, Esq. for example, above eighty-eight years of age, states "that he has resided in New Castle since 1780, now sixty-seven years. He was a practising lawyer for twelve years, afterwards chief justice of the supreme court for thirty-eight years, afterwards chancellor of the state, since that time, and at present, living a private gentleman." Any one else, speaking of him, would add, and during the whole of this lengthened period, exercising a most wholesome influence by example and precept, upon the minds and morals of the community he lived in. He says: "It has always been considered and held by the courts, public officers and lawyers of Delaware, as far as my memory reaches, that the title and jurisdiction of the state of Delaware, extended to a circle of twelve miles around New Castle, to low water mark on the New Jersey shore. I have never heard the title and jurisdiction of the state of Delaware, over that part of the river Delaware, doubted by any court, public officer or lawyer in Delaware, on any occasion whatever. Within my knowledge and remembrance, writs have been often issued out of the courts of Delaware, to seize vessels and persons in all parts of the river Delaware, within the circle to low water mark on the New Jersey shore, and no dispute, question, or plea was ever made or suggested, within my memory, before any court in Delaware, against the title of Delaware over all such parts." And, again: "The state of Delaware, for the whole period of my remembrance, and as far back as my researches extend, has claimed and exercised jurisdiction

over the Delaware river and soil thereof, within the circle, to low water mark on the Jersey shore, and the state has never failed to exercise this jurisdiction when called upon or asked to do so." Eleven other witnesses, eminent citizens of Delaware, with large means of knowledge, whose names, if repeated, would command respect for their testimony, make similar statements, and some of them give an account of particular cases of arrest and seizure, known to them personally. John Steele, also a citizen of Pennsylvania, gives an account of his following a vessel down the river, getting process against her from a court in Delaware, and having it executed far over on the east side of the river.

New Jersey, as before stated, never objected to the claim of Delaware, nor, as far as appears, set up any claim of her own. In 1709 the boundaries of counties were fixed by an act of the legislature. Those on the Delaware were bounded on the west by the river, the lines running along the river shore, and not into the river. In 1822, it is true, an act was passed to extend one or more of the lower counties into the river. But this was after the United States had obtained the cession from Delaware, was in actual possession, and this controversy had begun. Besides, of what avail is such an act of the legislature, except as some evidence (under the circumstances just mentioned, very feeble, indeed) of a belief of right, and keeping up of a claim over her own territory. A constitutional act of a state legislature, touching any part of such territory, is undoubtedly potent, and is notice to all the world; but as to territory of another state, it is inoperative, and it is notice to nobody. This act, therefore, is of no effect.

Upon all the grounds thus reviewed, the conclusion is, that the title to the Pea Patch Island was in the state of Delaware. On May 27, 1813, that state, by an act of her legislature, ceded it to the United States upon conditions having regard to the public benefit, and not for any selfish interest of her own. No doubt can be entertained that New Jersey would, in the like case, have done as her sister Delaware did, had she been free to do so. But a private claim had intervened, which she had no rightful power to dispose of; and, if it has so happened that, after a long and costly litigation, that claim has proved to be unfounded, it is to be regretted that the claimant should have been put to useless expense and trouble; but this feeling can have no influence in determining the question of right.

By the cession of Delaware the title passed to the United States. The award, therefore, must be, and is, that the title is in the United States.

Award.

Under and by virtue of the foregoing agreement and submission, having heard the parties by their counsel, their proofs and allegations, and duly and deliberately considered the whole matter, and weighed the evidence and arguments on both sides, I do hereby award that the title to the Pea Patch Island is in the United States.

In witness whereof, I have hereunto set my hand and seal, this fifteenth day of January, in the year of our Lord one thousand eight hundred and forty-eight, at the city of Washington.

JOHN SERGEANT. (Seal.)

Witness:

JOHN WM. WALLACE, Secretary of the

Reference.

JOHN M. CLAYTON, Senator from Delaware.

WILLIAM L. DAYTON, Senator from New Jersey.

PIRACY—CHARGE TO GRAND JURY IN RELATION TO PIRACY. See Cases. Nos. 18,256 and 18,277.

¹⁰ This, with the other evidence and proceedings in the case, all which were recorded by the secretary of the reference, was transmitted by the arbitrator, after making his award, to the office of the solicitor of the treasury of the United States. A call was subsequently made by the senate for these papers. Having been transmitted to that body and read there, they were ordered to be printed, and will be found among the senate documents (Executive, No. 21) of the first session of the 30th congress.

POSTAL LAWS—CHARGE TO GRAND JURY IN RELATION TO OFFENSES AGAINST POSTAL LAWS. See Case No. 18,248.

POSTAL LAWS—CHARGE TO GRAND JURY IN RELATION TO VIOLATION OF POSTAL LAWS. See Case No. 18,251.

POTOMAC BLDG. ASS'N (JOHNSTON v.). See Case No. 18,303.

PRIZE CASES—COSTS, FEES, AND COMPENSATION IN PRIZE CASES. See Case No. 18,283.

PROCESS—CHARGE TO GRAND JURY IN RELATION TO THE OBSTRUCTION OF LEGAL PROCESS. See Case No. 18,250.

PUBLIC OFFENSES—CHARGE TO GRAND JURY IN RELATION TO INVESTIGATION OF PUBLIC OFFENSES. See Case No. 18,255.

R.

RAINEY (FIELDS v.). See Case No. 18,296.

RAINEY (LATTON v.). See Case No. 18,296.

RATCLIFF (JOHNSTON v.). See Case No. 18,303.

REGISTERING, FEES FOR. See Case No. 18,295.

REVENUE—CHARGE TO GRAND JURY IN RELATION TO FRAUDS ON REVENUE. See Cases Nos. 18,247 and 18,251.

REVENUE—CHARGE TO GRAND JURY IN RELATION TO INTERNAL REVENUE LAWS. See Case No. 18,248.

ROSS (BLOOMER v.). See Case No. 18,242.

RUDELL (BLAKELY v.). See Case No. 18,241.

S.

SECRETARY OF TREASURY (BELL v.). See Case No. 18,231.

SECRETARY OF TREASURY (CLARKE v.). See Case No. 18,280.

SECRETARY OF TREASURY (JUDSON v.). See Case No. 18,304.

SEVIER (BENTLEY v.). See Case No. 18,233.

SMITH (GORMLEY v.). See Case No. 18,298.

STEAM VESSELS—CHARGE TO GRAND JURY IN RELATION TO THE ACT OF CONGRESS OF JULY 7, 1838. See Case No. 18,253.

T.

TREASON—CHARGE TO GRAND JURY IN RELATION TO LAW OF TREASON. See Cases Nos. 18,269-18,277.

TRUMBO (MANIER v.). See Case No. 18,309.

U.

UNITED STATES (BARGIE v.). See Case No. 18,229.

Case No. 18,312.

UNITED STATES v. BLODGETT.

[35 Ga. 336.]¹

District Court, S. D. Georgia. Nov. Term, 1867.

GRAND JURY—OATH PRESCRIBED BY ACT 1862—AIDING REBELLION—WHO MAY CHALLENGE—WHEN CHALLENGE TO BE MADE—TESTIMONY.

1. Although the oath prescribed by the second section of the act of June 17, 1862 [12 Stat. 430], will

¹ [Reported by Logan E. Bleckley, Esq.]

not, except at the instance of the attorney representing the government, be administered to jurors in the federal courts, yet, by the first section of said act substantially the same matters specified in the oath are made cause of challenge; and it is the right of any party to a case, civil or criminal, to challenge for such cause the jurors about to take action on such case. It does not follow, because the government attorney only can call for the oath to be administered, that he alone can urge the disqualifying conditions laid down by the first section of the act.

2. If, under said act, and by a party other than the government, jurors be challenged, the challenge may be disposed of by allowing those who deem themselves disqualified under the first section of the act to retire from the panel without any sworn evidence of their incompetency.

3. Grand jurors may, for cause, be challenged by any person to be affected by their finding. The right is not restricted to such persons as are in prison or under bail upon charges of crime; it may be exercised by

one who, though still at large, has been warned by the prosecuting attorney of the court that he will be made, during the term, the subject of an indictment for perjury.

4. Where there is reasonable excuse for the delay, challenges to members of the grand jury will be heard after the body has been fully organized.

5. The accused party has no right to submit evidence in his behalf to the grand jury, not even with the consent of the prosecuting attorney. The grand jury are to examine the foundation on which a charge is made by the government, not that on which it is denied by the alleged offender.

In the matter of the oath to be taken by jurors in the federal courts, under the act of June 17, 1862 [12 Stat. 430], in the case of the United States against Foster Blodgett.

ERSKINE, District Judge (charging grand jury). On the first day of the present term (November 7th) you were empanelled and sworn for this judicial district,—your foreman, and each of you, then taking the ancient common-law oath of grand jurors, and the court, at the same time, delivering to you its general charge. The court feels that it is due to you, as well as to the district attorney and the counsel for the challenger, Foster Blodgett, that such remarks as may be deemed proper to be made, and such decision as may be pronounced, be addressed to you, rather than to the learned counsel themselves; because the matters in controversy concern, and are directly against, the legal status of several members of your body. Blodgett comes here before the court, and demands the right to challenge the polls; and for this he relies on the first section of the act of congress of June 17, 1862, which statute is entitled "An act defining additional causes of challenge, and prescribing an additional oath for grand and petit jurors in the United States courts." The first section declares that, "in addition to the existing causes of disqualification and challenge of grand and petit jurors in the courts of the United States, the following are hereby declared and established, namely: Without duress and coercion to have taken up arms or to have joined any insurrection and rebellion against the United States; to have adhered to any rebellion, giving it aid and comfort; to have given, directly or indirectly, any assistance in money, arms, horses, clothes, or anything whatever, to or for the use or benefit of any person or persons, whom the person giving such assistance knew to have joined, or to be about to join, any insurrection or rebellion, or to have resisted, or to be about to resist, with force of arms, the execution of the laws of the United States, or who he had good ground to believe had joined, or was about to join, any insurrection or rebellion, or had resisted, or was about to resist, with force of arms, the execution of the laws of the United States; and to have counselled and advised any person or persons to join any insurrection and rebellion; or to resist with force of arms the laws of the United States." 12 Stat. 430.

The oath embodied in the second section—and which substantially follows the language of the disqualifying causes enumerated in the first—will be read to you, not that you may take or decline it, for it can be presented under the second section only, and at the suggestion of the prosecuting officers of the government, but upon hearing it read, you will be better able to conclude whether you are, or are not, vulnerable to any one or more of the disqualifications mentioned in the first section. If you find that you are, you may retire from the panel. And, in my judgment, the defect, in a case of challenge for cause like this, may, in this manner, be shown. U. S. v. Cornell [Case No. 14,868]; State v. Marshall, 3 Ala. 302.

The following is laid down in a late accurate work on Criminal Procedure: "The most natural method is to require the witness to declare the matter under oath, on the voir dire. But

witnesses are not generally required to answer questions which will tend to their disgrace; therefore, in England, the inquiry whether the juror has delivered an opinion adverse to the prisoner cannot be put to the juror himself, but it must be shown by other evidence. This point has been held the same way in some of our states. But generally in this country this class of questions is allowed to be put by the parties directly to the jurors; and in some of our states this doctrine is also aided by express statutes. When this is not done, and even when it is, the court will sometimes, in aid of the general object, and without prejudice to other methods, call upon the jurors, collectively or singly, to declare if they know any impediment to their serving, or if they are obnoxious to a particular objection which may have been suggested." 1 Bish. Cr. Proc. § 795. And see *Id.* § 768; *Cook's Case*, 13 How. St. Tr. 311, 337; *Respublica v. Dennie*, 4 Yeates, 267; *McCarty v. State*, 26 Miss. 299. See concluding sentence in section 2, Act June 17, 1862 (12 Stat. 430). The challenger states in his affidavit, that the district attorney distinctly promised him that he should be permitted on the trial before the grand jury to have evidence in his defence laid before them. No such promise or agreement can have the sanction of this court. To allow evidence, either oral or written, to go before the grand inquest, on behalf of a defendant, would be subversive of the ancient and well-settled rules of courts of justice. *McKean, C. J.*, in *Respublica v. Shaffer*, 1 Dall. [1 U. S.] 236, said: "It is a matter well known, and well understood, that by the laws of our country, every question which affects a man's life, reputation, or property must be tried by twelve of his peers; and that their unanimous verdict is, alone, competent to determine the fact in issue. If, then, you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the petit jury, you will supersede the legal authority of the court in judging of the competency and admissibility of witnesses, and, having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the law of the land."

Foster Blodgett does not ask to challenge the entire panel, but he avers that there are individual disqualifications attaching to particular jurors, because of their being within one or more of the clauses of the first section of the statute. In his petition, of file in this court, and which is before you, he states, among other matters, in substance, that he is informed and believes that a charge for perjury is now pending before you, but that as yet no presentment has been made, nor indictment found and returned, into court; that most of you are, under this statute, incompetent to inquire into his case; that he does not believe he can have a fair and impartial investigation of his case before you, or receive justice at your hands. He sets forth the names of the persons to whom he objects, and interposes a challenge to each.

It was contended by the district attorney that, under this statute, it is only the government that possesses the right to challenge. This court, at the last term, in the case of *U. S. v. Cohen* [unreported], which was an action of debt on bond, ruled that under the first section, the defendant, as well as the United States, was free to challenge the polls. And such is still the opinion of the court; nor can I perceive any difference in this respect between a grand and petit juror—between a civil suit and a criminal prosecution.

It is the general, if, indeed, it is not the universal, doctrine of the common law, as administered in the courts of our country, that when a person is charged with crime, and his case is to come before a particular grand jury,

he may be present at its organization, and present challenges either to the array or to the polls; but if he be not held, by process, to answer to an indictment, he is not thus entitled. If Mr. Blodgett does not come within the spirit of this rule (for he does not within the letter of it), his motion to challenge must be denied.

In addition to the written petition of the challenger, he has also filed in court an affidavit, which has been read to you without objection on the part of the district attorney. A synopsis of so much of this affidavit as is necessary for the court to pass upon will be stated. Blodgett swears that the district attorney, Henry S. Fitch, Esq., in the city of Atlanta, during the last session of the United States court there, informed deponent that he (the district attorney) "expected to prosecute deponent before the grand jury of this court, at this term, for the offence of perjury." Deponent says that he laid before the district attorney, by the hands of a friend, documents and papers which deponent expected to use in his defence, and informed him that he had witnesses by whom he could prove his innocence. He further says, that the district attorney distinctly promised deponent that he should be permitted, on the trial before the grand jury, to have his evidence in his defence laid before them. Further, he states that he was in attendance on this court on Thursday (7th instant), but being informed that the district attorney was then in New York sick, and that it was not probable that any action could be had on his case during the term, under advice of his counsel, he returned home, with the promise of his counsel that he would telegraph him if the district attorney arrived and he was needed. Receiving a telegram on Wednesday last (13th instant), he came down with his witnesses on the succeeding morning, and informed the district attorney (who had just arrived) that he was ready with his witnesses, when the district attorney replied, "Your case is now before the grand jury; and I will see what can be done with it." Deponent adds that he was afterwards informed by his counsel that the grand jury refused to hear his evidence.

And here the prime question presents itself, and it must be answered. Has Foster Blodgett now the right to challenge any individual member of the grand panel? True, he was not arrested and imprisoned on any criminal charge, and now brought hither by order of the court, nor is he under bail or recognizance; but because he is not in any of these constrained positions, is he any the less entitled to a grand jury of his country, legally qualified under its laws? Surely not. At the time of the empanelling of this grand jury, the district attorney for this district was in New York, confined to his bed by sickness; and had Foster Blodgett, by virtue of this statute, then demanded of the court the right to present his challenge, I should have felt it to be my duty, as a judge, to have postponed the consideration of the question until the coming of the district attorney, or until his place was filled pro tem., in pursuance of the sanction of the honorable secretary of the interior. Nor ought the unavoidable absence of the district attorney, at the time of the organization of the grand jury, to prejudice the rights of the government, and, in my judgment, he may still present challenges under the first section of the statute, or he may move the court, under the second section, to have the oath, incorporated therein, presented to the grand jurors, and the motion will be granted. But that Mr. Blodgett comes within the spirit and true intent of the rule

as to the right of challenge and the time to present challenges, I do not think there is any doubt whatever. He was informed by the prosecuting officer of the United States for this district, that he expected to prosecute him before the grand jury at this term of the court for perjury. In *Breeding v. State*, 11 Tex. 257, it was held that any person to be affected by the finding of the grand jury may object to their fitness. 1 *Bish. Cr. Proc.* § 724. From this authority, and others that might, if necessary, be cited, and on principle, it would seem that it is not essential to the right of challenge to grand jurors that the challenger should be in prison, or out on bail; for if he be warned, as Blodgett was in this case, by the district attorney for this district—the officer to whom the duty of prosecuting for crimes against the laws of the United States is confided—that he intended to prosecute him before a grand jury at a particular term of the court, the person thus notified is thereby affected.

After a most careful consideration of the proceedings before the court, I am of the opinion that Foster Blodgett had the right to present his challenges at the organization of the grand jury, and, further, that he has not waived that right, and may present them now.

In accordance with this judgment, thirteen of the panel were excepted to under the first section of the statute. And for the reasons already given in the early part of the opinion, the clerk read the oath in the second section to the jurors challenged, upon which the court said that if any one of the jurors included in the challenge believed that he came within one or more of the causes of disqualification mentioned in the first section, he could retire from the jury box. All those who had been challenged, except two, withdrew.

The district attorney then said that he desired to present a motion to the court to review and reverse its decision on this point, to-wit, that the mode adopted to try the challenges was erroneous. Leave was given, and he asked time to prepare his argument and produce authorities, which was also granted.

The following morning, the motion being put in writing, argument was had in support of it by the district attorney, and, contra, by

H. R. Jackson, for Foster Blodgett.

THE COURT denied the motion, and the jurors who had retired the day preceding were discharged for the term. The panel was then filled from the talesmen, subpoenaed on the previous day, who were immediately sworn in chief.

THE COURT, on motion of the district attorney, and in pursuance of the second section of the statute, caused the oath therein to be read by the clerk to the jurors. But, the district attorney declining to have said oath administered, the grand jurors, under the instructions of the court, retired to enter upon their duties.

UNITED STATES (CORPORATION OF GEORGETOWN v.). See Case No. 18,281.

UNITED STATES (CROSS v.). See Case No. 18,286.

UNITED STATES v. GANSEVOORT. See Case No. 18,313.

UNITED STATES (HICKERSON v.). See Case No. 18,301.

UNITED STATES (KEENAN v.). See Case No. 18,305.

Case No. 18,313.

UNITED STATES v. MACKENZIE et al.

[1 N. Y. Leg. Obs. 371.]

District Court, S. D. New York. ✓

CONSTITUTIONAL LAW — LEGISLATIVE POWER —
CRIMES COMMITTED ON NAVAL VESSEL — JURISDICTION OF CIVIL COURTS AND COURTS MARTIAL.

[1. The fifth amendment to the constitution of the United States provides that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." Held, that the limitation "when in actual service in time of war or public danger" refers only to the militia, and does not apply to the regular land and naval forces. In respect to these latter, the power of congress is irrespective of the actual condition of the country, and the same in time of peace as in time of war or public danger.]

[2. Congress has constitutional power to provide that crimes, even of a capital character, committed on board a naval vessel, by persons who form part of the naval forces of the United States, shall be tried exclusively by courts martial; and the act of April 23, 1800 (2 Stat. 45), establishing rules for the government and regulation of the navy, is valid, even if this be its true construction and effect.]

[3. Congress has not, by the crimes acts of 1825 and 1835 (4 Stat. 115, 775), given to the civil courts any jurisdiction over the crime of murder, when committed on board a United States ship of war, and triable before a court martial under the navy regulations.]

[4. The fact that manslaughter is not named in the naval code as an offence punishable by court martial is no ground for holding that the civil courts of the United States have jurisdiction thereof. In the absence of any statute conferring jurisdiction upon these courts, it is sufficient, in any case, to exclude such jurisdiction, that the accused is charged with the offence, in taking the life of a seaman belonging to a naval ship, in the exercise of what was claimed to be his rightful authority as an officer in command.]

[5. To warrant a court in declaring unconstitutional a law passed by congress, the defect of legislative power must be of the most plain and indisputable character.]

[6. The fact that a law of congress has been in course of execution for many years, and has been acquiesced in during that time, is a strong reason why the courts, especially those of a subordinate character, should not decide the same to be unconstitutional.]

[Alexander S. Mackenzie and Guert Gansevoort were charged before the grand jury with murder and manslaughter.]

B. F. Butler and Charles O'Connor, for the United States.

G. Griffin and John Duer, for Mackenzie and Gansevoort.

BETTS, District Judge (charging grand jury). In my charge to you on your organization, in leading your attention to subjects that might probably be brought before you, I stated, in substance, that you had cognizance of all crimes and offences in violation of the laws of the United States, and triable before the civil tribunals, whether committed within this territorial district, or within the admiralty and maritime jurisdiction of our laws. It was intended so to guard and qualify that instruction as to avoid asserting or denying a jurisdiction over crimes committed on the high seas on board a ship of war of the United States; the court wishing to leave that question, if it should be agitated before you, open for deliberate consideration and decision.

In the progress of your deliberations you came into court, and submitted in writing two inquiries, and prayed the advice and instruction of the court upon the points of law involved in them: First. Whether the grand jury has jurisdiction or is to make inquiry into offences committed on board of American ships of war on the high seas? Second. If so, is it their province to inquire into the offence alleged

to have been committed by Captain Mackenzie, or any other person on board the ship of war Somers?

With these inquiries you submitted to the court three several charges in writing, which had been laid before your body, and which supply, in part, the foundation upon which the specific advice is requested: One is a complaint by Henry Morris against Alexander Slidell Mackenzie and Guert Gansevoort "for the murder of Philip Spencer, committed on the high seas, on board the United States brig Somers, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular state, on the first day of December, 1842"; one by Margaret E. Cromwell, charging, in the same terms, the murder of Samuel Cromwell at the same time and place; and one by Charles Cleveland, charging the same persons with "the crime of manslaughter, in putting to death Elisha Small, at the same time and place."

No other facts are communicated by your body to the court, but the observations I shall proceed to offer, in reply to these questions, will be on the assumption that the parties named in these charges were, at the time of the alleged offences, all regularly attached to the brig of war Somers as officers and seamen, in the service of the United States, and that their several deaths were produced by the public execution of the deceased, under the orders of Mackenzie, commander of the brig, and that Gansevoort was a commissioned lieutenant in the navy, serving in that rank on board, and in that capacity aided and assisted in the executions. It will also be taken as connected with the facts of the case that on the return of the brig to the United States a court of inquiry was ordered by the secretary of the navy to investigate this transaction, and that court found and reported to the secretary that the conduct of Commander Mackenzie and Lieutenant Gansevoort in the matter was fully justified by the circumstances in which they and the ship were placed. That thereupon a court martial was ordered and convened by directions of the secretary of the navy, for the trial of Commander Mackenzie on a charge of murder, and that the court is now in session at Brooklyn, proceeding with the hearing and trial of the complaint now brought before your body.

These facts, in substance, are admitted by the prosecutors in court, and this dispenses with the necessity of referring to you the investigation and decision of the facts, in order to give application to the rules of law that will be stated to you. The right of a grand jury to apply to the court with which they are connected for advice and direction, in aid of the duties they are called upon to discharge, is fully recognized by the laws of this country and of England, and its free exercise is cherished and encouraged. For, although a jury, without a satisfactory certainty that the facts proved before them fall within any provision of the criminal law, may excusably direct an indictment, and leave it to the court afterward to decide whether the matter presented be a criminal offence, yet it is more consonant to a humane administration of justice to exempt the citizen from the pain and obloquy of a public accusation, where it is plain that no crime has been committed.

What has been said by great authorities with respect to imperfect or uncertain proof in support of a criminal charge applies with equal force when there is defective evidence that any law exists punishing the act; it being an indispensable ingredient to a criminal accusation that there be clear law both against the act charged as an offence, and to sustain the prosecution as presented. Lord Hale, Blackstone, and Chitty, in adverting to the ancient dogma that the grand jury ought to find the bill where there is probable evidence to support it, because it is only an accusation, and

the prisoner will afterwards defend himself before a more public tribunal, have all recommended a more merciful view of the subject, and, considering the ignominy, the dangers of perjury, the anxiety of delay, and the misery of a prison, insist that the grand jury should be well convinced of the guilt of the accused before subjecting him to a trial. 2 Hale, P. C. 61, 157; 4 Bl. Comm. 303; 1 Chit. Cr. Law, 318. The same reason should restrain the jury from finding an indictment, unless satisfied that the facts they present will subject the accused to a legal arraignment and punishment.

These considerations render appeals by grand juries to the court for preliminary counsel and direction proper and commendable, whenever they are not thoroughly satisfied that the case justifies their interference, in order that the citizen need not stand exposed to the reproach and terror of an infamous and perhaps capital charge, where there is a want of probable cause, either in law or evidence, to support it; as, also, that they may have the countenance and support of the court in unusual or difficult cases, or those of exciting interest, to help them to a clear understanding of their duties and an efficient execution of them. The practice to which you have been most accustomed in similar instances has undoubtedly been for the court to respond at once, or after a slight consideration, and without argument, to the inquiries propounded. But as the questions you submitted involve an inquiry into the constitutionality of an act of congress, and also into the just powers and duties of this court in the administration of criminal law in capital cases, together with the determination of the rightful authority of naval courts martial, and the effect of trials and sentences by those courts, I have thought these points to be of such weight and importance as to require, not only a mature and careful examination by me, and to justify the suspension of the other business of the court for that purpose, but also that they presented a proper occasion for me to invite counsel, as well representing those who prefer these complaints as the parties affected by them, to afford the court the benefit of an argument in aid of the decision to be rendered. The request has been acceded to, and most satisfactorily fulfilled, by the eminent gentlemen who have discussed the various and interesting topics arising out of these questions.

You have given your attendance from day to day, throughout this highly able and instructive argument, occupying more than five successive days, and you will accordingly fully comprehend that neither the time I have allowed myself to study and reflect upon the argument, nor the space within which these observations to you must necessarily be compressed, will permit me to follow out, or scarcely advert to, the multifarious positions and illustrations introduced into the discussion.

Gentlemen, it may be proper, in this connection, to add that you are not to consider the argument in court as addressed to you in your official character. In intimating to you, when your inquiries were submitted, that it would be left to your option to continue your deliberations in your room, or attend the discussion here, and in assigning you a place within the bar, the court expressed, and intended to signify, no more than its respect toward you personally. You are aware that you have not been called from day to day as embodied and in official attendance, nor is it recorded on the minutes that the grand jury has appeared in court since the day you presented these inquiries. It seemed necessary to notice these particulars, lest it might be supposed that these proceedings attempted to introduce or sanction the precedent that the grand inquest, organized and sitting as a jury, could have arguments of counsel or parties on matters under

their inquiry and deliberation addressed to them, and that it was their province to weigh and decide the points so discussed. This transaction is intended to have no such bearing, nor is it intended to consider your presence here as in any way varying or diminishing the rightful authority or responsibilities of the court. The questions proposed are strictly questions of law, which it is the province and duty of the court to decide, and I have not the slightest reason to doubt that in asking this advice you meant to recognize the authority of the court over the matter, and to abide by the replies that may be given; otherwise, this solemn investigation, and the prolonged toils attending it, would be but an idle parade.

The court cannot fail to perceive and appreciate the delicacy and importance of the points it is called upon to decide. Your inquiries are so framed as to present the subject in its most solemn form, as well as to awaken those solitudes and sympathies naturally accompanying the application of general rules to individual cases. You ask whether your authority extends to the investigation of offences committed on board American ships of war on the high seas; and, if so, whether the matters set forth in these specific complaints are within your jurisdiction. The occurrence on board the Somers, with all its painful consequences, is thus brought directly in view, but is manifestly of subordinate importance in your estimation, as ministers of the law, to the great question propounded touching the administration of criminal justice, and which interests and affects alike the individual citizen and the government, in the whole extent and duration of their rights and responsibilities under this branch of the law. This question ought to be calmly investigated and decided as a naked proposition of law, and without allowing the judgment to be disturbed by apprehensions that the conclusion adopted may, in its operation, place the parties accused in this instance under increased liabilities and dangers, or may tend to afford them extraordinary privileges and advantages of defence.

You are undoubtedly aware, gentlemen, that the subject matter involved in this special case has been under consideration before me, on several instances previous to the sitting of this court, and that I declined awarding a warrant to arrest these parties.¹ The disposition then made of the case was under special aspects of the subject, and does not necessarily embrace the main points now submitted; and, even if it involved the same matters, I feel called upon to examine and consider the whole subject, under the aid of the argument now heard, as if it had never before been brought to my attention.

In proceeding to the investigation of the juridical facts demanded by your inquiries, it may be fitting the occasion for me to say that it cannot be of the slightest consequence to the court how those facts may be found. I shall not hesitate to assume for my learned associate who presides in this court, nor to assert for myself, that the court never hesitates or shrinks from applying the full jurisdiction conferred upon it by law over whatever subjects or persons such jurisdiction may operate; and never seeks, or permits itself to exercise, one that it does not find clearly bestowed upon it by the law. Neither can it be of any moment to the judges whether they sit in judgment over crimes committed on the high seas, on board merchant vessels or war vessels, nor whether the individuals brought to trial be commanders and officers of private ships, or commissioned officers of the navy. The records of this court will show numerous instances in which the judges now in commission have tried sea offences of every denomination, and have sentenced to capital punish-

¹ See opinion of the learned judge [Case No. 15,690].

ment many persons convicted of homicides and other atrocious crimes committed on the high sea; and the question as a law fact now raised is whether the like powers extend to, and are to be exercised over, offences committed on board the armed vessels of the United States.

The answer to this inquiry must depend upon the true import and operation of the crimes act of April 30, 1790 [1 Stat. 112], and of March 3, 1825, in connection with the act of April 24, 1800 [2 Stat. 54], if the latter be a valid act, and still in force. This court can exercise no jurisdiction in criminal matters not allotted to it specifically by act of congress. This principle is definitely settled by the adjudications of the supreme court ([U. S. v. Hudson] 7 Cranch [11 U. S.] 32; [U. S. v. Coolidge] 1 Wheat. [14 U. S.] 415; [U. S. v. Wiltberger] 5 Wheat. [18 U. S.] 76); and U. S. v. Bevans, 3 Wheat. [16 U. S.] 336, determines that point most unequivocally, whatever may be its effect and influence on other questions connected with this case, upon which it has been so frequently cited. The objections to the jurisdiction of the court over the subjects of your inquiry result in these propositions: (1) That congress has power under the constitution to provide for the punishment of offences committed in the army and navy, without trial in the courts of law. (2) That the statute establishing rules for the government and regulation of the navy (April 23, 1800 [2 Stat. 45]) is an execution of that power in respect to the naval forces. (3) That the crimes acts of 1790 and 1825, neither in terms nor by necessary intendment, embrace offences committed in the navy; and only such offences committed in the army are punishable under them as are expressly reserved in the rules and articles of war for trial in the civil courts.

In support of the jurisdiction of this court over the matters charged before you, these general positions are contended for: (1) That the judicial power of this court under the constitution extends to all crimes against the United States committed on the high seas, and that such offences affecting the public peace or welfare must be proceeded against by indictment and trial before a jury. (2) That the crimes acts give to this court cognizance of murder and manslaughter committed on the high seas, without distinction between public and private vessels, and are a full execution of the constitutional power in that behalf. (3) That the power in congress to erect courts martial and punish offences by their sentence is an implied, and not a direct, power, and must be exercised in subordination to the positive powers reserved to the judiciary. (4) That the act establishing rules and regulations for the government of the navy, under the constitutional restriction, can give no authority to courts martial to try offences other than of a strictly military or disciplinary character, or such offences as are both committed and brought to trial out of the local jurisdiction of the circuit courts, or during the existence of war or public danger.

I do not attempt to lay down these positions in the precise language of counsel, but this statement exhibits the main conclusions which the arguments on the one side and the other labored to establish or combat, at least so far as they enter into the opinion I am about to submit to you.

The counsel have discussed the constitutional question as to the extent and character of the powers of congress in the government and regulation of the navy with the highest ability and learning, and if the duty devolved upon this court to settle that question definitively, I should feel constrained to bestow on it a much more labored and thorough examination, and give to the preparation of the opinion supporting my views a fuller development and wider range of illustration. But it does not appear to me that the case has assumed a posture ren-

dering it necessary or fitting for this court to enter at large into the consideration of the constitutional point. The circuit court has but a limited authority, and, though its decision affords the rule of action in the particular case, and may control the district court within its own district, yet beyond that it has no force or efficiency in fixing the construction of the constitution or a law, and the court will accordingly cautiously forbear carrying its adjudication beyond the demands of the special point under judgment. The point to which that discussion is alone pertinent here is whether, if the act of April 23, 1800 [2 Stat. 45], confers on naval courts martial jurisdiction over murder and manslaughter committed in the navy on the high seas, congress had competent authority to pass such a law.

Under our system of jurisprudence the written constitution is the supreme law, and not only bestows on congress all legislative powers that can be rightfully employed, but, furthermore, limits with paramount authority the extent within which such legislation may be exercised. An enactment by congress, therefore, in violation of the constitution, or not authorized by its provisions, becomes inoperative and void, and no court, of the humblest powers, can be called upon to enforce it. *Vanhorn v. Dorrance* [Case No. 16,857]. No court would be bound by an ex-post-facto law, by an act of attainder, a statute directing magistrates to try capital cases without the aid of juries, &c. But it is a principle equally sound and clear that the collision between the constitution and statute, or the defect of power in congress to pass the law, must be of the most plain and indisputable character to justify in any tribunal a refusal to recognize its validity. The supreme court restrains its high powers within such limits, and the caution is more needful, and should be more imperative, with every subordinate magistrate and court. The presumption is always to be in favor of the validity of statutes, until the contrary is clearly demonstrated. [*Cooper v. Telfair*] 4 Dall. [4 U. S.] 14. Full effect will be given by every judiciary to a statute, unless its opposition to the constitution is of that nature that the court feels a clear and strong conviction of their incompatibility. [*Fletcher v. Peck*] 6 Cranch [10 U. S.] 87; [*Fullerton v. Bank of U. S.*] 1 Pet. [26 U. S.] 604; *Serg. Const. Law*, c. 34. Under these principles of decision, it is manifest that, unless the discrepancy between the constitution and the act in question is palpable and irreconcilable, this court must acquiesce in the authority of congress to pass it, and receive the act as the law of the land. In connection with this point, the constitution will be adverted to only for the purpose of ascertaining whether there is colorable or probable authority given to congress in this behalf, and accordingly all doubts, if any arise, will apply in support of the validity of the law, and not against it.

The provisions of the constitution which have been cited and commented on as applicable to this question are article 1, § 8, subs. 9, 11-15, and article 3, § 1, subs. 1, 2, and amendments 5 and 6.

To discern more distinctly the bearings of these several clauses on the subject under consideration, those parts deemed essential will be recited in connection. Congress shall have power to constitute tribunals inferior to the supreme court; to define and punish felonies committed on the high seas and offences against the law of nations; to raise and support armies; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia, &c.; and for governing such part of them as may be employed in the service of the United States. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and estab-

lish; the judicial power shall extend to all cases in law and equity under this constitution and the laws of the United States, and to all cases of admiralty and maritime jurisdiction. The trial of all crimes shall be by jury, and no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed.

It may conduce to a clearer apprehension of the nature and extent of the powers thus imparted by the constitution, and of the manner in which they were practically to be applied, to advert to the condition of the country in relation to these particulars antecedent to the adoption of the constitution. During the colonial dependency of this country, the power to raise and support armies and provide and maintain navies was solely with Great Britain, and the British forces on land or at sea were subject to her laws alone. The civil polity of the colonies was, however, ample, and, in many instances, sovereign, within their respective boundaries, but it is believed was never recognized as extending beyond their territorial limits. Accordingly, although all crimes and misdemeanors committed on land were punished in the local courts, offences on the high seas or on waters within the admiralty jurisdiction were placed under the cognizance of the vice-admiralty courts, and were punishable under the laws and authority of the mother country. This jurisdiction was conferred by commissions issued from the high court of admiralty, and was exercised in capital cases by the vice-admiralty judge or commissary, in conjunction with the local judges of the superior court, governor, or lieutenant governor, and, it is believed, always up to the Revolution, without the intervention of juries.

A commission issued to Lewis Morris, in 1738, appointing him commissary of the provinces of New-York, Connecticut, east and west New-Jersey, empowered him personally, or by surrogate or deputy, to try all crimes and offences committed on the high seas, &c., according to the civil and maritime laws and customs of the high court of admiralty of England anciently used. Other commissions of the same tenor issued to the vice-admiralty here, and were undoubtedly granted in all the provinces. De Lovio v. Boit [Case No. 3,776]; Serj. Const. Law, Introduction, 4, 5. The archives of the court exhibit a trial for piracy before such court, without a jury, as early as the year 1701, and the valuable treatise of Mr. Washburne shows that trials in that form were common in this district, while composed of the New-England states, New-York, and New-Jersey, and in the Northern district, after it was separated in 1703 from New-York, from the year 1673 to the Revolution. Jud. Hist. Mass. 172, 176.

Time will not permit my examining with fullness and accuracy into the constitution of the admiralty courts of the several states, or the manner in which offences at sea were tried during the Revolutionary War. Some of the courts were probably first erected under the resolution of congress of 1775 (Sergt. Const. Law, 10, 11; 1 Jour. Cont. Cong. 142; 1 Laws [Bior. & D.] 620); and others, the organization of which had been retained by individual states as they existed at the Declaration of Independence, may have still continued their accustomed jurisdiction under the authority of the state. [Ross v. Rittenhouse] 2 Dall. [2 U. S.] 162; 3 Hall, Law J. 211, 221; Dup. Jur. 136; De Lovio v. Boit [supra]; Washburne, 185. But whatever may have been the character of the jurisdiction employed by these local admiralty courts from 1774 to 1781

in the trial and punishment of crimes committed at sea, it is most manifest that none was ever exercised in them over offences occurring in the naval forces. These forces were under the exclusive government and control of the continental congress, and in no way made amenable to the jurisdiction of the state courts. On the contrary, the earliest exercises of national authority by the congress, and not the least emphatic ones during the period of its existence, in the form of positive legislation, were the enactment of rules and articles of war for the government of the army, and rules and regulations for the government of the navy, by which the entire authority over both these branches of the public service was assumed by congress, and enforced by courts martial, without reference to the local tribunals. 2 American Archives, 1855; 1 Jour. Cont. Cong. 128, 139, 262. This separation of the land and naval forces from connection with the local courts, and method of punishment of offences committed within either by the appropriate courts martial, was resumed and maintained under the confederation, while that government continued, and until it passed into the national constitution. By the 9th article of the confederation, congress was empowered, with the assent of nine states, to enter into war. They had plenary power to appoint courts for the trial of piracies and felonies on the high seas, and to make rules for the government and regulation of the land and naval forces, and to direct their operations; and, on authorizing the raising of land forces in 1787, they recognized the existing rules and articles of war as in force for the government of the troops (12 Jour. Cont. Cong. 173); and this understanding of the continued operation and force of the rules and articles of war is shown by various statutes passed since the adoption of the constitution (Sept. 29, 1789, § 4 [1 Stat. 96]; April 30, 1790, § 13 [1 Stat. 121]; April 10, 1806, § 3 [2 Stat. 359]).

Congress executed the power to appoint courts for the trial of piracies and felonies on the high seas immediately after its organization under the confederation. By resolve of April 5, 1781, they directed that such offences should be inquired of, indicted, and tried by grand and petit juries according to the course of this common law, and constituted the justices of the supreme or superior courts of judicature and judges of the courts of admiralty of the several and respective states, or any two or more of them, judges for hearing and trying such offenders. 7 Jour. Cont. Cong. 76; 1 Laws [Bior. & D.] 670, 671. The members of the convention who framed the constitution, the citizens of the respective states, who finally adopted it, had been familiar through the Revolution, and the period of the confederation, with this arrangement and practical exercise of those respective powers.

When then they transferred to the new constitution the language of the confederation in relation to the government of the land and naval forces, and the spirit of the provision in respect to piracies and felonies, it is natural to suppose that these provisions were understood in the same sense, and were designed to convey the same power, as that affixed to them in the usages and practices under the preceding government. These circumstances would justly have great significance in denoting that the constitution on its adoption was understood and designed to leave to congress the power to govern the land and naval forces as heretofore, by means of courts martial, and that piracies and felonies in their ordinary common-law acceptation should be referred to the judiciary, and be indicted and tried by juries.

It is also a circumstance of some weight, in ascertaining the understanding and intent of the convention in the provisions of the constitution under consideration, that the usages of the continental government were designed to

be in strict correspondence with those of England in the same particulars. The rules and articles of war were borrowed in substance from the English mutiny acts, and those of the navy were copied literally, in all important features, from Act 22 Geo. II. c. 25 (1 MacArthur, Ct. Mart. 348, Append. No. 1; Jac. Law Dict. "Navy," 3), and the trial of sea felonies was made to conform to the proceedings in like cases before the oyer and terminer of the admiralty sessions. I think the English law, as understood at that day, was definite and clear that courts martial, army or navy, had exclusive cognizance over all offences against the rules and articles, unless jurisdiction was expressly given by statute to some other tribunal. Such acceptance of the import and operation of the articles connected with the familiar usages under the continental government tends strongly to show that, in giving congress power to make rules for the government and regulation of the land and naval forces, that power was intended to be broad enough to cover what was to that time practiced in England, and in this country, in that behalf. The implication of such full power from the terms used in the first article (section 8, cl. 13) would probably be of equal force with an express grant,—*Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 209,—with out the intervention of the third article, which attaches to the judiciary department the prosecution and trial of all crimes. It is to be remarked the expression "all crimes," in the article, is not to be taken in an absolute sense, as embracing every description of criminal offences; for the fifth amendment excepts from prosecution before a jury some cases arising in the land and naval forces and the militia. Whether all of that class of cases are excepted, it is not necessary to inquire, in this connection. There must, upon the plain meaning of the exception, be left to congress a power to legislate to some extent over the punishment of offences committed in the army or navy, by other means than trial by jury.

The next consideration is, whether this reserved power by the terms of the exception is limited to cases arising when the forces are in actual service in time of war or public danger; or whether there is an implied limitation of it to cases of a strictly disciplinary or military character, or to cases tried out of the territorial jurisdiction of the United States. As to the first of these positions, it appears to me that the arrangement of the excepting clause to the fifth amendment, obviously imports that the qualification of actual service and a state of war or public danger applies to the militia alone. By the provisions of the first section the militia are liable to be called into the service of the United States, and placed under their government, only under the existence of the exigencies of public danger in war. The terms of the limitation would therefore apply to this peculiar service exacted from the militia, but would be unusual and extraordinary in respect to forces under the regular enlistment, and whose subjection to the authority of the general government had no necessary connection with a condition of war or public danger. I have therefore no hesitation in deciding that the power of congress over the land and naval forces is irrespective of the actual condition of the country, and is the same in time of peace as in time of war or public danger.

The farther limitation argued for, to military offences strictly, or such as are committed abroad, does not arise out of the language of the power, but is inferred because of a supposed conflict with the authority of the judiciary, if the power be understood in an unlimited sense. Whatever may be the force of this argument, it does not establish an inevitable collision between the two clauses of the constitution, but only a possible one, dependent chiefly upon the construction of the fifth amendment, whether the exception embraces the en-

tire subject of cases arising in the army and navy, or only special and peculiar instances. To show a mere equivocal or dubious power in congress is not enough to nullify a law; the want of authority to pass it must be palpable.

It has been urged that there is an inherent restriction in the power to make rules for the government and regulation of the land and naval forces, confining the authority over these arms of public service to them in their organized and collective capacity. That to govern and regulate these forces, obviously imports an authority to control their operations and act upon them in their aggregate character, and that the power over the individuals composing the forces is only incidental, and can be carried no farther than is indispensable to maintain such organization and conduct such operations. It may be worthy of remark, that this power as expressed in the articles of confederation, was that of "making rules for the government and regulation of the land and naval forces, and directing their operations," implying, probably, that a doubt might exist whether the authority to govern and regulate the forces might not be construed as confined to the individuals composing them, and that therefore it was needful to obviate this possible qualification of the power, by a direct one over the forces in their united and combined character, and to that end the clause empowering congress to direct their operations was added. The convention, in copying from the articles of confederation the body of the power, omitted the closing clause. It was obviously superfluous, because the disposition and operation of the forces must be one incident to and inseparable from their government. The alteration, however, is significant to show that the states when the articles of confederation were established, and the convention in framing the constitution, understood the power to govern and regulate forces as indubitably comprehending legislative authority over the individuals constituting the forces. This is palpably the natural force of language; a different reading would be an artificial and constrained construction. A power to make rules for the government and regulation of a nation, a province, a city, necessarily imports full authority over the individual subjects as well as the community collectively. Neither in the ordinary acceptance, is the idea of land or naval forces limited to bodies combined and acting only in an organized form; each component part is as distinctly signified as if separately named. The grand total of the national powers is expressed in the term forces. But so also are its constituents to whatever diminution of sub-divisions. Armies, divisions, brigades, regiments, companies, guards, sentinels; fleets, squadrons, separate vessels, boats, crews, are land and naval forces, integrally and independently, no less than when compounded in the general mass, and so is the individual soldier and seaman. These observations, gentlemen, are all I propose to offer you on this branch of the subject.

It is not my purpose to attempt to settle the true construction of the constitution in the particular under consideration. The provisions of the constitution have been reviewed to ascertain whether they plainly interdict to congress the power to pass laws to punish by courts martial, common law crimes committed in the army or navy; and if no such prohibition exists, whether there is in those provisions probable cause to imply the existence of such power in congress.

I have already stated to you that, upon general principles, and in consonance with the adjudications of our highest tribunal, it is the duty of this court to accept an act of congress as of full authority and binding, if there be only color of authority or probable cause in the constitution to uphold it. I limit myself therefore to the remark that the incongruity insisted on between the constitution and an act

of congress assuming to take from the judiciary and confer on courts martial jurisdiction over criminal offences in the navy, is not direct and palpable, and is no more than supposititious and inferential, and accordingly reaches no farther than to raise a doubt whether the power is vested in congress. If such doubt exists, it is not to apply against the validity of the law, but in support of it. I therefore decide that in respect to this court and the action of your body, the act of congress of April 23, 1800, is valid and obligatory, even if in its true construction it gives exclusive jurisdiction to a court martial over the homicides complained of before you.

Under this view of the subject, gentlemen, there can be no doubt of the power of congress to govern the army and navy, by bringing offences committed in either under the cognizance of the courts of law. *Heuston v. Moore*, 5 Wheat. [18 U. S.] 1. This power is fully executed in respect to the army in the rules and articles of war adopted April 10, 1800. Rule 33, 4 Laws [Bior. & D.] 18 [2 Stat. 364]. But no such expression of intention is introduced into the navy code. Whether then the courts of the United States are to take cognizance of offences committed in the naval forces depends entirely upon the true intent of congress in that behalf as expressed in the crimes acts of 1790, 1825 and 1835, and the navy act of 1800. The competency of this court under the constitution and the judiciary act—section 11 [1 Stat. 78]—to exercise the jurisdiction cannot admit of question.

The sole inquiry then is, has the jurisdiction been given it over the subject matter, by act of congress, in express terms, or by necessary implication? The argument on this branch of the case has on both sides been exceedingly thorough and acute; and although it has been my duty and pleasure to study the reasonings and authorities adduced, with minute care and attention, it will not be necessary, nor will it be physically in my power, within the limits of these instructions, to state to you the details of this examination or its results in respect to all the particulars of the argument. The necessity of the case compels me to attempt no more than to lay before you the general conclusions of my judgment upon the controlling points embraced in your inquiries. The first crimes act was passed April 30, 1790 [1 Stat. 112], at the second session of the first congress. No action had been taken on the subject at the previous session, other than to provide for the apprehension and trial of criminals. Act Sept. 24, 1789, §§ 11, 33 [1 Stat. 78].

In proceeding to institute and establish a system of criminal jurisprudence, congress acted upon the assumption that there were four great classes of national offences over which it had supreme authority: (1) Infractions of the law of nations; (2) violations of the laws of the Union within the territorial limits of the United States; (3) piracies and felonies on the high seas or criminal offences committed there; and (4) offences committed in the army and navy and militia, when in actual service of the United States.

It was unquestionably competent for congress to legislate over all those subjects in a single statute or section, and when language is employed specifically applying to some of the subjects, and broad enough to embrace others, but not designating them expressly, it becomes a question of construction resting upon the intent of the legislature, whether the law is to have the more extensive or the more limited application. For instance, this statute punishes, but not capitally, misprision of felony, manslaughter, mayhem, embezzlement of public property or receiving stolen goods, committed in any port or place under the sole and exclusive jurisdiction of the United States; and this language is plainly extensive enough to include the commission of those crimes by

the land forces of the United States stationed at such places. Was it the intention of congress to apply this general legislation over crimes on land to like offences committed in the army? By the fiftieth article of the rules and articles of war, all crimes not capital, though not mentioned in the articles of war, are to be taken cognizance of by court martial and to be punished at their discretion. The second additional article provides for the punishment of embezzlement, by courts martial, etc. Those rules and articles of war were re-enacted by a general adopting clause in Act Sept. 29, 1789, § 4 [1 Stat. 96], and were accordingly in force when the crimes act was passed.

If, then, the general intendment might be that the posterior law repealed or superceded the antecedent one, that presumption or rule of construction could not be applied to the act of 1790, because on the same day that statute was enacted, congress passed another regulating the military establishment, by the thirteenth section of which it was declared that the commissioned officers, non-commissioned officers, privates, etc., of the army shall be governed by the rules and articles of war which have been established by the United States in congress assembled, as far as the same may be applicable to the constitution of the United States, etc. 2 Laws [Bior. & D.] 102 [1 Stat. 121].

Here then is a most positive and authoritative exposition of the crimes act, showing that it had no paramount operation over the land forces, but must be construed in subordination to the rules and articles of war applicable to the case. The thirty-second article of the existing rules of war—4 Laws [Bior. & D.] 18 [2 Stat. 359]—is pertinent to show the understanding of congress that express legislation was necessary in order to bring officers and privates of the army to trial before the civil courts for capital crimes, or acts of violence to the persons or property of citizens, and affords additional evidence that the crimes act of 1790 was not intended to apply to the land forces. At that time the United States had no ships of war in commission, and though the language of the act of 1790 is broad enough to include offences committed in the naval forces, yet the punishment provided for offences on the high seas would not as a fact have that direct and certain application to the navy that the statute had to crimes on board merchant vessels. There is, however, nothing incongruous or unusual in legislating prospectively in contemplation of a state of things likely or probable to exist. Nothing could be more probable with a maritime people having the habitudes of ours and connected with all the trading nations of the earth by an active and increasing commerce, than that ships of war and navies would speedily be constructed and put in service, and language in an act of congress adapted to vessels of that character, though not in fact in existence, would most properly be held as contemplating their existence and be applied to them when they should be called into service, if the construction and application of the language were to be gathered from the act alone.

I shall not go into a critical scrutiny of the phraseology of the crimes acts of 1790 and 1825, to test the force of the internal evidence, or how it preponderates, indicating an intent of the legislature to limit those acts to merchant vessels or to embrace within them national vessels also—supposing the language used in its general import to be alike applicable to either. I consider the act of April 23, 1800 [2 Stat. 45], a more satisfactory key to the intent of the act of 1790, or if not legitimately operating as an exposition of the crimes act, yet as fixing with clearness and certainty the rule thereafter to be applied to public vessels. It harmonizes with the legislation in respect to the land forces, placing each under its own laws and

courts to such extent as the discretion of congress deemed proper. Offenders in the land forces in certain cases were to be delivered over to the courts of law for trial and punishment. A similar provision is contained in the English mutiny act (2 MacArthur, 229), without which it would seem to be thought that under the general authority to try all cases not capital, courts martial would have exclusive cognizance of that class of offences when committed in the army (1 Toml. Law Dict. 482; 2 MacArthur, 296). But no such direction or authority is incorporated in the naval code, and the design of congress therefore to give the entire jurisdiction over the offences enumerated to the naval courts martial would seem indubitable. In this connection the reasoning of the supreme court, in *U. S. v. Bevens*, has direct pertinency and force (3 Wheat. [16 U. S.] 336). That case was argued with great talent and fulness, and the opinion delivered by the court manifests that it was considered with deep attention.

The question before the court was solely as to the operation and meaning of the crimes act of 1790. The indictment was on the eighth section of that act, here also in question. The act was cautiously explored by the court to ascertain whether there was any provision within it authorizing a circuit court to try one indicted for murder on board a ship of war, within the territorial jurisdiction of the United States; and a leading inquiry was whether language in the crimes act which might embrace a ship of war should be applied to it. First, the court repudiates the signification claimed for the word "place" under the exclusive jurisdiction of the United States used in the act, as comprehending a ship of war. But then not satisfied with that conclusion upon the mere import of a word and phrase, draws from the act what must be regarded an adjudged conclusion by the court as to its language and meaning, that there was no provision in that act adapted to the punishment of crimes in the navy. The court assigns a reason in fact why it was omitted or postponed, and then adverts to the act of April 23, 1800 [2 Stat. 45], as fortifying the conclusion, because that statute specifically relating to offences in the navy, gives no jurisdiction to courts of law of any crime committed in a ship of war, wherever it may be stationed. Although this is not an authoritative adjudication upon the specific point now raised, yet as to the intention of congress as expressed in the act of 1790, and the design and effect of the act of 1800, it affords high and commanding evidence that congress has power to legislate specifically for the government and regulation of the navy and to place that government in courts martial to the exclusion of courts of law. Almost forty years have elapsed since this law was passed. In that period the navy has augmented in numbers and force, and has been in service in all quarters of the globe. No instance is produced in which, during that period and under circumstances so probable to give occasion for it, the jurisdiction of the courts of law has been applied to the trial of offences in the navy cognizable by naval courts martial. This fact is of commanding cogency to establish the common conviction of the executive, legislative, and judicial departments of government, that no such jurisdiction exists. The supreme court regard it as a circumstance of deserved weight in support of the constitutionality and validity of an act of congress, that there has been a uniform course of action, or a partial acquiescence for a long period of time in consonance with the power exercised under the act. [Stuart v. Laird] 1 Cranch [5 U. S.] 299; 11 Pet. [36 U. S.] 257.

In respect to the institution of the circuit courts, most of the judges when applied to by General Washington, on the first adoption of the judiciary act, gave their opinions that the act in that particular was not authorized by the constitution. 1 Story, Const. Law, 437,

479, note. Yet the supreme court, after the law had been in a course of execution and acquiesced in for less than 15 years, decided that it was too late to call its constitutionality in question. [Stuart v. Laird] 1 Cranch [5 U. S.] 299. Cases to this point may be largely multiplied, but I deem the labor unnecessary, and should regard it an exceedingly unadvised and hasty act in this court, after so long and notorious an execution of the act of 1800, to assume the authority to pronounce it unconstitutional and void as to any of its provisions.

The jurisdiction of courts martial over the subject matter within their cognizance, I regard to be absolute and exclusive. From the examination I have bestowed on this point, I am persuaded this is the result of the English authorities, but I do not introduce them here or comment on them, because if in that country the courts of general jurisdiction would retain their powers, unless expressly taken from them by act of parliament, and might thus have cognizance of cases also assigned to courts martial, as inferior courts, that principle does not apply to the organization of our judicatories. The circuit court is a special court and of statutory jurisdiction, in precisely the same sense as a court martial. The circuit courts have no residuary or general jurisdiction, and none whatever over subaltern courts, except it be bestowed by positive law. The case of *Houston v. Moore*, 5 Wheat. [18 U. S.], is clear to the point, that the jurisdiction of courts martial is exclusive and final as to matters submitted to such courts by act of congress. Serg. Const. Law, 130; Rawle, Const. 209; Opinion of Judge Kent, Case of Somers.

Gentlemen, I shall be able to condense with a few remarks, what I propose saying to you in respect to the operation and effect of the crimes acts of 1825 and 1835 on these questions. The naval code had been in force a quarter of a century as a distinct and independent system of jurisprudence over the offences assigned to its jurisdiction, when the act of 1825 was passed. The decision in the case of *U. S. v. Bevens* [supra] made in 1818, had indicated to the public what was the judicial acceptance of that code, and also as to the effect of the crimes act of 1790, in relation to offences in the navy. The presumption therefore would be of the most violent character, that if congress designed by either of the later statutes to interfere with this known and settled course of the law in this respect, that intent would be directly and plainly expressed; and that a mere re-enactment of any provisions of the statute of 1790 would not be designed to have an operation broader than they were known to have under the former act. It is to be farther observed that though the act of 1825 (section 4) denounces the crime of murder in the same language as is used in section 8 of the act of 1790, yet other offences are introduced into the former section not found in that of 1790—and the one is accordingly not a precise re-enactment of the other, nor to be regarded as supplanting the former law, or establishing a substantively new one. But what is still more pointed and direct, and becomes in my judgment conclusive on this point, is that in the only section of the act of 1825 (section 11) in which offences on board vessels of war, or in relation to vessels of war, are specifically mentioned, the authority of naval courts martial is expressly reserved.

In my opinion the effect of this evidence is not varied, if that proviso is understood as limited to that section only, for the body of the section demonstrates that if congress means its penal law shall apply to ships of war, those vessels will be specifically named, and imports furthermore that without being so named, they will not come within the range of legislation in respect to crimes, and the proviso affords direct and positive evidence that congress recognized the power of naval courts martial as an

existing jurisprudence over crimes of a general bearing and character, and affecting the public otherwise than merely in the preservation of discipline. To the same effect is the first section of the act of 1835, which provides for the punishment of mutiny or revolt, a crime denounced in the act of 1790, and in the naval code of 1800, for it repeals the punishment of death for the offence imposed by the act of 1790, commuting it to fine and imprisonment, and leaves the act of 1800, which inflicts the same punishment for the same offence, in full force.

Without pursuing the discussion farther, I state to you, gentlemen, that in my judgment, neither of the acts of 1825 or 1835 gives to this court jurisdiction over the crime of murder committed on board a ship of war, and triable before a naval court martial. Manslaughter is not named in the naval code as an offence punishable by court martial, and it is contended that there is therefore nothing to intercept the jurisdiction of this court, given by the crimes act over that offence.

It is a general principle governing prosecutions in courts martial as well as in criminal courts of law, that the court may convict the accused of a crime of less degree than that charged in the accusation, but not of a distinct crime. 12 Petersd. Abr. 591, note; 1 Toml. Law Dict. 483. This is the same rule that prevails at law (1 Chit. Cr. Law, 521), and accordingly on a charge of murder the accused may be acquitted of that and be convicted of manslaughter. Article 32 of the naval code provides that all crimes committed by persons belonging to the navy which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea. 3 Laws Bior. & D. 246 [1 Stat. 709]. Manslaughter falls within the general denomination of a crime. 4 Bl. Comm. 5. The thirty-second article is taken from the article in the rules of 1773, and is also in substance the same with the English article 36 (1 MacArthur, 336), except that the expression in the latter is "used at sea." Numerous offences of various grades were from an early day known and recognized as crimes according to the customs of the sea, and were proceeded against and punished under a species of common law made applicable to them. They were originally punished in the admiralty court alone, and subsequently by inquest and petit juries before the admiralty sessions. The latter method of proceeding is particularly illustrated in an ancient inquisition in the year 1376 (Clerke, Praxis, Adm.), and in Sir Lionel Jenkins' charge to a grand jury at the admiralty session (about) 1668. 1 Sir L. Jenkins' Works, 90. See, also, Black Book of the Admiralty; Zouch. Adm. 1-34; God. Adm. Jur. 26; Sea Laws, 195. Manslaughter is mentioned in the first document, but not in the second, as one of those offences punishable under the customs of the sea. The English naval articles no doubt had relation to those ancient customs (Sutton v. Johnstone, 1 Durn. & E. [1 Term R.] 784, 520, per Lord Mansfield), but it is unnecessary now to decide whether our code is to be understood to confer jurisdiction over offences by that name. The

article refers to that custom only for the measure of punishment, and not for the authority to try; and as it expressly gives jurisdiction over all offences committed in the navy, a defect or failure of authority to designate a punishment, might not affect the question of jurisdiction as between one court and another. But I think the true ground to place this point upon is, that the accused are charged with manslaughter in taking the life of a seaman belonging to the ship, in doing what they claim to be the exercise of their rightful authority and command on board of a vessel of war, and that no statute of the United States gives this court jurisdiction to inquire into and punish that offence. This point is not so clear in my mind as the others, but from the best consideration I am able to bestow on the subject, I am led to the conclusion that naval courts martial have jurisdiction to punish the offence of manslaughter committed at sea on board of ships of war.

Gentlemen, questions affecting the jurisdiction and rightful powers of courts of law are always of a delicate and embarrassing nature. The law imperiously demands of every tribunal that it shall employ all its rightful functions in the furtherance of public justice, and it no less emphatically forbids to it the usurpation of authority not clearly bestowed upon it by acts of congress. In its supreme power over all the subjects of criminal jurisprudence, the legislature is to be supposed to allot jurisdiction to one tribunal or another, or withhold it from all, in the exercise of a wise and just discretion, and so as most efficiently to subserve the ends of public justice and the protection of the citizen.

It belongs to no court to arrogate to itself a wisdom beyond that of the legislature in this respect; and in conducting the inquiry into what the law has ordained and established in this behalf, and with the facts before us, that the naval code, as a distinct system of jurisprudence under our laws, has been in force for nearly forty years, that thirty of the last years of that period have witnessed a large increase of the naval forces, and a vast scope of employment, and that the application of the naval code by means of courts martial has been constant and notorious to every department of the government,—that a quarter of a century since the highest judicatory of the land intimated and published its opinion that the general crimes act did not apply to offences committed on board ships of war,—and that congress since that period has legislated at large over felonies and offences at sea, without directly bringing vessels of war within that legislation, except where the authority of courts martial was also reserved,—and that throughout the time the events on board the Somers have most agitated the public attention, and when the civil authorities of this district openly declined to exercise jurisdiction over the case, congress continued in session without changing the law or acting upon the matter, I think we must all feel a deep conviction that this court ought not to be the first to assume such a jurisdiction, and arraign the parties accused on a matter touching their lives.

W.

WALKER (DIXON v.). See Case No. 18,291.
WASHINGTON, THE CITY OF. See Case No. 18,278.
WATERS (BIBBS v.). See Case No. 18,235.

WILMINGTON & R. R. CO. (HANCOCK v.). See Case No. 18,300.
WINDER (CALDWELL v.). See Case No. 18,245.
WYLIE (BALDWIN v.). See Case No. 18,228.



APPENDIX.

COMPRISING THE LAWS OF OLERON, THE LAWS OF WISBUY, THE LAWS OF THE HANSE TOWNS, AND THE MARINE ORDINANCES OF LOUIS XIV., MISCELLANEOUS MATTERS FROM THE APPENDICES OF THE UNITED STATES CIRCUIT AND DISTRICT COURT REPORTS AND BIBLIOGRAPHIC NOTES CONCERNING THE SAME, AND BIOGRAPHICAL NOTES OF THE FEDERAL JUDGES.

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THE LAWS OF OLERON.

[Reprinted from 1 Pet. Adm. Append. iii.]

This justly celebrated code was originally promulgated by Eleanor, Duchess of Guienne, the mother of Richard I. of England. Returning from the Holy Land, and familiar with the maritime regulations of the Archipelago, she enacted these laws at Oleron in Guienne, and they derive their title from the place of their publication. The language in which this collection of laws was originally clothed is that of Gascony, and their first object appears to have been the commercial operations of that part of France only.

By Richard I. of England, who inherited the dukedom of Guienne from his mother, this code was improved, and introduced into England. Some additions were made to it by King John, it was promulgated anew in the 50th year of Henry III., and received its ultimate confirmation in the 12th of Edward III.¹

England and France contend for the honour of having originated this system of laws; but we only notice this circumstance to introduce the observation, that it affords the strongest testimony of the value of the collection, and of the high respect in which it is held by the two greatest nations of the world. Indeed it forms the basis of the celebrated Ordinances of Lewis XIV. of France, and it is admitted as authority in the courts of common law, as well as the admiralty courts of England.

The translation now published is printed from the "Sea Laws," and the editor has carefully compared it with the copy published in French by Cleirac, in a work entitled "Les Us. et Coutumes de la Mer." He has not considered himself authorized to make any alterations in the text, but wherever a variance between the copies has been discovered, he has pointed it out, and he has given the words of the French copy, with a particular reference to the passage from which, in his opinion, they differ.

The "notes and illustrations," which are highly valuable, will be found by a reference to Cleirac, to have been principally abridged from his work, and, indeed, in some instances they are extracted verbatim. While an acknowledgment of the source from whence they were derived, would have been honourable to the candour of the compiler of the Sea Laws, these Commentaries would have obtained increased authority from the reputation and talents of their real author, who is justly estimated among the most distinguished jurists of France.

ARTICLE I.

When several joint owners make a man master of a ship or vessel, and the ship or vessel departing from her own port, arrives at Bordeaux, Rouen, or any other such place,

and is there freighted to sail for Scotland, or some other foreign country; the master in such case may not sell or dispose of that ship or vessel, without a special procuration² from the owners: but in case he wants money for the victualling,³ or other necessary provisions of the said vessel, he may for that end, with the advice of his mariners, pawn or pledge part of the tackle or furniture of a ship.

Observation.

The title of master is so honourable, and the command of a ship of such importance, that great care has been taken by all maritime nations, that none may be employed but honest and experienced men. By an ordinance of the admiralty in France, A. D. 1584, every master of a ship before he took upon him that trust, was to be examined whether he was fit for it. The Spanish naval laws require the same thing: El maestro de la nave, para serlo, ha de ser marinero y examinado. Cedula real del Anno 1576. Impresa con las de Indias quarto tomo. The ordinances and regulations of the Hanse Towns, do not only demand experience and capacity, but honesty and good manners. And none was to be admitted into the service of any citizen aboard his ship, without a certificate of his qualifications, as to his honesty and capacity. See their Book of Ordinances, book 6, art. 1.

The Greeks called the master of a ship Πιστόν, *cujus fidei navis concreditur*, to whom the government of the ship is entrusted; but so, that the master cannot sell the ship itself, nor any of her tackle or furniture, without the order or consent of the owners. However, in case of necessity, when he is in a far country, he may pawn or pledge her tackle for provisions, and if that will not do, he may borrow money on the ship's bottom, though not without the consent of his officers and seamen. According to the Ordinances of Wisbuy, arts. 13, 15, and Philip II. King of Spain's Ordinances in the year 1563, art. 12. Those of the Hanse Towns forbid a master of a ship, notwithstanding he is part owner, not only to sell, but to do any thing, even to buy tackle or victuals, without acquainting the other owners of it, unless it be in a strange country, and in a case of necessity, well and lawfully attested. Articles 3-5 et seq.

By the ordinances and customs of the sea, it appears, that formerly it was not thought safe to entrust a master of a ship with the vessel

² In the copy of the Roll d'Oleron, published by Cleirac, in the original French, the words are, "procuracion ou mandement spécial."

³ "Pour les dépens," in Cleirac's copy.—E.

¹ 2 Brown, Civ. & Adm. Law, 40.

and cargo, unless he was a freeman of that city, and part-owner of the ship; and if he was part-owner, when he had betrayed or abused his trust, the other owners might turn him out of the ship, paying him what his part of her came to at the same price he gave for it. See Ordinances of the Hanse Towns, art. 14. And if he pretended he had sold his part to another person for more than it was worth, the other owners might have it appraised, and take it to themselves, paying him what it was valued at by such appraisement. Article 53.

The master commonly took care of every thing belonging to the ship, from the poop to the mainmast. He was obliged to understand the art of piloting and navigation, that he might know how to control the pilot, and mind how he steers the ship, y si el maestre no fuere piloto es obligado a vevar un marinere diestro en la navegacion, tel' que, pueda regir la nave a fala de piloto, according to the ordinances of Spain. The mate's command reached from the stern to the mizzenmast, the latter included. It will not be thought improper by the curious to mention here the several officers of a ship, either men of war, or merchantmen, as they were distinguished aboard, a century of years ago.

In royal navies the first officer was the admiral; then the vice-admiral, then the captain-major or chief of a squadron. In every man of war, the first officer was the captain, the second the pilot, who enjoyed that place in honour of the sciences he professed and practised; next to him was the master, who had the charge of the tackle and furniture, and then the captain, and lieutenant of the soldiers. In a merchantman the first officer was the master, the second the pilot, the third the mate, the fourth the factor, or supercargo; then his assistant, accomptants, the surgeons, the steward, four corporals, the cook, the gunner, the cockswain; the gunner and cockswain used to work before the mast, as well as the rest of the ship's crew, but their wages were more. There is a great deal of difference between the order of precedency on board of a ship now, and what was formerly: for the captain and lieutenant of the soldiers would think it very hard to give place to the pilot and master of a ship; and the factor, or supercargo, will as difficultly be persuaded to own the master of a vessel's superiority, except in what relates to the navigating the ship.

ART. II.

If a ship or other vessel be in a port, waiting for weather, and a wind to depart, the master ought when that comes, before his departure to consult his company, and say to them, Gentlemen, what think you of this wind? If any of them see that it is not settled, and advise him to stay until it is, and others, on the contrary, would have him make use of it as fair, he ought to follow the advice of the major part: If he does otherwise, and the vessel happens to miscarry, he shall be obliged to make good the same, according to the value upon a just appraisement.⁴

Observation.

It is a maxim, or general sea law, that a master of a ship shall never sail out of a port, never weigh or drop anchor, cut masts or cable, or indeed do any thing of consequence, let him be in whatever danger may happen, without the advice of the major part of his company, and the merchants, if there be any aboard.—He must call all together to consult. Wisbuy, art. 14.

⁴ "Ou la somme qu'elle sera prisée." Cleirac. —E.

ART. III.

If any vessel, through misfortune, happens to be cast away, in whatsoever place it be, the mariners shall be obliged to use their best endeavours for saving as much of the ship and lading as possibly they can: and if they preserve part thereof, the master shall allow them a reasonable consideration to carry them home to their own country.⁵ And in case they save enough to enable the master to do this, he may lawfully pledge to some honest persons such part thereof as may be sufficient for that occasion. But if they have not endeavoured to save as aforesaid, then the master shall not be bound to provide for them in any thing, but ought to keep them in safe custody, until he knows the pleasure of the owners, in which he may act—as becomes a prudent master; for if he does otherwise, he shall be obliged to make satisfaction.

Observation.

The ship's crew are obliged to do all that lies in their power to save things from shipwreck, and gather up what they save, on pain of losing their wages; and those that hinder or dissuade them from it, shall be severely punished. This law is very well explained by an ordinance of King Philip II. of Spain, in the year 1563, by which it is ordained, that the seamen shall be bound to save as much as they can from shipwreck; and in such case, the master is bound to pay them their wages, and to give them a further reward for their labour out of the goods. But if the seamen refuse to do their endeavor to save the goods, they shall neither have pay nor reward. Hanse Towns Ord. art. 44; Wisbuy, art. 15.

ART. IV.

If a vessel departing with her lading from Bordeaux, or any other place, happens in the course of her voyage, to be rendered unfit to proceed therein, and the mariners save as much of the lading as possibly they can; if the merchants require their goods of the master, he may deliver them if he pleases, they paying the freight in proportion to the part of the voyage that is performed, and the costs of the salvage. But if the master can readily repair his vessel, he may do it; or if he pleases, he may freight another ship to perform his voyage. And if he has promised the people who helped him to save the ship the third, or the half part of the goods saved for the danger they ran, the judicatures of the country should consider the pains and trouble they have been at, and reward them accordingly, without any regard to the promises made them by the parties concerned in the time of their distress.

Observation.

This law does not relate to an entire loss, but only to salvage, or rather not to the shipwreck, but to the disabling of a ship, so that she cannot proceed in her voyage without refitting. In which case the merchants may have their goods again, paying the freight in

⁵ "Le maître est tenu de leur bailler salaire raisonnable pour venir en leurs terres." Cleirac.

proportion to the way the ship made. If the merchant has not money to pay the freight, and the master will not credit, the latter may take his goods in payment at the market price. Wisbuy, art 33; Emperor Charles V. Ordinance, art. 40.

If the master can in a little time refit his vessel, and render her fit to continue her voyage, that is, if he can do it in 3 days' time at the most, according to the Hanse Town Laws; or if he will himself take freight for the merchandize aboard another ship bound for the same port to which he was bound, he may do it; and if the accident did not happen to him by any fault of his, the freight shall be paid him. *Leges Rhodior.* Numb. 42, secundo & ultimo *tomo juris Græco-Romani in fine*; Wisbuy, arts. 16, 37, 55; King Philip II. of Spain's Ordinance, under the head of "Averages," art. 30.

As for the charges of salvage, there are very great allowances made to the salvors, *lege Rhodior.* secundo *tomo juris Græco-Romani* Nos. 45, 47; *Hermopolis in Promptuario Juris*, lib. 2, tit. 6. By this law there was adjudged to the divers and salvors, the half, the third or the tenth of the things saved, and that according to the depth of the water out of which they were fished, fifteen, eight or one fathom; as also a tenth part for salvage on the coast, and the fifth to him that saving himself, carries and saves something with him. The promises that are extorted in danger on this account, ought always to be regulated according to justice, with reason and proportion, without keeping to the expressions of such promises; for this there are several laws in France, and an instance of it is thus recorded. A gentleman named La Mothe, embarked at St. Machaire with two horses in a boat, going for Bordeaux; as they were in their passage, one of the horses grew furious, and leaped overboard. La Mothe held him by the bridle; the horse splashed the water up in his face, and the gentleman pulling his handkerchief out of his pocket to wipe it off, at the same time pulled out a purse that had thirty pistoles in it, which fell into the water. The boatmen came, and La Mothe desired them to take notice of the place, by observing the trees and buildings that were near it, and when the tide was out, to seek after the purse; promising if they found it, to give them a pistole for their pains. The boatmen excused themselves; nevertheless, when they had put La Mothe and his horses ashore, they went to look for the pistoles when it was low water, and one of them found them where they were dropt. His companions demanded their share of them, but he who had the good fortune to find the purse, would not let them have any of the gold, and there was a law-suit about dividing it, before the judge of St. Machaire. Monsieur La Mothe hearing of it, came thither and put in his claim to the purse and pistoles; but the judge gave it against him. He then appealed to the seneschal of Guienne's court, but with no better success; at last he appealed to the parliament of Bordeaux, and that court decreed, he should have his pistoles, but should pay 60 livres to the boatmen for their pains and trouble.

ART. V.

If a vessel departing from one port, laden or empty, arrives at another, the mariners shall not leave the ship without the master's consent: if they do, and by that means she happens to be lost or damaged, they shall be answerable for the damage; but if the vessel be moored, and lying at anchor, with a sufficient number of men aboard to keep the decks and lading, they may go without the master's consent, if they come back in

good time; otherwise they shall be liable to make satisfaction, if they have wherewithal.

Observation.

This article relating to seamen, it will not be unacceptable to the reader to observe what other customs and ordinances we have met with concerning them.

Mariners are obliged to look carefully after every thing that relates to the preservation of the ship and goods. *Consolato*, c. 169; Wisbuy, art. 47. For which reason, they ought not to go ashore and leave the vessel, without the master or mate's permission: if they do, they are bound to answer all the damages that happen to the ship or merchandize in their absence. Wisbuy, art. 17. The emperor Charles V.'s Ordinance in the year 1552, arts. 9 and 10, conformable to the Rhodian Law, secundo *tomo juris Græco-Romani*, Num. 20. The Regulations of the Hanse Towns, art. 40, ordain, that if any seaman goes ashore without license, and if in his absence the ship happens to be lost for want of hands, the seaman thus absent shall be apprehended, and kept a year in prison on bread and water; and if any one should be killed or drowned in his absence, and that be the cause of it, he shall be corporally punished. The same ordinances condemn those mariners that lie out of their ship all night, to pay all the damage that shall happen while they are absent. Those of the Hanse Towns, arts. 22, 23, add imprisonment. Some laws forbid them to undress themselves, and the Hanse Towns, art. 32, to lie with their wives aboard. The reason is, that they may always be ready to assist their fellows in the discharge of their duty in the preservation of the ship and goods. The obligation of the mariner to the master, begins as soon as he is hired and terms are agreed; and ends when the voyage is finished, and they are returned. The obligation of the mariner to the merchant is from the beginning of his charge, and the mariner is obliged to stow and un-stow the goods, according as the place they are in is commodious or not, to keep them from damaging, and promote or hinder the ship's trimming; and if by their refusing to do so, the merchandize is damaged or spoiled, they are bound to make the damage good. Wisbuy, art. 48; Philip II. art. 19. By the laws of Wisbuy, they are also bound to unlade some goods with the shovel, and some to hand ashore; for which they are to have no extraordinary allowance; but for letting things up or down, they are by the same laws to be allowed something extraordinary, that is above their wages. The laws are very severe against those seamen that run away from ships after they are hired. In men of war, desertion is punished with death; in merchantmen, by the Hanseatic laws, or those of the Hanse Towns, they are to be marked in the face with a red hot iron, that they may be known, and be infamous as long as they live. If the mariner runs away before the voyage, when he is taken, he ought to refund half as much as the master was to have paid him for the whole voyage. If he hires himself to two masters, the first may demand him, and by the Hanseatic law, art. 1, he is not bound to pay him any wages. Provision is made for such seamen as run away, only because the master has used them ill. By the same laws, if any master entices away a mariner hired before by another, the last master shall forfeit to the first 25 livres, and the mariner, half the wages he was to have had of the master that so enticed him. That master who knowingly hires a mariner who was hired before, shall pay double the wages he was to pay the mariner, and the latter be bound to follow and serve the first master. However, a mariner may demand, and ought to have his discharge, either before or during the voyage, for these

four reasons: in case he is made master or mate of another ship; if he marries, and then he is obliged to refund what he has received; if he made any provision in his bargain for quitting the ship; if the voyage is finished, the ship disarmed, unloaded and light, the sails, tackle and furniture taken away and secured. See Laws Wisbuy, arts. 54, 63.

If the master gives a mariner his discharge, without any lawful cause, and for his pleasure only; in case he does it before the voyage, and while the ship is in port, he ought to pay half as much as he was to give him for the whole voyage; but if he discharges him after the ship is sailed, he ought to pay him all his wages. Wisbuy, art. 111.

By the Hanseatic law, the master is to pay a third of the wages only, and not to bring it to his owners' account. He is obliged also to pay him not only all his wages, if he discharges him in his voyage, but to defray the charges of his return. If after a bargain is made between the master and mariner, if the voyage happens to be hindered by war or pirates, or any other lawful account, the mariner, according to King Philip's Laws, art. 9, shall have a quarter part of the wages that were promised him for the voyage; and the master by a French law shall have half the freight. A master may turn off a mariner if he finds he is ignorant in maritime affairs, and incapable to perform the voyage, particularly a pilot, to whom in such cases he is not bound to pay any wages, and at his return may have him punished for his rashness, according to King Philip's and the Hanseatic laws. If it happens that the master finds out the pilot or mariner's ignorance when he cannot discharge them, they shall be obliged at their return to refund all the money he had advanced to them, and pay the master besides half what he had promised them: but if the pilot declares first he is dubious, and cannot depend on his knowledge, that he is out of the way, and does not very well understand his business; if it is when he is outward bound, he shall be paid half what was promised him; if homeward bound, all. If the master finds that any officer or seaman aboard his ship has any infectious distemper that is dangerous, he may put him ashore at the first place he comes to, without paying him any thing; but then he must prove it by two or three witnesses. He may also turn away any thieving mariner, or any quarrelsome or factious fellow; but as to the latter, he should have a little patience, to see if he can be brought to reason. Vide Hanseatics, art. 29; Laws of Wisbuy, art. 25.

ART. VI.

If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarrelling among themselves, whereby some happen to be wounded: in this case the master shall not be obliged to get them cured, or in any thing to provide for them, but may turn them and their accomplices out of the ship; and if they make words of it, they are bound to pay the master besides: but if by the master's orders and commands any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the costs and charges of the said ship.⁶

⁶ "Ils doivent être guéris & pansés sur le coût de ladite nef." Cleirac, 15.—E.

Observation.

By the Laws of Wisbuy, art. 18, those mariners that are mutinous and quarrelsome, are obliged to refund all they have received, and pay besides what the master is forced to give to others whom he hires in their places above the wages he was to give them.

The Laws of Charles V. art. 23 et seq., ordain certain punishments, according to the heinousness of the offences and crimes committed by seamen. If the mariners are wounded, or any wise hurt in serving the master of the ship, they shall be cured, taken care of, and indemnified at the charge of the ship. Wisbuy, art. 18; Hanseatics, art. 39; Charles V. arts. 27, 28; Philip II. art. 16. If mariners are taken by corsairs in his, and his ship's service, the master is bound to redeem them, and besides that, to pay them their wages, during their captivity, as much as if they had all that time been in his service. This law is in the Consulat, c. 182. If in defending himself, or fighting against an enemy or corsairs, a mariner is maimed, or disabled to serve on board a ship for the rest of his life, besides the charge of his cure, he shall be maintained as long as he lives at the cost of the ship and cargo. Vide the Hanseatic Law, art. 35. An instance of this is told by our author.

In the year 1621, Giles Esteben, a citizen and merchant of Bordeaux loaded a vessel of 36 tuns with wine for Calais, and gave the charge of the cargo to one Fiton his servant. The vessel set sail, and when she was at sea met with a Turkish rover. The corsair came up with her, and took her, but did not meddle with the vessel or the wine, either because the Alcoran forbids the Mahometans to drink or deal in wine, or because he held intelligence with the master of the vessel, who was a Scotchman; for he did him nor any of his crew no manner of hurt, but took away Fiton and sold him in Barbary for a slave. He remained there four years and a half in great misery and poverty; at last he was redeemed by alms in the year 1625, and paid for his ransom 780 livres. Fiton returning to Bordeaux, found that his master Esteben was dead; however, he entered an action in an inferior court against the widow, for his wages, as well for the time he was detained in slavery, as for that before his captivity, as also for the reimbursement of his ransom money, his losses and interest. The widow removed the suit to the higher courts, and from thence it came before the parliament, who decreed, that the widow should pay Fiton 1000 livres in full for his wages, redemption, expenses, loss and interest.

ART. VII.

If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him, and also to spare him one of the ship-boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship; that is to say, so much as he had on shipboard in his health, and nothing more, unless it please the master to allow it him; and if he will have better diet, the master shall not be bound to provide it for him, unless it be at the mariner's own cost and charges; and if the vessel be ready for her departure, she ought not to stay for the said sick party⁷—but if he recover, he ought to

⁷ "Et s'il guerit il doit avoir son loyer tout comptant, en rabattant les frais, si le maitre lui en a fait, et s'il meurt, sa femme et ses prochains le doivent avoir pour lui. Voyez le

have his full wages, deducting only such charges as the master has been at for him. And if he dies, his wife or next kin shall have it.

Observation.

The nineteenth article of the Laws of Wisbuy, the forty-fifth of the Hanseatic law, the twenty-seventh of Charles V., and the sixteenth of Philip II., which he compiled for the Low Countries, were all founded upon this law of Oleron, in what relates to a sick mariner, and agree exactly with it, both if he recovers his health, or dies in the voyage. The Spaniards have another custom in the West India voyages; for in case a mariner falls sick, he must substitute another in his place, otherwise he loses all his wages for the time in which he could not work. By the Hanseatic law, art. 45, if a mariner is detained ashore by sickness, the voyage ought not to be retarded on his account. By Charles V.'s ordinances, if the mariner dies as he is outward-bound, his wife and heirs shall receive half his pay: if as he is homeward-bound, they shall have all, deducting the charge of his funeral, if there has been any. In ships of war the custom in some places has been more favourable to sailors; for we find in a treatise written by Francis Pyrrard de Lalval, entitled, "Advis pour aller aux Indes Orientales," that if a man died the first day of the voyage, his heirs were to be paid as much as if he had completed it.

ART. VIII.

If a vessel be laden to sail from Bordeaux to Caen, or any other place, and it happens that a storm overtakes her at sea, so violent, that she cannot escape without casting some of the cargo overboard for lightening the vessel, and preserving the rest of the lading, as well as the vessel itself; then the master ought to say, "Gentlemen, we must throw part of the goods overboard"; and, if there are no merchants to answer him, or if those that are there approve of what he says by their silence, then the master may do as he thinks fit; and if the merchants are not pleased with his throwing over any part of the merchandize, and forbid him, yet the master ought not to forbear casting out so many of the goods as he shall see to be for the common good and safety; he and the third part of his mariners making oath on the Holy Evangelists, when they arrive at their port of discharge, that he did it only for the preservation of the vessel, and the rest of the lading that remains yet in her. And the wines, or other goods, that were cast overboard, ought to be valued or prized according to the just value of the other goods that arrive in safety. And when these shall be sold, the price or value thereof ought to be divided livre a livre among the merchants. The master may compute the damage his vessel has sustained, or reckon the freight of the goods thrown overboard at his own choice. If the master does not make it appear that he and his men did the part of able seamen, then neither he nor

tit. 6 de l'Ordonnance de 1681. Au surplus les malades sont mis a l'hôpital, & traités aux dépens du navir tant que dure le voyage." Cleirac, 17.—E.

they shall have anything. The mariners also ought to have one tun free,^s and another divided by cast of the dice, according as it shall happen, and the merchants in this case may lawfully put the master to his oath.

Observation.

Of two evils, to choose the least is the law of nature as well as of nations; and when a ship is in danger of perishing, the lives of the seamen, and the safety of the rest of the cargo make the throwing part of it overboard the least evil. But that the master's ignorance or fear might not hurry him to do any thing to the detriment of the merchant, without good grounds for it, he must consult the merchants, passengers, or mariners aboard his ship, and, according as the necessity of it appears to them, to throw the goods overboard. This he is warranted to do by the Rhodian Law. Secundo Tomo Juris Græco-Romani, Num. 9, and by 20th, 21st, and 38th articles of that of Wisbuy. The 20th and 38th articles provide also, that if the merchants alone are against the proposition of throwing the merchandize overboard, and the rest, who have their lives and goods also to lose, consent to it, the master and third part of the seamen purging themselves as soon as they come ashore by oath, that necessity forced them to do it, and that otherwise they could not have been saved, may do it, and shall then be justified for what they did. The master is not obliged, when he comes to this extremity, to throw his own goods overboard first. The custom of the Levant is, the traveller or merchant first flings out something of his own. Philip the Second's Ordinances, under the title of Avarages, require, that the ship's utensils should be first thrown overboard, such as old cables, firewood, anchors and guns, which weigh heavy, and are not of the greatest service; then the chests belonging to the ship's crew, as being of the least value. All those things which are thrown overboard come into an average, except those that belong to the sovereign.

By the thirty-eighth article of the Laws of Wisbuy, the clerk of the ship ought to register all the goods that are thrown overboard; and if there is no clerk aboard, it is convenient for the mariners to make attestation of them at the first port they come to.

By the Rhodian Laws, the goods that are damaged by the storm come into an average. By the same laws, if the master, by overloading his ship, is the occasion of the goods being thrown overboard, he shall make good the damage. The Laws of Wisbuy, art. 46, except, in this case, those goods which were so laden with the consent of the merchant. If the master has let out more freight than he has stowage for, he must not therefore overload his own ship, but by the Consolato is bound to find freight for them in another. If the merchants, passengers or mariners have any plate or other precious goods in their chests or cabinets, they ought to inform the master and clerk of it; otherwise their chests will not be liable to any average for any thing more than what is known to be within them. Persons never are reckoned in an average, but all sorts of goods whatsoever. Victuals belonging to the ship are exempted from the laws for throwing goods overboard, and privileged from paying contributions in averages. Seamen's wages are not liable to averages. By the Hanseatic Law, art. 28, these wages ought to be paid by three payments, a third part before the ship goes out of the port, a third part when she is unladen, and a third part at her return.

By the Rhodian Law, the sailors ought to have

^s "Et pour recouvrer le dommage, les mariners doivent avoir un tonneau franc." Cleirac, p. 18.—E.

a ton freight free from contributions in averages, when goods are thrown overboard. To explain this it will be necessary to observe—that sailors were used to hire themselves out for a voyage for several considerations; some had a certain sum of money for the whole voyage, or so much a month, or so much a day; others hired themselves for such a proportion of the freight, or a liberty to load so much goods aboard, or let out so much freight to others. But the most common way, and the best of hiring themselves, was for part in wages, and part in freight, either for themselves or to let out. Those seamen who had wages only, contributed nothing to the average for goods thrown overboard. Those who had goods contributed, unless those goods were bought with their wages, and they had only one ton exempted. The merchants who hired their freight of them had the same privilege by it as themselves.

Having had occasion to make mention of *livre a livre*, an explanation of it will not be unacceptable to the reader. The civilians consider every thing as one whole; as for example, an inheritance composed of several parts, makes together one whole or mass of inheritance, of whatever importance it may be, great or small, as if the whole of his inheritance made one *livre*, one pound, as *hereditatis*. This pound divided into twelve equal parts, is named ounces. The merchants and masters of ships, in case of averages for goods thrown overboard, or damaged in storms, have the same view; that is, they consider the ship and cargo together as one pound, and the goods lost or damaged as another; so that he who had a tenth in the pound of the cargo, a fifteenth, or any other share, must carry a tenth, a fifteenth, or any other share to the pound of the average; and this proportion of one pound to another, is what is called by the French naval laws, "*livre a livre*," pound to pound.

ART. IX.

If it happen, that by reason of much foul weather the master is like to be constrained to cut his masts, he ought first to call the merchants, if there be any aboard the ship, and such as have goods and merchandize in the vessel, and to consult them, saying, "Sirs, it is requisite to cut down the mast to save the ship and lading, it being in this case my duty." And frequently they also cut their mooring cables, leaving behind them their cables and anchors to save the ship and her lading; all which things are reckoned and computed *livre by livre*, as the goods are that were cast overboard. And when the vessel arrives in safety at her port of discharge, the merchants ought to pay the master their shares or proportions without delay, or sell or pawn the goods and employ the money he raises to satisfy by it the same, before the said goods be unladen out of the said ship: but if he lets them go, and there happens controversies and debates touching the premises, if the master observes collusion therein, he ought not to suffer, but is to have his complete freight, as well for what goods were thrown overboard, as for what he brought home.⁹

Observation.

No merchant is obliged to pay average for goods thrown overboard, unless the master can prove he did it for the safety of his own and

⁹ "Ains doit avoir son fret, comme si les tonneaux fussent p ris." Cleirac, 24.

his men's lives, and the preservation of the ship and the rest of her cargo. What loss happens by accidents, breaking the masts, or burning the sails, or pirates taking part of the goods, shall not come into the common average. By the Rhodian Laws, every merchant shall bear his own loss, and the master shall do the same. See also the twelfth article of the Laws of Wisbuy. Averages are by that to be paid for damages done *ad intra*, and not for those *ad extra*; therefore the master and mariners are obliged to purge themselves by oath, how the damage came, in the first court of admiralty they come to, and that it was done in very great necessity. Indeed if pirates take the ship and cargo entire, and both are redeemed for a sum of money, the average for that shall be common, and all the concerned shall pay contribution. If the merchants and passengers aboard the ship desire the master to put into any port out of his way for fear of pirates, and in going out of that port he loses anchors or cables, those who desired him to put in there shall pay for them, and the ship ought not to pay anything toward that loss. After a general shipwreck there is no average or common contribution, but save who save can, as is vulgarly said on this occasion. If any goods that were thrown overboard in a storm, to lighten the ship, happen to be recovered, the owner of them ought to restore what he had recovered for damages by average, to those that paid him, deducting for the loss he may be at by his merchandize being damaged. The Rhodian Law enjoins this.

ART. X.

The master of a ship, when he lets her out to freight to the merchants, ought to shew them his cordage, ropes, and slings, with which the goods are to be hoisted aboard or ashore; and if they find they need mending, he ought to mend them; for if a pipe, hogshead or other vessel, should happen by default of such cordage or slings to be spoiled or lost, the master and mariners ought to make satisfaction for the same to the merchants.¹⁰ So also if the ropes or slings break, the master not shewing them beforehand to the merchants, he is obliged to make good the damage. But if the merchants say the cordage, ropes or slings are good and sufficient, and notwithstanding it happens that they break, in that case they ought to divide the damage between them; that is to say, the merchant to whom such goods belong, and the said master with his mariners.

Observation.

By the twelfth article of the Laws of Wisbuy, and the seventh of King Philip's, the master when he lets his ship out to freight, is

¹⁰ The following important passage has been omitted in the translation of this article: "Et si doit le ma tre payer selon qu'il doit prendre du guindage, et doit le salaire du guindage  tre mis   recouvrer le dommage, et le rest ou surplus doit  tre d parti entr'eux." Cleirac, p. 26.

In France the owners of ships receiving freight, are not obliged to pay the expenses of loading or unloading, but they form a separate charge against the owners of the cargo. The passage above quoted authorizes a deduction from this charge, of the value of any article lost or injured from the negligence of the master to furnish proper cordage, &c. If this charge is not sufficient to compensate for the loss, the master and mariners are to make up the difference.—B.

bound to shew her to the merchants or their agents. The Consolato requires the same, and that the master should let the merchants visit not only the ropes, but all the ship above decks and below, that they may see what is wanting, and have it mended; and if it is not mended, and the merchandize is damnified, the master shall make good the loss. The forty-ninth article of the Laws of Wisbuy enjoins the mariners to give the master notice of the faults and defects in the cordage; otherwise they shall be responsible for all accidents that may happen; and if after such notice given, the master does not take care to have them mended, he shall answer the damage out of his own pocket.

The Rhodian Laws Secundo Tomo Juris Græco-Romani, Num. 11, wills and ordains, that the merchant who loads a ship, shall inform himself exactly of every thing, "Diligenter interrogare debet mercatores qui prius in ea navi navigaverunt." The law says he should enquire of those that have sailed in her before; but that is of little use, except as to her sailing, for ships grow daily more and more out of repair, and should be always viewed by the person that is going to be concerned in them, without trusting to the information of others.

ART. XI.

If a vessel being laden at Bordeaux with wines, or other goods, hoists sail to carry them to some other port, and the master does not do his duty as he ought, nor the mariners handle their sails, and it happens that ill weather overtakes them at sea; so that the main yard shakes or strikes out the head of one of the pipes or hogsheds of wine; this vessel being safely arrived at her port of discharge, if the merchant alleges, that by reason of the main yard his wine was lost; and the master denies it: In this case the master and his mariners ought to make oath (whether it be four or six of them, such as the merchant hath no exception against) that the wine perished not by the main yard, nor through any default of theirs, as the merchants charge them, they ought then to be acquitted thereof; but if they refuse to make oath to the effect aforesaid, they shall be obliged to make satisfaction for the same, because they ought to have ordered their sails aright before they departed from the port, where they took in their lading.

Observation.

This article is explained by the 23d of the Laws of Wisbuy, which ordains, that if the cargo is ill stowed, and the ship ill trimmed, and the mariners do not manage their sails rightly, and any damage happens by it to the ship or goods, they shall be responsible for the damages as far as they have wherewithal to do it with. There were formerly, in several ports of Guyenne certain officers called "arrameurs" or stowers, who were master-carpenters by profession, and were paid by the merchants, who loaded the ship. Their business was to dispose right, and stow closely all goods in casks, bales, boxes, bundles or otherwise; to balance both sides, to fill up the vacant spaces, and manage every thing to the best advantage. It was not but that the greatest part of the ship's crew understood this as well as these stowers; but they would not meddle with it, nor undertake it, to avoid falling under the merchant's displeasure, or being accountable for any ill accident that might happen by that means. There were also sacquiers, who were very ancient officers, as may be seen in the 14th book of the

Theodosian Code, Unica de Saccariis Portus Romæ, lib. 14. Their business was to load and unload vesels loaden with salt, corn, or fish, to prevent the ship's crew defrauding the merchant by false tale, or cheating him of his merchandize otherwise.

ART. XII.

A master, having hired his mariners, ought to keep the peace betwixt them, and to be as their judge at sea; so that if there be any of them that gives another the lie, whilst they have wine and bread on the table, he ought to pay four deniers; and if the master himself give any the lie, he ought to pay eight deniers; and if any of the mariners impudently contradict the master, he also ought to pay eight deniers; and if the master strike any of the mariners, he ought to bear with the first stroke, be it with the fist or open hand; but if the master strikes him more than one blow, the mariner may defend himself: but if the said mariner doth first assault the master, he ought to pay five sols, or lose his hand.

Observation.

The law restrains the correction of the master to one blow with his fist, which the mariner ought to bear, and no more. The Consulate, c. 16, explains how far the mariner is bound to suffer his master's assaulting him, in these terms: "The mariner is obliged to obey his master, though he should call him ill names, and is enraged against him, he ought to keep out of his sight, or hide himself in the prow of the ship; if the master follows him, he ought to fly to some other place from him; and if he still follows him, then the mariner may stand upon his defence, demanding witnesses how he was pursued by the master; for the master ought not to pass into the prow after him."

The twenty-fourth article of the Laws of Wisbuy punishes the giving the lie. The same article is very severe against the mariner that strikes the master. The mariner that strikes, or lifts up arms against his master, was to lose half his hand in a very painful way. If the mariner has committed a crime too great for the master's authority to punish, then the master and his officers ought to seize the criminal, put him in irons, and bring him to justice at his return.

ART. XIII.

If a difference happens between the master of a ship, and one of his mariners, the master ought to deny him his mess thrice, ere he turn him out of the ship, or discharge him thereof: but if the said mariner offer, in the presence of the rest of the mariners, to make the master satisfaction, and the master be resolved to accept of no satisfaction from him, but to put him out of the ship; in such case the said mariner may follow the said vessel to her port of discharge, and ought to have as good hire or wages, as if he had come in the ship, or as if he had made satisfaction for his fault in the sight and presence of the ship's company; and if the master take not another mariner into the ship in his stead, as able as the other, and the ship or lading happens thereby to be, through any misfortune, damnified, the master shall be obliged to make good the same, if he hath wherewithal.

Observation.

To deny him his mess, is, in the original, *oter la touaille*, an old Gascon phrase, which signifies to deny him the table-cloth or victuals for three meals; by which is understood a day and a half. The Wisbuy Law, art. 25, provides for the master's making satisfaction for the damages that may happen through the want of the mariner he turns off. And the Laws of the Hanse Towns, art. 27, require the master not to give the seamen any cause to mutiny; not to provoke them, call them names, wrong them, nor keep any thing from them that is theirs; but to use them well, and pay them honestly what is their due. Some French laws ordain, that no mariner should be admitted under 18 years, nor above 50. The choice of the crew is entirely in the master: the reason is, that he ought to be himself very well assured of his seamen's ability, and not take it upon trust by report of others.

ART. XIV.

If a vessel, being moored, lying at anchor, be struck or grappled with another vessel under sail, that is not very well steered, whereby the vessel at anchor is prejudiced, as also wines, or other merchandize in each of the said ships damaged. In this case the whole damage shall be in common, and be equally divided and appraised half by half;¹¹ and the master and mariners of the vessel that struck or grappled with the other, shall be bound to swear on the Holy Evangelists, that they did it not willingly or wilfully. The reason why this judgment was first given, being, that an old decayed vessel might not purposely be put in the way of a better, which will the rather be prevented when they know that the damage must be divided.

Observation.

This law agrees exactly with the 26th, 50th, 67th, and 70th articles of the Ordinances of Wisbuy. The dividing the loss in halves, is, to prevent any cheat; for an old vessel that's worth little or nothing, might else be put in a new one's way: and if she runs against her, more damages be pretended, than the old ship might fairly be valued at.

ART. XV.

Suppose two or more vessels in a harbour, where there is but little water, so that the anchor of one of the vessels lie dry; the master of the other vessel ought, in that case, to say unto him whose anchor lies dry: "Master, take up your anchor, for it is too nigh us, and may do us a prejudice;" if neither the said master nor his mariners will take up the said anchor accordingly, then may that other master and his mariners (who might be otherwise thereby damaged) take up the said anchor, and let it down at a farther distance from them; and if the others oppose or withstand the taking up of their anchor, and there afterwards happens damage thereby, they shall be bound to give full satisfaction for the same: but if they put out a buoy or anchor-mark, and the anchor does any damage, the master and mariners to whom it belongs are not

bound to make it good; if they do not, they are; for all masters and mariners ought to fasten such buoys or anchor-marks, and such cables to their anchors, as may plainly appear and be seen at full sea.

Observation.

The 28th and 51st articles of the Ordinances of Wisbuy, require masters to put out buoys to warn others where their anchors lie, on pain of making satisfaction for whatever damage may happen for want of them: for anchors hid under water, may do a great deal of mischief at ebb and low water. If any master spies them, and they lie near him, he may remove them, and prevent any damage coming to his ship. *Harmenopus in promptuario titulo de rebus nauticis, licet in discrimen adductis, qui se aliter explicare non possunt, alterius navis anchoras salutis sue causa præcidere.* The buoys that are made use of, are either empty barrels, or pieces of the trunk of a tree, or any other light wood with baskets that swim on the top of the water, and shews where the anchors lie.

ART. XVI.

When a ship arrives with her lading at Bordeaux, or elsewhere, the master is bound to say to his company, when she is ready to load again, "Gentlemen, will you freight your own share yourselves, or be allowed for it in proportion with the ship's general freight?" the mariners are bound to answer one or the other. If they take as the freight of the ship shall happen, they shall have proportionably as the ship hath; and if they will freight by themselves, they ought to freight so as the ship be not impeded or hindered thereby. And if it so happen, that they cannot let out their freight, or get goods themselves, when he has tendered them their share or stowage, the master is blameless; and if they will there lade a tun of water instead of so much wine, they may: and in case there should happen at sea, an ejection or a casting of goods overboard, the case shall be the same for a tun of water, as for a tun of wine, or other goods, *livre by livre*.¹² If they let out their proportion of freight to merchants, what freedom and immunity the said mariners have, the said merchants shall also have.

Observation.

This articles has some relation to the eighth, which treats of mariners' wages and their freight aboard. The thirtieth article of the Laws of Wisbuy is founded upon it. By the seamen's immunity, is meant the privilege of being the last that must throw overboard in a storm, and having a tun free from all averages. The mariners' freight should be first full; for the master is not obliged to stay for them when his cargo is all aboard. The reasons given by our author, why, in case of throwing overboard, the mariners' tun of water shall come in equally in the average, *livre a livre*, for a tun of wine, are, a mariner may make what use he pleases of his stowage, because he takes it as part of his pay: besides, in such case, the water he has aboard, lightens the ship as much as if it was wine. And the

¹¹ "Le dommage du coup doit être prisé et parti moitié des deux nefes." Cleirac, 33.—E.

¹² "Parquoi les mariniers se puissent défendre et s'aider a la mer." Cleirac, p. 36. This is omitted in the translation of the XVth article.—E.

mariner by throwing over his water, which by his privilege he may refuse to do, not only helps to save the ship and cargo, but to save the latter the more entire; for if any thing the merchant had aboard, of more value than wine, stood before his tun of water, it must have gone first, and his throwing his water overboard being so much for the common interest of the ship and cargo, he is allowed to come in upon an average, as if it had been a tun of wine. How far this law of Oleron prevails in our maritime courts now, the civilians must determine; but by the common law of England, a tun of water would never be rated livre a livre, pound by pound, with a tun of wine.

ART. XVII.

The mariners of Brittany ought to have but one meal a day from the kitchen, because they have beverage going and coming. But those of Normandy are to have two meals a day, because they have only water at the ship's allowance; and when the ship arrives in a wine country, there the master shall procure them wine to drink.

Observation.

The custom of giving every man a certain allowance is very ancient, and to prevent jealousies, complaints and disorders, that allowance is settled at so much a head, and exactly delivered out to all alike. As to the allowance of wine and meals by this article, the twenty-ninth of the Ordinances of Wisbuy agrees with it. In those voyages where wine is to be had, the master is bound to provide it for the mariners, and then they shall have but one meal a day. But when they drink water only, they shall have two meals. Charles V. and Philip II.'s Laws ordain, that the master shall order the mariners to have three certain meals a day, and if they would have more meat, they shall only have what was last at their meals, unless upon extraordinary occasions. By the fifty-second article of the Hanseatic Laws, the masters of German ships bound for France and Spain, are not to provide victuals for their mariners when they are outward bound; but when they are homeward bound, if the ship is let out to freight and loaden, the masters are obliged to maintain their mariners; if they return light or empty, they are not obliged. The Portuguese in their East India voyages, maintain both mariners and soldiers outward bound, and allow each a pound and a half of biscuit, 3 pints of wine, and 3 pints of water a day, and 31 pound of salt fish a month, some dry fish, garlic and onions. But in their homeward bound voyages, they have only biscuits and water to the Cape of Good Hope, and after that they live every man on his own provision.

—Facilis descensus ad Indos:

Sed revocare gradum, veteremque evadere ad Orbem,

Hoc opus, hic labor est—

In cases of necessity, when provisions fall short, those that have victuals aboard ought to communicate to those that have not, by the Rhodian Law.

ART. XVIII.

When a vessel is unladen, and the mariners demand their freight, some of them having neither bed, chest, nor trunk aboard, the master may lawfully retain part of their wages, till they have brought back the ship to the port from whence she came; unless they give good security to serve out the whole voyage.

Observation.

The thirty-first article of the Ordinances of Wisbuy agrees exactly with this. The seamen's wages are not regularly due till after their work is entirely done, or the time they hired themselves for expired; except there are any private agreements to the contrary. The twenty-eighth article of the Hanseatic Law ordains, that their wages should be paid at three several payments; one third when they set sail upon a voyage, one third when they arrive at their port of discharge, and the other third when the ship is returned home.

ART. XIX.

If the master hire the mariners in the town to which the vessel belongs, either for so much a day, week or month, or for such a share of the freight; and it happens that the ship cannot procure freight in those parts where she is arrived, but must sail further to obtain it: in such case, those that were hired for a share of the freight, ought to follow the master, and such as are at wages ought to have their wages advanced course by course, that is, in proportion to the length of the voyage, in what it was longer than they agreed for, because he hired them to one certain place. And if they go not so far as that place for which the contract was made, yet they ought to have the whole promised hire, as if they had gone thither; but they ought likewise to bring back the vessel to the place from whence she at first departed.

Observation.

This article is explained by the eighth and sixteenth, and what is said upon them. The thirty-second of the Laws of Wisbuy, the twelfth and thirteenth of Charles V., and the twenty-fourth of the Hanseatic Laws, are to the same purpose. By the ninth article of Philip II.'s Laws, if the voyage is broken off by wars, pirates, or the command of the sovereign, the seamen ought to have a quarter part of the wages they agreed to have, if they had completed it. In the year 1626, about October, all the English ships that were then in the river of Bordeaux, were stopped by order of Monsieur de Luxemburgh, governor of Blaye. Several of these ships were loaden with wine, and others with other merchandize. They were forced to return to Bordeaux, and unload; after which the masters demanded the whole freight of the merchants who had freighted them, by virtue of the law. *Colonus §. Navem conduxit. D. Locati.* Inasmuch as it was not their faults that they did not make their voyage, and carry the goods to their intended port: the freight was then 15 or 16 livres a tun: the admiralty court adjudged them a quarter part of it; they appealed to the sovereign court, who after two hearings set aside their appeal. Which instance of our author, makes somewhat against his own remarks.

ART. XX.

When a vessel arrives at Bordeaux, or any other place, two of the mariners at a time may go ashore, and take with them one meal of such victuals as are in the ship, therein cut and provided; as also bread proportionably as much as they eat at once, but no drink: and they ought very speedily, and in season, to return to their vessel, that thereby the master may not lose his tide;

for if so, and damage come thereby, they are bound to make satisfaction; or if any of their company be hurt for want of their help, they are to be at such charge for his recovery, as one of his fellow mariners, or the master, with those of his table shall judge convenient.

Observation.

The reason of this law now ceases for Bordeaux, for which place it was originally intended; for the said river is so full of eating-houses and taverns on both sides, that it is not likely sailors will carry any of their salt provisions ashore, when they can get fresh. The reason of it was to keep the seamen in health and vigour; for by encouraging them to go ashore, two at a time, when their attendance was not necessary aboard, the master gave them an opportunity to refresh themselves at land, which is the best remedy in the world for the scurvy, contracted on shipboard by living on salt meats and dry biscuit, and being crowded up in a close place for a considerable time: their eating fresh provisions, and breathing the free air at land, makes them strong, and the better able to go through their business. It was not lawful for mariners to be drunk, nor to feast on shipboard, unless there was good cause for their feasting, and the master allowed it. As we find by the thirty-first article of the Hanseatic Law, and the old law of Rhodes, *Vector in navi piscem ne frigit, & exercitor id ei ne permitto*,—as one of his fellow mariners. In the original, it is "son matelot," which we in English call "comrade": for it is the custom at sea to divide the ship's crew into couples; every two are comrades, and this the French call "matelotage." These two companions, or comrades should be loving and assisting to one another. Their task is generally the same, and they are always posted together.—Those of his table. The mariners in Spanish ships dress their meat, and pay for it, each man for himself; but in the English, Dutch, German and French, there is always a cook, and the seamen eat all together at the same table, six in a mess. There is commonly two tables; the master's, which is served with a table-cloth, and there himself and his officers eat; and the mariners, where they have their messes.

ART. XXI.

If a master freight his ship to a merchant, and set him a certain time within which he shall lade his vessel, that she may be ready to depart at the time appointed, and he lade it not within the time, but keep the master and mariners by the space of eight days, or a fortnight, or more, beyond the time agreed on, whereby the master loses the opportunity of a fair wind to depart; the said merchant in this case shall be obliged to make the master satisfaction for such delay, the fourth part whereof is to go among the mariners, and the other three-fourths to the master, because he finds them their provisions.¹³

Observation.

The thirty-fourth article of the Ordinances of Wisbuy, and the thirty-ninth of the emperor Charles V., are entirely agreeable to this law. By the Hanseatic Law and Philip II.'s the merchant is obliged to pay the whole freight, if he does not load the ship in 15 days after the

time agreed upon; and by the Theodosian Code de Naviculariis, when a vessel arrives at a port laden, the merchant to whom the cargo belongs, must unload in 10 days; but in our times, on account of holydays and Sundays, the common time for unloading a ship is 15 days: but that should not hinder the paying the freight, which ought to be cleared in eight days, whether the ship be discharged or not. The master for his pay cannot detain the merchandise aboard; but when they are in the boat or lighter, he may stop them until he is satisfied.

ART. XXII.

When a merchant freights a vessel at his own charge, and sets her to sea, and the said vessel enters into an harbour, where she is wind-bound, so that she stays till her monies be all spent, the master in that case ought speedily to write home to his own country for money; but ought not to lose his voyage on that account; for if so happen, he shall be obliged to make good to the merchant all damages that shall ensue. But the master may take part of the wines or other merchant goods, and dispose thereof for his present necessities; and when the said vessel shall be arrived at her port of discharge, the said wines that the master hath so disposed of, ought to be valued and appraised at the same rate as the other wines shall be commonly sold for, and accordingly be accounted for to the merchant. And the master ought to have the freight of such wines, as he hath so taken and disposed of, for the use and reason aforesaid.

Observation.

The thirty-fifth and thirty-ninth articles of the Laws of Wisbuy are to the same purport as this; but by the sixty-eighth article of those laws, if the ship happens afterwards to be cast away, the master shall pay the merchant for the wines or other goods he sold in a case of necessity, without pretending to deduct any thing for the freight. The Hanseatic Laws forbid any master to borrow any money on any other security but the ship's bottom, that if she should be lost the debt might be paid; nor do they allow him when he is at home, to borrow any thing on her bottom, or otherwise, without acquainting the owners with it. By the forty-fifth article of the Laws of Wisbuy, the ship is bound to the merchant whose goods the master has sold in this manner, to make him satisfaction, though she should be herself sold, and have other owners.

ART. XXIII.

If a pilot undertakes the conduct of a vessel, to bring her to St. Malo, or any other port, and fail of his duty therein, so as the vessel miscarry by reason of his ignorance in what he undertook, and the merchants sustain damage thereby, he shall be obliged to make full satisfaction for the same, if he hath wherewithal; and if not, lose his head.

ART. XXIV.

And if the master, or any one of his mariners, or any one of the merchants, cut off his head, they shall not be bound to answer for it; but before they do it, they must be

¹³ The right of the mariners to a part of the compensation allowed for the delay of the ship, could only arise, when they received a part of the freight instead of wages.—E.

sure he had not wherewith to make satisfaction.

Observation on the Two Foregoing Articles.

The original calls these pilots "locmen"; for when those laws were written, there were officers aboard all ships, called pilots, who went the whole voyage, whereas the locmen were like our pilots, mariners hired at every river to guide the ship; for, dwelling on the place, the locman was supposed to know the shore better than the ship's pilot, who perhaps was never there before; for which reason he commonly required the master to have a locman, to avoid rocks, shelves, shoals and sands, which he must be well acquainted with by long using the river: that of Roan is very dangerous on this account, and there are sworn pilots every two leagues to guide ships up the Seine. They are very necessary all over Brittany. The forty-fourth and fifty-ninth articles of the Ordinances of Wisbuy, oblige the master to take a new pilot, if his own and the ship's crew demand one of him. The master finds him maintenance, and the merchant pays him, by the sixtieth article of the Ordinances of Wisbuy. The loss of the pilot's head, if through his ignorance or negligence the ship is lost, is taken from the Consolato, c. 250,—and answers to that known maxim in the law, "Qui non habet in aere, luet in corpore."

ART. XXXV.

If a ship or other vessel arriving at any place, and making in towards a port or harbour, set out her flag, or give any other sign to have a pilot come aboard, or a boat to tow her into the harbour, the wind or tide being contrary, and a contract be made for piloting the said vessel into the said harbour accordingly; but by reason of an unreasonable and accursed custom, in some places, that the third or fourth part of the ships that are lost, shall accrue to the lord of the place where such sad casualties happen, as also the like proportion to the salvors, and only the remainder to the master, merchant and mariners: the persons contracting for the pilotage of the said vessel, to ingratiate themselves with their lords, and to gain to themselves a part of the ship and lading, do like faithless and treacherous villains, sometimes even willingly, and out of design to ruin ship and goods, guide and bring her upon the rocks, and then feigning to aid, help and assist, the now distressed mariners, are the first in dismembering and pulling the ship to pieces; purloining and carrying away the lading thereof contrary to all reason and good conscience: and afterwards that they may be the more welcome to their lord, do with all speed post to his house with the sad narrative of this unhappy disaster; whereupon the said lord, with his retinue appearing at the places, takes his share; the salvors theirs; and what remains the merchant and mariners may have. But seeing this is contrary to the law of God, our edict and determination is, that notwithstanding any law or custom to the contrary, it is said and ordained, the said lord of that place, salvors, and all others that take away any of the said goods, shall be accursed and ex-

communicated, and punished as robbers and thieves, as formerly hath been declared. But all false and treacherous pilots shall be condemned to suffer a most rigorous and unmerciful death; and high gibbets shall be erected for them in the same place, or as nigh as conveniently may be, where they so guided and brought any ship or vessel to ruin as aforesaid, and thereon these accursed pilots are with ignominy and much shame to end their days; which said gibbets are to abide and remain to succeeding ages on that place, as a visible caution to other ships that shall afterwards sail thereby.

ART. XXVI.

If the lord of any place be so barbarous, as not only to permit such inhuman people, but also to maintain and assist them in such villainies, that he may have a share in such wrecks, the said lord shall be apprehended, and all his goods confiscated and sold, in order to make restitution to such as of right it appertaineth; and himself to be fastened to a post or stake in the midst of his own mansion house, which being fired at the four corners, all shall be burnt together, the walls thereof shall be demolished, the stones pulled down, and the place converted into a market place for the sale only of hogs and swine to all posterity.

Observation on the Two Foregoing Articles.

We shall find something very curious in the remarks made by the French author on these articles. These two laws, says he, were made upon account of that inhuman Droit de Bris sur le Naufrages, the right of lords of coasts to shipwrecks; by which those miserable wretches who were cast away, their very persons, and the goods that were saved, were confiscated for the prince who was lord of the coast. In the barbarous times men used to put this law in practice, especially the Gauls, who took all strangers for their enemies, and not only robbed them of their goods, but of their lives, sacrificing them to their false gods. From which bloody custom, Hercules brought them off according to Diodorus Siculus, lib. 5, Hist. cap. 2. Pomponius Mela, lib. 3, de Situ Orbis, cap. 2. The Romans, though they were covetous to excess, and greedy after other men's goods, never approved of this cruelty, but condemned and abrogated the use of it to the utmost of their power. *Toto titulo de Incendio, Ruina & Naufragio. Et de Naufragiis libro undecimo Codicis, leg. 1, and leg. 3.* But the empire degenerating in its decadency, when so many barbarous nations poured in upon it out of Scythia and Scandinavia, and tore it to pieces; this wicked Droit de Bris sur le Naufrages was renewed, particularly on the coasts of Gaul, called Littus Saxonicum, on account of the frequent invasions of the Saxons there. Sidonius Apollinaris, lib. 8, epist. 6, & carmine septimo. Afterwards the Normans being by chance thrown upon that coast, were immediately dispatched by the inhabitants; and in course of time this pretended right insinuated itself, and prevailed not only against enemies and invaders, but against any persons that were shipwrecked. *Quid quid evadabat ex naufragiis totum sibi fiscus lege patriæ vindicabat, passosque naufragium miserabilibus violentia principis spoliabat quam procella, as says Hildebertus Turonensis, Archiepisc, epist. 32 & 65.* At last the counts and dukes of Armoreck, Bre-

tagne, and Gaul, were obliged by civility, and the request of the neighbouring people of Bordeaux and Rochelle, to change this barbarous custom of slavery and confiscation, into a tax for all such as procured licences from them; of which licences there were three sorts, *Bref de Sauveté*, *Bref de Conduite*, and *Bref de Victualle*. The first was to save them in case of shipwreck from the old forfeitures to the lord, and exempt them from the cruel *Droit de Bris*. The second was to allow them convoy upon reasonable terms. The third was for liberty to buy provisions in Bretagne. The dukes of Bretagne established an office and officers for giving out these licences, as at Rochelle and other places. The *Droit de Bris* was also practised in Guienne, Saintonge, Artois and Poictou, but much more civilly and humanely than it was used in Bretagne; for the lords of the coasts took only a third or a quarter part, according to their several customs; the salvors as much; and the rest was restored to the poor wretches that were shipwrecked, and their persons were free. This barbarity is abolished in England, Italy, Germany, Spain and France, unless it be practised against the enemies of the state, infidels or pirates; but the Spaniards observe this custom beyond the line against all but natural Spaniards. This *Droit de Bris*, which was not however so cruelly executed in Guienne, as in Bretagne, was solemnly abrogated by Henry III., king of England and duke of Aquitain and Guienne. His edict for this purpose is registered and preserved among the rolls at Bourdeaux, and is as follows:

"Henricus Dei gratia rex Angliæ, dominus Hiberniæ, dux Normandiæ, Aquitan. & comes Andegavensis. Archiepiscopis, episcopis, abbatibus, prioribus, comitibus, baronibus, justitiæ præpositis et magistris, et omnibus ballivis et fidelibus salutem: Sciatis quod nos pro salute animæ nostræ, et antecessorum et hæredum nostrorum, et ad malas consuetudines abolendas concedimus, et hac nostra carta confirmamus pro nobis et hæredibus nostris in perpetuum, quod quotiescunque contigerit de cetero aliquam navem periclitari in potestate nostra, sive in costera maris Angliæ, sive in costera Pictaviæ, sive in costera insulæ Oleronis, sive in costera Vasconniæ. Et de navi taliter periclitata aliquis homo vivus evaserit, et ad terram venerit, omnia bona et catalla in navi istæ contenta remaneant, et sint eorum quorum prius fuerant, et eis non deperant nomine Ejecti. Et si de navi taliter periclitata nullo vivo homine evadente contingat, qualemcunque bestiam vivam evadere, vel in navi illa vivam inveniri; tunc bona et catalla illa per manus ballivorum nostrorum, vel hæredum nostrorum, vel per manus ballivorum dominorum in quorum terra navis fuerit periclitata libenter quatuor probis hominibus custodienda deponantur usque ad terminum trium mensium: Ut si illi quorum catalla illa fuerunt intra terminum illum venerint ad exigenda catalla illa, et probare possint catalla illa sua esse, eis libenter restituant. Si vero infra prædictum terminum nullus venerit ad exigenda catalla sua, tunc nostra sint et hæredum nostrorum nomine Ejecti, vel alterius qui libertatem habet ejectionem habendi. Si veru de navi taliter periclitata nullus homo vivus evaserit, nec alia bestia sicut prædictum est, tunc bona et catalla in navi illa contenta nostra sint et hæredum nostrorum nomine Ejecti, vel alterius ubi navis fuit periclitata qui libertatem habet ejectionem habendi: Quod volumus, et firmiter præcipimus pro nobis et hæredibus nostris. His testibus, venerabili patri Edwardo Karkol, episcopo, Bertrando clerico comiti Lincol. et constabulario, Petro de Mulo-lacu, Henrico de Trubleville, tunc senescaldo Vasconniæ, Hugo de Dispencie, Godefrido Cran-tonibus, Amande Santo-Amando, Gulielmo de Crob. Anno 1226. Regni nostri vigesimo."

As to that part of these laws requiring traitorous pilots to be hanged on the shore, in some

eminent place, to be a warning to all mariners: Andronicus, emperor of Greece, who reigned about the year 1150, ordered the same or the like punishment for such as made spoil of wrecks, as Nicetas reports in the second book of his Annals. The Lord Verulam in his History of Henry VII. writes, that it was heretofore the custom in England to leave the dead bodies of pirates on gibbets near the water side, for a warning to seafaring men. *Morte affecti circa oras maritimas, ut loco signorum nauticorum & laternarum essent, & asseclas a littoribus Angliæ absterreere possent.* The hanging such as are condemned for crimes committed at sea by the water side, and some of the most criminal in chains, has been practised since in this kingdom. Those malicious fishermen, who in the night make fires in dangerous places to attract mariners thither, to the loss of their ships by making them believe they are near ports and inhabited places, deserve the same punishment. The author whom we have made use of on this occasion tells us, that "catalla," a word in king Henry's charter, is originally Gascon, and signifies riches or merchandize. The Picards in their idiom have it "cateus," in Spanish it is "caudal," and in English "chattels," than which no term is more frequent in the common law. The word in the French which is rendered "caution" in English, is "belise," properly a beacon; but in this place it is used metaphorically: for a gibbet would be an odd sort of a beacon in our language. There are several sorts of these belises or beacons at sea, set up to direct mariners to the right course they ought to take to avoid danger. These are very necessary in those parts where there are bars, that is, entrances, where there must be a high tide to carry ships over them. Sometimes buoys are made use of for belises, and sometimes trees, light-houses, and other things. The burning the criminal's house, mentioned in these two articles, and all that is in it, shews what an opinion the legislator had of the heinousness of the crime. Coiners were in France burnt in old times, and their false money with them; their buildings were levelled with the ground, their woods felled and rooted up, and the places that belonged to them condemned and strewed with salt, as was the town of Poicters, in the reign of King Dagobert.

ART. XXVII.

A vessel being arrived at her port of discharge, and hauled up there into dry ground, so as the mariners deeming her to be in good safety, do take down her sails, and so fit the vessel aloof and aft, the master then ought to consider an increase of their wages kenning by kenning; and if in hoisting up wines, it happens that they leave open any of the pipes or other vessels, or that they fasten not the ropes well at the ends of the vessel, by reason whereof it slips, and falls, and so is lost, and falling on another, both are lost; in these cases the master and mariners shall be bound to make them good to the merchants, and the merchants must pay the freight of the said damaged or lost wines, because they are to receive for them from the master and mariners, according to the value that the rest of the wines are sold; and the owners of the ship ought not to suffer hereby, because the damage happened by default of the master and mariners, in not making fast the said vessels or pipes of wine.

Observation.

Kenning by kenning, veue par veue, is a phrase used by mariners, as is also course by course, in the nineteenth article of these laws. These phrases are very ancient, and kenning was particularly used when navigation was performed by views, and by observations on the land from one prospect to another (Plin. lib. vi, c. 13), which was before the invention or knowledge of the use of the compass. It signifies what the logicians or metaphysicians called agreement; the arithmeticians and geometricians proportion, and others express otherwise.

ART. XXVIII.

If two vessels go on a fishing-design in partnership, as for mackarel, herrings, or the like, and do set their nets or lay their lines at Olonne, St. Gilles, Survie, or elsewhere; the one of the vessels ought to employ as many fishing engines as the other, and so shall go in equal shares, as to the gain, according to the agreement betwixt them made. And if it happens that one of the said vessels, with her fishing-instruments, engines and crew, perish, and the other escaping, arrives in safety; if the surviving friends of those that perished, require of the other to have their part of the gain, as also of their fish, fishing-instruments, and boat, they are to have, upon the oaths of those that escape, their part of the fish, and fishing-instruments; but they shall not have any part or share in the vessel itself.

ART. XXIX.

If any ship or other vessel sailing to and fro, and coasting the seas, as well in the way of merchandizing, as upon the fishing account, happen by some misfortune through the violence of the weather to strike herself against the rocks, whereby she becomes so bruised and broken, that there she perishes, upon what coasts, country or dominion soever; and the master, mariners, merchant or merchants, or any one of these escape and come safe to land; in this case the lord of that place or country, where such misfortune shall happen, ought not to let, hinder, or oppose such as have so escaped, or such to whom the said ship or vessel, and the lading belong, in using their utmost endeavours for the preservation of as much thereof as may possibly be saved. But on the contrary, the lord of that place or country, by his own interest, and by those under his power and jurisdiction, ought to be aiding and assisting to the said distressed merchants or mariners, in saving their shipwrecked goods, and that without the least embezzlement, or taking any part thereof from the right owners; but, however, there may be a remuneration or consideration for salvage to such as take pains therein, according to right reason, a good conscience, and as justice shall appoint; notwithstanding what promises may in that case have been made to the salvors by such distressed merchants and mariners, as is declared in

the fourth article of these laws; and in case any shall act contrary hereunto, or take any part of the said goods from the said poor, distressed, ruined, undone, shipwrecked persons, against their wills, and without their consent, they shall be declared to be excommunicated by the church, and ought to receive the punishment of thieves; except speedy restitution be made by them: nor is there any custom or statute whatsoever, that can protect them against the aforesaid penalties, as is said in the twenty-sixth article of these laws.

Observations on the Two Foregoing Articles.

The civil law almost every where allows all shipwrecked persons, a right to gather up their shipwrecked goods. The Codex and the Rhodian Laws are particular in this matter. King Henry III.'s charter, before recited, is very plain upon it; and the reader is referred to it.

ART. XXX.

If a ship or other vessel entering into harbour, happens by misfortune to be broken and perish, and the master, mariners and merchants, which were on board her, be all drowned; and if the goods thereof be driven ashore, or remain floating on the sea, without being sought after by those to whom they belong, they being ignorant of this said disaster, and knowing nothing thereof; in this most lamentable case, the lord of that place or country ought to send persons to save the said goods, which he ought to secure and to put into safe custody; and give the relations of the deceased persons who were drowned, notice of it, and to satisfy for the salvage thereof, not out of his own purse, but of the goods saved, according to the hazards run, and the pains taken therein; and what remains must be kept in safe custody for one year or more; and if in that time they to whom the said goods appertain, do not appear and claim the same, and the said year be fully expired, he may publicly sell and dispose thereof to such as will give most, and with the monies proceeding of the sale thereof, he ought to give among the poor, and for portions to poor maids, and other charitable uses, according to reason and good conscience. But if he assumes the said goods either in whole or in part unto himself, he shall incur the curse and malediction of our mother the holy church, with the aforesaid pains and penalties, without ever obtaining remission, unless he make satisfaction.

Observation.

The keeping such goods a year, is in the civil law (l. ii, Cod. Naufragiis); but the parliament of Paris in the year 1584, pretended to reduce the time to two months: which time was to commence from the day of proclaiming such goods in public market and fixing a placquard of it on the doors of the parish church. The Consulate provides for the salvors more largely, allowing them half of the goods saved, and the lord and the poor the other half (chapter 252). By some laws in France, as long as the goods are in being and

unalienated, the merchant to whom they belong, has a claim to them, paying the charge of salvage: but if after a lawful time, they are sold and become another's property, he has no claim to them. The casuists are of opinion, that if he who finds them is rich, he ought to give all to pious uses: if poor, to keep all himself, *hostiensis in summa de pœnitentia*. And the thirty-sixth article of the laws of Oleron agrees with the judgment of the casuists

ART. XXXI.

If a ship or other vessel happens to be lost by striking on some shore, and the mariners thinking to save their lives, reach the shore, in hope of help, and instead thereof it happens, as it often does, that in many places they meet with people more barbarous, cruel, and inhuman than mad dogs, who to gain their monies, apparel, and other goods, do sometimes murder and destroy these poor distressed seamen; in this case, the lord of that country ought to execute justice on such wretches, to punish them as well corporally as pecuniarily, to plunge them in the sea till they be half dead, and then to have them drawn forth out of the sea, and stoned to death.

Observation.

To plunge them in the sea, "plonger en la mer," is what the French now call "bailler la cale," and we "keel-hawling." The word "Καλαποντισμός," in Greek, signifies as much. The Goths heretofore used to practise it as a sport or exercise, *Olaus magnus historiæ Septentrionalis*, lib. v, et lib. x, c. 16. And one may conceive an idea of the barbarity of the northern nations, when that was a diversion to them, which was a punishment to others; as it was of old among the Celtes and Franks, and is now among the modern navigators. Lazy and scandalous persons had some such sort of punishment by the customs or laws of the old Germans, *Tacitus de Moribus Germanorum*, Num. 5. *Turnus Herdonius* was punished thus to death for abusing and railing at the king *Tarquinius Superbus*, *T. Livius*, lib. primo decadis primæ. Bawds and whores are served so at *Bordeaux*; and scolds something like it in *England*, when they are put into the ducking stool. By an old ordinance of *Philip II*, of *France*, blasphemers had the same punishment. The comparison of a mad dog is perhaps made use of here, on account of the cure for his bite, by plunging in the sea before the poison has taken too deep root, which is reckoned the most sovereign remedy for it. *Augustine de Moribus Manicheor*, lib. ii, cap. 8. *Apuleius Metamorphos*, lib. 9. It is said *Baldus* the great civilian, died miserably of the bite of his favorite dog, though the bite was very inconsiderable, as to any thing but the effects of it; see the twenty-first book of *Ambrose Parre's Treatise of Poisons*; and *Diogenes the cynic*, according to *Laertius*, died the same death. My author has tempted me unawares to this digression, which he very ridiculously continues about a hundred times as long; for in truth it may well be called a digression, at least, all that is not necessary to explain the metaphor in the text, and much farther we have not gone.

ART. XXXII.

If by reason of tempestuous weather, it be thought expedient, for the lightening of any ship or vessel at sea, or riding at anchor in any road, to cast part of the lading overboard,

and it be done accordingly for the common safety, though the said goods so ejected, and cast overboard, do become his that can first possess himself thereof, and carry them away: nevertheless, it is here to be further understood, that this holds true only in such cases, as when the master, merchant, and mariners have so ejected or cast out the said goods, as that they give over all hope or desire of ever recovering them again, and so leave them as things utterly lost and given over by them, without ever making any enquiry or pursuit after them: in which case only the first occupant becomes the lawful proprietor thereof.

Observation.

The property of things thrown overboard remains in the merchant, and the finder has no right to them, unless they were thrown out with an intention to leave them there, and look no more after them (l. 2, in fine, l. qui levandæ D. *Lege Rhodia*, l. quod ex naufragio). D. de acquirenda vel amittenda possessione. *Neptunus fastidiosus ædilis est*. *Siquæ sunt improbabæ merces jactat omnes*; as *Plautus* says in *Stichor*. The sea drives all things to land: *mari hæc est natura, ut omne immundum, stercoreumq; littoribus impingat*, *Seneca naturalium quæst.* lib. iii, cap. 26. On this assurance, every one that flings his goods overboard in time of danger, hopes and desires to recover them again after seeking for them, and those things non sunt in derelicto, sed in deperdito. l. Si quis merces. D. pro derelicto. It is true, what is abandoned through contempt or carelessness belongs to the first occupiers; quod dominus ea mente adject, ut in numerum rerum suarum esse nolit, qui primus occupaverit statim dominus sit *Jure Naturali*, *Instit. de Rerum divisione* 5, qua ratione: & *Lege l. D. pro derelicto*.

ART. XXXIII.

If a ship, or any other vessel, hath cast overboard several goods or merchandizes, which are in chests well locked and made fast; or books well clasped and shut close, that they may not be damaged by salt water; in such cases it is to be presumed, that they who did cast such goods overboard, do still retain an intention, hope, and desire of recovering the same: for which reason, such as shall happen to find such things, are obliged to make restitution thereof to him who shall make a due enquiry after them; or put them to pious uses, according to his conscience and the advice of some prudent neighbour.

Observation.

Well clasped; this is conformable to the gloss on the *Rhodian law*. D. *Lege Rhodia*.

ART. XXXIV.

If any man happens to find any thing in the sea, or in the sand on the shore, in floods or in rivers, if it be precious stones, fishes, or any treasure of the sea, which never belonged to any man in point of property, it belongs to the first finder.

ART. XXXV.

If any searches the sea-coasts to fish, or find gold or silver, and he finds it, he ought to restore it all without any diminution.

ART. XXXVI.

If any going along the sea-shore to fish, or otherwise, happens to find gold or silver, he shall be bound to make restitution thereof, deducting for his own pains; or if he be poor he may keep it to himself; that is, if he knows not to whom to restore it; yet he shall give notice of the place where he found it, to the neighbourhood and parts next adjacent, and advise with his superiors, who ought to weigh and take into consideration the poverty of the finder, and then to give him such advice as is consonant to good conscience.

Observations on the Three Preceding Articles.

There are three sorts of goods which the sea naturally drives to land: as entire wrecks; for which the cruel *droit de bris* was in old times established by pernicious and barbarous custom: but humanity, licenses and passports have abolished it in ours. The second is, what is flung overboard for the preservation of men's lives, the ship and cargo. Neither of these, by law, nor the custom of the sea, change their proprietors, but may be claimed and recovered by them, within the lawful time appointed by ordinances and customs to claim them, even while the goods are in being and unsold, as appears by what has been said in and upon the 30th article. The third sort comprehends the two first, which are not owned and demanded by the proprietor, and besides that, includes all the treasures of the sea which come out of its bowels, and it naturally drives ashore; as aromatic amber on the coast of Guienne, amber succinum in the German ocean, red, black, and white coral on the coast of Barbary, precious stones, fish-shells, and other riches which the sea produces, and which in the thirty-fourth article of these laws are called "herpes marines," in English, "treasures of the sea"; for it cannot be otherwise so fully expressed. The word "herpes" was taken from an old Gaulish term "harpir," which signifies to take, and its contrary "voerpir," is to leave: perhaps, says my author, taken from the Greek word "ἄρπαζω," *aurum mihi intus harpagatum est*, Plautus in *Aulularia*; that is, the property of such things is in the finder, or the person who first takes them from off the ground. *Vocari autem elecirum harpaga, eo quod attritu digitorum accepta anima folia paleasque vestium fimbrias rapiat*. Isidorus, orig. lib. xvi, cap. 8. Nor is he who first lays his hand on them, obliged to give those that are there with him a share of what he has found, unless he pleases to do it out of courtesy, *l. si is qui ultimo. D. acquirendo rerum Dominio. Robustus de Privilegiis Scholasticorum, num. 61*, notwithstanding the constitution of the Emperor Leo, which is contrary to it. This is the law of nature, but princes and lords of the coast have usurped this privilege, and laid claim to all the treasures of the sea, that it throws on their royalties. The lords of the coasts, that is, of the manors or lands on the coasts of France, were notorious usurpers in this, till the reign of Louis XIII., when Cardinal Richelieu, by an order of the council bearing date the 13th of December, 1629, took away the pretended rights of several lords, or very much abridged them; but he did not restore the law of nature in this case; he only enlarged his own and his successor's privileges and authority, he being great master and superintendant general of the navigation and commerce of France. This order of council caused great disorders, and the Count de Oleron was particularly so enraged at it that his officers by main force drove away those of the admiralty, who came upon his royalty. But the French kings were now masters of their

subjects' lives and fortunes, and it would have been in vain for many such counts to have disputed the king's edict with these words in it, "Car tel est notre plaisir"; the standing reason of the French laws at this time.

ART. XXXVII.

Touching great fishes that are taken or found dead on the sea shore, regard must be had to the custom of that country where such great fishes are taken or found. For by the custom, the lord of that country ought to have his share, and with good reason, since the subject owes obedience and tribute to his sovereign.

Observation.

This law declares, that by the ancient customs of countries, as well sovereigns as all particular lords of royalties to whom duties and tribute were due, had both heretofore certain rights to the *espaves de mer*, strays of the sea. The *Coustoumier de Normandie* under the article of *Varech*, specifies what belongs to the one, and what belongs to the other, and particularly that whales and other oil fish, belong to the particular lord of the royalty where they were found, that is, off whose land they were taken: on the shore—in the original it is—a *la rive de la mer*; and how far that is to be understood to belong to the lord of that royalty, may be found in the above mentioned *coustoumier*: where the *Varech* understands as far as a man on horseback can reach with his lance; for if the fish is found farther off the shore, the lord has no right to it, though it be brought or driven a-shore afterwards.

ART. XXXVIII.

The lord ought to have his share of oil fish, and of no other, according to the laudable custom of the country where they are found; and he that finds them is no farther obliged than to save them, by bringing them without the reach of the sea, and presently to makè it known to the said lord of the place, that he may come and demand what is his right.

Observation.

The *Coustoumier de Normandie* mentions two sorts of fish, the royal fish, which are the dolphin, the sturgeon, the salmon, the turbot, the sea-dragon, the sea-barbel, and in general all fish fit for a king's table: and oil fish, as whales, porpoises, sea-calves, and the like, of which oil may be made: all other fish are the property of those that take them in the sea, near the shore or afar off. The duke of Espernon, which is the capital of a little territory called de Buch, had a right to the eighth penny of all the fish sold in the market at Bordeaux, that were taken within his precinct of de Buch, the fishermen having been heretofore vassals to the Lords de Buch. And further, whatever part of the province of Guienne the duke was in, those fishermen were on all fast days bound to supply his table with fish for himself and his family; but then the duke must pay a reasonable price for them, and allow them something for their trouble: this right is called "bian," and is still, or was thirty years ago, in being.

ART. XXXIX.

If the lord of the place pleases, and if it be the custom of the country where the fish is found, he may cause the same to be brought by him that found it, to the public and open market place, but no where else; and there-

the said fish shall be appraised by the said lord, or his deputy according to custom. And the price being set, the other party that made not the price, shall have his choice, either to take or leave it at that price; and if either of them, whether per fas or nefas be an occasion of loss or damage to the other, though but to the value of a denier, he shall be obliged to make him restitution.

ART. XL.

If the costs and charges of carrying the said fish to the said market place would amount to a greater sum than the fish itself may be worth, then the said lord shall be bound to take his share at the place where such fish was found.

ART. XLI.

The said lord ought likewise to pay his part of the aforesaid costs and charges, because he ought not by another's damage to enrich himself.

ART. XLII.

If by some chance or misfortune the said fish happens to be stolen away, or otherwise lost from the place where it was found, after or before the said lord has visited it; in this case he that first found it shall not any ways be obliged to make it good. *Casus fortuiti in quibus est aggressura latronum a nemine præstantur l. quæ fortuitis. C. pignoratitia actione.*

ART. XLIII.

In all other things found by the sea side, which have formerly been in the possession of some one or other, as wines, oil, and other merchandize, although they have been cast overboard, and left by the merchants, and so ought to appertain to him that first finds the same; yet herein also the custom of the country is to be observed as well as in the case of fish. But if there be a presumption that these were the goods of some ship that perished, then neither the said lord, nor finder thereof, shall take any, to convert any part of it to their own use; but as has been said, distribute the money it produces amongst the poor and needy.

ART. XLIV.

If any ship or other vessel at sea, happens to find an oil fish, it shall be wholly theirs that found it, in case no due pursuit be made after it; and no lord of any place ought to demand any part thereof, though they bring it to his ground.

Observations on the Preceding Articles.

The French author pretends, that by the forty-fourth article of these laws, which he says answers to the thirty-seventh, the kings of England, who were also dukes of Guienne, acknowledged that the sea is no man's particular property; but that, as well as the air, it is common to all, *Instit. de Rerum Divisione, § 1, l. injuriarum, § si quis me prohibeat. D Injuriis*; which, says he, contradicts what the learned Selden writes in his treatise *De Dominio Maris*, composed by him for the kings of

England, whom he supposed to be kings of the sea, exclusive of all other kings and sovereigns; and unless the opposers of Selden can find out some better arguments than hitherto they have alleged, the kings of England will always believe the dominion of the sea is annexed to their crown. Under this article the author makes a long digression on the whale fishery on the coasts of Guienne, which might in former times be very famous, but now is very inconsiderable. After a description of whales, not at all pertinent in our sea laws, he tells us, when those animals used to come on these coasts; and because there is something historical in the relation, we shall give the reader a short abstract of it. The whales used to pass by the coasts of Guienne, near the ruins of the old castle of Ferragers, about a league from Bayonne, from the autumnal equinox till the winter was almost over. The fishermen had then some of their band always out upon the watch night and day, in huts built on purpose by the sea-side, having their boats and fishing tackle ready. When these centinels discovered a whale, which they knew by the noise he makes in breathing, and the exhalation that rises from it like smoke, they gave notice, by a token they had for that purpose, to their fellows, who immediately ran to them, and leaping into their boats put off to sea, rowing up to the animal, to whom they approached very near, and attacked him in the head, that the wounds they gave him might be the more mortal; besides they were afraid of being struck by it, which was commonly mortal to them: when they had killed him, they towed him ashore and extracted the oil. The fishermen were for the most part Biscainers, who were very bold and dexterous in this dangerous fishery: but what my author says on this subject will surprize the reader. The great gains the inhabitants of Cape Bezton near Bayonne, and the Biscainers of Guienne, found in the whale fishery, and the ease with which they did it, tempted them to run any hazards to come at whales. They ventured into the ocean, and set out ships to seek after the common abode of these monsters: inso-much, that following their route, they discovered the great and little banks of cod-fish, the island of Newfoundland, and Canada or New France, where the sea abounds in whales, one hundred years before Christopher Columbus's navigation; and if the Spaniards have been so unjust, as to rob the French of the glory of having first discovered the great Atlantic isle called the West Indies, they should confess with Cornelius Vuytler and Anthony Magin, Flemish cosmographers, F. Antonio St. Roman, Monge de St. Benico, del *Historia General de la India*, lib. i, cap. ii, p. 8, that the pilot who carried the first news to Christopher Columbus, and gave him any knowledge of the New World, was one of the French Newfoundland Biscainers. But all this is so contrary to every other history, that there is no credit to be given to it. Indeed it would have been very extraordinary, if there should have been any honour pretended to by any nation, and the French had not put in a claim to it. In the year 1627, some Biscainers, assisted by the merchants of Bordeaux, fitted out a ship for the whale fishery towards the frozen sea of Greenland, to the north of Ireland and Scotland, and at Spitzberg: where they at last found the common station of the whales during a six months stay which they made there. But now we come to what he is pleased to say of the English.

The English, who had not the address or industry for this fishery being advised of it, grew jealous. They hastened thither and did all they could to molest them in their work, and hinder their landing, which they did every year. At last they positively forbad them to land in Greenland, to melt their whales' fat into oil. The Biscainers complained to Lewis XIII, and Cardinal Richelieu; but there were

so many things of more importance then negotiating between the crowns of France and England, that they could not obtain any article in their favour, nor truce for their fishery. Afterwards they fished in the open sea, caught whales where they could, and with much trouble brought the fat home, where they melted it into oil. The company of north Holland, tempted some of these Biscainers to shew their fishermen the art of whale-fishing, and after they were become expert in it, they also forbade them to fish on the coast of Greenland, and then this fishery was lost to them. There is an air of fiction in this history:—By what authority could the English forbid the Biscainers to land in Greenland; does that country belong to the crown of England? But it is not a little the French will go out of their way to carry any point they drive at.

ART. XLV.

If a vessel by stress of weather be constrained to cut her cables or ropes by the end, and so to quit and leave behind her both cables and anchors and put to sea at the mercy of the wind and weather; in this case the said cables and anchors ought not to be lost to the said vessel, if there were any buoy at them; and such as fish for them, shall be bound to restore them, if they know to whom they belong; but they ought to be paid for their pains, according to justice. And if they know not to whom to restore them, the lords of the place shall have their shares, as well as the salvors; but for preventing further inconveniences, every master of a ship shall cause to be engraven, or set upon the buoys thereof, his own name, or the name of his ship, or of the port or haven to which she belongs: and such as detain them from him shall be reputed thieves and robbers.

ART. XLVI.

If any ship, or other vessel, by any casualty or misfortune happens to be wrecked and perish, in that case, the pieces of the hulk of the vessel, as well as the lading thereof, ought to be reserved and kept in safety for them to whom it belonged before such disaster happened, notwithstanding any custom to the contrary. And all takers, partakers, or consenters of, or to the said wreck, if they be bishops, prelates or clerks, they shall be deposed and deprived of their benefices respectively; and if they be laymen they shall incur the penal-

ties aforesaid. De his autem quos diripuisse probatum sit, præsidet ut de latronibus, gravem sententiam dicere convenit. I. ne quid. I. quo Naufrag. D. Incendio, ruina, & naufragio. I. navigia, C. furtis. The penalties aforesaid are in the 25th, 26th, and 29th articles.

ART. XLVII.

This is to be understood only when the said ship or vessel so wrecked, did not exercise the trade of pillaging, and when the mariners thereof were not pirates, sea-rovers, or enemies to our holy Catholic faith; but if they are found to be either the one or the other, every man may then deal with such as with rogues, and despoil them of their goods without any punishment for so doing.

Observations on the Three Foregoing Articles.

Every one has a Droit de Bris against pirates. Piratæ communes generis humani hostes sunt, quos idcirco omnibus rationibus persequi incumbit, says the lord Verulam, de Bello Sacro, p. 346. For which reason, according to the civilians, Sunt ipso jure dissidiati, cum quibus publice bellum habemus. Strachia in tertia parte de nautis; and again it is cruelty to have any mercy towards pirates, Solum pietatis genus est in hac re esse crudelium. There is no right of action amongst them, and they have none to bring against one who attacks them or robs them. Quia in omnium furum persona constitutum est, ne ejus rei nomine furti agere possint, cujus ipsi fures sunt, lege cum qui § quarto, lege qui re sibi § primo. lege qui res. § si ego. De Furtis, &c. They have no action among themselves. Comuni dividundo lege. communi § inter Prædiones. D. communi dividundo. On the contrary, for one pirate to take from another is very lawful, and will bear no action. Lege sed ipsi Nautæ, &c.

The test of these laws in this copy, is,

Witness the seal of the isle of Oleron, established for all contracts in the said isle, the Tuesday after the feast of St. Andrew, in the year one thousand two hundred and sixty-six.

This date of 1266, is too modern, and does not agree with the time when this piece was put forth, as the learned and curious Selden, libro secundo, capite 24. De Dominio Maris, very well observes: so that it is thought that this date of the time of the delivery of the copy, from whence the edition printed at Rouen was taken, and the test the seal established for contracts in the isle of Oleron, denotes, that it was a copy taken out by a notary from the original.



THE LAWS OF WISBUY.

[Reprinted from 1 Pet. Aöm. Append. lxvii.]

Wisbuy was the ancient capital of Gothland, an island in the Baltic sea. It formerly belonged to Sweden, but was afterwards annexed to Denmark, to whose crown it still continues an appendage. In Gothland there are several fine ports, the access to which is easy and safe. It is rich in cattle, of which it affords immense numbers, and abounds in venison, fish, forests of fine timber for building ships, naval stores, and excellent marble. In the north-west part of the island Wisbuy was situated, a fair and noble sea-port, built by foreigners, and whose first settlement in the country was opposed by the Gothlanders, but who successfully resisted them, and, in the year one thousand two hundred and eighty-eight, obtained an important victory over them; after which the citizens, to defend themselves against their enemies, obtained a permission from Magnus king of Sweden, to wall their city, and erect bastions and other fortifications. They flourished more and more, and grew great by their trade and navigation, to which they entirely gave themselves up; insomuch, that this town was a long time the most celebrated market of Europe; there being no city so full of merchants, and so famous for its commerce. Either came Swedes, Russians, Danes, Prussians, Livonians, Germans, Finlanders, Vandals, Flemings, Saxons, English, Scots and French to trade. Each nation had their quarter, and particular streets for their shops or warehouses. All strangers were safe and welcome there, and enjoyed the same privileges as the townsmen themselves. The magistrates of this city had the jurisdiction, or rather the arbitrement of all causes or suits relating to sea affairs. Their ordinances were submitted to in all such cases, and passed for just on all the coasts of Europe from Muscovy to the Mediterranean. In this account we are supported by Olaus Magnus, lib. x, cap. 16, and Baron Herbestain in *Rerum Muscovitarum Commentario*, p. 118. In the course of time, this town was entirely destroyed, except the citadel, which stands to this day. The Gothic historians do not tell us when, nor how its destruction came upon it, only that it was through civil dissensions which arose from trifles, but occasioned great factions; which set them so against one another, that it ended in the entire ruin of them all, city and citizens. The ruins of it are now to be seen, and under them are often found tables of marble, porphyry and jasper; evidences of the ancient splendor and magnificence of the citizens. The houses were covered with copper, the windows gilt with gold, and all that is said or that is discovered of it, shews the inestimable riches of the former inhabitants. The citizens who survived the ruin of the city, retired to the country of the Vandals and eastern Saxons, who were enriched with their wealth. Albert, king of Sweden, rebuilt the city, and granted great privileges to all that should come and in-

habit it; but it never could recover its trade and former magnificence.

It was in this city of Wisbuy that the sea laws and ordinances which the Swedes brought into credit, were composed; they were received as righteous and just, and are kept in the Teutonic language till now. The Germans, Swedes, Danes, Flemings, and all the people of the north observe them; but none have been so curious as to preserve the date and the remembrance of the time when they were composed and published.

Northern writers have contended that the laws of Wisbuy are more ancient than the *Roll d'Oleron*, and have even asserted the *Consolato del Mare* to have been composed subsequent to them. These claims are opposed with some irritation by *Cleirac*, who denies their having been promulgated prior to the year 1266. In this opinion he is supported by many historical facts. But at whatever period they may have been composed, these laws have been for ages, and still remain, in great authority in northern Europe. *Lex Rhodia navalis, pro jure gentium in illi mari Mediterraneo vigeat, sicut apud Galliam leges Oleronis, apud omnis transcribannos, leges Wisbuensis.* *Grotius de Jur. Bel. lib. ii, c. 3.*

ARTICLE I.

Whatever mariner, whether pilot, mate, or sailor, binds or hires himself to a master, if he afterwards leaves him, he shall refund what wages he has received; and besides that, pay half as much as the master had promised him for the whole voyage. And if a mariner has hired himself to two several masters, the first that hired him may claim him, and force him to serve him. Nevertheless he shall not be obliged to pay him any wages at all for the whole voyage, unless he does it of his own good will.

ART. II.

Every pilot, mate or mariner that does not understand his business, shall be obliged to repay to the master whatever wages he had advanced him, and be besides bound to pay half as much more as he had promised him.

ART. III.

A master may turn off a mariner without any lawful cause given, before he sets sail, paying him half what he had promised him for the voyage. After he has set sail, and

is gone out of his port, that master who turns off a mariner without lawful cause given, is obliged to pay him all his wages as much as if he had performed the voyage.¹

ART. IV.

² No mariner shall lie or stay a night ashore without the master's leave, on pain of forfeiting two deniers, nor shall he unmoor the ship's boat in the night, under the same penalty.³

ART. V.

The mariners shall have three deniers a last for loading, and three for unloading, which is to be reckoned only as their wages for guindage or hoisting.⁴

ART. VI.

It is not lawful to arrest or imprison the master, pilot or mariners of a ship in an action of debt, when they are ready to sail; but the creditor may seize and sell any thing he finds in the ship that belongs to his debtor, l. i, de Naviculariis, lib. iv, cod.⁵

ART. VII.

A ship being freighted for all the summer, the season shall end on the feast of St. Martin, or the eleventh of November.

ART. VIII.

Whoever shall make use of another man's lighter, without his leave, shall pay the owner four sols a day, unless it was in a case of necessity, as of fire or the like.

ART. IX.

If any one has occasion to have a debt witnessed, he need not carry strangers aboard; but may make use of the people in the ship. The same he may do in all acts where witnesses are necessary, lib. x. cod.

ART. X.

It is not lawful to sell or mortgage a vessel let out to freight; but it is lawful to freight it or underlet it to others for the same time, and the same voyage.⁶

¹ Laws of Oleron, arts. 12, 13, 20.

² Laws of Oleron, art. 5.

³ By deniers here are understood, those of which twenty-four make an ounce of silver. The double deniers are now called carolus's or grand blancs, by the French and other nations.

⁴ These duties are never fixed on account of the dearness of provisions, and the value of money, which changes and increases daily. The rate of *guindage or reguindage, is commonly in France five sols a last. Which is two sols six deniers tournois a tun.

⁵ Ord. Louis XIV. Mariners and Ships, tit. 1, art. 14.

⁶ The words of this article are, "de le fretter ou sous-louer à d'autres pour le même temps, et pour même voyage": which we think we have rendered right, notwithstanding the difficulty there seems to be in the sense, or the equity of this law.

* Hoisting up and down, or loading and unloading.

ART. XI.

If a ship that was freighted for a voyage is sent upon another longer than that, or upon several voyages; if there is no protestation or dissent entered against it, the freighter shall pay but half the damages that may happen to the ship in such longer voyage or voyages.

ART. XII.

If a mast, sail or any other tackling is unfortunately lost when the ship is under sail, or otherwise, the loss shall not be brought into an average. But if the master is obliged to cut his mast by the board, or spoil any of his tackling for the preservation of the ship, the bottom and the cargo shall make good the damage by an average.⁷

ART. XIII.

The master shall not sell the ship, nor any part of her tackling, without the consent of the owners; but if he wants victuals he may pawn his cables and cordage: always observing to have the advice of the mariners.⁸

ART. XIV.

The master being in port, ought not to depart and set sail without the advice and consent of the major part of the mariners; if he does, and there happens any loss, he is bound to make satisfaction.⁹

ART. XV.

The mariners are obliged to the utmost of their power to save and preserve the merchandize, and for doing it, ought to be paid their wages, but not otherwise. It is not lawful for the master to sell the ship's cordage, without the consent of the owners or factors: but he is bound to preserve all, as much as in him lies, on pain of making satisfaction.¹⁰

ART. XVI.

The mariners are obliged to save as much as they can, and the merchants may take away their goods, paying the freight or satisfying the master; otherwise the said master may fit out his ship if he can do it in a little time, in order to accomplish his voyage; if he cannot do it he may relade the merchandize upon other vessels, bound for the port to which he was to carry them, paying freight for them.

ART. XVII.

The mariners shall not go out of the ship without leave of the master, on pain of paying the damage that may happen in their absence, unless it is when the ship lies ashore moored with four cables. In such

⁷ Laws of Oleron, art. 9.

⁸ See art. 10; and Laws of Oleron, art. 1.

⁹ Laws of Oleron, art. 2.

¹⁰ Laws of Oleron, art. 3.

case they may go out of her for a little time, taking care not to transgress in it.¹¹

ART. XVIII.

A mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship: but if he goes ashore on his own head to be merry, and divert himself, or otherwise, and happens to be wounded, the master may turn him off; and the mariner shall be obliged to refund what he has received, and besides to pay what the master shall be forced to pay over and above to another whom he shall hire in his place.¹²

ART. XIX.

If a seaman falls ill of any disease, and it is convenient to put him ashore, he shall be fed as he was aboard, and have somebody to look after him there; and when he is recovered, be paid his wages; and if he dies, his wages shall be paid to his widow or heirs.¹³

ART. XX.

If by stress of weather it is thought necessary to throw any goods overboard to lighten the ship; and the supercargoes or merchants aboard, will not consent to it, the merchandize shall nevertheless be thrown overboard, if the rest of the people aboard think it safest to do so. In such case as soon as the ship puts into port, a third part of the mariners must go ashore, and purge themselves by oath, that they were forced to do it for the preservation of their own lives, the ship, and the rest of the cargo. The merchandize so thrown overboard, shall be brought into a gross average, and be rated at the same price the other merchandize of the same sort, that was saved, was sold for.¹⁴

ART. XXI.

Before the master throws any goods overboard, he is bound, in the absence of the merchant, to ask the pilot and mariners' advice, and the loss shall be made good by contribution: the ship and cargo being accountable towards it.¹⁵

ART. XXII.

The master and mariners are obliged to shew the merchant the cordage that is used for hoisting his goods in and out of the ship; if he does not do it, and there happens any accident, they shall stand to the loss; but if

the merchant has seen and approved of it, the damage he sustains shall be borne by himself.¹⁶

ART. XXIII.

If a ship is ill trimed, and it happens that the wine she has aboard is lost through the master's ignorance or negligence in governing her, the said master is bound to pay for it; but if the mariners clear him upon oath, the leakage or loss shall be borne by the merchant.¹⁷

ART. XXIV.

No man shall fight, or give another the lie aboard. He who offends in this kind shall pay four deniers; and if the mariner gives the master the lie, he shall pay eight deniers: but he who strikes him shall pay 100 sols, or lose his hand.¹⁸ If the master gives the lie he shall pay eight deniers; if he strikes he ought to receive blow for blow.¹⁹

ART. XXV.

The master may turn off a mariner for a lawful cause; but if the said mariner compensates for his fault, and the master nevertheless refuses to admit him again: the mariner may follow the ship to her destined port, and he shall be paid his wages, as much as if he had made the voyage in the same ship. If the master hires a less able seaman in his place, and there happens any damage by it, the master is to make good the loss.²⁰

ART. XXVI.

If a ship riding at anchor in a harbour, is struck by another ship which runs against her, driven by the wind or current, and the ship so struck receives damage, either in her hulk or cargo, the two ships shall jointly stand to the loss; but if the ship that struck against the other might have avoided it, if it was done by the master on purpose, or by his fault, he alone shall make satisfaction. The reason is, that some masters who have old crazy ships, may willingly lie in other ships' way, that they may be damnified or sunk, and so have more than they were worth for them. On which account this law provides, that the damage shall be divided, and paid equally by the two ships, to oblige both to take care, and keep clear of such accidents as much as they can.²¹

¹⁶ Laws of Oleron, art. 10.

¹⁷ Laws of Oleron, art. 11.

¹⁸ Per dignitatem injuriam preferentis, crescit culpa facientis. Salvianus lib. sexto, de gubernatione Dei. Lose his hand. This was a common punishment among the Scythians and the people of the north. Lucianus de Toxari. And also among those in the east. Harmonopolus de Poenis.

¹⁹ Laws of Oleron, art. 6.

²⁰ Laws of Oleron, art. 13.

²¹ Laws of Oleron, arts. 14, 15.

¹¹ Laws of Oleron, art. 5.

¹² Laws of Oleron, art. 6.

¹³ Laws of Oleron, art. 7.

¹⁴ Laws of Oleron, art. 8.

¹⁵ Id.

ART. XXVII.

A ship being at anchor in a harbour where there is so little water that she touches; another ship comes and anchors near her; if the ship's company of the former vessel require those of the latter to take up their anchor, because it is too near them, and they do not do it, the former may take it up themselves; and if the latter hinders them, they shall make satisfaction for all the damage that may happen by that anchor.²¹

ART. XXVIII.

No master of a ship shall lie at anchor in a haven without fastening a buoy to his anchor, to give notice to others where it is. If he omits to do so, and any damage is sustained by it, he is obliged to make it good.

ART. XXIX.

In all voyages where wine is the trade, the master is obliged to find the seamen with it, and then he may give them but one meal a day; but where it is not to be had, and the mariners drink water, he shall give them two meals a day.²²

ART. XXX.

When a ship is let out to freight, the master ought to assign and shew the seamen where they are to have the stowage that belongs to them; and they must declare whether they will load it themselves, or will let the master freight it with the rest of the ship, and be paid for their proportion.²³

ART. XXXI.

A ship being arrived at her destined port, those seamen who would be paid their wages there, if they have no chest nor bedding, or other movables aboard, equivalent to their wages, they must give the master security that they will serve out the rest of the voyage, and see it completed, or he may refuse to pay them before.²⁴

ART. XXXII.

Those seamen who bargained for a certain proportion of the ship's freight, instead of wages in money, in case freight is not to be had for her when she arrives at the port for which she was bound, and she must go further in quest of it, they must go with her: but those seamen who agreed to be paid in money, shall have their wages there.²⁵

ART. XXXIII.

When a ship is safe at anchor, the seamen may go ashore one after another, or

²² Laws of Oleron, art. 17.

²³ Laws of Oleron, art. 16.

²⁴ Laws of Oleron, art. 18.

²⁵ Laws of Oleron, art. 19.

two together, and carry sufficient meat and bread with them for one meal, but no drink. Nor must they stay any long time ashore; for if through their absence any damage happens to the ship or goods, they are obliged to make satisfaction. And if any one of the crew is wounded, or comes by any other ill accident in doing the merchant's business, the merchant is bound to cure him, and indemnify the master, pilot and mariners.²⁶

ART. XXXIV.

A ship being let out to hire to a merchant to freight her, and he agrees to load her in a certain time; if he fails and exceeds that time, fifteen days or more, and by this means the master loses his opportunity to freight his ship; the said merchant shall make him satisfaction for his delays, and pay his damages and interest, a quarter of which belongs to the mariners, and three quarters to the master.²⁷

ART. XXXV.

If the master being upon his voyage wants money, he must send home for it; but ought not to lose a fair opportunity of proceeding; if he does, he shall satisfy the merchant for all the damage he may sustain by his delay; but in case of great necessity he may sell part of the merchandize, and when he arrives at his destined port, he shall pay the merchant for them at the same price the rest was sold at, and the merchant shall pay freight as well for the merchandize the master sold, as for those he delivered him.²⁸

ART. XXXVI.

When the master arrives in a port, he should be careful to place his ship well, to moor her well; for if by his neglect in this the merchandize aboard comes by any damage, he is obliged to make it good.

ART. XXXVII.

If a ship has been in a storm, and the merchant, master or crew think she ought to be refitted, to enable her to continue her voyage, they may do it, and then proceed. However, the master shall be paid his freight for the goods saved, which are for the merchant's profit only. If the merchant has no money, and the master will not give him credit, he may take his merchandize in payment at the market price.²⁹

ART. XXXVIII.

The master shall not throw any goods overboard, without first consulting the mer-

²⁶ Laws of Oleron, arts. 5, 6, 20.

²⁷ Laws of Oleron, art. 21.

²⁸ Laws of Oleron, art. 22.

²⁹ Laws of Oleron, art. 4.

chant; and if the merchant will not consent to it, yet if two or three of the most experienced mariners think it necessary, they may be thrown overboard, but the mariners must swear they thought it was expedient so to do. If there is no merchant or factor aboard, the master and major part of the mariners may resolve upon what is fit to be done.³⁰

ART. XXXIX.

The merchandize thrown overboard shall be valued in the average, at the price the rest was sold for, freight only deducted.³¹

ART. XL.

The master in the average shall pay his proportion for the goods thrown overboard, either by calculating what the ship is worth, or what the freight amounts to, at the choice of the merchant; and the merchant shall pay his, according to the value of the remaining merchandize. It shall be left to the merchant to leave or take the ship at the price the master rated her at.

ART. XLI.

³² If any one has plate or merchandize of great price in his chest, he is bound to declare it before hand, and so doing he shall be paid for his merchandize according to its worth, and the plate after the rate of two deniers for one.

ART. XLII.

If any one has money in his chest, let him take it out and carry it about him, and he shall pay nothing.

ART. XLIII.

If a chest is thrown overboard, and the proprietor does not declare what is in it, it shall not be reckoned in the average, but for the wood and the lock, if it is locked, according to their value.³³

ART. XLIV.

If it is thought convenient in any river, or off any dangerous coast to take aboard a pilot of the country, and the merchant opposes it, yet if the master, the ship's pilot, and the major part of the seamen are of another opinion, he may be hired, and the pilot shall be paid by the ship and cargo, as averages are calculated for goods thrown overboard.³⁴

ART. XLV.

If a master is reduced to straits for want of money or victuals, and for that reason

forced to sell part of his merchandize aboard, or borrow money at bottomry, he ought to pay within 15 days after his arrival, for the merchandize at a reasonable price, neither the highest nor the lowest; and if he does not, and the ship be sold, and another master put in her, the merchant to whom the merchandize belonged, or the creditor that lent the money on bottomry, shall at any time within a year and a day, have a good right to the ship, until satisfaction is made for the goods sold, or money borrowed.³⁵

ART. XLVI.

A ship being laden, the master ought not to take in any more merchandize, without leave of the merchant; if he does, and there happens any occasion to throw goods overboard, he shall pay as much as he took in goods over and above the ship's loading. Wherefore he ought when he is lading, to declare how much goods he has, and ought to have aboard.

ART. XLVII.

The seamen are obliged to keep and watch the merchandize at the request of the merchants, master and pilot.

ART. XLVIII.

If for the preservation of the commodity, the seamen turn up the corn aboard, they shall be allowed a denier a last for each time; and if they will not do it, they are liable for the damage that comes to it for want of it. They shall also be allowed a denier a last for unloading, and so for other merchandize.

ART. XLIX.

The mariners ought to represent to the master what condition their tackling for lading and unloading is in; that if the cordage is out of repair, or any other part of it, it may be mended. And if the master does not do it, he shall be accountable for whatever damage happens by that means; but if the mariners do not make their representation, the accidents that befall the merchandize shall be indemnified at their expense.³⁶

ART. L.

If two ships strike against one another and receive damage, the loss shall be borne equally between them, unless the men on board one of them, did it on purpose; in which case that ship shall pay all the damage.³⁷

ART. LI.

To prevent all inconveniences, all masters of ships are required to fasten buoys to their anchors, on pain of making satisfaction for all

³⁰ Laws of Oleron, art. 8.

³¹ Laws of Oleron, art. 8.

³² Laws of Oleron, art. 8.

³³ Laws of Oleron, art. 22.

³⁴ Laws of Oleron, arts. 23, 24.

³⁵ Laws of Oleron, art. 22.

³⁶ Laws of Oleron, art. 10.

³⁷ Laws of Oleron, art. 10.

the damage that may happen for want of them.³⁸

ART. LII.

When a ship arrives at her port of discharge, she ought to be unladen with all possible dispatch, and the master to be paid in eight or fifteen days at farthest, according to the circumstances of the voyage.³⁹

ART. LIII.

If a ship freighted for one port, enters another, the master together with two or three of his chief mariners, ought to clear themselves upon oath, that it was by constraint and necessity that they went out of their way. After which he may proceed in his intended voyage, or ship the cargo aboard other ships, paying freight for the goods, which the merchant shall also pay him, and what else is due on account of the merchandize.

ART. LIV.

It is forbidden to any mariner to go out of the ship, and leave it, after the voyage is done and the ship discharged, unless her sails are all in, her furniture taken away, and she is sufficiently lightened of her ballast.⁴⁰

ART. LV.

If a ship strikes, the master may take out part of his cargo, and relade it aboard other ships, and the charges of it shall come into a general average upon ship and goods. However, the master and two or three of his seamen shall purge themselves upon oath, that they were forced to do it to save the ship and cargo.

ART. LVI.

When a ship arrives at the mouth of any river or harbour, and the master finds she is too heavy loaden to sail up, he may put part of the cargo aboard hoys, lighters, or barges, and an average shall be made for it, of which the master shall pay two thirds, and the merchant one third; but if after the ship is entirely discharged, the ship draws too much water, and cannot sail up, then the master shall pay all the charges.

ART. LVII.

The merchandize being put aboard lighters, in order to be landed, if the master has any jealousy of the merchant's ability or honesty to pay him, he may stop it at his ship's side, and refuse to let it go, till the merchant has paid him in full for his freight and charges.

ART. LVIII.

All lighters, open or close, shall be discharged in five days.

³⁸ Laws of Oleron, art. 14.

³⁹ Laws of Oleron, art. 21.

⁴⁰ Laws of Oleron, art. 5.

ART. LIX.

When a ship is at anchor before a harbour with which her pilot is not well acquainted, the master ought to hire one at the place to carry his ship into it, who shall be paid by ship and cargo.

ART. LX.

When a ship is in a harbour or river, and the master does not know the coast nor the river, he ought to take a pilot of that country to carry her up the river or harbour, which pilot shall be maintained by the master, and paid by the merchant.

ART. LXI.

If a seaman deserts his ship, and carries away what he has received of the master, and the master apprehends him, the fact being proved upon him by the depositions of two other seamen, he shall be condemned to be hanged, and executed.

ART. LXII.

If a master discover that a mariner is infected with any contagious distemper, he may put him ashore on the first land he makes, without being bound to pay him any wages, provided the case be proved by the attestation of two or three of the other mariners belonging to his ship.

ART. LXIII.

If a pilot or mariner buys a ship, or is made master of one, he shall be discharged from his own master, paying him back what he received of him; and it shall be the same if he marries.

ART. LXIV.

If the master, merchant and owners have any difference, and the owners will not furnish their quota of the charge of the out-set; the master may nevertheless proceed in his voyage or voyages with the said ship, paying the seamen what he thinks reasonable.

ART. LXV.

If the master lays out any money in repairing or refitting his ship, or buys any tackling, or any thing else for her use, he shall be reimbursed, and every owner pay his part.

ART. LXVI.

If the merchant obliges the master to insure the ship, the merchant shall be obliged to insure the master's life against the hazards of the sea.

ART. LXVII.

If two ships strike against one another, and one of them unfortunately perishes by the blow, the merchandize that is lost out of both of them, shall be valued and paid for pro rata by both owners, and the damage of the ships shall also be answered for by both according to their value.

ART. LXVIII.

In case of necessity the merchant may sell part of the merchandize to raise money for his ship's use; and the ship happening to be lost afterwards, the master shall however be obliged to pay the merchant for the said merchandize so sold, without pretending to deduct any thing for the freight.

ART. LXIX.

When the master is forced to sell any of the merchandize, he is obliged to pay the same

price for them, as the same goods were sold for at the market for which they were designed, and the master shall be paid his freight for what goods are sold.

ART. LXX.

If a ship under sail does damage to another, the master and mariners of the ship doing the damage must swear they did not do it designedly, and could not help it, and then the damage shall be borne by both ships in equal proportion; and if they refuse to swear, the damage shall be paid by the ship that did it.

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THE LAWS OF THE HANSE TOWNS.

[Reprinted from 1 Pet. Adm. Append. xciii.]

Before we give an abstract of the laws of the Hanse Towns, the confederacy which enacted them, and whose commercial policy they regulated, is entitled to some notice.

During the progress of successful commercial enterprize among the Italians, and towards the middle of the thirteenth century, the activity of the north was excited, and its attention was awakened to commerce. The Baltic was surrounded by nations immersed in extreme barbarism, whose piracies prevented the success of almost every maritime adventure, and compelled the cities of Lubeck and Hamburg, who had opened an intercourse with those people, to unite in a league of mutual defence. The immediate and extensive benefits resulting from this union, induced other towns to accede to it, and in a short time eighty-one cities of considerable importance, placed in those fertile and extensive countries which occupy the space between the lower part of the Baltic and the Scheld, became members of the Hanseatic league. It now obtained an influence in the affairs of Europe; and while its allies were enriched by an intercourse with its members, its friendship was courted, and its hostility dreaded by the most powerful monarchs. Among the means adopted by this association to insure prosperity to their trade, and protect them from controversies with each other, was the formation of a code for the regulation of their maritime enterprizes, and the circumstances incident to them. These laws are evidently founded on those of the neighbouring city of Wisbuy, and the justly celebrated Roll d'Oleron. They appear to have been first enacted and promulgated in the year 1597, at Lubeck, which is styled the "Mother of the Hanse Towns." They were formed by a general assembly, called together for the purpose, and first appeared in the German language. Afterwards, in the year 1614, they were revised by another delegation from each of the towns, and many new ordinances were added.

For the convenience of their commercial operations, different towns were selected by the confederacy where they established warehouses and factories, and at which their intercourse with other countries was chiefly conducted. Among the principal of these was Bruges and Antwerp, in the latter of which was erected a splendid hall, at that period the boast of the modern world. There, were brought by the Italians, the rich productions of India, with the ingenious manufactures of their own country, to be exchanged for the bulky and useful products of the north. The articles obtained by the Hanseatic merchants in this intercourse, were transported to the Baltic, and from thence along the larger rivers into the interior of Germany.

An intercourse so profitable to those who were immediately engaged in it, produced oth-

er effects than an augmentation of the wealth of the Hanseatic confederacy. The arts of southern Europe began to be known; and a desire to imitate them, and to possess their productions, was the result of this knowledge. This intercourse created new wants as it increased the means of their gratification; and by the demands it excited among the inhabitants of the Netherlands and Germany, for commodities of every kind, industry was promoted; and at a very early period the manufactures of flax and wool had made considerable progress.

As Bruges became the centre of communication between the Hanseatic and the Lombard merchants, the Flemings traded with both in that city, to such extent and advantage as spread among them a general habit of industry, which long rendered Flanders and the adjacent provinces the most opulent, the most populous, and best cultivated counties in Europe.¹

The pleasure which is derived from tracing the progress of such associations to prosperity, and noting their influence and connection with the welfare of other states, has induced us to enter more minutely into the history of the Hanseatic body, than was originally proposed.

If their example stimulated other nations to industry and trade, their laws must necessarily have obtained a corresponding estimation. Those institutions which protected the rights and regulated the contracts of these industrious adventurers, could not fail to obtain a due portion of praise and value. Accordingly we find them in extensive application among the northern powers of Europe, and governing them in their commercial transactions. By the most distinguished men of the fifteenth and sixteenth centuries, whose avocations induced their attention to them, they are spoken of with great respect, and esteemed as the production of great wisdom and extensive experience.

ARTICLE I.

No master shall undertake to build a ship, unless he is assured that his owners and undertakers are agreed upon what model it shall be built, and on every thing relating to the building of it; which undertakers and owners shall be burghers and inhabitants of one of the Hanse Towns, and no others. However, if the master will go through with the building at his own expense, he may do it; otherwise he must always have the consent of those burghers that are concerned

¹ Robertson's History of Charles V.

with him, on pain of forfeiting half a dollar a ton.²

ART. II.

No master shall begin to build a ship,^o after he and his joint owners or partners have resolved upon it, until they have agreed among themselves of what size, height and depth she shall be, how broad and how long, and this agreement shall be taken in writing on pain of forfeiting 12 sols a ton.³

ART. III.

The master in like manner shall not repair the ship, sails or cordage without the owner's consent, on pain of being at all the charge of it himself, unless in case of necessity, when he is in a strange country.

ART. IV.

The master may not buy any thing whatsoever for his ship, unless it is in the presence, and with the consent of one or two of the partners; if he does he shall forfeit 50 sols: nor shall the master, or any of the owners buy any thing for the ship's use, upon the credit of the other owners who would pay ready money for their part of the disbursement.

ART. V.

An inventory shall be taken of every thing the ship wants, that it may be bought by the master and owners jointly.

ART. VI.

The master ought to buy every thing at the cheapest rate without fraud, on pain of corporal punishment; and he shall enter in his account the name of the person of whom he bought the goods, and where they live.

ART. VII.

If a master or mariner keep back any of the merchandize he took in on freight, they shall be apprehended and punished as robbers, unless it was in case of necessity.

ART. VIII.

Nor may they give above the market price for any provisions, and what they shall buy

² In the stile of the Hanse Towns, the owners of ships are called burghers; because none but the burghers of those cities in Germany, were permitted to build ships. The inconvenience provided against by this article is to save the materials of building, that none might undertake what they could not go through with, and thereby the materials be lost: for if he who begins to build a ship, is not very well able to perfect it, and has not the approbation of his joint owners or partners, such is often the end of too rash beginnings of this kind.

³ It is the custom in the Levant, if during the building of a ship, any one of the owners die, his heirs are not obliged to continue the partnership; but the master undertaker is bound to look out for another owner in the room of him that is dead; and this new owner must pay the heirs of the deceased what the latter advanced on this account.

shall be carried to the ship's store-house, and be kept there till she is ready to sail.

ART. IX.

All masters are forbidden to sell any of the ship's provisions, on pain of being punished as thieves, except it is at sea, when they meet with other ships in distress and danger of perishing for want of them: for which they shall however be accountable to the owners.

ART. X.

The master when the ship is returned, is obliged to deliver up to the owners, the remains of his victuals and ammunition.

ART. XI.

The master is obliged to set sail two or three days after his ship is loaden, if the wind is fair, on pain of forfeiting 200 livres; and in case any one of the owners has not paid his quota of the charge of the ship's outset by that time, he shall forfeit as much; and the master may besides, borrow money on bottomry, for the deficient owner's quota. The merchants are bound to load the ship by a prefixed time, on pain of paying the whole freight, notwithstanding the ship proceeds in her voyage light, and in her ballast only.

ART. XII.

When the master gives in his account, he shall summon all his owners together, on pain of 100 livres forfeit.

ART. XIII.

The master shall not take any merchandize aboard on his head, or by the consent of one of his owners, without the approbation of them all: if he does, the penalty is confiscation, or other punishment.

ART. XIV.

The owners having lawful cause, may turn off a master, paying him for what share he has in the ship, at the price it cost him.

ART. XV.

All owners are forbidden to entertain any master unless he produces a certificate of his honesty and ability, and that he quitted the service of the merchants he served last, with their consent: if they do, they shall pay 25 crowns penalty.

ART. XVI.

Before the master hires any mariner or pilot, he ought to acquaint the owners with what wages he is to give them, and have their allowance of it, under penalty of 25 crowns.

ART. XVII.

If several ships are in company on the same voyage, they are obliged to stay for one an-

other, or be liable to all the damages that may happen to the others by an enemy or pirates.⁴

ART. XVIII.

No master shall hire a mariner, before he has seen his pass or certificate of his faithful behaviour in the service of his last master, on pain of forfeiting 100 sols, unless he is necessitated to it in a strange country.

ART. XIX.

Masters are obliged to give mariners certificates of their faithful service; and if any one refuses, or delays, he shall forfeit 100 sols.

ART. XX.

A ship being forced to stay or winter in a strange country, the mariners are not to go out of her without the master's permission, on pain of losing half their wages.⁵

ART. XXI.

If the master maintains the mariners all the winter, they cannot oblige him to give them more wages; but if they endeavour to do it, they shall forfeit half of what they were to have had, and be punished further, according to the circumstances of their offence.

ART. XXII.

No seaman may go ashore without the consent of the master, pilot, mate or clerk of the ship, under penalty of 25 sols for each time.

ART. XXIII.

The seamen who are ashore with the master, are obliged to look after the boat, and return on board as soon as they are commanded: and he who stays or lies ashore, shall pay a forfeit, or suffer imprisonment.

ART. XXIV.

If the master changes his voyage, and steers another course than was intended, he ought to have the consent of his mariners, or pay them what the major party of them shall adjudge to be due to them for his changing of the voyage: and if then any one of them will not obey him, he shall be punished as a mutineer.

ART. XXV.

If any mariner sleep on a watch, he shall pay four sols forfeit: and whoever finds him asleep, and does not discover it, two sols.

ART. XXVI.

All seamen are forbidden to moor any skiffs or boats to a ship's side, on pain of imprisonment.

ART. XXVII.

He who shall be found incapable of discharging his duty as a pilot or mariner, for which

⁴ Laws of Oleron, art. 28.

⁵ Laws of Oleron, art. 5; Laws of Wisbuy, art. 17.

he has received wages, shall forfeit all that was promised him, and be besides punished according to his demerit.

ART. XXVIII.

Masters shall pay their seamen at three payments, one third when the ship sets sail, outward bound; one third when she is unladen, and the other when she is returned home.

ART. XXIX.

A master may at any time turn away a mariner that rebels against, or is unfaithful to him.⁶

ART. XXX.

If one mariner kills another, the master is bound to seize him, and keep him in safe custody till he arrives at his port, and then to deliver him up to justice to be punished.

ART. XXXI.

The seamen may not feast and carouse in the ship without the master's leave, on pain of losing half their wages.

ART. XXXII.

No seaman shall let his wife lie aboard under penalty of 50 sols.

ART. XXXIII.

No seaman ought to carry powder and shot without the master's consent, on pain of paying double the value of it.

ART. XXXIV.

The master is bound when he returns home, to give an account before the magistrate, of what forfeitures he received, and for what, under penalty of 25 crowns.

ART. XXXV.

The seamen are obliged to defend the ship against rovers, on pain of losing their wages; and if they are wounded, they shall be healed and cured at the general charge of the concerned in a common average. If any one of them is maimed and disabled, he shall be maintained as long as he lives by a like average.

ART. XXXVI.

If the mariners, or any of the company refuse to assist on the like occasion, and the ship be taken or lost, they shall be condemned to be whipped as cowards and rascals.

ART. XXXVII.

If the mariners resolve to defend the ship, and the master is afraid and against it, he shall be turned out of his post with infamy, and declared incapable of ever commanding a ship afterwards.

ART. XXXVIII.

The ship's ballast shall be carried to the place designed for it, and those that are re-

fractory, and will not help in it, shall be punished by the magistrates of the place.

ART. XXXIX.

If any seaman is wounded in the ship's service, he shall be cured at the charge of the ship, but not if he is wounded otherwise.⁷

ART. XL.

If any one of the seamen goes ashore without leave, and the ship happens to receive any damage in the time, or to be lost for want of hands, he shall be kept in prison upon bread and water for one year; and if any seaman dies or perishes with the ship for want of the assistance of the absent seaman, the latter shall be punished with corporal punishment.⁸

ART. XLI.

If a mariner behaves himself ill the master may turn him off; but if he discharge him for no reason before the voyage begins, he shall pay him a third part of his wages, but shall not charge it in the ship's account.

ART. XLII.

If the master discharges a seaman during the voyage, for no lawful cause given, he is bound to pay him his whole wages, and defray the charge of his return; but if the mariner desires the master's leave to quit the ship, he shall be bound to restore all the money he received, and pay his own charges.⁹

ART. XLIII.

If an officer or seaman quits a ship, and conceals himself; if afterwards he is apprehended, he shall be delivered up to justice to be punished: he shall be stigmatized in the face with the first letter of the name of the town to which he belongs.

ART. XLIV.

If a ship is lost the mariners are obliged to save as much of the goods as they can, and the master ought to reward and satisfy them for it, and pay the charge of their journey home: if the mariners refuse to assist the master, they shall have neither wages nor reward.¹⁰

ART. XLV.

If any mariner falls sick of any disease, he shall be put ashore and maintained in like manner as if he was on shipboard, and be attended by another mariner.¹¹ How-

⁶ Laws of Oleron, arts. 12, 13.

⁷ Laws of Oleron, art. 6; Laws of Wisbuy, art. 18.

⁸ Laws of Oleron, art. 20.

⁹ Laws of Oleron, art. 18.

¹⁰ Laws of Oleron, art. 3.

¹¹ Laws of Oleron, art. 7.

ever, the master is not obliged to stay for him; if he recovers his health, he shall be paid his wages as much as if he had served out the whole voyage; and in case he dies, his heirs shall have what was due to him.¹²

ART. XLVI.

If mariners mutiny, and force the master to enter into any harbour or port, and the ship or cargo is lost, either in whole or in part, for which the seamen run away; if afterwards they are taken, they shall be corporally punished.

ART. XLVII.

The master shall not give the seamen any cause to mutiny, but supply them with what is convenient, and pay them what is their due punctually and faithfully.¹³

XLVIII.

The master who shall debauch a seaman, and hire him after he had hired himself to another master, shall pay 25 livres, and the mariner shall pay to the first master for damages, half the wages the second had promised him.

ART. XLIX.

If a ship is stopped in a strange country, or the mariners are forced to stay there for their freight, or on another account, they shall all that time be maintained as is usual; but shall not pretend to demand any extraordinary wages; and what is due to them shall be paid to them or their assigns, when the ship is discharged. If any seaman is so bold as to leave the ship because of her stay, he shall be corporally punished according to his demerits.

ART. L.

If a master takes any gold, silver, diamonds, or other merchandize of great price, which obliges him to have a more than ordinary care of it, a fourth part of the freight of such rich goods shall be allowed him, and the owners shall have the other three fourths.

ART. LI.

The master ought to put a mariner in each boat or lighter that is to carry salt to land as well to take care of it, as to see that a right account is kept of its measure.

¹² The Spaniards are the most unkind, and indeed unjust, to their sick mariners of any people: for they neither pay them any wages, nor maintain them, unless they pay for others to serve in their stead: and what is still worse, if during their sickness any accident or damage happens to the ship or goods, those mariners that were ill, are obliged to make satisfaction, their sickness being no plea for them, according to the *Laberinto de Comercio*, libro tertio, cap. "Navigantis," numero 18.

¹³ Laws of Oleron, art. 13.

ART. LII.

Mariners hired aboard ships bound for France or Spain, shall not be maintained by the masters when they are outward bound, but shall live on their own provisions; but when they are homeward bound, the master shall maintain them: and if the master advances or lends them any money, he may pay himself by deducting it out of their wages. If the ship is not loaden home, the master is not obliged to maintain them.

ART. LIII.

The masters may not alienate or sell any part of their provisions or furniture until the voyage is made, and when they do, the owners shall be preferred to any other in the sale of them.

ART. LIV.

The mariners shall not take any grains of salt belonging to the ship's loading, but shall put some aboard for their own use, with the knowledge and consent of the merchant or others concerned, on pain of being severely punished.

ART. LV.

The master or the pilot may each load 12 barrels on their particular account; the other officers six each, and the seamen four each; the cook and the boys two each.¹⁴

ART. LVI.

If a master, to displease his owners, sells his part of a ship for more than it is worth, the said part shall be appraised by men of

¹⁴ This is what is called "portage" in France, where 12 barrels make a last, and one last 2 tons.

experience; after which the owners may take it or leave it at the price it was appraised at, as they think fit.¹⁵

ART. LVII.

If a master, fraudulently, shall borrow money upon bottomry, and mortgage his ship for it, or stay with it in any port a long time, and sell it, together with the merchandize, the said master shall be incapable of having the command of a ship afterwards, and never be admitted into any city, but shall be punished without mercy.

ART. LVIII.

A master being at home, may not borrow any more money on bottomry, than his own part of the ship is worth; if he does, the other shares of the ship shall not be liable for it; neither shall he take any freight without the knowledge and consent of the owners.

ART. LIX.

If the owners are at variance, and cannot agree about the freight of their ship, that opinion shall carry it, which has the majority on its side by two or three. The master may also in such case, take up money upon bottomry, as well on their shares who do not consent, as on theirs who do.

ART. LX.

A master being in a strange country, if necessity drives him to it, may take up money on bottomry, if he cannot get it without, and the owners shall bear the charge of it.¹⁶

¹⁵ Laws of Oleron, art. 45.

¹⁶ Laws of Oleron, art. 27; Laws of Wisbuy, art. 45.



THE MARINE ORDINANCES OF LOUIS XIV.

[Reprinted from 2 Pet. Adm. Append. iii.]

While the French historians have employed themselves in tracing the commercial prosperity of their nation, at the conclusion of the seventeenth, and opening of the eighteenth centuries, to these ordinances, the civilians and lawyers of every period which has followed their promulgation, have avowed the greatest admiration of their wisdom and their justice. To the genius of Colbert, the celebrated minister of Louis XIV, France is indebted for this excellent code. Desirous of establishing the commerce of his country on a basis which nothing could successfully assail, he selected a masterly hand to compile and arrange these laws, from the prevailing maritime regulations of France and other states, and from the experience of the most respectable commercial men of his country. To these regulations which, having formed a part of the maritime code of Europe, had been acknowledged as authority by all, were added others which were considered as peculiarly necessary for the trade of France. The ordinances thus formed, were published by the French king in 1681, and have since enjoyed an uncontrolled authority over the commerce of the country for which they were intended, and have obtained the respect of every maritime state.

To the testimony in favour of this collection, which has so often been given by the most celebrated jurists of Europe, I can add that of a gentleman of distinguished legal acquirements, who has been recently selected, with the approbation of his country, to occupy the first judicial situation in the state of Pennsylvania. In the case of Morgan & Price v. The Insurance Company of North America, decided by the supreme court of this state in January, 1807, Chief Justice Tilghman, having referred to one of the articles of these ordinances, thus expressed himself: "They and the commentaries on them, have been received with great respect in the courts both of England and the United States, not as conveying any authority in themselves, but as evidence of the general marine law. When they are contradicted by judicial decisions in our own country they are not to be regarded: but on points which have not been decided, they are worthy of great consideration." The commentaries on these ordinances by Valin, we have reluctantly consented to omit, and the design of this work necessarily excludes from it, those articles in the ordinances which are local in their nature, or are confined to the regulation of the courts or the offices of the admiralty of France. Those only have been selected, which are founded on the general principles of maritime law, and which are thought peculiarly entitled to the notice of every commercial lawyer.

MARINERS AND SHIPS.

TITLE FIRST.

Of the Captain, Master and Patron.¹

I. No person shall be capable of being received captain, master, or patron of a ship, till he has navigated five years, and has been publickly examined in navigation, and judged capable by two ancient masters, in presence of the officers of the admiralty, and of the professor of hydrography, if any be in the place.²

II. We forbid all mariners to sail in quality of masters, and all owners to constitute any in their ships, before they be received in the aforesaid manner, under pain of three hundred livres, to be paid by each offender.³

III. However, such as are already masters shall not be obliged to undergo any examination.

IV. Such as have been received pilots, and have navigated two years in that quality, may be constituted masters without any examination, and without any act of the court of admiralty.

V. The master shall chuse the ship's company, and hire the pilots, mates, mariners and sailors; but he shall advise with his owners when at the port of their residence.

VI. In places where there are hospitals of poor boys, the masters shall be obliged to chuse amongst them their ship-boys.

VII. The master who shall entice away a mariner from another master, shall be fined in one hundred livres, applicable one half

¹ In France those who command vessels of war, or merchant ships destined on long voyages, are called "captains"; masters or patrons are those who command vessels employed in the coasting trade.

² A professor of hydrography is appointed to teach navigation and the sciences immediately connected with it, in all the considerable sea ports in France. His school is open to every one, and formerly each hospital sent two or three boys, annually, to be instructed in the sciences taught by him. Book 1, tit. 8.

³ Laws of the Hanse Towns, art. 15.

to the admiral, and the other half to the first master, who may take the mariner back again if he pleases.⁴

VIII. A master must take care before he puts to sea, that the ship be right ballasted and laded, and well provided with anchors and tackle, and all things necessary for the voyage.

IX. He shall be answerable for all the goods laded aboard his ship, which he shall be obliged to deliver according to the bills of lading.

X. He shall be obliged to keep a book or register, quoted and flourished on every leaf by one of his principal owners, in which he shall insert the day that he was constituted master, the names of the officers and mariners of his company, the rates and conditions of their engagement, the payments he makes them, what he receives and expends for the use of the ship, and generally every thing that concerns the functions of his employment, or of which he has to render any account, or any demand to make.

XI. If, with the master's consent, there is a clerk established in the ship, to take an account of all such things, the master shall be exempt from it.

XII. No master shall lade any goods upon the ship's deck, without the order or consent of his merchants, under pain of being answerable for all the damage that may happen.

XIII. Masters shall be obliged, under pain of an arbitrary fine, to be aboard their ships themselves when they go out of any port, harbour or river.

XIV. No master, patron, pilot, nor mariner, shall be arrested for a civil debt, being a shipboard to put to sea, except it be for debts contracted for the voyage.

XV. The master, before he sets sail, shall take the advice of the pilot, mate, and other principal men of the ship's company.⁵

XVI. He shall be obliged before he puts to sea to give into the admiralty office, of the place of his departure, the names, surnames, and dwelling-places of his company, passengers, and persons engaged for the West Indies, and to declare at his return such as he has brought back again, and the places where he left the others.

XVII. He shall not, while in the place where his owners reside, cause the ship to be refitted, buy sails, ropes, or other things for the ship, nor take up money for that account upon the ship, without their consent, under pain of paying the same himself.⁶

XVIII. However, if with the owner's consent, a ship be freighted, and any of them refuses to contribute towards the necessary charges for fitting out the ship; in that case

the master may take up money for bottomry for the account and upon the parts of the refusers, within four and twenty hours after he has sent them a summons in writing to furnish their proportions.⁷

XIX. He may likewise, during the voyage, take up money upon the ship, either for refitting, victuals, or other necessaries, or may pawn some of the rigging, or sell some goods of his lading, upon condition to pay for them at the rate that the rest shall be sold; all which must not be done without the advice of the mate and pilot, who shall write down in the journal the necessity of such borrowing of money, or selling of goods, and the manner how the money was laid out: but the master shall not in any case have power to sell the ship, without a special procuration from the owners.⁸

XX. If any master, without necessity, takes up money upon the ship or rigging, sells goods, pawns the tackle, or states in his accounts false and supposed averages and expenses, he shall pay what he takes up himself, be declared unworthy of being a master, and banished from his ordinary place of residence.

XXI. Masters hired to make a voyage shall be obliged to accomplish it, under pain of making good the damages and losses to the owners and merchants; and to be proceeded against extraordinary if that happens.

XXII. They may, with the advice of the mate and pilot, cause to be ducked or put in the hold, and inflict such sort of punishments upon drunken and disobedient seamen, or upon such as abuse their comrades, or commit such other faults and offences during the voyage.⁹

XXIII. And such as shall be guilty of murder, assassination, blasphemy, or other capital crimes committed at sea, the masters, mates and quarter-masters, shall be obliged under the entire penalty of one hundred livres, to inform against them, to seize their persons, and make the necessary proceedings for instituting process, in order to deliver the criminal into the hands of the officers of the admiralty, at the place of the lading or unloading of the ships within our kingdom.¹⁰

XXIV. We forbid all masters, under pain of exemplary punishment, to enter, except in cases of necessity, into any foreign port; and in case they be forced into any by tempest or pirates, they shall put to sea again with the first conveniency.¹¹

XXV. We enjoin all captains and masters, making long voyages, to assemble every day at noon, and oftener if necessary, the mates and pilots, and other expert persons,

⁷ Laws of the Hanse Towns, arts. 11, 59.

⁸ Laws of Wisbuy, art. 45; Laws of the Hanse Towns, art. 60.

⁹ Laws of Oleron, art. 15.

¹⁰ Laws of the Hanse Towns, art. 30.

¹¹ Laws of Wisbuy, art. 53.

⁴ Laws of the Hanse Towns, art. 48.

⁵ Laws of Oleron, art. 2; Laws of Wisbuy, art. 14.

⁶ Laws of the Hanse Towns, arts. 3, 4.

and to confer with them about the latitudes taken, the courses made, and to be made, and about their calculations.

XXVI. They shall not abandon their ships during the voyage, notwithstanding any danger, without the advice of the most expert officers and mariners; and in that case, they shall be obliged to carry off with them the money and the most precious goods they have on board, under pain of answering for it themselves, and of personal punishment.

XXVII. If the effects so taken out of the ship be lost by any accident, the master shall be free from any danger.

XXVIII. The masters and patrons who sail in partnership with other owners, shall have no separate dealings for their own particular account, under pain of confiscation of their goods for the benefit of the other partners.

XXIX. They shall not borrow for their voyages any more money than what is necessary for their lading, under pain of being deprived of their places, and their share in the profits.

XXX. They shall be obliged, under the like penalty, to give before their departure, to the proprietors of the ship, a signed account of the quality and price of the goods they have aboard, and of the sums of money borrowed by them, together with the names and dwelling places of the lenders.

XXXI. If the common stock of provisions fail at sea, the master may compel such as have any in particular to deliver them up for the use of all, subject to the payment of the price thereof.

XXXII. No master shall sell the provisions of his ship, nor divert and conceal them, under pain of bodily punishment.¹²

XXXIII. They may however, with the advice and consent of the officers, sell to ships found in necessity at sea, provided they have enough remaining for their own voyage, and render an account thereof to the owners.¹³

XXXIV. At the return of the voyage, the victuals and ammunitions shall be remitted by the master into the hands of the owners.¹⁴

XXXV. If the master steer a false course, commit any robbery, or suffer any to be committed in his ship, or fraudulently give way to any alienation or confiscation of ship or goods, he shall be punished corporally.

XXXVI. A master being convicted of having delivered to the enemy, or maliciously run his ship aground, shall be punished with death.

¹² Laws of the Hanse Towns, art. 9.

¹³ Laws of the Hanse Towns, art. 9.

¹⁴ Laws of the Hanse Towns, art. 10.

TITLE SECOND.

Of the Mate.

I. The mate shall take care of the fitting out of the vessel, and before they put to sea, shall examine whether it be sufficiently provided with ropes, pulleys, sails, and other rigging necessary for the voyage.

II. At the departure he shall see the anchor hoisted; and during the voyage, he shall visit once a day all the tackle high and low; and if he observes any thing amiss, shall acquaint the master.

III. He shall execute in the vessel, and cause to be executed, day and night, the orders of the master.

IV. Arriving at a port he shall cause the cables and anchors to be prepared, and shall have the care and management of the sails and yards, and moorings of the ship.

V. In case of the absence or sickness of the master, the mate shall command in his place.

TITLE THIRD.

Of Seamen.¹⁵

I. The seamen shall be obliged to appear at the days and places appointed, to take aboard the provisions, rig out the ship, and set sail.¹⁶

II. A seaman hired for a voyage must not leave the ship, without a discharge in writing, till the voyage is ended, and the ship moored at the key and unladed.¹⁷

III. If a seaman leaves a master without a discharge in writing before the voyage is begun, he may be taken up and imprisoned wherever he can be found, and compelled to restore what he has received, and serve out the time for which he had engaged himself for nothing; and if he leaves the ship after the voyage is begun, he may be punished corporally.¹⁸

IV. However, if after the arrival and unlading of a ship at the intended port, the master, instead of returning, takes a freight to go elsewhere, the seamen may leave him if they please, except it be otherwise provided by their agreement.

V. After the ship is laded, the seamen shall not go ashore without leave from the master, under pain of five livres for the first fault: and may be punished corporally if they commit a second.¹⁹

VI. We forbid the mariners and seamen to take any bread or victuals, or draw any

¹⁵ Un matelot est un homme de mer qui a acquis une expérience suffisante au fait la manœuvre d'un vaisseau. Valin, Com. tom. 1, p. 509.

¹⁶ Laws of the Hanse Towns, art. 18.

¹⁷ Laws of Wisbuy, art. 63; Laws of the Hanse Towns, art. 24.

¹⁸ Laws of Wisbuy, art. 1; Laws of the Hanse Towns, art. 43.

¹⁹ Laws of Oleron, art. 5; Laws of Wisbuy, art. 17.

drink without the permission of the master or steward, under pain of the loss of one month's wages, and of a greater punishment if the fault deserves it.²⁰

VII. The seamen or other that spoils the drink, destroys the bread, makes the ship leaky, excites a sedition to break the voyage, or strikes the master having arms in his hand, shall be punished with death.²¹

VIII. Any seaman sleeping in his post or upon the watch, shall be put in irons during fifteen days; and any of the company finding one asleep, and not acquainting the master therewith, shall pay five livres.²²

IX. Any mariner abandoning the master, and the defence of the ship in time of battle, shall be punished corporally.

TITLE FOURTH.

Of the Owners of Ships.

I. All our subjects, of any quality or condition whatsoever, may cause ships to be built or bought, fit them out for themselves, freight them to others, and drive a trade at sea by themselves, or by persons interposed; by which gentlemen shall not be reputed to do any act derogatory to their quality, provided they sell nothing by retail.

II. ²³The owners of ship shall be answerable for the deeds of the master; but shall be discharged, abandoning their ship and freight.

III. However, the owners of armed ships shall not be answerable for their crimes and piracies committed at sea by the crews of their ships, any further than for the sums for which they may have given security, except it appear that they are partakers or accomplices in the crimes.

IV. The owners of ships may dismiss the master, reimbursing him, if he requires it, for his part in the ship, according to the estimation of understanding persons.²⁴

V. In every thing concerning the common interest of the owners, the opinion of the greater number shall prevail; and the number shall be computed according to the shares that every man has in the ship.²⁵

VI. No person may constrain his partner to proceed to the sale of a ship, except the opinions of the owners be equally different about the undertaking of any voyage.²⁶

²⁰ Laws of the Hanse Towns, art. 9.

²¹ Laws of Wisbuy, art. 24; Laws of Oleron, art. 12.

²² Laws of the Hanse Towns, art. 25; Id. art. 37.

²³ The better to oblige owners of ships to be diligent and careful in providing themselves with honest masters, it is by this article declared, that they shall be answerable for the behaviour of the masters they put in their ships, for any sum not exceeding the value of their ships, and of their freight. See Valin, Com. tom. 1, p. 568.

²⁴ Laws of the Hanse Towns, art. 14.

²⁵ See Valin, Com. tom. 1, p. 575.

²⁶ Valin, Com. tom. 1, p. 584. See, also, the case of Willings v. Blight, Case No. 17,765.

TITLE FIFTH.

Of Ships and Vessels.

I. All ships and vessels shall be reputed personalty, and shall not be subject to redemptions,²⁷ nor to pay any duties to the lords of manors.

II. All vessels however, shall be liable for the debts of the seller, until they have made a voyage under the name, and at the risque of the new acquirer, except they have been sold by adjudication.²⁸

III. The sale of a ship in voyage, or under a private contract, shall not in any manner be prejudicial to the creditors of the seller.

IV. All ships shall be gauged immediately after they are perfected, by the viewers or overseers of the trade or mystery of carpenters; who shall give an attestation of the burthen of the ship, which shall be registered in the admiralty office.

V. To discover and regulate the burthen and capacity of a ship, the hold shall be measured at the rate of two and forty foot cube for the sea ton.

VI. The officers of the admiralty shall be obliged under pain of interdiction of their offices, to take every year, in the month of December, an account of all the ships belonging to the inhabitants of their jurisdiction; which shall contain their burthen, age, quality and shape, with the names of the owners; all which they shall send to the secretary of state, who has the management of the marine affairs of that department.²⁹

²⁷ The word which I here render "redemption," is in the original "retrait lignager," and implies a power inherent in an heir to revoke some grant, or redeem something mortgaged by his predecessors; to which sort of redemption ships are declared by this law not to be subject.

²⁸ The design of making ships sold privately, liable for the debts of the last owner, until they have made a voyage at the risk, and under the name of the new acquirer, is only to prevent the sham sales of ships frequently made only to defraud the creditors of the seller; which certainly is a very just and commendable constitution.

²⁹ The injunction in the last article upon the officers of the admiralty, to take a yearly account of the shipping belonging to the places of their residence, and others within the district of their courts, in order to send it to the proper secretary of state, is a very convincing proof of the regular and excellent methods observed by the French court for the improvement of navigation; which if (by the account brought in once a year) they find to decay in any place of the kingdom, diligent enquiry is made into the cause of this fact, and all manner of impediments by which the prosperity of their shipping has been obstructed, are carefully removed. Nor is this the only advantage attending their diligence and exactness in such matters; for, by those yearly lists, the French king knows, within the number of 100 men or less, how many mariners and seamen, foreigners as well as natives, there are within the extent of his dominions; and he likewise knows what number are abroad in long voyages, when they may reasonably be expected back again, and where they are to arrive, and consequently when and where they may be serviceable to him.

MARITIME CONTRACTS.**TITLE FIRST.****Of Charter Parties and Freighting of Ships.**

I. All articles for freighting of ships shall be reduced into writing, and agreed to by the merchants that freight, and the master or owners of the ships freighted.

II. The master shall observe the orders of his owners, when he freights the ship at the place of their residence.³⁰

III. The charter party shall contain the name and burthen of the vessel, the names of the master and freighters, the place and time of the lading and unlading, the freight, the time the vessel is to stay at the respective ports, and the conventions about demurrage; to which the parties may add such other conditions as they please.

IV. The time of the lading and unlading the goods shall be regulated according to the custom of the respective ports, except it be determined by the charter party.

V. If a ship be freighted by the month, and the time of the freight be not regulated by the charter party, it shall only commence from the day that the ship shall sail.

VI. He who after having received a summons in writing to fulfil the contract refuses it, or delays it, shall make good all the loss and damage.

VII. But if before the departure of the ship, there should happen an embargo, occasioned by war, reprisals, or otherwise, with the country whither the ship is bound, the charter party shall be dissolved, without any damages or charges for either party, and the merchant shall pay the charges of lading and unlading his goods: but if the difference be with one another, the charter party shall be valid in all its points.

VIII. If the ports be only shut, and the vessel stopped by force for a time, the charter party shall still be valid, and the master and merchant shall be reciprocally obliged to expect the opening of the ports and the liberty of the ships, without any pretensions for damages on either side.

IX. However the merchant may at his own charge unload his goods during the embargo, or shutting up of the port, upon condition either to load them again, or indemnify the master.

X. The master shall be obliged, during the voyage, to have aboard the charter party, and the other necessary deeds concerning his lading.

XI. The ship, rigging and tackle, and the freight and goods laded, shall be respectively affected by the conventions of the charter party.

TITLE SECOND.**Of Bills of Loading.**

I. All bills of loading for goods put aboard a ship, shall be signed by the master or the clerk of the ship.

II. All bills of loading shall contain the quality, quantity, and mark of the goods, the names of the persons that lade them, and of those to whom they are consigned, the places of departure and unloading, the names of the master and the ship, and the value of the freight.

III. All bills of loading shall be triple, one shall remain in the hands of the lader, another shall be sent to the person to whom the goods are to be consigned, and the third shall be left in the hands of the master or clerk.

IV. The merchants shall be obliged within four and twenty hours after the goods are laded, to present the bills of loading to be signed by the masters, and to give them the acquittances and discharges for the customs of their goods, under pain of paying the damages of the retardment.

V. Factors and others, receiving goods expressed in bills of loading, or charter parties, shall be obliged to give a receipt thereof to the masters upon their demanding it, under pain of all expenses, damages and losses, and those of the retardment as well as others.

VI. In case of any diversity in bills of loading taken for the same goods, that which shall be in the hands of the master shall be authentic, if filled up by the merchant or his factor; and that which is in the hands of the merchant shall be good, if filled up by the captain.

TITLE THIRD.**Of Freight.**

I. The freight of ships shall be regulated by the charter party or bill of lading, whether the ships be freighted in whole or in part, for the voyage, or by the month, expressing the burden by the ton, the quintal, by parts, or any other way.

II. If a vessel be hired, and the freighter does not put her full loading aboard, the master shall not take aboard any other goods without his consent nor without rendering him an account of the freight.

III. A merchant not loading the quantity of goods mentioned by the charter party, shall notwithstanding pay the freight as if he had done it; and if he loads any more, he shall pay freight for them.

IV. A master that declares his vessel to be of greater burden than she is, shall sustain the damages thereby happening to the merchant.

V. It shall not be reputed an error in the declaration of the ship's burden, if the difference does not exceed one fortieth part.

VI. If the vessel be laded by parts, or by the quintal, or by the ton, a merchant being desirous to take out his goods before her departure, may do it at his own charge, paying half freight.

VII. A master may likewise unlade and lay down upon the shore any goods found in his ship, and put on board there without his

³⁰ Laws of the Hanse Towns, art. 58.

knowledge, or take freight at the highest rate that any goods of that quality pay.

VIII. A merchant unloading his goods during a voyage, shall nevertheless pay the whole freight, except he be obliged to unload them by the deed of the master.

IX. If a ship is stopped in her course, or at the port of her unloading, by the deed of the merchant that freights her, or if she, after having been freighted outward and inward, is forced to return empty, the damages of the retardment, and the whole freight shall be, notwithstanding, due to the master.

X. The master shall be likewise answerable for the damages of the freighter, if according to the judgment of intelligent persons, a vessel is stopped in her course, or at a port, by the deed of the master.

XI. If a master is obliged to cause his ship to be refitted during a voyage, the freighter shall be obliged either to wait or pay the whole freight; and if the ship cannot be rigged out, the master shall forthwith hire another; and if none can be found, he shall only be paid in proportion to the part he has performed on the voyage.

XII. However, if the merchant prove that when the ship put to sea she was unfit for sailing, the master shall lose his freight, and pay the other damages and losses.

XIII. The master shall be paid the freight of goods thrown overboard for the common safety, out of the contribution.

XIV. Freight shall likewise be due for goods that the merchant may have been forced to sell for victuals, refitting, and other pressing necessities, an account being kept by him of their value, according as the rest are sold at the place of unloading.

XV. If there happens an interdiction of commerce with any country to which a vessel is bound, and in her course, so that she returns with her loading, there shall only be due to the master the freight for going thither, even though the ship be freighted to go and come.

XVI. If a vessel, in the course of her voyage, be arrested by a supreme power, there shall be no freight due for the time of their detention, if freighted by the month; nor no augmentation, if freighted by the voyage; but the food and wages of the seamen, during the detention, shall be reputed average.

XVII. In case the person mentioned in any bill of loading refuse to accept the goods, the master, by the authority of the judges, may cause some to be sold for the payment of his freight, and deposit the rest in a warehouse.

XVIII. No freight shall be due for goods lost by shipwreck, or taken by pirates or enemies; and in that case, the master shall be obliged to restore what has been advanced to him, except there be some agreement to the contrary.

XIX. If the ship and goods be ransomed, the master shall be paid his freight to the

place where they were taken; and he shall be paid his whole freight if he conduct them to the place agreed to, he contributing towards the ransom.

XX. The contribution for the ransom shall be made according to the current price of the goods at the place of their unloading, deducting the charges, and upon the total of the ship and freight, deducting the victuals made use of, and the money advanced to the seamen; who shall likewise contribute towards the discharge of the freight, in proportion of what shall remain due to them of their wages.

XXI. The master shall likewise be paid the freight of goods saved from shipwreck, he conducting them to the place appointed.

XXII. If he cannot find a ship to carry thither the goods preserved, he shall only be paid his freight in proportion to what he has performed of the voyage.

XXIII. The master shall not detain the goods in his ship for default of the payment of his freight, but at the time of unloading, he may hinder them from being carried away, or cause them to be seized in the hoys or lighters.

XXIV. The master shall be preferred for his freight upon the goods of his lading, as long as they are in the ship, in lighters, or upon the quay; and he shall likewise be preferred wherever the goods may be, within fifteen days after the delivery, provided they are not passed into the possession of a third person.

XXV. Merchants may not oblige masters to take for their freight goods that are fallen in price, or that are spoiled or damaged by their own fault, or by accident.

XXVI. However, if goods contained in casks, such as wine, oil, honey, and other liquors, have leaked so much that the casks are empty, or almost empty, the merchants that laded them, may abandon them to the master for the freight.

XXVII. We forbid all brokers and others to cause, underhand, more freight to be paid for goods than is expressed in the first contract or charter party, under pain of one hundred livres, and a severer punishment if they deserve it.

XXVIII. However, the freighter of a whole ship that has not completed her lading, may take in other goods to make it up, and apply the freight to his own use.

TITLE FOURTH.

Of the Contracts and Wages of Seamen.

I. All agreements between masters and their seamen, shall be reduced into a writing, which shall contain all the conditions, whether they engage themselves by the month, or for the voyage; whether by the profit or freight; if otherwise, the seamen's oath shall be believed.

II. The seamen shall not load any goods

upon their own account, under pretence of portage,³¹ nor otherwise, without paying the freight, except it be mentioned in their agreement.

III. If by the fault of the owners, masters or merchants, a voyage be broke before the departure of the ship, the seamen hired for the voyage shall be paid for the time taken up in rigging and equipping the ship, and have one fourth of their wages; and those engaged by the month, shall be paid in proportion, regard being had to the ordinary length of the voyage: but if the voyage be broke after it is begun, the seamen hired for the voyage shall be paid their whole wages, and those hired by the month what is due to them for the time they have already served, and for that which will be necessary for returning to the place from whence the ship departed; and both shall be paid for their maintenance till they arrive there.

IV. In case of a prohibition of trade, with the place to which the ship is bound, before the voyage begins, there shall be no wages due to the seamen of either sort; who shall only be paid for the time spent in fitting out the ship: and if such prohibition happens during the voyage, they shall only be paid in proportion to the time they have served.

V. If the ship be stopped by a sovereign order before the voyage be begun, there shall be nothing due to the seamen, but their wages for fitting out the ship; but if it is during the course of the voyage, those engaged by the month shall have half wages during the detention of the ship, and those engaged by the voyage shall be paid according to their agreement.

VI. If the voyage be prolonged, the wages of the seamen hired by the voyage shall be augmented proportionably,³² and if they voluntarily unlade in a nearer port than that mentioned in the agreement, their wages notwithstanding shall not be diminished: but if they are hired by the month, they shall be in both cases paid for the time they serve.³³

VII. And as for the seamen and others going by the profit or freight, they shall not pretend any wages for equipping or damages, if the voyage be broke, retarded or prolonged by a superior power, whether before or after the departure of the ship; but if the breaking, retarding or prolonging of the voyage, happens by the fault of the freighters, the seamen shall have share in the costs and damages allowed the master, who, as well as the owners shall pay damages to the seamen, if they be the cause of the hindrance.

VIII. In case the ship be taken, or suffer

³¹ By portage is here meant the privilege generally allowed the seamen in France, to carry a venture for their own account.

³² The first part of this article, has relation only to contracts with mariners for the voyage.

³³ Laws of Oleron, art 19; Laws of Wisbuy, art. 2.

shipwreck, and ship and goods be entirely lost, the seamen shall pretend to no wages; but they shall not however be obliged to restore what has been advanced to them.

IX. If some part of the ship be preserved, the seamen shall be paid the wages that are due to them out of the wreck they have preserved; and if there be only goods saved, the seamen, even those that are engaged by the freight, shall be paid their wages by the master, proportionably to the freight he receives; and whatever way they be hired, they shall be over and above paid for the time they are employed in saving the wreck and goods.³⁴

X. If a master dismiss a mariner without a sufficient cause before the voyage is begun, he must pay him one third of his wages; and if after the voyage is begun, he shall pay him his whole wages, together with his charges for returning to the place of his departure; nor shall he state that to the account of his owners.³⁵

XI. If a seaman be wounded in the service of a ship, or fall sick during the voyage, he shall be paid his wages, and treated at the charge of the ship, and if he be wounded in fighting against enemies or pirates, he shall be cured at the charge of ship and cargo.^{36 37}

XII. But if being on shore without leave, he be there wounded, he shall not be dressed at the charge of the ship, nor of the loading; and he may be dismissed, without pretending to any more than the wages that are due to him.³⁸

XIII. The heirs of a seaman hired by the month, and dying in the voyage, shall be paid his wages until the day of his decease.³⁹

XIV. The half of the wages of a seaman hired by the voyage shall be due to his heirs if he dies outward bound, and the whole if he dies in the way home: and if he sailed by the profit or freight, his heirs shall enjoy his full share, if the voyage be begun before his death.⁴⁰

XV. The wages of a seaman killed in defending the ship shall be entirely paid as if he had served all the voyage; provided the ship arrives safe at a good harbour.

XVI. Seamen taken in ships and made slaves, shall pretend nothing against the

³⁴ Laws of Oleron, art. 3; Laws of the Hanse Towns, art. 24.

³⁵ Laws of the Hanse Towns, arts. 41, 42; Laws of Wisbuy, art. 3.

³⁶ Laws of Wisbuy, arts. 18, 19; Laws of the Hanse Towns, arts. 39, 45; Laws of Oleron, arts. 1, 6, 7; Valin, Com. tom. 1, p. 721.

³⁷ "Treated" and "cured" are varied translations of the word "panse" in the original, and should in both places be "cured," which is the true meaning of "panse."

³⁸ Laws of Wisbuy, art. 18; Laws of the Hanse Towns, art. 39.

³⁹ Laws of Oleron, art. 7; Laws of Wisbuy, art. 19; Laws of the Hanse Towns, art. 45.

⁴⁰ Cleirac, p. 34.

masters, owners, or merchants for their ransom.

XVII. But if any of them, being sent out for the service of the ship, be taken ashore, or at sea, his ransom shall be paid at the expenses of the ship; and if he was sent out for the service of ship and cargo, his ransom shall be paid by both, if they arrive happily at a good port: however the whole shall not exceed three hundred livres besides his wages.⁴¹

XVIII. The master, immediately after the arrival of the ship, shall take care to regulate the sums appointed for the ransom of captives, and the money shall be deposited in the hands of the principal owner, who shall be obliged forthwith to apply it to that use, under pain of four times the value to be paid by him, for the benefit of the seamen that are in servitude.

XIX. The ship and freight shall be specially liable for the seamen's wages.

XX. The seamen's wages shall not contribute towards any average, except it be for the ransom of the ship.

XXI. What is ordained in this title for the wages and ransom of the seamen, and dressing and treating of the sick, shall take place for the officers and all others belonging to the ship.

TITLE FIFTH.

Of Contracts of Bottomry, etc.⁴²

I. All contracts of bottomry may be made either by a public notary, or under a private signature.

II. Money may be given upon the body and keel of the ship, and upon her rigging and tackle, munitions and provisions, jointly or separately, and upon all, or any part of her loading, for one whole voyage, or a time limited.

III. We forbid all persons to take up, upon their ships or goods on board thereof, more than their real value, under pain of being obliged in case of fraud, to pay the whole sums, notwithstanding the vessel should be lost or taken.

IV. We also forbid, under the like penalty, to take up any money upon the freight for the voyage to be made, or upon the profit expected on the lading, or even upon the seamen's wages; except it be in the presence and with the consent of the master, and under one half of the aforesaid wages.

V. We moreover forbid all persons to advance any money to seamen upon their wages and voyages in that manner, except it be in the presence and with the consent of the master, under pain of confiscations of the sums lent, and a fine of fifty livres.

VI. The masters shall be answerable in their names, for the total of the sums taken up by the seamen with their consent, except

they exceed one half of their wages, and that notwithstanding the loss or taking of the ship.

VII. The ship, her rigging and tackle, munitions and provisions, and even the freight, shall be by privilege affected for the payment of the principal and interest of money given upon the body and keel of the ship, for the necessities of the voyage, and the lading.⁴³

VIII. Such as give money upon bottomry to a master without the consent of the owners, if they live in the place, shall have no security nor privilege upon the ship, any further than the part that the master may have in the ship and freight, though the money was borrowed for rigging the ship, or for buying provisions.⁴⁴

IX. However, the parts of such of the owners as refuse to furnish their proportions for fitting out the vessel, shall be affected for the money lent to the master for the equipment and provisions of the ship.⁴⁵

X. Creditors for money formerly due for such things, shall not come in competition with those that have actually lent for the last voyage.⁴⁶

XI. All contracts of bottomry shall become void by the entire loss of the effects upon which the money was lent, if that happens by casualty, and within the times and places therein expressed.

XII. Nothing shall be reputed a casualty that is occasioned by the defects of the things themselves, or by the fault of the owners, master or merchants, except it be otherwise provided by the contract.

XIII. If the time of the risk be not regulated by the contract, it shall last as to the ship, her rigging, tackle and provisions, from the day she sets sail till she arrives at her intended port, and is moored at the quay; and as to the goods, it shall last from the moment they are laded on board the ship or lighter to be carried thither, till they be unladed and ashore.⁴⁷

XIV. A person loading goods and taking up money upon them on bottomry, shall not be acquitted by the loss of the ship and lading, unless he makes it appear that he had there, upon his own account, effects to the value of the sum so borrowed.

XV. However, if the person that has taken money upon bottomry, makes it appear that he could not load goods to the value of the sum so borrowed, the contract, in case of loss, shall be diminished in proportion to the value of the effects loaded, and shall only subsist for the overplus; of which the borrower shall pay the interest, according to the current price of the place where the contract is made, till the actual

⁴¹ Valin, Com. tom. 1, p. 749.

⁴² Valin, Com. tom. 2, p. 1.

⁴³ Laws of Wisbuy, art. 45.

⁴⁴ Laws of the Hanse Towns, art. 58.

⁴⁵ Laws of the Hanse Towns, arts. 11, 59.

⁴⁶ La Guidon de la Mer, c. 19, arts. 2, 3.

⁴⁷ Cleirac, p. 381.

payment of the principal: and if the ship arrives in safety, there shall be due only the interest, and not the maritime profit of the overplus of the effects put aboard.

XVI. Lenders of money on bottomry, shall contribute towards gross averages, such as redemptions, compositions, ejections, masts and ropes, cut for the common safety of ship and goods; but not for the simple averages, or particular damages that may happen, except there intervene some agreement to the contrary.

XVII. However, in case of shipwreck, the contracts of bottomry shall be reduced to the value of the effects that are saved.

XVIII. If there be a contract of bottomry, and insurance upon the same loading, the lender shall be preferred to the insurers upon the effects preserved from shipwreck, for his capital, and no further.⁴⁸

TITLE SIXTH.

Of Insurances.

I. We allow all our subjects, as well as strangers, to insure, and cause to be insured, within the extent of our dominions, the ships, goods and effects, which shall be transported by sea or by navigable rivers; and we allow the insurers to stipulate a price, for which they will take the peril upon them.

II. The contract called "Policy of Insurance," shall be reduced into writing, and may be done under private signature.

III. The policy shall contain the name and dwelling place of the insured, his quality, whether of owner or factor, the effects upon which insurance is made, the name of the ship and master, that of the place where the goods are loaded, and from whence the ship departs, and that whither the ship is bound, and where the goods are to be unloaded; and also the names of all the places where the ship is to touch, the time that the risk is to begin and end, the sums insured, the premium or cost of the insurance, the submission of the parties to arbitrators in case of contestation; and generally all other conditions which they shall stipulate between them.

IV. Goods loaded in Europe for the ports of the Levant, the coasts of Africa, and other parts of the world, may be insured upon any ship whatsoever, without naming either the master or the ship, provided the name of the person to whom they are consigned be expressed in the policy.

V. If the policy does not regulate the time of the risk, they shall be regulated as are the contracts of bottomry, by the thirteenth article of title fifth.⁴⁹

VI. The premium, or cost of the insurance, shall be entirely paid at the signing of the policy; but if the insurance be made upon goods both out and home, and the vessel having arrived at the intended port do not return,

the insurers shall restore one third of the premium, except there be a stipulation to the contrary.

VII. Insurances may be made upon the body and keel of the ship, empty or laded, before or during the voyage; upon the provisions and upon the goods, jointly or separately laded on board of any ship, armed or unarmed, alone or in company, for the going out or coming home, for a whole voyage, or a time limited.

VIII. If the insurance be made upon the body and keel of the ship, her rigging, tackle, munitions and provisions, or upon any portion thereof, the estimation shall be made in the policy; allowing the insurer, in case of fraud, to oblige the concerned to proceed to a new estimation.

IX. All navigators, passengers, and others, may insure the liberty of their persons; and in that case the policies shall contain the name, country, residence, age and quality of the person that insures himself; the name of the ship, of the port from whence she sails, and that of her last departure; the sum to be paid in case of being taken, as well for the ransom as the charges of returning; to whom the money shall be paid, and under what penalty.

X. We forbid all insurances upon the lives of any person.

XI. However, such as redeem captives may insure the lives of those they redeem, and the price of the redemption; which the insurers shall be obliged to pay, if the person redeemed is taken again, or killed, or drowned in his return, or if he perish by any other means but by a natural death.

XII. Women, may lawfully engage themselves, and alienate their patrimonial estates, for the redemption of their husbands.

XIII. Any person, who, upon the wife's refusal, and by the authority of justice, lends money for the ransom of the husband shall be preferred to the wife upon the husband's estate, except for the restitution of her patrimony.

XIV. Minors may, likewise, with the advice of their relations, contract such obligations for ransoming their fathers from captivity, without any possibility of revocation.

XV. The owners nor masters of ships shall not insure beforehand the freight of their ships; the merchants, the profit they expect by their goods; nor the seamen, their wages.

XVI. We forbid all persons borrowing money upon bottomry to insure it, under pain of the insurance being void, and corporal punishment.

XVII. We likewise forbid, under the same penalty, the lenders upon bottomry to insure the profit of the sums lent.

XVIII. The insured shall still run the hazard of the tenth part of the effects they lade, except there be a positive clause in the policy, declaring that they mean to insure the whole.

XIX. And if the insured be in the ship, or if they be the owners, they shall nevertheless

⁴⁸ See Valin, Com. tom. 2, p. 20.

⁴⁹ See ante, p. 1210.

less run the risk of one tenth, though they declare that they mean to insure the whole.

XX. The insurers may re-insure with others the effects they may have insured, and the insured may likewise cause to be insured the premium of the insurance, and the solvency of the insurers.

XXI. The premiums of the re-insurance may be smaller or greater than those of the insurance.

XXII. We forbid to cause to be insured, or re-insured, any effects beyond their value, by one or several policies, under pain of nullity of the insurance and confiscation of the goods.

XXIII. However, if there happens to be made without fraud, a policy exceeding the value of the effects laded, it shall subsist for the value of the goods: and in case of loss, the insurers shall be bound, every one for the sum by him insured, and likewise to restore the overplus of the premium, retaining only a half per cent.

XXIV. And if there happen to be several policies likewise made without fraud, and the first contains the value of the goods laded, it shall subsist alone, and the other insurers shall not be bound in the insurance, but shall render the premium, retaining only a half per cent.

XXV. In case the first policy does not amount to the value of the effects laded, the insurers of the second shall be answerable for the overplus; and if there be effects laded to the value of the insurance, in case of the loss of some part of them, it shall be paid by the insurers there mentioned at so much per ⁵⁰ livre of the sums they are concerned in.

XXVI. All losses and damages happening at sea by tempest, shipwreck, running aground or aboard of other ships, changing of course of the voyage or course of the ship, ejection, fire, taking, rifting, detention by princes' declarations of war, reprisals, and generally by all other maritime accidents, shall be at the risk of the insurers.

XXVII. However, if the changing of the course, voyage or ship, happens by the order of the insured, without the consent of the insurers, they shall be discharged from the risk; which shall likewise take place in all other losses and damages happening by the fault of the insured; nor shall the insurers be obliged to restore the premium, if the time of their bearing the risk be begun.

XXVIII. Nor shall the insurers be obliged to bear the losses and damages happening to ships and goods by the fault of the master and mariners, except that by the policy they be engaged for the barratry of the master.

XXIX. The wastes, diminutions, and losses, happening by the proper defects of the goods, shall not fall upon the insurers.

XXX. Nor shall they be concerned in the

pilotage, lodemanage, duties of passports, searchings, declarations, anchorage, or in any others imposed upon ships or goods.

XXXI. The goods subject to leakage shall be expressed in the policy; if not, the insurers shall not be answerable for damages befalling them by tempest, except the insurance be made upon returns from foreign countries.

XXXII. If the insurance on goods be made separately by several ships mentioned, and the whole loading be put in one, the insurer shall only run the risk of the sum insured upon the ship in which the goods are loaded, even though all the ships together should perish; and he shall restore the premium of the overplus, retaining only a half per cent.

XXXIII. When the masters and patrons have liberty to touch at several ports, the insurers shall not run the hazard of the effects which shall be ashore, though they be intended for the loading they have insured, and the ship be in the port to take them aboard; except there be an express clause for it in the policy.

XXXIV. If the insurance be made for a limited time, without expressing the voyage, the insurer shall be discharged after the expiration of the time, and the insured may cause the goods to be insured again.

XXXV. But if the voyage be expressed in the policy, the insurer shall run the hazard of the whole voyage; upon condition however, that if it exceeds the limited time, the premium shall be augmented in proportion: nor shall the insurer be obliged to restore any thing, if the voyage be sooner ended.

XXXVI. The insurers shall be discharged from the risk, without losing the premium, if the insured, without their consent, send the ship to a place farther distant than that mentioned in the policy, though in the same course: but the insurance shall have its full effect, if the voyage be only shortened.

XXXVII. If the voyage be entirely broke before the departure of the ship, though by the fault of the insured, the insurance shall remain null; and the insurers shall restore the premium, all but a half per cent.

XXXVIII. We declare void all insurances made after the loss or arrival of the effects insured, if the insured knew, or could know of the loss, or the insurer of the arrival, before the signing of the policy.

XXXIX. The insured shall be presumed to have known of the loss, and the insurer of the arrival of the effects insured, if it be found that the news might have been brought from the place of the loss or arrival of the ship, to that of the signing of the policy, after either of these happened, and before the signing; allowing a league and a half per hour, without the prejudice of such other proofs as may be brought.

XL. However, if the insurance be made upon good or bad news, it shall subsist; except it be made appear, by other proofs than that of the league and half per hour, that the

⁵⁰ The French, in making computations, reckon so much per livre, as we do per cent.

insured knew of the loss, or the insurer of the arrival of the ship, before the signing of the insurance.

XXI. In case of proof against the insured, he shall be obliged to restore to the insurer what he has received, and pay him double the premium; and if there be proof against the insurer, he shall be likewise condemned to the restitution of the premium, and to pay the double to the insured.

XXII. When the insured receives advice of the loss of the ships or goods insured, of the detention thereof by any prince, and other accidents in which the insurers are concerned; he shall be obliged to cause it forthwith to be signified unto them, or to the person that has signed the policy for them, with protestation to make his abandonment in time of place.

XXIII. However, the insured, instead of protestation, may at the same time make his abandonment, and summons the insurers to pay the sums insured, within the time specified in the policy.

XXIV. If the time of payment be not specified in the policy, the insurers shall be obliged to pay the insurance within three months after the signification.

XXV. In case of shipwreck, or running aground, the insured may endeavour to recover the shipwrecked effects, without prejudice of the abandonment, which he may make in time and place; and of the reimbursement of his charges, as to which his affirmation shall be believed, to the value of the effects preserved.

XXVI. An abandonment shall not be made but in case of being taken, wrecked, run aground, stopped by a prince, or the entire loss of the goods insured; and all other damages shall only be reputed average, and shall be regulated between the insurers and insured, in proportion to their concerns.

XXVII. No person can make an abandonment of one part, retaining the other; nor any demand for average, except it exceed one per cent.

XXVIII. Abandonments, and all demands for the execution of a policy, shall be made to the insurers within six weeks after the news of losses happened upon the coasts of the same province where the insurance is made; and for those that happen in another province of our kingdom, within three months; upon the coasts of England, Flanders and Holland, four months; upon those of Spain, Italy, Portugal, Barbary, Muscovy and Norway, one year; and upon the coasts of America, Brazil, Guinea, and other remote countries, two years; and that time being expired, the insurers shall not be heard in their demands.

XXIX. In case of a ship's being detained by any prince, the abandonment shall not be made until six months afterwards, if the ship be stopped in Europe or Barbary; and a year in remoter countries; reckoning from the day that that was signified to the insurers: and in that case, the exception against the insurers

mentioned in the precedent article, shall only commence from the day that they may have begun to act therein.

L. However, if the goods so stopped be perishable, the abandonment may be made after six weeks, if they be stopped in Europe or Barbary; and after three months, if in a remoter country; counting from the day that the stoppage was signified to the insurers.

LI. The insured shall be obliged during these delays to use their utmost endeavours to get the arrest taken off the effects that are detained; and the insurers may do it themselves, if they please.

LII. If a vessel be detained by our order, in any port of our kingdom, before the voyage be begun; the insured may not, because of that arrest, abandon his effects to the insurer.

LIII. The insured shall be obliged, in making his abandonment, to declare all the insurances that he has caused to be made, and the money taken on bottomry upon the effects insured; under pain of being deprived of the benefit of the insurances.

LIV. If the insured conceals any insurances or contracts of bottomry, which, with these he declares, exceed the value of the effects insured, he shall be deprived of the benefit of the insurances, and obliged to pay the sums borrowed, notwithstanding the loss or taking of the vessel.

LV. And if he sues for payment of the sums insured beyond the value of his effects, he shall further be punished exemplarily.

LVI. The insurers of the loading shall not be obliged to pay the sums by them insured, beyond the value of the effects of which the insured proves the loading and the loss.

LVII. The evidences⁵¹ of the loading, and loss of the effects insured, shall be signified to the insurers immediately after the abandonment, and before they be sued for payment of the sums insured.

LVIII. However if the insured receives no news of his ship, he may, after the expiration of one year (reckoning from the day of departure) for the ordinary voyages, and after two years for long voyages, make his abandonment to the insurers; and demand payment, without any necessity of an attestation for certifying the loss.

LIX. Voyages from France into Muscovy, Greenland, Canada, Newfoundland, and other coasts and islands of America, to the Green Cape and coasts of Guinea, and all other places beyond the tropic, shall be reputed long voyages.

LX. After the abandonment is declared, the effects insured shall belong to the insurer; who must not, under pretence of the returning of the vessel, delay to pay the sums insured.

LXI. The insurer may bring what proofs he can against the validity of the attesta-

⁵¹ By those are meant bills of loading, and other necessary certificates, papers and writings.

tions; but shall nevertheless be condemned by provisions to pay the sums insured; security being given him by those to whom he pays them.

LXII. A master causing goods loaded on board his own ship for his own account to be insured, shall be obliged, in case of the loss thereof, to prove the buying of them, and to produce a bill of loading signed by the clerk and the pilot.

LXIII. All mariners and others, who shall bring goods from foreign countries upon which they have caused insurance to be made in France, shall be obliged to leave a bill of lading in the hands of the French consul or his chancellor, if there be any in the place where the goods are loaded; and if otherwise, in the hands of some eminent merchant of the French nation.

LXIV. The value of the goods shall be proved by books or invoices; if otherwise, the estimation thereof shall be made according to the current price at the place and time that they were loaded: included all duties and charges in getting them abroad; except the value be expressed in the policy.

LXV. If insurance be made upon returns from a country where traders only carry on by barter, the returns shall be made according to the value of the goods given in exchange for them, including the charges of their transportation.

LXVI. In case of capture the insured may redeem their effects without the order of the insurers, if they cannot give them advice thereof; but they must afterwards inform them by writing of the composition they have made.

LXVII. The insurers may take the composition for their benefit, in proportion to their concerns; and in that case they shall be obliged forthwith to make their declaration, to contribute actually towards the payment of the ransom, and to run the hazard of the return; or otherwise to pay the sums by them insured, without having any pretensions upon the ransomed effects.

LXVIII. We forbid all makers of policies, clerks of the chambers of insurance, notaries, brokers and others, to cause to be signed any policies where any blank is left, under pain of all damages and charges; and likewise to draw up any in which they themselves are concerned directly or indirectly by themselves, or by persons interposed; or to take any cession of right from the insured, under pain of five hundred livres for the first time, and deprivation of their employments in case of a relapse; which penalties shall not be in any manner moderated.

LXIX. We likewise enjoin them under the like penalties, to have a register quoted and flourished on every leaf by the lieutenant of the admiralty, and therein to record the policies they draw up.

LXX. When the policy contains a submission to arbitration, and one of the parties desire to go before the arbitrators before

any contest happens, the other party shall be obliged to consent; or if otherwise, the judge shall name for the refuser.

LXXI. Within eight days after the nomination of the arbitrators, the parties shall deliver the deeds and writing into their hands; and within the eight days following, they shall pronounce sentence thereupon.

LXXII. The decisions of arbitrators shall be confirmed in the court of admiralty, within the jurisdiction of which they are pronounced: and we forbid the judge, under that pretence, to take any knowledge of the cause, under pain of nullity, and all the charges, costs and damages of the parties.

LXXIII. Appeals from decisions by arbitrators' sentences and confirmations, shall be carried before our courts of parliament, and shall not be received until the penalty expressed in the clause of submission be paid.

LXXIV. The sentences of arbitrators may be executed, notwithstanding the appeals; security being given before the judges who confirm them.

TITLE SEVENTH.

Of Averages.⁵²

I. All extraordinary charges for the ships and their lading jointly or separately, and all damages which shall befall them from the time of their loading and departure, till their arrival and unloading, shall be reputed average.

II. The extraordinary charges for the ship alone, or for the goods alone, and the damage befalling either in particular, shall be simple and particular averages, and the extraordinary charges paid, and damages suffered for the common good and safety of ship and goods, shall be gross and common averages.

III. The simple averages shall be borne and paid by the owner of the thing that suffers the damages, or occasions the charge; but the gross or common averages shall fall upon the ship and goods at so much per livre, in proportion to their value.

IV. The loss of cables, anchors, sails, masts, and ropes, occasioned by tempest or any maritime accident, and damage, happening to the ship by the fault of the master or company, by neglecting to shut close the hatches, moor the ship, providing good tackle and ropes, or otherwise are simple averages, and shall be borne by the master, ship and freight.⁵³

V. Damages happening to goods by their own defects, tempest, being taken, shipwrecked, or run aground; the charges paid for preserving them, and the duties, impositions, and customs, are likewise simple averages, at the cost of their owners.

VI. Things given by composition to pirates, for ransom of the ship and loading; those that are cast into the sea, masts or cables broke or cut, anchors and other effects aban-

⁵² Valin, Com. tom. 2, p. 158.

⁵³ Laws of Wisbuy, art. 12.

done for the common safety, damage done to goods remaining in the ship by throwing over others; the dressing and treating seamen wounded in the defence of the ship, and the charges of lightening to enter into a port or river, or to get a ship afloat, shall be gross or common averages.

VII. The maintenance and hire of the seamen of a ship detained by a sovereign prince's order, shall likewise be reputed gross averages, if the ship be hired by the month; but if by the voyage, they shall be borne by the ship only, as simple averages.

VIII. The lodemanage, towage, and pilotage for entering into, or going out of a river are petty averages, one third to be paid by the ship, and the other two by the goods.⁵⁴

IX. The dues for the passport, search, declaration, anchorage, buoys, and sea marks, shall not be reputed averages, but shall be paid by the master.

X. In case of ships running aboard each other, the damage shall be equally sustained by those that have suffered and done it, whether during the course, in a road, or in a harbour.⁵⁵

XI. But if the damage be occasioned by either of the masters, it shall be repaired by him.⁵⁶

TITLE EIGHTH.

Of Ejections and Contributions.

I. If by tempest, or being chased by enemies or pirates, the master believes himself obliged to throw overboard part of his lading, to cut or force his masts, or leave his anchors; he must take the advice of the merchants, and principal men of the ship's company.⁵⁷

II. If they differ in their opinions, that of the master and ship's company shall prevail.

III. The utensils of the ship, and other things that are least necessary, heaviest, and of least value, shall be thrown overboard first, and afterwards the goods between decks: however, all must be done by the order of the captain, with the advice of the ship's company.

IV. The clerk, or such other person as performs his function, shall insert the deliberation in his book, as soon as possible; and shall cause it to be signed by those that voted, or otherwise shall mention the reason why they did not sign; and shall take as exact an account as he can of the goods thrown overboard or damnified.

V. At the first port where the ship touches, the master shall declare before the judge of the admiralty, if any be; and if none, before the ordinary judge, the reason of the ejection, or the cutting or forcing of his masts, or leaving of his anchors. and if it is in a

foreign country he arrives, he shall make that declaration before the French consul.

VI. The master shall take care to make the account of the losses and damages, at the place where the ship is unloaded; and the goods cast away, and those that are preserved, shall be esteemed according to the current price thereof, at the said place.⁵⁸

VII. The reparation for the payment of losses and damages, shall be made upon the goods lost and preserved, and upon the half of the ship and freight, at so much per livre, according to their value.⁵⁹

VIII. The better to judge of the quality of effects thrown overboard, the bills of loading and invoices, if there be any, shall be produced.

IX. If the quality of goods be misrepresented by bills of loading, and they be found to be of greater value than they were said to be by the merchant that laded them, they shall contribute, if saved, in proportion to their real value; but if lost, shall only be paid according to the bills of loading.

X. And if on the other hand, the goods are found to be of a meaner quality, and be preserved; they shall notwithstanding contribute according to the declaration: and if they be cast away or damnified, they shall only be paid according to their value.

XI. The munitions and provisions, and seamen's clothes and wages, shall not contribute towards the ejection; but such things as are cast away shall be paid by contribution, out of the other effects.

XII. Effects for which there is no bill of loading, shall not be paid, though thrown overboard; but if they are saved, they shall nevertheless contribute.⁶⁰

XIII. There shall no contribution be demanded for payments of such effects as were upon the deck, if they be thrown overboard, or damnified by the ejection; allowing the owner his recourse against the master: however, if they are preserved they shall contribute.

XIV. Nor shall any contribution be made, for damage befallen the ship, except it be done of purpose to facilitate the ejection.

XV. If the ejection does not save the ship, there shall be no contribution; and the goods that are saved from shipwreck, shall not be in any measure liable to pay the loss or damage of those that have been thrown away or spoiled.

XVI. But if the ship being once preserved by the ejection, continuing her course, comes afterwards to be lost, the effects that are preserved, shall contribute towards the ejection, according to their value, in the condi-

⁵⁴ Laws of Wisbuy, arts. 44, 56, 59, 60.

⁵⁵ Laws of Oleron, art. 14; Laws of Wisbuy, arts. 26, 50, 67, 70.

⁵⁶ Laws of Wisbuy, arts. 28, 51; Laws of Oleron, art. 15; Valin, Com. tom. 1, p. 188.

⁵⁷ Laws of Oleron, arts. 8, 9; Laws of Wisbuy, arts. 20, 21, 38.

⁵⁸ Laws of Oleron, art. 8; Laws of Wisbuy, art. 39.

⁵⁹ By the eighth article of the Laws of Oleron, the master may contribute for his ship or for his freight, as he pleases.

⁶⁰ Laws of Oleron, art. 8; Laws of Wisbuy, art. 43.

tion they shall be in, charges being first deducted.

XVII. The effects cast away shall not contribute in any case, towards the payment of damages, happening after the ejection, to the goods that are preserved; nor the goods to the payment of the ship, if lost or broken.

XVIII. However, if the ship be opened by the determination of the chief men of the company, and of the merchant, if any be, to take out the goods; they shall in that case contribute for the reparation of the damage done to the ship, to take them out.

XIX. In case of the loss of goods put aboard of any bark for lightening of a ship entering into any river, reparation shall be made by the whole ship and loading.

XX. But if the vessel perish, with the rest

of its loading, no reparation shall be made by goods put out into barges, though they arrive safe at their port.

XXI. If the owners of any goods that ought to contribute, refuse to pay their proportion, the master may, for the security of the contribution, retain, or by the authority of justice, may sell goods, to the value of their said proportions.⁶¹

XXII. If after the reparation, the effects thrown overboard be recovered by the owners, they shall be obliged to restore to the master, and the others concerned, what they have received of the contribution, deducting for the damage caused to their goods by the ejection, and for the charges of recovering them.

⁶¹ Laws of Oleron, art. 9.

TABLE OF LAND CLAIMS

PRESENTED TO THE COMMISSION PURSUANT TO THE PROVISIONS OF THE ACT
OF CONGRESS OF MARCH 3, 1851, ENTITLED "AN ACT TO ASCER-
TAIN AND SETTLE THE PRIVATE LAND CLAIMS
IN THE STATE OF CALIFORNIA."

[Reprinted from 1 Hoff. Land Cas. Append. 1.]

NOTE. The first number is that of the Commission; the second is the number of the District Court. N. D. and S. D. stand for Northern or Southern District. Where there is a third or other numbers they correspond to the Jimeno Index, from No. 1 to No. 433, and to Hartnell's Index, a continuation of Jimeno's Index, from No. 434 to No. 579.

1, 1, N. D., 352. John C. Fremont, claimant for Las Mariposas, 10 square leagues, in Mariposa county, granted February 29th, 1844, by Manuel Micheltorena to Juan Bautista Alvarado; claim filed January 21st, 1852, confirmed by the commission December 27th, 1852, by the district court June 27th, 1854, and by the U. S. supreme court in 17 Howard [58 U. S.] 542; containing 44,386.83 acres. Patented.

2, 54, N. D. Maria de la Soledad, Ortega de Arguello et als., claimants for Las Pulgas, 4 square leagues, in San Mateo county, granted December 10th, 1835, to Luis Arguello; claim filed January 21st, 1852, confirmed by the commission October 2d, 1853, by the district court January 26th, 1855, and by the U. S. supreme court in 18 Howard [59 U. S.] 539; containing 35,240.47 acres. Patented.

3, 2, N. D., 266. Archibald Ritchie, claimant for Suisun, 4 square leagues, in Sonoma county, granted January 28th, 1842, by Juan B. Alvarado to Francisco Solano; claim filed January 21st, 1852, confirmed by the commission January 3d, 1852, by the district court November 8th, 1853, and by the U. S. supreme court in 17 Howard [58 U. S.] 525; containing 17,754.73 acres.

4, 100, N. D. Domingo and Vicente Peralta, claimants for San Antonio, in Alameda county, granted August 16th, 1820, by Don Pablo Vicente de Sola to Luis Peralta; claim filed January 21st, 1852, confirmed by the commission February 7th, 1854, by the district court January 26th, 1855, and by the U. S. supreme court in 19 Howard [60 U. S.] 343; containing 19,143.86 acres.

5, 297, N. D. Thomas Jefferson Smith, claimant for 200 varas, Mission Dolores, in San Francisco county, granted July 26th, 1843, by Juan B. Alvarado to Domingo Feliz; claim filed January 21st, 1852, rejected by the commission March 20th, 1855, and for failure of prosecution appeal dismissed April 21st, 1856.

6, 416, N. D., 250. Roland Gelston, claimant for New Helvetia, 11 square leagues, in Yuba and Sutter counties, granted June 18th, 1841, by Juan B. Alvarado to John A. Sutter; claim filed January 21st, 1852, confirmed by the commission January 26th, 1856, and by the district court November 25th, 1859. See No. 92.

7, 174, N. D., 286. Bernard Murphy, claimant for Las Uvas, 3 square leagues, in Santa Clara county, granted June 14th, 1842, by Juan B. Alvarado to Lorenzo Pineda; claim filed January 22d, 1852, confirmed by the commission September 19th, 1854, and by the district court January 14th, 1856; containing 11,079.93 acres.

8, 77, N. D., 353. Robert F. Stockton, claimant for Potrero de Santa Clara, 1 square league, in Santa Clara county, granted February 29th, 1844, by Manuel Micheltorena to James Alexander Forbes; claim filed January 24th, 1852, confirmed by the commission November 15th, 1853, and by the district court October 29th, 1855; containing 1,939.03 acres.

9, 13, S. D., 25. William G. Dana, claimant for Nipoma, 15 square leagues, in Santa Barbara county, granted April 6th, 1837, by Juan B. Alvarado to Guillermo Dana; claim filed January 26th, 1852, confirmed by the commission March 1st, 1853, and dismissed December 20th, 1856; containing 32,728.62 acres.

10, 214, N. D. Emilius Voss, claimant for Las Mariposas, 11 square leagues in Mariposa county, granted September 19th, 1843, by Manuel Micheltorena to Manuel Castañares; claim filed January 26th, 1852, rejected by the commission November 21st, 1854, and for failure of prosecution appeal dismissed April 21st, 1856.

11, 299, N. D. Joel S. Polack, claimant for Island of Yerba Buena, in Bay of San Francisco, granted November 8th, 1838, by Juan B. Alvarado to Juan José Castro; claim filed January 27th, 1852, confirmed by the commission May 22d, 1855, and rejected by the district court March 17th, 1858.

12, 13, N. D., 462. Archibald A. Ritchie, claimant for Guenoc, 6 square leagues, in Sonoma county, granted May 8th, 1845, by Pio Pico to George Rock; claim filed January 27th, 1852, confirmed by the commission December 18th, 1852, and appeal dismissed December 15th, 1856; containing 21,220.03 acres.

13, 10, S. D., 147. José de la Guerra y Noriega, claimant for San Julian, 6 square leagues, in Santa Barbara county, granted April 7th, 1837, by Juan B. Alvarado to George Rock; claim filed January 28th, 1852, confirmed by

the commission February 21st, 1853, by the district court December 17th, 1856, and appeal dismissed February 24th, 1859; containing 48,221.68 acres.

14, 31, N. D., 35. Elam Brown, claimant for Acalanes, 1 square league, in Contra Costa county, granted August 1st, 1834, by José Figueroa to Candelario Valencia; claim filed February 2d, 1852, confirmed by the commission February 14th, 1853, and appeal dismissed November 26th, 1856; containing 3,328.95 acres. Patented.

15, 15, S. D., 171. Joaquin and José A. Carrillo, claimants for Lompoc, in Santa Barbara county, granted April 15th, 1837, by Juan B. Alvarado to Joaquin and José A. Carrillo; claim filed February 2d, 1852, confirmed by the commission April 11th, 1853, and appeal dismissed February 24th, 1857; containing 38,335.78 acres.

16, 52, N. D., 254, 411. Josefa Carrillo Fitch et al., claimants for Sotoyomé, 8 square leagues, in Sonoma and Mendocino counties, granted September 28th, 1841, by Manuel Micheltorena to Henry D. Fitch; claim filed February 2d, 1852, confirmed by the commission April 18th, 1853, and appeal dismissed November 17th, 1857; containing 48,836.51 acres.

17, 6, N. D., 494. José de Jesus Noé, claimant for San Miguel, 1 square league, in San Francisco county, granted December 23d, 1845, by Pio Pico to José de Jesus Noé; claim filed February 2d, 1852, confirmed by the commission December 18th, 1852, and appeal dismissed October 23d, 1856; containing 4,443.38 acres.

18, 208, N. D. Antonio Maria Osio, claimant for Island of Los Angeles, in San Francisco county, granted June 11th, 1839, by Juan B. Alvarado to Antonio Maria Osio; claim filed February 2d, 1852, confirmed by the commission October 24th, 1854, by the district court September 10th, 1855, and decree reversed by the U. S. supreme court and cause remanded, with directions to dismiss the petition, 23 Howard [64 U. S.] 273.

19, 44, N. D. Antonio Cazares, claimant for Cañada de Pogolomé, 2 square leagues, in Marin county, granted February 12th, 1844, by Manuel Micheltorena to Antonio Cazares; claim filed February 3d, 1852, confirmed by the commission April 11th, 1853, by the district court March 24th, 1856, and appeal dismissed December 8th, 1856; containing 8,780.81 acres. Patented.

20, 102, S. D., 82. Juan Miguel Anzar, claimant for Los Aromitas y Agua Caliente, 3 square leagues, in Monterey county, granted October 12th, 1835, by José Castro to Juan Miguel Anzar; claim filed February 3d, 1852, confirmed by the commission January 10th, 1853, by the district court December 10th, 1856, and appeal dismissed February 21st, 1857; containing 8,659.69 acres.

21, 75, N. D., 220. Maria Luisa Greer et al., claimants for Cañada de Raymundo, two and a half by three-quarter leagues, in San Mateo county, granted August 3d, 1840, by Juan B. Alvarado to John Coppinger; claim filed February 3d, 1852, confirmed by the commission November 29th, 1853, by the district court January 14th, 1856, and appeal dismissed November 11th, 1856; containing 12,545.01 acres. Patented.

22, 258, S. D., 127. Juan Miguel Anzar and Manuel Larios, claimants for Santa Ana, 1 square league, and Quien Sabe, 6 square leagues, in Santa Clara county, granted April 9th, 1839, by Juan B. Alvarado to Manuel Larios and Juan Anzar; claim filed February 6th, 1852, confirmed by the commission November 7th, 1854, by the district court December 11th, 1856, and appeal dismissed June 4th, 1857; 48,822.60 acres. Patented.

23, 35, N. D., 308. Stephen Smith and Manuela T. Curtis, claimants for Bodega, 8 square leagues, in Sonoma county, granted September 14th, 1844, by Manuel Micheltorena to Stephen Smith; claim filed February 9th, 1852, confirmed by the commission February 21st, 1853, by the district court July 5th, 1855, and appeal dismissed April 2d, 1857; containing 35,487.53 acres. Patented.

24, 224, N. D., 280. Stephen Smith, claimant for Blucher, 6 square leagues, in Sonoma county, granted October 14th, 1844, by Manuel Micheltorena to Juan Vioget; claim filed February 9th, 1852, confirmed by the commission October 31st, 1854, by the district court January 26th, 1857, and appeal dismissed April 2d, 1857; containing 26,759.42 acres. Patented.

25, 147, N. D., 19. Daniel and Bernard Murphy and James and Martin Murphy, claimants for San Francisco de Las Llagas, 6 square leagues, in Santa Clara county, granted February 3d, 1834, by José Figueroa to Carlos Castro; claim filed February 9th, 1852, confirmed by the commission August 22d, 1854, by the district court October 22d, 1855, and appeal dismissed November 24th, 1856; containing 22,979.66 acres.

26, 162, N. D. Dolores Riesgo Armijo et al., heirs of José F. Armijo, claimants for Las Tolenas, 3 square leagues, in Solano county, granted March 10th, 1840, by Juan B. Alvarado to José Francisco Armijo; claim filed February 9th, 1852, rejected by the commission August 8th, 1854, and appeal dismissed November 24th, 1856; containing 13,315.93 acres.

27, 18, N. D., 243. José Rafael Gonzalez and Mariana Gonzalez, claimants for San Miguelito de Trinidad, 5 square leagues, in Monterey county, granted July 24th, 1841, by Juan B. Alvarado to José Rafael Gonzalez; claim filed February 9th, 1852, confirmed by the commission March 1st, 1853, by the district court September 24th, 1855, and appeal dismissed February 17th, 1857; containing 22,135.89 acres.

28, 4, N. D. Pearson B. Reading, claimant for San Buenaventura, 6 square leagues, in Sacramento county, granted December 4th, 1844, by Manuel Micheltorena to P. B. Reading; claim filed February 9th, 1852, confirmed by the commission December 18th, 1852, by the district court October 31st, 1853, and by the U. S. supreme court in 18 Howard [59 U. S.] 1; containing 26,632.09 acres. Patented.

29, 391, N. D. Thomas Dorland, claimant for 200 square yards, in San Francisco county, (Mission Dolores) granted by Mariano Castro to Toribio Fanfaran; claim filed February 9th, 1852, rejected by the commission September 25th, 1855, and for failure of prosecution appeal dismissed March 30th, 1857.

30, 5, N. D., 177. Carmen Sibirian de Bernal and José Cornelio Bernal, claimants for Rincon de las Salinas y Potrero Nuevo, 1 square league, in San Francisco county, granted October 10th, 1839, by Manuel Jimeno to José Cornelio de Bernal; claim filed February 9th, 1852, confirmed by the commission December 18th, 1852, by the district court August 20th, 1855, and appeal dismissed December 8th, 1856; containing 4,446.40 acres. Patented.

31, 177, S. D., 14, 145. Isabel Yorba, claimant for Guadaluasca, in Santa Barbara county, granted May 6th, 1846, by Mariano Chico to Isabel Yorba; claim filed February 9th, 1852, rejected by the commission April 25th, 1854, confirmed by the district court March 3d, 1856, and appeal dismissed. December 8th, 1856; containing 30,593.85 acres.

32, 94, N. D., 109. Juan Wilson, claimant for Guillicos, 4 square leagues, in Sonoma county, granted November 20th, 1847, by Juan B. Alvarado to John Wilson; claim filed Febru-

ary 10th, 1852, confirmed by the commission December 27th, 1853, by the district court March 3d, 1856, and appeal dismissed December 8th, 1856; containing 18,833.86 acres.

33, 353, N. D. Eustaquio and José Ramon Valencia, claimants for 200 varas square, Mission Dolores, in San Francisco county, granted July 18th, 1845, by Mariano Castro to Eustaquio and José Ramon Valencia; claim filed February 17th, 1852, and rejected by the commission July 3d, 1855.

34, 389, N. D. Candelario Valencia, claimant for 50 varas square, Mission Dolores, in San Francisco county, granted November 18th, 1840, by Juan B. Alvarado; claim filed February 11th, 1852, confirmed by the commission August 14th, 1855, by the district court December 28th, 1857, and appeal dismissed December 28th, 1857.

Candelario Valencia, claimant for 100 varas square, Mission Dolores, in San Francisco county, granted May 18th, 1841, by Juan B. Alvarado.

35, 57, N. D., 347. Sebastian Nunez, claimant for Orestimba, 6 square leagues, in Tuolumne county, granted February 21st, 1844, by Manuel Micheltorena to Sebastian Nunez; claim filed February 12th, 1852, rejected by the commission October 25th, 1853, confirmed by the district court May 4th, 1857, and appeal dismissed September 3d, 1858; containing 26,641.17 acres.

36, 36, N. D., 6. Maximo Martinez, claimant for El Corte de Madera, 2 square leagues, in Santa Clara county, granted May 1st, 1844, by Manuel Micheltorena to Maximo Martinez; claim filed February 12th, 1852, confirmed by the commission February 28th, 1853, by the district court September 10th, 1855, and appeal dismissed April 2d, 1857; containing 13,316.05 acres. Patented.

37, 62, N. D., 315. Juan Perez Pacheco, claimant for San Luis Gonzaga, in Mariposa county, granted December 3d, 1843, by Manuel Micheltorena to Francisco Rivera; claim filed February 12th, 1852, rejected by the commission October 18th, 1853, confirmed by the district court April 21st, 1856, and appeal dismissed September 3d, 1858; containing 48,821.43 acres.

38, 103, S. D., 271. José de la Guerra y Noriega, claimant for San José de Gracia or Simi, in Santa Barbara county, granted 1795, by Borica to Patricio Javier y Miguel Pico, and revalidated by J. B. Alvarado April 25th, 1842; claim filed February 12th, 1852, confirmed by the commission March 14th, 1854, and appeal dismissed December 20th, 1856; containing 92,341.38 acres.

39, 11, S. D. Victor Linares, claimant for 1,000 varas square, in San Luis Obispo county, granted September 18th, 1842, by Juan B. Alvarado to Victor Linares; claim filed February 12th, 1852, confirmed by the commission March 14th, 1853, by the district court January 14th, 1857, and appeal dismissed June 3d, 1859; containing 165.76 acres.

40, 14, N. D., 383. Arch. A. Ritchie and Paul S. Forbes, claimants for Callayomi, 3 square leagues, in Sonoma county, granted January 17th, 1845, by Manuel Micheltorena to Robert F. Ridley; claim filed February 12th, 1852, confirmed by the commission December 22d, 1852, and appeal dismissed December 8th, 1856; containing 8,241.74 acres.

41, 14, S. D., 144. Ramona Carrillo de Wilson, claimant for 5 square leagues, granted April 6th, 1837, by Juan B. Alvarado to Ramona Carrillo; claim filed February 12th, 1852, confirmed by the commission April 11th, 1853, and by the district court January 8th, 1857.

42, 345, N. D. James and Squire Williams, claimants for 1 square league, granted June 12th, 1840, by Juan B. Alvarado to Gil Sanchez; claim filed February 17th, 1852, confirmed by the commission July 10th, 1855, and appeal dismissed December 24th, 1856.

43, 95, N. D., 488. Manuel Torres, claimant for Muniz, 4 square leagues, in Mendocino county, granted December 4th, 1845, by Pio Pico to Manuel Torres; claim filed February 17th, 1852, confirmed by the commission December 27th, 1853, by the district court October 17th, 1855, and appeal dismissed May 7th, 1857; containing 17,760.75 acres. Patented.

44, 61, N. D., 483. Bartolomé Bojorquez, claimant for Laguna de San Antonio, 6 square leagues, in Marin county, granted November 5th, 1845, by Pio Pico to B. Bojorquez; claim filed February 17th, 1852, confirmed by the commission October 12th, 1853, by the district court September 10th, 1855, and appeal dismissed November 24th, 1856; containing 24,903.42 acres.

45, 397. Thomas B. Valentine, claimant for Arroyo de San Antonio, 3 square leagues, in Marin county, granted October 8th, 1844, by Manuel Micheltorena to Juan Miranda; claim filed February 17th, 1852, and discontinued February 6th, 1855.

46. Thomas Jefferson Smith, claimant for 200 varas, Mission Dolores, in San Francisco county, granted August 20th, 1842, to Domingo Feliz; claim filed February 17th, 1852; included in No. 5.

47, 211, S. D. Francisco Perez Pacheco, claimant for San Justo, 4 square leagues, in Monterey county, granted April 15th, 1839, by Juan B. Alvarado to José Castro; claim filed February 17th, 1852, confirmed by the commission September 26th, 1854, by the district court June 3d, 1857, and appeal dismissed June 8th, 1857; containing 33,689.99 acres.

48, 24, S. D. Francisco Branch, claimant for Santa Manuela, in San Luis Obispo county, granted April 6th, 1837, by Juan B. Alvarado to Francisco Branch; claim filed February 17th, 1852, confirmed by the commission March 1st, 1853, by the district court October 16th, 1855, and appeal dismissed February 24th, 1857; containing 16,954.83 acres.

49, 32, S. D., 100. Carlos Antonio Carrillo, claimant for Sespé, 6 square leagues, in Santa Barbara county, granted November 9th, 1833, by José Figueroa to C. A. Carrillo; claim filed February 17th, 1852, confirmed by the commission April 18th, 1853, and by the district court February 19th, 1856.

50, 261, S. D. John Wilson, claimant for Huerta de Romaldo, one-tenth square league, in San Luis Obispo county, granted 1842 by J. B. Alvarado, and July 10th, 1846, by Pio Pico, to Romaldo; claim filed February 17th, 1852, rejected by the commission December 12th, 1854, and confirmed by the district court February 9th, 1857.

51, 53, S. D., 553. Fernando Tico, claimant for 400 varas, Mission of San Buenaventura, in Santa Barbara county, granted March 24th, 1845, by Pio Pico to F. Tico; claim filed February 17th, 1852, confirmed by the commission November 23d, 1853, by the district court January 7th, 1856, and appeal dismissed February 5th, 1857; containing 28.90 acres.

52, 159, N. D. Bernard Murphy, claimant for La Polka, 1 square league, in Santa Clara county, granted January 19th, 1833, by José Figueroa to Ysabel Ortega; claim filed February 17th, 1852, confirmed by the commission August 15th, 1854, by the district court January 14th, 1856, and appeal dismissed January 18th, 1856; containing 4,166.78 acres.

- 53, 148, N. D., 361. Domingo Feliz, claimant for Feliz Rancho, 1 square league, in San Mateo county, granted May 1st, 1844, by Manuel Micheltoarena to D. Feliz; claim filed February 17th, 1852, confirmed by the commission January 27th, 1854, by the district court October 29th, 1855, and appeal dismissed November 18th, 1856; containing 4,448.27 acres.
- 54, 4, S. D., 94. David S. Spence, claimant for Encinal y Buena Esperanza, 2 square leagues, in Monterey county, granted November 29th, 1834, by José Figueroa to D. S. Spence; 1 square league additional, in Monterey county, granted April 15th, 1839, by Juan B. Alvarado; claims filed February 19th, 1852, confirmed by the commission February 14th, 1853, by the district court December 19th, 1855, and appeal dismissed February 23d, 1857; containing 13,351.64 acres.
- 55, 370, S. D. Francisco Castillo Negrete, claimant for Quien Sabe, 6 square leagues, in San Joaquin county, granted April 16th, 1836, by Nicolas Gutierrez to F. C. Negrete; claim filed February 20th, 1852, and rejected by the commission September 11th, 1855.
- 56, 178, S. D., 156. Cruz Cervantes, claimant for San Joaquin or Rosas Morada, 2 square leagues, in Monterey county, granted April 1st, 1836, by Nicolas Gutierrez to C. Cervantes; claim filed February 20th, 1852, confirmed by the commission December 18th, 1852, by the district court September 21st, 1855, and judgment affirmed by the U. S. supreme court in 18 Howard [59 U. S.] 553.
- 57, 74, N. D., 465. Juan Manuel Vaca and Juan Felipe Peña, claimants for Los Putos, 10 square leagues, in Solano county, granted January 27th, 1843, by Manuel Micheltoarena to J. M. Vaca and J. F. Peña; claim filed February 20th, 1852, rejected by the commission November 15th, 1853, confirmed by the district court July 5th, 1855, and decree affirmed by the U. S. supreme court in 18 Howard [59 U. S.] 556; containing 44,383.78 acres. Patented.
- 58, 161, N. D. José de los Santos Berreyesa, claimant for Señor de Mallacomés or Moristal y Plan de Agua Caliente, 4 square leagues, in Sonoma county, granted October 14th, 1843, by Manuel Micheltoarena to J. de los Santos Berreyesa; claim filed February 20th, 1852, confirmed by the commission June 27th, 1854, by the district court December 24th, 1856, and appeal dismissed November 24th, 1856; containing 12,540.22 acres.
- 59, 150, N. D. Lovett P. Rockwell and Thomas P. Knight, claimants for portion of Mallacomés or Moristal, No. 58, 2 square leagues, in Sonoma county, granted October 14th, 1843, by Manuel Micheltoarena to José de los Santos Berreyesa; claim filed February 20th, 1852, confirmed by the commission August 29th, 1854, and appeal dismissed November 24th, 1856; containing 8,328.85 acres.
- 60, 155, N. D., 128. José Dolores Pacheco, claimant for Santa Rita, in Alameda county, granted April 10th, 1839, by Juan B. Alvarado to J. D. Pacheco; claim filed February 21st, 1852, rejected by the commission April 25th, 1854, confirmed by the district court August 13th, 1855, and decree affirmed by the U. S. supreme court in 23 Howard [64 U. S.] 495; containing 8,855.67 acres.
- 61, S. D., 290. Rafael Vilavicencio, claimant for San Geronimo, 2 square leagues, in San Luis Obispo county, granted July 24th, 1842, by Juan B. Alvarado to R. Vilavicencio; claim filed February 21st, 1852, confirmed by the commission February 14th, 1853, and by the district court October 14th, 1859.
- 62, 9, N. D., 143. Antonio and Faustin German, claimants for Juristac, 1 square league, in Santa Clara county, granted October 22d, 1835, to A. and F. German; claim filed February 21st, 1852, confirmed by the commission December 18th, 1852, by the district court June 7th, 1855, and appeal dismissed April 28th, 1857; containing 4,482.41 acres.
- 63, 79, S. D., 149. Francisco Perez Pacheco, claimant for 2 square leagues, in Monterey county, granted November 26th, 1833, by José Figueroa to F. P. Pacheco; by another grant, claimant for Ausaymas, 2 square leagues, in Tuolumne county, granted February 6th, 1836, by Nicolas Gutierrez; claims filed February 24th, 1852, confirmed by the commission July 5th, 1853, and by the district court October 10th, 1855; containing 35,504.34 acres. Patented.
- 64, 78, S. D. Francisco Perez Pacheco, claimant for San Felipe, 3 square leagues, in Monterey county, granted April 1st, 1836, by Nicolas Gutierrez to F. D. Pacheco; claim filed February 24th, 1852, confirmed by the commission July 5th, 1853, and by the district court October 11th, 1855. Surveyed with No. 63 and patented.
- 65, 77, S. D., 212. Francisco Perez Pacheco, claimant for Bolsa de San Felipe, 2 square leagues, in Monterey county, granted October 14th, 1840, by Juan B. Alvarado to F. D. Pacheco; claim filed February 14th, 1852, confirmed by the commission December 29th, 1852, by the district court February 19th, 1857, and January 11th, 1861, and appeal dismissed March 4th, 1858.
- 66, 39, S. D., 122. Diego Olivera and Teodoro Arellanes, claimants for Guadalupe, described by boundaries, in San Luis Obispo county, granted March 21st, 1840, by Juan B. Alvarado to D. Olivera and T. Arellanes; claim filed February 24th, 1852, confirmed by the commission December 6th, 1853, by the district court September 25th, 1855, and appeal dismissed February 5th, 1857; containing 32,408.03 acres.
- 67, 365, S. D., 523. Maria Antonio de la Guerra and Lataillade, claimants for Cuyama, 5 square leagues, in Santa Barbara county, granted April 24th, 1843, by Manuel Micheltoarena to José Maria Rojo; claim filed February 24th, 1852, confirmed by the commission July 17th, 1855, by the district court January 20th, 1857, and appeal dismissed March 4th, 1858; containing 22,198.74 acres.
- 68, 223, N. D., 188. Assignee of Bezer Simmons, claimant for Novato, 2 square leagues, in Marin county, granted April 16th, 1839, by Juan B. Alvarado to Fernando Feliz; claim filed February 24th, 1852, confirmed by the commission November 7th, 1854, and appeal dismissed December 16th, 1856; containing 8,870.62 acres.
- 69, 30, N. D., 484. David Wright, claimant for Roblar de la Miseria, 4 square leagues, in Sonoma county, granted November 21st, 1845, by Pio Pico to Juan Nepomaseno Padillo; claim filed February 24th, 1852, confirmed by the commission February 14th, 1853, by the district court September 10th, 1855, and appeal dismissed December 8th, 1856; containing 16,887.45 acres. Patented.
- 70, 411, N. D. Edmund L. Brown et al., claimants for Laguna de Santos Calle, 11 square leagues, in Yolo county, granted December 29th, 1845, by Pio Pico to Victor Prudon and Marcos Baca; claim filed February 24th, 1852, rejected by the commission January 15th, 1856, and by the district court September 18th, 1860.
- 71, 10, N. D., 320. Camilo Ynitia, claimant for Olompali, 2 square leagues, in Marin county, granted October 22d, 1843, by Manuel Micheltoarena to C. Ynitia; claim filed February 26th, 1852, confirmed by the commission December 18th, 1852, by the district court Feb-

ruary 23d, 1857, and appeal dismissed July 31st, 1857; containing 8,877.43 acres.

72, 16, N. D., 346. Timoteo Murphy, claimant for San Pedro, Santa Margarita and Las Gallinas, 5 square leagues, in Marin county, granted February 14th, 1844, by Manuel Micheltorena to T. Murphy; claim filed February 26th, 1852, confirmed by the commission December 22d, 1852, and appeal dismissed November 18th, 1856; containing 21,678.69 acres.

73, 202, N. D. Julian and Fernando, sons of Santos, a neophite, claimants for Rincon del Alisal, 600 varas, in Santa Clara county, granted December 28th, 1844, by José Maria del Ray (priest) to Santos and Sons; claim filed February 27th, 1852, rejected by the commission November 21st, 1854, and for failure of prosecution appeal dismissed by the district court April 21st, 1856.

74, 421, N. D. Jacob Leese and Salvador Valledo, claimants for 200 by 100 varas, in city of San Francisco, granted May 21st, 1839, by Juan B. Alvarado to Jacob Leese and S. Valledo; claim filed February 27th, 1852, confirmed by the commission February 5th, 1856, and appeal dismissed April 6th, 1857; containing 3.38 acres. Patented.

75, 7, N. D., 364. José Agustin Narvaez, claimant for San Juan Bautista, 2 square leagues, in Monterey county, granted March 30th, 1844, by Manuel Micheltorena to J. A. Narvaez; claim filed February 27th, 1852, rejected by the commission November 15th, 1853, confirmed by the district court July 15th, 1855, and appeal dismissed July 5th, 1855; containing 8,877.60 acres.

76, 20, N. D., 64. Salvio Pacheco, claimant, for Monte del Diablo, in Contra Costa county, granted March 30th, 1844, by José Figueroa to S. Pacheco; claim filed February 27th, 1852, confirmed by the commission January 5th, 1853, by the district court January 14th, 1856, and appeal dismissed November 24th, 1856; containing 17,921.54 acres. Patented.

77, 135, N. D., 129. José Noriega and Roberto Livermore, claimants for Las Positas, 2 square leagues, in Alameda county, granted April 10th, 1839, by Juan B. Alvarado to Salvio Pacheco; claim filed February 27th, 1852, confirmed by the commission February 14th, 1854, and by the district court February 18th, 1859.

78, 133, N. D., 125. Fulgencio Higuera, claimant for Agua Caliente, 2 square leagues, in Alameda county, granted October 13th, 1836, by Nicolas Gutierrez, and April 4th, 1839, by Juan B. Alvarado, to F. Higuera; claim filed February 27th, 1852, confirmed by the commission February 14th, 1854, and appeal dismissed November 24th, 1856; containing 9,563.87 acres. Patented.

79, 386, N. D., 431. Robert Livermore, claimant for Cañada de los Vaqueros, in Contra Costa county, granted February 29th, 1844, by Manuel Micheltorena to Francisco Alvisu et al.; claim filed February 27th, 1852, confirmed by the commission September 4th, 1855, by the district court December 28th, 1857, and appeal dismissed December 28th, 1857.

80, 210, N. D. Timothy Murphy, in behalf of the San Rafael tribe of Indians, claimant for Tinicasia, 1 square league, in Marin county, granted in 1841, by M. G. Vallejo to San Rafael tribe of Indians; claim filed February 28th, 1852, rejected by the commission November 21st, 1854, and for failure of prosecution appeal dismissed April 21st, 1856.

81, 338, N. D. James R. Bolton, claimant for Mission Dolores, 3 square leagues, in San Francisco county, granted February 10th, 1846, by Pio Pico to José Prudencio Santillan; claim filed March 1st, 1852, confirmed by the commission January 5th, 1855, pro forma by the

district court April 7th, 1857, and decrees reversed by the U. S. supreme court and cause remanded, with direction to dismiss the claim, 23 Howard [64 U. S.] 341.

82, 60, N. D., 318. José de Jesus Vallejo, claimant for Arroyo del Alameda, 4 square leagues, in Alameda county, granted August 30th, 1842, by Juan B. Alvarado to J. de Jesus Vallejo; claim filed March 2d, 1852, confirmed by the commission October 18th, 1853, by the district court March 2d, 1857, and appeal dismissed July 28th, 1857; containing 17,705.38 acres. Patented.

83, 59, N. D., 216, 318. José de Jesus Vallejo, claimant for Arroyo del Alameda, 1,000 varas square, in Santa Clara county, granted December 30th, 1840, by Manuel Jimeno to J. de Jesus Vallejo; claim filed March 2d, 1852, and rejected by the commission October 18th, 1853.

84, 65, N. D., 167. Domingo Sais, claimant for Cañada de Herrera, one-half square league, in Marin county, granted August 10th, 1830, by Manuel Jimeno to D. Sais; claim filed March 2d, 1852, confirmed by the commission October 21st, 1853, by the district court May 25th, 1853, and appeal dismissed May 25th, 1853; containing 6,653.35 acres.

85, 35, S. D. José de Jesus Vallejo, claimant for Bolsa de San Cayetano, 2 square leagues, in Monterey county, granted October 25th, 1824, by Arguello, and October 13th, 1834, by José Figueroa, to Ignacio Vallejo; claim filed March 2d, 1852, confirmed by the commission December 6th, 1853, by the district court February 1st, 1856, and appeal dismissed January 9th, 1857; containing 8,866.43 acres.

86, 48, N. D., 501. Jasper O'Farrell, claimant for Cañada de la Jonive, 2 square leagues, in Sonoma county, granted February 5th, 1845, by Pio Pico to James Black; claim filed March 2d, 1852, confirmed by the commission April 18th, 1853, by the district court July 16th, 1855, and appeal dismissed December 22d, 1856; containing 10,786.51 acres. Patented.

87, 196, S. D., 282, 506. Francis Branch, claimant for Huerhuero or Huerfano, 1 square league, in San Luis Obispo county, granted May 9th, 1842, by Juan B. Alvarado, and March 28th, 1846, by Pio Pico, to Mariano Bonilla; claim filed March 2d, 1852, confirmed by the commission September 12th, 1854, by the district court December 31st, 1855, and appeal dismissed February 24th, 1857; containing 15,684.95 acres.

88, 64, S. D., 451. Antonio Maria Villa, claimant for Tequepis, 2 square leagues, in Santa Barbara county, granted May 24th, 1845, by Pio Pico to Joaquin Villa; claim filed March 2d, 1852, rejected by the commission November 13th, 1853, confirmed by the district court January 14th, 1856, and appeal dismissed February 5th, 1857; containing 8,919 acres.

89, 166, N. D., 550. James G. Morehead, claimant for Carmel, 10 square leagues, granted May 4th, 1846, by Pio Pico to William Knight; claim filed March 2d, 1852, rejected by the commission February 21st, 1854, confirmed by the district court September 29th, 1859, and appeal dismissed October 26th, 1859.

90, 84, N. D.; 265. Martin Murphy, claimant for Pastoria de las Borregas, 3,207 $\frac{1}{4}$ acres, in Santa Clara county, granted January 15th, 1842, by Juan B. Alvarado to Francisco Estrada; claim filed March 3d, 1852, confirmed by the commission January 24th, 1854, by the district court October 17th, 1856, and appeal dismissed November 18th, 1856; containing 4,894.35 acres.

91, 397, N. D. William Johnson, claimant for Johnson's Rancho, 5 square leagues, in Yuba county, granted December 22d, 1844, by

Manuel Micheltorena and J. A. Sutter to Pablo Gutierrez; claim filed March 3d, 1852, confirmed by the commission August 7th, 1855, and appeal dismissed November 18th, 1856; containing 22,197.31 acres. Patented.

92, 319, N. D., 250. John A. Sutter, claimant for New Helvetia, 11 square leagues, and a surplus of 22 square leagues, in Yuba and Sutter counties, granted June 18th, 1841, by Juan B. Alvarado, and February 25th, 1845, by Manuel Micheltorena, to J. A. Sutter; claim filed March 8th, 1852, confirmed by the commission May 15th, 1855, by the district court January 14th, 1857, grant of June 18th, 1841, confirmed by the U. S. supreme court, and that of February 5th, 1845, rejected, 21 Howard [62 U. S.] 170; containing 48,827.90 acres.

93, 213, N. D., 92. Antonio Chaboya, claimant for Yerba Buena or Socayre, in Santa Clara county, granted November 5th, 1833, by José Figueroa to A. Chaboya; claim filed March 8th, 1852, confirmed by the commission October 17th, 1854, by the district court January 21st, 1858, and appeal dismissed October 8th, 1858; containing 24,342.64 acres. Patented.

94, 262, N. D., 552. Abel Stearns, claimant for 600 varas square, in San Francisco county, granted May 6th, 1846, by Pio Pico to José Andrada; claim filed March 9th, 1852, and rejected by the commission January 25th, 1855.

95, 379, N. D.; 19 S. D., (transcript sent to N. D.) 29. Bernard Murphy, claimant for Ojo de Agua de la Coché, 2 square leagues, in Santa Clara county, granted August 4th, 1835, by José Figueroa to Juan Maria Hernandez; claim filed March 9th, 1852, confirmed by the commission February 21st, 1853, by the district court January 18th, 1856, and appeal dismissed November 18th, 1856; containing 8,927.10 acres.

96, 403, N. D. Juan José Castro, claimant for El Sobrante, 11 square leagues, in Alameda county, granted April 23d, 1841, by Juan B. Alvarado to J. J. Castro; claim filed March 9th, 1852, confirmed by the commission July 3d, 1855, and appeal dismissed April 6th, 1857.

97, 101, N. D., 20. José de la Cruz Sanchez et al., claimant for Buri-Buri, in San Mateo county, granted September 18th, 1835, by José Castro to José Sanchez; claim filed March 9th, 1852, confirmed by the commission January 31st, 1854, by the district court October 16th, 1855, and appeal dismissed May 11th, 1858; containing 15,739.14 acres.

98, 71, S. D., 342. Ellen E. White, claimant for Cholam, 6 square leagues, in San Luis Obispo county, granted February 7th, 1844, by Manuel Micheltorena to Mauricio Gonzalez; claim filed March 12th, 1852, rejected by the commission January 17th, 1854, confirmed by the district court March 4th, 1858, and appeal dismissed December 31st, 1860; containing 26,627.16 acres.

99, 375, S. D. Ellen E. White and John Carney, claimants for San Justo el Viejo and San Bernabé, 6 square leagues, in Monterey county, granted February 18th, 1836, by Nicolas Gutierrez to Rafael Gonzalez; claim filed March 12th, 1852, rejected by the commission August 28th, 1855, and for failure of prosecution appeal dismissed December 22d, 1856.

100, 219, N. D. Francisco Rufino, claimant for preemption claim, 50 by 180 feet, Mission Dolores, in San Francisco county; claim filed March 13th, 1852, rejected by the commission November 21st, 1854, and for failure of prosecution appeal dismissed April 21st, 1856.

101, 381, N. D., 360. Josefa de Haro et al., claimants for Potrero de San Francisco, one-half square league, in San Francisco county, granted April 30th, 1844, and May 1st, 1844, by Manuel Micheltorena to Ramon Francisco

de Haro; claim filed March 16th, 1852, and confirmed by the commission November 6th, 1855.

102, 380, N. D., 10. Josefa de Haro et al., claimants for Laguna de la Merced, 1 by one-half league, in San Mateo county, granted September 27th, 1835, by José Castro to José Antonio Galindo; claim filed March 16th, 1852, confirmed by the commission July 24th, 1855, by the district court January 13th, 1858, and appeal dismissed March 19th, 1858; containing 2,220.16 acres.

103, 408, N. D. Guillermo Antonio Richardson, claimant for 10 by 2 leagues, in Mendocino county, granted October 30th, 1844, by Manuel Micheltorena to José Antonio Galindo; claim filed March 16th, 1852, and confirmed by the commission November 6th, 1855.

104, 83, N. D., 111. Guillermo Antonio Richardson, claimant for Saucelito, 3 square leagues, in Marin county, granted February 11th, 1835, by Juan B. Alvarado, to José Antonio Galindo; claim filed March 16th, 1852, confirmed by the commission December 27th, 1853, by the district court February 11th, 1856, and appeal dismissed September 2d, 1857; containing 19,571.92 acres.

105, 281, N. D. Timoteo Murphy, claimant for 100 by 30 varas, in Marin county, granted December 16th, 1844, by Manuel Micheltorena to T. Murphy; claim filed March 16th, 1852, and rejected by the commission August 22d, 1854, and March 27th, 1855.

106, 91, N. D., 405. Alberto J. Toomes, claimant for El Rio de los Molinos, 5 square leagues, in Tehama county, granted December 20th, 1844, by Manuel Micheltorena to A. J. Toomes; claim filed March 18th, 1852, confirmed by the commission January 17th, 1854, by the district court March 3d, 1856, and appeal dismissed November 6th, 1856; containing 22,172.46 acres. Patented.

107, 85, N. D., 404. Robert H. Thomes, claimant for Los Sancos, 5 square leagues, in Tehama county, granted December 20th, 1844, by Manuel Micheltorena to R. H. Thomes; claim filed March 18th, 1852, confirmed by the commission January 17th, 1854, by the district court February 4th, 1856, and appeal dismissed November 6th, 1856; containing 22,212.21 acres.

108, 323, N. D. Jacob D. Hoppe, claimant for Ulistac, one-half square league, in Santa Clara county, granted May 19th, 1845, by Pio Pico to Marcelo Pio and Cristoval; claim filed March 19th, 1852, confirmed by the commission May 8th, 1855, by the district court March 2d, 1857, and appeal dismissed April 16th, 1857; containing 2,401.32 acres.

109, 377, N. D. Dionisio Z. Fernandez et al., claimants for 4 square leagues, in Butte county, granted June 12th, 1846, by Pio Pico to Dionisio and Maximo Fernandez; claim filed March 19th, 1852, confirmed by the commission July 17th, 1855, by the district court March 2d, 1857, and appeal dismissed March 9th, 1857; containing 17,805.84 acres.

110, 407, N. D. Andres Pico et al., claimants for Mission San José, 30,000 acres, in Alameda county, granted May 5th, 1846, by Pio Pico to Andres Pico and Juan B. Alvarado; claim filed March 22d, 1852, confirmed by the commission December 18th, 1855, and rejected by the district court June 30th, 1859.

111, 310, S. D., 442. James B. Huie, claimant for Sisquoc, in Santa Barbara county, granted June 3d, 1833, by Pio Pico to Maria Antonio Caballero; claim filed March 22d, 1852, confirmed by the commission April 24th, 1855, and appeal dismissed February 21st, 1857; containing 35,485.90 acres.

112, 216, N. D.; 197, S. D., (transcript sent to N. D.) Quintin Ortega et al., claimants for San Isidro, 1 square league, in Santa Clara county, granted June 3d, 1833, by José Figueroa to Quintin Ortega et al.; claim filed March 23d, 1852, confirmed by the commission September 19th, 1854, and by the district court June 3d, 1856; containing 4,438.70 acres.

113, 96, N. D. Rafael Garcia, claimant for 9 square leagues, in Mendocino county, granted November 15th, 1844, by Manuel Micheltoarena to Rafael Garcia; claim filed March 23d, 1852, rejected by the commission January 17th, 1854, confirmed by the district court, decree reversed, petition dismissed by the U. S. supreme court, and cause remanded for that purpose in 22 Howard [63 U. S.] 274.

114, 68, N. D., 124. Rafael Garcia, claimant for Tomales and Baulinas, 2 square leagues, in Marin county, granted March 19th, 1836, by Nicolas Gutierrez to Rafael Garcia; claim filed March 23d, 1852, confirmed by the commission November 22d, 1853, and appeal dismissed October 19th, 1858; containing 8,863.25 acres.

115, 233, S. D., 319. José Antonio Estudillo, claimant for San Jacinto, 4 square leagues, in San Diego county, granted December 21st, 1842, by Manuel Jimeno to J. A. Estudillo; claim filed March 23d, 1852, confirmed by the commission November 21st, 1854, and by the district court March 5th, 1858.

116, 80, S. D., 512. José Antonio Aguirre, in right of his wife, claimant for Sobrante of Jacinto Viejo y Nuevo, 5 square leagues, in San Diego county, granted May 9th, 1846, by Pio Pico to Maria del Rosario Estudillo de Aguirre; claim filed March 23d, 1852, rejected by the commission January 17th, 1854, and confirmed by the district court December 24th, 1855.

117, 56, S. D., 313. Manuela Carrillo de Jones, claimant for Santa Rosa Island, described by boundaries, in Santa Barbara county, granted October 4th, 1843, by Manuel Micheltoarena to José Antonio and Carlos Carrillo; claim filed March 23d, 1852, rejected by the commission November 15th, 1853, confirmed by the district court January 18th, 1856, and appeal dismissed February 5th, 1857.

118, 81, S. D., 304. Joaquina Alvarado, claimant for Cañada Larga o Verde, one-half square league, in Santa Barbara county, granted June 30th, 1841, by Juan B. Alvarado to J. Alvarado; claim filed March 23d, 1852, rejected by the commission December 20th, 1853, and confirmed by the district court January 20th, 1857.

119, 130, N. D. Juana Briones, claimant for La Purisima Concepcion, 1 square league, in Santa Clara county, granted June 30th, 1840, by Juan B. Alvarado to José Gorgonio and José Ramon; claim filed March 23d, 1852, confirmed by the commission April 11th, 1854, by the district court April 17th, 1856, and appeal dismissed December 24th, 1856; containing 4,436.74 acres.

120, 104, S. D., 569. Maria Antonia de la Guerra y Lataillade, claimant for Cuyama, 11 square leagues, in Santa Barbara county, granted June 9th, 1846, by Pio Pico to Cesario Lataillade; claim filed March 23d, 1852, and rejected by the commission February 28th, 1854.

121, 188, S. D., 410. Luis Arellanes and Emilio Miguel Ortega, claimants for La Punta de la Laguna, 6 square leagues, in San Luis Obispo county, granted December 26th, 1844, by Manuel Micheltoarena to L. Arellanes and E. M. Ortega; claim filed March 23d, 1852, confirmed by the commission May 2d, 1854, by the district court January 7th, 1856, and appeal dismissed February 5th, 1857; containing 26,648.42 acres.

122, 12, N. D., 414. Francisco Dye, claimant for El Primer Cañon or Río de los Berendos, 6 square leagues, in Tehama county, granted May 22d, 1844, by Manuel Micheltoarena to F. Dye; claim filed March 23d, 1852, confirmed by the commission December 18th, 1852, by the district court July 23d, 1855, and appeal dismissed February 10th, 1857; containing 26,637.11 acres.

123, 41, S. D., 192. Vicente Cané, claimant for San Bernardo, 1 square league, in San Luis Obispo county, granted February 11th, 1840, by Juan B. Alvarado to Vicente Cané; claim filed March 23d, 1852, confirmed by the commission November 22d, 1853, by the district court September 25th, 1855, and appeal dismissed February 5th, 1856; containing 4,379.42 acres.

124, 1, S. D., 34. John B. R. Cooper, claimant for El Sur, 2 square leagues, in Monterey county, granted September 30th, 1834, by José Figueroa to Juan B. Alvarado; claim filed March 23d, 1852, confirmed by the commission December 18th, 1852, by the district court September 21st, 1855, and appeal dismissed February 5th, 1857; containing 8,949.06 acres.

125, 410, N. D., 422. Robert Walkinshaw, claimant for Posolomi, including El Posito de las Animas, 3,042 acres, in Santa Clara county, granted February 15th, 1844, by Juan B. Alvarado and Manuel Micheltoarena to Lope Inigo; claim filed March 23d, 1852, confirmed by the commission November 20th, 1855, and appeal dismissed February 16th, 1857; containing 3,391.90 acres.

126, 45, N. D., 262. Cayetano Juarez, claimant for Tulucay, 2 square leagues, in Napa county, granted October 26th, 1841, by Manuel Jimeno to C. Juarez; claim filed March 23d, 1852, confirmed by the commission April 11th, 1853, by the district court February 25th, 1856, and appeal dismissed February 23d, 1857; containing 8,865.33 acres. Patented.

127, 87, N. D., 344. Joseph Swanson, administrator of the estate of William Welch, claimant for Las Juntas, 3 square leagues, in Contra Costa county, granted February 9th, 1844, by Manuel Micheltoarena to William Welch; claim filed March 23d, 1852, confirmed by the commission December 20th, 1853, and appeal dismissed November 3d, 1857; containing 13,324.29 acres.

128, 144, N. D., 80. José Maria Amador, claimant for San Ramon, 4 square leagues and 1,800 varas, in Alameda county, granted August 17th, 1835, by José Figueroa to J. M. Amador; claim filed March 23d, 1852, confirmed by the commission August 1st, 1854, by the district court January 14th, 1856, and appeal dismissed January 10th, 1857; containing 16,516.95 acres.

129, 358, N. D. Thomas O. Larkin, claimant for Flugge Ranch or Boga, 5 square leagues, in Butte and Sutter counties, granted February 21st, 1844, by Manuel Micheltoarena to Charles William Flugge; claim filed March 24th, 1852, confirmed by the commission July 17th, 1854, and appeal dismissed February 9th, 1857; containing 22,150.71 acres.

130, 115, N. D., 417. Francis Larkin et al., claimants for Larkin's Rancho, 10 square leagues, in Colusi county, granted December 15th, 1844, by Manuel Micheltoarena to F. Larkin et al.; claim filed March 24th, 1852, confirmed by the commission April 25th, 1854, by the district court January 14th, 1856, and appeal dismissed February 10th, 1857; containing 44,364.22 acres. Patented.

131, 23, N. D., 413. Thomas O. Larkin et al., claimants for Jimeno Rancho, 11 square leagues, in Colusi and Yuba counties, granted November 4th, 1844, by Manuel Micheltoarena to Manuel Jimeno; claim filed March 24th, 1852, confirmed by the commission January

10th, 1853, by the district court July 5th, 1855, and by the U. S. supreme court in 18 Howard [59 U. S.] 557; containing 48,854.26 acres.

132, 105, S. D., 291. Vicente Sanchez et al., heirs of José Maria Sanchez, claimants for Lomerias Muertas, $1\frac{1}{2}$ square leagues, in Monterey county, granted August 16th, 1842, by Juan B. Alvarado to José Antonio Castro; claim filed March 30th, 1852, confirmed by the commission March 14th, 1854, by the district court February 1st, 1856, and appeal dismissed February 24th, 1857; containing 6,651.91 acres.

133, 106, S. D., 49. José Maria Sanchez, claimant for Llano del Tequisquita, one-half square league, in Monterey county, granted October 12th, 1835, by José Castro to J. M. Sanchez; claim filed March 30th, 1852, confirmed by the commission March 14th, 1854, by the district court February 1st, 1856, and appeal dismissed February 24th, 1857; containing 16,016.30 acres.

134, 92, N. D., M. G. Vallejo, claimant for lot 150 by 130 varas, in Sonoma city, granted July 5th, 1835, by José Figueroa to M. G. Vallejo; claim filed March 30th, 1852, confirmed by the commission January 17th, 1854, by the district court February 18th, 1856, and appeal dismissed February 23d, 1857; containing 3.81 acres.

135, 107, S. D., 139. José de la Guerra y Noriega, claimant for Conejo, described by boundaries, in Santa Barbara county, granted October 12th, 1822, by Pablo V. de Sola to José de la G. y Noriega; claim filed March 30th, 1852, confirmed by the commission March 14th, 1854, by the district court February 16th, 1857, and appeal dismissed February 21st, 1859; containing 48,671.56 acres.

136, 41, N. D., 172. Jasper O'Farrell, claimant for Estero Americano, 2 square leagues, in Sonoma county, granted September 4th, 1839, by Manuel Jimeno to Ed. Manuel McIntosh; claim filed March 30th, 1852, confirmed by the commission April 11th, 1853, and appeal dismissed February 2d, 1857; containing 8,849.13 acres. Patented.

137, 26, S. D., 251. Guadalupe Cantua, claimant for San Luisito, described by boundaries, in San Luis Obispo county, granted August 6th, 1841, by Juan B. Alvarado to G. Cantua; claim filed March 30th, 1852, confirmed by the commission October 25th, 1853, by the district court September 25th, 1855, and appeal dismissed February 5th, 1856; containing 4,389.13 acres. Patented.

138, 7, S. D., John B. R. Cooper, claimant for Bolsas del Potrero y Moro Cojo or La Sagrada Familia, 2 square leagues, in Monterey county, granted June 22d, 1822, P. V. de Sola to José Joaquin de la Torre; claim filed March 30th, 1852, confirmed by the commission February 21st, 1853, by the district court January 10th, 1856, and appeal dismissed February 5th, 1857; containing 6,915.77 acres. Patented.

139, 168, S. D., 142. Fernando Tico, claimant for Ojaj, described by boundaries, in Santa Barbara county, granted April 6th, 1837, by Juan B. Alvarado to F. Tico; claim filed March 30th, 1852, confirmed by the commission May 16th, 1854, by the district court October 2d, 1855, and appeal dismissed February 5th, 1857; containing 17,792.70 acres.

140, 73, S. D., 218. Julian Estrada, claimant for Santa Rosa, 3 square leagues, in San Luis Obispo county, granted June 18th, 1841, by Juan B. Alvarado to J. Estrada; claim filed March 30th, 1852, confirmed by the commission January 17th, 1854, by the district court September 26th, 1855, and appeal dismissed February 5th, 1857; containing 13,183.62 acres.

141, 37, N. D. José Maria Alviso, claimant for Milpitas, 1 square league, in Santa Clara

county, granted September 23d, 1835, by José Castro to J. M. Alviso; claim filed March 30th, 1852, confirmed by the commission March 14th, 1853, by the district court March 3d, 1856, and appeal dismissed December 5th, 1856; containing 4,807 acres.

142, 237, N. D. Robert S. Eaton, claimant for part of Cañada de Guadalupe Visitation y Rodeo Viejo, 700 acres of 2 square leagues, in San Francisco and San Mateo counties, (No. 745) granted July 31st, 1841, by Juan B. Alvarado to Jacob P. Leese; claim filed March 30th, 1852, confirmed by the commission December 19th, 1854, by the district court October 18th, 1858, and appeal dismissed October 18th, 1858; containing 766.35 acres.

143, 33, N. D., 392. John Bidwell, claimant for Arroyo Chico, described by boundaries, in Butte county, granted November 18th, 1844, by Manuel Micheltorena to William Dickey; claim filed March 30th, 1852, confirmed by the commission March 14th, 1853, by the district court July 16th, 1855, and by the U. S. supreme court; containing 22,214.47 acres. Patented.

144, 28, N. D., 473. Charles D. Semple, claimant for Rancho de Colus, 2 square leagues, in Colusi county, granted October 4th, 1845, by Pio Pico to John Bidwell; claim filed March 31st, 1852, rejected by the commission October 25th, 1853, confirmed by the district court July 5th, 1855, and by the U. S. supreme court; containing 8,876.02 acres.

145, 5, S. D., 70, 88. Concepcion Munras et al., heirs of Stephen Munras, claimants for San Vincente, 2 square leagues, in Monterey county, granted December 16th, 1835, by José Castro, September 20th, 1836, by Nicolas Gutierrez, and $2\frac{1}{2}$ square leagues November 11th, 1842, by Juan B. Alvarado to Francisco Soto and Stephen Munras; claim filed April 1st, 1852, confirmed by the commission February 14th, 1853, by the district court February 20th, 1856, and appeal dismissed February 24th, 1859; containing 19,979.01 acres.

146, 53, N. D., 403. Samuel Norris, claimant for Rancho del Paso, 10 square leagues, in Sacramento and Placer counties, granted December 20th, 1844, by Manuel Micheltorena to Eliab Grimes; claim filed April 1st, 1852, confirmed by the commission April 18th, 1853, by the district court August 13th, 1855, and appeal dismissed December 22d, 1856; containing 44,371.42 acres.

147, 301, N. D. Charles Covillaud et al., administrators of the estate of John Thompson et al., claimants for Honcut, 7 square leagues, in Yuba county, granted December 22d, 1844, by Manuel Micheltorena and J. A. Sutter to Teodora Cordua; claim filed April 1st, 1852, confirmed by the commission March 27th, 1855, by the district court February 23d, 1857, and appeal dismissed August 21st, 1857; containing 31,069.33 acres.

148, 228, N. D. Antonia Higuera et al., heirs of José Higuera, claimants for Los Tularcitos, described by boundaries, in Santa Clara and Alameda counties, granted October 4th, 1821, by P. V. de Sola to José Higuera; claim filed April 1st, 1852, confirmed by the commission November 28th, 1854, and appeal dismissed December 12th, 1856; containing 4,394.35 acres.

149, 203, N. D. Antonia Higuera et al., claimants for Llano del Abrevadero, described by boundaries, in Santa Clara county, granted January 1st, 1822, by P. V. de Sola to José Higuera; claim filed April 1st, 1852, rejected by the commission December 19th, 1854, and appeal dismissed for failure of prosecution April 21st, 1853.

150, 25, N. D., 418. Guillermo Chard, claimant for Rancho de las Flores, 3 square leagues, in Tehama county, granted December 24th, 1844, by Manuel Micheltorena to G. Chard;

claim filed April 2d, 1852, confirmed by the commission February 7th, 1853, by the district court July 16th, 1855, and appeal dismissed January 13th, 1857; containing 13,315.58 acres. Patented.

151, 108, S. D., 169. Mariano Malarin, executor of the estate of Juan Malarin, claimant for Zanjones, 1½ square leagues, in Monterey county, granted August 20th, 1839, by Manuel Jimeno to Gabriel de la Torre; claim filed April 2d, 1852, confirmed by the commission February 21st, 1854, by the district court January 11th, 1856, and appeal dismissed February 5th, 1857; containing 6,714.49 acres.

152, 109, S. D., 21. Mariano Malarin, executor of the estate of Juan Malarin, claimant for Guadalupe Llanito de los Correos, 2 square leagues, in Monterey county, granted May 22d, 1833, by José Figueroa to Juan Malarin; claim filed April 2d, 1852, confirmed by the commission February 21st, 1854, by the district court January 11th, 1856, and appeal dismissed February 5th, 1857; containing 8,558.44 acres.

153, 204, S. D. Mariano Malarin, attorney for José Santiago Estrada and brothers, claimants for Buenavista, 2 square leagues, in Monterey county, granted May 28th, 1822, by L. A. Arguello to José Santiago Estrada and brothers; claim filed April 2d, 1852, confirmed by the commission September 26th, 1854, and appeal dismissed January 14th, 1857; containing 7,725.56 acres.

154, 110, S. D., 46, 176. Mariano Malarin, executor of the estate of Juan Malarin, claimant for Chualar, 2 square leagues, in Monterey county, granted September 7th, 1839, by Manuel Jimeno to Juan Malarin; claim filed April 2d, 1852, confirmed by the commission February 21st, 1854, by the district court January 11th, 1856, and appeal dismissed February 5th, 1857; containing 8,889.68 acres.

155, 16, S. D., 77. Catalina Manzaneli de Munras, claimant for Laguna Seca, 1 league by ½, in Monterey county, granted June 22d, 1834, by José Figueroa to C. M. de Munras; claim filed April 2d, 1852, confirmed by the commission April 11th, 1853, by the district court February 20th, 1856, and appeal dismissed February 24th, 1857; containing 2,179.50 acres.

156, 56, N. D. 421. William H. McKee, claimant for Jacinto, 8 square leagues, in Colusi county, granted September 2d, 1844, by Manuel Micheltoarena to Jacinto Rodriguez; claim filed April 2d, 1852, rejected by the commission October 18th, 1853, confirmed by the district court January 15th, 1857, and appeal dismissed August 5th, 1857; containing 35,487.52 acres. Patented.

157, 42, N. D. 412. Josefa Soto, claimant for Capay, 10 square leagues, in Colusi and Tehama counties, granted December 21st, 1844, by Manuel Micheltoarena to Josefa Soto; claim filed April 5th, 1852, confirmed by the commission April 11th, 1853, by the district court July 16th, 1855, and appeal dismissed November 25th, 1855; containing 44,388.17 acres. Patented.

158, 351, N. D. Alpheus Basilio Thompson, claimant for 8 square leagues, in San Joaquin and Stanislaus counties, granted June 1st, 1846, by Pio Pico to A. B. Thompson; claim filed April 5th, 1852, confirmed by the commission June 19th, 1855, by the district court September 12th, 1856, and appeal dismissed December 24th, 1856; containing 35,532.80 acres. Patented.

159, 51, N. D. Henrique Huber, claimant for Honcut, 8 square leagues, in Butte county, granted February 11th, 1845, by Manuel Micheltoarena to E. Huber; claim filed April 5th, 1852, and rejected by the commission October 12th, 1853.

160, 34, N. D., 310. George C. Yount, claimant for La Jota, 1 square league, in Napa county, granted October 23d, 1843, by Manuel Micheltoarena to G. C. Yount; claim filed April 5th, 1852, rejected by the commission October 21st, 1853, confirmed by the district court July 6th, 1854, and appeal dismissed April 2d, 1857; containing 4,453.84 acres. Patented.

161, 136, N. D. José Maria Sanchez, claimant for Las Animas or Sitio de la Brea, in Santa Clara county, granted August 17th, 1802, by Marquinas to Mariano Castro, and August 7th, 1835, by José Figueroa to Josefa Romero, widow of M. Castro; claim filed April 5th, 1852, confirmed by the commission February 14th, 1854, by the district court May 17th, 1856, and appeal dismissed January 26th, 1857; containing 24,066.24 acres.

162, 75, S. D., 273. Francisco Branch, claimant for Arroyo Grande or San Ramon, described by boundaries, in San Luis Obispo county, granted April 25th, 1841, by Juan B. Alvarado to Zeferino Carlon; claim filed April 6th, 1852, confirmed by the commission January 17th, 1854, by the district court October 20th, 1855, and appeal dismissed February 24th, 1857; containing 4,437.58 acres.

163, 59, S. D., 152. Teodoro Arellanes, claimant for El Rincon, 1 square league, in Santa Barbara county, granted June 22d, 1835, by José Figueroa to T. Arellanes; claim filed April 6th, 1852, rejected by the commission November 22d, 1853, confirmed by the district court October 18th, 1855, and appeal dismissed February 24th, 1857; containing 4,459.63 acres.

164, 49, N. D., 180. Josefa Haro de Guerrero et al., heirs of Francisco Guerrero Palomares, claimants for El Corral de Tierra, 1 square league, in San Francisco county, granted October 16th, 1839, by Manuel Jimeno, and May 1st, 1844, by Manuel Micheltoarena, to F. G. Palomares; claim filed April 6th, 1852, confirmed by the commission April 18th, 1853, by the district court March 24th, 1856, and appeal dismissed December 24th, 1856; containing 7,766.35 acres.

165, 50, N. D., 246; 430. Jacob P. Leese, claimant for Huichicha, 2 square leagues, in Sonoma county, granted October 26th, 1841, by Manuel Jimeno, and July 6th, 1844, by Manuel Micheltoarena, to J. P. Leese; claim filed April 6th, 1852, confirmed by the commission April 18th, 1853, by the district court April 22d, 1856, and appeal dismissed December 24th, 1856; containing 18,704.04 acres. Patented.

166, 47, N. D., 225. Marico Ygnacio del Bale et al., widow and heirs of Ed. A. Bale, claimants for Carne Humana, 4 square leagues, in Napa county, granted March 14th, 1841, by Juan B. Alvarado to Edouardo A. Bale; claim filed April 6th, 1852, confirmed by the commission April 18th, 1853, by the district court March 24th, 1856, and appeal dismissed December 24th, 1856.

167, 289, N. D., 210, 354. Antonio Suñol et al., claimants for part of Los Coches, one-half square league, in Santa Clara county, granted March 12th, 1844, by Manuel Micheltoarena to Roberto; claim filed April 6th, 1852, confirmed by the commission March 20th, 1855, by the district court April 1st, 1856, and appeal dismissed December 24th, 1856; containing 2,219.34 acres. Patented.

168, 46, N. D., 36. Heirs of Juan Sanchez de Pacheco, claimants for Arroyo de las Nueces y Bolbones, 2 square leagues, in Contra Costa county, granted July 11th, 1834, by José Figueroa to J. S. de Pacheco; claim filed April 6th, 1852, confirmed by the commission April 11th, 1853, by the district court December 22d, 1856, decision of the U. S. supreme court as to the right of appeal in 20 Howard, 261 [61 U. S.] and decree of the district court affirmed by

the U. S. supreme court in 22 Howard [63 U. S.] 225; containing 17,734.52 acres.

169, 111, S. D. James Stokes, claimant for Rancho de las Vergeles, formerly called Rancho de la Cañada de Enmedio and Cañada de Cebada, 2 square leagues, in Monterey county, granted August 28th, 1835, by José Figueroa, and September 4th, 1835, by José Castro, to José Joaquín Gomez; claim filed April 7th, 1852, rejected by the commission February 21st, 1854, confirmed by the district court September 28th, 1855, and appeal dismissed February 24th, 1857; containing 8,759.82 acres.

170, 359, S. D., 15. Henry D. McCobb, claimant for Corral de Tierra, described by boundaries, in Monterey county, granted April 15th, 1836, by Nicolás Gutierrez to Guadalupe Figueroa; claim filed April 7th, 1852, confirmed by the commission July 3d, 1855, and by the district court June 17th, 1859.

171, 200, N. D. John Frederick Schultess, claimant for 37 50-vara lots, Mission Dolores, in San Francisco county, granted February 10th, 1846, by Pio Pico to Prudencio Santillan; claim filed April 8th, 1852, rejected by the commission December 19th, 1854, and appeal dismissed for failure of prosecution April 21st, 1856.

172, 201, N. D. John Frederick Schultess et al., claimants for 47 50-vara lots, Mission Dolores, in San Francisco county; claim filed April 8th, 1852, rejected by the commission December 19th, 1854, and appeal dismissed for failure of prosecution April 21st, 1856.

173, 182, N. D., 328, 423. Catherine Sheldon, administratrix, and Gabriel W. Gunn, administrator of the estate of Jared Sheldon, claimant for Omochumne, 5 square leagues, in Sacramento county, granted January 8th, 1844, by Manuel Micheltorena to Joaquin Sheldon; claim filed April 10th, 1852, confirmed by the commission October 10th, 1854, by the district court December 3d, 1856, and appeal dismissed August 6th, 1857.

174, 175, S. D., 367. José Amesti, claimant for Los Corralitos, 4 square leagues, in Santa Cruz county, granted April 1st, 1844, by Manuel Micheltorena to José Amesti; claim filed April 13th, 1852, confirmed by the commission May 2d, 1854, and appeal dismissed January 28th, 1857; containing 15,440.02 acres. Patented.

175, 347, S. D. Santiago Arguello, claimant for Mission San Diego, in San Diego county, granted June 8th, 1846, by Pio Pico; claim filed April 13th, 1852, confirmed by the commission June 26th, 1855, and by the district court June, 1858.

176, 340, S. D., 187. Andres Castillero, claimant for Island of Santa Cruz, described by boundaries, in Santa Barbara county, granted May 22d, 1839, by Juan B. Alvarado to Andres Castillero; claim filed April 13th, 1852, confirmed by the commission July 3d, 1855, by the district court January 14th, 1857, and decree affirmed by the U. S. supreme court in 23 Howard [64 U. S.] 464.

177, 72, S. D., 406. José Mariano Bonilla, claimant for 100 varas by 50, in San Luis Obispo county, granted September 30th, 1844, by Manuel Micheltorena to J. M. Bonilla; claim filed April 13th, 1852, confirmed by the commission January 24th, 1854, by the district court September 27th, 1855, and appeal dismissed February 5th, 1857.

178, 61, S. D., 481. Joaquin Carrillo and José Antonio Carrillo, claimants for Mission Vieja de la Purisima, 1 square league, in Santa Barbara county, granted November 20th, 1845, by Pio Pico; claim filed April 13th, 1852, confirmed by the commission November 15th, 1853, and appeal dismissed June 8th, 1857; containing 4,443.43 acres.

179, 73, N. D. Rafaela Soto de Pacheco et al., claimants for San Ramon, 2 square leagues, in Contra Costa county, granted June 10th, 1833, by José Figueroa; claim filed April 13th, 1852, rejected by the commission November 22d, 1853, and confirmed by the district court February 8th, 1858.

180, 382, N. D., 511. Jasper O'Farrell, claimant for Cañada de Capay, 9 square leagues, in Yolo county, granted May 2d, 1846, by Pio Pico to Santiago Nemesis and Francisco Berreyesa; claim filed April 13th, 1852, confirmed by the commission August 14th, 1855, by the district court March 2d, 1857, and appeal dismissed April 2d, 1857; containing 40,078.58 acres.

181, 324, N. D., 416. Hiram Grimes, claimant for San Juan, 4½ square leagues, in Placer and Sacramento counties, granted December 24th, 1844, by Manuel Micheltorena to Joel P. Dedmond; claim filed April 13th, 1852, confirmed by the commission May 8th, 1855, by the district court June 3d, 1856, and appeal dismissed August 11th, 1857; containing 19,982.70 acres. Patented.

182, 367, N. D. Peter Lassen, claimant for Bosquejo, 5 square leagues, in Tehama county, granted December 26th, 1844, by Manuel Micheltorena to P. Lassen; claim filed April 14th, 1852, confirmed by the commission July 24th, 1855, by the district court March 2d, 1857, and appeal dismissed July 29th, 1857; containing 16,208.65 acres.

183, 179, N. D. Samuel Neal, claimant for Esquon, 5 square leagues in Butte county, granted December 22d, 1844, by Manuel Micheltorena and J. A. Sutter to S. Neal; claim filed April 16th, 1852, rejected by the commission January 23d, 1855, confirmed by the district court March 2d, 1857, and appeal dismissed July 30th, 1857; containing 22,193.78 acres. Patented.

184, 295, N. D., 31. Martina Castro, claimant for Shoquel, 3 miles by one-half league, in Santa Cruz county, granted November 23d, 1833, by José Figueroa to M. Castro; claim filed April 16th, 1852, confirmed by the commission June 23d, 1854, and appeal dismissed January 22d, 1857; containing 1,668.03 acres. Patented.

185, 371, N. D., 415. William B. Ide, claimant for Baranca Colorada, 4 square leagues, in Tehama county, granted December 4th, 1844, by Manuel Micheltorena to Josiah Belden; claim filed April 19th, 1852, confirmed by the commission July 24th, 1855, and appeal dismissed January 13th, 1857; containing 17,707.49 acres. Patented.

186, 40, S. D., 302. Joaquin de la Torre, claimant for Arroyo Seco, 4 square leagues, in Monterey county, granted December 30th, 1840, by Juan B. Alvarado to J. de la Torre; claim filed April 20th, 1852, rejected by the commission November 22d, 1853, confirmed by the district court March 3d, 1856, and appeal dismissed January 9th, 1857; containing 16,523.35 acres. Patented.

187, 289, S. D. Sebastian Rodriguez, claimant for Bolsa del Pajaro, 2 square leagues, in Santa Cruz county, granted September 30th, 1837, by Juan B. Alvarado to S. Rodriguez; claim filed April 20th, 1852, confirmed by the commission March 27th, 1855, and appeal dismissed February 21st, 1857; containing 5,496.51 acres. Patented.

188, 257, S. D., 554. Frederick Billings et al., assignees of Bezer Simmons, claimants for an island, 2 square leagues, in San Diego county, granted May 15th, 1846, by Pio Pico to Pedro C. Carrillo; claim filed April 20th, 1852, rejected by the commission October 31st, 1853, and confirmed by the district court January 9th, 1857.

189, 49, S. D., 479. Maria Antonia de la Guerra y Lataillade, claimant for Corral de Cuati, 3 square leagues, in Santa Barbara county, granted November 14th, 1845, by Pio Pico to Agustín Davila; claim filed April 20th, 1852, confirmed by the commission November 22d, 1853, by the district court September 16th, 1855, and appeal dismissed February 5th, 1857; containing 13,300.24 acres.

190, 45, S. D., 237. José Maria Villavicencia, claimant for Corral de Piedra, 2 square leagues, in San Luis Obispo county, granted May 14th, 1841, by Juan B. Alvarado, with an extension of 5, granted May 28th, 1846, by Pio Pico, to J. M. Villavicencia; claim filed April 20th, 1852, confirmed by the commission November 15th, 1853, by the district court December 3d, 1855, and appeal dismissed February 24th, 1857; containing 30,911.20 acres.

191, 112, S. D., 7. Charles Walters, claimant for El Toro, $1\frac{1}{2}$ square leagues, in Monterey county, granted April 17th, 1835, to José Ramón Estrada; claim filed April 20th, 1852, confirmed by the commission December 22d, 1852, by the district court October 5th, 1855, and appeal dismissed February 24th, 1857; containing 5,668.41 acres.

192, 229, N. D., 202. Sebastian Rodriguez, claimant for Rincon de la Ballena, 1 square league, in Santa Cruz county, granted April 15th, 1839, by Juan B. Alvarado to José Cornelio Bernal; claim filed April 20th, 1852, and rejected by the commission November 14th, 1854.

193, 227, N. D., 264. John B. R. Cooper, claimant for El Molino or Rio Ayoska, $10\frac{1}{2}$ square leagues, in Sonoma county, granted December 31st, 1833, by José Figueroa, and February 24th, 1836, by Nicolas Gutierrez to J. B. R. Cooper; claim filed April 20th, 1852, confirmed by the commission November 14th, 1854, by the district court March 24th, 1856, and appeal dismissed December 15th, 1856; containing 17,892.42 acres. Patented.

194, 39, N. D., 226. Salvador Vallejo, claimant for Lajome, $1\frac{1}{2}$ square leagues, in Napa county, granted March 16th, 1841, by Juan B. Alvarado to Tomaso A. Rodriguez; claim filed April 20th, 1852, confirmed by the commission February 21st, 1853, and appeal dismissed February 9th, 1857; containing 6,652.58 acres.

195, 3, S. D., 95. Josefa Antonia Gomez de Walters et al., widow and heirs of Rafael Gomez, claimants for Los Tularcitos, 6 square leagues, in Monterey county, granted December 18th, 1834, by José Figueroa to Rafael Gomez; claim filed April 20th, 1852, confirmed by the commission December 22d, 1852, by the district court September 24th, 1855, and appeal dismissed February 5th, 1857; containing 26,581.34 acres.

196, 302, N. D. Charles Chana, claimant for Nemshas, 4 square leagues, granted July 26th, 1844, by Manuel Michelorena to Teodoro Sicard; claim filed April 22d, 1852, confirmed by the commission January 23d, 1855, by the district court October 16th, 1856, judgment of district court reversed by the U. S. supreme court and petition dismissed in 24 Howard [65 U. S.] 151.

197, 74, N. D., 400. José B. Chiles, claimant for Catacula, 2 square leagues, in Napa county, granted November 4th, 1844, by Manuel Michelorena to J. B. Chiles; claim filed April 21st, 1852, confirmed by the commission November 4th, 1853, by the district court August 13th, 1855, and appeal dismissed April 2d, 1857; containing 8,545.72 acres.

198, 40, N. D., 207. Ygnacio Pacheco, claimant for San José, $1\frac{1}{2}$ square leagues, in Marin county, granted October 3d, 1840, by Juan B. Alvarado to Y. Pacheco; claim filed April 23d, 1852, confirmed by the commission April 11th, 1853, by the district court March 24th, 1857,

and appeal dismissed July 31st, 1857; containing 6,659.25 acres. Patented.

199, 15, N. D., 507. Charles Mayer et al., claimants for German, 5 square leagues, in Mendocino county, granted April 8th, 1846, by Pio Pico to Ernest Rufus; claim filed April 27th, 1852, confirmed by the commission December 22d, 1852, by the district court September 10th, 1855, and by the U. S. supreme court; containing 17,580.01 acres.

200, 81, N. D., 230. Teodoro Robles and Secundino Robles, claimants for Rincon de San Francisquito, in Santa Clara county, granted March 29th, 1841, by Juan B. Alvarado to José Peña; claim filed April 27th, 1852, confirmed by the commission November 29th, 1853, by the district court October 29th, 1855, and by the U. S. supreme court.

201, 33, N. D. Samuel J. Hensley, claimant for Aguas Nieves, 6 square leagues, in Butte county, granted December 22d, 1844, by Manuel Michelorena to Samuel J. Hensley; claim filed April 27th, 1852, confirmed by the commission February 14th, 1853, by the district court July 5th, 1855, decision of the U. S. supreme court as to the right of appeal in 20 Howard [61 U. S.] 261.

202, 43, N. D., 549. William Gordon and Nathan Coombs, claimants for Chimiles, 4 square leagues, in Napa county, granted May 2d, 1846, by Pio Pico to José Ygnacio Berreyesa; claim filed April 28th, 1852, confirmed by the commission April 11th, 1853, and appeal dismissed July 27th, 1857; containing 17,762.44 acres. Patented.

203, 26, N. D. William Gordon, claimant for Quesesosi or Guesesosi, 2 square leagues, in Yolo county, granted January 27th, 1843, by Manuel Michelorena to William Gordon; claim filed April 28th, 1852, confirmed by the commission January 10th, 1853, by the district court March 2d, 1857, and appeal dismissed June 2d, 1857; containing 8,894.49 acres. Patented.

204, 308, N. D. Teodora Soto, claimant for Cañada del Hambre and Las Bolsas del Hambre, 2 square leagues, in Contra Costa county, granted May 18th, 1842, by Juan B. Alvarado to Teodora Soto; claim filed April 29th, 1852, confirmed by the commission May 15th, 1855, by the district court April 16th, 1857, and appeal dismissed August 11th, 1857; containing 13,312.70 acres.

205, 121, N. D., 571. James D. Galbraith, claimant for Bolsa de Tomales, 5 square leagues, in Marin county, granted June 12th, 1845, by Pio Pico to Juan N. Padilla; claim filed April 29th, 1852, confirmed by commission April 11th, 1854, by the district court December 1st, 1854, decree reversed by the U. S. supreme court and cause remanded in 22 Howard [63 U. S.] 87. Confirmed by the district court February 7th, 1861.

206, 336, S. D., 110. Antonia Maria Cota et al., heirs of Tomas Olivera, claimants for Tepusquet, 2 square leagues, in Santa Barbara county, granted April 7th, 1837, by Juan B. Alvarado to Thomas Olivera; claim filed April 30th, 1852, confirmed by the commission July 3d, 1855, and appeal dismissed February 21st, 1857; containing 8,900.75 acres.

207, 246, N. D.; 236 S. D., (returned to N. D. September 21st, 1855.) Joseph L. Majors, in behalf of his wife, Maria de los Angeles Castro, claimant for Rancho del Refugio, one-third of Rancho, in Santa Cruz county, granted April 8th, 1839, by Juan B. Alvarado to Maria Candida, Maria Jacinta and Maria de los Angeles Castro; claim filed April 30th, 1852, rejected by the commission January 15th, 1855, and for failure of prosecution appeal dismissed December 18th, 1856.

208, 180, N. D., 233. J. L. Majors, claimant for San Agustin, 1 square league, in Santa Cruz

county, granted April 21st 1841, by Juan B. Alvarado to Juan José Crisostomo Mayor; claim filed April 30th, 1852, confirmed by the commission September 26th, 1854, by the district court December 23d, 1857, and appeal dismissed December 23d, 1857; containing 4,436.78 acres.

209, 250, N. D., 324. Ramon Rodriguez and Francisco Alviso, claimants for Agua Puerca and Las Trancas, 1 square league, in Santa Cruz county, granted November 2d, 1843, by Manuel Micheltoarena to R. Rodriguez and F. Alviso; claim filed April 30th, 1852, and rejected by the commission January 30th, 1855.

210, 255, N. D. William Bocle, claimant for La Carbonera, one-half square league, in Santa Cruz county, granted February 3d, 1838, by Juan B. Alvarado to William Bocle; claim filed April 30th, 1852, confirmed by the commission January 23d, 1855, and appeal dismissed February 13th, 1857; containing 1,062.14 acres.

211, 113, S. D. Henry Haight, claimant for Atascadero, 1 square league, in San Luis Obispo county, granted May 6th, 1842, by Juan B. Alvarado to Trifon Garcia; claim filed May 3d, 1852, confirmed by the commission March 6th, 1855, and appeal dismissed January 19th, 1857; containing 4,348.23 acres. Patented.

212, 288, N. D. Pearson Barton Reading, claimant for part of Capay, (see No. 157) 5 square leagues, in Tehama county, granted October 13th, 1835, by Manuel Micheltoarena to Josefa Soto; claim filed May 3d, 1852, and rejected by the commission March 6th, 1855.

213, 107, N. D., 30. John Marsh, claimant for Los Mejanos, 4 leagues by 3, in Contra Costa county, granted October 13th, 1835, by José Castro to José Noriega; claim filed May 3d, 1852, rejected by the commission March 14th, 1854, confirmed by the district court April 9th, 1858, and by the U. S. supreme court.

214, 275, S. D., 131. Francisco and Juan Bolcoff, claimants for Refugio, 3 leagues by 2, in Santa Cruz county, granted April 7th, 1841, by Juan B. Alvarado to José Bolcoff; claim filed May 5th, 1852, confirmed by the commission January 30th, 1855, and appeal dismissed February 21st, 1857; containing 12,147.12 acres. Patented.

215, 37, S. D., 130. Miguel Abila, claimant for San Miguelito, 2 square leagues, in San Luis Obispo county, granted May 10th, 1842, by Juan B. Alvarado to M. Abila; claim filed May 5th, 1852, confirmed by the commission December 6th, 1853, by the district court January 25th, 1856, and appeal dismissed February 23d, 1857.

216, 38, S. D., 503. Miguel Abila, claimant for addition to San Miguelito, (see No. 215) 500 varas, in San Luis Obispo county, granted March 17th, 1846, by Pio Pico to Miguel Abila; claim filed May 6th, 1852, confirmed by the commission December 6th, 1853, by the district court January 25th, 1856, and appeal dismissed February 25th, 1857.

217, 21, S. D., 355, 478. Octaviano Gutierrez, claimant for La Laguna, in Santa Barbara county, granted November 13th, 1845, by Pio Pico to Miguel Abila; claim filed May 7th, 1852, confirmed by the commission February 21st, 1853, by the district court December 3d, 1855, and appeal dismissed February 23d, 1857; containing 18,212.48 acres.

218, 28, S. D., 268, 317, 470, 524. John Wilson, claimant for Cañada de los Osos Pecho y Islay, in San Luis Obispo county, granted December 1st, 1842, by Juan B. Alvarado to Victor Linares, April 27th, 1843, by Manuel Micheltoarena to Francisco Vadillo, and September 24th, 1845, by Pio Pico to James Scott and John Wilson; claim filed May 7th, 1852, confirmed by the commission April 18th, 1853, and appeal dismissed January 8th, 1859; containing 32,430.70 acres.

219, 200, S. D., 272. Guillermo Domingo Foxon, claimant for Tinaquaic, 2 square leagues, in Santa Barbara county, granted May 6th, 1837, by Juan B. Alvarado to Victor Linares; claim filed May 7th, 1852, confirmed by the commission February 7th, 1853, by the district court October 5th, 1855, and appeal dismissed February 5th, 1857; containing 8,874.60 acres.

220, 25, S. D., 474. John Wilson, claimant for Cañada del Chorro, 1 square league, in San Luis Obispo county, granted October 10th, 1845, by Pio Pico to Diego Scott and Juan Wilson; claim filed May 7th, 1852, confirmed by the commission April 18th, 1853, by the district court October 20th, 1855, and appeal dismissed February 5th, 1857; containing 3,166.99 acres. Patented.

221, 184, S. D., 534, 575. Thomas M. Robbins and Manuela Carrillo de Jones, claimants for La Calera or Las Positas, described by boundaries, in Santa Barbara county, granted May 16th, 1843, by Manuel Micheltoarena to Narciso Fabrigat, and one-half square league additional, July 1st, 1846, by Pio Pico to Thomas M. Robbins; claim filed May 8th, 1852, confirmed by the commission April 11th, 1854, and appeal dismissed February 21st, 1857; containing 3,281.70 acres.

222, 2, S. D., 372. John Keyes, claimant for Cañada de Salsipuedes, 1½ square leagues, in Santa Barbara county, granted May 18th, 1844, by Manuel Micheltoarena to Pedro Cordero; claim filed May 8th, 1852, confirmed by the commission December 18th, 1852, by the district court October 12th, 1855, and appeal dismissed February 24th, 1857; containing 6,653.38 acres.

223, 134, N. D., 182. Juan Martin, claimant for Corte de Madera de Novato, 2 square leagues, in Marin county, granted October 16th, 1839, by Juan B. Alvarado to J. Martin; claim filed May 8th, 1852, confirmed by the commission February 14th, 1854, by the district court October 29th, 1855, and appeal dismissed September 8th, 1857; containing 8,878.82 acres.

224, 366, S. D. John Wilson, claimant for part of the buildings of the Mission San Luis Obispo, in San Luis Obispo county, granted December 6th, 1845, by Pio Pico to Scott, Wilson and McKinley; claim filed May 10th, 1852, confirmed by the commission July 17th, 1855, and by the district court June 8th, 1858.

225, 231, S. D. Valentin Cota et al., claimants for Rio de Santa Clara, in Santa Clara county, granted May 22d, 1837, by Juan B. Alvarado to Valentin Cota et al.; claim filed May 10th, 1852, rejected by the commission October 31st, 1854, and confirmed by the district court June 4th, 1857.

226, 268, N. D. Michael C. Nye, claimant for Willy, 4 square leagues, granted December 22d, 1844, by Manuel Micheltoarena and J. A. Sutter to Michael C. Nye; claim filed May 10th, 1852, confirmed by the commission February 8th, 1855, by the district court February 16th, 1857, and rejected by the U. S. supreme court in 21 Howard [62 U. S.] 408.

227, 370, N. D., 396. Andrew Randall and Samuel Todd, claimants for Aguas Frias, 6 square leagues, in Butte county, granted November 10th, 1844, by Manuel Micheltoarena to Salvador Osio; claim filed May 12th, 1852, confirmed by the commission July 17th, 1853, by the district court May 7th, 1857, and appeal dismissed May 7th, 1857; containing 26,761.40 acres. Patented.

228, 362, N. D., 252, 419, and 357, S. D. Guillermo Eduardo Hartnell, claimant for Todos Santos y San Antonio, 5 square leagues, in Santa Barbara county, granted August 28th, 1841, by Juan B. Alvarado, and Cosumes, 11 square leagues, in Sacramento county, November 3d, 1844, by Manuel Micheltoarena to Salvador Osio; claim filed May 12th, 1852, confirmed for six

leagues on the Cosumnes river by the commission August 7th, 1855, by the district court May 14th, 1857, and decree affirmed by the U. S. supreme court in 22 Howard [63 U. S.] 286.

229, 131, N. D. Josefa Palomares et al., heirs of Francisco Guerrero, claimants for 400 varas square, Mission Dolores, in San Francisco county, granted November 30th, 1836; claim filed May 15th, 1852, confirmed by the commission March 14th, 1854, by the district court March 24th, 1856, and appeal dismissed April 2d, 1857; containing 28.41 acres.

230, 232, N. D., 281. William Wolfskill, claimant for Rio de los Putos, 4 square leagues, in Yolo and Solano counties, granted May 24th, 1842, by Juan B. Alvarado to Francisco Guerrero; claim filed May 15th, 1852, confirmed by the commission November 7th, 1854, and appeal dismissed March 14th, 1857; containing 17,754.73 acres. Patented.

231, 102, N. D., 126. Antonio Suñol et al., claimants for El Valle de San José, described by boundaries, in Alameda county, granted April 10th, 1839, by Juan B. Alvarado to Antonio Maria Pico et al.; claim filed May 18th, 1852, confirmed by the commission January 31st, 1854, by the district court January 14th, 1856, and decision of the U. S. supreme court as to the right of appeal in 20 Howard [61 U. S.] 261; containing 51,572.26 acres.

232, 103, N. D., 548. Juan Roland, claimant for 11 square leagues, at the junction of the San Joaquin and Stanislaus rivers, granted May 2d, 1846, by Pio Pico to Juan Roland; claim filed May 18th, 1852, and rejected by the commission January 31st, 1854.

233, 329, N. D., 365. Joshua S. Brackett, claimant for Soulaajule, 3 square leagues, in Marin county, granted March 29th, 1844, by Manuel Micheltorena to Ramon Mesa; claim filed May 20th, 1852, rejected by the commission April 17th, 1855, confirmed by the district court March 3d, 1856, and appeal dismissed August 7th, 1857; containing 2,492.19 acres.

234, 328, N. D. George N. Cornwell, claimant for Soulaajule, 1¾ square miles, in Marin county, granted March 29th, 1844, by Manuel Micheltorena to Ramon Mesa; claim filed May 20th, 1852, rejected by the commission April 17th, 1855, confirmed by the district court February 23d, 1857, and appeal dismissed August 7th, 1857; containing 919.18 acres.

235, 348, N. D. Emanuel Pratt, claimant for Socayac, 3 square leagues, granted December 22d, 1844, by Manuel Micheltorena to John Chamberlain; claim filed May 21st, 1852, confirmed by the commission July 10th, 1855, by the district court March 16th, 1857, and decree reversed by the U. S. supreme court, with direction to dismiss the petition, in 23 Howard [64 U. S.] 476.

236, 175, N. D., 433. Maria Anastasia Higuera de Berreyesa, claimant for Las Putas, 8 square leagues, in Solano county, granted November 3d, 1843, by Manuel Micheltorena to José de Jesus y Sisto Berreyesa; claim filed May 21st, 1852, confirmed by the commission September 5th, 1854, by the district court August 13th, 1855, and appeal dismissed April 2d, 1857; containing 35,515.82 acres.

237, 423, N. D. Mayor and common council of Sonoma, claimants for Pueblo of Sonoma, 4 square leagues, granted June 24th, 1835, by M. G. Vallejo to Pueblo of Sonoma; claim filed May 21st, 1852, and confirmed by the commission January 22d, 1856.

238, 129, N. D., 221. Maria Antonia Mesa, widow of Rafael Soto, claimant for Rinconada del Arroyo de San Francisquito, one-half square league, in Santa Clara county, granted February 16th, 1841, by Juan B. Alvarado to M. A. Mesa; claim filed May 25th, 1852, rejected by the commission March 21st, 1854, confirmed by the dis-

trict court November 23th, 1855, and appeal dismissed April 16th, 1857; containing 2,229.84 acres.

239, 191, S. D., 391. José Joaquin Ortega and Edouardo Stokes, claimants for Santa Ysabel, 4 square leagues, in San Diego county, granted November 9th, 1844, by Manuel Micheltorena to José Joaquin Ortega and Edouardo Stokes; claim filed May 25th, 1852, rejected by the commission September 19th, 1854, and confirmed by the district court February 8th, 1858.

240, 327, S. D., 327. José Antonio Aguirre and Ignacio del Valle, claimants for Tejon, 22 square leagues, in Los Angeles and Buena Vista counties, granted November 24th, 1843, by Manuel Micheltorena to J. A. Aguirre and Ignacio del Valle; claim filed May 25th, 1852, confirmed by the commission May 8th, 1855, and by the district court March 15th, 1858.

241, 351, S. D., 375. Petronillo Rios, claimant for Paso de Robles, 6 square leagues, in San Luis Obispo county, granted May 12th, 1844, by Manuel Micheltorena to Pedro Narvaez; claim filed May 25th, 1852, confirmed by the commission July 3d, 1855, and appeal dismissed February 21st, 1857; containing 25,993.18 acres.

242, 57, S. D., 504. Juana Tico de Rodriguez et al., heirs of Ramon Rodriguez, claimants for Cañada de San Miguelito and Cañada del Diablo, 2 square leagues, in Santa Barbara county, granted March 21st, 1846, by Pio Pico to Ramon Rodriguez; claim filed May 26th, 1852, rejected by the commission December 13th, 1853, confirmed by the district court January 7th, 1856, and appeal dismissed February 5th, 1856; containing 8,877.04 acres.

243, 32, N. D., 154. George C. Yount, claimant for Caymus, 2 square leagues, in Napa county, granted February 23d, 1836, by Nicolas Gutierrez to Geo. C. Yount; claim filed May 26th, 1852, confirmed by the commission February 8th, 1853, by the district court July 17th, 1855, and appeal dismissed February 23d, 1857; containing 11,886.63 acres.

244, 211, N. D. Liberata Ceseña Bull et al., heirs of William Fisher, claimants for La Laguna Seca, 4 square leagues, in Santa Clara county, granted July 23d, 1834, by José Figueroa to Juan Alvarez; claim filed May 27th, 1852, confirmed by the commission September 26th, 1853, by the district court July 17th, 1855, and appeal dismissed January 14th, 1857; containing 19,972.92 acres.

245, 331, N. D. Pedro J. Vasquez, claimant for part of Soulaajule, 12 square leagues, in Marin county, granted March 29th, 1844, by Manuel Micheltorena to Ramon Mesa; claim filed May 27th, 1852, rejected by the commission April 17th, 1855, confirmed by the district court March 3d, 1856, and appeal dismissed August 7th, 1857; containing 4,473.71 acres.

246, 352, N. D. Luis D. Watkins, claimant for part of Soulaajule, 2¾ square leagues, in Marin county, granted March 29th, 1844, by Manuel Micheltorena to Ramon Mesa; claim filed May 27th, 1852, rejected by the commission April 17th, 1855, confirmed by the district court March 3d, 1856, and appeal dismissed August 7th, 1857; containing 919.18 acres.

247, 334, N. D. Martin F. Gormley, claimant for part of Soulaajule, one-half square league, in Marin county, granted March 29th, 1844, by Manuel Micheltorena to Ramon Mesa; claim filed May 27th, 1852, rejected by the commission April 17th, 1855, confirmed by the district court March 3d, 1856, and appeal dismissed March 7th, 1857; containing 2,266.25 acres.

248, 331, N. D. Charles Covillaud, claimant for New Helvetia, part of 11 leagues first granted, in Yuba and Sutter counties, granted July 18th, 1841, by Juan B. Alvarado, and 1845, by Manuel Micheltorena, to John A. Sutter; claim filed May 31st, 1852, confirmed by the commis-

sion May 22d, 1855, and by the district court April 10th, 1858.

249, 140, N. D. Mariano Guadalupe Vallejo, claimant for Yulupa, 3 square leagues, in Sonoma county, granted November 23d, 1844, by Manuel Micheltorena to Miguel Alvarado; claim filed May 31st, 1852, rejected by the commission May 10th, 1854, confirmed by the district court January 21st, 1857, decree reversed by the U. S. supreme court and cause remanded for further evidence, in 22 Howard [63 U. S.] 416.

250, 321, N. D., 306. Mariano Guadalupe Vallejo, claimant for Petaluma, 10 square leagues, in Sonoma county, granted October 22d, 1843, by Manuel Micheltorena to M. G. Vallejo, (grant) and 5 square leagues, June 22d, 1844, by Manuel Micheltorena to M. G. Vallejo (sale by the government); claim filed May 31st, 1852, confirmed by the commission May 22d, 1855, by the district court March 16th, 1857, and appeal dismissed July 3d, 1857; containing 66,622.17 acres.

251, 326, N. D. Guadalupe Vasquez de West et al., claimants for San Miguel, 6 square leagues, in Sonoma county, granted November 2d, 1840, by Juan B. Alvarado, and October 14th, 1844, by Manuel Micheltorena, to Marcus West; claim filed May 31st, 1852, rejected by the commission April 24th, 1855, confirmed by the district court June 2d, 1857, and decree confirmed by the U. S. supreme court for one league and a half, in 22 Howard [63 U. S.] 315.

252, 58, N. D., 362. Joaquin Carrillo, claimant for Llano de Santa Rosa, 3 square leagues, in Sonoma county, granted March 29th, 1844, by Manuel Micheltorena to Marcus West; claim filed May 31st, 1852, confirmed by the commission October 21st, 1853, by the district court March 24th, 1856, and appeal dismissed January 13th, 1857; containing 13,336.55 acres.

253, 358, S. D., 579. J. J. Warner, claimant for Camajal y El Palomar, 4 square leagues, in San Diego county, granted August, 1846, by Pio Pico to Juan J. Warner; claim filed May 31st, 1852, rejected by the commission July 17th, 1855, and by the district court September 14th, 1860.

254, 219, S. D., 228, 407. J. J. Warner, claimant for Agua Caliente or Valle de San José, 6 square leagues, in San Diego county, granted January 8th, 1840, by Juan B. Alvarado to José Antonio Pico, and November 28th, 1844, by Manuel Micheltorena to Juan J. Warner; claim filed May 31st, 1852, confirmed by the commission October 10th, 1854, by the district court February 6th, 1856, and appeal dismissed February 24th, 1857; containing 26,629.88 acres.

255, 298, N. D., 340. Charles M. Weber, claimant for Campo de los Franceses, 11 square leagues, in San Joaquin county, granted June 13th, 1844, by Manuel Micheltorena to Guillermo Gulnack; claim filed May 31st, 1852, confirmed by the commission April 17th, 1855, by the district court May 1st, 1857, and by the U. S. supreme court; containing 48,747.03 acres. Patented.

256, 234, N. D., 300. José Joaquin Estudillo, claimant for San Leandro, 1 square league, in Alameda county, granted October 16th, 1842, by Juan B. Alvarado to Joaquin Estudillo; claim filed May 31st, 1852, confirmed by the commission January 9th, 1855, by the district court May 7th, 1857, and by the U. S. supreme court; containing 7,010.84 acres.

257, 97, N. D. Mariano Castro, claimant for Rancho del Refugio or Pastoria de las Borregas, 2 square leagues, in Santa Clara county, granted June 15th, 1842, by Juan B. Alvarado to Francisco Estrada; claim filed May 31st, 1852, confirmed by the commission January 23d, 1854, by the district court November 23d, 1859, and by the U. S. supreme court.

258, 119, N. D., 358. Tomas Pacheco and Agustin Alviso, claimants for Potrero de los Ceritos, 3 square leagues, in Alameda county, granted March 23d, 1844, by Manuel Micheltorena to T. Pacheco and A. Alviso; claim filed May 31st, 1852, confirmed by the commission February 14th, 1854, by the district court October 29th, 1855, and by the U. S. supreme court; containing 10,610.26 acres.

259. William Reynolds and Daniel Frink, claimants for part of Nicasia, 2½ square leagues, in Marin county, granted August 1st, 1844, by Manuel Micheltorena to Pablo de la Guerra and Juan Cooper; claim filed June 2d, 1852 (see No. 270).

260, 342, N. D., 234. Isaac Graham et al., claimants for Zayanta, 1 league by one-half, in Santa Cruz county, granted April 22d, 1841, by Juan B. Alvarado to Juan José Crisostomo Mayor; claim filed June 4th, 1852, confirmed by the commission June 26th, 1855, and appeal dismissed; containing 2,514.64 acres.

261, 360, N. D., 311. James M. Harbin et al., claimants for Río de Jesus Maria, 6 square leagues, in Yolo county, granted October 23d, 1843, by Manuel Micheltorena to Tomas Hardy; claim filed June 8th, 1852, confirmed by the commission June 26th, 1855, by the district court March 23d, 1857, and appeal dismissed May 8th, 1857; containing 26,637.42 acres. Patented.

262, 114, S. D., 467. T. W. Sutherland, guardian of the minor children of Miguel Pedrorena, claimants for El Cajon, 11 square leagues, in San Diego county, granted September 23d, 1845, by Pio Pico to Maria Antonia Estudillo de Pedrorena; claim filed June 10th, 1852, confirmed by the commission March 14th, 1854, by the district court September 28th, 1855, and by the U. S. supreme court in 19 Howard [60 U. S.] 363; containing 48,794.03 acres.

263, 82, S. D., 495. T. W. Sutherland, guardian of the minor children of Miguel Pedrorena, claimants for San Jacinto Nuevo and Potrero, in San Diego county, granted January 14th, 1846, by Pio Pico to Miguel Pedrorena; claim filed June 10th, 1852, rejected by the commission December 27th, 1853, confirmed by the district court December 24th, 1855, and appeal dismissed February 23d, 1857.

264, 254, S. D. W. E. P. Hartnell, claimant for part of the Alizal, two-thirds square league, in Monterey county, granted January 26th, 1834, by José Migueroa to Guillermo Eduardo Hartnell; claim filed June 10th, 1852, confirmed by the commission October 31st, 1854, by the district court October 3d, 1855, and appeal dismissed February 5th, 1857; containing 2,971.26 acres.

265, 241, S. D. Maria Antonia de la Guerra y Lataillade, claimant for La Zaca, in Santa Barbara county, granted, 1838, by Juan B. Alvarado to Antonio; claim filed June 10th, 1852, confirmed by the commission November 14th, 1854, by the district court January 25th, 1856, and appeal dismissed February 5th, 1857; containing 4,480 acres.

266, 115, S. D., 409. Agustin Yansens, claimant for Lomas de la Purificacion, 3 square leagues, in Santa Barbara county, granted December 27th, 1844, by Manuel Micheltorena to A. Yansens; claim filed June 10th, 1852, confirmed by the commission November 14th, 1854, by the district court October 3d, 1855, and appeal dismissed February 5th, 1857; containing 13,341.49 acres.

267, 170, N. D., 370. Antonio Maria Pico and Henry M. Naglee, claimants for El Pescadero, 8 square leagues, in San Joaquin county, granted November 28th, 1843, by Manuel Micheltorena to Antonio Maria Pico; claim filed June 10th, 1852, rejected by the commission September 19th, 1854, confirmed by the district court

September 2d, 1856, and by the U. S. supreme court; containing 35,546.39 acres.

268, 218, N. D., 578. Josefa Carrillo de Fitch et al., heirs of Henry D. Fitch, claimants for Paraje del Arroyo, one-half square league, at Presidio San Francisco, granted July 24th, 1846, by Pio Pico to Henry D. Fitch and Francisco Guerrero; claim filed June 10th, 1852, rejected by the commission November 7th, 1854, and by the district court December 10th, 1857.

269, 275, N. D., 136. Encarnacion Mesa et al., claimants for San Antonio, 1 square league, in Santa Clara county, granted March 24th, 1839, by Juan B. Alvarado to Prado Mesa; claim filed June 11th, 1852, confirmed by the commission January 30th, 1855, by the district court March 10th, 1856, and appeal dismissed March 13th, 1857; containing 898.41 acres.

270, 392, N. D., 420. Henry W. Halleck and James Black, claimants for Nicasia, 10 square leagues, in Marin county, granted August 18th, 1844, by Manuel Michelorena to Pablo de la Guerra and Juan Cooper; claim filed June 14th, 1852, confirmed by the commission September 25th, 1855, by the district court March 9th, 1857, and appeal dismissed April 30th, 1857; containing 56,621.04 acres.

271, 333, S. D. Joaquin Gutierrez, claimant for El Potrero de San Carlos, 1 square league, in Monterey county, granted October 28th, 1837, by Juan B. Alvarado to Fructuoso; claim filed June 14th, 1852, confirmed by the commission June 5th, 1855, and appeal dismissed June 8th, 1857; containing 4,306.98 acres.

272, 116, S. D., 211. Maria Merced Lugo de Foster et al., claimants for San Pascual, 3 square leagues in Los Angeles county, granted September 24th, 1840, by Juan B. Alvarado to Enrique Sepulveda and José Perez; claim filed June 14th, 1852, rejected by the commission February 14th, 1854, and dismissed for want of prosecution March 7th, 1860.

273, 98, N. D., 345. Antonio Maria Peralta, claimant for part of San Antonio, 2 square leagues, in Alameda county, granted August 16th, 1820, by Pablo V. de Sola to Luis Peralta; claim filed June 18th, 1852, confirmed by the commission February 7th, 1854, by the district court December 4th, 1855, and appeal dismissed October 20th, 1857; containing 16,067.76 acres.

274, 99, N. D. Ygnacio Peralta, claimant for part of San Antonio, 2 square leagues, in Alameda county, granted August 16th, 1820, by Pablo V. de Sola to Luis Peralta; claim filed June 18th, 1852, confirmed by the commission February 7th, 1854, by the district court January 13th, 1857, and appeal dismissed April 20th, 1857; containing 9,416.66 acres. Patented.

275, 315, S. D. Josefa Morales del Castillo Negrete, claimant for Santa Ana y Santa Anita, 6 square leagues, in San Joaquin county, granted April 15th, 1836, by Nicolas Gutierrez to Luis del Castillo Negrete; claim filed June 24th, 1852, rejected by the commission March 6th, 1855, and for failure of prosecution appeal dismissed December 17th, 1856.

276, 226, N. D., 227. Manuel Alvisu, claimant for Quito, 3 square leagues, in Santa Clara county, granted March 16th, 1841, by Juan B. Alvarado to José Z. Fernandez and José Noriega; claim filed June 28th, 1852, confirmed by the commission December 5th, 1853, by the district court January 20th, 1857, and appeal dismissed March 9th, 1857; containing 13,309.85 acres.

277, 239, N. D. Francisco Berreyesa et al., heirs of G. Berreyesa, claimants for part of the Rincon de los Esteros, described by boundaries, in Santa Clara county, granted February 10th, 1838, by Juan B. Alvarado to Ygnacio Alvisu; claim filed June 28th, 1852, confirmed by the commission December 26th, 1854, by the district

court December 28th, 1857, and appeal dismissed February 18th, 1858.

278, 204, N. D., 114. Rafael Alvisu et al., claimants for part of the Rincon de los Esteros, described by boundaries, in Santa Clara county, granted February 10th, 1838, by Juan B. Alvarado to Ygnacio Alvisu; claim filed June 28th, 1852, confirmed by the commission December 26th, 1854, by the district court December 24th, 1857, and appeal dismissed February 20th, 1858; containing 2,200.19 acres.

279, 245, S. D. Juan Miguel Anzar, claimant for Vega del Rio del Pajaro, 8,000 acres, in Monterey county, granted April 17th, 1820, by Pablo V. de Sola to Antonio Maria Castro; claim filed June 28th, 1852, confirmed by the commission December 5th, 1854, by the district court December 12th, 1856, and appeal dismissed June 4th, 1857; containing 4,310.29 acres.

280, 427, N. D. City of San Francisco, claimant for 4 square leagues, granted in 1833 to the pueblo of San Francisco; claim filed July 2d, 1852, confirmed by the commission October 3d, 1854, and appeal dismissed March 30th, 1857.

281, 207, N. D. The executors and heirs of Agustin Iturbide, claimants for 400 square leagues, granted April 18th, 1835, to Agustin Iturbide; claim filed July 6th, 1852, rejected by the commission December 19th, 1854, dismissed by the district court January 8th, 1858, for want of jurisdiction, and decree affirmed by the U. S. supreme court in 22 Howard [63 U. S.] 290.

282, 221, N. D., 550. John Roland and J.L. Hornsby, claimants for Los Huecos, 9 square leagues, in Santa Clara county, granted May 6th, 1846, by Pio Pico to Luis Arenas and John Roland; claim filed July 6th, 1852, and rejected by the commission November 7th, 1854.

283, 90, N. D., 508. Pedro Sainsevain, claimant for La Cañada del Rincon, 2 square leagues, in Santa Cruz county, granted July 10th, 1843, by Pio Pico to Pedro Sainsevain; claim filed July 6th, 1852, confirmed by the commission January 17th, 1854, and appeal dismissed September 20th, 1854; containing 5,826.86 acres. Patented.

284, 205, N. D., 278. Maria Antonia Martinez de Richardson et al., claimants for Pinole, 4 square leagues, in Contra Costa county, granted June 1st, 1842, by Juan B. Alvarado to Ygnacio Martinez; claim filed July 8th, 1852, confirmed by the commission October 24th, 1854, and appeal dismissed March 10th, 1857; containing 17,786.49 acres.

285, 29, N. D., 223, 309. Guillermo Castro, claimant for part of San Lorenzo, 600 varas square, in Alameda county, granted February 23d, 1841, by Juan B. Alvarado to G. Castro; and for San Lorenzo, 6 square leagues, in Alameda county, granted October 24th, 1843, by Manuel Michelorena to G. Castro; claim filed July 8th, 1852, confirmed by the commission February 14th, 1853, by the district court, July 6th, 1855, and appeal dismissed January 16th, 1858; containing 26,717.43 acres.

286, 419, N. D. The mayor and common council of San José, claimants for land, described by boundaries, granted July 22d, 1778, by Felipe de Neve to pueblo of San José; claim filed July 14th, 1852, confirmed by the commission February 5th, 1856, and by the district court November 26th, 1859.

287, 426, N. D. Charles White and Isaac Brenham, trustees for C. White et al., claimants for land granted by Felipe de Neve to the mayor and common council of the city of San José; claim filed July 14th, 1852, and rejected by the commission February 5th, 1856.

288, 280, N. D. Joseph M. Miller, claimant for part of Llano de Santa Rosa, 1 square league, in Sonoma county, granted March 29th,

1844, by Manuel Micheltorena to Joaquin Carrillo; claim filed July 15th, 1852, rejected by the commission March 6th, 1858, and appeal dismissed April 21st, 1856.

289, 398, N. D., 472. Charles J. Brenham et al., claimants for Llano Seco, 4 square leagues, in Butte county, granted provisionally, July 26th, 1844, by Manuel Micheltorena, and October 2d, 1845, by Pio Pico, to Sebastian Keyser; claim filed July 17th, 1852, rejected by the commission September 25th, 1855, confirmed by the district court May 26th, 1857, and appeal dismissed June 3d, 1859; containing 17,767.17 acres. Patented.

290, 70, S. D., 166. Vicente Cantua, claimant for Rancho Nacional, 2 square leagues, in Monterey county, granted April 4th, 1839, by Juan B. Alvarado to Vicente Cantua; claim filed July 17th, 1852, confirmed by the commission January 24th, 1854, by the district court January 26th, 1855, and appeal dismissed January 28th, 1857; containing 6,633.19 acres.

291, 318, N. D. M. G. Vallejo, claimant for Suscol, in Solano county, granted March 15th, 1843, by Manuel Micheltorena to M. G. Vallejo; claim filed July 17th, 1852, confirmed by the commission May 22d, 1855, and by the district court March 22d, 1860.

292, 238, N. D. Ellen E. White, claimant for part of the Rincon de los Esteros, 2,000 acres, in Santa Clara county, granted February 10th, 1838, by Juan B. Alvarado to Ygnacio Alvisu; claim filed July 19th, 1852, confirmed by the commission December 19th, 1853, by the district court December 28th, 1857, and appeal dismissed February 9th, 1858; containing 2,308.17 acres.

293, 137, N. D., 371. Hiram Grimes et al., claimants for El Pescadero, 8 square leagues, in San Joaquin county, granted November 28th, 1843, by Manuel Micheltorena to Valentin Higuera and Rafael Feliz; claim filed July 22d, 1852, rejected by the commission February 14th, 1854, confirmed by the district court April 11th, 1856, and appeal dismissed December 22d, 1856; containing 35,446.06 acres. Patented.

294, 270, N. D. James Noe, claimant for Island of Sacramento, 5 square leagues, granted March 15th, 1845, by Juan B. Alvarado to Roberto Ellwell; claim filed July 24th, 1852, rejected by the commission February 8th, 1855, confirmed by the district court November 15th, 1856, decree reversed by the U. S. supreme court, cause remanded and petition to be dismissed, in 23 Howard [64 U. S.] 312.

295, 390, N. D. Edward A. Breed et al., claimants for Mission of San Rafael, 16 square leagues, in Marin county, granted June 8th, 1846, by Pio Pico to Antonio Suiñol and Antonio Maria Pico; claim filed July 26th, 1852, and rejected by the commission September 11th, 1855.

296, 117, S. D., 11. José de la Guerra y Noriega, claimant for Las Posas, 6 square leagues, in Santa Barbara county, granted May 15th, 1834, by José Figueroa to José Carrillo; claim filed July 27th, 1852, confirmed by the commission February 28th, 1854, by the district court December 18th, 1856, and appeal dismissed January 21st, 1858; containing 26,623.26 acres.

297, 325, S. D. Manuel Larios, claimant for 1 square league, in Monterey county, granted May 4th, 1839, by José Castro to M. Larios; claim filed August 5th, 1852, confirmed by the commission June 19th, 1855, and by the district court December 23d, 1858.

298, 374, N. D., 312. J. Jesus Peña et al., heirs of J. G. Peña, claimants for Tzabaco, 4 square leagues, in Sonoma county, granted October 14th, 1843, by Manuel Micheltorena to

José German Peña; claim filed August 5th, 1852, confirmed by the commission June 26th, 1855, by the district court March 9th, 1857, and appeal dismissed April 2d, 1857; containing 15,439.32 acres. Patented.

299, 364, S. D. Nicolas A. Den et al., claimants for San Marcos, 8 square leagues, in Santa Barbara county, granted June 8th, 1846, by Pio Pico to N. A. Den; claim filed August 11th, 1852, confirmed by the commission July 17th, 1855, and appeal dismissed June 8th, 1857; containing 35,573.10 acres.

300, 22, N. D., 408. Fernando Feliz, claimant for Sanel, 4 square leagues, in Mendocino county, granted November 9th, 1844, by Manuel Micheltorena to F. Feliz; claim filed August 14th, 1852, rejected by the commission October 18th, 1853, confirmed by the district court January 14th, 1856, and appeal dismissed March 20th, 1857; containing 17,754.38 acres. Patented.

301, 322, N. D., 50. Domingo Peralta, claimant for half of San Ramon or Las Juntas, described by boundaries, in Contra Costa county, granted in 1833, by José Figueroa to Bartolo Pacheco and Mariano Castro; claim filed August 14th, 1852, confirmed by the commission May 15th, 1855, by the district court March 2d, 1857, and appeal dismissed January 5th, 1858.

302, 43, S. D., 189. José de Jesus Pico, claimant for Piedra Blanca, described by boundaries, in San Luis Obispo county, granted January 18th, 1840, by Juan B. Alvarado to José de Jesus Pico; claim filed August 14th, 1852, confirmed by the commission December 13th, 1853, by the district court September 25th, 1855, and appeal dismissed February 4th, 1857.

303, 376, N. D. James Murphy, claimant for Cazadores, 4 square leagues, in Sacramento county, granted December 22d, 1844, by Manuel Micheltorena to Ernesto Rufus; claim filed August 14th, 1852, confirmed by the commission July 17th, 1855, by the district court September 22d, 1856, decree reversed by the U. S. supreme court and cause remanded, with direction to dismiss the petition, 23 Howard [64 U. S.] 476.

304, 260, S. D., 577. Tomas Herrera and Geronimo Quintana, claimants for San Juan Capistrano del Camote, 10 sitios of 4,428 acres each, in San Luis Obispo county, granted July 11th, 1846, by Pio Pico to T. Herrera and G. Quintana; claim filed August 14th, 1852, rejected by the commission December 26th, 1854, and dismissed for failure of prosecution August 8th, 1860.

305, 44, S. D. Ygnacio Pastor, claimant for Las Milpitas, in Monterey county, granted May 5th, 1838, by Juan B. Alvarado to Y. Pastor; claim filed August 14th, 1852, confirmed by the commission December 5th, 1853, and by the district court August 28th, 1860.

306, 395, N. D., 366. Domingo Peralta, claimant for Cañada del Corte de Madera, in Santa Clara county, granted in 1833, by José Figueroa to D. Peralta and Maximo Martinez; claim filed August 14th, 1852, rejected by the commission October 2d, 1855, and confirmed by the district court April 6th, 1858.

307, 311, N. D. G. W. P. Bissell and William H. Aspinwall, claimants for Isla de la Yegua, or Mare Island, described by boundaries, in Sonoma county, granted October 31st, 1840, by Manuel Jimeno, and May 20th, 1841, by Juan B. Alvarado, to Victor Castro; claim filed August 30th, 1852, confirmed by the commission May 8th, 1855, and by the district court March 2d, 1857.

308, 9, S. D. Antonio Maria Lugo, claimant for San Antonio, in Los Angeles county, granted in 1810, by José Dario de Arguello, confirmed by Don Luis Arguello April 1st,

1823, extension granted by José M. Elcheandia April 23d, 1827, and finally granted by Juan B. Alvarado, September 27th, 1838, to A. M. Lugo; claim filed August 30th, 1852, confirmed by the commission February 21st, 1853, by the district court December 3d, 1855, and appeal dismissed February 24th, 1857; containing 29,514.13 acres.

309, 212, S. D. Maria Antonia de la Guerra y Lataillade, claimant for El Alamo Pintado, 1 square league, in Santa Barbara county, granted August 16th, 1843, by Manuel Micheltoarena to Marcelino; claim filed August 30th, 1852, rejected by the commission September 26th, 1854, and by the district court June 3d, 1857.

310, 401, N. D. Juana Briones de Miranda et al., heirs of Apolinario Miranda, claimants for Ojo de Agua de Figueroa, 100 varas square, in San Francisco county, granted November 16th, 1833, by José Sanchez to Apolinario Miranda; claim filed August 30th, 1852, rejected by the commission October 23d, 1855, and confirmed by the district court November 25th, 1858.

311, 188, N. D. Manuel Diaz, claimant for Sacramento, 11 square leagues, in Colusi county, granted May 18th, 1846, by Pio Pico to M. Diaz; claim filed August 30th, 1852, rejected by the commission October 31st, 1854, and by the district court March 15th, 1858.

312, 36, S. D., 513. Lewis T. Burton, claimant for Bolsa de Chemisal, in San Luis Obispo county, granted May 11th, 1837, by Juan B. Alvarado to Francisco Quijada; claim filed August 30th, 1852, rejected by the commission December 5th, 1853, confirmed by the district court December 21st, 1855, and appeal dismissed February 24th, 1857; containing 14,335 acres.

313, 347, N. D. Juan C. Galindo, claimant for Mission of Santa Clara, in Santa Clara county, granted June 10th, 1846, by José Maria del Ray (priest); claim filed August 30th, 1852, rejected by the commission June 12th, 1855, and confirmed by the district court October 21st, 1857.

314, 74, S. D., 130. Miguel Abila, claimant for San Miguelito, 2 square leagues, in San Luis Obispo county, granted April 29th, 1846, by Pio Pico to M. Abila; claim filed August 31st, 1852, and rejected by the commission December 13th, 1853.

315, 70, N. D.; 199, S. D., (sent to N. D.) 298. Maria Antonio Pico et al., heirs of Simeon Castro, claimants for Punta del Año Nuevo, 4 square leagues, in Santa Cruz county, granted May 27th, 1842, by Juan B. Alvarado to Simeon Castro; claim filed August 31st, 1852, confirmed by the commission December 13th, 1853, by the district court December 4th, 1856, and appeal dismissed April 2d, 1856; containing 17,763.15 acres. Patented.

316, 12, S. D., 233. José del Carmen Lugo et al., claimants for San Bernardino, 8 square leagues, in San Bernardino county, granted June 21st, 1842, by Juan B. Alvarado to José del Carmen Lugo, José Maria Lugo, Vicente Lugo and Diego Sepulveda; claim filed August 31st, 1852, confirmed by the commission February 21st, 1853, by the district court December 7th, 1855, and appeal dismissed February 18th, 1857; containing 35,509.41 acres.

317, 316, S. D., 528. Jonathan R. Scott and Benjamin Hays, claimant for La Cañada, 2 square leagues, in Los Angeles county, granted May 12th, 1843, by Manuel Micheltoarena to Ygnacio Coronel; claim filed September 1st, 1852, confirmed by the commission April 3d, 1855, by the district court February 16th, 1857, and appeal dismissed June 4th, 1856; containing 5,832.10 acres.

318, 305, S. D., 71. Jacoba Feliz, claimant for San Francisco, in Santa Barbara and Los

Angeles counties, granted January 22d, 1839, by Juan B. Alvarado to Antonio del Valle; claim filed September 2d, 1852, confirmed by the commission January 2d, 1855, and appeal dismissed June 8th, 1857; containing 48,813.58 acres.

319, 86, N. D., 387. John Bidwell, claimant for Los Ulpinos, 4 square leagues, in Solano county, granted November 20th, 1844, by Manuel Micheltoarena to J. Bidwell; claim filed September 3d, 1852, confirmed by the commission January 2d, 1855, by the district court October 29th, 1855, and appeal dismissed March 21st, 1857; containing 17,726.44 acres.

320, 331, S. D. Robert B. Neligh, claimant for 6 square leagues, granted April 4th, 1846, by Pio Pico to José Castro; claim filed September 3d, 1852, confirmed by the commission May 8th, 1855, by the district court October 5th, 1859.

321, 359, N. D., 389. Joseph L. Folsom and Anna Maria Sparks, claimants for Rio de los Americanos, 8 square leagues, in Sacramento county, granted October 8th, 1844, by Manuel Micheltoarena to Guillermo A. Leidesdorff; claim filed September 4th, 1852, confirmed by the commission June 12th, 1855, by the district court February 23d, 1857, and further appeal dismissed April 30th, 1857; containing 35,521.36 acres.

322, 207, S. D. Maria Antonia de la Guerra y Lataillade, claimant for Las Huertas, 1,300 varas square, in Santa Barbara county, granted July 26th, 1844, by Manuel Micheltoarena to Francisco, Luis and Raymundo; claim filed September 4th, 1852, rejected by the commission September 26th, 1844, and by the district court June 3d, 1857.

323, 177, N. D. Julius Martin, claimant for part of Entre Napa or Rinconda de los Carne-ro, 1 mile square, in Solano county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed September 4th, 1852, rejected by the commission September 19th, 1854, confirmed by the district court September 7th, 1856, and appeal dismissed May 15th, 1857; containing 2,557.68 acres. Patented.

324, 83, S. D. José Antonio de la Guerra y Carrillo, claimant for Los Alamos, in Santa Barbara county, granted March 9th, 1839, by Juan B. Alvarado to J. A. de la Guerra y Carrillo; claim filed September 7th, 1852, confirmed by the commission January 17th, 1854, by the district court January 7th, 1856, and appeal dismissed February 3d, 1857; containing 48,803.38 acres.

325, 84, S. D., 468. George W. Hamley, claimant for Guejito y Cañada de Palomia, 3 square leagues, in San Diego county, granted September 20th, 1845, by Pio Pico to José Maria Orosio; claim filed September 7th, 1852, confirmed by the commission January 24th, 1854, by the district court September 26th, 1855, and appeal dismissed February 5th, 1857.

326, 186, N. D., 363. William Forbes, claimant for La Laguna de los Gentiles or Caslamayome, 8 square leagues, in Sonoma county, granted March 20th, 1844, by Manuel Micheltoarena to Eugenio Montenegro; claim filed September 7th, 1852, and rejected by the commission September 26th, 1854.

327, 118, S. D., 58. Anastasio Carrillo, claimant for Punta de la Concepcion, in Santa Barbara county, granted May 10th, 1837, by Juan B. Alvarado to A. Carrillo; claim filed September 7th, 1852, rejected by the commission February 14th, 1854, confirmed by the district court October 20th, 1855, and appeal dismissed February 5th, 1857; containing 24,992.04 acres.

328, 20, S. D., 475. Anastasio Carrillo, claimant for Cieneguita, 400 varas square, in Santa Barbara county, granted October 10th,

1845, by Pio Pico to A. Carrillo; claim filed September 7th, 1852, confirmed by the commission March 14th, 1853, and by the district court January 12th, 1857.

329, 85, S. D., 222. Gil Ybarra, claimant for Rincon de la Brea. 1 square league, in Los Angeles county, granted February 23d, 1841, by Juan B. Alvarado to G. Ybarra; claim filed September 9th, 1852, confirmed by the commission December 20th, 1852, by the district court October 11th, 1855, and appeal dismissed February 24th, 1857; containing 4,452.59 acres.

330, 226, S. D. Victoria Dominguez et al., heirs of José Antonio Estudillo, claimants for Otay, 1 square league, in San Diego county, granted March 24th, 1829, by José M. Echeandía to J. A. Estudillo; claim filed September 9th, 1852, confirmed by the commission December 19th, 1854, and appeal dismissed June 8th, 1857.

331, 22, S. D., 453. Henry Dalton, claimant for San Francisco, 2 square leagues, in Los Angeles county, granted May 26th, 1845, by Pio Pico to H. Dalton; claim filed September 10th, 1852, confirmed by the commission April 11th, 1853, rejected by the district court December 3d, 1855, decree reversed by the U. S. supreme court, and claim confirmed, in 22 Howard [63 U. S.] 436.

332, 195, S. D., 325. José Joaquin Ortega et al., claimants for Valle de Pamo, 4 square leagues, in San Diego county, granted November 25th, 1843, by Manuel Micheltorena to J. J. Ortega and Eduardo Stokes; claim filed September 10th, 1852, rejected by the commission September 19th, 1854, and confirmed by the district court February 8th, 1858.

333, 332, S. D., 168. Charles M. Weber, claimant for Cañada de San Felipe y Las Animas, 2 square leagues, in Santa Clara county, granted August 17th, 1839, by Manuel Jimeno to Tomas Boun; claim filed September 11th, 1852, confirmed by the commission May 8th, 1855, by the district court January 21st, 1857, and appeal dismissed March 4th, 1858; containing 8,787.80 acres.

334, 80, N. D. Joseph P. Thompson, claimant for part of Entre Napa, 1 square league, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed September 11th, 1852, confirmed by the commission December 13th, 1853, by the district court January 14th, 1856, and appeal dismissed September 2d, 1857.

335, 217, N. D., 452. Cayetano Jaures, claimant for Yokaya, 8 square leagues, in Mendocino county, granted May 24th, 1845, by Pio Pico to C. Juarez; claim filed September 11th, 1852, and rejected by the commission November 7th, 1854.

336, 104, N. D., 23. Juan José Gonzales, claimant for San Antonio or El Pescadero, three-fourths square league, in Santa Cruz county, granted December 24th, 1833, by José Figueroa to J. J. Gonzales; claim filed September 11th, 1852, confirmed by the commission January 31st, 1854, by the district court October 29th, 1855, and decree affirmed by the U. S. supreme court in 22 Howard [63 U. S.] 161; containing 3,282.22 acres.

337, 152, N. D. Mariano G. Vallejo, claimant for part of Entre Napa, 300 varas square, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed September 11th, 1852, rejected by the commission January 27th, 1854, and for failure of prosecution appeal dismissed April 21st, 1856.

338, 30, S. D., 426. David W. Alexander and Francis Mellus, claimants for Providencia, 1 square league, in Los Angeles county, granted March 23d, 1843, by Manuel Micheltorena to Vicente de la Osa; claim filed September

11th, 1852, and confirmed by the commission October 18th, 1853.

339, 194, S. D., 335. Samuel Carpenter, claimant for Santa Bertrudes, 5 square leagues, in Los Angeles county, granted May 22d, 1834, by José Figueroa to Josefa Cota de Nieto; claim filed September 11th, 1852, confirmed by the commission September 12th, 1854, by the district court January 21st, 1857, and appeal dismissed March 4th, 1858.

340, 132, N. D., 294. Charles Fossat, claimant for Los Capitancillos, three-fourths square league, in Santa Clara county, granted September 1st, 1842, by Juan B. Alvarado to Justo Larios; claim filed September 13th, 1852, confirmed by the commission February 28th, 1854, by the district court August 17th, 1857, decree reversed by the U. S. supreme court and cause remanded, 20 Howard [61 U. S.] 413, and decision of the U. S. supreme court on the survey, 21 Howard [62 U. S.] 445; containing 3,360.48 acres.

341, 203, S. D., 390, 545. Luis Vignes, claimant for Pauba, 6 square leagues, in San Diego county, granted November 9th, 1844, by Manuel Micheltorena to V. Morago, and February 4th, 1846, by Pio Pico, to Vicente Moraga and Luis Arenas; claim filed September 13th, 1852, confirmed by the commission May 2d, 1854, by the district court February 7th, 1857, and appeal dismissed March 1st, 1858; containing 26,597.96 acres. Patented.

342, 6, S. D., 398. Luis Vignes, claimant for Temecula, 6 square leagues, in San Diego county, granted December 14th, 1844, by Manuel Micheltorena to Feliz Valdez; claim filed September 13th, 1852, rejected by the commission March 14th, 1854, confirmed by the district court September 21st, 1855, and appeal dismissed October 18th, 1855; containing 26,608.94 acres. Patented.

343, 86, S. D., 240, 436. Henry Dalton, claimant for Santa Anita, 3 square leagues, in Los Angeles county, granted provisionally April 16th, 1841, by Juan B. Alvarado, and March 31st, 1845, finally by Pio Pico, to Perfecto Hugo Reid; claim filed September 14th, 1852, confirmed by the commission January 17th, 1854, by the district court October 24th, 1855, and appeal dismissed February 23d, 1857; containing 13,319.06 acres.

344, 265, S. D., 1, 91. Maria Antonio Machado, claimant for Los Virgenes, 2 square leagues, in Los Angeles county, granted April 6th, 1837, by Juan B. Alvarado to José Maria Dominguez; claim filed September 15th, 1852, confirmed by the commission November 7th, 1854, by the district court February 23d, 1857, and appeal dismissed March 4th, 1858.

345, 173, S. D., 157. Manuel Garfias, claimant for San Pascual, 3½ square leagues, in Los Angeles county, granted November 28th, 1843, by Manuel Micheltorena to M. Garfias; claim filed September 16th, 1852, confirmed by the commission April 25th, 1854, by the district court March 6th, 1856, and appeal dismissed February 23d, 1857; containing 13,693.93 acres.

346, 161, S. D., 425. Abel Stearns, claimant for La Laguna, 3 square leagues, in San Diego county, granted June 7th, 1844, by Manuel Micheltorena to Julian Manriquez; claim filed September 18th, 1852, confirmed by the commission February 14th, 1854, by the district court February 14th, 1856, and appeal dismissed February 24th, 1857.

347, 217, S. D., 386. F. P. F. Temple and Juan Matias Sanchez, claimants for La Merced, 1 square league, in Los Angeles county, granted October 8th, 1844, by Manuel Micheltorena to Casilda Soto; claim filed September 18th, 1852, confirmed by the commission October 14th, 1854, by the district court Decem-

ber 29th, 1856, and appeal dismissed March 4th, 1858; containing 2,363.75 acres.

348, 339, S. D. William Cary Jones, claimant for San Luis Rey and Pala, 12 square leagues, in San Diego county, granted May 18th, 1846, by Pio Pico to Antonio José Scott and José Antonio Pico; claim filed September 20th, 1852, confirmed by the commission June 12th, 1855, and by the district court April 1st, 1861.

349, 287, N. D. Leo Norris, claimant for part of San Ramon, 1 square league, in Contra Costa county, granted August 1st, 1834, by José Figueroa to José Maria Amador; claim filed September 20th, 1852, confirmed by the commission August 1st, 1854, and by the district court September 10th, 1857; containing 4,450.94 acres.

350, 156, N. D., 432. Thomas S. Page, claimant for Cotate, 4 square leagues, in Sonoma county, granted July 7th, 1844, by Manuel Micheltoarena to Juan Castañeda; claim filed September 21st, 1852, confirmed by the commission August 27th, 1854, by the district court January 14th, 1856, and appeal dismissed March 21st, 1857; containing 17,238.60 acres. Patented.

351, 17, S. D. Juan Temple, claimant for Los Cerritos, 5 square leagues, in Los Angeles county, granted May 22d, 1834, by José Figueroa to Manuela Nieto; claim filed September 21st, 1852, confirmed by the commission April 11th, 1853, by the district court February 28th, 1857, and appeal dismissed January 12th, 1857.

352, 82, N. D. Francisco Sanchez, claimant for San Pedro, 2 square leagues, in San Mateo county, granted January 26th, 1839, by Juan B. Alvarado to F. Sanchez; claim filed September 22d, 1852, confirmed by the commission December 13th, 1853, and appeal dismissed March 20th, 1857; containing 8,926.46 acres.

353, 169, S. D., 37, 402. Jacob P. Leese, claimant for Punta de Pinos, described by boundaries, in Monterey county, granted May 24th, 1833, by José Figueroa to José Maria Armenta, and October 4th, 1844, by Manuel Micheltoarena to José Abrego; claim filed September 22d, 1852, confirmed by the commission June 13th, 1854, and February 8th, 1855.

354, 269, N. D., 217. Candelario Miramontes, claimant for Arroyo de los Pilarcitos, 1 square league, in Santa Clara county, granted January 2d, 1841, by Juan B. Alvarado to C. Miramontes; claim filed September 22d, 1852, confirmed by the commission February 6th, 1855, by the district court February 16th, 1857, and appeal dismissed March 21st, 1857; containing 4,424.12 acres.

355, 67, S. D. Salvador Espinoza, claimant for Bolsa de las Escorpinas, 2 square leagues, in Monterey county, granted October 7th, 1837, by Juan B. Alvarado to S. Espinoza; claim filed September 22d, 1852, confirmed by the commission December 28th, 1853, by the district court September 24th, 1855, and appeal dismissed February 24th, 1857; containing 6,415.96 acres.

356, 42, S. D., 376. Francisco Arce, claimant for Santa Ysabel, 4 square leagues, in San Luis Obispo county, granted May 12th, 1844, by Manuel Micheltoarena to F. Arce; claim filed September 22d, 1852, rejected by the commission December 13th, 1853, and confirmed by the district court January 12th, 1857.

357, 184, N. D. Andres Pico, claimant for Moquelamo, 11 square leagues, in Calaveras county, granted June 6th, 1846, by Pio Pico to A. Pico; claim filed September 22d, 1852, rejected by the commission September 26th, 1854, confirmed by the district court April 24th, 1857, decree reversed by the U. S. supreme court and cause remanded for further evidence, in 22 Howard [63 U. S.] 406.

358, 89, N. D., 259. Salvador Castro, claimant for part of San Gregorio, 1 square league, in Santa Cruz county, granted April 6th, 1839, by Juan B. Alvarado to Antonio Buelna; claim filed September 22d, 1852, rejected by the commission December 27th, 1853, confirmed by the district court January 14th, 1856, and appeal dismissed July 23d, 1857; containing 4,439.31 acres. Patented.

359, 350, N. D. José Antonio Alvisu, claimant for Cañada de Verde y Arroyo de la Purísima, 2 square leagues, in Santa Cruz county, granted April 25th, 1838, by Juan B. Alvarado to José Maria Alvisu; claim filed September 22d, 1852, confirmed by the commission July 10th, 1855, by the district court March 9th, 1857, decision of the U. S. supreme court as to the right of appeal, 20 Howard [61 U. S.] 261, and decree of confirmation affirmed by the U. S. supreme court, 23 Howard [64 U. S.] 318; containing 8,905.58 acres.

360, 23, S. D., 380. José Maria Aguila, claimant for Cañada de los Nogales, one-half square league, in Los Angeles county, granted August 30th, 1844, by Manuel Micheltoarena to J. M. Aguila; claim filed September 25th, 1852, confirmed by the commission April 11th, 1853, by the district court January 21st, 1856, and appeal dismissed February 21st, 1857.

361, 213, S. D., 196, 203. Juan Bandini, claimant for Jurupa, 7 square leagues, in San Bernardino county, granted September 28th, 1838, by Juan B. Alvarado to J. Bandini; claim filed September 25th, 1852, confirmed by the commission October 17th, 1854, and by the district court April 5th, 1861.

362, 120, S. D., 214. Isaac J. Sparks, claimant for Pismo, 2 square leagues, in San Luis Obispo county, granted November 18th, 1840, by Manuel Jimeno to José Ortega; claim filed September 29th, 1852, confirmed by the commission March 21st, 1854, by the district court December 24th, 1856, and appeal dismissed March 1st, 1858; containing 8,838.89 acres.

363, 69, S. D., 321. Isaac J. Sparks, claimant for Huasna, 5 square leagues, in San Luis Obispo county, granted December 8th, 1843, by Manuel Micheltoarena to I. J. Sparks; claim filed September 29th, 1852, confirmed by the commission March 21st, 1854, by the district court January 8th, 1857, and appeal dismissed March 1st, 1858; containing 21,422.08 acres.

364, 121, S. D. Henry Dalton, claimant for Azusa, 3 square leagues, in San Bernardino county, 2 leagues granted by Juan B. Alvarado, one under the name of San José to Ignacio Palomares and Ricardo Vejar April 15th, 1837, with another to same grantees by Luis Arenas under the name of Azusa March 14th, 1840, and a third one by Manuel Jimeno to Luis Arenas November 8th, 1841; claim filed September 29th, 1852, confirmed by the commission January 21st, 1854, by the district court March 6th, 1855, and appeal dismissed June 4th, 1857; containing 27,151.327 acres.

365, 122, S. D. Ygnacio Palomares, claimant for part of San José, 2 square leagues, in San Bernardino county, granted April 15th, 1837, by Juan B. Alvarado to Y. Palomares; claim filed September 29th, 1852, confirmed by the commission January 31st, 1854, by the district court February 4th, 1856, and appeal dismissed February 23d, 1857.

366, 420, N. D. Andres Castellero, claimant for the quicksilver mine New Almaden, formerly called Santa Clara, discovered by him in 1845, in Santa Clara county, with two leagues of land granted to him by the president of Mexico, May 23d, 1846. Possession of the mine was given by the alcalde, Antonio Maria Pico, December 13th, 1845, with 3,000 varas of land in all directions from the mouth of the mine. Claim filed September 30th, 1852. The commission, on the eighth of January, 1856, con-

firmed the grant of 3,000 varas, and rejected all other claims. On the ground of fraud, the United States, on the twenty-ninth of October, 1858, obtained an injunction from the United States circuit court to stop the working of the mine. On the eighth of January, 1861, the district court, rejecting all claims to land, confirmed the mining rights, with seven pertinencias for mining purposes; and all shadow of fraud having been dispelled, the injunction was dissolved, on the twenty-sixth of January, 1861. [The pertinencia varies from 112½ to 200 varas square, according to the inclination of the vein.]

367, 157, N. D. Gervesio Arguello, executor of the heirs of José Darío Arguello, claimants for Las Pulgas, described by boundaries, in San Mateo county, granted in 1795, by Diego Borica to José Darío Arguello; claim filed September 30th, 1852, rejected by the commission August 1st, 1854, and for failure of prosecution appeal dismissed April 21st, 1856.

368, 305, S. D., 519. Benj. D. Wilson et als., claimants for San José de Buenos Ayres, 1 square league, in Los Angeles county, granted February 24th, 1843, by Manuel Micheltorena to Maximo Alanis; claim filed October 2d, 1852, confirmed by the commission February 20th, 1855, by the district court February 18th, 1857, and appeal dismissed June 4th, 1857; containing 4,438.69 acres.

369, 123, S. D., 184. Agustin Machado et al., claimants for Ballona, 1 square league, in Los Angeles county, granted November 27th, 1839, by Juan B. Alvarado to Agustin Machado et al.; claim filed October 2d, 1852, confirmed by the commission February 14th, 1854, by the district court December 19th, 1855, and appeal dismissed January 28th, 1857; containing 13,919.90 acres.

370, 214, S. D. Leon Victor Prudhomme, administrator, claimant for Cucamonga 3 square leagues, in San Bernardino county, granted April 16th, 1839, by Juan B. Alvarado to Tiburcio Tapia; claim filed October 2d, 1852, rejected by the commission October 17th, 1854, and confirmed by the district court December 31st, 1856.

371, 309, S. D. Anacleto Lestrade, claimant for Rosa de Castillo, described by boundaries, in Los Angeles county, granted June 25th, 1831, by Manuel Vittoria to Juan Ballestero; claim filed October 2d, 1852, rejected by the commission April 3d, 1855, and for failure of prosecution appeal dismissed December 17th, 1856.

372, 353, S. D. Januario Abila, claimant for Las Cienegas, 1 square league, in Los Angeles county, granted in 1823, by José de la Guerra y Noriega and Manuel Micheltorena to Francisco Abila; claim filed October 4th, 1852, confirmed by the commission June 26th, 1855, and appeal dismissed June 8th, 1857; containing 4,439.05 acres.

373, 87, S. D., 61. Pio Pico et al., claimants for Paso de Bartolo Viejo, 2 square leagues, in Los Angeles county, granted June 12th, 1835, by José Figueroa to Juan Crispin Perez; claim filed October 4th, 1852, confirmed by the commission December 27th, 1853, by the district court February 4th, 1856, and appeal dismissed February 24th, 1857.

374, 46, S. D., 236. Andres Duarte, claimant for Azusa, 1½ square leagues, in Los Angeles county, granted May 10th, 1841, by Juan B. Alvarado to A. Duarte; claim filed October 6th, 1852, confirmed by the commission November 4th, 1853, by the district court September 19th, 1855, and appeal dismissed February 23d, 1857; containing 6,595.62 acres.

375, 124, S. D., 464. Agustin Olvera, claimant for Cuyamaca, 11 square leagues, in San Diego county, granted August 11th, 1845, by

Pio Pico to A. Olvera; claim filed October 6th, 1852, rejected by the commission April 4th, 1854, and confirmed by the district court March 15th, 1858.

376, 235, S. D., 257. Daniel Sexton, claimant for 1,000 varas square, in Los Angeles county, granted November 5th, 1841, by Manuel Jimeno to José Maria Ramirez; claim filed October 6th, 1852, confirmed by the commission October 10th, 1854, by the district court December 28th, 1856, and appeal dismissed March 4th, 1858.

377, 259, S. D. Daniel Sexton, claimant for 500 varas square, in Los Angeles county, granted May 19th, 1842, by Juan B. Alvarado to Vicente de la Osa; claim filed October 6th, 1852, confirmed by the commission November 14th, 1854, by the district court February 27th, 1856, and appeal dismissed February 24th, 1857.

378, 343, S. D. Eulogio de Celis, claimant for Mission of San Fernando, 14 square leagues, in Los Angeles county, granted June 17th, 1846, by Pio Pico to E. de Celis; claim filed October 7th, 1852, confirmed by the commission July 3d, 1855, and appeal dismissed March 15th, 1858; containing 121,619.24 acres.

379, 292, N. D.; 392 S. D., (sent to the Southern district February 23d, 1857) 458. Vicente de la Osa et al., claimants for Encino, 1 square league, in Los Angeles county, granted July 8th, 1845, by Pio Pico to Ramon, Francisco and Roque; claim filed October 8th, 1852, and confirmed by the commission March 20th, 1855.

380, 378, S. D. Juan Bandini, claimant for Cajon de Muscupiabe, described by boundaries, in Los Angeles county, granted December 18th, 1839, by Juan B. Alvarado to J. Bandini; claim filed October 8th, 1852, rejected by the commission January 8th, 1856, and for failure of prosecution appeal dismissed December 22d, 1856.

381, 125, S. D., 382, 394. Bruno Abila, claimant for Aguage del Centinela, one-half square league, in Los Angeles county, granted September 14th, 1844, by Manuel Micheltorena to Ygnacio Machado; claim filed October 8th, 1852, confirmed by the commission March 21st, 1854, and by the district court February 21st, 1856.

382, 126, S. D. Bernardo Yorba, claimant for La Sierra, 4 square leagues, in San Bernardino county, granted June 15th, 1846, by Pio Pico to B. Yorba; claim filed October 9th, 1852, rejected by the commission February 14th, 1854, and confirmed by the district court January 22d, 1857.

383, 88, S. D., 195. Maria de Jesus Garcia et al., claimant for Los Nogales, 1 square league, in San Bernardino county, granted March 13th, 1840, by Juan B. Alvarado to José de la Cruz Linares; claim filed October 9th, 1852, confirmed by the commission January 17th, 1854, by the district court January 16th, 1857, and appeal dismissed March 4th, 1858; containing 464.72 acres.

384, 297, S. D. Bernardo Yorba, claimant for El Rincon, 1 square league, in San Bernardino county, granted April 8th, 1839, by Juan B. Alvarado to Juan Bandini; claim filed October 9th, 1852, confirmed by the commission February 13th, 1855, and by the district court February 11th, 1857; containing 4,431.47 acres.

385, 127, S. D., 270, 544. John Roland and Julian Workman, claimants for La Puente, described by boundaries, in Los Angeles and San Bernardino counties, granted July 22d, 1845, by Pio Pico to J. Roland and Julian Workman; claim filed October 9th, 1852, confirmed by the commission April 4th, 1854, and by the

district court February 24th, 1857; containing 48,790.55 acres.

386, 164, N. D. Sebastian Peralta and José Hernandez, claimants for Rinconada de los Gatos, 1½ square leagues, in Santa Clara county, granted May 21st, 1840, by Juan B. Alvarado to S. Peralta and J. Hernandez; claim filed October 9th, 1852, confirmed by the commission August 8th, 1854, by the district court March 10th, 1856, and appeal dismissed March 13th, 1856; containing 6,631.44 acres. Patented.

387, 89, S. D., 24. Bernardo Yorba, claimant for Cañada de Santa Ana, 3 square leagues, in Los Angeles county, granted August 1st, 1834, by José Figueroa to B. Yorba; claim filed October 9th, 1852, confirmed by the commission January 24th, 1854, by the district court October 9th, 1855, and appeal dismissed February 23d, 1857; containing 13,328.53 acres.

388, 128, S. D., 141. Ricardo Vejar, claimant for part of San José, described by boundaries, in San Bernardino county, granted April 15th, 1837, and March 14th, 1840, by Juan B. Alvarado to R. Vejar, Ignacio Palomares and Luis Arenas; claim filed October 9th, 1852, confirmed by the commission January 31st, 1854, by the district court February 4th, 1856, and appeal dismissed February 21st, 1857; containing 22,720.28 acres.

389, 90, S. D., 140. Juan Sanchez, claimant for Santa Clara or El Norte, described by boundaries, in Santa Barbara county, granted May 6th, 1837, by Juan B. Alvarado to J. Sanchez; claim filed October 9th, 1852, confirmed by the commission January 24th, 1854, by the district court January 19th, 1857, and appeal dismissed March 4th, 1858; containing 15,988.91 acres.

390, 320, N. D., 18. Joaquin Ysidro Castro, administrator, claimant for San Pablo, 4 square leagues, in Contra Costa county, 3 leagues granted by José Figueroa, June 12th, 1834, to Francisco Castro, deceased, and to his heirs, and on the 13th the surplus lands to Joaquin Ysidro Castro and the heirs of Francisco Castro; claim filed October 9th, 1852, confirmed by the commission April 17th, 1855, by the district court February 24th, 1858, and appeal dismissed March 10th, 1858; containing 19,394.40 acres.

391, 167, S. D. Enrique Abila, claimant for Tajauta, 1 square league, in Los Angeles county, granted July 5th, 1843, by Manuel Micheltoarena to Anastasio Abila; claim filed October 11th, 1852, confirmed by the commission August 22d, 1854, by the district court May 10th, 1856, and by the U. S. supreme court; containing 3,559.86 acres.

392, 129, S. D., 461. Urbano Odon and Manuel et al., claimants for El Escorpion, 1½ square leagues, in Los Angeles county, granted August 7th, 1845, by Pio Pico to U. Odon and Manuel; claim filed October 11th, 1852, confirmed by the commission April 25th, 1854, by the district court May 6th, 1859.

393, 406, N. D., 329. Angel and Maria Chabolla, heirs of Anastasio Chabolla, claimants for Sanjon de los Moquelumnes, 8 square leagues, in Sacramento and San Joaquin counties, granted January 24th, 1844, by Manuel Micheltoarena to A. Chabolla; claim filed October 16th, 1852, rejected by the commission January 24th, 1854, and September 4th, 1855, confirmed by the district court May 10th, 1857, and by the U. S. supreme court; containing 35,509.97 acres.

394, 337, S. D., 438. Juan Foster, claimant for Potreros de San Juan Capistrano, in Los Angeles and San Bernardino counties, granted April 5th, 1845, by Pio Pico to J. Foster; claim filed October 16th, 1852, confirmed by the commission

June 26th, 1855, by the district court February 21st, 1857, and appeal dismissed June 4th, 1857; containing 1,167.74 acres.

395, 228, S. D., 288, 541. Andres Ybarra, claimant for Los Encinitos, 1 square league, in San Diego county, granted July 3d, 1842, by Juan B. Alvarado to A. Ybarra; claim filed October 16th, 1852, confirmed by the commission October 31st, 1854, by the district court October 16th, 1855, and appeal dismissed February 24th, 1857; containing 4,431.03 acres.

396, 250, S. D., 437. Juan Foster, claimant for Mission Vieja or La Paz, in Los Angeles county, granted April 4th, 1845, by Pio Pico to Agustin Olvera; claim filed October 16th, 1852, confirmed by the commission October 31st, 1854, by the district court February 21st, 1857, and appeal dismissed June 4th, 1857; containing 46,432.65 acres.

397, 243, S. D., 439. Juan Matias Sanchez, claimant for Potrero Grande, 1 square league, in Los Angeles county, granted April 8th, 1845, by Pio Pico to Manuel Antonio; claim filed October 18th, 1852, confirmed by the commission October 24th, 1854, by the district court December 29th, 1856, and appeal dismissed March 4th, 1858; containing 4,431.96 acres. Patented.

398, 273, S. D. Manuel Dominguez et al., claimants for San Pedro, 10 square leagues, in Los Angeles county, granted December 31st, 1822, to Juan José Dominguez; claim filed October 19th, 1852, confirmed by the commission October 17th, 1854, by the district court December 20th, 1856, and appeal dismissed June 1st, 1857; containing 43,119.13 acres. Patented.

399, 130, S. D., 285. Juan Abila et al., claimants for El Niguel, 3 square leagues, in Los Angeles county, granted June 21st, 1842, by Juan B. Alvarado to J. Abila et al.; claim filed October 19th, 1852, confirmed by the commission April 25th, 1854, by the district court February 25th, 1856, and appeal dismissed February 24th, 1857.

400, 372, S. D. Andres Pico et al., claimants for Los Coyotes, 10 square leagues, in Los Angeles county, granted in 1784, by Pedro Fajes to Manuel Nieto, and May 22d, 1834, by José Figueroa to Juan José Nieto, heir of Manuel Nieto; claim filed October 20th, 1852, confirmed by the commission September 25th, 1855, and by the district court February 18th, 1857; containing 56,979.72 acres.

401, 355, S. D., 181. Andres Pico et al., claimants for La Habra, 1½ square leagues, in Los Angeles county, granted October 22d, 1839, by Manuel Jimeno to Mariano R. Roldan; claim filed October 20th, 1852, confirmed by the commission July 3d, 1855, by the district court February 18th, 1857, and appeal dismissed March 4th, 1858; containing 6,698.57 acres.

402, 208, S. D. Ramon Yorba et al., claimants for one-half of Las Bolsas, described by boundaries, in Los Angeles county, granted in 1784 by Pedro Fajes to Manuel Nieto, and May 22d, 1834, by José Figueroa to Catarina Ruiz, widow of M. Nieto; claim filed October 20th, 1852, confirmed by the commission September 26th, 1854, by the district court February 17th, 1857, and appeal dismissed March 4th, 1858; containing 34,486.13 acres. (See No. 459.)

403, 381, S. D. Julio Berdugo et al., claimants for San Rafael, 8 square leagues, in Los Angeles county, granted October 20th, 1784, by Pedro Fajes, and confirmed by Borica January 12th, 1798, to José Maria Berdugo; claim filed October 21st, 1852, confirmed by the commission September 11th, 1855, and appeal dismissed June 4th, 1857.

404, 290, S. D. Abel Stearns, claimant for Alamitos, 6 square leagues, in Los Angeles county, granted in 1784, by Pedro Fajes to Manuel Nieto, and May 22d, 1834, by José Figueroa to Juan José Nieto, heir of M. Nieto; claim filed

October 21st, 1852, confirmed by the commission February 13th, 1855, by the district court February 23d, 1857, and appeal dismissed March 4th, 1857; containing 17,789.79 acres.

405, 205, S. D., 244. Joaquin Ruiz, claimant for La Bolsa Chica, 2 square leagues, in Los Angeles county, granted July 1st, 1841, by Juan B. Alvarado to J. Ruiz; claim filed October 21st, 1852, confirmed by the commission September 26th, 1854, by the district court February 13th, 1857, and appeal dismissed June 4th, 1857; containing 8,107.46 acres.

406, 185, S. D., 279. José Sepulveda, claimant for San Joaquin, 11 square leagues, in Los Angeles county, being La Cienega de las Ranas, granted April 15th, 1837, and an augmentation granted May 13th, 1842, by Juan B. Alvarado to J. Sepulveda; claim filed October 22d, 1852, confirmed by the commission April 25th, 1854, by the district court December 11th, 1856, and appeal dismissed January 21st, 1858; containing 48,803.16 acres.

407, 367, S. D., 493. Pio Pico, claimant for Janual, 2 square leagues, in San Diego county, granted April 20th, 1831, by Manuel Victoria to Pio Pico; claim filed October 22d, 1852, rejected by the commission April 25th, 1855, and by the district court March 5th, 1858.

408, 62, S. D. Antonio Valenzuela and Juan Alvitre, claimants for Potrero de la Mission Vieja de San Gabriel, 1,000 varas by 500, in Los Angeles county, granted November 9th, 1844, by Manuel Micheltorena to J. Alvitre and A. Valenzuela; claim filed October 23d, 1852, confirmed by the commission December 13th, 1853, by the district court January 25th, 1856, and appeal dismissed February 24th, 1857.

409, 131, S. D. Francisco Higuera et al., claimants for Rincon de los Bueyes, three-fifths square league, in Los Angeles county, granted December 7th, 1821, by José de la Guerra y Noriega, and July 10th, 1843, by Manuel Micheltorena, to Bernardo Higuera; claim filed October 23d, 1852, rejected by the commission February 28th, 1854, and confirmed by the district court April 16th, 1861.

410, 363, S. D. Juan Foster, claimant for Mission of San Juan Capistrano, in Los Angeles county, granted December 6th, 1845, by Pio Pico to J. Foster; claim filed October 23d, 1852, confirmed by the commission July 17th, 1855, and appeal dismissed February 1st, 1858.

411, 238, S. D., 295. Juan Maria Marron, claimant for Agua Hedionda, 3 square leagues, in San Diego county, granted August 10th, 1842, by Juan B. Alvarado to J. M. Marron; claim filed October 23d, 1852, confirmed by the commission October 24th, 1854, by the district court October 6th, 1855, and appeal dismissed February 24th, 1859; containing 13,311.01 acres. ⁹

412, 216, S. D., 247. Juan Foster, claimant for Trabuco, 5 square leagues, in Los Angeles county, 2 leagues provisionally granted February 16th, 1841, and finally July 31st, 1841, by Juan B. Alvarado to Santiago Arguello et al., and 3 leagues granted to Juan Foster by Pio Pico April 21st, 1846; claim filed October 23d, 1852, confirmed by the commission September 26th, 1854, by the district court February 21st, 1857, and appeal dismissed February 11th, 1858; containing 22,184.47 acres.

413, 229, S. D. William Workman, claimant for Cajon de los Negros, 3 square leagues, in Los Angeles county, granted June 15th, 1846, by Pio Pico to Ygnacio Coronel; claim filed October 23d, 1852, and rejected by the commission December 12th, 1854.

414, 374, S. D. Josefa Montalva et al., claimants for Temascal, described by boundaries, in San Bernardino county, granted by José Maria Echeandia to Leandro Serano; claim filed October 26th, 1852, and rejected by the commission September 18th, 1855.

415, 132, S. D. Michael White, claimant for San Gabriel, 500 varas square, in Los Angeles county, granted March 27th, 1845, by Pio Pico to M. White; claim filed October 26th, 1852, confirmed by the commission February 28th, 1854, by the district court December 21st, 1855, and appeal dismissed February 24th, 1857.

416, 133, S. D., 350. Maria Ignacio Berdugo, claimant for De los Felis, 1½ square leagues, in Los Angeles county, granted March 22d, 1843, by Manuel Micheltorena to M. I. Berdugo; claim filed October 26th, 1852, confirmed by the commission February 28th, 1854, by the district court January 13th, 1857, and appeal dismissed March 4th, 1858.

417, 134, S. D. Lugardo Aguilar and Pascuala Garcia, his wife, claimants for 500 varas by 250, near San Gabriel, in Los Angeles county, granted May 15th, 1843, by Manuel Micheltorena to Manuel Dolivera; claim filed October 26th, 1852, confirmed by the commission February 28th, 1854, by the district court March 3d, 1856, and appeal dismissed February 24th, 1857.

418, 135, S. D. Rafael Valenzuela et al., claimants for 466 varas by 264, near San Gabriel, in Los Angeles county, granted May 16th, 1843, by Manuel Micheltorena to Prospero Valenzuela; claim filed October 26th, 1852, confirmed by the commission February 28th, 1854, and appeal dismissed February 1st, 1858.

419, 136, S. D., 476. Juan Silvas, claimant for 500 varas by 250, near San Gabriel, in Los Angeles county, granted May 15th, 1843, by Manuel Micheltorena to Manuel Dolivera; claim filed October 26th, 1852, confirmed by the commission March 14th, 1854, by the district court February 24th, 1857, and appeal dismissed March 4th, 1858.

420, 137, S. D. Santiago Rios or Riva, claimant for 300 varas square, near San Juan Capistrano, in Los Angeles county, granted July 5th, 1843, by Manuel Micheltorena to S. Rios; claim filed October 26th, 1852, confirmed by the commission February 28th, 1854, by the district court March 4th, 1856, and appeal dismissed February 23d, 1857.

421, 186, S. D. Teodocio Yorba, claimant for Lomas de Santiago, 4 square leagues, in Los Angeles county, granted May 26th, 1846, by Pio Pico to Teodocio Yorba; claim filed October 26th, 1852, confirmed by the commission August 15th, 1854, by the district court December 11th, 1856, and appeal dismissed January 21st, 1858.

422, 386, S. D. City of Los Angeles, claimant for 16 square leagues, granted May 26th, 1781, to Pueblo de los Angeles; claim filed October 26th, 1852, confirmed by the commission February 5th, 1856, and appeal dismissed February 1st, 1858; containing 17,172.37 acres.

423, 193, S. D. Concepcion Nieto et al., claimants for Santa Gertrudes, 5 square leagues, in Los Angeles county, granted in 1784, by Pedro Fajes to Manuel Nieto, and May 22d, 1834, by José Figueroa to Josefa Cota, widow of A. M. Nieto, heir of M. Nieto; claim filed October 28th, 1852, and rejected by the commission September 12th, 1854.

424, 138, S. D., 530. Michael White, claimant for 200 varas square, near San Gabriel, in Los Angeles county, granted May 15th, 1843, by Manuel Micheltorena to Emilio Joaquin; claim filed October 28th, 1852, rejected by the commission February 28th, 1854, and appeal dismissed for failure of prosecution January 7th, 1860.

425, 139, S. D., 434. Andrew J. Courtney and Wife, claimants for 700 varas by 400, near San Gabriel, in Los Angeles county, granted March 15th, 1845, by Pio Pico to Ramon Valencia et al.; claim filed October 28th, 1852, confirmed by the commission February 28th,

1853, by the district court December 17th, 1855, and appeal dismissed January 24th, 1857; containing 49.29 acres.

426, 162, S. D., 496. Domingo Yorba, claimant for Cañada de San Vicente, 3 square leagues, in San Diego county, granted January 25th, 1846, by Pio Pico to Juan Lopez; claim filed October 29th, 1852, confirmed by the commission May 21st, 1854, and appeal dismissed February 1st, 1858.

427, 376, S. D., 532. Tomas Sanchez et al., claimants for La Cienega or Paso de la Tigera, six-sevenths of 1 square league, in Los Angeles county, granted May 16th, 1843, by Manuel Micheltoarena to Vicente Sanchez; claim filed October 29th, 1852, confirmed by the commission July 10th, 1855, by the district court January 27th, 1857, and appeal dismissed January 21st, 1858.

428, 183, S. D., 560. Agustin Olvera, claimant for Los A'amos y Agua Caliente, 6 square leagues, in Los Angeles county, granted May 27th, 1846, by Pio Pico to Francisco Lopez et al.; claim filed October 29th, 1852, rejected by the commission August 15th, 1854, and confirmed by the district court December 13th, 1856.

429, 170, S. D., 547. José Maria Flores, claimant for La Liebre, 11 square leagues, in Santa Barbara county, granted April 21st, 1846, by Pio Pico to J. M. Flores; claim filed October 30th, 1852, rejected by the commission May 2d, 1854, and confirmed by the district court February 11th, 1857.

430, 60, S. D., 148. Gabriel Ruiz et al., claimants for Calleguas, described by boundaries, in Santa Barbara county, granted May 10th, 1847, by Juan B. Alvarado to José Pedro Ruiz; claim filed November 1st, 1852, confirmed by the commission November 4th, 1853, by the district court December 3d, 1855, and appeal dismissed February 23d, 1857; containing 9,998.29 acres.

431, 31, S. D., 274, 558. José Serano, claimant for Cañada de los Alisos, 2 square leagues, in Los Angeles county, part granted May 3d, 1842, by Juan B. Alvarado, and May 27th, 1846, additional extent by Pio Pico, to J. Serano; claim filed November 1st, 1852, confirmed by the commission October 21st, 1853, by the district court December 6th, 1855, and appeal dismissed February 23d, 1857; containing 10,668.81 acres.

432, 33, S. D., 444. Jorge Morillo et al., claimants for Potrero de Felipe Lugo, described by boundaries, in Los Angeles county, granted April 18th, 1845, by Pio Pico to Teodoro Romero et al.; claim filed November 1st, 1852, confirmed by the commission October 18th, 1853, by the district court September 19th, 1855, and appeal dismissed February 23d, 1857; containing 2,042.81 acres.

433, 182, S. D., 231. Isaac Williams, claimant for Santa Ana del Chino, 5 square leagues, in San Bernardino county, granted March 26th, 1841, by Juan B. Alvarado to Antonio Maria Lugo; claim filed November 1st, 1852, confirmed by the commission April 23d, 1854, by the district court January 13th, 1857, and appeal dismissed March 4th, 1858.

434, 335, S. D., 522. Isaac Williams, claimant for addition to Santa Ana del Chino, 3 square leagues, in San Bernardino county, granted April 1st, 1843, by Manuel Micheltoarena to I. Williams; claim filed November 1st, 1852, confirmed by the commission May 8th, 1855, by the district court January 13th, 1857, and appeal dismissed March 4th, 1858.

435, 55, S. D. Pablo Apis, claimant for Temecula, one by one-half league, granted May 7th, 1845, by Pio Pico to P. Apis; claim filed November 1st, 1852, rejected by the commis-

sion November 15th, 1853, and confirmed by the district court February 21st, 1857.

436, 91, S. D., 60. Santiago E. Arguello, claimant for Melyo, in San Diego county and Lower California, granted November 25th, 1833, by José Figueroa to S. E. Arguello; claim filed November 1st, 1852, rejected by the commission December 20th, 1853, and by the district court September 20th, 1855.

437, 66, S. D. Magdalena Estudillo, claimant for Otay, 2 square leagues, in San Diego county, granted May 4th, 1846, by Pio Pico to M. Estudillo; claim filed November 1st, 1852, confirmed by the commission November 4th, 1853, by the district court February 11th, 1856, and appeal dismissed February 24th, 1857; containing 6,657.98 acres.

438, 163, S. D., 572. Antonio Coronel, claimant for Sierra de los Verdugos, described by boundaries, in Los Angeles county, granted June 15th, 1846, by Pio Pico to A. Coronel; claim filed November 1st, 1852, rejected by the commission January 27th, 1854, and appeal dismissed for failure of prosecution October 24th, 1855.

439, 189, S. D., 393. José A. Serano et al., claimants for Pauma, 3 square leagues, granted November 9th, 1844, by Manuel Micheltoarena to J. A. Serano et al.; claim filed November 1st, 1852, confirmed by the commission May 16th, 1854, and appeal dismissed February 1st, 1858.

440, 140, S. D. Juan P. Ontiveros, claimant for San Juan Cajon de Santa Ana, granted May 13th, 1837, by Juan B. Alvarado to J. P. Ontiveros; claim filed November 1st, 1852, rejected by the commission April 11th, 1854, and confirmed by the district court December 4th, 1855.

441, 92, S. D., 72, 463, 529. Juliana Lopez Osuna, claimant for San Dieguito, 2 square leagues, 1 granted in 1840 or 1841, by Juan B. Alvarado, and the other August 11th, 1845, by Pio Pico to Juan Maria Osuna; claim filed November 1st, 1852, rejected by the commission January 24th, 1854, and confirmed by the district court March 4th, 1858.

442, 48, S. D., 17. Apolinaria Lorenzana, claimant for Jamacho, 2 square leagues, in San Diego county, granted April 27th, 1840, by Juan B. Alvarado to A. Lorenzana; claim filed November 1st, 1852, confirmed by the commission November 4th, 1853, by the district court February 4th, 1856, and appeal dismissed February 23d, 1857; containing 3,881.16 acres.

443, 269, S. D., 521. Louis Roubideau, claimant for San Jacinto and San Gregorio, granted March 22d, 1843, by Manuel Micheltoarena to Santiago Johnson; claim filed November 1st, 1852, rejected by the commission January 2d, 1855, and confirmed by the district court February 29th, 1860.

444, 199, N. D. Andres Pico, claimant for Arroyo Seco, 11 square leagues, in Sacramento, Amador and San Joaquin counties, granted May 8th, 1840, by Juan B. Alvarado to Teodocio Yorba; claim filed November 1st, 1852, rejected by the commission February 27th, 1855, confirmed by the district court April 21st, 1856, and by the U. S. supreme court; containing 48,857.52 acres.

445, 141, S. D., 330. Isidor Reyes et al., claimants for Voca de Santa Monica, 1½ square leagues, in Los Angeles county, granted June 19th, 1839, by Manuel Jimeno to Francisco Marques et al.; claim filed November 1st, 1852, confirmed by the commission April 4th, 1854, by the district court December 10th, 1856, and appeal dismissed March 4th, 1858.

446, 93, S. D., 565. José Loreto Sepulveda et al., claimants for Los Palos Verdes, in Los Angeles county, granted June 3d, 1846, by Pio

Pico to J. L. Sepulveda et al.; claim filed November 1st, 1852, confirmed by the commission December 20th, 1853, by the district court December 10th, 1856, and appeal dismissed March 4th, 1858; containing 31,629.13 acres.

447, 63, S. D., 443. José Ledesma, claimant for 400 by 200 varas, near San Gabriel, in Los Angeles county, granted June 3d, 1846, by Pio Pico to José Ledesma; claim filed November 1st, 1852, confirmed by the commission December 6th, 1853, by the district court February 11th, 1857, and appeal dismissed March 4th, 1858.

448, 94, S. D. Francisco Sales, claimant for 50 by 250 varas, near San Gabriel, in Los Angeles county, granted April 18th, 1845, by Pio Pico to F. Sales; claim filed November 1st, 1852, confirmed by the commission January 17th, 1854, by the district court February 20th, 1856, and appeal dismissed February 24th, 1857.

449, 95, S. D., 563. Simeon, (Indian) claimant for 500 by 200 varas, near San Gabriel, in Los Angeles county, granted June 1st, 1846, by Pio Pico to Simeon; claim filed November 1st, 1852, confirmed by the commission December 13th, 1853, by the district court February 18th, 1856, and appeal dismissed February 24th, 1857.

450, 51, S. D. Andres Duarte et al., claimants for 25 by 40 varas, near San Gabriel, in Los Angeles county, granted April 25th, 1846, by Pio Pico to A. Duarte et al.; claim filed November 1st, 1852, rejected by the commission December 6th, 1853, and appeal dismissed for failure of prosecution October 25th, 1855. °

451, 192, S. D., 205. Lorenzo Soto, claimant for Los Vallecitos, 2 square leagues, in San Diego county, granted April 22d, 1840, by Juan B. Alvarado to José Maria Alvarado; claim filed November 4th, 1852, rejected by the commission September 5th, 1854, confirmed by the district court February 11th, 1856, and appeal dismissed February 24th, 1857.

452, 142, S. D. Francisco Maria Alvarado, claimant for Los Peñasquitos, 2 square leagues, in San Diego county, granted June 15th, 1823, by Luis Antonio Arguello to Francisco Maria Ruiz; claim filed November 4th, 1852, rejected by the commission February 21st, 1854, and confirmed by the district court March 4th, 1858.

453, 362, S. D. Vicenta Sepulveda, claimant for La Sierra, 4 square leagues, in Los Angeles county, granted June 15th, 1846, by Pio Pico to V. Sepulveda; claim filed November 4th, 1852, confirmed by the commission July 10th, 1855, by the district court February 19th, 1857, and appeal dismissed March 4th, 1858.

454, 341, S. D., 267. Maria Antonia Snook, claimant for San Bernardo, 4 square leagues, in San Diego county, 2 leagues granted February 16th, 1842, by Juan B. Alvarado, and 2 leagues May 26th, 1845, by Pio Pico, to José Francisco Snook; claim filed November 5th, 1852, confirmed by the commission June 5th, 1855, by the district court January 6th, 1857, and appeal dismissed March 4th, 1858; containing 17,763.07 acres.

455, 171, S. D. Victoria Reid, claimant for Huerta de Quati or Quati, in Los Angeles county, granted October 12th, 1838, by Juan B. Alvarado to V. Reid; claim filed November 5th, 1852, rejected by the commission August 1st, 1854, confirmed by the district court October 4th, 1855, and appeal dismissed January 3d, 1857; containing 128.26 acres. Patented.

456, 354, S. D., 87, 337. Antonio Ygnacio Abila, claimant for Sansal Redondo, 5 square leagues, in Los Angeles county, granted May 20th, 1837, by Juan B. Alvarado to A. Y. Abila; claim filed November 5th, 1852, confirmed by the commission June 19th, 1855, by the district

court January 28th, 1857, and appeal dismissed March 4th, 1858.

457, 143, S. D., 186. Francisco Sepulveda, claimant for San Vicente and Santa Monica, 4 square leagues, in Los Angeles county, granted December 20th, 1839, by Juan B. Alvarado to F. Sepulveda; claim filed November 5th, 1852, confirmed by the commission April 25th, 1854, by the district court February 23d, 1857, and appeal dismissed January 21st, 1858.

458, 360, S. D. Casildo Aguilar et al., claimants for La Cienega or Paso de la Tigera, 1 square league, in Los Angeles county, granted May 16th, 1843, by Manuel Micheltoarena to Vicente Sanchez; claim filed November 6th, 1852, confirmed by the commission July 10th, 1855, by the district court January 27th, 1857, and appeal dismissed June 4th, 1857.

459, 302, S. D. José Justo Morillo et al., claimants for Las Bolsas, 7 square leagues, in Los Angeles county, granted in 1784, by Pedro Fajes to Manuel Nieto, and May 22d, 1834, by José Figueroa to Catarina Ruiz, widow of Manuel Nieto; claim filed November 6th, 1852, rejected by the commission February 13th, 1855, and confirmed by the district court February 17th, 1857. (See No. 402.)

460, 246, S. D., 491. Juan Foster, claimant for Rancho de la Nacion, 6 square leagues, in San Diego county, granted December 11th, 1845, by Pio Pico to J. Foster; claim filed November 6th, 1852, confirmed by the commission October 24th, 1854, by the district court February 21st, 1857, and appeal dismissed June 4th, 1857; containing 26,631.94 acres.

461, 329, S. D., 562. Juan Foster, claimant for Valle de San Felipe, 3 square leagues, in San Diego county, granted May 30th, 1846, by Pio Pico to Felipe Castillo; claim filed November 6th, 1852, confirmed by the commission May 22d, 1855, by the district court February 21st, 1857, and appeal dismissed June 4th, 1857; containing 9,972.08 acres.

462, 312, S. D., 536. Heirs of Juan B. Alvarado, claimants for Rincon del Diablo, 3 square leagues, in San Diego county, granted May 18th, 1843, by Manuel Micheltoarena to J. B. Alvarado; claim filed November 8th, 1852, confirmed by the commission May 22d, 1855, by the district court January 6th, 1857, and appeal dismissed March 4th, 1858; containing 12,653.77 acres.

463, 263, S. D. Louis Roubideau, claimant for Jurupa, 7 square leagues, in San Bernardino county, granted September 28th, 1838, by Juan B. Alvarado to Juan Bandini; claim filed November 8th, 1852, confirmed by the commission December 19th, 1854, and appeal dismissed June 8th, 1857.

464, 52, S. D., 215. David W. Alexander et al., claimants for Tujunga, 1½ square leagues, in Los Angeles county, granted December 5th, 1840, by Juan B. Alvarado to Pedro Lopez et al.; claim filed November 8th, 1852, rejected by the commission November 4th, 1853, confirmed by the district court February 28th, 1856, and appeal dismissed February 23d, 1857; containing 6,660.71 acres.

465, 50, S. D. David W. Alexander, claimant for Cahuenga, one-fourth square league, in Los Angeles county, granted May 5th, 1843, by Manuel Micheltoarena to José Miguel Trunfo; claim filed November 8th, 1852, rejected by the commission November 15th, 1853, by the district court December 13th, 1856, and appeal dismissed by stipulation February, 1857.

466, 54, S. D. Manuel Sales Tasion, claimant for 400 by 200 varas, near San Gabriel, in Los Angeles county, granted April 18th, 1845, by Pio Pico to M. S. Tasion; claim filed November 8th, 1852, rejected by the commission November 15th, 1853, and appeal dismissed for failure of prosecution October 24th, 1855.

- 467, 58, S. D., 446. José Domingo, claimant for 350 by 250 varas, near San Gabriel, in Los Angeles county, granted April, 1845, by Pio Pico to Felipe; claim filed November 8th, 1852, and confirmed by the commission November 22d, 1853.
- 468, 47, S. D., 486. Victoria Reid, claimant for 200 varas square, near San Gabriel, in Los Angeles county, granted May 15th, 1843, by Manuel Micheltorena to Serafin de Jesus; claim filed November 8th, 1852, rejected by the commission November 29th, 1853, and appeal dismissed for failure of prosecution October 24th, 1855.
- 469, 144, S. D., 155. Silvestre de la Portilla, claimant for Valle de San José, 4 square leagues, in San Diego county, granted April 16th, 1836, by Gutierrez to S. de la Portilla; claim filed November 8th, 1852, rejected by the commission February 21st, 1854, and confirmed by the district court February 23d, 1857.
- 470, 346, S. D., 559. Bernardo Yorba et al., heirs of Antonio Yorba, claimants for Santiago de Santa Ana, 11 square leagues, in Los Angeles county, granted July 1st, 1810, by José Figueroa to Antonio Yorba; claim filed November 9th, 1852, confirmed by the commission July 10th, 1855, and appeal dismissed June 8th, 1857; containing 62,516.57 acres.
- 471, 251, S. D., 449. Maria Juana de los Angeles, claimant for Cuca, one-half square league, in San Diego county, granted May 7th, 1845, by Pio Pico to M. J. de los Angeles; claim filed November 9th, 1852, confirmed by the commission October 10th, 1854, and by the district court December 24th, 1856.
- 472, 65, S. D., 241. Raimundo Olivas et al., claimants for San Miguel, 1½ square leagues, in Santa Barbara county, granted July 6th, 1841, by Juan B. Alvarado to R. Olivas et al.; claim filed November 9th, 1852, confirmed by the commission November 22d, 1853, by the district court February 27th, 1856, and appeal dismissed February 23d, 1857; containing 4,693.91 acres.
- 473, 219, S. D., 542. José Ramon Malo, claimant for Santa Rita, 3 square leagues, in Santa Barbara county, granted April 12th, 1845, by Pio Pico to J. R. Malo; claim filed November 9th, 1852, confirmed by the commission October 17th, 1854, and by the district court December 24th, 1856.
- 474, 294, S. D., 160. Maria Jesus Olivera de Cota et al., claimants for Santa Rosa, 3½ square leagues, in Santa Barbara county, 1½ leagues granted July 30th, 1839, by Manuel Jimeno, and 2 leagues November 19th, 1845, by Pio Pico, to Francisco Cota; claim filed November 9th, 1852, confirmed by the commission February 27th, 1855, and by the district court December 24th, 1856.
- 475, 272, S. D. Tomas Sanchez Colima, claimant for Santa Gertrudes, in Santa Barbara county, granted by Pio Pico to Antonio Maria Nieto; claim filed November 9th, 1852, confirmed by the commission December 12th, 1854, and appeal dismissed June 8th, 1857.
- 476, 389, S. D. José Ramon Malo, claimant for La Purisima, in Santa Barbara county, granted December 6th, 1845, by Pio Pico to J. R. Malo; claim filed November 10th, 1852, confirmed by the commission December 31st, 1855, and appeal dismissed June 8th, 1857; containing 14,927.62 acres.
- 477, 248, S. D. Juan Gallardo, claimant for 2,000 varas square, in Los Angeles county, granted July 17th, 1838, by Juan B. Alvarado to J. Gallardo; claim filed November 11th, 1852, rejected by the commission November 14th, 1854, and confirmed by the district court January 20th, 1860.
- 478, 371, S. D. Maria Rita Baldez, claimant for San Antonio, 1 square league, in Los Angeles county, granted in 1831, by Juan B. Alvarado to M. R. Baldez et al.; claim filed November 11th, 1852, confirmed by the commission September 25th, 1855, and appeal dismissed June 8th, 1857.
- 479, 318, S. D. Manuel Antonio Rodriguez de Poli, claimant for Mission of San Buenaventura, 12 square leagues, in Santa Barbara county, granted June 8th, 1846, by Pio Pico to José Arnas; claim filed November 11th, 1852, confirmed by the commission May 15th, 1855, and by the district court April 1st, 1861.
- 480, 313, S. D. Nasario Dominguez, claimant for one-sixth of San Pedro, in Los Angeles county, granted in 1822, by P. V. de Sola to Cristobal Dominguez; claim filed November 12th, 1852, rejected by the commission January 2d, 1855, and appeal dismissed in district court by claimant December 21st, 1857.
- 481, 145, S. D., 459. Andres et al., claimants for Guajome, 1 square league, in San Diego county, granted July 19th, 1843, by Pio Pico to Andres and José Manuel; claim filed November 12th, 1852, confirmed by the commission February 7th, 1854, by the district court December 17th, 1855, and appeal dismissed February 24th, 1857; containing 2,219.41 acres.
- 482, 146, S. D. Emigdio Vejar, claimant for Boca de la Playa, 1½ square leagues, in Los Angeles county, granted May 7th, 1846, by Pio Pico to E. Vejar; claim filed November 12th, 1852, confirmed by the commission March 14th, 1854, and appeal dismissed February 1st, 1858.
- 483, 147, S. D. Leon V. Prudhomme, claimant for Topanga Malibu, 3 square leagues, in Los Angeles county, granted in 1804, by José Joaquin de Arrellaga to José Bartolomé Tapia; claim filed November 12th, 1852, rejected by the commission March 21st, 1854, and by the district court in 1860.
- 484, 249, S. D. William Williams et al., claimants for Valle de las Viejas, 4 square leagues, in San Diego county, granted May 1st, 1846, by Pio Pico to Ramon Asuna et al.; claim filed November 13th, 1852, rejected by the commission December 26th, 1854, and appeal dismissed for failure of prosecution February 11th, 1856.
- 485, 264, S. D. Cave J. Coutts, claimant for La Soledad, 1 square league, in San Diego county, granted April 13th, 1838, by Carlos Antonio Carrillo, styling himself provisional governor, to Francisco Maria Alvarado; claim filed November 13th, 1852, rejected by the commission January 23d, 1855, and appeal dismissed for failure of prosecution February 11th, 1856.
- 486, 148, S. D., 499. Juan Moreno, claimant for Santa Rosa, 3 square leagues, in San Diego county, granted January 30th, 1846, by Pio Pico to J. Moreno; claim filed November 13th, 1852, confirmed by the commission April 4th, 1854, and by the district court January 15th, 1856.
- 487, 287, S. D. Antonio José Rocha et al., claimants for La Brea, 1 square league, in Los Angeles county, granted January 6th, 1828, by José Antonio Carrillo to A. J. Rocha et al.; claim filed November 15th, 1852, rejected by the commission March 6th, 1855, and by the district court August 8th, 1860.
- 488, 266, S. D., 531. Anacleto Lestrade, claimant for Cañada de los Coches, 400 varas square, granted August 16th, 1843, by Manuel Micheltorena to Apolinaria Lorenzana; claim filed December 13th, 1852, confirmed by the commission December 26th, 1854, and appeal dismissed for failure of prosecution February 1st, 1858.
- 489, 96, S. D., 537. Arno Maube, claimant for 200 varas square, near San Gabriel, in Los Angeles county, granted May 20th, 1843, by Manuel Micheltorena to A. Maube; claim filed December 13th, 1852, rejected by the commission

January 17th, 1854, and dismissed for failure of prosecution March 7th, 1860.

490, 138, N. D., 284. Maria Manuel Valencia, claimant for Boca de Cañada del Pinole, 3 square leagues, in Contra Costa county, granted June 21st, 1842, by Juan B. Alvarado to M. M. Valencia; claim filed December 13th, 1852, rejected by the commission August 10th, 1854, confirmed by the district court November 26th, 1854, and by the U. S. supreme court; containing 13,353.38 acres.

491, 239, S. D., 314. Pedro C. Carrillo, claimant for Camulos, 4 square leagues, in Santa Barbara county, granted October 2d, 1843, by Manuel Micheltoarena to Pedro C. Carrillo; claim filed December 13th, 1852, rejected by the commission November 7th, 1854, and appeal dismissed for failure of prosecution August 10th, 1860.

492, 29, S. D., 395. Raimundo Carrillo, claimant for Nojoqui, 3 square leagues, in Santa Barbara county, granted April 27th, 1843, by Manuel Micheltoarena to R. Carrillo; claim filed December 13th, 1852, confirmed by the commission October 12th, 1853, by the district court October 3d, 1855, and appeal dismissed February 24th, 1857; containing 13,284.50 acres.

493, 185, N. D., 441. Hilario Sanchez, claimant for Temalpais or Tamalnais, 2 square leagues, in Marin county, granted November 28th, 1845, by Pio Pico to H. Sanchez; claim filed December 13th, 1852, and rejected by the commission September 26th, 1854.

494, 97, S. D., 55, 163. Crisogono Ayala et al., claimants for Santa Ana, in Santa Barbara county, granted April 14th, 1837, by Juan B. Alvarado to Crisogono Ayala et al.; claim filed December 20th, 1852, confirmed by the commission January 24th, 1854, by the district court October 9th, 1855, and appeal dismissed February 3d, 1857; containing 21,522.04 acres.

495, 67, N. D., 200. Joseph P. Thompson, claimant for part of Napa, 640 acres, in Napa county, granted September 30th, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed December 21st, 1852, confirmed by the commission December 13th, 1853, by the district court February 13th, 1857, and appeal dismissed April 2d, 1857.

496, 209, N. D. José Maria Fuentes, claimant for Potrero, 11 square leagues, in Santa Clara county, granted June 12th, 1843, by Manuel Micheltoarena to J. M. Fuentes; claim filed December 21st, 1852, rejected by the commission November 21st, 1854, by the district court August 24th, 1857, and decree affirmed by the U. S. supreme court in 22 Howard [63 U. S.] 443.

497, 183, N. D., 27. Heirs of Juan Reid, claimants for Corte de Madera del Presidio, 1 square league, in Marin county, granted October 2d, 1834, by José Figueroa to Juan Reid; claim filed December 23d, 1852, confirmed by the commission June 13th, 1854, by the district court January 14th, 1856, and appeal dismissed April 2d, 1857; containing 4,460.24 acres.

498, 236, S. D., 307. Pedro C. Carrillo, claimant for Los Alamos y Agua Caliente, in Los Angeles county, granted October 2d, 1843, by Manuel Micheltoarena to P. C. Carrillo; claim filed December 24th, 1852, rejected by the commission November 7th, 1854, and appeal dismissed for failure of prosecution August 10th, 1860.

499, 253, N. D. John Hendley et al., claimants for Llano de Santa Rosa, 1 square league, in Sonoma county, granted March 20th, 1844, by Manuel Micheltoarena to Joaquin Carrillo; claim filed December 24th, 1852, rejected by the commission January 23d, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

500, 78, N. D., 200. Lilburn W. Boggs, claimant for part of Napa, 630 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed December 28th, 1852, confirmed by the commission December 13th, 1853, by the district court April 14th, 1856, and appeal dismissed April 2d, 1857.

501, 149, S. D., 253. Joaquin Estrada, claimant for Santa Margarita, 4 square leagues, in San Luis Obispo county, granted September 23th, 1841, by Manuel Jimeno to J. Estrada; claim filed December 28th, 1852, confirmed by the commission April 4th, 1854, by the district court October 3d, 1855, and appeal dismissed February 5th, 1857; containing 17,734.94 acres. Patented.

502, 101, S. D. Teodoro Gonzales, claimant for Rincon de la Puenta del Monte, 7 square leagues, in Monterey county, granted September 20th, 1836, by Gutierrez to T. Gonzales; claim filed December 28th, 1852, confirmed by the commission February 7th, 1854, by the district court September 21st, 1855, and appeal dismissed February 24th, 1857; containing 15,218.62 acres.

503, 363, N. D., 293. Maria L. B. Berreyesa et al., claimants for San Vincente, 1 square league, in Santa Clara county, granted August 20th, 1842, by Juan B. Alvarado to José R. Berreyesa; claim filed December 30th, 1852, confirmed by the commission July 3d, 1855, by the district court March 13th, 1857, and decree affirmed by the U. S. supreme court in 23 Howard [64 U. S.] 499; containing 4,438.36 acres.

504, 320, S. D. José Miguel Gomez, claimant for San Simeon, 1 square league, in San Luis Obispo county, granted December 1st, 1842, by Juan B. Alvarado to José Ramon Estrada; claim filed December 31st, 1852, confirmed by the commission May 8th, 1855, by the district court January 12th, 1857, and appeal dismissed March 4th, 1858; containing 4,463.81 acres.

505, 27, S. D., 248. Felician Soberanes, claimant for San Lorenzo, 5 square leagues, in Monterey county, granted August 9th, 1841, by Juan B. Alvarado to F. Soberanes; claim filed December 31st, 1852, rejected by the commission October 25th, 1853, confirmed by the district court September 24th, 1855, and appeal dismissed February 24th, 1857; containing 21,884.38 acres.

506, 181, N. D. Agustin Bernal, claimant for Santa Teresa, 1 square league, in Santa Clara county, granted July 11th, 1834, by José Figueroa to Joaquin Bernal; claim filed January 3d, 1853, confirmed by the commission September 5th, 1854, by the district court August 11th, 1856, and appeal dismissed November 2d, 1858; containing 4,460.03 acres.

507, 8, N. D. H. F. Teschemacher, claimant for Lup Yomi, 14 square leagues, in Napa county, granted September 5th, 1844, by Manuel Micheltoarena to Salvador Vallejo et al.; claim filed January 5th, 1853, rejected by the commission December 13th, 1853, confirmed by the district court June 27th, 1855, decree reversed by the U. S. supreme court and case remanded for further evidence, 22 Howard [63 U. S.] 392.

508, 256, S. D., 54. Heirs of Domingo Carrillo, claimant for one-half of Las Virgenes, 4 square leagues, in Los Angeles county, granted October 1st, 1834, by José Figueroa to D. Carrillo et al.; claim filed January 6th, 1853, rejected by the commission November 7th, 1854, and appeal dismissed for failure of prosecution May 7th, 1860.

509, 330, N. D., 341. Samuel G. Reed et al., claimants for Rancho del Puerto, 3 square leagues, in Stanislaus county, granted January 20th, 1844, by Manuel Micheltoarena to Ma-

riano Hernandez et al; claim filed January 7th, 1853, confirmed by the commission May 22d, 1855, by the district court May 6th, 1856, and appeal dismissed March 27th, 1857; containing 13,340.39 acres.

510, 168, N. D., 200. Uladislao Vallejo, claimant for part of Napa, 600 yards square, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed January 11th, 1853, rejected by the commission August 22d, 1854, and appeal dismissed for failure of prosecution April 1st, 1856.

511, 349, N. D. Henry Cambuston, claimant for 11 square leagues, in Butte county, granted May 23d, 1846, by Pio Pico to H. Cambuston; claim filed January 14th, 1853, confirmed by the commission July 10th, 1855, by the district court March 3d, 1856, decree reversed by the U. S. supreme court and case remanded for further hearing, 20 Howard [61 U. S.] 59. Claim rejected by the district court November 9th, 1859.

512, 227, S. D. Guadalupe Ortega de Chapman et al., claimants for San Pedro, 1 square league, in Santa Barbara county, granted in 1838, by Juan B. Alvarado to José Chapman; claim filed January 15th, 1853, rejected by the commission November 21st, 1854, and confirmed by the district court April 11th, 1861.

513, 292, S. D. Francisco Estevan Quintana, claimant for La Vena, 1 square league, in San Luis Obispo county, granted January 14th, 1842, by Juan B. Alvarado to F. E. Quintana; claim filed January 15th, 1853, rejected by the commission February 27th, 1855, and appeal dismissed for failure of prosecution December 18th, 1856.

514, 143, N. D. James Enright claimant for 2,000 varas square, in Santa Clara county, granted January 6th, 1845, by Manuel Micheltoarena to Francisco Garcia; claim filed January 17th, 1853, confirmed by the commission August 8th, 1854, by the district court April 26th, 1858, and by the U. S. supreme court; containing 710.14 acres.

515, 394, N. D. Joseph C. Palmer et al., claimants for Punta de Lobos, 2 square leagues, in San Francisco county, granted June 25th, 1846, by Pio Pico to Benito Diaz; claim filed January 17th, 1853, rejected by the commission August 14th, 1855, by the district court December 5th, 1857, and judgment affirmed by the U. S. supreme court with costs, 24 Howard [65 U. S.] 125.

516, 220, N. D., 454. Barcelona Bernal, claimant for Embarcadero de Santa Clara, 1,000 varas square, in Santa Clara county, granted June 18th, 1845, by Pio Pico to B. Bernal; claim filed January 17th, 1853, confirmed by the commission December 12th, 1854, and by the district court February 23d, 1857.

517, 150, S. D., 301. Nicholas A. Den, claimant for Dos Pueblos, 3 square leagues, in Santa Barbara county, granted April 18th, 1842, by Juan B. Alvarado to N. A. Den; claim filed January 18th, 1853, confirmed by the commission March 14th, 1854, by the district court December 28th, 1855, and appeal dismissed February 24th, 1857; containing 15,535.33 acres.

518, 151, S. D. David Spence, claimant for Llano de Buenavista, 2 square leagues, in Monterey county, granted in 1823, by Luis Antonio Arguello to José Mariano Estrada; claim filed January 18th, 1853, confirmed by the commission March 14th, 1854, by the district court January 7th, 1856, and appeal dismissed February 23d, 1857; containing 8,446.23 acres. Patented.

519, 152, S. D., 261. José Dolores Ortega, claimant for Cañada del Corral, 2 square leagues, in Santa Barbara county, granted No-

vember 5th, 1841, by Manuel Jimeno to J. D. Ortega; claim filed January 19th, 1853, confirmed by the commission February 21st, 1854, by the district court February 1st, 1856, and appeal dismissed February 23d, 1857; containing 8,875.76 acres.

520, 252, S. D., 570. Daniel Hill, claimant for La Goleta, 1 square league, in Santa Barbara county, granted June 10th, 1846, by Pio Pico to D. Hill; claim filed January 19th, 1853, confirmed by the commission December 26th, 1854, by the district court February 8th, 1858, and appeal dismissed May 15th, 1861.

521, 153, S. D., 520. Manuel Arguisola, claimant for Temascal, 3 square leagues, in Santa Barbara county, granted March 17th, 1843, by Manuel Micheltoarena to Francisco Lopez et al.; claim filed January 19th, 1853, rejected by the commission April 4th, 1853, and confirmed by the district court February 20th, 1857.

522, 154, S. D., 9. Antonio Maria Ortega et al., claimants for Nuestra Señora del Refugio, 6 square leagues, in Santa Barbara county, granted August 1st, 1834, by José Figueroa to A. M. Ortega et al.; claim filed January 19th, 1853, confirmed by the commission March 14th, 1854, by the district court December 29th, 1856, and appeal dismissed March 4th, 1858; containing 26,529.30 acres.

523, 240, N. D. Hicks and Martin, claimants for Rancho de los Cosumnes, 1 square league, in Sacramento county, granted December 22d, 1844, by Manuel Micheltoarena to Heleno; claim filed January 21st, 1853, and rejected by the commission January 23d, 1855.

524, 300, N. D., 299. Barbara Soto et al., claimants for San Lorenzo, 1½ square leagues, in Alameda county, granted October 10th, 1842, by Manuel Micheltoarena, and January 20th, 1844, by Juan B. Alvarado, to Francisco Soto; claim filed January 22d, 1853, confirmed by the commission April 24th, 1855, by the district court April 23d, 1857, and appeal dismissed April 29th, 1857; containing 6,686.33 acres.

525, 418, N. D. Bethuel Phelps, claimant for Punta Reyes, 8 square leagues, in Marin county, granted March 17th, 1836, by Nicolas Gutierrez to James Richard Berry; claim filed January 22d, 1853, confirmed by the commission August 7th, 1855, by the district court December 22d, 1857, and appeal dismissed December 22d, 1857.

526, 348, S. D. Feliciano Soberanes, claimant for Mission de la Soledad, 2 square miles, in Monterey county, granted January 4th, 1846, by Pio Pico to F. Soberanes; claim filed January 22d, 1853, confirmed by the commission July 17th, 1855, and appeal dismissed June 8th, 1857; containing 8,899.82 acres.

527, 201, S. D. James Blair et al., claimants for Salsipuedes, 8 square leagues, in Santa Cruz county, 2 square leagues granted with conditions November 4th, 1834, by José Figueroa, and final title to 8 square leagues March 1st, 1840, by Juan B. Alvarado, to Manuel Jimeno Casarin; claim filed January 27th, 1853, confirmed by the commission May 2d, 1854, and appeal dismissed October 8th, 1857; containing 27,662.57 acres. Patented.

528, 268, S. D., 150. Luis T. Burton et al., claimants for two-thirds of Jesus Maria, in Santa Barbara county, granted April 8th, 1837, by Juan B. Alvarado to Lucas Olivera et al.; claim filed January 27th, 1853, confirmed by the commission December 19th, 1854, and appeal dismissed February 1st, 1858; containing 42,184.93 acres.

529, 155, S. D., 260. James McKinlay, claimant for Moro y Cayucos, 2 square leagues, in San Luis Obispo county, 1 square league

granted April 27th, 1842, to Martin Olivera, and the other by Juan B. Alvarado to Vicente Feliz; claim filed January 28th, 1853, confirmed by the commission April 4th, 1854, by the district court December 24th, 1856, and appeal dismissed March 4th, 1858; containing 8,845.49 acres.

530, 34, S. D., 384. James McKinlay, claimant for San Lucas, 2 square leagues, in Monterey county, granted May 9th, 1842, by Juan B. Alvarado to Rafael Estrada; claim filed January 28th, 1853, rejected by the commission December 13th, 1853, confirmed by the district court February 21st, 1856, and appeal dismissed February 24th, 1857; containing 3,590.25 acres.

531, 270, S. D. Fermina Espinoza de Perez and Domingo Perez, claimants for Los Gatos or Santa Rita, 1 square league, in Monterey county, granted in 1820, and September 3d, 1837, by Juan B. Alvarado to José Trinidad Espinoza; claim filed January 29th, 1853, confirmed by the commission January 23d, 1855, by the district court January 23d, 1857, and appeal dismissed March 4th, 1858; containing 4,424.46 acres.

532, 244, S. D., 191. Eusebio Boronda, claimant for Rinconada del Sanjon, 1½ square leagues, in Monterey county, granted February 1st, 1840, by Juan B. Alvarado to E. Boronda; claim filed January 29th, 1853, confirmed by the commission October 31st, 1854, by the district court October 16th, 1856, and appeal dismissed February 5th, 1857; containing 2,229.70 acres. Patented.

533, 240, S. D., 175. José Manuel Boronda et al., claimants for Los Laureles 1½ square leagues, in Monterey county, granted September 20th, 1839, by Juan B. Alvarado to José M. Boronda and Vicente Blas Martinez; claim filed January 29th, 1853, confirmed by the commission October 31st, 1854, by the district court January 7th, 1856, and appeal dismissed February 5th, 1857; containing 6,624.99 acres.

534, 156, S. D. Joaquin Carrillo et al., claimants for San Carlos de Jonata, 6 square leagues, in Santa Barbara county, granted September 24th, 1845, by Pio Pico to J. Carrillo et al.; claim filed January 29th, 1853, confirmed by the commission January 31st, 1854, and by the district court February 7th, 1857; containing 26,631.31 acres.

535, 215, S. D., 16. Rafael Estrada, claimant for Rincon de las Salinas, one-half square league, in Monterey county, granted December 2d, 1833, by José Figueroa to Cristina Delgado; claim filed January 29th, 1853, confirmed by the commission September 26th, 1854, by the district court January 7th, 1856, and appeal dismissed February 5th, 1857; containing 2,220.02 acres. Patented.

536, 349, S. D., 326. José Maria Covarrubias, claimant for Castac, 5 square leagues, in Los Angeles county, granted November 22d, 1843, by Manuel Micheltorena to J. M. Covarrubias; claim filed January 29th, 1853, confirmed by the commission July 10th, 1855, by the district court January 21st, 1857, and appeal dismissed March 6th, 1858.

537, 230, S. D., 75. Juana Briones de Lugo et al., claimants for Paraje de Sanchez, 1½ square leagues, in Monterey county, granted June 8th, 1839, by Juan B. Alvarado to Francisco Lugo; claim filed January 29th, 1853, confirmed by the commission November 7th, 1854, by the district court October 16th, 1856, and appeal dismissed February 5th, 1857; containing 6,584.32 acres.

538, 369, S. D. José Maria Covarrubias et al., claimants for Mission of Santa Inez, in Santa Barbara county, granted June 15th, 1846, by Pio Pico to J. M. Covarrubias et al.; claim filed January 29th, 1853, and rejected by the commission September 11th, 1855.

539, 234, S. D., 135. Maria del Espiritu Santo Carrillo, claimant for Loma del Espiritu Santo, described by boundaries, in Monterey county, granted April 15th, 1839, by Juan B. Alvarado to Maria del Espiritu Santo Carrillo; claim filed January 29th, 1853, rejected by the commission November 14th, 1854, and appeal dismissed for failure of prosecution February 11th, 1856.

540, 222, S. D., 121. Heirs of Felipe Vasquez, claimants for Chamisal, 1 square league, in Monterey county, granted November 17th, 1835, by José Castro to F. Vasquez; claim filed January 31st, 1853, and rejected by the commission October 24th, 1854.

541, 189, N. D.; 174, S. D., (sent to Northern District). Gregorio Briones, claimant for Las Baulines, 2 square leagues, in Marin county, granted February 11th, 1846, by Pio Pico to G. Briones; claim filed January 31st, 1853, confirmed by the commission May 15th, 1854, by the district court January 19th, 1857, and appeal dismissed April 2d, 1857; containing 8,911.34 acres.

542, 88, N. D. Encarnacion Buelna and heirs of Maria Concepcion V. de Rodriguez, claimants for part of San Gregorio, 3 square leagues, in Santa Cruz county granted May 2d, 1839, by Juan B. Alvarado to Antonino Buelna; claim filed February 1st, 1853, rejected by the commission December 27th, 1853, confirmed by the district court October 29th, 1855, and appeal dismissed July 24th, 1857; containing 13,344.15 acres. Patented.

543, 242, S. D. Mayor and common council of Santa Barbara, claimants for 8¼ square leagues, granted, in 1782, to the Pueblo of Santa Barbara; claim filed February 1st, 1853, rejected by the commission August 1st, 1854, and confirmed by the district court March 6th, 1861.

544, 221, S. D., 275. Mariano Soberanes, claimant for Los Ojitos, 2 square leagues, in Monterey county, granted April 5th, 1842, by Juan B. Alvarado to M. Soberanes; claim filed February 1st, 1853, confirmed by the commission September 26th, 1854, by the district court January 7th, 1856, and appeal dismissed February 5th, 1857; containing 8,900.17 acres.

545, 181, S. D., 348. Julian Ursua, claimant for La Panocha de San Juan, 5 square leagues, in San Joaquin county, granted February 17th, 1844, by Manuel Micheltorena to J. Ursua; claim filed February 2d, 1853, confirmed by the commission May 2d, 1854, and by the district court December 17th, 1856.

546, 373, S. D., 198. José Castro, claimant for San José y Sur Chiquita, 2 square leagues, in Monterey county, granted April 16th, 1839, by Juan B. Alvarado to Marcelino Escobar; claim filed February 2d, 1853, and rejected by the commission August 28th, 1855.

547, 368, S. D. José Maria Covarrubias, claimant for Isla de Santa Catalina, described by boundaries, in Los Angeles county, granted July 4th, 1846, by Pio Pico to Tomas M. Hobbins; claim filed February 3d, 1853, confirmed by the commission September 25th, 1855, and by the district court March 1st, 1858.

548, 424, N. D. José Y. Limantour, claimant for 4 square leagues, in San Francisco county, part of the city, supposed to extend south of California street, granted February 27th, 1843, by Manuel Micheltorena to J. Y. Limantour; claim filed February 3d, 1853, confirmed by the commission January 22d, 1856, and rejected by the district court October 19th, 1858.

549, 429, N. D. José Y. Limantour, claimant for the islands of Farrallones, Alcatraz and Yerba Buena, and a tract of 1 square league in Marin county, opposite the island of Los Angeles, known as Punta del Tiburon, granted December 16th, 1843, by Manuel Micheltorena to J. Y. Limantour; claim filed February 3d,

1853, confirmed by the commission February 12th, 1856, and rejected by the district court November 19th, 1858.

550, 328, S. D., 204. John P. Davison, claimant for Santa Paula y Saticoy, 4 square leagues, in Santa Barbara county, granted April 1st, 1843, by Manuel Micheltorena to Manuel Jimeno Casarin; claim filed February 3d, 1853, confirmed by the commission May 22d, 1855, and appeal dismissed March 4th, 1858; containing 17,733.33 acres.

551, 223, S. D., 238. Mariano Soberanes et al., claimants for San Bernardo, 3 square leagues, in Monterey county, granted June 16th, 1841, by Juan B. Alvarado to M. Soberanes et al.; claim filed February 5th, 1853, confirmed by the commission November 7th, 1854, by the district court January 14th, 1856, and appeal dismissed February 5th, 1857; containing 13,345.65 acres.

552, 210, S. D., 292. Heirs of Joaquin Soto, claimants for El Piojo, 3 square leagues, in Monterey county, granted August 20th, 1842, by Juan B. Alvarado to Joaquin Soto; claim filed February 5th, 1853, confirmed by the commission September 26th, 1854, by the district court January 19th, 1857, and appeal dismissed March 4th, 1858; containing 13,329.23 acres.

553, 284, S. D., 209. Antonio Olivera, claimant for Casmalia, 2 square leagues, in Santa Barbara county, granted September 12th, 1840, by Juan B. Alvarado to A. Olivera; claim filed February 5th, 1853, confirmed by the commission March 6th, 1855, and appeal dismissed February 1st, 1858; containing 8,841.21 acres.

554, 356, S. D. Andrew Randall and Fletcher M. Haight, claimants for Cañada de la Segunda, 1 square league, in Monterey county, granted April 4th, 1839, by José Castro to Lazaro Soto; claim filed February 5th, 1853, confirmed by the commission August 14th, 1855, by the district court February 5th, 1858, and appeal dismissed February 8th, 1858; containing 4,366.80 acres. Patented.

555, 253, S. D., 316. Andrew Randall, claimant for San Lorenzo, 5 square leagues, in Monterey county, granted November 16th, 1842, by Juan B. Alvarado to Francisco Rico; claim filed February 5th, 1853, confirmed by the commission December 12th, 1854, by the district court January 12th, 1857, and appeal dismissed March 4th, 1858; containing 22,264.47 acres.

556, 344, S. D., 289. Francisco Dominguez et al., claimants for San Emidio, 4 square leagues, in Los Angeles county, granted July 14th, 1842, by Juan B. Alvarado to José Antonio Dominguez; claim filed February 5th, 1853, confirmed by the commission December 26th, 1854, and appeal dismissed June 8th, 1857; containing 17,709.79 acres.

557, 190, S. D. Jacob P. Leese, claimant for Rancho de Sausal, 2 square leagues, in Monterey county, granted August 2d, 1834, and August 10th, 1845, by José Figueroa to José Tiburcio Castro; claim filed February 5th, 1853, confirmed by the commission August 15th, 1854, by the district court December 18th, 1856, and appeal dismissed March 4th, 1858; containing 10,241.88 acres. Patented.

558, 346, N. D. Charles White, claimant for Arroyo de San Antonio, in Sonoma county, granted August 10th, 1840, by Juan B. Alvarado to Antonio Ortega; claim filed February 7th, 1853, confirmed by the commission June 26th, 1855, by the district court August 17th, 1857, decree reversed by the U. S. supreme court, and record remitted for further proceedings, 23 Howard [64 U. S.] 249.

559, 409, N. D. W. D. M. Howard, claimant for San Mateo, 2 square leagues, in San Mateo county, granted May 5th or 6th, 1846, by Pio Pico to Cayetano Arenas; claim filed February 7th, 1853, confirmed by the commis-

sion September 18th, 1855, and appeal dismissed April 6th, 1857; containing 6,438.80 acres. Patented.

560, 352, S. D. Patrick Breen, claimant for 1,500 varas square, in Monterey county, granted April 13th, 1846, by Pio Pico to José Castro; claim filed February 7th, 1853, confirmed by the commission June 26th, 1855, and appeal dismissed February 1st, 1858; containing 401.25 acres.

561, 281, S. D., 525. Michael White, claimant for Muscupiabe, 1 square league, in Los Angeles county, granted April 29th, 1843, by Manuel Micheltorena to M. White; claim filed February 8th, 1853, confirmed by the commission March 6th, 1855, and appeal dismissed June 8th, 1857.

562, 68, S. D., 276. James Watson, claimant for San Benito, 1½ square leagues, in Monterey county, granted April 5th, 1842, by Juan B. Alvarado to Francisco Garcia; claim filed February 9th, 1853, confirmed by the commission January 17th, 1854, by the district court February 23d, 1857, and appeal dismissed March 4th, 1857; containing 6,671.08 acres.

563, 380, S. D. L. E. Pogue et al., claimants for Point Pinos, 2 square leagues, in Monterey county, granted May 24th, 1833, by José Figueroa to José Maria Armenta; claim filed February 9th, 1853, and rejected by the commission September 11th, 1855.

564, 157, S. D., 151. John C. Gore, claimant for Pescadero, 1 square league, in Monterey county, granted March 3d, 1836, by Nicolas Gutierrez to Fabian Barreto; claim filed February 9th, 1853, rejected by the commission February 28th, 1854, and confirmed by the district court January 18th, 1856; containing 1,695.04 acres.

565, 361, S. D. Ramona Butron et al., claimants for Natividad, 2 square leagues, in Monterey county, granted November 16th, 1837, by Juan B. Alvarado to M. Butron and N. Alviso; claim filed February 9th, 1853, confirmed by the commission July 10th, 1855, by the district court February 23d, 1857, and appeal dismissed March 4th, 1858; containing 8,642.21 acres.

566, 100, S. D., 133. Guadalupe Castro, claimant for San Andres, 2 square leagues, in Santa Cruz county, granted November 27th, 1833, by José Figueroa to Joaquin Castro; claim filed February 9th, 1853, confirmed by the commission February 7th, 1854, by the district court February 21st, 1857, and appeal dismissed March 4th, 1858; containing 8,911.53 acres.

567, 288, S. D., 457. W. S. Johnson et al., claimants for Pleyto, 3 square leagues, in Monterey county, granted July 18th, 1845, by Pio Pico to Antonio Chaves; claim filed February 9th, 1853, rejected by the commission March 6th, 1855, and confirmed by the district court February 7th, 1857.

568, 332, N. D., 514. Antonio Rodriguez, claimant for San Vicente, 2 square leagues, in Santa Cruz county, granted April 16th, 1839, by Juan B. Alvarado to A. Rodriguez; claim filed February 9th, 1853, rejected by the commission May 8th, 1855, appeal dismissed and cause stricken from the docket February 23d, 1857.

569, 278, N. D., 393, S. D. (sent to the Southern district March 9th, 1837). Vicente Gomez, claimant for Panoche Grande, 4 square leagues, in San Joaquin county, granted in 1844, by Manuel Micheltorena to V. Gomez; claim filed February 9th, 1853, rejected by the commission March 6th, 1855, confirmed by the Southern district court June 5th, 1859. In this case, motion was made to review the decree. Pending the motion, the case was taken up on appeal to the U. S. supreme court, where the cause was docketed and dismissed. In 23 Howard [64 U. S.] 326, the order of the supreme

court docketing and dismissing cause was vacated and the mandate recalled. Case reopened in district court March 21st, 1861, and is at issue.

570, 158, S. D., 13. Heirs of Gabriel Espinoza et al., claimants for Salinas, 1 square league, granted April 15th, 1836, by Nicolas Gutierrez to G. Espinoza; claim filed February 9th, 1853, rejected by the commission April 4th, 1854, and confirmed by the district court February 7th, 1857.

571, 306, S. D., 224. Henry Cocks, claimant for San Bernabé, 3 square leagues, in Monterey county, 1 square league granted March 10th, 1841, to Jesus Molina, and 2 square leagues granted January 8th, 1842, by Juan B. Alvarado to Petronillo Rios; claim filed February 9th, 1853, confirmed by the commission March 20th, 1855, and appeal dismissed June 8th, 1857; containing 13,296.98 acres.

572, 298, S. D. Henry Cocks, claimant for one-fourth square league, in Monterey county, granted July 30th, 1840, by Juan B. Alvarado to Esteben Espinoza; claim filed February 9th, 1853, confirmed by the commission March 20th, 1855, and appeal dismissed June 8th, 1857; containing 1,106.03 acres.

573, 159, S. D., 193. James Meadows, claimant for land in Monterey county, granted January 27th, 1840 by Juan B. Alvarado to Antonio Romero; claim filed February 10th, 1853, confirmed by the commission March 14th, 1854, by the district court December 30th, 1856, and appeal dismissed January 21st, 1858; containing 4,591.71 acres.

574, 342, S. D. Julian Workman et al., claimants for Mission of San Gabriel, in Los Angeles county, granted June 8th, 1846, by Pio Pico to J. Workman and P. Hugo Reid; claim filed February 11th, 1853, rejected by the commission June 26th, 1855, and appeal dismissed for failure of prosecution December 20th, 1856.

575, 176, S. D. John F. Jones et al., claimants for Rio de las Animas, 6 square leagues, in Los Angeles county, granted May 12th, 1846, by Pio Pico to Leonardo Cota and Julian Chaves; claim filed February 11th, 1853, rejected by the commission August 1st, 1854, and appeal dismissed for failure of prosecution October 24th, 1855.

576, 165, S. D., 546. Agustin Olvera, claimant for La Cienega, 20 square leagues, in Los Angeles county, granted April 21st, 1846, by Pio Pico to A. Olvera and Narciso Botello; claim filed February 11th, 1853, rejected by the commission August 1st, 1854, and by the district court January 26th, 1860.

577, 249, N. D. B. McCombs, claimant for part of Salvador's Rancho, 140 acres, in Napa county, granted January 1st, 1839, by Juan B. Alvarado to Salvador Vallejo; claim filed February 11th, 1853, confirmed by the commission December 26th, 1854, and by the district court February 23d, 1857.

578, 231, N. D. Joel P. Walker, claimant for part of Entre Napa, 60 acres, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed February 11th, 1853, confirmed by the commission December 26th, 1854, by the district court December 23d, 1857, and appeal dismissed December 23d, 1857.

579, 212, N. D. Johnson Horrel, claimant for part of Salvador's Rancho, 240 acres in Napa county, granted January 1st, 1839, by Juan B. Alvarado to Salvador Vallejo; claim filed February 11th, 1853, confirmed by the commission October 17th, 1854, by the district court March 2d, 1857, and appeal dismissed June 13th, 1857.

580, 171, N. D. Peter D. Bailey, claimant for part of Entre Napa, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas

Higuera; claim filed February 11th, 1853, confirmed by the commission September 5th, 1854, by the district court December 23d, 1855, and appeal dismissed December 23d, 1855.

581, 176, N. D. Joseph Mount et al., claimants for part of Entre Napa, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed February 11th, 1853, confirmed by the commission September 5th, 1854, and by the district court February 13th, 1857.

582, 241, N. D. John Love, claimant for part of Salvador's Rancho, 100 acres, in Napa county, granted January 1st, 1839, by Juan B. Alvarado to Salvador Vallejo; claim filed February 11th, 1853, confirmed by the commission December 26th, 1854, and by the district court February 23d, 1857.

583, 261, N. D. William Keely, claimant for part of Salvador's Rancho, 40 acres, in Napa county, granted January 1st, 1839, by Juan B. Alvarado to Salvador Vallejo; claim filed February 11th, 1853, confirmed by the commission January 9th, 1855, and by the district court February 23d, 1857.

584, 222, N. D., 510. Johnson Horrel et al., claimants for Rincon de Musulacon, 2 square leagues, in Mendocino and Sonoma counties, granted May 2d, 1846, by Pio Pico to Francisco Berreyesa; claim filed February 11th, 1853, confirmed by the commission December 12th, 1854, by the district court January 14th, 1856, and appeal dismissed April 2d, 1857; containing 8,866.88 acres.

585, 172, N. D. Joseph Green, claimant for part of Entre Napa, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed February 11th, 1853, confirmed by the commission September 19th, 1854, and by the district court February 13th, 1857.

586, 242, N. D. John Patchell, claimant for part of Entre Napa, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed February 11th, 1853, confirmed by the commission January 9th, 1855, and by the district court February 23d, 1857.

587, 244, N. D. Marta Frias de Higuera, claimant for part of Entre Napa, in Napa county, granted May 8th, 1836, by Mariano Chico to Nicolas Higuera; claim filed February 11th, 1853, confirmed by the commission January 9th, 1855, and by the district court June 10th, 1858.

588, 76, S. D., 455. Pedro Estrada, claimant for La Asuncion, in San Luis Obispo county, granted June 19th, 1845, by Pio Pico to P. Estrada; claim filed February 12th, 1853, confirmed by the commission January 24th, 1854, by the district court January 25th, 1856, and appeal dismissed February 24th, 1857; containing 39,224.81 acres.

589, 390, S. D. President and trustees of the city of San Diego, claimants for land granted, in 1769, to the Pueblo of San Diego; claim filed February 14th, 1853, confirmed by the commission January 27th, 1856, and appeal dismissed June 8th, 1857; containing 48,556.69 acres.

590, 276, N. D., 249. Joaquin Moraga, claimant for Laguna de los Palos Colorados, 3 square leagues, in Contra Costa county, granted August 10th, 1841, by Juan B. Alvarado to J. Moraga and Juan Bernal; claim filed February 15th, 1853, confirmed by the commission January 23d, 1855, by the district court March 24th, 1856, and appeal dismissed April 8th, 1856; containing 13,318.13 acres.

591, 285, S. D., 357. Nicolas Dodero, claimant for Tres Ojos de Agua, 1,300 varas square, in Santa Cruz county, granted March 18th, 1844, by Manuel Micheltorena to N. Dodero; claim filed February 15th, 1853, confirmed by the commission February 20th, 1855, by the district

court January 18th, 1856, and appeal dismissed February 24th, 1857; containing 176 acres.

592, 307, S. D., 105. Juan Hames et al., claimants for Arroyo del Rodeo, one by one-fourth square leagues, in Santa Cruz county, granted August 2d, 1834, by José Figueroa to Francisco Rodriguez; claim filed February 15th, 1853, confirmed by the commission March 27th, 1855, by the district court March 5th, 1856, and appeal dismissed February 24th, 1857; containing 1,473.07 acres.

593, 343, N. D. Martina Castro, claimant for Shoquel, 1 square league, in Santa Cruz county, granted May 17th, 1834, by José Figueroa, and surplus lands, known as Palo de la Yesca, described by boundaries, granted January 7th, 1844, by Manuel Micheltoarena, to M. Castro; claim filed February 16th, 1853, confirmed by the commission June 26th, 1855, and appeal dismissed March 20th, 1857; containing 32,702.41 acres. Patented.

594, 167, N. D., 179. Tiburcio Vasquez, claimant for Corral de Tierra, 1 square league, in San Mateo county, granted October 5th, 1839, by Manuel Jimeno to T. Vasquez; claim filed February 17th, 1853, confirmed by the commission August 15th, 1854, by the district court April 18th, 1859, and appeal dismissed June 29th, 1859; containing 4,436.18 acres.

595, 247, S. D., 69. José Abrego, claimant for San Francisquito, 2 square leagues, in Monterey county, granted November 9th, 1835, by José Castro to Catalina Manzanelli de Munnas; claim filed February 17th, 1853, confirmed by the commission October 17th, 1854, by the district court December 19th, 1856, and appeal dismissed January 21st, 1858; containing 8,813.50 acres.

596, 220, S. D., 296. Angel Castro et al., claimants for Los Paicines or Cienega de los Paicines, 2 square leagues, in Monterey county, granted October 5th, 1842, by Juan B. Alvarado to Angel Castro; claim filed February 17th, 1853, confirmed by the commission October 17th, 1854, by the district court January 28th, 1857, and appeal dismissed June 4th, 1857; containing 8,917.52 acres.

597, 323, S. D., 5. Gregorio Tapia, claimant for Aguajito, one-half square league, in Monterey county, granted August 13th, 1835, by José Figueroa to G. Tapia; claim filed February 17th, 1853, rejected by the commission May 8th, 1855, and confirmed by the district court February 8th, 1858.

598, 270, S. D. Maria Antonia Cruz, claimant for Cañada de los Piñacates, one-fourth square league, in Los Angeles county, granted November 20th, 1835, by José Castro to José Cruz and José Maria Cruz; claim filed February 17th, 1853, rejected by the commission January 23d, 1855, and appeal dismissed for failure of prosecution February 11th, 1856.

599, 202, S. D., 239. Maria Josefa Soberanes, claimant for Los Coches, $2\frac{1}{4}$ square leagues, in Monterey county, granted June 14th, 1841, by Juan B. Alvarado to M. J. Soberanes; claim filed February 18th, 1853, rejected by the commission September 26th, 1854, confirmed by the district court September 24th, 1855, and appeal dismissed February 24th, 1857; containing 8,794.09 acres.

600, 255, S. D. Manuel Castro, claimant for Laguna de Tache, 9 square leagues in Monterey county, granted January 10th, 1846, by Pio Pico to M. Castro; claim filed February 18th, 1853, rejected by the commission October 17th, 1854, and confirmed by the district court February 9th, 1858.

601, 267, S. D. Jeremiah Clark, claimant for part of Rancho Laguna de Tache, 2 square leagues, in Monterey county, granted January 10th, 1846, by Pio Pico to Manuel Castro; claim filed February 18th, 1853, rejected by the commission October 17th, 1854, confirmed by the dis-

trict court February 9th, 1858. On claimant's motion, case dismissed February 10th, 1858.

602, 399, N. D. Francisco Pico, claimant for Las Calaveras, 8 square leagues, granted July 20th, 1846, by Pio Pico to F. Pico; claim filed February 18th, 1853, rejected by the commission October 16th, 1855, confirmed by the district court January 9th, 1858, decree reversed by the U. S. supreme court and petition to be dismissed, 23 Howard [64 U. S.] 321.

603, 145, N. D. Elizabeth de Zaldo, claimant for 50 varas square, at the Mission Dolores, granted October 12th, 1842, by Francisco Sanchez to Carlos Moreno; claim filed February 18th, 1853, rejected by the commission August 9th, 1854, and confirmed by the district court March 24th, 1856.

604, 284, N. D. Stephen Smith, claimant for two 50-vara lots, in San Francisco, granted December 4th, 1845, by Pio Pico to S. Smith; claim filed February 19th, 1853, and rejected by the commission March 27th, 1855.

605, 312, N. D. John Rose et al., claimants for 6 square leagues, in Yuba county, granted in 1844, by Manuel Micheltoarena to John Smith; claim filed February 19th, 1853, confirmed by the commission May 22d, 1855, by the district court May 4th, 1857, and decree reversed by the U. S. supreme court with direction to dismiss the petition, 23 Howard [64 U. S.] 262.

606, 98, S. D., 164. Maria Antonia Pico de Castro et al., claimants for Bolsa Nueva y Moro Cojo, 8 square leagues, in Monterey county—Moro Coyo, 2 square leagues, granted February 14th, 1825, by Luis Arguello, and Bolsa Nueva, 1 square league, granted by Mariano Chico, May 14th, 1836; lands between the two above tracts, granted November 20th, 1837, by Juan B. Alvarado, to Simeon Castro; regrant of the whole property, being 8 square leagues, to the widow and representatives of S. Castro, September 26th, 1844, by Manuel Micheltoarena; claim filed February 19th, 1853, confirmed by the commission February 7th, 1854, by the district court January 8th, 1857, and appeal dismissed March 1st, 1858; containing 28,827.78 acres.

607, 350, S. D. Rufina Castro, claimant for one lot 100 by 200 and another 400 varas square, in Monterey county, granted May 19th, 1839, by José Castro to Mariano Castro; claim filed February 19th, 1853, and confirmed by the commission July 3d, 1855.

608, 280, S. D. Blas A. Escarilla, claimant for San Vicente, in Santa Cruz county, granted June 16th, 1846, by Pio Pico to B. A. Escarilla; claim filed February 19th, 1853, confirmed by the commission January 23d, 1855, by the district court February 7th, 1857, and appeal dismissed January 7th, 1858.

609, 425, N. D., and 388, S. D. Archbishop Joseph Sadoc Alemany, claimant for the following missions and land; claim filed February 19th, 1853, confirmed by the commission December 18th, 1855, appeal dismissed in Northern district March 16th, 1857, and in Southern district March 15th, 1858. [The dates of the foundation of the missions were furnished by the Reverend Father José Maria de Jesus Gonzalez, of the Mission of Santa Barbara.]

Mission San Diego, in San Diego county, founded under Carlos III., July 16th, 1769; containing 22.24 acres.

Mission San Luis Rey, in San Diego county, founded under Carlos IV., June 13th, 1798; containing 53.39 acres.

Mission San Juan Capistrano, in Los Angeles county, founded under Carlos III., November 10th, 1776; containing 44.40 acres.

Mission San Gabriel Arcangel, in Los Angeles county, founded under Carlos III., September 8th, 1771; containing 190.69 acres. Patented.

Mission San Buenaventura, in Santa Bar-

bara county, founded under Carlos III., March 31st, 1782; containing 36.27 acres.

Mission San Fernando, in Los Angeles county, founded under Carlos IV., September 8th, 1797; containing 76.94 acres.

Mission Santa Barbara, in Santa Barbara county, founded under Carlos III., December 4th, 1786; containing 37.83 acres.

Mission Santa Inez, in Santa Barbara county, founded under Carlos IV., September 17th, 1804; containing 17.35 acres.

Mission La Purisima Concepcion, in Santa Barbara county, founded under Carlos III., December 8th, 1787.

Mission San Luis Obispo, in San Luis Obispo county, founded under Carlos III., September 1st, 1772; containing 52.72 acres. Patented.

Mission San Miguel Arcangel, in San Luis Obispo county, founded under Carlos IV., July 25th, 1797; containing 33.97 acres. Patented.

Mission San Antonio de Padua, in San Luis Obispo county, founded under Carlos III., July 14th, 1771; containing 33.19 acres. Patented.

Mission La Soledad, in Monterey county, founded under Carlos IV., October 9th, 1791; containing 34.47 acres. Patented.

Mission El Carme or San Carlos de Monterey, in Monterey county, founded under Carlos III., June 3d, 1770; containing 9 acres. Patented.

Mission San Juan Bautista, in Monterey county, founded under Carlos IV., June 24th, 1797; containing 55.23 acres. Patented.

Mission Santa Cruz, in Santa Cruz county, founded under Carlos IV., August 28th, 1791; containing 16.94 acres. Patented.

Mission Santa Clara, in Santa Clara county, founded under Carlos III., January 18th, 1777; containing 13.13 acres. Patented.

Mission San José, in Alameda county, founded under Carlos IV., June 11th, 1797; containing 28.33 acres. Patented.

Mission Dolores or San Francisco de Assis, in San Francisco county, founded under Carlos III., October 9th, 1776; two lots, one containing 4.3 acres and the other 4.51 acres. Patented.

Mission San Rafael Arcangel, in Marin county, founded under Fernando VII., December 18th, 1817; containing 6.48 acres. Patented.

Mission San Francisco Solano, in Sonoma county, founded under Fernando VII., August 25th, 1813; containing 14.20 acres.

Cañada de los Pinos or College Rancho, 6 square leagues, in Santa Barbara county; containing 35,499.37 acres. Patented.

La Laguna, 1 square league, in San Luis Obispo county; containing 4,157.02 acres. Patented.

Two Gardens, in San Luis Obispo county.

610, 187, S. D., 356. Leander Ransom, claimant for Los Laureles, 2,000 varas square, in Monterey county, granted March 13th, 1844, by Manuel Micheltorena to José Agricia; claim filed February 21st, 1853, rejected by the commission August 29th, 1854, and confirmed by the district court June 2d, 1857.

611, 230, N. D. Jacob P. Leese, claimant for Lac, 1,000 varas square, in Sonoma county, granted July 25th, 1844, by Manuel Micheltorena to Damoso Rodriguez; claim filed February 21st, 1853, confirmed by the commission December 12th, 1854, and by the district court December 28th, 1857, and appeal dismissed December 28th, 1857.

612, 195, N. D. Andres Pico, claimant for 400 varas square, Mission Dolores, granted February 10th, 1846, by Pico to José Prudencio Santillan; claim filed February 21st, 1853, and rejected by the commission January 23d, 1855.

613. William Cary Jones et al., claimants for Potrero de San Francisco, one-half square league, in San Francisco county, granted May 1st, 1844, by Manuel Micheltorena to Ramon de Haro and Francisco de Haro; claim filed

February 23d, 1853, and discontinued November 27th, 1855.

614, 99, S. D., 51. John Wilson et al., claimants for Saucito, one by one-half league, in Monterey county, granted May 22d, 1833, by José Figueroa to Craciano Manjares; claim filed February 23d, 1853, confirmed by the commission February 7th, 1854, by the district court December 29th, 1856, and appeal dismissed January 21st, 1858; containing 2,211.65 acres.

615, 160, S. D. Maria Antonia Pico de Castro et al., claimants for Corral de Padilla, 2,000 varas square, granted March 7th, 1836, by Nicolas Gutierrez to Baldomero; claim filed February 23d, 1853, rejected by the commission March 14th, 1854, and appeal dismissed for failure of prosecution October 24th, 1855.

616, 364, N. D. Jonathan D. Stevenson et al., claimants for Medanos, 2 square leagues, in Contra Costa county, granted November 26th, 1839, by Juan B. Alvarado to José Antonio Mesa et al.; claim filed February 24th, 1853, confirmed by the commission June 19th, 1855, by the district court October 16th, 1856, and appeal dismissed April 2d, 1857; containing 8,890.26 acres.

617, 373, N. D. José de Jesus Bernal et al., claimants for Cañada de Pala, 8,000 by 1,200 varas, in Santa Clara county, granted August 9th, 1839, by José Castro to J. de Jesus Bernal; claim filed February 24th, 1853, confirmed by the commission June 26th, 1855, and appeal dismissed May 7th, 1857; containing 15,714.10 acres.

618, 166, S. D., 456. Jesus Machado, claimant for Buenavista, one-half square league, in San Diego county, granted July 8th, 1845, by Pio Pico to Felipe; claim filed February 24th, 1853, confirmed by the commission May 16th, 1854, by the district court February 1st, 1856, and appeal dismissed February 24th, 1857.

619, 355, N. D. José Noriega, claimant for 4 suertes, in Santa Clara county, granted December 5th, 1845, by Mariano Castro to J. Noriega; claim filed February 24th, 1853, rejected by the commission July 3d, 1855, and appeal dismissed for failure of prosecution February 23d, 1857.

620, 172, S. D., 79. Rafael Castro, claimant for Aptos, 1 square league, in Santa Cruz county, granted November 16th, 1833, by José Figueroa to R. Castro; claim filed February 24th, 1853, confirmed by the commission May 16th, 1854, by the district court October 11th, 1855, and appeal dismissed February 23d, 1857; containing 6,685.91 acres. Patented.

621, 338, S. D. Richard S. Den, claimant for Mission of Santa Barbara, in Santa Barbara county, granted June 10th, 1846, by Pio Pico to R. S. Den; claim filed February 24th, 1853, and confirmed by the commission June 12th, 1855.

622, 326, S. D. Petronillo Rios, claimant for Mission of San Miguel, in San Luis Obispo county, granted July 4th, 1846, by Pio Pico to William Reed, Petronillo Rios and Miguel Garcia; claim filed February 24th, 1853, rejected by the commission May 15th, 1855, and appeal dismissed for failure of prosecution December 17th, 1856.

623, 271, S. D., 277. Maria Antonio Ortega, claimant for Atascadero, in San Luis Obispo county, granted May 6th, 1842, by Juan B. Alvarado to Trifon Garcia; claim filed February 24th, 1853, rejected by the commission January 2d, 1855, and appeal dismissed for failure of prosecution February 11th, 1857.

624, 209, S. D., 201. Carlos C. Espinoza, claimant for Posa de los Ositos, 4 square leagues, in Monterey county, granted May 7th, 1839, by Juan B. Alvarado to C. C. Espinoza; claim filed

February 24th, 1853, rejected by the commission September 26th, 1854, confirmed by the district court September 26th, 1855, and appeal dismissed February 24th, 1857; containing 16,933.98 acres. Patented.

625, 224, S. D. Ysidro Maria Alvarado, claimant for Monserrate, 3 square leagues, in San Diego county, granted May 4th, 1846, by Pio Pico to Y. M. Alvarado; claim filed February 24th, 1853, rejected by the commission November 14th, 1854, and confirmed by the district court February 16th, 1857.

626, 194, N. D. William Bennitz, claimant for Briesgau, 5 square leagues, in Shasta county, granted July 26th, 1844, by Manuel Micheltorena to Wm. Bennitz; claim filed February 24th, 1853, rejected by the commission September 26th, 1854, confirmed by the district court April 7th, 1856, decree reversed and cause remanded by the U. S. supreme court with direction to dismiss the petition, 23 How. [64 U. S.] 255.

627, 271, N. D., 385. Manuel Rodriguez, claimant for Butano, 1 square league, in Santa Cruz county, informal grant February 19th, 1838, by Juan B. Alvarado, and ratified November 13th, 1844, by Manuel Micheltorena to Romana Sanchez; claim filed February 24th, 1853, confirmed by the commission February 8th, 1855, by the district court November 19th, 1856, and appeal dismissed June 12th, 1857; containing 3-025.65 acres.

628, 262, S. D., 369. Maria Antonia Castro de Anzar et al., claimants for Real de las Aguilas, 7 square leagues, in Monterey county, granted January 17th, 1844, by Manuel Micheltorena to Francisco Arias and Saturnino Cariaga; claim filed February 24th, 1853, rejected by the commission December 12th, 1854, and confirmed by the district court February 9th, 1857.

629, 387, N. D., 190. Ferdinand Vassault, claimant for Camaritos, 300 varas square, in San Francisco county, granted January 21st, 1840, by Juan B. Alvarado to José de Jesus Noé; claim filed February 24th, 1853, confirmed by the commission September 4th, 1855, by the district court March 9th, 1857, and by the U. S. supreme court.

630, 163, N. D. Quentin Ortega, claimant for San Ysidro, 1 square league, in Santa Clara county, granted June 4th, 1833, by José Figueroa to Q. Ortega; claim filed February 25th, 1853, confirmed by the commission August 15th, 1854, by the district court March 22d, 1858, and appeal dismissed March 23d, 1858; containing 4,437.67 acres.

631, 232, S. D., 381. Thomas Blanco's heirs, claimants for 400 by 600 varas, one suerte, in Monterey county, granted August 27th, 1844, by Manuel Micheltorena to Thomas Blanco; claim filed February 25th, 1853, confirmed by the commission December 26th, 1854, and appeal dismissed June 8th, 1857.

632, 245, N. D. James L. Ord, claimant for 2 square leagues, in Tuolumne county, granted in 1844, by Manuel Micheltorena to Solomon Pico; claim filed February 25th, 1853, and rejected by the commission January 23d, 1855.

633, 274, N. D. Sacramento City, claimant for land granted June 18th, 1841, by Juan B. Alvarado to John A. Sutter; claim filed February 25th, 1853, rejected by the commission March 6th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

634, 283, S. D., 108. John H. Watson and D. S. Gregory, claimants for Bolsa de Pajaro, in Santa Cruz county, granted October 1st, 1836, to A. Rodriguez and S. Rodriguez; claim filed February 25th, 1853, and rejected by the commission March 27th, 1855.

635, 291, S. D. José Manuel Borgas, claimant for El Pajaro, six suertes, in Monterey county, granted March 18th, 1843, by José R. Estrada to J. M. Borgas; claim filed February 25th, 1853, rejected by the commission March

27th, 1855, and appeal dismissed December 18th, 1856.

636, 304, S. D., 303. Maria Concepcion Boronda, claimant for Potrero de San Luis Obispo, 1 square league, in San Luis Obispo county, granted November 8th, 1842, by Juan B. Alvarado to M. C. Boronda; claim filed February 26th, 1853, confirmed by the commission February 6th, 1855, and appeal dismissed February 3d, 1858; containing 3,506.33 acres.

637, 257, N. D. Peter H. Burnett, claimant for lot in Sacramento City, granted June 18th, 1841, by Juan B. Alvarado to John A. Sutter; claim filed February 26th, 1853, rejected by the commission January 23d, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

638, 233, N. D. Ellen White et al., widow and heirs of Charles White, claimants for Pala, 1 square league, in Santa Clara county, granted November 5th, 1835, by José Castro to José Higuera; claim filed February 26th, 1853, confirmed by the commission December 19th, 1854, by the district court February 23d, 1857, and appeal dismissed February 9th, 1858; containing 4,454-08 acres.

639, 243, N. D. City of Sonora, claimant for 1 square mile; claim filed February 26th, 1853, rejected by the commission January 23d, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

640. Rufus Rowe et al., claimants for part of Las Pulgas, 1½ square leagues, in San Mateo county, granted in 1820, by Pablo V. de Sola and José Castro to Luis Argello; claim filed February 28th, 1853, and discontinued by claimant March 13th, 1855. (See No. 2.)

641, 265, N. D. Antonio Maria Osio, claimant for land in Santa Clara county, near the Mission, granted June 23d, 1846, by José Castro to A. M. Osio; claim filed February 28th, 1853, rejected by the commission February 6th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

642, 206, N. D. Maria Concepcion Valencia de Rodriguez et al., claimants for San Francisco, 8 suertes of 200 varas square each, in Santa Clara county, granted May 1st, 1839, by Juan B. Alvarado to Antonio Buelna; claim filed February 28th, 1853, confirmed by the commission November 28th, 1854, by the district court February 4th, 1856, and appeal dismissed April 2d, 1857; containing 2,250.98 acres.

643, 124, N. D., 255. Julio Carrillo, claimant for part of Cabeza de Santa Rosa, in Sonoma county, granted September 30th, 1841, by Manuel Jimeno to Maria Ygnacia Lopez; claim filed February 28th, 1853, confirmed by the commission April 4th, 1854, by the district court March 2d, 1857, and appeal dismissed March 27th, 1857; containing 4,500.42 acres.

644, 128, N. D., 255. Jacob R. Mayer et al., claimants for part of Cabeza de Santa Rosa, in Sonoma county, granted September 30th, 1841, by Manuel Jimeno to Maria Ygnacia Lopez; claim filed February 28th, 1853, confirmed by the commission April 4th, 1854, by the district court March 2d, 1857, and appeal dismissed March 27th, 1857; containing 1,484.82 acres.

645, 126, N. D., 255. James Eldridge, claimant for part of Cabeza de Santa Rosa, in Sonoma county, granted September 30th, 1841, by Manuel Jimeno to Maria Ygnacia Lopez; claim filed February 28th, 1853, confirmed by the commission April 4th, 1854, by the district court March 2d, 1857, and appeal dismissed March 27th, 1857; containing 1,667.68 acres.

646, 127, N. D., 255. Felicidad Carrillo, claimant for part of Cabeza de Santa Rosa, in Sonoma county, granted September 30th, 1841, by Manuel Jimeno to Maria Ygnacia Lopez; claim filed February 28th, 1853, confirmed by the commission April 4th, 1854, and by the district court March 2d, 1857.

647, 125, N. D., 255. Juana de Jesus Malag, claimant for part of Cabeza de Santa Rosa, in Sonoma county, granted September 30th, 1841, by Manuel Jimeno to Maria Ygnacia Lopez; claim filed February 28th, 1853, confirmed by the commission April 4th, 1854, by the district court March 2d, 1857, and appeal dismissed March 27th, 1857; containing 256.16 acres.

648, 314, N. D. Maria Teodora Peralta, claimant for Buacocho, 2½ square leagues, in Marin county, granted February 18th, 1846, by Pio Pico to M. T. Peralta; claim filed February 28th, 1853, and rejected by the commission April 3d, 1855.

649, 149, N. D., 200. Otto H. Frank et al., claimants for part of Napa, 6,156 acres, in Napa county, granted by Juan B. Alvarado to Salvador Vallejo; claim filed February 28th, 1853, confirmed by the commission August 22d, 1854, by the district court June 12th, 1858, and appeal dismissed June 12th, 1858.

650, 198, S. D., 4. Joaquin Soto, claimant for Cañada de la Carpenteria, one-half square league, in Monterey county, granted September 25th, 1845, by José Castro to J. Soto; claim filed February 28th, 1853, confirmed by the commission August 15th, 1854, by the district court October 12th, 1855, and appeal dismissed February 24th, 1857; containing 2,236.13 acres.

651, 384, N. D., 359. James Williams, Maria Louisa Carson and John S. Williams, widow and son of John S. Williams, the heirs and legal representatives of Edward A. Farwell, and the heirs of John Potter, claimants for Rancho de Farwell, called Arroyo Chico in Jimeno's Index, 5 square leagues, in Butte county, granted March 29th, 1844, by Manuel Micheltorena to Edward A. Farwell; claim filed February 28th, 1853, confirmed to claimants, except the heirs of J. Potter, by the commission August 28th, 1855, by the district court nunc pro tunc June 15th, 1858, and appeal dismissed March 21st, 1857; containing 22,193.93 acres.

652, 305, N. D. Benjamin S. Lippincott, claimant for 11 square leagues, in San Joaquin county, granted April 4th, 1846, by Pio Pico to José Castro; claim filed February 28th, 1853, rejected by the commission May 8th, 1855, and appeal dismissed for failure of prosecution April 28th, 1856.

653. Frederick E. Whiting, claimant for Las Animas, in Santa Clara county, granted in 1802, by José Figueroa to Mariano Castro; claim filed February 28th, 1853.

654, 304, N. D. Inocencio Romero et al., claimants for land in Contra Costa county, granted February 4th, 1844, by Manuel Micheltorena to I. Romero et al.; claim filed February 28th, 1853, rejected by the commission April 17th, 1855, and by the district court September 16th, 1857.

655, 272, N. D. George Swat, claimant for Nueva Flandria, 3 square leagues, granted in 1844, by Manuel Micheltorena to G. Swat; claim filed February 28th, 1853, rejected by the commission March 27th, 1855, and by the district court October 5th, 1857.

656, 415, N. D. John A. Sutter, for Moquelumne Indians, claimant for 4 square leagues, in Sacramento county, granted December 22d, 1844, by Manuel Micheltorena to Moquelumne Indians; claim filed February 28th, 1853, and confirmed by the commission November 20th, 1855.

657, 375, N. D., 305. Martin E. Cook et al., claimants for part of Malacomes or Moristal, 2 miles square, in Sonoma county, granted October 1843, by Manuel Micheltorena to José de los Santos Berreyesa; claim filed February 28th, 1853, confirmed by the commission August 7th, 1855, and appeal dismissed April 16th, 1857; containing 2,559.94 acres. Patented.

658, 286, N. D. Nathaniel Bassett, claimant for Los Coluses, 4 square leagues, in Colusa county, granted in 1844, by Manuel Micheltorena to Juan Daubenbiss; claim filed February 28th, 1853, confirmed by the commission March 20th, 1855, by the district court April 17th, 1856, decree reversed by the U. S. supreme court and cause remanded with direction to dismiss the petition, 21 Howard [62 U. S.] 412.

659, 235, N. D., 255. John Hendley, claimant for part of Cabeza de Santa Rosa, 1 mile square, in Sonoma county, granted September 30th, 1841, by Manuel Jimeno to Maria Ygnacia Lopez; claim filed February 28th, 1853, confirmed by the commission December 19th, 1854, by the district court March 2d, 1857, and appeal dismissed March 27th, 1857; containing 640.19 acres.

660, 396, N. D., 266. J. H. Fine, claimant for part of Suisun, in Solano county, granted January 28th, 1842, by Juan B. Alvarado to Francisco Solano; claim filed February 28th, 1853, confirmed by the commission December 4th, 1855, and appeal dismissed August 20th, 1857.

661, 252, N. D. E. R. Carpentier, claimant for 10 square leagues, in Contra Costa county, a portion granted by P. V. de Sola, another portion granted in 1841 to Juan José and Victor Castro by Juan B. Alvarado, and another portion granted by José Figueroa to Francisco Castro, and regranted in 1844 by Manuel Micheltorena to Luis Peralta; claim filed February 28th, 1853, rejected by the commission January 30th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

662. H. W. Carpentier, claimant for 225 acres, in Contra Costa county, granted by P. V. de Sola and Manuel Micheltorena to Luis Peralta; claim filed February 28th, 1853, and discontinued by claimant January 23d, 1855.

663, 422, N. D., and 387, S. D. Joseph Sadoc Alemany, claimant, in behalf of the Christianized Indians formerly connected with the missions of Upper California: 1st. In behalf of the Indians of Santa Clara, under a grant by Manuel Micheltorena, June 10th, 1844, for all the vacant lands of Santa Clara ungranted before that time. 2d. In behalf of the Indians for lands known as Las Gallinas, El Nacimiento and La Estrella, in San Luis Obispo county, under a grant of Manuel Micheltorena, July 16th, 1844. 3d. In behalf of sixteen neophytes, for small tracts of land, from 100 to 300 acres each, in the vicinity of the Mission of Santa Ynes, Santa Barbara county. 4th. And in behalf of the Indians generally, one square league in each of the 21 missions (see No. 609). Claim filed February 28th, 1853, rejected by the commission December 31st, 1855, appeal dismissed for failure of prosecution in the Northern district February 23d, 1857, and in the Southern district December 22d, 1857.

664, 259, N. D., 349. L. Hoover, administrator, claimant for 5 square leagues, called Rio de las Plumas in Jimeno's Index, in Butte county, granted February 21st, 1844, by Manuel Micheltorena to Charles W. Flugge; claim filed March 1st, 1853, rejected by the commission January 23d, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

665, 322, S. D., 81. Heirs of David Littlejohn, claimants for Los Carneros, 1 square league, in Monterey county, granted June 28th, 1834, by José Figueroa to David Littlejohn; claim filed March 1st, 1853, confirmed by the commission May 22d, 1855, and appeal dismissed February 1st, 1858; containing 4,482.38 acres.

666, 236, N. D., 322. A. Randall, claimant for Punta de los Reyes, 11 square leagues, in

Marin county, granted November 30th, 1843, by Manuel Micheltorena to Antonio M. Osio; claim filed March 1st, 1853, confirmed by the commission January 9th, 1855, by the district court December 28th, 1858, and appeal dismissed May 24th, 1858; containing 43,189.34 acres. Patented.

667, 283, N. D., 343. José M. Revere, claimant for San Geronimo, 2 square leagues, in Marin county, granted February 12th, 1844, by Manuel Micheltorena to Rafael Cacho; claim filed March 1st, 1853, confirmed by the commission February 13th, 1855, by the district court June 26th, 1858, and appeal dismissed June 26th, 1858; containing 8,701 acres. Patented.

668, 279, S. D. Bruno Bernal, claimant for El Alisal, $1\frac{1}{2}$ square leagues, in Monterey county, granted June 26th, 1834, by José Figueroa to Feliciano Soberanes et al.; claim filed March 1st, 1853, confirmed by the commission January 23d, 1855, by the district court January 13th, 1857, and appeal dismissed March 4th, 1858; containing 5,941.12 acres.

669, 335, N. D., 566. Francisco Arce, claimant for 50 by 60 varas, in Santa Clara county, granted June 3d, 1846, by Pio Pico to F. Arce; claim filed March 1st, 1853, confirmed by the commission June 12th, 1855, and by the district court March 9th, 1857.

670, 151, N. D. Presentación de Ridley et al., claimants for Cañada de Guadalupe, 2 square leagues, granted July 31st, 1841, by Juan B. Alvarado to Jacob P. Leese; claim filed March 1st, 1853, rejected by the commission August 1st, 1854, and by the district court December 28th, 1857.

671, 165, N. D. C. S. de Bernal et al., claimants for 200 varas square, Mission Dolores, granted in 1834, by José Figueroa to José C. Bernal; claim filed March 1st, 1853, confirmed by the commission August 8th, 1854, by the district court March 24th, 1856, and appeal dismissed April 1st, 1857; containing 6.32 acres.

672, 178, N. D. José de la Cruz Sanchez, claimant for San Mateo, 2 square leagues, in San Mateo county, petitioned for by J. de la Cruz Sanchez in December, 1836, and April, 1844; claim filed March 1st, 1853, and rejected by the commission September 19th, 1854.

673, 206, S. D. Francisco Soberanes, claimant for Sanjon de Santa Rita, 11 square leagues, in Merced and Fresno counties, granted September 7th, 1841, by Juan B. Alvarado to F. Soberanes; claim filed March 1st, 1853, rejected by the commission September 19th, 1854, confirmed by the district court February 9th, 1858, and appeal dismissed November 1st, 1860; containing 48,823.84 acres.

674, 277, S. D. Rafael Sanchez, claimant for San Lorenzo, 11 square leagues, in Monterey county, granted July 27th, 1846, by Pio Pico to R. Sanchez; claim filed March 1st, 1853, rejected by the commission January 13th, 1855, confirmed by the district court March 6th, 1856, and appeal dismissed February 24th, 1857; containing 43,235.95 acres.

675, 225, S. D. Nicolas Morchon, claimant for Cahuenga, 4 square leagues, in Los Angeles county, granted July 29th, 1846, by José Castro to Luis Arenas; claim filed March 1st, 1853, rejected by the commission October 24th, 1854, and by the district court September 13th, 1859.

676. John B. Frisbie, claimant for Matzultaquea, 4 square leagues, in Los Angeles county, granted in 1845, by Pio Pico to Ramon Carrillo; claim filed March 1st, 1853, and discontinued.

677, 215, N. D., 45. Joaquin Higuera, claimant for Pala, 1 square league, in Santa Clara county, granted November 5th, 1835, by José Castro to José Higuera; claim filed March 1st, 1853, rejected by the commission December 26th,

1854, and appeal dismissed for failure of prosecution April 21st, 1856.

678, 282, S. D., 113. Miguel Villagran, claimant for Aguajito, 500 varas square, in Santa Cruz county, granted November 20th, 1837, by Juan B. Alvarado to M. Villagran; claim filed March 1st, 1853, and confirmed by the commission February 20th, 1855.

679, 300, S. D. Vicente Gomez et al., claimants for El Tucho, 1,500 varas square, in Monterey county, granted December 4th, 1843, by José R. Estrada to José Joaquin Gomez; claim filed March 1st, 1853, and rejected by the commission March 27th, 1855.

680, 384, S. D., 297. Maria Antonia Castro de Anzar et al., claimants for Los Carneros, 1 square league, in Monterey county, granted October 7th, 1842, by Juan B. Alvarado to Maria Antonia Linares; claim filed March 1st, 1853, confirmed by the commission August 28th, 1855, by the district court December 9th, 1856, and appeal dismissed March 4th, 1858; containing 1,628.70 acres.

681, 330, S. D., 159. Ermenegildo Vasquez, claimant for 500 by 400 varas, in Monterey county, granted November 6th, 1835, by José Castro to E. Vasquez; claim filed March 1st, 1853, rejected by the commission March 27th, 1855, and appeal dismissed for failure of prosecution December 28th, 1856.

682. C. S. de Bernal, claimant for 200 varas square, in San Francisco county, granted in 1833, by José Figueroa to José C. Bernal; claim filed March 1st, 1853, and discontinued January 23d, 1855. (See No. 671.)

683, 417, N. D. Hiram Grimes, claimant for part of New Helvetia, in Yuba and Sutter counties, granted June 18th, 1841, by Juan B. Alvarado to John A. Sutter; claim filed March 1st, 1853, rejected by the commission January 15th, 1856, and confirmed by the district court March 6th, 1857.

684, 404, N. D. Juan B. Alvarado, claimant for Nicasio, 20 square leagues, in Marin county, granted March 13th, 1835, by José Figueroa to Teodocio Quilajuequi et al., Indians; claim filed March 1st, 1853, rejected by the commission September 25th, 1855, and appeal dismissed for failure of prosecution February 4th, 1858.

685, 290, N. D. Henry C. Smith, claimant for one-fourth league, in Santa Clara county, granted November 2d, 1844, by Miguel Muro (priest) to Buenaventura et al., (neophytes); claim filed March 1st, 1853, rejected by the commission March 27th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

686, 277, N. D. William C. Jones et al., claimants for San Pablo, 3 square leagues, in Contra Costa county, granted June 12th, 1834, by José Figueroa to Francisco Maria Castro; claim filed March 1st, 1853, rejected by the commission March 27th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

687, 196, N. D. José de Arnas, claimant for 5 square leagues of Santa Clara mission lands, granted August 1st, 1846, by José Castro to J. de Arnas; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and by the district court February 11th, 1856.

688, 324, S. D. Juan Temple and David W. Alexander, claimants for 100 varas square, in Los Angeles county, granted March 11th, 1834, by José Figueroa to José A. Carrillo and Abel Stearns; claim filed March 2d, 1853, rejected by the commission May 22d, 1855, and confirmed by the district court April 3d, 1861.

689, 278, S. D. Maria Antonio Pico et al., claimants for Bolsa de San Cayetano, in Monterey county, granted by Don Pablo de Sola, and October 18th, 1824, by Luis Arguello, to José Dolores Pico and Ignacia Vallejo; claim filed

March 2d, 1853, rejected by the commission January 30th, 1853, and appeal dismissed for failure of prosecution March 7th, 1860.

690, 405, N. D., 26. Rufina Castro et al., claimants for Solis, in Santa Clara county, granted by José Figueroa to Mariano Castro; claim filed March 2d, 1853, rejected by the commission December 4th, 1855, confirmed by the district court May 1st, 1856, and appeal dismissed March 24th, 1857; containing 8,875.46 acres. Patented.

691, 291, N. D., 185. James Enright et al., claimants for Medano, (see No. 616) 2 square leagues, in Contra Costa county, granted November 26th, 1839, by Juan B. Alvarado to José Antonio and José Maria Meza; claim filed March 2d, 1853, rejected by the commission March 27th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

692, 337, N. D. Guillermo Castro, claimant for land in Alameda county, granted January 14th, 1840, by Juan B. Alvarado to G. Castro; claim filed March 2d, 1853, rejected by the commission May 15th, 1855, and appeal dismissed for failure of prosecution March 9th, 1857.

693, 344, N. D. José Castro et al., claimants for 11 square leagues, on the San Joaquin river, (see Nos. 320 and 652) granted April 4th, 1846, by Pio Pico to José Castro; claim filed March 2d, 1853, confirmed by the commission May 8th, 1855, by the district court November 4th, 1858, and judgment of the circuit court reversed by the U. S. supreme court with direction to dismiss the petition, 24 Howard [65 U. S.] 346.

694, 141, N. D., 200. Ann McDonald et al., claimants for part of Napa, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 25th, 1854, by the district court February 18th, 1857, and appeal dismissed April 1st, 1857.

695. Thomas Shaddon, claimant for 5 square leagues, in Yolo county, granted December 22d, 1844, by Manuel Michelorena to T. Shaddon; claim filed March 2d, 1853. Discontinued.

696, 264, N. D. William Blackburn, claimant for Arastradero, 1 square league, in Santa Cruz county, granted November 17th, 1844, by Manuel Rodriguez to Alberto F. Morris; claim filed March 2d, 1853, rejected by the commission January 23d, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

697, 345, S. D. Julian Workman et al., claimants for Mission of San Gabriel, in Los Angeles county, granted June 8th, 1846, by Pio Pico to J. Workman and Hugo Reid; claim filed March 2d, 1853, confirmed by the commission June 26th, 1855, and by the district court April 1st, 1861.

698, 301, S. D. R. S. Den, claimant for San Antonio, 4,000 yards square, in Los Angeles county, granted April 29th, 1842, by Juan B. Alvarado to Nicholas A. Den; claim filed March 2d, 1853, rejected by the commission March 27th, 1855, and appeal dismissed for failure of prosecution December 19th, 1856.

699, 400, N. D. Narciso Bennett, claimant for 140 varas square, one solar, in Santa Clara county, granted November 28th, 1845, by Pio Pico to N. Bennett; claim filed March 2d, 1853, rejected by the commission October 23d, 1855, and appeal dismissed for failure of prosecution February 23d, 1857.

700, 317, S. D., 235. Pio Pico et al., claimants for Santa Margarita and Las Flores, in San Diego county, granted May 10th, 1841, by Juan B. Alvarado to Pio Pico and Andres Pico; claim filed March 2d, 1853, and confirmed by the commission April 24th, 1855.

701, 192, N. D. Pedro Chaboya, claimant for 2 square leagues, in Santa Clara county,

granted to P. Chaboya; claim filed March 2d, 1853, rejected by the commission October 24th, 1854, and by the district court for failure of prosecution August 29th, 1861.

702, 237, S. D. José and Jaime de Puig Monmany, claimants for Noche Buena, a little less than 1 square league, in Monterey county, granted September 15th, 1835, by José Castro to Juan Antonio Muñoz; claim filed March 2d, 1853, confirmed by the commission October 24th, 1854, by the district court February 14th, 1857, and appeal dismissed January 27th, 1858; containing 4,411.56 acres.

703, 191, N. D.; 179 S. D. Modesta Castro, claimant for Cañada de los Osos, 11 square leagues, in Monterey county, granted October 20th, 1844, by Manuel Michelorena to M. Castro; claim filed March 2d, 1853, rejected by the commission August 29th, 1854, and appeal dismissed for failure of prosecution October 24th, 1855.

704, 173, N. D. Heirs of Francisco de Haro, claimants for 100 varas square, in Mission Dolores, granted June 28th, 1841, by Francisco Guerrero, justice of the peace, to Francisco de Haro; claim filed March 2d, 1853, rejected by the commission September 19th, 1854, and confirmed by the district court February 1st, 1858.

705, 166, N. D. Heirs of Francisco de Haro, claimants for 50 varas square, in Mission Dolores, granted August 16th, 1843, under a marginal decree by Juan B. Alvarado to Francisco de Haro; claim filed March 2d, 1853, rejected by the commission August 29th, 1854, confirmed by the district court August 24th, 1857, and by the U. S. supreme court, 22 Howard [63 U. S.] 293.

706, 383, N. D. William A. Dana et al., claimants for part of San Antonio, 6,102 acres, in Santa Clara county, granted March 24th, 1839, by Juan B. Alvarado to Juan Prado Mesa; claim filed March 2d, 1853, rejected by the commission July 10th, 1855, confirmed by the district court March 3d, 1856, and appeal dismissed March 20th, 1857; containing 3,541.89 acres. Patented.

707, 366, N. D. William A. Dana et al., claimants for part of San Antonio, 2,551 acres, in Santa Clara county, granted March 24th, 1839, by Juan B. Alvarado to Juan Prado Mesa; claim filed March 2d, 1853, rejected by the commission July 10th, 1855, and by the district court March 23d, 1857.

708, 368, N. D. James W. Weeks, claimant for part of San Antonio, 3,051 acres, in Santa Clara county, granted March 24th, 1839, by Juan B. Alvarado to Juan Prado Mesa; claim filed March 2d, 1853, rejected by the commission July 10th, 1855, and appeal dismissed for failure of prosecution February 23d, 1857.

709, 354, N. D. Henry C. Curtis, claimant for part of San Antonio, 500 acres, in Santa Clara county, granted March 24th, 1839, by Juan B. Alvarado to Juan Prado Mesa; claim filed March 2d, 1853, rejected by the commission July 10th, 1855, and by the district court March 16th, 1857.

710, 378, N. D. William W. White, claimant for part of San Antonio, 100 acres, in Santa Clara county, granted March 24th, 1839, by Juan B. Alvarado to Juan Prado Mesa; claim filed March 2d, 1853, rejected by the commission July 10th, 1855, and appeal dismissed for failure of prosecution February 23d, 1857.

711, 193, N. D. Victor Prudon, claimant for Island of Sacramento, 3½ by 1 league, in the Sacramento river, granted July 6th, 1844, by Manuel Michelorena to Victor Prudon; claim filed March 2d, 1853, rejected by the commission October 24th, 1854, and by the district court February 7th, 1858.

712, 357, N. D. Roland Gelston, claimant for 200 by 50 varas, in San Francisco county, granted December 1st, 1838, to William Gulnae; claim filed March 2d, 1853, and rejected by the commission September 4th, 1855.

713, 294, N. D., 102. Juan Alvarez et al., claimants for Laguna Seca, 4 square leagues, in Santa Clara county, granted July 22d, 1834, by José Figueroa to Juan Alvarez; claim filed March 2d, 1853, rejected by the commission March 20th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

714, 382, S. D. City of Monterey, claimant for lands previously assigned to the pueblo, dedication approved by the territorial deputation July 24th, 1830; claim filed March 2d, 1853, confirmed by the commission January 22d, 1856, and appeal dismissed February 1st, 1858.

715, 315, N. D. José Y. Limantour, claimant for 80 square leagues, 10 leagues on the Pacific Ocean, between latitude 39° 18' and 39° 48' north, running back eight leagues in Mendocino county, south of Cape Mendocino, granted December 20th, 1844, by Manuel Micheltoarena to J. Y. Limantour; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and appeal dismissed April 28th, 1856.

716, 274, S. D., 351. Thomas Coal, claimant for 250 by 150 varas and 100 varas more, part of Tucho, in Monterey county, granted December 8th, 1842, by Juan B. Alvarado, and 400 varas square, in Monterey county, granted February 28th, 1844, by Manuel Micheltoarena, to T. Coal; claim filed March 2d, 1853, rejected by the commission January 23d, 1855, and confirmed by the district court June 6th, 1857.

717, 225, N. D., 200. Salvador Vallejo, claimant for part of Napa or Francas and Jalapa, 3,020 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission November 7th, 1854, by the district court February 23d, 1857, and appeal dismissed May 13th, 1857; containing 3,178.93 acres.

718, 361, N. D., 485. Mary S. Bennett, claimant for two tracts, one 140 varas square and the other 2,000 by 1,000 varas, in Santa Clara county, near the Mission, granted December, 1845, by Pio Pico to Narciso Bennett; claim filed March 2d, 1853, confirmed by the commission July 10th, 1855, by the district court February 28th, 1857, and appeal dismissed April 14th, 1857; containing 358.51 acres.

719, 154, N. D., 256. Joseph Pope et al., claimants of Locoallomi, 2 square leagues, in Napa county, granted September 30th, 1841, by Manuel Jimeno to Julian Pope; claim filed March 2d, 1853, confirmed by the commission August 1st, 1854, by the district court August 25th, 1856, and appeal dismissed February 9th, 1858; containing 8,872.79 acres.

720, 122, N. D., 200. Horace Inghram, claimant for part of Napa, 74 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 2d, 1857.

721, 146, N. D., 200. James M. Harbin, claimant for part of Napa, 688 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission May 16th, 1854, and by the district court December 23d, 1857.

722, 111, N. D. 200. Hannah McCoombs, claimant for part of Napa, 160 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 2d, 1857.

723, 123, N. D., 200. Hart and McGarry, claimants for part of Napa, 500 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, by the district court March 2d, 1857.

724, 109, N. D., 200. N. Coombs, claimant for part of Napa, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court April 4th, 1861.

725, 116, N. D., 200. A. Farley, claimant for part of Napa, 44 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 2d, 1867.

726, 120, N. D., 200. George N. Cornwell, claimant for part of Napa, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 2d, 1857.

727, 118, N. D., 200. John Truebody, claimant for part of Napa, 796 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 2d, 1857.

728, 113, N. D., 153. R. S. Kilburn, claimant for part of Entre Napa, granted April 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 30th, 1861.

729, 117, N. D., 200. A. L. Boggs, claimant for part of Napa, 320 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 2d, 1857.

730, 110, N. D., 200. J. R. McCoombs, claimant for part of Napa, 487 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court April 18th, 1859.

731, 393, N. D., 200. Ogden Wise, claimant for part of Napa, 625.85 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission December 4th, 1855, and appeal dismissed August 6th, 1857.

732, 71, N. D., 200. Julius K. Rose, claimant for part of Napa, 526 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission December 13th, 1853, by the district court October 6th, 1858, and appeal dismissed October 8th, 1858; containing 594.83 acres.

733, 79, N. D., 200. William H. Osborn, claimant for part of Napa, 250 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission December 13th, 1853, by the district court October 6th, 1858, and appeal dismissed October 8th, 1858; containing 259.61 acres.

734, 66, N. D., 200. Lyman Bartlett, claimant for part of Napa, 1 square mile, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission

December 13th, 1853, by the district court April 21st, 1856, and appeal dismissed April 2d, 1857; containing 679.52 acres.

735, 313, N. D., 200. Eben Knight, claimant for part of Napa, one-half mile square, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, and rejected by the commission March 27th, 1855.

736, 76, N. D., 200. James McNeil, claimant for part of Napa, 450 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, and confirmed by the commission December 13th, 1853.

737, 139, N. D., 200. Archibald A. Ritchie, claimant for part of Napa, 150 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 25th, 1854, and by the district court March 2d, 1857.

738, 164, S. D. City of San Luis Obispo, claimant for 4 square leagues, claim filed March 2d, 1853, rejected by the commission August 1st, 1854, and appeal dismissed for failure of prosecution October 24th, 1855.

739, 327, N. D., 229. Joseph Hooker, claimant for part of Agua Caliente, in Sonoma county, granted July 13th, 1840, by Juan B. Alvarado to Lazaro Piña; claim filed March 2d, 1853, confirmed by the commission April 24th, 1855, by the district court March 2d, 1857, and appeal dismissed March 27th, 1857; containing 550.86 acres.

740, 372, N. D., 208. Benjamin R. Bucklew, claimant for Punta de Quentin, 2 square leagues, in Marin county, granted September 24th, 1840, by Juan B. Alvarado to Juan B. R. Cooper; claim filed March 2d, 1853, confirmed by the commission July 10th, 1855, and by the district court March 30th, 1857.

741, 153, N. D. Mariano G. Vallejo, claimant for Agua Caliente, in Sonoma county, granted July 13th, 1840, by Juan B. Alvarado to Lazaro Piña; claim filed March 2d, 1853, rejected by the commission August 1st, 1854, and confirmed by the district court July 13th, 1859.

742, 412, N. D. J. W. Redman et al., claimants for Orchard of Santa Clara, 10 acres, granted June 30th, 1846, by Pio Pico to Benito Dias, Juan Castañeda and Luis Arenas; claim filed March 2d, 1853, rejected by the commission December 18th, 1855, and by the district court May 21st, 1858.

743. John A. Sutter, claimant for surplus lands of New Helvetia, 22 square leagues, in Yuba and Sutter counties, granted February 5th, 1845, by Manuel Micheltorena to John A. Sutter; claim filed March 2d, 1853. Discontinued.

744, 142, N. D. Guadalupe Mining Company, claimant for part of Cañada de los Capitancillos, described by boundaries, in Santa Clara county, granted September 1st, 1842, by Juan B. Alvarado to Justo Larios; claim filed March 2d, 1853, confirmed by the commission May 2d, 1854, and by the district court August 17th, 1857. (See No. 340.)

745, 285, N. D., 245. Henry R. Payson, claimant for Cañada de Guadalupe and Visitation y Rodeo Viejo, 2 square leagues, in San Mateo county, granted July 31st, 1841, by Juan B. Alvarado to Jacob P. Leese; claim filed March 2d, 1853, confirmed by the commission January 30th, 1855, by the district court June 18th, 1856, and appeal dismissed April 1st, 1857; containing 9,594.90 acres.

746, 293, N. D. Mowry W. Smith, claimant for part of Las Pulgas, 7,000 acres, in San Mateo county, granted in 1835, by P. V. de

Sola and José Castro to Luis Arguello; claim filed March 2d, 1853, rejected by the commission February 20th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

747, 383, S. D. Thomas Russell, claimant for 800 varas square, in Santa Cruz county, granted in 1838, by José R. Estrada, Prefect, to José R. Buelna, and Potrero and Rincon de San Pedro, 500 varas from east to west and 600 varas from north to south, granted in 1842 by José Jimeno to José Arana; claim filed March 2d, 1853, grant of 800 varas rejected and grant by Jimeno confirmed by the commission January 30th, 1855, and by the district court June 18th, 1859.

748. Martin Murphy, Sr., claimant for part of Las Animas, one-eighth of 12 square leagues, in Santa Clara county, granted August 17th, 1802, by Marquina, and August 7th, 1835, by José Figueroa, to Mariano Castro; claim filed March 2d, 1853, and discontinued April 3d, 1855. (See No. 161.)

749, 295, S. D. Talbot H. Green, claimant for land under a grant of the ayuntamiento of the town of Monterey of April 23d, 1846; claim filed March 2d, 1853, rejected by the commission March 27th, 1855, and appeal dismissed December 18th, 1856.

750. William Carey Jones et al., claimants for part of Las Pulgas, in San Mateo county, granted in 1835, by P. V. de Sola to Luis Arguello; claim filed March 2d, 1853, and discontinued August 1st, 1854. (See No. 2.)

751, 414, N. D. Clement Panaud et al., claimants for Garden of San Cayetano, 1,000 by 200 varas, in Santa Clara county, granted August 1845, by Pio Pico to Juan B. Alvarado; claim filed March 2d, 1853, rejected by the commission February 8th, 1855, and by the district court October 2d, 1860.

752, 385, S. D. Clement Panaud et al., claimants for Orchard of San Juan Bautista, 400 varas square, in Monterey county, granted May 4th, 1846, by Pio Pico to Oliver Deleisiguez; claim filed March 2d, 1853, and confirmed by the commission December 18th, 1855.

753, 379, S. D. Adolph Canil et al., claimants for Arias Rancho, 1 square league, in Monterey county, granted December 10th, 1839, by José Castro to Francisco Arias; claim filed March 2d, 1853, rejected by the commission February 27th, 1855, and by the district court June 17th, 1859.

754, 402, N. D. Thomas O. Larkin, claimant for Mission Santa Clara Orchard, 15 acres, in Santa Clara county, granted June 30th, 1846, by Pio Pico to Juan Castañeda, Luis Arenas and Benito Dias; claim filed March 2d, 1853, rejected by the commission December 18th, 1855, and by the district court May 21st, 1858.

755. James Stokes, claimant for La Natividad, 850 acres, in Monterey county, granted by Juan B. Alvarado to Nicolas Alviso and Manuel Butron; claim filed March 2d, 1853. Discontinued.

756. Charles Brown et al., claimants for 4 square leagues, in Napa county, granted in 1834, by Hajar, styled Governor, to C. Brown et al.; claim filed March 2d, 1853. Discontinued.

757, 388, N. D. Nicolas Berreyesa, claimant for Las Milpitas, in Santa Clara county, under a decree signed by Pedro Chaboya, first alcalde of the Ayuntamiento of San José of May 6th, 1834, to N. Berreyesa; claim filed March 2d, 1853, and rejected by the commission October 16th, 1855.

758, 377, S. D. James Stokes, claimant for 3 suertes, in Monterey county, granted January 2d, 1843, by José R. Estrada, prefect of the First district, to José C. Boronda; claim filed March 2d, 1853, rejected by the commission Oc-

tober 2d, 1855, and appeal dismissed for failure of prosecution December 22d, 1856.

759, 369, N. D. John A. Sutter, claimant for town of Sutter, in Sacramento county; claim filed March 2d, 1853, rejected by the commission July 17th, 1855, and appeal dismissed for failure of prosecution February 23d, 1857.

760, 333, N. D. Thaddeus M. Leavenworth, claimant for part of Agua Caliente, in Sonoma county, granted July 13th, 1840, by Juan B. Alvarado to Lazaro Piña; claim filed March 2d, 1853, confirmed by the commission April 24th, 1855, by the district court March 2d, 1857, and appeal dismissed April 3d, 1857; containing 320.33 acres.

761, 260, N. D. Robert Hopkins claimant for part of Entre Napa, 80 acres, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed March 2d, 1853, rejected by the commission January 30th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

762, 258, N. D. 255. Oliver Boulio, claimant for part of Cabeza de Santa Rosa, 640 acres, in Sonoma county, granted September 30th, 1841, by Manuel Jimeno to Maria Ignacia Lopez; claim filed March 2d, 1853, rejected by the commission January 30th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

763, 169, N. D. 200. John E. Brown, claimant for part of Napa, 110 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission September 5th, 1854, by the district court March 2d, 1857, and appeal dismissed March 21st, 1857.

764. Charles B. Strode, claimant for part of San Antonio, 5,000 acres, in Alameda county, granted by P. V. de Sola and Luis Antonio Arguello to Luis Peralta; claim filed March 2d, 1853. Discontinued.

765. Charles B. Strode, claimant for part of San Antonio, 10,000 acres in Alameda county, granted by P. V. de Sola and Luis Antonio Arguello to Luis Peralta; claim filed March 2d, 1853. Discontinued.

766, 248, N. D., 39. Victoria D. Estudillo et al., claimants for Tecmeca, .6 square leagues, in San Diego county, granted February 11th, 1835, by José Figueroa to José Antonio Estudillo; claim filed March 2d, 1853, rejected by the commission January 30th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

767, 413, N. D. Francisco Rico et al., claimants for Rancharia del Rio Estanislao, 11 square leagues, in San Joaquin and Calaveras counties, granted December 29th, 1843, by Manuel Micheltorena to Francisco Rico and José Antonio Castro; claim filed March 2d, 1853, confirmed by the commission October 16th, 1855, by the district court November 10th, 1856, and appeal dismissed April 1st, 1857; containing 48,886.64 acres.

768, 279, N. D. José Jesus Berreyesa, claimant for Yucuy, 8 square leagues, near Clear Lake, granted May 29th, 1846, by José de los Santos Berreyesa to J. J. Berreyesa; claim filed March 2d, 1853, rejected by the commission March 27th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

769, 293, S. D. 118. Charles Morse et al., claimants for La Laguna de las Calabasas, one and one-fourth by one-half league, in Santa Cruz county, granted December 30th, 1833, by José Figueroa to Felipe Hernandez; claim filed March 2d, 1853, rejected by the commission March 27th, 1855, and confirmed by the district court June 17th, 1855.

770. Martin Murphy, claimant for 300 acres, granted by Manuel Micheltorena to Shelton;

claim filed March 2d, 1853, and rejected by the commission March 27th, 1855. Discontinued.

771, 309, N. D. 90. Robert Cathcart, administrator, claimant for Sayente, 2 by 1 league, in Santa Cruz county, granted October, 1833, by José Figueroa to Joaquin Buelna; claim filed March 2d, 1853, rejected by the commission April 17th, 1855, and appeal dismissed for failure of prosecution April 28th, 1856.

772, 385, N. D. A. Randall, claimant for 2 square leagues, in Marin county, granted March 17th, 1836, by Juan B. Alvarado to James Richard Berry; claim filed March 2d, 1853, confirmed by the commission September 11th, 1855, by the district court December 23th, 1857, and appeal dismissed May 24th, 1858; containing 8,887.68 acres. Patented.

773, 114, N. D., 200. L. D. Brown et al., claimants for part of Napa, 640 acres, in Napa county, granted September 21st, 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 2d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 2d, 1857.

774, 263, N. D. Paula Sanchez de Valencia, claimant for Buri Buri, two-tenths of 4 square leagues, in San Mateo county, granted provisionally by Luis Antonio Arguello December 11th, 1827, and by José Castro September 23d, 1835, to José Sanchez; claim filed March 2d, 1853, rejected by the commission January 30th, 1855, (confirmed in No. 97) and appeal dismissed for failure of prosecution April 21st, 1856.

775, 325, N. D. C. P. Stone, claimant for part of Agua Caliente, 300 acres, in Sonoma county, granted July 13th, 1840, by Juan B. Alvarado to Lazaro Piña; claim filed March 2d, 1853, confirmed by the commission April 24th, 1855, by the district court March 2d, 1857, and appeal dismissed March 31st, 1857.

776, 306, N. D. Francis J. White, claimant for 300 acres, in Sacramento county, granted by Juan B. Alvarado to John A. Sutter; claim filed March 2d, 1853, rejected by the commission April 17th, 1855, and appeal dismissed for failure of prosecution April 28th, 1856.

777, 254, N. D. Widow and heirs of Anastasio Chabolla, claimants for 3 suertes, in San José, Santa Clara county, granted in 1785 by authority of the king of Spain to Mazario Laez; claim filed March 2d, 1853, rejected by the commission January 30th, 1855, and claim dismissed by the district court for failure of prosecution January 8th, 1858.

778, 220. Barcella Bernal, claimant for Embarcadero de Santa Clara, 1,000 varas square, in Santa Clara county, granted June 18th, 1845, by Pio Pico to B. Bernal; claim filed March 2d, 1853. Discontinued.

779, 198, N. D. Barcella Bernal, claimant for 1 square league, in Santa Clara county, granted in 1845 or 1846 by the governor of California to B. Bernal et al.; claim filed March 2d, 1853, and rejected by the commission March 6th, 1855.

780, 317, N. D. José Y. Limantour, claimant for Lupyomi, 11 square leagues, granted October 20th, 1844, by Manuel Micheltorena to José Y. Limantour; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and by the district court March 11th, 1857.

781, 311, S. D. José Y. Limantour, claimant for Laguna de Tacha, 11 square leagues, granted December 4th, 1843, by Manuel Micheltorena to José Y. Limantour; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and appeal dismissed for failure of prosecution December 17th, 1856.

782, 314, S. D. José Y. Limantour, claimant for Cienega del Gabilan, 11 square leagues, in Monterey county, granted October 26th, 1843, by Manuel Micheltorena to Antonio Chavis; claim

filed March 2d, 1853, rejected by the commission April 24th, 1855, and confirmed by the district court February 4th, 1858.

783, 321, S. D. José Y. Limantour, claimant for Cajuela, 6 square leagues, in Los Angeles county, granted February 7th, 1845, by Manuel Micheltoarena to José Y. Limantour; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and appeal dismissed for failure of prosecution December 17th, 1856.

784, 307, N. D. José Y. Limantour, claimant for Ojo de Agua, 400 varas square, near the mission of San Francisco Solano, granted December 20th, 1844, by Manuel Micheltoarena to José Y. Limantour; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and by the district court March 11th, 1857.

785, 319, S. D. José María Castañares, claimant for Arroyo de los Calsoncillos, 11 square leagues, in Santa Clara county, granted December 28th, 1843, by Manuel Micheltoarena to J. M. Castañares; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and appeal dismissed for failure of prosecution February 12th, 1857.

786, 310, N. D. Victor Prudon, claimant for Bodega, in Sonoma county, granted July 15th, 1841, by M. G. Vallejo to V. Prudon; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and by the district court March 17th, 1857.

787, W. W. Warner, claimant for part of Nueva Flandria, 3 leagues square, granted in 1845 on an order of Manuel Micheltoarena by J. A. Sutter to Juan de Swat; claim filed March 2d, 1853, and rejected by the commission March 27th, 1855.

788, 340, N. D. Justo Larios et al., claimants for Campo de los Franceses, granted in 1844, by Manuel Micheltoarena to Guillermo Gulnack; claim filed March 2d, 1853, and rejected by the commission April 24th, 1855.

789, 339, N. D. Agustin Juan, claimant for Campo de los Franceses, granted in 1844, by Manuel Micheltoarena to Guillermo Gulnack; claim filed March 2d, 1853, rejected by the commission April 24th, 1855, and dismissed by claimant March 20th, 1857.

790, 296, S. D. Widow and children of Simeon Castro, claimants for Tucho, 800 varas square, in Monterey county, granted June 12th, 1841, by Juan B. Alvarado to Simeon Castro; claim filed March 3d, 1853, confirmed by the commission March 20th, 1855, and appeal dismissed February 1st, 1858.

791, 112, N. D., 200, H. G. Langley, claimant for part of Napa, in Napa county, granted September 21st 1838, by Juan B. Alvarado to Salvador Vallejo; claim filed March 3d, 1853, confirmed by the commission April 11th, 1854, and by the district court with consent of the U. S. district attorney March 2d, 1857.

792, 266, N. D. Cyrus Alexander, claimant for part of Sotoyomi, 2 square leagues, granted September 23th, 1841, by Juan B. Alvarado to Henry D. Fitch; claim filed March 3d, 1853, rejected by the commission February 8th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856. (See No. 16.)

793, 303, N. D. Sacramento City, claimant for land; claim filed March 3d, 1853, rejected by the commission April 17th, 1855, and appeal dismissed April 21st, 1856.

794, 247, N. D. Salvador Vallejo, claimant for part of Lupyomi, 2 square leagues, granted September 5th, 1844, by Manuel Micheltoarena to S. Vallejo and Juan Antonio Vallejo; claim filed March 3d, 1853, rejected by the commission January 30th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856. (See No. 507.)

795, 356, N. D. Peter Scherreback, claimant for 800 varas square, in San Francisco county, granted December 5th, 1845, by Mariano Castro to P. Scherreback; claim filed March 3d, 1853, rejected by the commission November 6th, 1855, confirmed by the district court December 5th, 1859, and decree vacated June 2d, 1860.

796, 308, S. D. Eulogio de Celis, claimant for 100 varas square, in San Diego county, granted in 1835 by the ayuntamiento of the town of San Diego to Juan Maria Osuna; claim filed March 3d, 1853, rejected by the commission February 8th, 1855, and appeal dismissed for failure of prosecution December 19th, 1856.

797, 336, N. D. William M. Fuller, claimant for part of Soula Julie, one and one-sixteenth square miles, in Marin county, granted March 29th, 1844, by Manuel Micheltoarena to José Ramon Mesa; claim filed March 3d, 1853, rejected by the commission April 17th, 1855, and appeal dismissed for failure of prosecution February 23d, 1857.

798, 316, N. D. Harriet Besse, claimant for part of Lassen's Rancho, in Tehama county, granted December 26th, 1844, by Manuel Micheltoarena to Peter Lassen; claim filed March 3d, 1853, rejected by the commission April 17th, 1855, and appeal dismissed for failure of prosecution April 28th, 1856.

799, 160, N. D. Charles E. Hart, claimant for part of Los Carneros, in Solano county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed March 3d, 1853, confirmed by the commission August 1st, 1854, and by the district court March 2d, 1857.

800, 256, N. D. James H. Watmough, claimant for part of Petaluma grant, one square mile, in Sonoma county, granted October 22d, 1843, by Manuel Micheltoarena to M. G. Vallejo; claim filed March 3d, 1853, rejected by the commission January 30th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

801, 296, N. D. Reuben M. Hill, claimant for part of Los Carneros, 500 yards square, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed March 3d, 1853, rejected by the commission February 27th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

802, 282, N. D. Sarah Ann Madie, claimant for part of Los Carneros, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed March 3d, 1853, rejected by the commission February 27th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

803, 365, N. D. Edward Wilson, claimant for part of Los Carneros, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed March 3d, 1853, confirmed by the commission June 12th, 1855, and appeal dismissed March 20th, 1857.

804, 267, N. D. John Conn, claimant for Locoollome, 2 square leagues, in Napa county, granted in 1845, by José de los Santos Berreyesa, first alcalde of the district of Sonoma, to John Rainsford; claim filed March 2d, 1853, rejected by the commission February 8th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

805, 334, S. D. José Antonio Aguirre, claimant for one-half of Island Santa Cruz, in Santa Barbara county, granted May 22d, 1839, by Juan B. Alvarado to Andres Castellero, under an alleged sale from Castellero, (see No. 176); claim filed March 3d, 1853, rejected by the commission June 5th, 1855, and dismissed by claimant March 4th, 1858.

806, 187, N. D. José Santos Berreyesa, claimant for 200 by 300 varas, in Sonoma county, granted May 30th, 1846, by Joaquin Carrillo to J. S. Berreyesa; claim filed March 3d, 1853, re-

jected by the commission October 17th, 1854, and appeal dismissed for failure of prosecution April 21st, 1856.

807, 197, N. D. Milton Little, claimant for 5 square leagues, in Monterey county, granted in 1844 or 1845, by Manuel Micheltorena to Josefa Martinez; claim filed March 3d, 1853, rejected by the commission April 17th, 1855, and by the district court June 1st, 1858. Rejected again on rehearing, July 6th, 1858.

808, 180, S. D. John Foster et al., claimants for mission of San Juan Capistrano, in Los Angeles county, granted December 6th, 1845, by Pio Pico to J. Foster and J. McKinley; claim filed March 3d, 1853, rejected by the commission August 1st, 1854, and appeal dismissed by claimant February 8th, 1858.

809, 158, N. D. R. S. Kilburn, claimant for 1,500 acres, granted to Manuel Baca; claim filed March 3d, 1853, rejected by the commission August 1st, 1854, and appeal dismissed for failure of prosecution April 21st, 1856.

810, 108, N. D. N. Coombs, claimant for part of Entre Napa, in Napa county, granted May 9th, 1836, by Mariano Chico to Nicolas Higuera; claim filed March 3d, 1853, confirmed by the commission April 11th, 1854, and by the district court March 30th, 1861.

811, 251, N. D. W. H. Davis et al., claimants for 200 varas square, in San Francisco county, granted in 1835, by José Castro to José Joaquin Estudillo; claim filed March 3d, 1853, rejected by the commission February 6th, 1855, and appeal dismissed for failure of prosecution April 21st, 1856.

812. James A. Shorb et al., claimants for Arroyo de San Antonio, 3 square leagues, granted October 8th, 1844, by Manuel Micheltorena to Juan Miranda; claim filed March 3d, 1853, and discontinued February 6th, 1855.

813, 428, N. D. Juan M. Luco, claimant for Ulpinos, granted December 4th, 1845, by Pio Pico to José de la Rosa; claim filed September 13th, 1854, by virtue of an act of congress of April 17th, 1854, the two years within which claims might be presented having elapsed, rejected by the commission September 25th, 1855, by the district court June 26th, 1858, and judgment affirmed by the U. S. supreme court, 23 Howard [64 U. S.] 615.

By the law of congress of March 3d, 1851, the commission was to act during three years from

the passage of the law, and the claims not presented within two years from the date of the act, were to be considered part of the public domain.

By the law of January 18th, 1854, the time within which the commission was to act, was extended one year more from the third of March, 1854, and by the law of the tenth of January, 1855, the time was again extended one year more from the third of March, 1855. Commission adjourned, March 1st, 1856.

JIMENO INDEX.

As to the importance of the registry of a grant in the Jimeno Index, the United States court in the case of the United States v. West's Heirs, in 22 Howard [63 U. S.] 315, say:

"We do not regard the catalogue of grants as authoritative proof of grants enumerated in it, or as a conclusive exclusion of grants not so registered by Jimeno, which may be alleged to have been made whilst California was a part of the Mexican republic, though they may bear date within the time to which that index relates, but in this case it may be referred to as an auxiliary memorandum made by Jimeno himself of his action upon the petition of West."

No grant presented to the commission seems to correspond to the following numbers:

In the Jimeno Index—Nos. 12, 22, 28, 42, 44, 47, 48, 52, 53, 56, 57, 63, 65, 68, 73, 76, 78, 89, 93, 96, 97, 98, 99, 101, 104, 106, 107, 112, 115, 116, 117, 119, 120, 123, 132, 134, 137, 138, 146, 158, 161, 165, 170, 173, 178, 183, 183, 199, 206, 213, 219, 232, 242, 258, 263, 269, 287, 323, 368, 373, 374, 378, 379, 383, 386, 388, 392, 399, 401, 427, 428 and 429.

Grants refused—Nos. 2, 3, 8, 32, 33, 38, 40, 41, 43, 59, 62, 66, 67, 74, 83, 84, 85, 86, 103.

In the Hartnell Index—Nos. 435, 440, 445, 447, 448, 450, 460, 466, 469, 471, 477, 480, 486, 487, 505, 509, 515, 516, 517, 518, 526, 533, 535, 538, 539, 540, 543, 561, 567, 568, 573, 574 and 576.

Grants appearing to be in Lower California—Nos. 482, 489, 490, 492, 497, 498, 500, 502; 555, 556, 557, 564.

The above grants, in Upper California, are supposed not to have been presented to the commission, but by a more diligent search some of the above numbers might be found to correspond to the grants presented.

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GOVERNORS OF CALIFORNIA.

[Reprinted from 1 Hoff. Land Cás. 453.]

GASPAR DE PORTALÁ, FROM 1767 TO 1771.

It was under Portalá that the Reverend Father Junipero Serra founded the first missions of Upper California.

Father José Miguel Serra was born on the twenty-fourth of November, 1713, on the island of Majorca. At sixteen he entered the Convent of Jesus, in Palma, the capital of the island. On the fifteenth of September, 1731, he was admitted to holy orders under the name of Father Junipero. On the thirteenth of April, 1749, he sailed from the island with his bosom friend and biographer, Father Francisco Palou, for Mexico. They left Cadiz on the twenty-eighth of August, reached Vera Cruz on the sixth of December, and traveling on foot, Father Junipero arrived at Mexico on the first of January, 1750. From thence he was sent on the Sierra Gorda, among the Pima Indians, where he remained nine years; from thence he traveled over Mexico, preaching the gospel, until the middle of 1767.

The decree of Carlos III, expelling the Jesuits from his dominions, was put in force on the twenty-fifth of June, 1767. As to Lower California, the Viceroy, Marquis de Croix, placed its execution in the hands of the Catalonian captain of dragoons, Gaspar de Portalá, appointing him at the same time governor of the Peninsula, and placing under his command fifty well armed men to expel the Jesuits from the missions by force, if necessary.

Portalá embarked in Matchantel with his forces, and fourteen Franciscan monks to succeed the Jesuits. Being prevented by a storm from reaching Loreto, in Lower California, as ordered by the Viceroy, he landed at San Bernabé towards the latter part of 1767. From San Bernabé, Portalá went to Loreto with twenty-five soldiers and the captain of the Peninsula. In his conversation with the captain, he discovered that no force would be required to expel the sixteen Jesuits. When he reached Loreto, he sent for Father Bonito Ducrue, missionary of Guadalupe and superior of the missions. He communicated his decree to Father Ducrue and two other Jesuits. He found that the captain was right, as the Jesuits respectfully submitted to the order, and left California on the third of February, 1768, on the Concepcion, bound for San Blas.

After the expulsion of the Jesuits, the viceroy, with the concurrence of the inspector general of the kingdom, Don José de Galvez, decided to place the missions of Lower California under the care of the college of San Fernando, in Mexico. For that purpose they required twelve priests of the college, and Father Junipero was appointed president of these missionaries. On the fourteenth of July, 1767, they left Mexico for San Blas. On the twenty-first of August they reached Tepic, where four other priests were taken. Whilst they were awaiting there the construction of the vessels which were to carry them, the Concepcion arrived at San Blas with the Jesuits, and they sailed on that vessel

on the twelfth of March, 1768. They arrived at Loreto on the first of April; the next day each one went to the mission assigned him, Father Junipero taking care of the mission of Loreto.

Galvez having been invested with powers to visit the missions of Lower California, and having a royal order to send an expedition by sea to settle the port of Monterey, in Upper California, or at least that of San Diego, he sailed from San Blas on the twenty-fourth of May, 1768, and reached the Peninsula on the sixth of June.

In order to better carry out the intentions of his majesty, Galvez made up his mind that, besides the expedition by sea, he would send another by land. He communicated this idea to Father Junipero, who agreed with him. They decided that three vessels should sail to meet the expedition by land at San Diego; that three missionaries should leave on the first two, and another on the vessel to start subsequently. They agreed that three missions should be founded: one at San Diego, another at Monterey, and a third at San Buenaventura, midway between the two first.

On the ninth of January, 1769, the San Carlos left La Paz with the members of the expedition, among whom was Pedro Fajes, who became governor of Upper California, in 1782, and had under his command twenty-five Catalonian volunteers. The San Antonio left San Lucas on the eleventh, and the Señor San José left Loreto on the sixteenth of June of the same year.

Galvez divided the expedition by land in two parts. Portalá was appointed commander-in-chief of the expedition, and Captain Fernando Rivera y Moncada, his second in command, was to take charge of the first division.

The first division arrived at San Diego on the fourteenth of May, 1769, after fifty-two days travel from Loreto. The second division, under the charge of Portalá, with whom was Father Junipero, arrived on the first of July, after forty-six days travel. They found in port the San Antonio, which had arrived on the eleventh of April, and the San Carlos, which reached San Diego twenty days after. The Señor San José not having been heard from, it was presumed that it was wrecked.

On account of the loss of life among the crews of the vessels, it was agreed that the expedition by sea should join the one by land, and the San Antonio was ordered to San Blas for additional crew and more supplies for the two vessels. The San Carlos remained at anchor to await the arrival of the San Antonio, when both were to sail for Monterey.

On the sixteenth of July, 1769, Father Junipero founded the Mission of San Diego, at the port of that name, which in 1603 had been discovered by Admiral Sebastian Vizcaino, who in the same year discovered the port of Monterey.

Portalá, Fajes Moncada, and seventy-three others left San Diego by land on the fourteenth of July, 1769, to seek out the port of Monterey; they, however, returned on the twenty-fourth of

January, 1770, after having gone as far north as San Francisco without finding the above named port.

The San Antonio left San Blas direct for Monterey. Fortunately, the loss of her anchor in the neighborhood of Santa Barbara compelled her to put back for San Diego to get an anchor from the San Carlos. This vessel being loaded with supplies and having an additional crew, it was resolved that a new expedition, by land and sea, should start for Monterey. Father Junipero sailed on the San Antonio on the sixteenth of April, 1770, and Portalá started by land the next day. The San Antonio reached Monterey on the thirty-first of May, 1770. The expedition by land had already arrived there on the twenty-fourth. On the third of June, the ceremony of taking possession of the port was performed, and on that day the Mission of San Carlos was founded. The dates of the foundation of the other missions are to be found at No. 609 in the annexed table of land claims presented to the land commission.

Whilst gathering the foregoing facts from the life of Father Junipero by Father Francisco Palou, where they are related with such pious simplicity, we involuntarily feel a desire to pay a just tribute to those holy men whose sole object was to Christianize the Indians of the Californias. It was neither gold nor honors which drew them to encounter the dangers and hardships we find described in those interesting pages, and which breathe the true fervor of the servants of the Lord; but they were true apostles, devoting their evangelical lives in teaching the simple doctrines of their faith, and the trades and occupations of civilized communities.

Father Palou tells us that on the fifteenth of August, 1769, at San Diego, one month after the founding of the mission, Father Junipero and his party were attacked by a large number of Indians, and they were driven away only after the loss of a boy. A few days after the attack, the Indians appearing to be more friendly, Father Junipero attempted to baptize a child for the first time. Whilst completing the ceremony by pouring water on the child out of a shell, the Indians snatched away the child, leaving the confused father with the shell in his hands. It required all his prudence to prevent the soldiers from avenging the insult. The grief experienced by the father was so great that he could not get over it for several days, and he attributed his ill success to his own sins. Many years after, whilst stating this circumstance, his eyes would be filled with tears, but as he could then count 1046 christianized Indians in that mission, he would exclaim: "But let us thank God, that without the least opposition, we have accomplished so much."

On the fourth of November, 1775, the Indians again attacked that mission, reduced it to ashes, cruelly massacred Father Luis Jaime, and killed several other persons. In August, 1781, the Yumas set fire to the two missions on the Colorado river, killed four priests, eight soldiers and Captain Fernando Rivera y Moncada.

These were some of the dangers encountered by these devout men; but nothing can better show the meekness and humility of Father Junipero than the following anecdote told us by Father Palou. After landing, in December, 1749, in Vera Cruz, he traveled on foot to Mexico; the journey caused his feet to swell considerably. One night, in his sleep, he scratched one of them to such an extent, that when he awoke he had made such a severe wound that he never got over it through life. Immediately preceding Galvez's arrival, and to meet him, he had walked nine hundred miles, and as in all his travels he never wore either socks, boots or

shoes but simply sandals; one evening when he arrived at San Juan de Dios, in Lower California, on his way to San Diego, his wound became such that he could not go any further. Portalá, seeing his condition, ordered his men to prepare a litter to carry him. Father Junipero was so deeply affected at the idea of giving so much trouble to the men, that placing his faith in God, he called to him Juan Antonio Coronel, the arriero. "My son," said he, "could you not prepare something to relieve my foot and leg?" "Why, father," answered Coronel, "what can I know; am I a doctor? I am only an arriero, and all that I have cured are the wounds of beasts." "Well, my son," said the holy man, "only consider that I am a beast, and that this wound is nothing but a beast's wound, which has caused the swelling of the leg and those pains which even keep me from sleeping, and prepare me the same thing you would apply to a beast." The arriero smiling, with all the assistants, said, "I will do it, father, to please you." He took some tallow and gathered a few herbs; he crushed and mixed them well with two stones, and after stewing the mixture he applied it. With the help of God, as Father Junipero writes to Father Palou when he arrived at San Diego, he slept all that night till morning. He was so relieved that he said his morning prayers as customary, and celebrated mass as if nothing had happened, and the expedition kept on without losing an instant.

In July, 1784, Father Palou, who was then in San Francisco, having received a letter from Father Junipero requesting his presence in Monterey, he reached that place on the eighteenth of August, and found Father Junipero afflicted with the disease which was to terminate his Christian career. On the twenty-eighth, a little before ten in the evening, Father Junipero, in his room, was still able to walk to the boards covered with a blanket, on which he rested; and after reclining on them with the holy cross near by, so softly did his soul depart that his faithful companion thought it was nothing but a quiet slumber. Father Junipero was in his seventy-first year when he died. In the fifteen years of his life in Upper California, five Spanish and nine christianized Indian settlements had been made, and 5,800 Indians had been baptized.

The following particulars are drawn from the Spanish archives of the state of California: On the twelfth of November, 1770, the Viceroy Marquis de Croix writes to Pedro Fajes, commander of the presidio at Monterey, directing him to make a settlement at the port of San Francisco.

FELIPE BARRI, FROM 1771 TO 1774.

The first mention we find of Barri as governor is in a letter he addresses in that capacity from Loreto to Pedro Fajes, commander of the presidio of Monterey, dated the second of June, 1771. On the seventh of September, 1773, Pedro Fajes was succeeded in the command of the presidio of San Diego and Monterey by Fernando Rivera y Moncada, under an order of the Viceroy Bucarely.

FELIPE DE NEVE, FROM 1774 TO 1782.

On the twenty-eighth of December, 1774, Governor Barri is succeeded by F. de Neve. On the twentieth of July, 1776, Governor Neve is ordered by the Viceroy to remove from Loreto to the presidio of Monterey; he arrived there on the third of February, 1777. Moncada is then transferred as lieutenant of Neve at Loreto, or at whatever place the presidial might be located.

NOTES

CONCERNING

THE UNITED STATES CIRCUIT AND DISTRICT COURT REPORTS.

ABBOTT'S ADMIRALTY REPORTS.

[Abb. Adm.]

Reports of cases in admiralty in the district court, S. D. N. Y., before Judge Betts, from 1847 to 1850. By Abbott Bros., counselors at law. Boston: Little, Brown & Co., 1857.

Vol. 1 (so entitled, though no other volume was ever published) contains the following preface:

The present volume contains a full selection of the decisions in admiralty causes rendered in the United States district court for the Southern district of New York, by the Hon. Samuel R. Betts, from the early part of the year 1847 down to the close of 1850. It may be regarded as a continuation of the series of Admiralty Reports commenced by Blatchford & Howland, and continued by Olcott. The present editors have spared no pains in the effort to perform the duty which has devolved upon them; and they have enjoyed every facility which could be desired, both from the eminent judge whose decisions are reported, and from those gentlemen in whose immediate charge are the books and papers of the district court. In the hope that it may be of service, not only to their professional brethren practicing in this district, but also to those who may labor in other fields of professional life, the volume is now submitted to the bar.

ABBOTT'S UNITED STATES REPORTS.

[Abb. U. S.]

Reports of decisions rendered in the circuit and district courts from 1865 to 1871. Selected from all the circuits and districts by Benjamin Vaughan Abbott. Two volumes. New York: Diossy & Co. Vol. 1, 1870; vol. 2, 1871.

The following preface is from vol. 1:

To present the adjudications of the United States circuit and district courts, in a comprehensive and satisfactory manner, is the general purpose of this series. The progress of our national jurisprudence is embodied in the laws passed by congress, the decisions of the supreme court, and those decisions of circuit or district courts which are not reviewed on writ or error or appeal; in addition to which should be mentioned the determinations of the court of claims, as covering one important, though limited, department. Systematic and satisfactory arrangements now exist (relying partly upon government aid) for the prompt publication

of the acts of congress, and for regular reports of the adjudications of the supreme court and of the court of claims. If the system of reporting the important decisions of the circuit and district courts can be made comprehensive and reliable, there will then be in operation a complete scheme, presenting the progress of the entire jurisprudence developed under the operation of the national government. To some extent the decisions of the circuit and district courts are now reported. There is, for the first circuit, a special series of circuit court reports, almost unbroken; and for the second, another, nearly, though not quite, as continuous. In some other circuits there are valuable reports covering limited periods. But there remain some circuits which are almost wholly unreported, and, as respects the district courts, there has not been anything like a systematic method of selecting and reporting what is valuable in their decisions. So far as it is practicable for reports within a particular circuit to be maintained, the cases which they may include ought not to be duplicated in these volumes; but the endeavor of this series will be to collect from the circuit and district courts at large, wherever local reports are not supported, those decisions which have general value and importance, and to report them in the best and most satisfactory manner, to the end that the current volumes of the Supreme Court Reports and of this series may give, from time to time, a good view of the course of decision in the national courts. The selection of cases to be reported in these volumes, must be chiefly controlled by the consideration of their value and utility to the practicing lawyer. There is a tendency towards the unnecessary multiplication of reports, to which, it is hoped, this enterprise will not be found to yield. The volumes will be devoted to decisions of general application and value, exhibiting the advance and progress of the national jurisprudence, the construction and application of the United States laws, the procedure of the United States tribunals, and similar subjects; and, as far as practicable, cases of only local application, decisions which only resolve controverted questions of fact peculiar to the particular controversy, or repeat and apply familiar principles of law, together with decisions which there is reason to anticipate will be carried before the supreme court for review, or will be seasonably reported in standard reports to which the bar would naturally turn for them, will be excluded.

BALDWIN'S REPORTS.

[Baldw.]

Reports of cases determined in the circuit court, Third circuit, from 1827 to 1833, by Hon. Henry Baldwin, circuit justice, one of

the judges of the court. One volume. Philadelphia: James Kay, Jr., & Bro., 1837.

The following dedication to Judge Hopkinson will be found on page iii:

I should do great injustice to my feelings, in submitting this volume to the profession, without testifying to them my sense of obligation to you, who have contributed so much to make its contents worthy of their approbation, not only by the opinions delivered by yourself, but in others, in which it has been left to me to give the result of our mutual labor and concurring judgment. When we became associated in our judicial duties, we had an arduous task before us, the high character of the bar of the circuit court, and the nature of the causes depending therein, were in themselves just cause for apprehension; but there was still greater reason to be appalled, when we consider the reputation which that court had acquired and sustained for thirty years, under the administration of that eminent and most beloved judge who preceded me. The highest call was made on you, to bring into active requisition all the powers of your acute, discriminating mind, your cogent reasoning and sound judgment, as well as the large fund of legal information, acquired during a long and active course of professional experience, in the development and application of the great principle of federal and state jurisprudence. If a more imperious call could be made on any one, it was on me to exert every faculty in a way more appropriate to your junior in years and practice; by a patient and laborious examination of the adjudged cases, and the analogies of the law, to so apply the test of precedents to principles, that while we followed the former, the latter should not be violated. If this volume does not suffice to show that we have obeyed these calls by the execution of every talent at our command, and the just expectations of the public have been disappointed, we must submit to their opinion; having done our best, we are spared the pain of our self-reproach. But if we have in some degree adjudicated the cases before us as to have given reasonable satisfaction, or measurably preserved the character of the court, it has been by a singleness of object, its steady pursuit, and a happy union of opinion in our several judgment on the points adjudged, as well as in the illustrations and analogies on which our decisions were founded. It has been to me a subject of pride and pleasure, that the cases in which we have been unable to agree in opinion, are fewer in number than the years of our judicial association; that when they have occurred it has been a subject of mutual regret, and each has been desirous of yielding to the other. When we were colleagues in another department of the government, we came in collision with less regret, owing perhaps to one stimulus, which neither of us now feel, or suffer to have any influence on our minds. The pride of victory is a strong incentive in political debate, in which none can engage without feeling its impulse; but however it may have operated on us during a discussion, it ended with it, and we always parted with the same mutual sentiment as we have since done after a judicial conference, when each felt compelled to adhere to his opinion, more diffidence of himself, and respect for the other. While these are the relations between us, others will appreciate the reasons why I dedicate this book to you.

BANNING AND ARDEN'S PATENT CASES.

[Ban. & A.]

Reports of patent causes decided in the circuit courts from Jan. 1, 1874, to 1880, and

reprinting many cases from Blatchford's Reports. By Hubert A. Banning and Henry Arden, counselors at law. Five volumes. New York: L. K. Strouse & Co. Vol. 1, 1881; vols. 2, 3, and 4, 1882; vol. 5, 1883.

The following preface is from vol. 1:

These Reports will contain the decisions of the circuit courts of the United States in patent cases, from January 1, 1874, the date to which such decisions are reported in Fisher's Patent Cases. When the cases are reported to date, volumes will thereafter be published, whenever a sufficient number of opinions can be collected and prepared. After careful consideration, and upon the advice of some of the judges, we have omitted, except in a few cases, the insertion of preliminary statements and diagrams. The opinions, in almost all cases, fully explain the nature of the questions and the mechanical features of the inventions involved in the controversies. We are under great obligations to the judges for their assistance and co-operation, without which the undertaking would have been impracticable. We especially acknowledge our indebtedness to Judge Blatchford, who has permitted us to insert those cases, decided in the Second circuit, which appear in Blatchford's Circuit Court Reports, as therein reported by him. Judge Sawyer has accorded us like permission to use the cases decided in the Ninth circuit, which are reported in Sawyer's Reports, and for which we are indebted to him.

BEE'S ADMIRALTY REPORTS.

[Bee.]

Reports of cases in the district court, D. S. C., from 1792 to 1809, by Hon. Thomas Bee, judge of the court. The appendix contains Judge Hopkinson's decisions in the admiralty court of Pennsylvania from 1779 to 1788, and a case from the district court, D. Mass., decided in 1809. The book also contains opinions of Justices Marshall and Johnson in two cases on appeal from Judge Bee's decision, and Marshall's speech in congress in the case of Nash alias Robins, who was extradited by England for murder. One volume. Philadelphia: William P. Farrand & Co., 1810.

The following preface will be found on page iii:

These decisions are published at the suggestion of many members of the Charleston bar, and in the hope that they may afford some aid to the profession in general, and some direction to merchants, captains of ships, and mariners, whose interests constitute the chief subject of them. It is presumed they have been in most instances, satisfactory, for in every case of appeal, except one, they have been confirmed. It was the intention and wish of the judge to revise them before publication; but he was prevented from doing so by a very long and serious illness. The candour of the profession will make due allowance for this very material circumstance. Judge Davis's decree in the district court of Massachusetts is here republished, not only on account of its intrinsic excellence, but because it gives weight to a similar decision by Judge Bee; the circuit court of Pennsylvania having given a different determination, it is desirable that the question should be finally settled by the supreme judicature of the United States.

BENEDICT'S DISTRICT COURT REPORTS.

[Ben.]

Reports of cases in district courts of the Second circuit from 1865 to 1879. Ten volumes. New York: Baker, Voorhis & Co. The volumes appeared at intervals from 1869 until 1882. Vols. 1-6 are by Robert D. Benedict, Esq. Vols. 7-10, by Robert D. Benedict, Esq., and B. Lincoln Benedict, Esq.

The following note is from vol. 10, p. iii:

The cases reported in this volume are selected from the many in which opinions were handed down in the district courts of the United States within the Second circuit, between July, 1878, and January, 1880, when the publication of the Federal Reporter began. The field of these Reports is so nearly covered by the Reporter that it seems at present unadvisable to continue them. The author begs to return thanks to the members of the profession generally, and to the admiralty bar in particular, for the favor shown to the work in its previous volumes, and to announce that the present and 10th volume closes the series of Benedict's Reports.

BISSELL'S REPORTS.

[Biss.]

Cases in the circuit and district courts for the Seventh circuit from 1851 to 1883, by Josiah H. Bissell, of the Chicago bar. Eleven volumes. Chicago: Callaghan & Co. Vols. 1 and 2 appeared in 1873, and the others at intervals until 1883, when vol. 11 was published.

The following preface is from vol. 1:

This volume, the work of the early and late hours of a practicing lawyer, is the first of a series which is designed to include the leading decisions of the United States circuit and district courts for the Seventh judicial circuit since the time of McLean's Reports, and to form with them a continuous and harmonious series. The opinions after passing through the reporter's hands have been revised by the respective judges. Not originally designed for publication, and in many cases laid aside as soon as the interest of a nisi prius case had passed away, the difficulties of properly preparing them and the necessary statements of facts have been greater than any one could have expected,—far greater than the reporter imagined when he undertook this task. The reporters of the state courts are furnished with printed records, statements of facts and briefs, and opinions prepared with reference to publication,—an advantage which no one can appreciate until he has collated loose manuscript, slips of newspapers, old law periodicals, resurrected briefs and memoranda, and dusty court files. Where facts and figures have slipped from the memory of court, counsel and litigants, it is extremely difficult to prepare and present the principles in a manner satisfactory to the profession or author; nor is it possible to do full justice to the judges whose opinions are thus presented to the public. That since the death of the late Judge McLean, whose valuable series of reports bears his name, there should have been no regular reports of the decisions in this circuit, comprising three large and rapidly growing states, before whose tribunals are continually arising cases involving important questions and large commercial and landed inter-

ests, has long been a surprise and regret to the members of the profession. Encouraged by many of his professional brethren to collect and arrange these decisions, the reporter only hopes that if some of the cases may appear incomplete, they will remember the circumstances under which this series has been undertaken and prepared. A number of cases here reported have been carried to the supreme court, as will appear by the notes added thereto; but the opinions below are published here, either as containing a fuller discussion of the principles involved, or because the case was decided in the upper court on some point of practice, or question not considered below. In some cases where the decision below is affirmed without discussion of principles or authorities, the opinion of the circuit or district judge acquires, so to speak, the authority of a supreme court decision. By no means all the opinions which have come to the hands of the reporter are published in this series. During the period covered by the present volume, many questions of great interest and importance at the time have become dead issues, and the value of many decisions as contributions to the permanent body of judicial decision has passed away. Many able, elaborate, and well reasoned decisions on questions connected with the fugitive slave law, special state statutes, and the varied and exciting questions arising out of the late civil war have been laid aside, even though some of them were both interesting in themselves and by reason of the circumstances under which they were delivered, and formed, perhaps, a legitimate portion of the judicial history of the Northwest. The executors of the late lamented Judge McLean, associate justice of the supreme court of the United States, have kindly furnished to the reporter all his unpublished manuscript, and many of his opinions will be found in this volume. The opinions of the late Judge McDonald, of Indiana, have also been delivered to the reporter to be incorporated into this series, where they naturally belong. They will form a large part of the third volume. After the materials had been collected, and the work of revising and arranging commenced, the whole narrowly escaped destruction in the great Chicago fire, and the entire destruction of all the law libraries, both public and private, necessitated a long delay,—it being indispensable that the numerous authorities cited by court and counsel be verified and compared. The second volume is now in the printer's hands, and the third and fourth will follow as rapidly as is consistent with accuracy. To the respective judges, the clerks of the several courts, to the Honorable S. S. Fisher, late United States patent commissioner, and to many lawyers in this and other cities, the reporter is under obligations for opinions and information. It is hoped that the notes added to many of the cases will be found convenient to the practicing lawyer, and if the series shall meet the approval of his professional brethren, the reporter will feel that his labors of love have been amply rewarded, and that he has discharged some portion of that duty which, according to Lord Bacon, every man owes to his profession.

The following preface is from vol. 4:

Since the commencement of the publication of this series of Reports, a large number of opinions by the different judges within the circuit have come to the reporter's hands after the publication of the volumes to which they respectively belonged. These opinions are of such interest and value that the series would be essentially incomplete were they not to appear, even though their publication necessarily involves a break in the continuity of the series. The reporter has, therefore, after a careful examination of these opinions, selected such as he deemed most valuable, and now presents them

in their chronological order, with such notes and references to subsequent decisions as will, he trusts, make them more practically useful to the profession, and present, even in the older cases, the present state of the law applicable to the questions involved. The opinions of the late Hon. David McDonald of Indiana, were furnished by his executors, and revised by him for publication shortly before his decease. Those of the other judges have, in every case, been revised by the respective judges. For the notes, the reporter alone is responsible.

BLATCHFORD'S CIRCUIT COURT REPORTS.

[Blatchf.]

Reports of cases in the circuit courts for the Second circuit from 1845 to 1887, by Samuel Blatchford, Esq. Twenty-four volumes. Vol. 1, Auburn: Derby & Miller, 1852. Vol. 2, New York: John S. Voorhies, 1859. All the other volumes are published by Baker, Voorhies & Co., New York, at intervals from 1868 until 1888. Vols. 1-3 were published before the author's elevation to the bench, vols. 4-13 while United States district judge for the Southern district of New York, vols. 14-18 while United States circuit judge for the Second circuit, and vols. 19-24 while associate justice of the United States supreme court assigned to the Second circuit.

The following preface is from vol. 1:

Since the accession of Mr. Justice Nelson to the bench of the supreme court of the United States in March, 1845, a desire has been very generally expressed by the profession, that his decisions as a judge of the circuit courts within the Second circuit, embracing the two districts of New York and those of Vermont and Connecticut, should be collected in a permanent form. Those decisions comprise cases both at law and in equity, and questions of constitutional, commercial, revenue, and admiralty law, of patents, of copyright, and other important subjects. The high reputation of Judge Nelson, and the fame earned by him during a judicial career, now of twenty-nine years duration, for fourteen of which he occupied a seat upon the bench of the supreme court of New York, and for nine of which he was chief justice of that court, and the fact that in only two reported cases, that of *Lawrence v. Allen*, 7 How. [48 U. S.] 785, and that of *Williamson v. Berry*, 8 How. [49 U. S.] 495, have his decisions in the court below failed to secure the approbation of a majority of the supreme court, have been to the reporter a sure guarantee that it required nothing but the presentation in a proper form of the cases contained in this volume to ensure for them the approbation of the profession. In this view, the preparation of the volume was undertaken in the summer of 1850, but its completion has been delayed till now by other engagements. The reporter has in his possession sufficient materials to enable him, with the addition of decisions that will probably be made during the ensuing year, to publish another volume at the expiration of about that time. Whether he will do so or not, will of course depend upon the wishes of his brethren of the profession, whose indulgence is asked for this his first effort as a reporter. It is proper to say that the opinions in this volume were nearly all of them written without any view to their publication, and that the entire manuscript has had the benefit of the revision

and approbation of Judge Nelson. The title of Circuit Court Reports is adopted for these Reports, to prevent their being confounded in citation with Blackford's Indiana Reports.

BLATCHFORD'S PRIZE CASES.

[Blatchf. Prize Cas.]

Reports of cases in prize in the circuit and district courts for the Southern district of New York from 1861 to 1865. By Samuel Blatchford. One volume. New York: Baker, Voorhies & Co., 1866.

This volume contains the decisions of Justice Nelson and Judge Betts in prize cases. The following is the preface:

The compilation of the cases contained in this volume was undertaken at the request of the department of state of the United States. The cases reported are all the prize suits decided in the circuit and district courts of the United States for the Southern district of New York during the Rebellion, with, perhaps, the exception of a very few cases in which decrees were entered without any opinion or memorandum of decision having been filed by the court. For the information of those who are not acquainted with the constitution of the courts of the United States, it may be well to say that the district court is held by the district judge, and that the circuit court is, as a general rule, held by the justice of the supreme court of the United States, who is assigned to the circuit embracing the court, and the district judge of the district, sitting jointly, or by either of them sitting alone. But it is provided by law that, in all cases which are removed by appeal or writ of error from a district to a circuit court, judgment shall be rendered in conformity to the opinion of the judge of the supreme court presiding in the circuit court. Practically, therefore, the justice of the supreme court always sits alone in hearing cases removed by appeal or writ of error from the district to the circuit court. Down to the 3d of March, 1863, appeals from decrees made by the district court in prize cases were taken to the circuit court in like manner as appeals to the circuit court from decrees made by the district court in other cases. But by the seventh section of the act of congress approved March 3, 1863, entitled "An act further to regulate proceedings in prize cases, and to amend various acts of congress in relation thereto" (12 Stat. 760), it was provided that appeals from the district courts of the United States in prize cases should be directly to the supreme court. This provision was re-enacted by the thirteenth section of the act of congress approved June 30, 1864, entitled "An act to regulate prize proceedings and the distribution of prize money, and for other purposes" (13 Stat. 310), and is still in force. Therefore after the 3d of March, 1863, no appeals in prize cases were taken from the district to the circuit court.

BLATCHFORD AND HOWLAND'S REPORTS.

[Blatchf. & H.]

Reports of admiralty cases decided by Judge Betts in the district court, S. D. N. Y., from 1827 to 1837. By Samuel Blatchford and Francis Howland, counselors at law. One volume. A second volume was in contemplation, but was never published. New York: Jacob R. Halstead, 1855.

The following preface will be found on page iii:

It has long been a source of regret among the members of the legal profession, that there were no reports of cases, particularly of admiralty cases, adjudged in the district court of the United States for the Southern district of New York, other than such as were to be found scattered here and there in legal periodicals. The variety and importance of the cases decided in that court, within whose jurisdiction is found the chief commercial city of the Union, and the long experience and high juridical attainments of the distinguished judge who, for nearly thirty years, has presided there, have seemed to warrant the preparation of formal reports of some of the cases determined in that court. The present volume embraces a selection of cases in admiralty, fifty-three in number, running through a period of nearly ten years. It is intended to publish other volumes containing cases down to the present time. There is an apparent anachronism in citing the laws of the United States from Little & Brown's edition of the United States Statutes at Large. But this has been done, because that edition is a standard publication recognised by act of congress, and has superseded, in most libraries, all earlier editions. In some instances, too, the rules of court referred to are cited by their numbers in the rules now in force, as those in force at the dates of the decisions are entirely out of print, and the same rules differ in their numbers in the two sets of rules.

BOND'S REPORTS.

[Bond.]

Reports of cases in the circuit and district courts for the Southern district of Ohio from 1856 to 1871. By Lewis H. Bond, counselor at law. Two volumes. Cincinnati: Robert Clark & Co., 1872.

The following preface is from vol. 1:

The liberal encouragement proffered by a number of his professional brethren, in advance of the publication of these volumes, and the assurance of the co-operation of the learned judge whose decisions are herein presented, induced the reporter cheerfully to enter upon the labor of preparing them for the press. The six volumes of Judge McLean's Reports include the period dating from his appointment to the bench of the supreme court, in 1829, to the year 1855. Since the last-named year, with the exception of decisions occasionally appearing in law periodicals and newspapers, there have been no reports of cases in the courts for the Southern district of Ohio. It occurred to the reporter that it could not be otherwise than acceptable to the profession to present, in an enduring form, a portion of the numerous cases before Judge Leavitt from 1855 to the spring of 1871, when he retired from the bench, after his long judicial service. And in this view, the reporter is gratified in knowing he had the cordial concurrence of many prominent members of the bar with whom he conferred. After the division of the state of Ohio, in 1855, into two judicial districts, and the establishment of the courts for the Southern district at Cincinnati, there was a rapid increase of business in both tribunals. For a few years prior to the death of Judge McLean, in the spring of 1861, his duties in the supreme court, and his failing health, prevented his regular attendance at the terms of the circuit court. After the appointment of Justice Swayne to the supreme court, in 1862, his necessary attendance at its protracted terms, and his duties in other districts of his extended circuit, rendered it impossible for him to give any considerable

portion of his time to the court at Cincinnati. As a result of these causes, the labor and responsibility of presiding in the circuit court were imposed by law on the district judge. In addition to his labors there, it was his duty to hear and decide cases in the district court, and after the adoption of the internal revenue system of the United States they were exceedingly numerous, and frequently involved new and difficult questions. The enactment of the bankrupt act of 1867 greatly increased the previous heavy pressure upon the district judge. This brief reference is made, preliminary to the statement that it was a physical impossibility for the court to prepare extended written opinions in all the cases before it, which are reported in these volumes. It was deemed expedient that these Reports should not exceed two volumes. The cases reported comprise but a small portion of the whole number decided by Judge Leavitt. The reporter has exercised his best judgment in selecting the cases for publication. His aim has been to include only such as might be of some interest to the profession. He has purposely omitted all the cases arising under the fugitive slave act. The abolishment of slavery, and the certainty that it could never again have an existence in this country, rendered the report of such cases altogether superfluous. And for a reason kindred to this, the numerous exciting cases growing out of and connected with the late civil war, with one or two exceptions, do not appear in these volumes. That was an abnormal condition of the country, never, as we may hope, to return again. Some of these cases created at the time a highly excited state of public feeling; but as the exigencies which gave rise to them have passed away, it is deemed expedient not to report them.

With the consent and approval of the Honorable S. S. Fisher, the learned and laborious reporter of four valuable volumes of Patent Cases, the reporter of the present volumes has reproduced the decisions of Judge Leavitt, as reported by Mr. Fisher. If any apology for this were needed, it will be found in the fact that the edition published by him was very limited, and that the work is in the possession of only a small number of the profession.

BROCKENBROUGH'S REPORTS.

[Brock.]

Sometimes cited as MARSHALL'S DECISIONS.

Reports of cases decided by Chief Justice Marshall in the circuit courts for the Fourth circuit from 1802 to 1833. By John W. Brockenbrough, counselor at law. Two volumes. Philadelphia: James Kay, Jr., & Bro.; Pittsburg: John I. Kay & Co., 1837.

The following preface is from vol. 1:

In presenting the following volumes to the members of the bench and bar of the United States, the editor deems it but an act of simple justice to himself, to state that the task of editing them, in a suitable manner, was beset with many and unusual difficulties: so formidable, indeed, were these difficulties deemed by some, whose opinions had every claim to a respectful consideration, that it was confidently predicted that the attempt would finally be abandoned in despair. Where the reporter has the advantage of hearing the arguments of counsel in a cause, it is, comparatively, an easy task to present a report of it exact, full, and, in all respects, satisfactory. The record, containing all the evidence and pleadings in the cause, and from which he is to prepare

his statement, is before him: the authorities which bear upon the points, arising in it, are all collected by the researches of counsel: and while the arguments at the bar, and the views of the court are yet fresh in his recollection, he retires to his closet, and with these ample materials before him, he is enabled, with little labour, to prepare a report, which, with entire confidence, he sends forth to the world, to encounter, and to challenge the enlightened and searching criticism of the profession. To the editor, in the present instance, however, all these important aids were denied. By far the greater portion of the opinions, published in these volumes, came to his hands many years after they were delivered from the bench. No notes of the arguments were preserved by the late chief justice, in a single instance; and where the necessity of presenting a full statement of the material facts in a cause, was not dispensed with by its being incorporated in the opinion itself, no alternative remained, but to publish the bare opinion of the court, unaccompanied by the facts, essential to its elucidation, or, by patient and laborious investigation of the papers in the cause, which were, for the most part, extremely voluminous, to extract from them, a narrative of the facts, which constituted the basis of the opinion. To have taken the course first indicated, would have been an act of inexcusable injustice to the character of the eminent individual who had pronounced the opinions, to the profession, and to the editor himself. In such a state of things, it was impossible not to yield to the considerations which so sternly demanded, at the hands of the editor, the dedication of his time and labour, to the important work which he had undertaken: and the course which these considerations required, was adopted, without hesitation, and has been persevered in, without faltering, for years. The editor trusts, that these remarks will not be imputed to an unmanly wish, to exaggerate the labours and the obstacles he has encountered, or with any view to disarm the criticism of the learned profession, to whom they are addressed. The task, such as it was, was voluntarily assumed; and full well he knows, that it would be worse than idle to invoke the indulgence of those, by whose judgment the work now offered must stand or fall, to such of its imperfections as can, in fairness, be ascribed to the remissness, or incompetency of the reporter. But he also feels the strongest assurance, that in pronouncing a candid judgment on the result of his labours, they will not hesitate to attach their due weight, (and he asks nothing more,) to the untoward circumstances which he has detailed. The causes in which the opinions now published were delivered, were, generally speaking, of unusual complexity and difficulty. This remark is especially applicable to the equity decisions, which constitute a very large proportion of the entire work. It was, indeed, the practice of the late chief justice, to commit his opinions to writing, only in cases of real difficulty: and the fact, that all the opinions contained in these volumes, were written by Chief Justice Marshall, with his own hand, and were carefully preserved by him, furnishes an ample guarantee of their intrinsic value and importance. They are, indeed, altogether worthy of the exalted fame of the venerable judge, who, for so many years, adorned the highest judicial station in our country. The earnest desire felt by the editor to render these volumes as extensively useful and convenient to the profession, as possible, suggested to him the propriety of embodying, in the form of notes, copious references to parallel cases decided in the highest courts, both in the United States and in England: and, especially, to such as were of a more recent date, than the opinions to which they should be annexed, respectively. This part of a plan, not

originally contemplated, has also been carried into execution; and the editor flatters himself that these notes will be found to constitute a valuable addition to the work, particularly to gentlemen of the profession residing in the country, and who are precluded, by their situation, from having access to extensive and well selected libraries. Two of the following cases are republished from the sixth volume of Mr. Call's Reports. Their republication in these volumes was demanded, not only by their intrinsic value, but by the importance of preserving, as far as it was possible, an unbroken series of the decisions of Chief Justice Marshall, in the circuit court of the United States, during the whole period of his judicial life. Two important cases, decided in the same court since the death of Chief Justice Marshall, are also added.

BROWN'S ADMIRALTY REPORTS.

[Brown, Adm.]

Reports of admiralty and revenue cases in the circuit and district courts for the Western lake and river districts from 1859 to 1875. By the Honorable Henry B. Brown, district judge. One volume. New York: Baker, Voorhies & Co., 1876.

The following preface will be found on page v:

If any apology be needed for adding another volume to the already crowded shelves of our professional libraries, it may perhaps be found in the fact that, in the multitude of reports issued since the adoption of the constitution, only about a dozen volumes of exclusively admiralty decisions are included; of these but one, viz., that of Mr. Newberry (of which the present volume is designed as a continuation) is devoted to cases arising upon the Western lakes and rivers. This volume was published in 1867, and is believed to be the last of the strictly admiralty series, excepting the 3d of Ware. By far the greater number of admiralty decisions are mingled with common law, equity, bankruptcy, and patent cases, and scattered through more than a hundred volumes of reports. Indeed this fact suggests the observation, that the present method of incorporating in the same volume these widely differing classes of cases is expensive, unphilosophical, and unsatisfactory. Few admiralty practitioners are interested in bankruptcy business, and yet to obtain the benefit of fifty admiralty precedents, they are obliged to purchase a volume containing at least an equal number of bankruptcy cases, and in the Circuit Court Reports a still larger proportion of common law and equity cases. The same is true of the patent lawyer, who is not infrequently compelled to purchase an entire volume to obtain the benefit of a single important case. Thus a great many who would gladly buy every book devoted to the branch of the law they particularly affect (and nearly every lawyer is more or less a specialist) are deterred by the expense from purchasing at all.

The reporter ventures to suggest to the profession that cases determined by the federal courts, instead of being reported by districts might more acceptably to the bar, and, in the end, more profitably to the publishers, be reported by classes, viz.: (1) Patent cases. (The most important of these have already been reported by the late Mr. Fisher.) (2) Admiralty cases. (3) Bankruptcy cases. (These are very acceptably collated in the Bankruptcy Register.) (4) Criminal cases and cases peculiar to the jurisdiction and practice of the federal court. No mention is made in this classification of ordinary cases at common law and equity, as they

are more satisfactorily, if not better, decided by the supreme courts of the several states, than they can be by a single judge.

The present volume contains the more important admiralty cases determined in the Sixth circuit during the last eighteen years. The accidents of compilation have limited it to cases arising in the two districts of Michigan and the Northern district of Ohio; but subsequent volumes, if published, will probably include cases from other districts. The fact that a large majority of these cases has arisen within the Eastern district of Michigan is due not more to the fortunate location of Detroit for admiralty business, than to the painstaking industry and marked ability of the late Judge Longyear. Without formal dedication to that effect, this volume is intended as a tribute of respect to the memory of that most excellent judge and upright citizen.

In selecting material, the following cases have been, with few exceptions, eliminated: (1) Cases turning solely upon questions of fact. (2) Cases reversed. (3) Cases affirmed by the appellate court and elsewhere reported. (4) Those reannouncing principles of law already well settled. (5) Cases reported in other volumes. Probably some of the cases here reported were hardly worthy the consideration, but it is hoped the volume may prove useful to those interested in this branch of the profession. I beg to acknowledge my indebtedness to my late partner Mr. Newberry, and to the several judges whose opinions are here published. Since the book went to press, the cases of *The Free State* [Case No. 5,090] and *The Colorado* [Id. 3,028] have been affirmed, and that of *The Sunnyside* [Id. 13,620] reversed, by the supreme court.

BRUNNER'S COLLECTED CASES.

[Brunner, Col. Cas.]

Reports of cases in circuit courts prior to 1880. Collected and annotated by Albert Brunner, Esq. One volume. San Francisco: Sumner, Whitney & Co., 1884.

The following preface is from page iii:

The object in preparing this collection of cases has been to place before the profession, in a compact and accessible form, the decisions of the U. S. circuit courts, which are constantly cited in the federal digests, and treatises upon U. S. courts, and which have not been published in the regular series of reports. Frequent inquiries at our law libraries for such cases have shown the necessity for a collection of this nature. It has been the endeavor of the editor to include all the cases (except decisions on bankruptcy and revenue law), which have been decided in circuit courts throughout the United States, and which have been printed in law magazines, periodicals, etc., from the date of the earliest decisions to time of the publication of the *Federal Reporter*, which latter purports to include all circuit court cases decided since its inception. The bankruptcy cases in these courts are extremely voluminous, of little or no value at present, and most of these cases will be found in the *Bankrupt Register*. The decisions relative to revenue law are of special interest only to a very few, and are to be found collected in the *Internal Revenue Record*. The cases comprising this collection, containing many valuable decisions on federal law, have been taken from the law periodicals, magazines, and states reports, current at the time when the decisions were rendered, many of which volumes are now out of print, and rarely found even in the most complete public libraries. The result of such a collection is in effect to complete the series of *Circuit Court Reports*, and to present in connection with the already publish-

ed volumes of circuit court cases, easy access to any decision rendered by the circuit courts (with the exception above stated), which may be cited or referred to. There have been added to the cases, notes and references showing the citations thereto, and the effect of such cases in subsequent decisions.

CHASE'S DECISIONS.

[Chase.]

Sometimes cited as JOENSON'S REPORTS.

Cases decided by Chief Justice Chase in the circuit courts for the Fourth circuit from 1865 to 1869. An appendix contains the constitution of the Confederate States, and the conscription, impressment, and sequestration acts of that government. Reported by Bradley T. Johnson, of the Virginia bar. One volume. New York: Diossy & Co., 1876.

The following is the preface:

The decision of the chief justice in the case of *Shortridge v. Macon* [Case No. 12,812], at the June term, 1867, of the circuit court for the Eastern district of North Carolina, made a profound impression on the bar of the late Confederate States. It was the first indication of the view which the federal judiciary would probably take on the legal questions arising out of the late status of war, questions which affected every interest, all property, and lay at the very base of social organization. If the issue of force, which had just been tried and decided in favor of the federal Union, was to be regarded by the courts of the successful side as nothing but rebellion, civil tumult, and insurrection, then it was clear that no legal consequence could flow from it, nor could any acts of any agents, created by such rebellion, be acknowledged as having any legal and permanent consequences whatever. Acknowledgments of deeds, protest of notes, records of courts, judicial proceedings, contracts based on the existing state of things would, on that theory, all be void, and inextricable confusion and injury to society would be the consequence. If, on the contrary, the supreme court adopted the theory which the Southern bar believed the true one, warranted and required by every principle of public law, by the precedents of English history, and necessary to the restoration of peace and order in the South—if that august tribunal determined that the late war was war, to be judged by all the rules applicable to a war inter gentes, then the result would flow necessarily and certainly that all the acts of all the officers, agents, and employees, as well as of the people of each one of the late Confederate States, would be recognized as valid by the federal tribunals, provided those acts were not in aid of the war against the federal government. On such a sure basis we could look forward to a rapid recrystallization of society and reorganization of social order. When, therefore, the chief justice first sat in Richmond, his decisions attracted universal attention over all that country so vitally interested in the conclusions to which his mind would ultimately come.

It soon became manifest that he was rapidly comprehending the prodigious consequences that would flow from his decisions, and the discussion in *Keppel v. Petersburg R. Co.* [Case No. 7,722] was the first outgiving from him of the change that was going on in his mind since the case of *Shortridge v. Macon* [supra]. It then became clear that a body of decisions, discussing the fundamental principles of all law, must result from the questions

that would be submitted to him by the bar of Virginia and the Carolinas, and that these decisions would be of great value in settling all doubtful questions in the South growing out of the war.

I, therefore, proposed to the chief justice that, if agreeable to him, I would undertake the work of collecting his circuit court decisions for publication. He assented to the suggestion with gratification, and subsequently furnished me with copies of his decisions as fast as they were made on circuit. In the winter of 1872-73 it became apparent that his work was done. The decisions on the questions growing out of the war, made by him on this circuit and in the supreme court, had settled the principles on which the new constitution of the United States was to be administered under the new conditions of society, and his wise and statesmanlike views, impressed by him on the supreme court, had prevailed in nearly all courts, and peace and order were thereby largely restored. The manuscript of this volume was then submitted to him for revision, and he went over the whole of it with the reporter, making such corrections as he deemed necessary. They were generally merely verbal, and in the main consisted of softening the language or expressions used in alluding to the war. He struck out the words "rebellion," "rebels," "insurrection," and "insurgents," and substituted the words "civil war," "belligerents," etc., wherever the sense of the text would permit, and instructed me to do so wherever he had overlooked it. I had an appointment with him in Washington the very day he left there for New York, and he postponed it until after his return, when it was proposed to see if there would be room in the volume for his decisions in the *Legal-Tender Cases* [110 U. S. 421, 4 Sup. Ct. 122], and in the case of *Texas v. Chiles* [21 Wall. (88 U. S.) 488]. But he never returned, and I have left the book just as it came from his revision.

I hope thereby to contribute to the reputation of a judge whose large intellect, strong will, and clear perception of great principles have done much toward quieting discussion and settling differences of opinion on all legal questions growing out of the war, and has thus greatly contributed to the peaceful reorganization of society in the South. I have added the constitution of the Confederate States and the acts of the Confederate congress for the conscription of all arms-bearing citizens, the impressment act, and the sequestration act, by virtue of which exercise of power the Confederate government assumed and exercised control over all of its citizens, and over all property within its jurisdiction. I have done this in order that it may be seen what force, vigor, and vitality that government had, and to place on record our claims to have been treated as a government. Whether a government *de facto* or a government of paramount force, or a regent government, exercising the *occupatio bellica*, or a government *de jure*, overthrown by foreign conquest, the future historian will decide: we are not competent judges.

[Here follow proceedings upon the death of Chief Justice Chase, which will be found in the Biographical Notes, under Salmon Portland Chase.—Ed.]

CLIFFORD'S REPORTS.

[Cliff.]

Reports of cases in the circuit court for the First circuit, from 1858 to 1873, being the decisions of the Honorable Nathan Clifford, associate justice of the supreme court. Reported by William Henry Clif-

ford, counselor at law. Four volumes. Boston: Little, Brown & Co. The volumes appeared at intervals from 1869 until 1880.

CRABBE'S REPORTS.

[Crabbe.]

Reports of cases in the district court for the Eastern district of Pennsylvania, from 1836 to 1846. By William H. Crabbe. One volume. Philadelphia: T. & J. W. Johnson, 1853.

The following is the preface:

This volume takes up the decisions of the district court of the United States, for the Eastern district of Pennsylvania, from the period at which Gilpin's Reports terminate, and ends with the appointment of his honor, Judge Kane, now on the bench. I have, after considerable hesitation, included eleven bankruptcy cases in the following pages. The case of the Estate of Robert Morris, under the bankrupt law of 1800, was, perhaps, the least objectionable; the great amount of learning expended in the arguments and decisions in that case, and the knowledge that considerable landed interests, in this and another state, depended thereon, easily led to its introduction. The ten cases decided under the law of 1841 were selected, as involving points of the most general interest, from a very large number of manuscript opinions by Judge Randall on the subject, which I was not willing wholly to pass by. I feel bound to express my obligation and thanks for the kindness with which the notes of counsel have, in numerous instances, been placed at my disposal while preparing this volume for the press. There were many obstacles in the way of an intelligible report of cases so long since decided which these notes greatly assisted to remove, while, at the same time, they afforded the fullest and most reliable materials for an abstract of the arguments at the bar.

CRANCH'S CIRCUIT COURT REPORTS.

[Cranch, G. C.]

Reports of cases in the circuit court for the District of Columbia, from 1801 to 1841. By William Cranch, chief judge of the court. Six volumes. Vol. 6 contains only an index and table of cases. Boston: Little, Brown & Co.; Washington: William M. Morrison & Co., 1852.

The following preface is from vol. 1:

By the act of congress of the 13th of February, 1801, the congress of the United States passed an act entitled "An act to provide for the more convenient organization of the courts of the United States." By that act the United States were divided into twenty-two districts, and these subdivided into six circuits, in each of which, except the Sixth, there were to be "three judges of the United States, to be called 'circuit judges,' one of whom was to be commissioned as chief judge"; and they were to hold circuit courts in their respective circuits. Afterward in the same session, congress passed the act of the 27th of February, 1801, entitled "An act concerning the District of Columbia," and by the third section thereof, erected, upon the same model, a circuit court for the District of Columbia, "to consist of one chief judge and two assistant judges"; and conferred upon "the said court and the judges thereof" "all the powers by law vested

in the circuit courts and the judges of the circuit courts of the United States"; evidently referring to the act of the 13th of February, 1801, which they had previously passed at the same session; for, before that act, there had been no judges of the circuit courts of the United States, no nominees—the circuit courts being then held by one justice of the supreme court of the United States and the judge of the district court of the district in which the circuit court was, for the time being sitting. Among the powers thus conferred upon the circuit court of the District of Columbia, were the power to hold special sessions for the trial of criminal causes,—the power to appoint a clerk in each of the two counties in the said District; namely, the counties of Washington and Alexandria.

By the fifth section of the act of February 27, 1801, it is enacted that the said court "shall have cognizance of all crimes and offences committed within said District; and of all cases in law and equity between parties both or either of which shall be resident, or shall be found within said District; and also of all actions and suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water; and all penalties and forfeitures made, arising or accruing under the laws of the United States." By the first section of the act, it is enacted, "that the laws of the state of Virginia as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government; and that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said District which was ceded by that state to the United States and by them accepted as aforesaid." And by the second section it is enacted, "that the said District of Columbia shall be formed into two counties; one county shall contain all that part of the said District which lies on the east side of the river Potomac, together with the islands therein and shall be called the 'County of Washington'; the other county shall contain all that part of said District which lies on the west side of said river, and shall be called the 'County of Alexandria'; and the said river in its whole course through said District shall be taken and deemed, to all intents and purposes, to be within both of said counties." By the seventh section of the act a marshal, and, by the ninth section an attorney of the United States for the District are to be appointed, and by the eleventh section as many justices of the peace as the president of the United States shall from time to time, think expedient; to hold their office for five years, and, in whatever relates to the conservation of the peace, to have all the powers vested in, and to perform all the duties required of, justices of the peace as individual magistrates by the laws of Virginia and Maryland respectively continued in force in the District by the first section of the act; and to have cognizance of personal demands, not exceeding the value of twenty dollars, extended to fifty dollars by the act of March 1, 1823. By the eighth section of the act of 27th of February, 1801, an appeal or writ of error to the supreme court of the United States is given, from any final judgment, order or decree of the circuit court of the District of Columbia where the matter in dispute exceeds the value of one hundred dollars, afterward extended by the act of April 2, 1816, c. 39, to one thousand dollars. But where the value is more than one hundred dollars, and less than one thousand dollars, an appeal or writ of error may be allowed by a judge of the supreme court, "if he shall be of opinion that the errors involve questions of law of such extensive in-

terest and operation as to render the final decision of them by the supreme court desirable." By the twelfth section of the act of 27th of February, 1801, a register of wills and a judge of the orphans' court in each county are to be appointed, to have the like powers and to perform the like duties, as were then exercised and performed by the like officers in Maryland; and an appeal from the orphans' court to the circuit court is given. By the act of the 29th of April, 1802, a district court of the United States for the District of Columbia, having the same powers and jurisdiction which were by law vested in the other district courts of the United States is directed to be holden twice a year, by the chief judge of the District of Columbia, from whose judgment or decree a writ of error or appeal lies to the circuit court of the District, and from that to the supreme court of the United States. The act of the 13th of February, 1801, was repealed at the following session of congress, but that repeal did not deprive the circuit court of the District of Columbia of any of the powers which were, by the act of the 27th of February, given to it by reference to the act of the 13th of February. The circuit court of the District of Columbia is a court of the United States; and having jurisdiction over such a variety of cases, the reports of its decisions cannot but be interesting; and the facility with which its errors may be corrected by the supreme court gives great weight to such of its decisions as have been acquiesced in.

The cases here reported were cases arising under the constitution and laws of the United States, and the constitutions and laws of Virginia and Maryland, including the common law as adopted by those states; and including also causes of admiralty and maritime jurisdiction, and seizures on land or water for breaches of the laws relating to the revenue and the laws of trade and navigation; appeals from the district court of the United States for the District of Columbia; from the orphans' court in relation to guardians and the administration of the estates of deceased persons; and from the judgments of justices of the peace in civil causes within their cognizance. In general, the cases which were carried up to the supreme court, by writ of error or appeal, and affirmed, are not here reported;—having been already reported among the cases decided by that court; some few cases, however, which were reversed, will be found here reported as they appeared in the court below. As the circuit court for the District of Columbia is the tribunal to which is intrusted, either originally or by appeal, the execution of those laws which protect the personal liberty and property, not only of the citizens of the District, but of all the officers of the government, from the highest to the lowest, residing therein, and of the members of both houses of congress; and of all the citizens of the United States visiting this neutral ground, the common domain of all the states, it seems to be peculiarly important that the decisions of that tribunal be publicly known. It is with this view that these Reports are now published.

CURTIS'S CIRCUIT COURT REPORTS.

[Curt.]

Reports of cases in the circuit courts for the First circuit from 1851 to 1856. By the Honorable Benjamin Robbins Curtis, associate justice of the supreme court, allotted to that circuit. Two volumes. Boston: Little, Brown & Co. Vol. 1 was published in 1854; vol. 2 in 1857.

The following preface is from vol. 1:

This volume includes a part of the cases tried in the First circuit since the autumn of 1851. In making the selection, I have endeavored to insert only those which might be useful to the profession. A few of those which turned wholly on the local law of a particular state, I have inserted in accordance with the wishes of gentlemen of the bar of those states.

DAVEIS' REPORTS.

[Daveis.]

See "Ware."

DEADY'S REPORTS.

[Deady.]

Reports of cases in the circuit and district courts of Oregon and California from 1859 to 1869. By the Honorable Matthew P. Deady, district judge. One volume. San Francisco: A. L. Bancroft & Co., 1872.

The following is the preface:

In submitting this volume of Reports to the profession, a word of explanation in regard to the organization of the courts, in which the cases were decided, is deemed proper. The district court, in Oregon, was organized in September 1, 1859, under the act of March 3, of that year (11 Stat. 437), and had circuit court powers and jurisdiction until the creation of a separate circuit court for the district, by act of March 3, 1863 (12 Stat. 794). The cases entitled in the circuit court for the district of California, were decided while I held that court during portions of the years 1867-8-9, in pursuance of the designation of Justices Chase and Field of the supreme court.

DILLON'S CIRCUIT COURT REPORTS.

[Dill.]

Cases in the circuit courts for the Eighth circuit from 1870 to 1879. Reported by the Honorable John F. Dillon, circuit judge Eighth circuit. Five volumes. San Francisco: Sumner, Whitney & Co., 1885 (2d edition). The first edition was published by Egbert, Fidler & Chambers, Davenport, Iowa, the last volume appearing in 1880.

The following preface is from vol. 1:

This is the first volume of a proposed regular series of reports for the Eighth circuit. No judicial tribunal in England or America has conferred upon it powers so comprehensive and various as those of the circuit courts of the United States. Their jurisdiction is original and appellate, civil and criminal. They are constantly adjudicating cases which are elsewhere intrusted to distinct tribunals. Nearly every question of a nature to come before the queen's bench, the common pleas, the chancery, the exchequer, the admiralty, or the bankruptcy courts of Great Britain, may, in an original or appellate form, come before the circuit courts of the United States. Besides, in a great variety of cases, arising under the constitution and laws of the general government, they have original jurisdiction, exclusive of all other courts. The reports of cases determined by tribunals to which are confided powers so diversified and important, possess a character, and ought to have a value, distinctively their own.

In Mr. Woolworth's Reports, recently published, are collected the hitherto scattered decisions

of Mr. Justice Miller, since he was assigned to this circuit, down to the date of the re-organization of the courts by the act of congress of April 10, 1869, which provided for the appointment, in each of the existing circuits, of a circuit judge, to whom, within the circuit, is given the same powers and jurisdiction which are possessed by the justice of the supreme court allotted to it. I cannot refrain from here expressing my sense of the value of Mr. Woolworth's admirable volume. The cases are nearly all new or important, and the learning and industry of the reporter are only less marked than the ability and intellectual vigor of the judge. Regularly there will be included in these Reports only such of the current cases as are believed to be important in principle, or useful to the practitioner in the federal courts. Most of the states aid the publication of their law reports; and to some extent this is done by congress, in respect to the decisions of the supreme court of the United States. But the reports of the circuits must stand on their unassisted merits, and since their publication is attended with much labor and little reward, no temptation exists to multiply them too rapidly by reporting useless cases. There is to some extent a distinctive character in the litigation of the different circuits. This is manifestly true of the Eighth, comprising six large, populous, and growing states: Minnesota, Iowa, Missouri, Arkansas, Kansas, and Nebraska. Within this circuit are large commercial centres, giving rise to characteristic controversies. Bounded as the circuit is, for nearly two thousand miles on the Mississippi, and traversed by the Missouri and other great water-courses, there originates on this vast inland navigation a large amount of admiralty business, of a character somewhat different from that in circuits bordering on the great lakes or the high seas. This circuit, too, it should be added, extends to Lake Superior, whose growing commerce is already furnishing the federal courts with admiralty causes. Four districts in the circuit stretch so far westward that they embrace various Indian tribes, sustaining different treaty relations to the general government, and peculiar relations to the states, within whose boundaries they remain; from whence we have here litigation of an anomalous, yet most interesting nature. The circuit embraces also a large amount of the public domain, some of which has been granted to railway companies, and to different states, for specified objects; but much of which is yet subject to the various land laws of the United States, including the beneficent and salutary pre-emption and homestead acts. These circumstances, too, leave their impress upon controversies that find their way into the national courts within the circuit. Besides which, it has its share of cases in bankruptcy, and those relating to railway, insurance, revenue, commercial and corporation law. A field so vast, and one so rich in the variety and character of the materials which, with proper attention, it can be made to contribute to the building up of a symmetrical system of national jurisprudence, ought, surely, not to be neglected. Considerations like these, which the reporter has persuaded himself will meet with the approving judgment of an enlightened profession, have moved him to attempt to do his part in this useful work; and to preserve, in an authentic form, for the use of others, the results of some of the labors of his co-workers and himself. The chief requirements of a law report—a clear but not prolix or redundant statement, perspicuous head-notes, and a full but not diffuse index—the reporter has endeavored to meet in the preparation of this volume. What appears in the head-notes, is intended to be the statement of a point, or principle, involved in the case and actually decided, unless the contrary be therein indicated. A few cases, involving the construction of state statutes, have been included in the volume; but for this a reason existed, either in

the fact that they were upon important subjects, or because the local statute had not been settled by state adjudication. To some of the cases notes have been added by the reporter, who trusts that they will be regarded as worth the brief space they occupy.

FISHER'S PATENT CASES.

[Fish. Pat. Cas.]

Reports of cases arising under letters patent for inventions in the circuit courts from 1848 to 1873. By Samuel S. Fisher, counselor at law. Six volumes. Vol. 6 was completed after Mr. Fisher's death, by John E. Hatch and Robert H. Parkinson. Cincinnati: Robert Clarke & Co., 1870-1874.

The following preface is from vol. 1:

When the publication of these Reports was determined upon, it was supposed that they might be included in a single volume; but, before the first pages were printed, so many cases had been received, that it was apparent that two volumes would scarcely contain them. This, together with the great difficulty of reporting a patent case intelligibly, in the absence of drawings or models, without much prolixity of statement, and the fact that a recital of facts, amply sufficient to enable the practitioner to comprehend the case, is embodied in nearly every opinion, led the reporter to omit the arguments of counsel entirely, and to limit himself to such brief statement as seemed to be needed for a full understanding of the language of the court. Without a rigid adherence to this plan, the number of volumes would have been doubled, without, it is believed, materially enhancing the value of the Reports. As some of the earlier cases were decided nearly twenty years ago, and many of the judges, whose opinions are reported, are no longer living, it was not easy to procure any accurate information in regard to them. Nevertheless, it is believed that no decision or charge is reported in this volume, that is not given in the words of the judge who delivered it, or in language adopted by him after revision; and, to avoid all possible risk of misstatement, or misapprehension as to the point decided, or as to dicta believed to be valuable, the language of the court, as far as possible, is used in preparing the syllabus of each case. The principal sources from which these Reports have been supplied, have been manuscripts furnished by the judges themselves; certified copies of opinions, from the originals on file in the various clerks' offices; pamphlet opinions revised by the judges and furnished by reliable counsel, and publications in law magazines and other accredited legal journals. Many thanks are due to the judges, clerks and counsel who have assisted in furnishing opinions, charges, briefs and memoranda, without which the publication of such a work would have been impossible.

The following preface is from vol. 2:

This volume brings the reports of cases down to the close of the year 1865. The reporter confesses to some disappointment at being unable to include at least another year, but it was impossible to do so within the compass of a volume of reasonable size. It is true that some of the cases reported relate mainly to questions of fact, and do not involve any legal point of special interest; but, since patent suits are now almost universally brought on the equity side of the court, every practitioner in this specialty will realize the importance of a knowledge of the manner in which the judges

of the several circuits deal with questions of fact. As a volume of reports in a single department of the law must necessarily have a limited circulation, and would present very few attractions to publishers, it seemed as if the profession must depend for such a book upon individual enterprise. A limited edition, at a somewhat advanced price, which could be speedily disposed of, was the only manner in which the labor of publishing and distributing such a work could be reconciled with more legitimate professional engagements. Every page has been carefully read not less than three times, and yet a few typographical inaccuracies have escaped notice. It was a less excusable error that led, in the first volume, to a mistake in the name of the late learned judge of the Eastern district of Pennsylvania, and to the affixing of a star to the name of one, who, though no longer on the bench of the court for the district of Massachusetts, which he so long graced by his industry, learning, and marked ability, still lives, to enjoy, in the respect of his fellow-citizens and of the profession who are so much his debtors, the reward of a long, laborious, and successful career in the impartial administration of private right and public justice.

The following preface is from vol. 6:

This volume was commenced by Hon. Samuel S. Fisher, under an arrangement by which the undersigned [John E. Hatch and Robert H. Parkinson] were to assist him in its preparation. The cases to be reported were selected by him, and a little less than one-third of the volume had been prepared for the press under his supervision, when his death devolved upon them the responsibility of carrying on and completing it. This has been done, so far as possible, in conformity to the original plan. The more legitimate engagements of the profession, rendered unusually pressing by Mr. Fisher's sudden withdrawal, have been made to yield to the purpose of completing the volume with such accuracy, fullness, and thoroughness, that it might not prove an unworthy companion of its predecessors. This brings the series of Reports down to the beginning of the present year.

FISHER'S PATENT REPORTS.

[Fish. Pat. R.]

Reports of cases relating to letters patent for inventions determined in the supreme and circuit courts from 1821 to 1851. By William Hubbell Fisher. One volume. Cincinnati: Robert Clarke & Co., 1873.

The following is the preface:

These Reports, of which the present is the first volume, embrace all the patent cases of the United States supreme and circuit courts not included in Robb's Patent Cases and Fisher's Patent Cases. The syllabus of each case has been newly prepared, and the statement of each case carefully revised with special reference to the exigencies of patent suits. All material portions of the specifications of the patents involved in controversy have been inserted. Numerous engravings illustrating the mechanical devices involved in controversy have been added. Heretofore, the majority of the adjudications in patent cases upon the mechanism in litigation were wholly useless, because mechanism cannot be well understood from mere written description. The engravings render the decisions on the mechanism in dispute at once intelligible and capable of being effectively cited in deciding analogous mechanical questions involved in pending cases. The author here takes occasion to say he is under many obligations to

the learned reporters of the various Reports for those portions of their admirable statements of cases which he has incorporated into this work. He also expresses his obligations to the Honorable Samuel S. Fisher for many valuable suggestions as to the preparation of the work. With the hope that this work may contribute something to the advancement of the practice and litigation under the patent laws of the United States, the author submits his work to the public.

FISHER'S PRIZE CASES.

[Fish. Pr. Cas.]

Cases decided in the district and circuit courts for the Pennsylvania district from 1812 to 1813, with one case from the district court for Massachusetts. Reported and published by Redwood Fisher. Philadelphia, 1813. The volume was reprinted without change in 1871.

The following is the preface:

The restricted state of our commerce consequent to the impolitic system adopted by the government of the United States, and its further diminution by the disastrous war with England, have left us no means for the export of the products of the United States but by the employment of licenses or passports. The decisions of such of the courts of the United States, as have been called on to determine upon the legality of these passports are therefore deemed peculiarly interesting to the public. The national legislature having refused to enact laws, prohibiting the use of such safe-guards, by the few American ships which navigate the ocean; unless the judiciary shall consider their employment unauthorised by law; the merchant, may still enjoy a small portion of that commerce, which under a wiser administration and better auspices, would know no limits.

FLIPPIN'S REPORTS.

[Flip.]

Reports of cases in the circuit and district courts for the Sixth circuit from 1859 to 1881. By William Searcy Flippin, Esq. Two volumes. Chicago: Callaghan & Co., 1882.

The following preface is from vol. 1:

The reporter hopes that this volume will meet with a fair reception at the hands of the profession. When his mind was made up to the task of preparing a series of reports for this circuit, he at once set himself to the work of collecting all available and valuable material, and succeeded in getting into his possession a large number of cases decided within the last twenty years. Some of these, however, related to questions growing out of the war and its incidents, and were not thought to be of sufficient interest or importance for publication at this day. The bankrupt act being repealed, it was deemed best to omit all cases growing out of the same, except where other questions of permanent value were discussed. Of the cases found herein, it will be seen that twelve were decided by Halmer H. Emmons, all bearing unmistakable marks of his high abilities. As his judgments (he was often so pleased to term opinions,) shall be better known to his surviving brethren his fame will grow wider and brighter—just as they begin to duly appreciate the truth that a great master has left them forever. The case of *Tait v. New York Life Ins. Co.* [Case No. 13,726], a most important one, is reported in full, as also *Talcott v. Pine*

Grove [Id. 13,735], *Memphis v. Brown* [Id. 9,415], and *Sharpleigh v. Surdam* [Id. 12,711]. The merits of the opinions in these cases need no other reference. A number of Judge Brown's opinions are reported in the volume, as well as decisions by Judges Withey, Welker, Swing, H. V. Willson, Sherman, Ballard and Trigg. Judges McLean, Swayne and Miller wrote others. Questions in almost all branches of the law have been fully and elaborately discussed. Some difficulty was found in ascertaining the respective times at which certain of the opinions were delivered, as also the names of counsel representing the different parties, but the hope is entertained that no good ground of complaint will be found to exist because of a failure in this regard. In the next volume, perhaps, the task will be easier. In this connection, thanks are tendered to that distinguished veteran in the profession, Hon. Rufus P. Ranney, of Cleveland, for copies of opinions of Judge H. V. Willson and to his firm, and to Messrs. Willey, Sherman and Hoyt of the same city, for other courtesies. Upon consultation, Judges Swayne, Baxter and Hammond gave the reporter a written consent and approval of what he is now doing. They were of opinion that they had no power to appoint an official reporter, but were willing to confer upon the undersigned all the authority which they felt they possessed, and that was their consent and approval of his undertaking, adding their best wishes for his success. This was the mode adopted by reporters and judges under the old English system. To some of the cases notes have been added, which it is hoped may prove of some service. The one on page 513, through mistake, crept into the body of the opinion.

The following preface is from vol. 2:

One of the district judges having suggested that he experienced considerable difficulty in finding federal decisions on points of criminal law, it was deemed advisable to insert a few cases of that character in this volume. An effort was made to bring the decisions down to July 1, 1882, but the publishers found that this would make the book too large, and wholly out of proportion to the first volume.

GALLISON'S REPORTS.

[Gall.]

Reports of cases in the circuit court for the First circuit, from 1812 to 1815. By John Gallison, Esq. The first edition was published in 1815-1817; second edition in 1845. Boston: Charles C. Little and James Brown.

The following advertisement is from vol. 1:

All the cases, which appear in this volume, were decided before the subscriber assumed the office of reporter. It is much to be regretted, that the gentleman [John Stickney, Esq.], who preceded him, was compelled by his literary and professional pursuits, not only to relinquish the office, but to decline the labor of preparing the Reports for publication. The task would no doubt have been executed by him in a manner far more satisfactory, than was possible for one, who, to say nothing of other causes, was not present at the arguments, and was, therefore, but ill qualified to fill up the outline of the minutes taken in court. In many of the cases of the fall circuit, 1812, a slight sketch of the argument has been attempted, and the editor feels it his duty to apologize to the counsel for the very imperfect manner, in which it has been done. A consciousness of this imperfection, combined with the discovery, as the

work progressed, that it would exceed the proposed number of pages, induced him, in the succeeding cases, to confine the report to the bare statement of facts, and the opinion of the court, which fortunately has been uniformly in writing. In general, however, a very full account of the points raised will be found in the opinion. The subscriber hopes shortly to offer to the public more full reports of the many important cases, which were decided in the year 1814. This, however, will in some degree depend on the encouragement, the present volume may receive. When the proposals for this work were issued, it was supposed, that five hundred pages would easily contain all the cases intended to be published. Though they have, in fact, extended to six hundred and fifty pages, it has been thought best to bring down the Reports to the year 1814, omitting only such cases as appeared to involve no important legal principles. It is presumed, that this course will be most satisfactory to subscribers. It has however rendered necessary the addition of one dollar to the price, in order to secure the reimbursement of the expense of publication.

The following advertisement is from vol. 2:

Most of the questions, which are agitated in the courts of the United States, are remote from any of the ordinary subjects of discussion in other tribunals. They form a new and distinct branch of law, connected with some of our most important rights and interests. The construction of the federal and state constitutions, of treaties, and of the laws regulating our foreign commerce; the fixing of the boundary, which marks the division of power between the whole confederacy, and its several members; the limits of the jurisdiction of the national courts, as courts of common law, chancery, admiralty and prize; in what cases this jurisdiction is exclusive, and in what concurrent with the courts of the several states; all these are topics, which must long continue to supply cases of great legal doubt, the decisions upon which will form a body of public law of the United States. The revenue laws afford another class of questions of great interest, not only to the citizen, who may often be compelled to resort to the treasury for relief from penalties incurred through mistake or ignorance; but to the numerous officers, who are appointed to watch over the execution of these laws, and to whom an accurate knowledge of the extent of their powers and duties is in the highest degree important. If to these are added the many admiralty and maritime causes, which affect the interests of navigation and commerce; the large class of contracts and civil injuries, as well as crimes and offences, which belong to this branch of the jurisdiction of the federal courts; it will be sufficiently apparent, that their decrees ought not to be confined within the walls, where they are pronounced. Nor is it enough to publish the decisions of the supreme court only. Those of the circuit courts are final in by far the greater part of the cases, that are brought before them. In revising, on writs of error, the judgments of the district courts, they must in all cases decide in the last resort, with the single exception provided by the sixth section of the act of 1802, c. 31. Numberless questions will necessarily arise and receive their determination in these courts, especially in commercial districts and in cases relating to the revenue laws, which will never reach the supreme court. Of this fact abundant proof will be found in the ensuing volume. These considerations will, it is hoped, be sufficient to excuse the addition of another to those numerous volumes of Reports, to which at their present rate of increase, the "mille plaustrorum onus" of Heinæccius [preface to Vinnius] may, soon, without

a very extravagant hyperbole, be applied. If any thing may be anticipated from the favorable reception of the former volume, that now offered, containing cases not less important in principle or useful in practice, will not be unacceptable to the profession. (Mr. Hoffman, in his "Course of Legal Study" (2d Ed.) p. 460, recommends the following cases as leading cases: The Alligator [Case No. 248]; The Rapid [Id. 11,576]; The Grotius [Id. 5,844]; The Julia [Id. 7,575]; The Invincible [Id. 7,054]; *Maisonnaire v. Keating* [Id. 8,978]; The Jerusalem [Id. 7,294].)

In stating the arguments of counsel, the reporter has aspired to no other merit, than that of being brief, accurate and perspicuous. He alone must, in general, be responsible for the language employed. Where the case appeared to possess a more than ordinary degree of importance, the arguments have been reported in a more extended form. All the authorities cited have, it is believed, been retained, and the references, both in the arguments and opinions, have been carefully compared with the books referred to. Particular care has been taken to notice and preserve such points of practice, as arose incidentally, and were not of sufficient importance to call for a written opinion. But, whatever care and diligence may have been used, the reporter is conscious of many defects, for which he must claim the indulgence of the profession. At the period, which closes the present volume, he found his other engagements incompatible with a further attention to the duties of reporting. The work will be continued by a gentleman, whose qualifications ensure the successful performance of his undertaking.

GILPIN'S REPORTS.

[Gilp.]

Reports of cases in the district court for the Eastern district of Pennsylvania, from 1828 to 1836. By Henry D. Gilpin. Philadelphia: P. H. Nicklin and P. Johnson, 1837.

The following note, addressed to Judge Hopkinson, district judge, E. D. Pennsylvania, will be found on page iii:

This volume of reports, deriving its chief value from his genius and learning, is respectfully inscribed, as some acknowledgment of his uniform kindness and courtesy, throughout a constant official intercourse of several years.

HASKELL'S REPORTS.

[Hask.]

Reports of judgments of Hon. Edward Fox, district judge from the district of Maine, from 1866 to 1881. By Thomas Hawes Haskell, Esq. Two volumes. Portland, Me.: Loring, Short & Harmon, 1887-1888.

The following preface is from vol. 1:

Soon after the death of Judge Fox his executor placed in my hands the MSS. of his judicial opinions to be edited. Having devoted to this work such time as was free from more imperative duties, I now present the result in two volumes of reports. I have endeavored to verify all citations and quotations and to guard against all errors of the press, and I only desire that my work may be charitably received and prove valuable to my professional brethren.

HAYWARD AND HAZLETON'S CIRCUIT COURT REPORTS.

[Hayw. & H.]

Reports of cases, civil and criminal, in the circuit court for the District of Columbia, Washington county, from 1840 to 1850. By John H. Hayward, Esq., and George C. Hazleton, Esq. Washington: William H. Lowdermilk & Co., 1892.

This is the first volume of a series designed as a continuation of Cranch's Circuit Court Reports, and may be cited as 1 Hayw. & H. D. C., or as 6 U. S. Cir. Ct. Rep. D. C. 6 Cranch is merely an index and table of cases for vols. 1-5. These should not be confused with the Reports of the supreme court of the District, the first of which is sometimes cited as 6 D. C., etc. .

The following preface is from vol. 1:

This is the first of a series of Reports which when completed will cover a period of time from 1840 to 1863. These Reports will complete the link in the chain of records of the courts of the District of Columbia for that period, and be of great value and importance to the profession. In producing the same, all sources which could furnish any information upon the subject have been carefully explored, the records thoroughly examined, so that the work when done could be as authoritative and correct as possible. Heretofore there have been no accessible reports of the proceedings in this jurisdiction since the Reports of Judge Cranch, which left off at the November term of 1840. These Reports commence at the March term of 1841, and will complete the interval from 1840 to 1863, when the courts of the District of Columbia were reorganized. The cases are arranged in terms, and can easily be found and verified from the court records, and where found in cotemporary works they are given from them in full, with the necessary corrections and additions. There is not another jurisdiction in the United States in which the cases are so varied. As Chief Judge Cranch said: "It is the tribunal to which is intrusted, either originally or by appeal, the execution of those laws which protect the personal liberty and property, not only of the citizens of the District, but of all the officers of the government, from the highest to the lowest residing therein, and of all the members of both houses of congress and of all the citizens of the United States, visiting this neutral ground, the common domain of all the states, it seems to be peculiarly important that the decisions of that tribunal be publicly known." Here can be found cases of admiralty from the district court, of mandamus against the officers of the government, habeas corpus against arbitrary arrest by congress, writs of error from the criminal court, appeals from the orphans' court, justices of the peace, and the commissioners of patents. In addition to this it had a general jurisdiction in law and equity in cases in which either of the parties reside without the District. The five volumes of Cranch, with this volume and either one or two others which are to follow, we have thought it better to number consecutively, as they are reports of the United States circuit court. It is therefore proper, as this is a continuation of the valuable work of Judge Cranch, to style it "6th United States Circuit Reports of the District of Columbia and also 1st Hayward and Hazleton's Reports of the United States Circuit Court of the District of Columbia." That the work is necessarily imperfect

must be expected, considering the meager sources from which the cases are compiled. The dust and files of the old circuit court have been uncovered in obtaining the material necessary to make this volume as complete as it is.

Mr. Hayward had completed four numbers of this volume, embracing the first two hundred and twenty pages thereof, which can now be found in some of the private and public libraries of the city, and which is known as "Hayward's Reports of the Circuit Court of the District of Columbia." In the preparation of the remaining portion of this volume, he has associated with him, and has had the co-operation and assistance of, Mr. Hazleton, which he takes pleasure in saying has enabled him not only to present this volume to the public much earlier than he otherwise could have done, but which has added materially to the efficiency and value of the work itself.

The following preface is from vol. 2:

The original design of Hayward and Hazleton to publish, in convenient form, the decisions of the old circuit court for the District of Columbia, made during that period of its history which dates from the issue of the last volume of Cranch, in 1840, to the abolition of the court by the act of congress, approved March 3, 1863, is complete and is concluded in this volume, to be designated "7th U. S. Circuit Court Reports for the District of Columbia and 2d Hayward and Hazleton's Reports of the United States Circuit Court for the District of Columbia." These two volumes of reported cases have been compiled and printed from manuscripts of the original records of the cases themselves, as found on file in the court archives in the city hall, and are, therefore, commended to the public, and to the profession, for their accuracy. As will be seen by their perusal, we have prefaced each case with a carefully prepared syllabus intended to present an accurate synopsis of the material points therein passed upon by the court. Some of these decisions, such as involve important constitutional questions and proceedings in mandamus, may serve the profession and the courts as precedents in future adjudications. The organization of this court consisting of one chief judge and two assistant judges, followed very closely upon the organization of the government itself. Congress conferred upon it, by the act which created it, a broad and well defined jurisdiction. They gave it rank and legal power co-equal with the circuit courts of the United States. They expressly conferred upon it, "cognizance of all crimes and offences committed within said district, and all cases in law and equity between parties, both, or either of which shall be resident, or be found within said District, and also of all actions or suits of civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants, and of all seizures on land or water, and all penalties or forfeitures made, arising or accruing under the laws of the United States." The territorial jurisdiction of the court originally embraced the counties of Washington and Alexandria, and the waters of the Potomac coursing between them, and forming the District of Columbia. The latter has now within its limits the county of Washington; the county of Alexandria having been receded back by congress to the state of Virginia. The court was created by an act of congress, approved by President Adams, as early as February 27, 1801, at a period when the judicial power of the government was in its infancy, and exercised the jurisdiction conferred upon it by law, and administered justice upon the rights and property of men for more than a half century of its history. Its judges ranked well as jurists, while some still merit and receive distinguished consideration for the skill they evinced, and the contributions they made

to American jurisprudence. It will be found that lawyers of great learning and ability took part in these proceedings, in some instances distinguished talent in the profession from the states. This work has not been one of profit, and we shall scarcely realize enough out of the sale of the entire edition issued to pay the expenses incurred in its publication, but this is immaterial, as we shall find our compensation largely in the pleasure afforded us in thus rescuing from practical oblivion decisions of merit and value, as we believe, to the profession and to the community.

HEMPSTEAD'S CIRCUIT COURT REPORTS.

[Hempst.]

Reports of cases in the superior court of Arkansas territory, from 1820 to 1836, and in the district and circuit courts for the district of Arkansas, from 1836 to 1856. By Samuel H. Hempstead, Esq. One volume. Boston: Little, Brown & Co., 1856.

The following is the preface:

This volume of Reports is presented to the profession to preserve the decisions of the federal courts of Arkansas in a more enduring form than in tradition. Adjudged cases become precedents, and it is therefore important that they should be known. In fact, if we have to appeal to recollection, or neglected records, justice safely administered can hardly be expected. Those practising in these courts have felt the inconvenience arising from the want of a published report of their decisions. If this volume shall wholly or partially remove the evil, my labor will not have been lost. It can never be a source of profit to me, and certainly distinction is not won by performing the duties of reporter. It forms a sort of judicial history of Arkansas from its commencement as a territory down to this time, and in that point of view will possess some interest there, if not elsewhere. The decisions of the superior court are embraced, because it is conceded on all hands that the court was always an able one; and although this book, no doubt, contains many cases of little or no value, yet in that respect it is not different from other Reports. Whilst tautology has been omitted in the opinions, the substance, and generally the exact language of the court, has been preserved. Cases sustaining a principle decided have been added; and if time had permitted, I should have made full notes to the cases. The late Benjamin Johnson, of Arkansas, who sat in those courts for nearly thirty years, and was their pride and ornament, generally wrote out his opinions, and before his death placed such as had been preserved in my hands. [Here follows a eulogy of Judge Johnson, which will be found in the Biographical Notes.]

HOFFMAN'S LAND CASES.

[Hoff. Land Cas.]

Reports of land cases in the district court for the Northern district of California, from 1853 to 1858, decided by the Honorable Ogden Hoffman, district judge. One volume. Reported and published by Numa Hubert. San Francisco, 1862.

The following is the preface:

The accompanying volume contains all the opinions delivered by the judge of the United States district court for the Northern district of California, in land cases, during the time

over which the Reports extend. They were obtained by the reporter, with the judge's permission, from the files, and are published as originally prepared and delivered. There has also been added a list of the governors of California from its first settlement, etc., together with a sketch of the early history of Upper California. In the appendix will be found a carefully prepared table of all the claims presented to the board of commissioners, with the number of each on the docket of the commissioners, and of the district court to which it was appealed, and the corresponding number on the Index of Jimeno; also the name of the claimant, of the original grantee, the date of the grant, and the name of the rancho and of the governor who granted it, the quantity claimed, the county in which it lies, a brief statement of the proceedings with regard to it before the board, the district and supreme courts, the number of acres when surveyed, whether a patent has been issued, together with a full index of the names of ranchos and of claimants. It is hoped the volume will be found useful to the profession.

HOLMES' REPORTS.

[Holmes.]

Reports of cases in the circuit courts for the First circuit, from 1870 to 1875. By Jabez S. Holmes. Boston: Little, Brown & Co., 1877. One volume. Covers the same period as 3 and 4 Cliff., but does not contain any cases which appeared in those volumes.

HUGHES' REPORTS.

[Hughes (U. S.)]

Reports of cases in the circuit and district courts for the Fourth circuit from 1870 to 1883, with some old cases beginning in 1792. By Hon. Robert W. Hughes, district judge. Five volumes. Vols. 1-3 were published by W. & O. H. Morrison, Washington, 1877-80; vols. 4-5, by Banks & Bros., New York, 1883. The last volume is devoted to admiralty cases from 1808 to 1883.

The following preface is from vol. 1:

The decisions of the courts of the United States in the judicial circuit now designated as the Fourth, so far as yet published, are embraced in the two volumes of Burr's Trial, by David Robertson; the two volumes of Marshall's Decisions, published by John W. Brockenbrough; the volume of Taney's Circuit Court Decisions, published by J. M. Campbell; and the recent volume of Chief Justice Chase's Decisions, published by Bradley T. Johnson. In an appendix to Sixth Call's Virginia Reports are five decisions, three of which are not elsewhere to be found,¹ one of them by Chief Justice Jay, and the other two respectively by Associate Justices Iredell and Washington. These three cases, in order that they may be found in some volume of United States Reports proper, are incorporated into the present volumes. I have also incorporated a decision of Chief Justice Ellsworth never before published in a permanent form, and two other cases, from Francois Xavier Martin's Notes of North Carolina Decisions, published in 1797. [Hamilton v. Eaton, Case No. 5,980; Jones v. Neale, Id. 7,483.] This author was afterwards

¹ [See Sheldon v. Custis, Case No. 12,736; U. S. v. Mundell, Id. 15,834; Banks v. Greenleaf, Id. 959.]

chief justice of the supreme court of Louisiana. The present volumes contain all the decisions up to this time made by Chief Justice Waite which he has reduced to writing; and all decisions of Circuit Judge Bond preserved in manuscript form, which I have been able after careful endeavor to obtain. To them I have added a number of decisions in circuit court made by the several district judges sitting there. I probably owe an apology to the profession for including in the present volumes so many decisions in bankruptcy and admiralty of the district courts, and especially so many which have been made by myself. But, in truth, the necessity which was felt to exist of publishing these district court decisions, suggested the publication of those also which I could collect of the circuit courts.

The admiralty jurisdiction of the ports and waters of Chesapeake Bay, and of the ports of the Carolinas, has been fruitful of many important cases, reports of which cannot fail to be interesting to admiralty lawyers generally, while they are almost indispensable to those who practice in the admiralty courts of the Fourth circuit. Many cases are decided in the admiralty courts proper, which do not reach appellate courts. These decisions are upon points most frequently arising in practice, and the rulings in them are really of more practical value to the admiralty lawyer than those often are in the exceptional cases which go up by appeal for final determination. These remarks apply with greater force to the decisions of the courts of bankruptcy contained in these volumes. In the single district of Eastern Virginia, there have been filed 6,455 cases in bankruptcy, and 161 suits connected with bankruptcy; 6,616 in all. When the writer came to the bench, in January, 1874, under rulings of circuit and supreme courts then recently and soon afterwards made, a large proportion of these cases were brought before him by petition praying the setting aside or modification or review of former orders and decrees made in them. Naturally, the action of the court upon these petitions suggested or required written explanations of the principles on which the court acted. These written decisions had often to be referred to in subsequent cases, and a desire for the publication of them in compendious and convenient form accessible to the bar has become general. These are the considerations which have induced the writer to insert many of the more important of his own decisions in bankruptcy in the second volume, and to collect from other districts of the circuit like decisions of his brethren of the bench. This he has done with diligence, and he regrets that he has been able to collect comparatively but few of these last.

Although the decisions in these volumes are not published under distinct classifications, yet the reader will find that they are in fact grouped in the following order, viz.: cases in equity, cases at law, indictments, ex parte proceedings under extraordinary writs,—these in the first volume; and, in the second, admiralty cases and bankruptcy cases. Near the end of each volume will be found a few cases dislocated from these groups. But for the feeling that reports professing to cover the period of the political offences against the civil rights and enforcement acts which have been tried in this circuit, would be deficient, if not embracing at least as many of the cases as exhibit the principles of law on which they turned, I should have gladly omitted the whole subject from these volumes. I reflect, however, that these are books for lawyers and not for politicians or the populace; that the whole class of civil disorders out of which the trials grew have ceased, I hope and believe, forever; and that even if there be in the evidence as reported anything which, in worse times than the peaceful era which we now have entered and confidently anticipate, would tend to pro-

duce or keep alive excited feeling, no such effect is or will be possible. I am sure that no public evil can come from publishing the three or four trials of the class alluded to which are given in these volumes; and I should regret to find that in the manner in which the evidence has been reported any individual or class has been wronged either by omission or exaggeration.

The following preface is from vol. 4:

The present volume of decisions in the common law, equity and bankruptcy courts of the United States, held in the Fourth judicial circuit, will be followed by a volume of admiralty decisions, now in press. These two volumes will terminate the present series of Reports, as the object of their publication will henceforth be fully subserved by the Federal Reporter, edited by Robert Desty, Esq., and published by the West Publishing Company, of St. Paul, Minnesota. That book furnishes with admirable promptness and fidelity reports of all important decisions rendered by the federal courts in all the judicial circuits and districts of the United States.

The following preface is from vol. 5:

The present volume is a collection of the decisions of the courts of the Fourth circuit on admiralty subjects which are not included in the various Reports of this circuit already published. Some of the cases contained in this volume have previously appeared in print. The first six were selected from old numbers of Hall's Law Journal (a magazine long out of print and scarce), and a number of the remainder have appeared in the Federal Reporter. But it was nevertheless deemed advisable to insert them, so as to make the volumes of Hughes' Reports an epitome of the federal decisions of the circuit—the more so, as the facilities for prompt publication afforded by the Federal Reporter will render unnecessary the continuance of the present series. It is to be regretted that reporters have not hitherto adopted more frequently the plan of collecting admiralty decisions into separate volumes. The practitioner who desires to make a specialty of admiralty finds the law on the subject scattered through scores of volumes of federal reports, many of them scarce and all costly. He may frequently have to purchase an entire volume for the sake of a single case. Hence, until late years the decisions of one circuit have been practically inaccessible to the bench and bar of another. The result has been a serious conflict of authorities on many points of admiralty law. The comparative cheapness of the later federal reports as compared with the old, the increase of association law libraries, and, above all, the foundation of the Federal Reporter will gradually make this conflict disappear. In fact it is already disappearing, and under the influences above specified the system of admiralty law is daily becoming more homogeneous and less fettered by the restrictiveness of former judges. And although in the past a support might not have been secured for such a publication, yet considering the unexampled growth of admiralty jurisdiction and litigation in the past decade, the day is not far distant when a magazine devoted exclusively to admiralty in America will be established and generously sustained. Then the admiralty lawyer will no longer be obliged, in order to keep posted in his profession, to cumber his library with hundreds of pages of mere descriptions of patent machines, or discussions as to whether some town ought to be made to pay her bonds. The plan of reporting by subjects instead of by states or circuits is certainly the proper plan and as certainly the plan of the future. A few cases have been incorporated in this volume which, while not

strictly speaking a part of admiralty law, are so cognate thereto as to have been deemed worthy of insertion. The reporter, not wishing to make the judges responsible for his head-notes, has distinguished by an asterisk those which were prepared by himself, leaving without any distinguishing mark those prepared by the judges. Some of the cases have been annotated by additional authorities on the question decided; care being taken however not to use such notes as a means of inflicting the private opinions of the reporter on the profession. He regrets that the demands of his practice prevented him from making these notes more extensive.

LOWELL'S DECISIONS.

[Low.]

Judgments delivered in the federal courts for the district of Massachusetts, from 1865 to 1877. By John Lowell, district judge. Two volumes. Boston: Little, Brown & Co., 1872.

McALLISTER'S CIRCUIT COURT REPORTS.

[McAll.]

Reports of cases in the circuit courts for the districts of California, from 1855 to 1859. By Cutler McAllister. One volume. New York: John S. Voorhies, 1859.

MAC ARTHUR'S PATENT CASES.

[MacA. Pat. Cas.]

Reports of cases in the circuit and supreme courts of the District of Columbia on appeal from the commissioner of patents, with a table of the patents involved in such cases, and with references to cases wherein these patents have been subsequently litigated. By Frank MacArthur, examiner of interferences in the United States patent office. One volume. Washington, D. C.: William A. Morrison, 1885.

The following is the preface:

It is believed that these decisions of the judges on appeal, now presented to the profession in collected form, will prove an interesting addition to the literature of patent law. The decisions cover very nearly the entire period of the active life of the patent office. In the system of quasi-judicial investigation, or examination preceding the grant of the patent, which was instituted by the act of 1836, the judges of the circuit and supreme courts of the district of Columbia have acted for many years as the tribunal of last resort. According to the provisions of the original act of 1836 the applicant was given an appeal from the decision of the commissioner to a board of examiners appointed by the secretary of state for that purpose. By the act of 1839 this appellate jurisdiction was vested in the chief justice of the circuit court of the District of Columbia. This jurisdiction was extended by the act of 1842 to include the associate justices of the court. By the act of 1870 and by the Revised Statutes now in force the appeal is taken to the supreme court of the District of Columbia, sitting in general term. In their anomalous relations with an executive department, the judges do not exercise the purely judicial functions of a court of record. The judgment is recorded in the patent office

and controls the further proceedings of the commissioner, but does not preclude any person interested from renewing the contest in another forum. The very singularity of this relation, however, gives peculiar value to these decisions as the opinions of the judicial mind upon the many questions that arise in the patent office in the preliminary stages of the patent unaffected by the presumptions of law that follow the patent itself throughout the subsequent litigation. In this regard these cases furnish a line of precedents bearing upon the controversies that arise by way of bill in equity under section 4915, Rev. St., to compel the issuance of the patent. For a brief period immediately following the opinion of the attorney general of August 20, 1881, the secretary of the interior exercised concurrent jurisdiction with the court as an appellate tribunal from the commissioner of patents, by way of petition, in the nature of appeal. It may now be regarded, however, as definitely established by the decision of the supreme court of the United States in the case of *U. S. v. Butterworth*, 29 O. G. 615, that the supreme court of the District of Columbia exercises an exclusive jurisdiction over the judicial actions of the commissioner. This circumstance may be thought to lend additional importance to these volumes. Many of the decisions appearing in this volume are already well known. Some of the opinions of Judge Cranch were included in an early edition of *Curtis on Patents*, and individual opinions have from time to time found their way into periodicals or have become familiar by dint of citation; but as a body of judicial learning, the decisions have been practically unavailable to the profession. Many of the cases were digested by Mr. Law in his valuable digest, under the name of "The Manuscript Appeal Cases;" but, as the lawyer is aware, the syllabus without the case is but an illusive guide to the law. This volume has been carefully and faithfully compiled from the original records on file in the United States patent office. It is expected that another volume of equal size will bring the Reports down to date, and it is the present intention of the author to include in the second volume the opinions of the attorneys general in patent matters, now scattered through the sixteen volumes of the *Opinions of the Attorneys General*. [Mr. MacArthur died shortly after the first volume was published, and the second was never issued.] The table of patents, which immediately precedes the text, will enable the reader to follow the subsequent history of the application or patent under consideration in any particular case so far as it has been involved in litigation, and has been construed, sustained, or declared invalid.

McCrary's Reports.

[McCrary.]

Cases in the circuit courts for the Eighth circuit, from 1877 to 1883. By George W. McCrary, circuit judge. Five volumes. Chicago: Callaghan & Co. The volumes appeared at intervals from 1881 to 1884.

McLean's Reports.

[McLean.]

Reports of cases in the circuit courts for the Seventh circuit, from 1829 to 1855. By John McLean, circuit justice. Six volumes. Vol. 1, Cincinnati: E. Morgan & Co., 1840. Vol. 2, Columbus: Derby & Allen, 1843. Vol. 3, Cincinnati: Derby, Bradley & Co., 1847. Vols. 4-6, Cincinnati: Derby & Co., 1851-1856.

The following preface is from vol. 1:

These Reports were prepared and published at the request of gentlemen of the bar, in different parts of the Seventh circuit; and it is hoped that they will be found somewhat useful to the bench and the bar, at least within the circuit. Many of the important cases reported, were taken to the supreme court for revision, and the decisions of the circuit court in all of them were affirmed, with the exception of some two or three decrees, the principles of which were mainly affirmed, but the forms of entering the decrees were modified. These modifications are stated in the Reports. In some of the opinions of the court, there will be found a similarity to the opinions of the supreme court, on a review of the same cases. This arises from the fact, that the opinions in both courts were written by the circuit judge; who does not deem it necessary to write the opinions delivered in the circuit court, over again.

MASON'S REPORTS.

[Mason.]

Reports of cases in the circuit courts for the First circuit from 1816 to 1830. By William P. Mason. Five volumes. Boston: Wells & Lilly, 1819-1831.

The following advertisement is from vol. 1:

The judicial systems of the United States, and of the separate governments composing the Union, give the promise of so unlimited an increase to the number of volumes forming the library of the American lawyer, already overcrowded with English reports, that some apology to the profession seems necessary for every additional one that is presented to it. The present series of Reports was commenced at a period when the relations between this country and Great Britain had thrown into the circuit courts of the United States an unusual quantity of business, and when the construction of national law, as well as the adjustment of private rights, had given great interest and importance to their decisions. From the local situation of the First circuit, a large proportion of the most important cases fell within the jurisdiction of this court; and it was thought that a collection of them might not be altogether unacceptable to the profession, nor without some advantage to the jurisprudence of the country. Although the same reasons cannot now be offered for the continuation of these Reports, as seemed sufficient to authorize their commencement, it is hoped that those gentlemen of the bar, who have occasion to look into this volume, will not find cause to regret its appearance. It has been the only object of the present reporter to give a correct statement of the cases as they were presented, and of the decisions of the court. The arguments of counsel have been added, when the nature of the discussion appeared to call for their insertion. To those, who are acquainted with the legal character of the learned justice who presides on this circuit, it will be sufficiently apparent, that this was all that would be left for the reporter to do.

NEWBERRY'S ADMIRALTY REPORTS.

[Newb.]

Reports of admiralty cases in the district courts for the western lake and river districts, from 1842 to 1857. By John S. Newberry, of the Detroit bar. One volume. New York: Banks, Gould & Co.; Albany: Gould, Banks & Co., 1857.

The following is the preface:

In this volume are collected the most important admiralty decisions, of seven districts of the United States, bordering upon the great northern lakes and the Mississippi river and its tributaries, for the last ten years. The admiralty courts have been gradually growing into favor with those doing business upon these waters; and they are fast absorbing the entire mass of maritime litigation growing out of the vast shipping interest and extended commerce of our inland navigation. And up to the present time, there has been no effort made to present in an authentic form, any of the admiralty decisions of the eminent judges presiding over these courts; but the profession have been compelled to rely upon newspaper reports, and tradition, for their knowledge of the decisions that may have been rendered. The want of such a book of reports has been often felt by those practicing in the admiralty courts; and it was to supply that want, that the reporter undertook to gather from the inland admiralty courts the materials forming the present volume. The author takes this opportunity to acknowledge with pleasure, the great obligation he is under to the judges whose decisions are herein reported, for their full and hearty co-operation and assistance in enabling him to present to the profession so complete, and as he hopes will prove, so valuable an addition to the admiralty learning of the country. He also would express his thanks to the many members of the profession, from Louisiana to Michigan, who have so kindly and promptly given so much valuable assistance in furnishing statements of facts, and memoranda of arguments upon the trial of the different cases. The publication of these Admiralty Reports will be continued, and will probably hereafter contain the decisions of other districts not reported in this volume.

OLCOTT'S REPORTS.

[Olcott.]

Reports of admiralty cases decided by Judge Betts in the district court for the Southern district of New York, from 1843 to 1847. By Edward R. Olcott. New York: Jacob R. Halsted, 1857.

PAINÉ'S REPORTS.

[Paine.]

Reports of cases in the circuit courts for the Second circuit, from 1810 to 1840. By Elijah Paine, Jr., counselor at law. Two volumes. The first was published in 1827, and the second in 1856, after the death of the editor, and under the supervision of Thomas W. Waterman, Esq. New York: R. Donaldson.

The following preface is from vol. 2:

A large proportion of the learning of the law is contained in the Reports. To be reminded of their utility, we need only to remember, that it is to this source we must look for the interpretation, not only of statutes, but also of all the leading rules and principles which compose our system of jurisprudence. Every elementary treatise derives its sanction from the reported cases, and no judicial proceeding is conducted without constant reference to, and dependence upon them. They are as various as the conflicting and diversified interests of society, no two cases scarcely ever being in all

their features precisely alike. It is this protean character which gives them their true value, for they thus become eminently serviceable as examples. Arising, as they do, from the common transactions of active life, at the period of their decision they are of more or less practical significance; and while it must be admitted that some, in the progress of time, become obsolete, yet many, founded as they are upon the broad and everlasting foundation of universal justice, continue to be studied and cited long after the occasion which gave birth to them has been forgotten. It is not surprising, then, that this species of knowledge is sought after with avidity by the profession, and that the best and most useful libraries are those which are the most complete in all the standard reports. In a commercial community like ours, cases of deep general interest, involving many nice questions, are constantly being tried, and it cannot be doubted that the withholding an accurate report of them, would be a public misfortune.

The comparative value of reports must depend upon the importance of the questions decided in them, as well as upon the dignity, ability and learning of the court. It may be safely affirmed, that the cases in the second volume of Paine's Circuit Court Reports, are, at least, equal in interest and importance, to any to be found in similar publications, while some of them are of very decided value. With regard to the court, it may be sufficient to remind the reader that they not only emanate from the circuit court of the United States, but from some of the ablest judges of that court. Of the judges we have only to enumerate the illustrious names of Chief Justice Jay, Brockholst Livingston, Wm. P. Van Ness, James M. Wayne and Smith Thompson, to be satisfied of the high character of the bench which pronounced these opinions, and of their consequent weight as authority. To Justice Thompson, however, we are chiefly indebted for the learned, clear and satisfactory decisions which are contained in this volume. [Here follows a reference concerning Mr. Justice Thompson, which will be found in the Biographical Notes.] He subsequently filled the post and discharged the duties of chief justice of the state of New York; and on the 18th of March, 1823, a vacancy having occurred on the bench of the supreme court of the United States, by the lamented death of the Hon. Brockholst Livingston, one of the associate justices and presiding judge of the circuit court in the Second circuit, on the 9th of December of the same year Judge Thompson was appointed his successor. It was while he served in the latter capacity that the opinions contained in the following pages were pronounced. They were given by Judge Thompson when he had attained the fullest maturity of judgment, and after many years rich in experience as well as in study; they ought, therefore, to possess, and doubtless do possess, a superior value. This volume has been compiled from manuscript cases which the late Hon. Elijah Paine, Jr., had collected, and partly arranged with a view to publication. The design of Judge Paine was, that they should form a second volume in the series of his Circuit Court Reports, and he had selected them with care for that purpose. They begin in 1827 and continue to 1840, thus commencing where the cases in the first volume of Paine's Circuit Court Reports leave off, and extending over a period of thirteen subsequent years. They were all decided in the Second circuit with one exception—a case relative to the right of British creditors to recover claims which subsisted prior to the American Revolution, tried in the Virginia circuit; and in which the general principles of international obligation which ought to govern in such cases, are discussed with great learning and ability by Chief Justice Jay. As this case had been marked for

publication by Judge Paine, and was in itself of considerable interest and importance, it was not thought advisable to omit it; although it did not come within the original design and scope of the work, which was simply to report cases tried in the Second circuit. The biographical sketch of the late Judge Paine [see Appendix], prepared by his brother, Dr. Martyn Paine, a physician of eminence of this city, will command attention for the feeling, yet truthful tribute of affectionate admiration and regard it pays to the memory of one whom, while living, the bar of New York delighted to honor, and the recollection of whose learning and virtues, now that he is no more, will long be preserved. The duties of the present editor may be comprised as follows: A careful and thorough revision of the manuscript; the preparation of an outline or statement of each case, except when rendered unnecessary by minuteness and circumstantiality in the opinion; ample and comprehensive, and yet concise head notes; a complete table of cases; and a very full index. Both volumes have also been annotated with a view to introduce the more recent cases. It is hoped that the notes, which are quite extensive, will prove useful, and that they will enhance the practical value of the work.

PETERS' ADMIRALTY DECISIONS.

[Pet. Adm.]

Admiralty decisions in the district court for Pennsylvania. By the Honorable Richard Peters, with some cases decided by Judge Hopkinson, from 1780 to 1806, and a few cases from other districts. The appendix contains the laws of Oleron, Wisbuy, and the Hanse Towns, with the marine ordinances of Louis XIV., a Treatise on Admiralty, and the laws of the United States relative to mariners. Two volumes. Sometimes printed as one. Philadelphia: William P. Farrand, 1807.

PETERS' CIRCUIT COURT REPORTS.

[Pet. C. C.]

Reports of cases in the circuit courts for the Third circuit, from 1803 to 1818. By Richard Peters, Jr., counselor at law. One volume. Philadelphia: William Fry, 1819. It covers part of the period covered by Washington's Reports, but no cases are duplicated.

The following is the advertisement:

The public are exclusively indebted to Mr. Justice Washington for the reports contained in this volume. They have been compiled from his note books, in which they were entered, with no view to their publication, but solely for his private reference. They will be found to contain all the essential parts of a full report of the cases, and a faithful statement of the opinion of the court, on the points intended to be decided. It would have comported more with the estimate the editor has formed of the duties executed by him, to have omitted his name in the title page, but in compliance with the wishes of Judge Washington, and as this volume forms the first, of a series of Reports he is about to publish, of decisions in the same court, and in which his agency will be more extensive, the present form has been adopted.

This volume contains all the cases decided in the circuit court, for the district of New Jersey, since Mr. Justice Washington presided in that court, and as late as April term, 1818; and all the decisions in the Pennsylvania district from 1815, to the division of the district, in 1818. The publication of the earlier decisions of the court, in the Pennsylvania district, has been undertaken by a gentleman, whose skill and ability for the performance of the task, is universally admitted, and by whose liberal relinquishment of the situation, in favour of the editor of this volume, he has become the reporter of the decisions of the circuit court of the United States, for the Third circuit.

ROBB'S PATENT CASES.

[Robb, Pat. Cas.]

A collection of patent cases decided in the supreme and circuit courts from 1789 to 1850, with notes. By James B. Robb, counselor at law. Two volumes. Boston: Little, Brown & Co., 1854.

- o The following preface is from vol. 1:

The collection of cases embraced in these two volumes, contain all of the patent cases decided in the circuit courts of the United States and reported prior to the first of January, 1850; and all of the cases decided in the supreme court of the United States to the same period. They are arranged as nearly as may be in chronological order; numbering one hundred and twenty-four cases, selected from sixty volumes of Reports, namely: Washington, Brockenhoro', Peters, McLean, Paine, Gilpin, Gallison, Mason, Wallace, Sumner, Baldwin, Story, and Woodbury and Minot, of the Circuit Court Reports;—and Cranch, Wheaton, Peters, and Howard, of the Supreme Court Reports, thus embracing all of the decisions illustrating the principles of the patent laws of the United States. A few cases have been decided by the state courts, involving, incidentally, questions arising under the patent laws, which have been omitted, as not affecting the principles or doctrines settled by the United States courts; exclusive jurisdiction of these subjects, in the administration of the patent laws, being vested in the United States circuit and supreme courts. The decisions upon the earlier statutes, in all cases which have been modified by subsequent legislation, have been appropriately noted, with reference to the statutes, a collection of which will be found in the appendix, with marginal notes indicating the alterations and additional provisions. The index embraces all of the topics discussed and decided by these courts, and is so full as to greatly abridge the labor of search for the requisite authority. It is proposed to continue this collection by the addition, from time to time, of volumes embracing the cases decided subsequent to the first of January, 1850, if the facilities afforded hereby shall be deemed sufficient to warrant it. It is much to be regretted that the numerous decisions of his honor, Judge Sprague, in the circuit court for the district of Massachusetts, have not been reported. Their luminous exposition of the principles of the patent laws, in their application to the increasing and ever-varying mechanical developments of the laws of phenomena, in their progress from obvious to refined and intangible distinctions, which characterize the cases which he has been called upon to decide, would not only have enhanced the value of these volumes, but would have greatly enriched the science of mechanical jurisprudence. Such of these decisions, however, as may have been preserved, will be collected and embraced in the subsequent volumes of these Reports.

SAWYER'S REPORTS.

[Sawy.]

Reports of cases in the circuit and district courts for the Ninth circuit, from 1870 to 1884. By L. S. B. Sawyer. Fourteen volumes. San Francisco: A. L. Bancroft & Co., and the Bancroft-Whitney Co., 1873-1891.

The following preface is from vol. 1:

The judges of the circuit and district courts of the United States for the Ninth circuit, yielding to a very generally expressed desire of the legal profession in the circuit, that their decisions should be reported in a regular series, have authorized the undersigned to report such of the numerous decisions rendered as may be supposed to be of a somewhat general and permanent interest to the profession. The series will commence with the reorganization of the circuit courts, by the appointment of circuit judges, under the act of congress of April 10th, 1869. The extension of the jurisdiction of the national courts by recent legislation, and the appointment of circuit judges, who will be at all times engaged in the discharge of their duties on the circuit, has tendered to largely increase the business of these courts. Many legal propositions of great interest and importance are discussed in the decisions now being rendered in the United States circuit and district courts, and no circuit is likely to present a greater number of new and important questions of lasting interest, than the Ninth. The Reports now commenced will embrace cases at law, civil and criminal; cases in equity, admiralty, and bankruptcy; and special cases arising under acts of congress. The circuit court for the district of California, in addition to its ordinary jurisdiction, has, also, the new and final appellate jurisdiction from the United States consular and ministerial courts in China and Japan, in the exercise of which novel and interesting questions for adjudication are likely to arise. This volume contains the first case brought to the circuit court from the consular court at Canton, in the Empire of China. Should the demand for the present volume indicate that it supplies a want to the profession, the series will be continued.

The following note is taken from vol. 4, p. 455:

The following cases were decided by Mr. Justice Field, in the circuit court, before the passage of the act of 1869, providing for the appointment of circuit judges. Those relating to the title to real property are of special interest to the profession in California. The other cases are believed to be of general interest. Most of them have been often cited from the manuscript by the California bar, and a desire has been expressed that they should be reported. The charges of the court, in the few instances in which they are given, were delivered in writing, after argument, upon the points of law involved. The questions received as thorough consideration as is given to cases tried without a jury.

SPRAGUE'S DECISIONS.

[Spr.]

Decisions by Judge Sprague in maritime, admiralty, and prize causes in the district court for Massachusetts, from 1841 to 1864. Two volumes. Vol. 1 is edited by F. E. Parker; vol. 2, by John Lathrop. Vol. 1 was published in 1861 by T. & J. W. John-

son & Co., Philadelphia. The second volume was published in 1863 by Little, Brown & Co., Boston.

The following preface is from vol. 1:

A small part only, of the decisions made by Judge Sprague, have ever been reported. Owing to his inability to use his eyes in reading or writing, his opinions were delivered orally. A considerable number of the opinions, embraced in this volume, especially the more elaborate ones, were originally written out from his dictation, and some of them are now published for the first time. The others were in the first instance reported by the counsel, and published in the Law Reporter, or elsewhere. All of them have been revised by Judge Sprague, and now appear with his sanction. In this revision, the original reports have, sometimes, been curtailed, by omitting the analysis and comparison of evidence, which, however important to the parties in the cause, are of no interest to the professional reader, who desires only to know what were the facts found by the court, upon which the law was pronounced. The head-notes were prepared by the judge; as a general rule, they contain only the points decided, but in some instances embrace legal propositions which were the foundation of the reasoning of the court. An occasional foot-note has been added, where the authorities subsequent to the decisions seemed to demand it; and these, and the references to cases, have been made by me as editor. In collecting the reported cases, I have had the valuable assistance of Mr. Charles Francis Adams, Jr., of the Boston bar, by whom most of that labor was performed.

The following preface is from vol. 2:

The first volume of Sprague's Decisions was published in 1861. In the early part of 1865, Judge Sprague retired from the bench. This volume includes the most important of the decisions rendered by him subsequently to the publication of the first volume of his decisions, and some of a prior date. All of them now appear with the sanction of Judge Sprague. The prize cases were prepared for publication by the Hon. Richard H. Dana, Jr. The foot-notes were made by me as editor, and the work has been published under my supervision. [Signed] John Lathrop.

STORY'S REPORTS.

[Story.]

Reports of cases in the circuit courts for the First circuit, from 1839 to 1845. By William W. Story. Three volumes. Boston: Charles C. Little and James Brown, 1842-1855.

The following preface is from vol. 3:

This volume contains the last opinions ever pronounced by Mr. Justice Story, and concludes the grateful labors of the present reporter. It will be found to contain no indications of failure of powers, but to give added proof of that comprehensive grasp of intellect, singular acuteness in analysis, luminous insight, and breadth of learning, which in him were so harmoniously blended, and directed to the great end of morals, justice and humanity. While the last opinion in this book was yet undelivered, Mr. Justice Story, after a short and violent illness, died on the 10th day of September, 1845, at the age of 66. [Here follows an account of the proceedings of the bar upon the death of Justice Story, which will be found under "Story" in the Biographical Notes.]

SUMNER'S REPORTS.

[Sumn.]

Reports of cases in the circuit court for the First circuit, from 1829 to 1839, by Hon. Charles Sumner. Three volumes. The second edition was published in 1851 by Charles C. Little and James Brown, Boston.

TANEY'S CIRCUIT COURT REPORTS.

[Taney.]

Reports of cases in the circuit court for the district of Maryland, decided by Roger Brooke Taney, chief justice of the supreme court, from 1836 to 1861. Reported by James Maron Campbell, of the Baltimore bar. One volume. Philadelphia: Kay & Bro., 1871.

The following notice is from page iii.:

As circumstances prevented the publication of this volume during the lifetime of the compiler, the laborious and important duty of reading the proof necessarily devolved upon others. In this emergency, Mr. Brightly, of the Philadelphia bar, most kindly offered his services. The family of the late chief justice desire to express their appreciation of the motives which prompted him to this "labor of love," while they feel assured they may unite with the profession in the opinion,

"Nil tangit quod non æquiparat."

VAN NESS' PRIZE CASES.

[Van Ness.]

Reports of two prize cases in the district court for the New York district. By the Honorable William P. Van Ness, district judge. New York: Gould, Banks & Gould, 1814.

The following is the preface:

The first of the following opinions was published in the National Advocate on the 3d January last. The amount of property in controversy, the nature of the principles which it involved, and the ability with which they had been examined and illustrated by the judge, gave to this case a novelty and importance that attracted very general attention. The publishers were so frequently applied to, by their customers and others, for copies of this opinion, without being able to supply the demand, that they at length resolved to reprint it in the form of a pamphlet. While it was in the press, they were informed that Judge Van Ness had decided another interesting question of prize law; and on application to him, received the second of the following opinions. This, in point of time, was first delivered; but as the printing of the other was commenced before it was obtained, the order could not conveniently be changed. This will explain also some allusions in the Case of Beswicke & Son, to questions decided in the Case of Richardson.

WALLACE'S NOTES OF DECISIONS.

Manuscript reports of cases in the Third circuit. See Wall. Sr.

WALLACE'S REPORTS.

[Wall. Sr.]

Reports of cases in the circuit court for the Third circuit in 1801. By John B. Wallace. One volume. The second edition was published in 1838, with two additional cases. This has been reprinted by W. J. Gilbert, St. Louis, 1871.

The following is the preface to the first edition:

By those who are conversant with subjects of municipal jurisprudence, the design of publishing memorials of adjudged cases in the circuit court of the United States for the Third circuit, will, no doubt, be received with approbation. Questions on the constitution and laws of the United States, on general commercial law, and the law of nations, must furnish a series of decisions highly valuable to every juridical officer, and of great importance to the community; and such are the questions which will principally occupy the attention of this court. It is only for the execution of the task, that I feel anxiety. I am no ways satisfied, that this first essay will be thought to augur favorably of the reporter. It may serve, however, to soften the rigor of judgment, to know that it has been made under considerable disadvantages which will not attend upon future efforts; and if, in these circumstances, the present publication should meet with patronage, I shall feel encouraged to proceed, in the hope of arriving much nearer to the point of merit. The state of each case will, I think, be found to be accurately given; and the opinion of the court, generally, in the words in which it was delivered; with only such slight departures in mere phraseology, as to create no variation in the sense. It does not come within the power of any one but the stenographer, to exhibit a copy of an oral discourse that shall, in every particular, comport with the original. Where the opinions were written, I have been favored by the judges with leave to take copies. As to the arguments of counsel, from their nature, they require much compression: where several are concerned; the arguments of all on each side must be thrown together. In doing this, much of the spirit, and many of the beauties of an eloquent debate will be lost. I have to lament, that it is not within the compass of such compilations to do justice to the great abilities which are conspicuous at the bar of the court in which these cases were decided. All that I can profess to have given on this head, is a correct state of the points made by the counsel, and the substance of the arguments on each side. It may be thought that I sometimes give to the arguments a cast rather more forensic than is usual in the modern style of reporting; and that I too frequently introduce into the principal report, colloquial and incidental matter. I am not conscious, however, of having indulged this too far; and where I have yielded to it, I promise myself, it will be found to answer some useful purpose; and to present, if not so much of symmetry, at least a more natural exhibition of the case. I have only to add, that in the outset of a great national judicature, it appeared to me proper, not only to record the more solemn sentences of the law, but also to preserve rules of practice, and the course of proceeding. In courts long established, and where the practical forms and principles are well understood, or may be traced to digested systems, the preservation of these incidental cases of a discretionary kind, would not be so important. But in this court, which must, in some measure, originate a code of practice, points of that nature, when settled, become of considerable conse-

quence. Should my design be approved, I purpose to continue a report of the adjudged cases in the Third circuit.

The following is the preface to the second edition:

Frequent orders, which we have not been able to supply, for these Reports of the late Mr. Wallace, published many years ago, have induced a reprint of them; to which are added two new cases, decided in the same court, and hitherto unpublished. The volume appeared originally in a pamphlet number, and was intended to have been continued. The court itself, however, was of short duration. Its history, brief and instructive, has thus been beautifully given to us: "It was established at the close of the second administration of our government; and although this particular measure was deemed by wise men on all sides, and is still cited by many of them as the happiest organization of the federal judiciary, yet, having grown up amid the contentions of party, it was not spared by that which spares nothing. In a year after its enactment, the law which erected the court was repealed; and judges who had received their offices during good behavior, were deprived of their offices without the imputation of a fault." Much time and labor, it is known, were bestowed by Mr. Wallace, in recording the decisions of the court which succeeded; and we have lamented, in common with others, that the profession never realized the expectation long had, of seeing the decisions of Judge Washington thus favorably presented to the public. The publication, though actually begun, was delayed, and the manuscripts of that excellent judge, since printed, give ideas of the cases in general so correct, that considering the size of the work, and that it is still easily to be found, a continuation of the work of the original reporter is not undertaken.

The following reference to this work of Mr. Wallace is taken from Wallace's Reporters, pp. 340-341, footnote:

It was their author's intention [John Bradford Wallace, author of Wallace, Sen., Reports] to publish the decisions of Judge Washington [associate justice of the United States supreme court], and there were recently in the possession of his son, the late Horace B. Wallace, Esq., of Philadelphia, whose testamentary executor purposes to present them to the Franklin Library [now known as the "Philadelphia Library"] of that city, three large volumes richly bound in blue Turkey morocco of the Reporter's Notes, from 1801 to 1816, of cases in the Third circuit, of which the bench was then occupied by Judges Washington and Peters. They cover a part of the same term embraced by the work called "Washington's Circuit Court Reports": "a book," says Mr. Marvin (Leg. Bibl. 720), "which was printed from Judge Washington's Notes, never originally designed for the press; and which while accurate, so far as it goes, is but an imperfect monument to the judicial powers of that upright man. It was a matter of deep regret with Judge Washington, as it was with the profession of that day generally, and especially with Mr. Wallace's friends, that the decision of the Third circuit should not have been given to the bar by their original reporter. The work would have been an enduring monument alike of his fine intellectual powers and accomplishments, and of Judge Washington's first-rate capacities as a judge upon the circuit."

These Notes of Decisions by Wallace have been examined. They are contained in three manuscript folio volumes, in the Philadel-

phia Library. The first is a folio of trials, containing arguments of counsel, time of adjournment of court, remarks of Justice Washington of points of law, objections to evidence and witnesses, etc. The reporter seems to have watched the trials very closely, and to have taken minute and accurate notes of the proceedings. This folio contains no opinions. The second is a folio of hearings on motions and rules, with the points of counsel in reference thereto. The cases are the same as in the folio of trials. There are no opinions in the folio of rules, but the arguments of counsel are given exhaustively. The third is a folio of opinions, containing facts and opinions in federal cases, with a few state (Pennsylvania) cases added. Pencil notes on the margin seem to indicate that these cases have been resorted to for publication (probably for Washington's Circuit Court Reports, to certain volumes of which these marginal notes often refer, and with which the cases in this folio compare very closely). This folio, unlike the others, seems to have been prepared for the press, though the pages are not numbered, and seem to have been thrown together without order after copying the manuscript. The cases in all the folios are the same, and all the federal cases are contained in Washington's Circuit Court Reports.

WALLACE, JR.'S REPORTS.

[Wall. Jr.]

Cases in the circuit court for the Third circuit, from 1842 to 1862. Reported by John William Wallace. Three volumes. Philadelphia: Vol. 1, Walker, 1849; vols. 2 and 3, T. & J. W. Johnson & Co., 1854-1871.

WARE'S REPORTS.

[Ware.]

Cases decided by Hon. Ashur Ware in the district court for the district of Maine. Vol. 1 (1822-1829), Portland: Colman & Chisholm, 1839; 2d Ed., by Edward H. Daveis (with additional cases, 1854-1855), Boston: Little, Brown & Co., 1856; vol. 2 (1839-1849), by Daveis, and sometimes cited as Daveis' Reports, Portland, 1849; 2d Ed., Portland: Loring, Short & Harmon, 1873. Vol. 2 contains some of Judge Ware's decisions in the circuit court. Vol. 3 (1853-1866), by George F. Emery, Portland: Loring, Short & Harmon, 1874.

The following preface is from vol. 1, 2d Ed.:

The first edition of these Reports has been out of print for several years. In preparing the second, a few notes have been added, and some additional cases, decided since the publication of Daveis' Reports. The corrections of typographical errors in the first edition, wherever the sense is affected by them, have been made under the direction of Judge Ware.

The following preface is from vol. 2, first edition:

This volume contains a selection of cases in the district court, principally in admiralty, decided by Judge Ware since the publication of Ware's Reports, and also some opinions pronounced by him in cases decided in the circuit court. The Note upon the Admiralty Jurisdiction [Case No. 6,914], was written out at the request of the reporter, while the printing was in progress. The decisions in bankruptcy, which formed the great mass of the business in the district court, for some years after the act went into operation, have been omitted, excepting a few cases presenting points of more general application. The rubrics have been prepared under direction of the judge, and are generally given as made by him at the time the cases were decided.

The following preface is from vol. 2, 2d Ed.:

This volume is a reprint of Daveis' Reports, published in 1849. Its present title has been substituted for that of the former edition for sake of uniformity, it being the purpose of the publishers to issue a third volume of Judge Ware's Decisions, which have never been published in a form for preservation.

The following preface is from vol. 3:

A short time prior to the death of Judge Ware, the materials constituting the principal contents of this volume were placed in the hands of the reporter, for the purpose of preparing the same for publication in a form suitable for preservation. Some of the more important cases, especially those decided in Massachusetts district during the temporary illness of Judge Sprague, have been heretofore published in periodicals of an ephemeral character, but the major part of them has never appeared in print in any form. In preparing this, the third and last volume of Ware's Reports, the reporter did not have the benefit of the supervision of the author of these "decisions," which will account for (especially among those familiar with Judge Ware's chirography) defects which otherwise would have been avoided. But however defective the manner of executing the work, the text of the volume will be found as perfect as was practicable to make it during the process of printing; and although errors in the citations of authorities may be frequently noticed, especially of statutes, those can be readily overcome by referring to the "Errata," which has been prepared with care since the body of the work went to press. No apology surely will be required for preserving in an enduring form the eulogiums found in the appendix, much less for giving to the public the latest opinions of him of whose prior ones the eminent judge who succeeded their author so recently said: "I believe no treatises or reports are now extant which are at this moment more useful to the profession, or more frequently acknowledged as authority, or which can afford more knowledge and information, than these reports."

[Signed]

Geo. F. Emery.

The following advertisement is from vol. 3:

This volume contains the latest opinions of Judge Ware, and is entirely new. It is a sequel to the first and second volumes (the latter originally entitled "Daveis' Reports") issued in his lifetime. All together give to the public the benefit of his judicial labors for more than forty years. Congress having failed to confer on him the advantages of the retracy provisions now provided for judges of the federal courts, this publication appeals with all the more force to the patronage of a profession not wont to ignore the service of a public benefactor.

WASHINGTON'S CIRCUIT COURT REPORTS.

[Wash. C. C.]

Reports of cases in the circuit court for the Third circuit from 1803 to 1827. Reported by Richard Peters, Jr. Four volumes. Philadelphia: P. H. Nicklin and P. Johnson. Vol. 4 was published in 1829. A second edition was published in 1853 by T. & J. W. Johnson, Philadelphia.

The following advertisement is from vol. 1:

When, in 1819, the editor published "Reports of Cases Determined in the Circuit Court of the United States, for the Third Circuit," it was his intention to proceed with a work which would have placed in the hands of the profession, the decisions of that court from 1815 to the present period. This purpose has been suspended, in consequence of an impression, derived from the limited sale of the volume, that the publication of the earlier cases, should have preceded those which were then printed. That these cases would have appeared long since, was an expectation entertained and expressed at the period referred to. It was understood, that they had been prepared for the press, by a professional gentleman, who had devoted much time and attention to the trust; and who intended to complete the work within a short time. [This reference is to Wallace's Notes of Decisions; for an account of them see Wall. Sr.] These expectations have been disappointed; and in accordance with the wishes of Judge Washington, these Reports are now published; this volume being the first of a series, which will contain all cases decided in the Third circuit, during the time that distinguished and learned gentleman has presided in the court. The cases are taken from the manuscripts of the judge, and they will be found to contain all the matters essential to be known, and a full and accurate statement of the opinions of the court, in every case. It may be claimed with confidence, that this work will contain a body of law, of the highest interest to the community. The jurisdiction of the circuit court of the United States, extends to international and commercial questions, of the greatest, and of the most general importance: its particular province to examine and decide upon revenue, and questions arising under the patent laws; and the final determination by the court, of the many principles by which the land titles of a very considerable portion of Pennsylvania are regulated—these circumstances, together with the various and changing relations of the United States, between 1803 and 1815; our neutrality; our belligerent and peaceful positions; gave rise to very many of the most intricate and important legal investigations. The volume now published will be immediately followed by others, and the work will be completed as early as possible.

The following advertisement is from vol. 3:

The editor, in presenting this volume to the profession, begs leave to state, that, contrary to his expectations, the work cannot be comprehended in less than four volumes. This is the necessary result of the abundance and importance of the matter, contained in the manuscripts of Mr. Justice Washington; and of the length of the judicial period, during which he has, so honourably and so ably, presided in the circuit court of the United States, for the Third circuit. In this volume, are, the decisions of Judge Washington in the circuit court of Pennsylvania, from April term, 1811, to April term, 1814, inclusive; and from April term, 1818, to October term, 1819, also inclusive; and the cases decided in the circuit court of New Jersey from April, 1818, to October, 1820. The intervening cases are contained in 1 Peters's Reports, pub-

lished in 1819. It is not intended to proceed further with the last-mentioned work; but to complete the publication of the remaining cases decided in Pennsylvania and New-Jersey, in a fourth volume to these Reports; which it is expected will be printed in 1828. The three volumes of these Reports, with First Peters's Reports, and the succeeding volume of the present work, will exhibit a series of decisions, commencing in 1803, and ending in 1828. In no portion of the political existence of the United States, have cases of such novelty, interest, and high importance to the community, been presented before the courts of the United States, for judicial investigation and decision; and before the circuit court, for the Third circuit, most of the questions of law arising out of these cases, have been first examined and adjudged.

The following preface is from vol. 4:

The editor has now completed the pledge given to the profession and to the public, on the commencement of this work. The present volume contains the decisions of the circuit court of the United States for the Third circuit, comprising the districts of Pennsylvania and New Jersey, from April term, 1820, to October term, 1827, inclusive; with some cases decided in 1818 and 1819, omitted in the third volume of this work; and completing the series of cases adjudged in that court from 1803. Few of the decisions of the court remain to be published. By the liberality of Messrs. Nicklin and Johnson, this volume has been extended to an unusual size, for the purpose of completing the series, as far as practicable; and it will be found to contain a body of most useful and highly valuable law learning, and an equal, if not a greater number of interesting cases, than any volume of reports heretofore published in the United States. In the conclusion of his labours, the editor claims to avail himself of the occasion to express his high sense of the judicial talents, legal discrimination, laborious and persevering industry, and exalted virtues of the learned and venerable judge, from whose manuscripts, exclusively, this work has been published. In this record of his feelings, he proudly testifies his gratitude for the affectionate friendship, and for the many manifestations of kindness and regard he has received from Mr. Justice Washington.

WOODBURY AND MINOT'S REPORTS.

[Woodb. & M.]

Reports of cases in the circuit court for the First circuit from 1845 to 1847. By Charles L. Woodbury and George Minot. Three volumes. Boston: Charles C. Little and James Brown, 1847-1852.

WOODS' REPORTS.

[Woods.]

Cases in the circuit courts for the Fifth circuit, from 1870 to 1882. Reported by Hon. William B. Woods, circuit judge. Four volumes. Chicago: Callaghan & Co., 1875-1883.

WOOLWORTH'S CIRCUIT COURT REPORTS.

[Woolw.]

Cases in the circuit courts for the Eighth circuit, from 1863 to 1869, being the decisions of the Honorable Samuel F. Miller, associate justice of the supreme court. Reported by James M. Woolworth, counselor at law. One volume. Chicago: Callaghan & Cockerroft, 1870.

RESOLUTIONS

AND OTHER

PROCEEDINGS UPON THE RETIREMENT OF FEDERAL JUDGES.

BETTS, SAMUEL ROSSITER.

[For brief biographical notice, see 30 Fed. Cas. 1363.]

The following extract is reprinted from 2 Ben. 559:

Died at New Haven, Nov. 3, 1863, Samuel Rossiter Betts, for many years judge of the district court of the United States for the southern district of New York.

The following were the proceedings in that court on the announcement of his death on the following day, Judge Blatchford, with Judge Benedict, of the eastern district, being on the bench:

Hon. Samuel G. Courtney, district attorney of the United States, moved the adjournment of the court as follows: "May it please your honors, I rise to perform the sad duty of announcing formally to the court the death of Hon. Samuel R. Betts, for nearly forty-five years the judge of the United States district court in this district. He died on Monday evening at New Haven, whither he had removed after his resignation of his seat upon the bench. My acquaintance with him was of recent date, but during the time that I have been officially connected with this court I have been brought into intimate relations with him, and I always found him courteous, kind, and urbane in every respect. To the older members of the bar his history is better known than to me, and I shall leave it to them to say what they have to say of his character and merits. I will only say that he died full of years and full of honors, and out of respect to his memory I move that this court do now adjourn."

Mr. E. C. Benedict rose to second the motion, and said: "I feel that it is my painful duty to say a few words in seconding this motion, because of my long acquaintance with Judge Betts, and my long practice in this court. I had known him since 1823, when I was a student in his office, and his family I had known before that time. I have practiced almost uninterruptedly in this court since his appointment, in 1827, by Mr. Adams, who, together with Mr. Clay, signed his commission. He came to this city from the country, where he had been eminent at the bar, and for some years circuit judge. He came, therefore, with great familiarity with the legal questions which occupy the courts of common law, but with little acquaintance with those with which an admiralty court must deal. When he came here there was almost no business in the court. It did not then sit a week where now it sits a month. Thus he had leisure to familiarize himself with the law of admiralty, and he soon became one of the most learned judges in that branch of the law. As time went on the business of the court increased, and his experience in admiralty became far more extended than that of any other judge that ever sat on the bench. He, more than any other man, formed the admiralty system of the United States. When he came to the bench the British view of the jurisdiction of the admiralty

prevailed. He devoted himself to that branch of the law in the spirit which belonged to it of old, and which has since been adopted by the jurists and courts of this country, and his views have prevailed everywhere, though at first they were a novelty. His decisions were always characterized by acuteness, learning, and research. If they had been carefully reported they would have built up for him a reputation which would have been like that which the chancery decisions of this state gave Chancellor Kent, or which the English admiralty decisions gave to Lord Stowell. But in those days the newspapers were not, as they are now, volumes of reports, and Judge Betts always seemed not entirely satisfied with the form of his decisions, and was reluctant to publish them till he had given them a more perfect finish: and though I was appointed reporter of the court many years ago, I did not succeed in getting together matter enough even for a pamphlet, before his greatly increased labors by the bankrupt act of 1840 prevented his giving any attention to it, and the idea was abandoned till its importance was destroyed by reports of other courts. Judge Betts was a man of urbanity and kindness to all who practiced before him. All who practiced in his court, young or old, always felt that they had had full opportunity to be heard, and that they had been treated with uniform kindness and courtesy,—an excellent quality in a judge. We can hardly realize, in these days, when changes are so frequent upon the bench, what it was to have a judge upon the bench for forty years, as he was. He reached great age, and gave an example to us all of the results of a quiet and uniform and industrious life of moral and domestic virtue. His death calls upon us all to prepare for that end of life to which we must all come, and which few of us can expect to have deferred as long as it was in his case."

Judge Beebe then spoke as follows: "Perhaps I, too, should say a word on the occasion which has called so many members of the bar together. When a boy I commenced a student's life in the office of my friend who has just sat down, and soon gained familiarity with the business in that office, and therefore with the business of this court. And in my practice since that time I have experienced many kindnesses and often indulgence at the hands of Judge Betts. When I was a boy I always received from him treatment which gave me courage and hope, and during my long acquaintance with him there has been no jar in our friendship. I have always had the utmost respect and affection for him, and we all reverence his memory now that he has gone. Few men reached the years which he reached or the honors which he attained. He was a man of extraordinary industry, who never allowed any matter to pass before him without careful consideration, and a great many hours and years of labor were spent in elaboration, which he conscientiously believed to be his duty, for he was a man instant in season and out of season in the performance of duty. He has passed away, and it is due to us who remain to pay respect to

his memory, and I again second the motion that the court adjourn."

Judge Benedict said: "My own relations with Judge Betts were perhaps somewhat different from those of any one present. I first began to know him as a student; my first cause I tried before him; I practiced before him as long as I continued at the bar, and when I took my seat upon the bench I was in some sense associated with him as judge. To his kindness to me as a lad, to his patience with me while at the bar, and to his uniform kindness to me while on the bench, I desire to bear my testimony, and the motion seems to me eminently proper."

Judge Blatchford said: "I can add but little to what has been said. Sitting in this place as the successor of Judge Betts, and brought into intimate familiarity as I am daily with his decisions in all branches of the law administered here, I cannot but express the obligations which both the bench and the bar are under to this distinguished judge for the light which he has shed upon the path of this court. My acquaintance with him began some twenty years ago, and my relations with him have been intimate since then. He was always kind, encouraging, faithful, industrious, and conscientious in the discharge of every judicial duty. Of one branch of his judicial career I can speak better, perhaps, than any other person. I refer to the great services which he rendered to his country and to the law, in the prize cases which came before the court during the late Rebellion. In preparing his decisions in those cases for the press, as I did, I was amazed at the industry with which the judge, from the seventy-eighth to the eighty-second year of his life, went through the mass of papers in those cases, going over the evidence in each, digesting it and spreading it out in an opinion, so that the volume now stands for the information of all who have need of information on any branch of that subject. As it was the first great war that the country had waged, he was, as it were, treading a new path, using principles which had been already discussed, but adapting them to entirely new circumstances. And it was done with a clearness and a care which made the work a fitting close to his career. He has added to the reputation of the country by it, and I think the country owes a greater debt to him than to any other man in this branch of the law. I cordially accede to the request of the bar, and direct the court to stand adjourned till Friday, and this motion to be entered on the minutes."

BOYLE, JOHN.

[For brief biographical notice, see 30 Fed. Cas. 1364.]

The following obituary notice is reprinted from 1 McLean, 558:

Judge Boyle, like almost all the distinguished men of the west, and indeed of the east, was indebted for the eminence he acquired to his own exertions. Having no influential friends in early life, and his parents being poor, he was thrown upon the native vigor of his own mind; and the history of his life affords that fine development of mind and of character which justly excites universal admiration. At the bar he soon attained a lucrative business and an enviable reputation. Without his solicitation, and scarcely with his consent, in 1802 he was taken up by the people and elected to congress. In that body he became highly respected for his intelligence and uncompromising integrity. He attracted the attention and confidence of Mr. Jefferson and Mr. Madison, in a very high degree; the latter of whom, in 1809, unsolicited, appointed him governor of the Illinois territory. This office was much sought after and desired, but it was not suited to the taste of Judge Boyle, and he eventually declined its acceptance. The appointment was then conferred on Ninian Edwards, chief justice of the court of appeals of Kentucky. To the station thus made vacant, Judge Boyle was appointed. The important office of chief justice he filled with great ability for many years, until he was appointed district judge

of the United States for Kentucky, on the promotion of Judge Trimble to the supreme bench of the Union. To this station he carried great experience and high talent; and he continued to discharge its duties most faithfully and ably until his lamented death, which took place in the winter of 1835. Judge Boyle's opinions, published in the Kentucky Reports, show a mind deeply imbued with the science of his profession. They are learned, and able, and just. They place his character for high intelligence and learning on an imperishable basis. Few, if any, of the sons of his adopted state have left to her a richer legacy. They emit and will continue to emit, in all time to come, a clear and a steady light on the jurisprudence of the state, and on rights public and private. Of such a legacy the state may well be proud. It was the result of patient and laborious research, and of high intellectual endowment.

To appreciate Judge Boyle's personal qualities, it was necessary to know him intimately. He was modest without affectation. His manners were simple and unobtrusive. In conversation he was not ambitious to shine, but, when roused to the support of his own views, it was difficult to meet him, and still more difficult to overcome him. He seemed in his discussions to have no object but truth, and he always yielded to conviction. He was above that pride of opinion which is the characteristic of a narrow mind. Few gentlemen of the profession equaled Judge Boyle in general legal acquirement, and he was surpassed by none in a knowledge of the principles of the common law. To the study of the common law he was attached. He entered into the philosophy of the system, and considered it as a noble monument of the wisdom of our ancestors. Judge Boyle's mind was acute and discriminating. He saw principles clearly, and applied them judiciously and powerfully. He was sometimes inclined to draw nice distinctions and to fall into metaphysical abstractions; but a sound and comprehensive understanding, and a thorough knowledge of the subjects he investigated, conducted him to a safe and just conclusion. The judgment of few men in any age formed a more unerring standard than his. No one associated with him in the discharge of judicial duties could differ with him in opinion, without being solicitous as to the correctness of his own views. The writer of this was intimately associated with this eminent man, in the latter years of his most useful life; and he learned to appreciate the high qualities of his head and heart. Many an instructing and interesting hour was spent in his society, which can never be forgotten. And in this intercourse, on more than one occasion, he remarked, that he had no ambition to gratify, and cherished no wish, beyond a sincere desire faithfully to discharge his public duties. A mind of purer aspirations, and of nobler aims, never graced a bench.

CAMPBELL, JOHN WILSON.

[For brief biographical notice, see 30 Fed. Cas. 1366.]

The following obituary note is reprinted from 1 McLean, 557:

In the history of this excellent man, another instance is found where a high reputation was attained by unaided personal efforts. The struggle began early, and it terminated only at the close of his life. Judge Campbell was a good scholar, and possessed general knowledge. At the bar he was highly respectable; and in the legislature of Ohio, his adopted state, and in congress, he sustained a high standing. Having served several years in congress, he declined being a candidate for reelection, against the wishes of his constituents and friends. He would have been re-elected, probably, without opposition; and had he remained in congress, it is not doubted that he would have been elected speaker of the house of representatives. In 1829, he was appointed district judge of the United States, for the state of Ohio. The duties of this office he continued to discharge until his death, in 1833. Having been abstracted from his profession

some 10 or 12 years, while engaged in political life, Judge Campbell, on taking his seat on the bench, reviewed his legal studies with as much energy and success as could be expected from the ardor of youth. He possessed a strong mind and a well-balanced judgment. His perceptions were not quick; but they were clear, and they were carried out and sustained by the most patient and laborious effort. In forming a correct judgment of men and measures, he had few equals; and in a manly independence and purity of purpose he was unsurpassed. As a judge, he was highly respectable, and, had his valuable life been spared, he would have become eminent. That indomitable spirit which, in youth, overcame all obstacles, was bearing him onward and upward in his judicial course. He had a capacity, a steadiness, and a perseverance which insured no ordinary degree of success, in every line of study which engaged his attention. Judge Campbell's modesty amounted to diffidence; and yet he had no common share of moral courage. He was rather prone to underrate his own powers of mind, and, indeed, he had as little of selfishness in his character as any other human being. His friendship was without alloy. It was deep and abiding. His heart was full of the most endearing principles of humanity.

CHASE, SALMON PORTLAND.

[For brief biographical notice, see 30 Fed. Cas. 1367.]

The following obituary notice is reprinted from 4 Dill:

At the opening of the circuit court for the district of Nebraska on Thursday, May 8, 1873, the circuit judge announced the death of Mr. Chief Justice Chase, saying: "Gentlemen of the bar: The telegraph brings us this morning the sad intelligence of the death, on yesterday, of Chief Justice Chase. It is fitting that all classes of citizens should pay appropriate honors to the memory of one who for more than a quarter of a century has worthily filled so many places of public trust and confidence in the country. It is especially fitting that this should be done by the courts of law, and particularly by the courts of the United States. The illustrious deceased was the head of the national judiciary. He occupied the seat which the professional as well as the popular mind associates with the great and venerable names of Marshall and Taney. The seat to-day is vacant. The chief of the highest tribunal on earth—a tribunal more august than the Amphictyonic Council—a tribunal endeared to the American people by the spotless character of its individual members, and by the unclouded splendor of its reputation—lies, after a long life of usefulness and honor, silent in death."

(The court appointed a committee of the bar to draft appropriate resolutions, which were, on the following day, presented to the court by Mr. James M. Woolworth, the chairman, with appropriate remarks.)

The following are the resolutions:

"Resolved, that the death of the chief justice of the United States, announced in fitting terms by his honor, the presiding judge, has closed a career of eminent service and beneficence. In the first conflict with the arrogant slave power, he stood forth a stalwart figure, inspired by the loftiest philanthropy, and sustained by an unconquerable courage, and did dauntless battle for the weak and the oppressed. In the great Rebellion, which drained the best blood of the people and the vast wealth of the land, and the inexorable demand, still unsatisfied, called for new and strange devices for replenishing the treasury of the Union, his wisdom conceived, developed, matured, and executed a series of financial measures which supplied the great necessities of those times, and in these days of peace form an integral part of the government. And in that highest human dignity in which we most delight to honor him, the chief of the august tribunal over which he presided, adjudicating the new questions to which the war

gave rise, and expounding the novel phases which the federal power has assumed, he towers before us a character solid, massive, and pure,—the peer of those greatest of our country's magistrates, Marshall and Taney."

"Resolved, that while we mourn the loss which the nation has sustained in the demise of this great and good man, we rejoice that his life was so long protracted to be illustrated by services so beneficent and noble to his country and race."

On behalf of the court, the circuit judge responded:

"We assure the bar that the court fully shares in the sentiments respecting the illustrious deceased, and his services and character, so appropriately expressed in the resolutions just presented, and in the eloquent observations with which they have been accompanied. It is not necessary to recount the history or services of the late chief justice. For more than twenty-five years his life has been spent in public employment, and in the public eye. To him have been committed, at various times, high executive, administrative, legislative, and judicial trusts. He has been called upon to act in many of the decided epochs which have marked the marvelous growth and development of our country during his time, and he has demonstrated his greatness by rising always to the full height of any demand made upon his intellectual resources. There is one portion of his public history which his countrymen, and lovers of constitutional liberty in all lands, now and hereafter, will cherish with peculiar interest. I allude to his services throughout the Civil War as the counselor of the lamented Lincoln, and as finance minister. Instead of pressing the securities of an imperiled nation upon the timid and unfriendly capitalists of the old world, he appealed with confidence to the people, whose highest interests were at stake. The result attested his wisdom, and surprised the world and even ourselves. To him, as secretary of the treasury, may justly be applied, in all its scope, the magnificent and striking eulogy which Webster pronounced on Hamilton: 'He touched the dead corpse of the public credit, and it sprang to its feet. He smote the rock of the national resources, and abundant streams of revenue gushed forth.' I am aware that the opinion has, to some extent, prevailed, that Mr. Chase did not increase his reputation by his services as chief justice of the supreme court. I do not concur in that opinion. In intellectual capacity, in purity of life and character, I regard him a worthy successor of the great men to whose seat he succeeded. Before his health gave way he seemed to do as much work in the supreme court, and on the circuit, as either of his associates, or as any of his predecessors, had done. Some of his published judgments, particularly those respecting the constitutional powers and relations of the state and federal government, and those concerning the novel questions which grew out of the civil conflict, in logical force, clearness, and finished beauty of expression, take rank with the best opinions of Sir William Scott or Lord Mansfield, and scarcely fall below those of even Marshall himself. We join with the bar and with all classes of citizens in mourning the death of the chief justice, and in desiring to pay honors to his memory. Accordingly, the resolutions presented will be ordered to be entered of record, and the court will be adjourned during the remainder of the day."

[The following is reprinted from the preface of Chase's Decisions, iv:]

On the receipt of the intelligence of the death of the chief justice, a meeting of the bench and bar of Maryland was held on the 9th of May, 1873, in the United States court room in Baltimore, and the following proceedings took place:

The Hon. Reverdy Johnson called the meeting to order by saying: "All are aware that the occasion that brings us together is to pay respect to the late chief justice, and, in order that we may organize, I move that the Hon. Justice Giles, United States district judge, be called to the chair."

This motion being carried, Judge Giles took the chair. On motion of Hon. Reverdy Johnson, Henry Stockbridge, Esq., was chosen to act as secretary. Mr. Johnson suggested the appointment of a committee to prepare suitable resolutions expressive of the sense of the meeting. The chair accepted the suggestion, and appointed Hon. Reverdy Johnson, I. Nevitt Steele, A. Sterling, W. S. Waters, R. S. Mathews, and J. P. Poe, who retired to draft the resolutions. The committee in a few minutes reported the following:

"Whereas, the bench and bar of Maryland have heard with deep regret the death of Salmon P. Chase, the late chief justice of the United States, and desire to express their sense of the loss which has been sustained by the country and by the profession, and of his eminent merits as a man and a judge, therefore, be it

"Resolved, that in the death of the late Salmon P. Chase the country has been deprived of the services of a jurist who has fairly adorned his high position, and who, by the purity of his life, the extent and variety of his learning, the comprehensiveness of his intellect, and unswerving devotion to justice and law, has left another illustrious example for the inspiration and guidance of our profession.

"Resolved, that the spotless integrity which distinguished his discharge of duty in the many official positions to which he had been elevated by the respect and confidence of his fellow citizens, fully entitles him to an honorable place in history, and to the grateful memories of his country.

"Resolved, while the bar of Maryland had not in any large degree the happiness of enjoying those genial and generous qualities which made the late chief justice the ornament of every social circle in which he was wont to move, they cannot refrain from bearing testimony to the impressions which his attractive qualities made upon them during his comparatively brief attendance in this circuit.

"Resolved, that the sympathies of the bench and bar of Maryland are respectfully tendered to the bereaved family of Mr. Chase, and the secretary of the meeting is instructed to forward to them a copy of these resolutions.

"Resolved, that the judges of the circuit court are requested to direct a copy of these resolutions to be entered upon the minutes of the court."

The Hon. Reverdy Johnson, in rising to second the passage of the resolutions, said he had enjoyed the acquaintance of Chief Justice Chase longer than any other member of the Maryland bar. He (Johnson) had known him at the bar, in the senate of the United States, and as secretary of the treasury of the United States, and in all these several offices he had not only known him generally, but intimately. He had discharged the duties of each with wonderful ability. He came to the bench upon the death of his immediate predecessor, in December, 1864. As secretary of the treasury he discharged the high functions of his position creditably, but he had not for years engaged in the active duties of his profession, and there was a doubt of his filling worthily the place of his great predecessor, but at his first term that doubt was removed; that term at which he first presided was the December term of 1864. There were then before the court cases involving many questions of admiralty law, and the rights and duties of citizens of states that had been involved in the war. Chief Justice Chase had on all the questions that had been presented for adjudication given opinions, and discussed each with so much ability that it showed that he was fully acquainted with the knowledge necessary for their proper adjudication. Those opinions were so clearly and elegantly expressed that they were models of judicial style. The bar and bench at once said that the ermine worn by his predecessor was in hands to preserve it unspotted. Mr. Johnson sketched the important decisions given by Chief Justice Chase in relation to the enforcement act, legal tender, and other matters, and said he was not unworthy to fill the place that Marshall had filled for thirty, and Taney for thirty-four, years. What was said by Randolph, of Roanoke, upon the occasion of the death of Marshall, might, with equal propriety, be said

of Taney and Chase. He presided with native dignity and unpretending grace. In point of ability he was the equal of either of them. His opinions will bear the strictest scrutiny, and in learning and moral considerations compare favorably with those of his illustrious predecessor. There are men that survive upon the bench who fully equal him; there are men in the different states in the profession who might equal him, and it is to be hoped that in his successor may be found in equal degree the attributes of learning, mental power, courtesy of manner, and purity of character.

R. Stockett Mathews rose to second the motion of Mr. Johnson for the adoption of the resolutions reported by the committee. He said: He could not refrain from giving some expression to his accord with the thoughts expressed by Mr. Johnson. Mr. Mathews recalled Chief Justice Chase as he had seen him when full of life and vigor and manly beauty. Never had the speaker seen a man whose mere presence so impressed the beholder with a sense of capacity. He possessed a strong power of reasoning, that enabled him to grasp the most difficult subjects, and wrest from them their simplicity and clearness. He was a large man in the broadest sense of the term. Not a mere lawyer in unquestioning servitude to tradition, or in blind veneration for precedents, he sought to reach results in his decisions which would stand the tests of mutation of opinion, and changing conditions of society in coming generations. He did not seek mere popularity nor present applause, but with sure precision was always able to anticipate the judgment of the future. In his brave grasp of difficult problems it was of himself and his personal interest that he thought last. He possessed in a remarkable degree the suavity of temperament and the kindly graces of heart which drew towards him the homage and friendship of others with whom he associated, and especially of younger men, whom he never overwhelmed with inconsiderate exhibitions of his rank and greatness, out sought to win them by placing at their service his wealth of gathered stores, his ripe wisdom, and his sympathetic counsels. He numbered, perhaps, more warm admirers and a larger number of devoted friends than any statesman of his time. And one of them, in the dispatch sent to apprise his family at Washington of the sudden decease of Mr. Chase, has eloquently described him in a single sentence, "Our grand man is gone." Mr. Chairman, he was a grand man. It has been said that he was ambitious. But who, with such noble powers, such generous instincts, would not desire to put every great faculty at the service of his country? He was ambitious for a larger field and ampler opportunities to do good, and to achieve greatness for his nation rather than for himself. He may have felt that he was better fitted for the administration than the interpretation of law. One thing is assured beyond all cavil,—he filled many stations and discharged great trusts, and he adorned every position with the beauty of spotless probity, and fulfilled every duty with a disinterested patriotism which has seldom been surpassed. Mr. Mathews then drew a touching picture of Mr. Chase's appearance when he last saw him, some months ago, in Philadelphia, speaking of him as the "counterfeit presentment" of his former self, and closed with a warm tribute to his native royalty of heart, the charm of his manners, and the dignity of his public life.

When Mr. Mathews concluded, the resolutions were put by Judge Giles, and were unanimously adopted. The meeting then adjourned.

On the same day a similar meeting of the bench and bar of Virginia took place in the United States court room in Richmond, which was presided over by the Hon. James Lyons, with M. F. Pleasant, Esq., clerk of the U. S. circuit court, as secretary. Messrs. William Green, W. A. Maury, Bradley T. Johnson, James Neeson, Hon. E. H. Fitzhugh, judge of the chancery court for the city of Richmond, Hon. Beverly R. Willford, judge of the circuit court for the city of Richmond, E. Bardsdale, Jr., Esq., W. W. Henry, Charles Dabney, Hon. James C. Taylor, attorney general of Virginia, John O. Steger, and John Howard, were

appointed a committee to prepare and report suitable resolutions. They reported the following:

"Seldom is it that the hand of death snatches from the place of honor a man more inspired by greatness and moral worth than Salmon Portland Chase, to whose memory we are now come together in these precincts of justice, which will know him no more forever, to lay tribute. His sudden death, after being so recently amongst us in apparently improved health, and deepening the impressions he had already made upon our minds and hearts, has caused a shock, from which we shall not soon recover, and is another solemn lesson that 'the paths of glory lead but to the grave.' From one end to the other of this broad and varied land will his death produce grief, and a sense that this time, in very truth, has death pulled down a great pillar of state, and that there are few in the land to supply his place. Called to the position of chief justice of the supreme court of the United States from the station of secretary of the treasury, as was his distinguished predecessor, like him, he rose superior to the passions and prejudices of the hour. His greatness could not have been subjected to a more crucial test than by his succession to the position made vacant by the death of that mirror of justice and judicial propriety, the venerable and ever to be revered Roger Brooke Taney. It had been many years since Mr. Chase had any experience at the bar when he was made chief justice; and, had he not been a man of extraordinary endowments, his appointment would have been a serious mistake; but it turned out that in his case the particular in which he was thought to be wanting—a sufficient practical acquaintance with jurisprudence—was one of his best qualifications, for he went on the bench at a time when he was soon to encounter those new and important questions which arose in the southern states after the close of the war,—questions which were only to be satisfactorily resolved by a mind of vigorous and comprehensive grasp, accustomed to a frequent recurrence to great principles, but, at the same time, accustomed to range untrammelled by precedents. That the mind of Chief Justice Chase was of that stamp, no person of discernment will question. It may be safely said that there was no man known to us who was better fitted to handle those novel questions than he was. His boldness and independence, and at the same time his sobriety, as a thinker, are too well known to be more than referred to. There was a massiveness and self-reliance, a solidity and equilibrium, about his mind that were impressive, and singled him out as one born to figure in matters of great concernment. The high traits of his intellect were conspicuously shown while he was at the head of the treasury, the duties of which position he administered with distinguished sagacity and originality; so much so that he falsified predictions as to the effect of his measures confidently made in high quarters in Europe. The consciousness of his masterly administration in finance was, it is believed, a source of great satisfaction to him. Endowed with an intellect of such characteristics,—mind impatient of things narrow or technical,—it was exceedingly opportune that, during the brief period he held a judicial station, there was work for him of a kind both suitable and congenial. He at once began to deal very masterly with the great international questions that came before the supreme court, sitting as a tribunal of prize; but, perhaps, in no cases did the greatness of his judicial qualifications so generally impress themselves on the whole country as in those cases usually called 'The Gold Cases.' His judgments in those cases were couched in terms so luminous, and enforced by reasoning so irresistible, that all previous doubts and conflicts—and they were many—were at once laid, and men wondered that a matter, now so clear, should ever have been obscured by misgivings. It is an interesting coincidence that the chief justice should have most distinguished himself as a judge in cases involving questions about the currency. The greatness of Chief Justice Chase was set off by a striking simplicity and directness, both in manner and diction. What he said was briefly

said, and yet it always appeared by a *curiosa felicitas* to be fully said. His brevity was never cramped or straightened, but his subject was laid before you in all its length and breadth and thickness. His character was pure and spotless, and notwithstanding his life before his elevation to the bench was passed in times of great bitterness and rancor, in which he was a prominent actor, there never was a suspicion of his integrity. Viewed in his social relations, there is none of us who will not treasure the recollection of his personal intercourse with the deceased, or that will ever forget his geniality, tempered only, but not diminished, by a perfect and quiet dignity, or that readiness to listen, and entire freedom from dogmatism, which lent such a charm to his society.

"Resolved, that this meeting of the bar and judges of Virginia is deeply penetrated by a sense of the calamity which they, in common with the rest of the people of the United States, have sustained in the death of the Hon. Salmon Portland Chase, and that they will ever cherish his memory, which is endeared to them no less by many personal attractions and associations than by his eminent ability and wisdom.

"Resolved, that we will wear the usual badge of mourning for thirty days.

"Resolved, that the chairman of this meeting be requested to present a copy of the foregoing preamble and resolutions to the circuit court of the United States and the supreme court of appeals of Virginia, at Richmond, with the request that the same be spread on the minutes of the said courts.

"Resolved, that the chairman of this meeting be requested to transmit a copy of the preamble and resolutions aforesaid to the family of the deceased."

William A. Maury, Esq., moved the adoption of the resolutions, when General Bradley T. Johnson addressed the meeting as follows:

"Mr. Chairman: In the vicissitudes of life a man is seldom called upon to perform a sadder duty than I undertake now, for I am to speak of the death of one who was not only the lover of the liberties of this whole country, and the defender of its constitution, but he was the sincere sympathizer with the distress of my own broken and suffering people, the brave champion of their rights, and my personal friend. But now, while the country stands awe-struck at this unexpected dispensation of Providence, which has taken from it one of its foremost men, and words but faintly express our feelings, it is right and proper that we should bear our testimony, however humble, to his character as a man, his conduct as a statesman, and his purity and wisdom as a magistrate. From the beginning of that career which was to become so illustrious in American history, he evinced that high moral courage in the enunciation and defense of principles he thought true, that consistency in the maintenance of them, and that intrepidity in following them out, that have long since elicited the admiration of all, even those of us who differed from him so widely and so irreconcilably. Coming in the flush of mature manhood to the senate of the United States, he so bore himself in that high arena as to prove himself worthy of his great compeers. Called thence to preside over the destinies of one of the American commonwealths, he guided her action during those trying times so as to earn the applause of his fellow-citizens who had placed him there; and immediately afterwards, placed in charge of the finances of the United States, his will, sagacity, and skill so conducted them that he became probably the most efficient support of his government in the Civil War. He was placed on the bench in the last months of that struggle, and he at once appreciated clearly the great opportunities which opened on the cessation of it. He rose to the height of statesmanship which those opportunities required, and he was earnest in his efforts that they should be improved. He perfectly appreciated the danger to Republican liberty from the tremendous accession of power brought to the government by such a prodigious effort of national life, and his first endeavor was to restore the supremacy of the civil law over mil-

itary rule; to bring back the rule of right and justice over that of force and the strong hand. Acting under the conviction of the absolute necessity for this, he sought to expedite it by declining to exercise his judicial functions in the territory lately in arms until civil authority was restored, until the writ of the law became supreme over the order of the soldier. He pressed upon the president the justice and necessity that this state of things should at once be inaugurated, and in 1867, when the proclamation of the executive of the United States had assured the world that such was the case, he first entered upon his duties here. His first coming among our people was received respectfully and unostentatiously. He had been the lifelong adversary of our political systems and our social organization, and his genius, more than that of any one man, had contributed to our overthrow, and we waited to see what application of his principles we should be called on to observe. A short time sufficed to dispel all doubts. Rising at once to the greatness of the occasion, he eliminated and declared the principles of public law which controlled our circumstances, and from them marked out an application which operated as amnesty, peace, and security for life and property. In the case of Keppell's Administrator v. The Petersburg Railroad, he announced that the contest through which we had gone was a civil war, and that all the consequences of general war flowed from it. He declared that the acts of the governments belligerent to the federal government, so far as they concerned private rights and personal obligations, were to be respected by the federal courts, and he held that the court would take judicial notice of the fact that the business transactions of life here during the war were based on Confederate currency, which currency was to be treated as of its real value.

"In the case of United States v. Morrison, in the South Carolina district, he decided that the orders of military officers in time of war protected persons obeying them from all liability, penal or personal, for acts of war. Following these broad and beneficent declarations of legal principles controlling the status of the late Confederate States, his decisions here during the few years he presided in this circuit did more to restore confidence, to reconstruct our shattered institutions, and to rehabilitate peace than all other acts of all other functionaries. With a contrary course of decision we should have been plunged in endless confusion. All contracts made during the war and acts done, all judicial proceedings, would have been considered void, and years of turmoil and exasperating controversy would have been before us. He saved us all this.

"The existence of the state governments de facto being granted, all their acts relating to the common affairs of life were sustained and upheld. The actual existence of Confederate currency acknowledged, all transactions based on it became obligatory and enforceable. Immunity for acts of war done in obedience to military orders once secured, prosecutions for treason became well-nigh impossible, and so his course of judicial decision at once restored confidence, quiet, and order among our people in all their relations to themselves. He went further, for he authorized me to record that his judicial opinion in the case of Mr. Jefferson Davis was that the adoption of the fourteenth amendment operated as a complete and perfect amnesty against all political offenses claimed to have been committed during the war, by aiding, assisting, or abetting it. His decisions have been followed by the supreme court, whose adjudications they preceded, and we are indebted to him for the policy of the law adopted and enforced by that tribunal. I do not believe that his abilities as a magistrate are yet fully appreciated by the profession, but I am sure that the final judgment of the bar will place his decisions side by side with those of Marshall and Taney, his great predecessors.

"His style was exceedingly clear and concise, and I know no happier specimen of judicial expression than that in the case of *The Gary*, where he calls admiralty 'the human Providence that

watches over those who go down to the sea in ships, and do their business on the great waters;' nor that other one in the case of *Texas v. Chiles*, where, referring to the language of the old articles of confederation and of the constitution, he declares the object of the latter to be 'to make more perfect the perpetual Union' created by the former,—'thereby creating an indissoluble Union of indestructible states.'

"His purity as a man was beyond the breath of suspicion. While at the head of the treasury of the United States, disbursing the enormous expenditures of the war, his salary being insufficient to support his family, he paid his annual expenses out of the savings of former years, and went out of the treasury a poorer man than he went into it. He was ambitious,—not eager for applause nor desirous of the approbation of the public, but ambitious of serving his country and of reuniting her dissevered members; for, he said, his only desire to be president arose from the conviction that he could bring back reconciliation and peace were he intrusted with the power of chief executive to mould the policy of the government. He was so warm a friend, and so thoroughly a sympathizer with us, that he desired to make his home in this city; and on his last visit here he told me that if the house of the late Chief Justice Marshall had not been occupied by the gentleman who lives in it, he should have purchased it and fitted it up as his permanent residence and home. In his death the country has been deprived of a great magistrate, and we have lost a staunch and able friend."

Colonel H. Coulter Cabell followed in some remarks, stating that he had known Chief Justice Chase in early life, and in late years, and that he bore willing testimony to his rare ability and personal qualities.

The resolutions were then adopted. On presenting them to the circuit court of the United States, the Hon. James Lyons, the chairman of the meeting, paid a tribute of high eulogy to the character and abilities of the chief justice, and mentioned an incident which occurred during the reconstructive era, when Mr. Lyons casually mentioned to him that a staff officer of the general commanding had been detailed to do duty as presiding judge of the court of appeals of Virginia. Upon the chief justice expressing his incredulity as to such a fact, thinking that a jest was being made with him, the morning paper was produced, in which the military order was published, relieving an officer from duty as judge of the hustings court of the city of Richmond, and detailing him as judge of the supreme court of appeals of Virginia. "Great Heavens!" said the chief justice, "and will your bar consent to appear before a court thus constituted?"

His honor, Judge Bond, said: "Gentlemen of the bar: It is with sorrow for the occasion which requires it that I yield to the motion which you have offered. For the loss of the late chief justice, the nation at large will lament. His past eminent services in the congress of the United States, in the cabinet during the most trying period of the nation's history, and on the bench of the supreme court since, have taught all his fellow citizens to revere and honor him who love integrity and moral and intellectual worth. But to the bar and people of this judicial circuit his loss is particularly severe and painful. Assigned to this circuit, and coming among you as he did, immediately after the close of the war, when the citizens of these states, alarmed by the result, were doubtful of the future, when the rights of property and personal security were altogether unsettled, he was enabled by his great ability and knowledge of jurisprudence, notwithstanding the many new questions arising out of recent events, to inspire confidence in the courts of the United States, to restore quiet of mind, and to hold so evenly the balance of justice among his fellow citizens, who had widely and vehemently differed with him in the political forum, as to win the good opinion of the whole bar. One by one, rapidly those who endured the strain and severe anxiety of the great conflict depart,—men whom the republic would long delight to honor,—but among those whom we lament there is no one who will hereafter be

thought to excel, in uprightness, ability, integrity, and patriotic devotion to the best interest of his country in war and peace, Salmon P. Chase. I shall direct your proceedings to be entered on the minutes of the court, and will adjourn at once in respect to the memory of the deceased."

The court then adjourned.

CRANCH, WILLIAM.

[For brief biographical notice, see 30 Fed. Cas. 1368.]

The following proceedings are reprinted from 2 Hayw. & H. 435:

Circuit Court of the District of Columbia, for the County of Washington. October 15, 1855.

On the opening of this court this morning, John Marbury, Esq., after some preliminary remarks, read to the court the following proceedings:

At a meeting of the members of the bar of the District of Columbia and the officers of the courts, held pursuant to notice, John Marbury, Esq., was called to the chair, and John A. Smith appointed secretary.

Richard S. Coxe, Esq., rose and stated that the meeting had assembled in consequence of an event which, though long anticipated, had struck them with surprise. They had met to commemorate the life, virtues and character of their deceased brother, the Honorable William Cranch, chief judge of the circuit court and judge of the district court of the District of Columbia, who died at his residence in this city on Saturday last, September 1, 1855. Judge Cranch died at the age of 86 years, after having lived thus long as an individual, and has presided on the bench a longer period of time than had ever been heard of in a judicial officer. He was appointed a judge of the circuit court in March, 1801, 54 years since. He has now left us, and the place made vacant by his death is to be supplied; but he might say a long time would elapse before that place could be supplied with so acceptable a gentleman and one possessed of so much ability. All who knew him in the course of their practice in the courts, knew how well and admirably he fulfilled all the duties with which he was intrusted. Few judges ever excelled him; few ever equalled him in all the essentials of a great judge. He was eminent for learning in all the departments of law, (admiralty, chancery, criminal and common,) and was thoroughly imbued with the learning of the profession from the earliest days. We have met with a great loss, but thank God! he has left a bright example. We trust that every young man, while he reverences, will follow him—will imitate Judge Cranch in industry, and endeavor to equal him in learning, be pure of heart as he was pure, honorable as he was honorable, so as to have as pure and eminent a character for the admiration of his countrymen.

Mr. Coxe offered the following resolution: "Resolved, that a committee of five members of the meeting be appointed by the chair, to draft appropriate resolutions, on the subject which has thus convened us together." The chair appointed Richard S. Coxe, Wm. Redin, Joseph H. Bradley, James M. Carlisle and John F. Ennis, Esqrs., who having retired, subsequently returned, and by their chairman, Mr. Coxe, presented the following resolutions: "The Hon. William Cranch, chief judge of the circuit court and judge of the district court of the District of Columbia, having departed this life on Saturday, the 1st of Sept., 1855, the members of the bar and officers of the court, entertain the highest veneration for the private and public character of the deceased,—duly appreciating his great and varied professional attainments, his unsullied integrity, his patient diligence, his uniform courtesy and amenity of manner on the bench and in private intercourse, regard his death, though long anticipated, with deep regret as a severe public loss. They have therefore: (1) Resolved, that during the whole course of the private life of the deceased in this vicinity, extending beyond sixty years, he had emi-

nently entitled himself to possess what he fully enjoyed, the unqualified admiration and esteem of our whole community. (2) Resolved, that as a reporter of the decisions of the supreme court, and as a judge of the circuit court, on the bench of which he occupied a seat for upwards of 54 years, he was distinguished for his acquirements in all the different branches of professional learning, for untiring industry, for indefatigable diligence in the discharge of his duties, for his kind and courteous amenity of deportment towards all with whom he had intercourse, for dignified, patient and impartial treatment toward his colleagues and the members of the bar. (3) Resolved, that we deeply deplore the loss which the community, the profession, and we ourselves more especially have sustained in the death of Judge Cranch. (4) Resolved, that in the manifestation of the high esteem and respect we entertain for the deceased, we will wear the customary badge of mourning for the period of thirty days, and will as a body attend his funeral. (5) Resolved, that we will undertake, with the consent and approbation of the family, to erect a substantial and appropriate monument over the grave of the deceased in commemoration of his character, and that the chairman of this meeting, Mr. Redin and Mr. Carlisle be a committee to carry this resolution into effect. (6) Resolved, that the chairman communicate a copy of these proceedings to the family of the departed, with an expression of our condolence with them in the loss they have sustained. (7) Resolved, that at the next meeting of the circuit court the chairman be requested to present a copy to the court, with a request that the same may be entered upon the minutes of the court. (8) Resolved, that copies of these proceedings be handed to the different newspapers in this district for publication. The resolutions having been seconded by Mr. Carlisle, with appropriate remarks, were unanimously adopted. John Smith, Secretary. John Marbury, Chairman."

After the reading of the above proceedings Mr. R. S. Coxe, with some appropriate remarks, seconded the motion that the same be entered on the minutes of the court, and then moved that the court adjourn one week. To which the Hon. James S. Morsell, the presiding judge, made the following reply: "Gentlemen of the Bar and Officers of the Court: We heartily unite with you in doing honor to the memory of our lamented brother, Judge Cranch. He was all that you so respectfully and appropriately ascribe to him. You have not said too much. A great and good judge has gone from us; his loss is deeply deplored by us all. But though he has gone, he will still live in the admiring memory of a grateful community, who have for so many years enjoyed the blessings of his able, pure and impartial administration of justice. In the eminent example he has left us of a pure and unsullied character and in the rich fruit of his long and indefatigable judicial labors. In addition to a display of superior legal talent, his course was marked by a calm and amiable composure of temper and patient forbearance, with an inflexible faithfulness and uprightness; to the rich and the poor he was alike impartial and just, always accessible and ready, cheerfully on all occasions, however arduous the duties to fulfill them. The court therefore order the resolutions of the bar and officers of the court to be entered on the records of the court, and the judges will wear the customary badge of mourning during the residue of the term." The court also passed the following order: "Ordered by the court that the court room be draped in mourning during the residue of the term."

Memoir of Wm. Cranch, LL. D., chief judge of the U. S. circuit court of the District of Columbia: "Wm. Cranch, chief judge of the U. S. circuit court of the District of Columbia, was the only son of Judge Richard Cranch, of Quincy, Mass., who emigrated from England to this country in the year 1746, and Mary Smith, a daughter of the Rev. Wm. Smith, of Weymouth, Mass. He was born at Weymouth on the 17th

day of July, 1769, and received his early education from his mother, a woman of high accomplishments and of rare virtue, who instructed him also in the elements of Latin and algebra. He was afterwards fitted for college by his uncle, the Rev. Wm. Shaw, of Haverhill, Mass., in whose family he in the meantime resided. In 1773, he entered Harvard University, in the same class with his cousin, John Quincy Adams, between whom and himself there had always existed a sincere and intimate friendship, which remained unimpaired to the time of Mr. Adams' decease. In 1787, he graduated, and in the same year commenced reading law in the office of the Hon. Thos. Dawes, one of the justices of the supreme judicial court of Massachusetts. In July, 1790, he was admitted to practice in the court of common pleas, and in July, 1791, in the supreme judicial court. On the death of his relative, John Thaxter, Esq., who had been settled in the practice of the law, in Haverhill, Mr. Cranch removed to that place and took charge of his unfinished business. After practicing in the courts of Mass. and N. H. for nearly four years, he removed to the city of Washington, and had charge of the large contracts of Morris, Nicholson and Greenleaf, in that city. In 1800 he was appointed one of the commissioners of the public buildings, then in process of erection. In 1801 he was appointed by President Adams one of the assistant judges of the circuit court of the District of Columbia, under the act of the 27th of February, 1801; and on the resignation of Mr. Kilty, chief judge, in 1805, he was appointed by President Jefferson, in his place. Judge Cranch succeeded Mr. Dallas, as reporter of the decisions of the supreme court of the United States. These reports are well known, and are highly valued by the profession. He also made accurate reports of the cases decided in the circuit court of the District of Columbia, from its organization to 1841. These Reports have not failed to be acceptable to the profession and to the public, from the great variety and importance of the cases arising under the wide and peculiar jurisdiction of a United States court at the seat of government. In 1827 Judge Cranch, by request, delivered 'A Memoir of the Life, Character and Writings of John Adams' before the Columbian Institute. He also prepared a Code of Laws for the District of Columbia, in conformity to an act of congress, which was printed by order of congress but was never referred to a committee. In the year 1829 the degree of doctor of laws was conferred upon him by Harvard University. He was an honorary member of the American Academy of Arts and Science, also a member of the Antiquarian Society. The life of Judge Cranch, like that of many other distinguished men, has been marked with few of those vicissitudes which impart so great an interest in biography. In the regular exercise of his high duties for 54 years, his life has been varied only by those events which are incident to all men. As chief judge he has been eminent alike for profound learning, and for impartiality and wisdom. It would be difficult to find one in any situation who has labored more diligently, more patiently, or more successfully than he has done, in the office which he has so long and so faithfully filled."

CURTIS, BENJAMIN ROBBINS.

[For brief biographical notice, see 30 Fed. Cas. 1363.]

The following matter is reprinted from 4 Cliff. 625:

Pursuant to the call of the committee appointed at the meeting of the bar held Sept. 18, 1874, the members of the bar assembled in the court room of the circuit court Oct. 7, 1874, at ten o'clock. Mr. Sidney Bartlett presided. The committee, through their chairman, presented their report, and members of the bar added their tribute to the memory of the distinguished deceased.

Report of the committee: "Circuit Court of the

United States, District of Massachusetts. October 7, 1874. The members of the bar of this court, brought together by the news of the decease of their brother and friend, Benjamin Robbins Curtis, desire to place upon the records of the court the expression of their sense of personal bereavement and of the loss which the bar, the courts, and the country at large have sustained by his death. They recognized, with fraternal pride, in Mr. Curtis all the elements of a great lawyer and judge. Thoroughly grounded in the common and commercial law, master of equity in the peculiar yet broad domain of jurisprudence administered in the courts of the United States, the fullness, breadth, and accuracy of his learning were not surpassed at the bar or on the bench of his time. With a strong mind carefully trained and disciplined, capacious and retentive memory, sound and cautious judgment, the mental qualities which illustrated and gave full force and effect to the rest were an almost intuitive capacity to discern the points on which a cause hinged, and the power of simple, clear, comprehensive statement,—in method and manner as perfect when oral as when written, and which gave to the enunciation of legal principles something of the beauty and precision of the exact sciences. His manners at the bar and on the bench were quiet, courteous, and marked by a modest dignity and firmness which won, or, if need be, commanded respect. We may not better express the admiration and esteem in which Judge Curtis was held than to say that, when the last two vacancies occurred in the chief justiceship of the supreme court of the United States, he was deemed, by his brethren of the bar throughout the country, eminently fitted by wisdom, learning, love of justice, and a thoroughly judicial mind, to discharge the duties of that exalted trust. Of Judge Curtis, as an associate and friend, it may be said that the better he was known the more highly he was esteemed. Under a calm and quiet exterior, which to strangers seemed like coldness, he had warm affections and generous sympathies. Careful observation of life and manners, a liberal culture outside of his profession, conversation thoughtful and suggestive, and marked by curious felicity of expression, made him a most interesting and instructive companion. The name of Judge Curtis is to be added to the list of great lawyers and judges, who, not as a matter of sentiment merely, but as the result of careful study and reflection, were firm believers in the great truths of Christianity. Not inattentive to modern scientific thought or speculation, catholic in spirit, unwilling to judge others, he retained to the last his conviction and sense of the being and providence of God and the hope of immortal life. Recalling to-day his services to the cause of jurisprudence, his fidelity to duty, the amenity of his manners and the kindness of his heart, his pride in his profession and the lustre and dignity he imparted to it, and, above all, the integrity, weight, and influence of his character, his brethren of the bar gratefully pay this tribute to his memory."

Remarks of Hon. E. Rockwood Hoar: "Mr. Chairman,—I move that the sentiments of the bar, in regard to the death of Judge Curtis, as reported by your committee, be presented by the district attorney to the circuit court, which shall come in this morning, with the request that they be entered on the records of the court. I do not feel, Mr. Chairman and brethren, that it is necessary for me to add anything to the very complete expression of our thoughts and feelings on this occasion, which the report of the committee contains; yet I desire to add my personal expression of our sense of loss, and the more, because, to my own sorrow and regret, I could not attend the funeral services of our friend. Judge Curtis was a man in his position and relations in life so admirable and so complete, that a statement of his merits, modelled upon his own style of presentation, seems to me the most appropriate. What a monument at Mount Auburn records of one of his early associates at the bar is eminently true of him,—that 'he had the beauty of accuracy in his understanding, and the beauty of uprightness in

his character.' I think that his loss at the present time is a national one, for this more than, perhaps, any other reason, that in the supreme court at Washington he was a model to the lawyers of the country; that in these days, when there are so many defects of taste, he was a model of good taste in the profession; that he did nothing in excess, while all his professional performances were adequate to the occasion. I think the loss of no lawyer in the country would be so much felt by the members of that high tribunal. In these days of loose and turgid eloquence, and of imperfect legal training, of which there are so many exhibitions before them, they must have constantly felt it a relief, and pleasure, and satisfaction, when they could turn for an hour or two to listen to that master of lucid statement, with a wealth of learning never paraded, but always ample in furnishing what the case and the presentation of it required, with clear perception of the point at issue, rigidly confining himself to conveying it clearly to the mind of the tribunal which he addressed, and then stopping. I think it is felt among the profession throughout the country that one of its pillars has fallen, as well as one of its ornaments. Entirely concurring with what the paper presented by the committee states of the personal courtesy, generosity, and kindness, which were exhibited by our departed friend, I think that, meeting here as members of the bar, we are entitled to say besides that our commonwealth and this bar has furnished to the country in him one who must be recognized everywhere as a great lawyer. Judge Curtis had his limitations. I do not know that I should be prepared to say or to think that, aside from what he was as a lawyer, he was also a great man. By this I mean that I do not suppose he has produced upon the country or the world any leading or great impression from any thing that he has said or done, except so far as he has made his profession respected, so far as he has administered the law in his judicial position, and as he has applied its principles, in his advocacy of cases, in a manner which tended to strengthen the foundations of society, and to illustrate the value of absolute justice. But the man who has made these contributions to society, who has done so much to keep the administration of justice steady and useful to mankind, to make all the machinery of government in its daily applications serviceable to the interests of his fellow-men, has a solid claim to respectful memory. Perhaps he has made no contribution to judicial science of the importance of those which were made by his predecessor, Judge Story. Perhaps, as development did not seem to be the order of his being to so great an extent as in some other great judges, it may have been well that in the earlier and formative period of our jurisprudence a man of a different character occupied the seat which he afterwards adorned. But for clearness, learning, steadiness, and uprightness, he has left a judicial fame that any man might envy."

Remarks of Gen. Benjamin F. Butler: "Mr. Chairman,—Being called to another sphere of public duty, I was unhappily unable to mingle my regrets with my brethren at the bar at the meeting of which this is an adjournment, at the great loss the bar of the nation has sustained in the death of our late associate, Judge Curtis. I have used the extended words, 'the bar of the nation,' because I deem the loss of such a lawyer, with so great a national reputation, of accumulated acquirements and extensive practice in the highest branches of jurisprudence, a national loss. It is a tradition, and a true one, that the memory of the work of a great lawyer exists only in the traditions of the bar; and even when embodied in the form of decisions of the bench, they are only sought after by his brethren for a different purpose, and hardly in commemoration of his fame. Still, I think the memory of Judge Curtis will live many, many years in that most able opinion delivered by him in the Dred Scott decision, worthy to be compared with that of Lord Mansfield on a kindred subject, which opened and developed an idea as to the rights of citizens, which has since been embalmed in constitutional law. If I were

to venture to add, sir, a word to the resolutions now before us, so happily framed, it would be wherein they describe the lucidity and comprehensiveness of statement which so eminently characterized our deceased associate, and would add the word 'exhaustive.' Having had occasion to observe him in the greatest and most solemn trial had before the highest tribunal ordained by the constitution of his country, the senate of the United States, of the impeachment of Andrew Johnson, I may be permitted with truth to say, that after Judge Curtis had finished his opening statement for his distinguished client, thereafterwards in that trial in his behalf, although many things were said, and well said, by the learned and eminent counsel with whom he was associated, yet nothing more that was new or pertinent was said. Because of the deep feeling of profound admiration which I have for the legal attainments, the judicial character, of Judge Curtis, I am exceeding glad that it has been permitted to me on this occasion, even by a single word, to testify my respect for his virtues, and to mingle my sorrows here with those of his brethren of this bar."

The chairman here read the following letter which he had received from Judge Campbell, formerly of the United States supreme court:

Judge Campbell's letter:

"169 St. Paul Street, Baltimore, Sept. 20, 1874. My Dear Sir,—The melancholy intelligence of the death of our friend, Judge Curtis, reached me through the press. I cannot refrain from expressing my sorrow for the bereavement which the legal profession of the country, his friends, and the community have sustained, to one of his most valued friends and associates. My relations to him commenced after my appointment to the bench of the supreme court of the United States, in 1853. Before that appointment was made, Justices Catron and Curtis informed President Pierce, on behalf of the court, that it would be acceptable to the justices. My reception in the court, as then existing, was cordial, and, as the survivor of all the members that composed it, I may be indulged in making the statement, that, in all of the consultations of that court, and in all of the official acts of its members, there was a seemliness and dignity of deportment, an earnest endeavor to execute justice and to maintain truth, and an impress of personal honor upon their deliberations and judgments, which commanded and was entitled to the approbation and esteem of the jurists of the land and the confidence of the people. In that court, Justice Curtis was an able and an esteemed member. He examined the causes submitted with caution and candor; he meditated the opinions he gave in the conference with care, and delivered them with precision, consideration, and deference to the opinions of others. The opinions he prepared have made for him a lasting reputation. My own relations with him were always those of kindness and good-will, and these relations were not affected by the war, which created so many estrangements. I find in my library, in a volume concerning the 'Worthies of England,' a description of one of the judges of the queen's bench in the sixteenth century. To this judge is attributed 'a great happiness in all the four faculties that make a lawyer: 1. A sharp invention and a clear comprehension to search all the circumstances of a case propounded. 2. Judgment to examine and weigh the particulars invented and apprehended, for truth lieth in things as gold in mines. 3. Memory to retain what is judged and examined. 4. A prompt and ready delivery of what is conceived and retained, set out with ingenuity and gravity. Oratio prompta non audax. What he said was close and pinching, and not confident and earnest; allowing passion not to disturb either the method or delivery of his discourse, but to quicken it.' On the margin of the page is written, 'Justice Curtis,' in pencil. I do not know that I could express my opinion of his characteristics with more satisfaction to myself than by adopting a description which I had applied as suitable to him. In the apparent decay of an ambition purely professional, and the diminution of profound and various learning which can

only be obtained through such an ambition, among the bar of the Union, the loss of such a jurist is a loss to the bar. In these tumultuous and anarchical times, when landmarks are so little respected, the loss of a calm, conscientious, learned, independent, and approved constitutional lawyer may be regarded as a public calamity. With much respect and esteem, I am very truly yours, John A. Campbell.

"Hon. Sidney Bartlett, Boston, Mass."

Remarks of Mr. H. Weld Fuller: "Mr. Chairman,—I came here to listen, not to speak. But esteeming and loving Judge Curtis as I did, and having occupied a place under him during almost the whole of his judicial career, I trust you will pardon me for breaking the temporary silence which has followed the eloquent utterances of others. Many are present who knew him more intimately and shared more closely his confidence; and they can better speak of his social qualities and portray his noble character and high attainments. But my memory goes back to his college days, and to the rank he then held as a thinker and writer. He was distinguished before his entrance to the law school at Cambridge. Even then the tendency of his mind to matters of government and law was manifest. His prize essay had for its subject, 'How Far can Absolute Governments Depend upon the Ignorance of the People?' Indeed his step from boyhood to manhood seemed nearly instantaneous! There was a thoughtfulness and thoroughness unusual for his age. As a student he was indefatigable, and all his accumulations of knowledge, and the inferences incident thereto, were so classified and arranged as to be at all times at his command. During his whole life they seemed to come at his call, without confusion and clear as crystal. By this power of memory and association—modified by a sound judgment and a right application to legitimate issues—he could see and show to others the most striking features of a case, and hold the subject out, like a solid substance, for inspection. It was said of Lord Mansfield that his statement of facts was often equal to another man's argument; and this may be said of Judge Curtis. Without overstating or exaggerating the facts, he could so order and connect them with apt allusions and natural suggestions as to make the deepest and most favorable impression. His cases were always hinged on their strongest points, and opened to the most practicable view. Although strong, very strong in his friendships, he never exhibited any favoritism on the bench. He was courteous to all. The parties before him were as algebraic characters. He looked steadfastly at a legitimate result. Faithful and fearless, he was never arrogant or disdainful. It was a pleasure to serve him. He may have had his faults, but in my intercourse with him I could not see them. We can truly say, 'Happy is the state which has such men for counselors and judges!' When they leave us we are bereft, indeed."

Remarks of Mr. Elias Merwin: "Mr. Chairman,—It is impossible for me to add anything to the just and eloquent tributes which have been paid to Judge Curtis by the distinguished brethren who have preceded me. Did I consult my own feelings,—feelings which you, Mr. Chairman, who experienced, through so many years and to so great an extent, the constancy and reality of his friendship, will not fail to excuse,—my part-to-day would be only that of a sorrowing silence. The character of Judge Curtis was unique, but it was complete. Great as were his intellect and learning, he possessed in an equal degree those sterling personal qualities which give to human friendships their charm and value, and strength and solidity and dignity to character. It is true that he did not 'wear his heart upon his sleeve,' but with the modesty and reserve which belong to the most thoroughly great and genuine natures, he cherished the precious gift in a breast that was as pure and transparent as crystal. The waters were silent, but they ran deep. The predominant traits of his character and the controlling forces of his conduct, it always seemed to me, were justice, charity, and truth. Judicial in his moral

as well as in his mental temperament, no considerations of expediency or self-interest marred the spotless integrity of his life. From this characteristic it followed that it was impossible for him to be a partisan, or that his patriotism should ever be a thing to be made or marred by popular clamor. Generous but unostentatious in giving, as in every other act and habit of his life, he likewise illustrated that rarer and higher form of charity, which thinketh no evil. Detraction never fell from his lips, and to envy he was as superior as to falsehood. In these respects he seemed to dwell upon a serener height and to breathe an untainted air. He was incapable of uttering or acting any thing which he did not mean, and therefore, in his case, when he did speak, it was speech, rather than silence, that was golden. Some men we honor for the prompt indignation with which they would repel and rebuke a dishonest suggestion. Others there are, and have been, to whom it is impossible that such a suggestion could be made. Judge Curtis, I think, was one of these. The wonderful precision and accuracy of his mental operations, I cannot but believe, were due in a large measure to the singular rectitude and force of his character. No baser metal thwarted its action, or caused the magnet to deviate from the pole. In contemplating the character of Judge Curtis, no one can fail to be impressed with the beautiful contrast presented by the rich diversity of his great intellectual gifts and attainments, and the absolute simplicity and unity of his moral nature. In him was exemplified that contradiction of traits which inspiration has depicted as the highest type of manhood,—in understanding a man, in malice a child. In recalling that illustrious career at the bar and upon the bench, we are at some loss to determine in what department of jurisprudence he was most accomplished or most distinguished. Superficial in nothing, he seemed in turn to be equally master of each. As he threaded his way—which he made luminous at every step—through the intricate mazes of some complex patent cause, it seemed for the time as if this certainly was his forte and province, pre-eminently. But then again his mastery of commercial and maritime law was complete, and he could expound and apply each with a practical sagacity and facility which one might suppose was due only to an experience that had been gathered in the counting-room and upon the quarter-deck. At the same time there was apparently no exigency in human affairs, arising from accident, mistake, or the frauds of men, for which his thorough familiarity with the principles and spirit of equity jurisprudence could not find some relief. Above and beyond all these, summoned, as he frequently was, to deal with the graver and grander problems of constitutional and international law, he, of all others, by the precision of his statement, the vigor of his logic, the repressed fervor of his convictions, and the elevated tone of his simple eloquence, called back for a while the now departed glories of Marshall and of Webster."

Remarks of Mr. Cyrus Cobb: "I am impelled to speak for the younger members of the bar. It was remarked at the former meeting, held immediately after his death, that to many Judge Curtis seemed cold and distant. An undoubted test of an elderly man's heart is the estimation in which he is held in the hearts of young men; and in this regard I would bear testimony in behalf of the young men, whom I, on a recent occasion, had the honor to represent in connection with Judge Curtis. Last June the first reunion of the Alumni of the Boston University School of Law occurred. In preparing for this event, the members of the Alumni sent invitations to the various members of the faculty, with the request that they respond to toasts to be given at the meeting. Judge Curtis, though one of the faculty, had never been able to officiate as such; hence no personal relations had arisen between him and the students, and they viewed him as one who could hardly be approached. At their request, however, I waited upon Judge Curtis, and made known their desires. He, with peculiar and unexpected urbanity, expressed his regrets that

he could not grant their request, explaining that he had been forbidden by his physicians to expose himself to the night air, on account of a disease of the throat from which he was then suffering. I reported the result of the interview to my fellow-students. Then the suggestion was made that a note from Judge Curtis, to be read at the reunion, would be very highly prized, and the wondering query was expressed whether he would be willing to write such a note. I consented to wait on Judge Curtis again, with this object in view. I did so, and the response, which was in the affirmative, was gracious in the extreme. There was in both interviews, in which conversation was entered into by the deceased, a singular courtesy and kindness of manner, imparting an undefinable charm, which lingers with me still. The note was sent and read, and will be ever cherished by the Alumni. I would further say, that so strongly was Judge Curtis's largeness of heart impressed upon my own, I felt, when I heard of his death, as if some respected relative had departed, whom I had known and revered for years."

Remarks of Hon. Charles Levi Woodbury: "I had intended, Mr. Chairman, to have refrained from saying anything to-day, coming here simply to listen; but I cannot forbear to add my tribute to the memory of one whom I had known for nearly thirty years, and whose progress I had watched with admiration and esteem. When Judge Curtis came to the bench of the United States it probably was accompanied with the unanimous consent of all the bar of the circuit that he was the most fitting man to fill the seat then vacant. Before he left the bench it became my duty, as district attorney, to watch the proceedings of the court, and I can therefore cheerfully bear my testimony to those merits which have been acknowledged on all sides. There is one thing in Judge Curtis's personal character which has been hardly dwelt upon as much as it should have been, and that was that beneath the cold exterior, beneath the calm and regulated manner, there was borne a heart as warm and generous as any man could desire to be the possessor of, true in its instincts, and firm in its resolves. I have known him, in cases where he had thought the judgment had fallen too hard upon his client, to turn and relinquish every dollar of his fee, in order to soften the adverse blow, and that, too, without a word, without any open demonstration, and probably without anybody knowing it except myself, his book-keeper, and client. With such knowledge of his personal character, I think no one can fail to believe, as I believe, that Judge Curtis filled out the accurate calibre of a man, in all its fullness and fairness. Of the great loss his death has caused to the profession, to the bench, and to those who unfortunately are involved in litigation, none can refrain from admitting. I have no more to say than this, but I have said it simply to add one single point to the well-merited eulogies given by the members of this bar."

Remarks of Mr. Causten Browne: "Mr. Chairman,—I beg the indulgence of the bar while I add a few words to those expressions of respect and attachment with which we are now, as a body, taking leave of our late distinguished associate and friend. I am sure we should all be willing to lengthen out the minutes of this hour, the last in which we, who knew him well, knew him as a class better than any other men did, can speak here to one another of those qualities which we most loved to contemplate in him while he lived, and shall most love to remember in him now that he is gone. We are in no danger of being immoderate in our speech. None of us ever knew a man whose memory would more reproach us than his would do, if for any cause we should fall into exaggeration or extravagance in what we have occasion to say. In regard to the character and the foundation of Judge Curtis's professional fame, I wish to make but one remark; and that relates to the completeness of his equipment, intellectual and moral, for the work of his life. It might not be difficult (it certainly would not be easy) to find a man with as fine a natural capacity for the acquisition and digestion of legal learning as he had;

or a man as comprehensively and exactly read in the law as he; or a man having his knowledge of the law as perfectly in hand for use on the 'occasion sudden' as was his; or a man of like power of legal reasoning, illustration, and expression; or even a man with the same exquisite habit of mind, always calm, always vigilant, always ready. But to find a man who had all these possessions combined, and thus to make good the loss which this bar and the bar of the nation has sustained, would be a very difficult task indeed. I believe that the depth of the impression which he made as a lawyer upon the minds of his time was not so much owing to the degree in which he possessed one or more of the cardinal qualities I have mentioned as to the fact that he possessed them all, each in first-rate degree, and all in perfect balance and proportion. A young man, coming a stranger into a large and strong bar like this (as I did in the year 1852, when Judge Curtis had just gone upon the bench), is apt to be deeply impressed by the marked manifestation on the part of the bench of certain moral qualities, which others, not so anxiously situated, might take for granted; and it is of some of these qualities, very conspicuous in Judge Curtis, that I wish to speak. He was a very patient judge. I suppose he thought that it was as much a judge's duty to be patient as it was to be learned, and that his possession of much learning did not excuse him from the obligation of patience towards those who had less. And, in his case, I early observed that whatever encouragement or exhilaration a young advocate might miss in the frigid and reserved and distant manner which was maintained by the bench, was more than made up by the steadiness conferred upon the speaker by the quiet and courteous attention with which he was listened to from the beginning to the end of what he had to say. If a young advocate happened to be making bad work of it, he was at any rate not helped downward by the slightest manifestation of weariness or vexation from the bench. He was a perfectly impartial judge. If we are to speak of this trait in its highest aspect, we cannot do better than to apply to Judge Curtis the language which he himself applied to another distinguished jurist of this bench (I mean—and I delight in this brief opportunity of doing him honor—Mr. Justice Sprague) on the occasion of his retirement from judicial life: 'The bar have found in you that absolute judicial impartiality which can only exist where an instructed and self-reliant intellect is joined to a tender and vigilant conscience and a firm will.' Not a word can be spared from this definition. It was all true of Judge Sprague. It was all true of his judicial comrade, Judge Curtis. We may assume now that all judges mean to be impartial, as it is here defined. But it is not possible that all, or more than a very few, should have an intellect at once instructed and self-reliant, a conscience at once tender and vigilant, as well as a firm will; and without them all, it is most true that absolute judicial impartiality, to be useful to the world as well as meritorious in its possessor, cannot exist. He was an absolutely independent judge,—independent not only in conduct, so that in his judicial seat he neither feared nor favored any man, but by natural sentiment, so that he could be and was single-minded, having no ends, large or small, to accomplish, outside of and apart from the great end of doing justice. He had an ambition, of course, to command the respect of his contemporaries, and to make himself a lasting reputation as a wise and learned judge; but he had no judicial ambition beyond this. How he would appear, what people would say, how his or anybody's personal feeling would be affected if he decided thus or thus, were thoughts of which he was simply incapable. He was that kind of man that could not lower himself to entertain such considerations. The result of the possession and steady exercise of this principle or instinct of independence was to make the administration of the law in his court profoundly respected. Patient, impartial, independent, possessing these three qualities in absolute perfection, he might have been much less able and much less learned than he was, and still have been a judge whose time we could look back upon

with pride and gratitude. After Judge Curtis's return to the bar, I enjoyed frequent professional intercourse with him, mostly as his colleague; and it was in this relation of senior counsel that I find much to remember with peculiar interest and admiration. It was here that the characteristics I have mentioned, of his holding his power calmly in reserve and letting it forth in full strength at the instant it was called for, and his having his learning always ready in hand for use as the occasion sudden might require, made him so supremely valuable to a junior associate. He was patient and courteous in consultation with him; generous in giving him his opportunity in the trial or hearing of the cause; considerate and forbearing towards his mistakes; ready, on occasion of his successes, with words of commendation, very few, very appropriate, and (it could never be doubted) perfectly sincere. Towards the court he maintained a dignified courtesy which was so perfect as to be a model. The principles by which he guided his conduct towards the court were the highest. He was incapable of abusing the trust which every court must put in its counselors. In matters pertaining to this trust, he walked in the light of a 'tender and vigilant conscience' as well as an 'instructed and self-reliant intellect,' and neither did, advised, nor permitted anything which did not at the time stand approved by that scrutiny.

"I would fain linger for a moment on one or two traits which marked Judge Curtis in his private intercourse with his friends. You can bear witness, Mr. Chairman, that none who did not know him at home knew him at all. He was indeed (how strange it seems to us who so knew him, that it should surprise anybody!) a very warm-hearted, tender-hearted man. He prized the affection of his friends. He relied much upon it for his enjoyment of life. It might be truly said of him that the friends he had, and their adoption tried, he grappled them to his soul with hooks of steel. He sympathized readily and tenderly in their distresses, and testified that sympathy by many and many an act, very fragrant in the memory now; but of which he never spoke. I must resist the temptation to dwell longer on such recollections. One more thought let me express before I take my seat. Others may have left as much, nay, in some respects, perhaps, more than he did, to command the admiration of us, the younger men of this bar; but no one has left us so much that we could safely and reasonably imitate. If we shall do so successfully, we shall do honor to ourselves and to our profession."

Remarks of Hon. Richard H. Dana, Jr.: Mr. Chairman,—I had not the fortune to know Judge Curtis privately, well. I can therefore only speak as to that side of his character which was presented to the public. And everything has been so well said that I should not rise were it not that I am unwilling to lose an opportunity of at least attempting to express my own sense of what every one here feels. Seeing you, sir, reminds me of the first time I heard Judge Curtis, when he was at the age of thirty-three, in the trial of the great case of the overseers of the poor of Boston against certain proprietors of lands in the city. It was a great cause, from the amount involved, from the principles necessary to be passed upon, and from the eminence of the counsel engaged in it, of whom I now recall, besides yourself, Charles Loring, Judge Fletcher, and Mr. Curtis, the youngest of the counsel. I mention it, because I know you will agree with me that he then made a deep and lasting impression upon the bar and the bench. It is no breach of confidence, I suppose, for me to say that at the close of one day's great debate, at Mr. Loring's office, where I was a student, one of the counsel said, 'That young man ought to be chief justice of Massachusetts.' Mr. Loring replied, 'There is no court in Christendom he is not fitted now to preside over.' This was a great deal to be said of so young a man, and by such an authority as Mr. Loring; but I do not think any large deduction need be made from it by those who have watched Mr. Curtis's career to its close. About twenty-two years ago, the bar, the political world,

and the public were extremely excited by the fugitive slave trials. There was a strong tide setting for the conviction of the rescuers. I felt deeply on the subject on account of my political opinions, and as counsel in the cases. Judge Curtis presided. I regretted deeply the conclusions to which he had arrived on the law. I knew he would conduct the trials with impartiality. What I now wish to say is that I felt then, and have felt ever since, that there was in the conduct of those trials more than passive impartiality. There was, on his part, an affirmative determination that the trial should be had with absolute fairness. At a critical stage of one case, he volunteered a suggestion in favor of the accused as to the weight of testimony, which, I think, in the measuring cast, secured the verdict of acquittal. And they who remember how things then stood at Washington in those days will see the force of the suggestion that Judge Curtis had not been confirmed by the senate, but was acting upon an executive appointment, made during a recess of the senate.

"As I knew but little of Judge Curtis privately, I can only speak of him as his constitution and temperament were a kind of study to a spectator who respected him as much as I did. I think I am not wrong in the belief that from the earliest he exercised over himself an extraordinary command, and enforced a constant mental and moral self-discipline. I think, perhaps, we may say that in the smallest matters and in his social relations he held a kind of court within himself, and weighed evidence and settled the principles applicable to the case, before he allowed himself to express an opinion, or say anything that might affect the rights or feelings of any man. An exaggeration was to him an untruth, and he would have felt himself dishonored if he said more than was necessary at any time on any subject. Enough, perhaps, has been said already on the subject of Judge Curtis's precision and conciseness. It would be presumption for me to pass judgment upon his higher powers, his instincts or his qualities as a jurist, but I certainly may express the admiration I felt, beginning with the trial I have spoken of, for his power of condensed statement,—a power which none could appreciate so well as those who had prepared themselves upon the same subject. And whenever I have heard Judge Curtis state his propositions on a subject which I had myself made a matter of study, I listened to it with something of that surprise and delight with which one who has labored through the slow and repetitious processes of arithmetic sees his work done before his face by the methods and signs of algebra. I think, though relative criticism is rarely well, it would be no disparagement to the members of any bar in America to say that for condensed statement he has not left his superior; and, brethren, speaking of our own bar, were it not that the presiding officer of this meeting is still active among us, we might safely say that in that respect he has not left his equal."

At the close of Mr. Dana's remarks, the report of the committee was unanimously adopted.

Circuit Court of the United States. District of Massachusetts. May Term, 1874.

Present: Honorable Nathan Clifford, Associate Justice of the Supreme Court of the United States, Assigned to the First Circuit; Honorable George F. Shepley, Circuit Judge of the United States, First Judicial Circuit; Honorable John Lowell, District Judge of the United States District of Massachusetts.

The district attorney addressed the court as follows:—"May it please your honors,—When the sad intelligence of the death of Judge Curtis, coming over the wires, was announced to the court upon the day of his decease, Mr. Justice Shepley, who was presiding, at once directed the court to be adjourned. Upon the day of the funeral the court also adjourned, that the members of the bar might attend the services, and that they might hold a meeting to take such action as should be deemed proper upon the occasion of his decease. That meeting was attended in unusual numbers by members of the bar from every dis-

trict in this circuit, and from other districts, all profoundly penetrated with undissembled sorrow at the death of their distinguished brother, leader, and friend; and eminent counsellors from the great metropolis gave utterance to their common sympathy with the members of this bar and the profession everywhere at the great loss which the country had sustained in the death of Mr. Curtis. At that meeting a committee was appointed, to report at an adjourned meeting the sentiments of this bar upon the occasion of the death of Mr. Curtis. That adjournment has been held this morning, and the expressions of the sentiments reported by the committee were adopted; and in accordance with the custom of this bar, the attorney of the United States has been requested to present them to the court, and to ask to have them spread upon its records. In compliance with this request, and also moved by the deepest admiration for the unsurpassed ability and attainment of the deceased, as a lawyer, judge, and jurist, and with the highest respect for his professional, judicial, and personal character, I respectfully request of your honors that these expressions of the sentiments of the bar, after they have been read by the chairman of the committee, may be extended upon the records of the court."

Hon. Benjamin F. Thomas, chairman of the committee of the bar, read the expression of the sentiments of the bar, as reported by the committee and unanimously adopted at the bar meeting.

Mr. Sidney Bartlett addressed the court as follows:—"May it please your honors,—The resolutions drawn up and presented by the chairman of the committee express in a truthful and I think not exaggerated form the estimate in which Judge Curtis was held by his associates of this bar. It is now forty years since he removed to this city and began here his professional life. During nearly that entire period, relations the most friendly, perhaps I may say intimate, have subsisted between him and myself. I cannot, therefore, suffer him to pass away without uttering my vain regrets, nor without briefly stating some of the features of his mind and character by which he won and deserved the great eminence to which he attained,—the profound respect and regard in which he was held. To those who hold that intellectual qualities are usually to be traced to a preceding generation, I have too scanty means to furnish information. That he was the son of a mother of great intelligence, and of the highest womanly virtues, is known to me; and among his collateral kindred was one, recently departed, who, in addition to his many other virtues and accomplishments, stood among the foremost in the field of letters,—the author of the 'History of Spanish Literature.' Of his earliest training nothing can be known beyond the circle of his home; but his life in college gave token of his high faculties, and his career in the law school at Harvard, under the charge of the learned, acute, and able Ashmun, drew the attention of his instructor and of his classmates, and led to the firm anticipation of his future success. So much by tradition was known of Judge Curtis by his brethren when he became, in 1834, a member of this bar; and from that period until his death he has walked before us, his conduct and qualities are personally known to us, and we can speak of them truthfully with such discrimination as our recent loss and the deep regard in which we held him permit. As the result of this retrospect, I feel confident it may be said that the great distinction attained by Judge Curtis was in his mastery of the common law. I do not mean to say that with a mind so wide as his, and filling the great judicial position he did, he failed to become familiar with the rules and principles of equity jurisprudence; nor that, like some admirers of the common law, he held that admirable system in disesteem. Whoever will peruse his recorded judgments will find how thoroughly, when the occasion arose, he mastered, and how acutely and comprehensively he applied, those principles; but, if I mistake not, he may also find slight though not disfiguring traces of a mind thoroughly imbued with the principles of the common law, and which that common law had moulded. In this, his favorite science he had among us no

superior and but few equals. But legal scholarship, however wide and thorough, might, without the addition of his other marked qualities, have limited him to the life of an author and a student; furnishing, through his pen, thoughts and principles, the weight and value of which, in their practical application, must be found and wrought out by others. Had he lacked the power of giving weight to his words by the mode of their utterance, he could hardly have attained distinction at the bar; but he added to his other learning a familiar acquaintance with the beauties and the strength of the tongue he spoke, and from them he formed for himself a style of surpassing simplicity and power. The clothing he thus gave his thought, striking as it was, would, with the thought itself, have failed of its true effect, if he had not added to it a clearness of statement and a rigorous logic that I have rarely known to be excelled. Quick in his perceptions, he had also a power of memory which was almost wonderful. I recollect to have heard him state that when he had finished the study of Stephen on Pleading, he found himself able, without recurrence to the book, to state in their order every proposition it contained. It is possible that his severe training in the common law may be supposed by some to have made his mind too highly technical; but if this were so, it would be difficult to point out an occasion where in professional or judicial life it effectively obscured his vision of the right, or narrowed the breadth of his view. We are too near the period of the nation's great struggle to expect a uniform concurrence in the estimate to be formed of Judge Curtis's merits as a student and expositor of the constitution. It has sometimes been said that sound and broad views of constitutional law require in addition to the powers of a jurist those of a statesman familiar with the actual administration of the government, as well as a thorough knowledge of its early history. Judge Curtis held no political office except for a short period when he was a member of the state legislature. He took no part in what is usually termed the administration of the government, state or national; but whereforever, in civil controversies, he was called on to determine the rights of parties to property or estate under the constitution, it is believed there is a complete concurrence in the estimate of the strength and soundness of his views. Whatsoever may be the difference of opinion as to the merits and conclusiveness of his arguments or judgments on questions of constitutional law, involving political considerations, few, I think, can peruse his address to the senate, in the case of the impeachment of President Johnson, and his admirable judgment in the Dred Scott Case, without conceding that he had thoroughly studied the constitution, was familiar with the history of our governments, state and national, and that on the powers he exhibited on both those occasions may well be rested his reputation as a constitutional lawyer, a jurist, and an advocate. I have thus stated to your honors the estimate in which the character, capacity, and learning of our friend, as a lawyer, whether exhibited at the bar or on the bench, must, I think, be held by those who knew him. With what clearness, vigor, courtesy, and fairness these faculties were applied at nisi prius is known to us all. No counsel or client could have ever left his court, whatsoever might have been the issue, without feeling assured that his cause had been disposed of ably, carefully, and without bias.

"As a citizen, as a man filling the relations of domestic and of social life, Judge Curtis was, I think, less widely known. Not that he held aloof from affairs of public interest, nor that he failed to form and to express to those who sought them, his views and judgment upon the important events or questions of his day; but he had an inherent disinclination to be publicly and actively engaged in giving effect to the results of his careful thought on public topics, and contented himself with communicating and discussing the same with those with whom he was familiar. Of his bearing and the mode in which he filled the relations of private life, it is difficult for me to speak measurely. It was obvious to those who knew him best that his

whole life was a life of discipline. Grave almost to a fault, unless life is to be exclusively devoted to serious purposes, he yet carried with him a heart capable of the widest and most generous sympathies, but which was careful not to suffer itself to be led astray by false or exaggerated sentiment. Thus constituted, he carefully fulfilled the duties of life, but not to the exclusion of cordial and intimate friendships, the memory of which will be a melancholy pleasure to many beyond the professional circle. A few lines occur to me at this moment which admirably, I think, sum up the character of Judge Curtis:—

'Though deep, yet clear; though gentle, yet not dull;
Strong without rage; without o'erflowing, full.'

"May it please your honors,—our associate is lost to us. The ranks close up. In the firm step and manly bearing of the column which presses on may be had the assurance that soon other talent, other learning and discipline, will be found to scale the eminences of the law; but to those who, side by side with him, have been so long engaged in the contests of the profession, may be permitted the trite, melancholy, but not thoughtless exclamation, 'We shall not look upon his like again!'"

Reply of the Court: Mr. Justice Clifford replied to the address of the bar as follows:—"Gentlemen of the bar,—Of all the lessons of life, the most solemnly instructive is death, as the lesson of death accords, in its teachings, with the substance of the divine admonition that the great aim of man here should be to prepare for his own well-being in the life to come. Bereavements which sever even the dearest ties of love and friendship are of constant occurrence, and they should admonish the bereaved that it 'is not all of life to live, nor all of death to die,' as man should live to fulfil the law of his Creator; and to promote as well as he may all the great ends of his being, and should never forget that his works will follow him into the spirit world. Admonitions of the kind have more than once, since the presiding justice came into the court, been addressed to the members of this bar, when they, as now, have been called to mourn the loss of some one of the most eminent and highly esteemed of their present or former associates. Experience shows that none are exempt from the sentence, as it applies to the whole human family without regard to station, attainment, or usefulness. Your most polished and eloquent orator bowed to the inexorable doom, within the period mentioned, while yet in the midst of his usefulness, and the great magistrate of your state obeyed the dread summons only a few years later; and, more recently, the great philanthropist of the country, who at one time was the reporter of the decisions of the most learned judge who ever presided over the deliberations of this court, followed his eminent patron to the grave. Webster also is gone, though he died at an earlier period, and yet the demands of the destroyer are not satisfied. Such vacancies unquestionably served to weaken for the time the power and influence of your circle, but it still embraced one of the eminent leaders of the American bar. Better evidence need not be required than is exhibited in the assemblage here convened, that death has again invaded your ranks; and the appropriate resolutions presented in behalf of the bar announce, what was but too well known before, that you are now called to mourn the loss of your distinguished leader, of whom it may be properly said, he had no living superior at the American bar. Equals, undoubtedly, he had, who still survive to honor and adorn the record-roll of the legal profession, yet it may nevertheless be safely affirmed that your deceased brother had no living superior practicing in the federal courts, without fear of contradiction from the bench or bar. You have assembled to express your sorrow for the loss which the bar of this court, and of the country everywhere have sustained by the decease of our lamented brother, and to pay appropriate honors to his memory, and the court is here to mingle their sorrows for the great bereavement with those of the bar, and to unite and co-operate with the bar in such proceedings as they may deem

it proper to adopt on the occasion, and to comply with their request that their proceedings may be entered in the records of the court. Death having removed from your circle, and from the extended sphere of his professional employment, an associate so distinguished, and with whom you have so long maintained such intimate social and professional relations, it is eminently fit and proper that you should pause in the midst of your usual avocations, and give public expression to your sense of the great loss you have sustained, and to the profound respect and veneration you entertain for the private virtues and distinguished professional services of the eminent jurist whose earthly career is now closed for ever. Influenced by such considerations, the court cordially approves the resolutions presented in your behalf, and unhesitatingly assures the members of the bar that they do heartily unite with them in responding to the sentiments which the resolutions so appropriately express. Such a manifestation of the sense of the great loss which has been sustained by the decease of our esteemed brother is no more than what is fitting on the occasion, and entirely accords with our own views and feelings upon the subject. More than forty years have elapsed since he commenced his career at the bar, and yet it may not be amiss to remark that he came into the legal profession without any deficiencies to supply in his preparatory education, and that the history of the time shows that he entered at once into a successful and remunerative practice.

"Competition at the state bar was, perhaps, never greater than at that period, as the ranks of the profession were filled with men of great legal learning, erudition, and experience, but all admit that he was eminently successful in every point of view which evidences the rising prospects of the younger members of the profession. Day by day his reputation as a sound lawyer and successful advocate increased throughout the whole period of his professional life which preceded his elevation to the bench of the supreme court of the United States. Years before that event occurred he was second to none of his associates, except the great leaders of the bar, such as Webster and Mason, all of whom, with one accord, upon the decease of the late Mr. Justice Woodbury, joined with the other members of the bar in presenting his name to the president, to fill the vacancy created by the decease of that distinguished jurist. Appointed to that bench, as it were, by common consent, and carrying with him into the court the fruits, not only of his excellent early training, but of the untiring studies of his riper experience, his success in that new and responsible sphere of duty was not a matter of surprise to any of his old associates, as all well-informed persons knew that he possessed good health, and an active, vigorous, and logical mind, well stored with legal knowledge and erudition, as the fruits of patient industry and long and active experience at the bar; nor were the public expectations disappointed, as the result showed that he was able to meet every demand upon the station, whether it had respect to the performance of the varied and responsible duties it imposed, or to the dignity of the office, or to the elevation of the individual character of the incumbent. Throughout the comparatively brief period of his judicial life, his opinions delivered in the supreme court are published in the volumes of that period, which also contain the opinions delivered by all his learned associates, and it is no more than just to say that his opinions compare favorably with the opinions delivered within the same period by the other members of the supreme court. Considered as a whole, they are characterized by a clear statement of the facts of the case, and by an accurate application of sound principles of law to the well-ascertained state of the case. Consequently his judgments remain undisturbed, and, it would seem, must ever remain as safe precedents and correct expositions of law, as applied to the cases then before the court. Two volumes of his opinions, delivered in the circuit court, have also been published, and those decisions are everywhere admitted to be of great value to all whose duty it is either to discuss or decide legal or con-

stitutional questions. Complete success attended him as a judge in the performance of all his duties while he remained on the bench, and many of his friends were much disappointed when he resigned his seat to resume the practice of the profession which he relinquished when he accepted the commission of associate justice of the supreme court. Deep regrets undoubtedly were felt by many at his decision, but no one ever questioned his right to resign, and pursue a more lucrative employment, as the compensation of a supreme court judge at that period was quite small when compared with the remuneration which a jurist of his acquirements and experience might reasonably expect to receive from a full practice. Friends left behind him know full well that he more than once remarked that it was the duty he owed to his family that induced him to resign, which is certainly a motive that all are bound to respect. Eminently successful though he was as a judge, it is nevertheless true that his highest eminence and widest reputation were acquired in his forensic displays as a lawyer and advocate, and in one respect his reputation derived from that source is as peculiar as it is exalted and resplendent.

"Other living examples of the kind there are, but they are few, where a judge of a high court has been able to leave the bench and resume the practice of the law, and find himself able to win new professional honors beyond what were accorded to him before his elevation, and to secure and retain for a long period a much increased and greatly more lucrative practice than he enjoyed before he accepted the station from which he subsequently retired. Instances are certainly more frequent where the retiring judge, though he left the bench with high expectations of renewed professional success, has either fallen a prey to some lurking disease, and become incapable of protracted mental exertion, or lived to find that all his hopes of professional preferment were vain, and finally to linger out an existence rendered unhappy by chagrin and disappointment that younger men than himself have succeeded to the fruition of the hopes which induced him to withdraw from the bench, and return to the profession from which he had been promoted. Nothing of the kind occurred in the case of our deceased brother, as all will bear witness who were in a situation to see and know what took place. Instead of that, old clients hastened to offer new retainers, and new clients flocked in the same direction, securing to the new applicant for professional employment, in a brief space of time, more important and remunerative engagements than he ever represented before he was promoted to the high place from which he voluntarily retired. Such peculiar events in the history of a professional man evince beyond controversy that the individual in question possessed unusual qualifications to serve the interests of those who with such alacrity and spontaneous concurrence hastened to engage his professional services. Nor was that impression a fanciful one, for his forensic power in the discussion of questions of law and constitutional questions, as they arise in controversies between party and party, were scarcely ever surpassed, especially in cases where law and fact are both in dispute. Beyond all doubt he was a good jury lawyer, but his highest eminence was acquired in the discussion to the court of mixed questions of law and fact, as he never failed to exhibit the whole substance of the case in such a concise, clear, and, at the same time, comprehensive form that the tribunal addressed seldom or never found much difficulty in determining that he was either right or wrong in his view of the case; and if right, it almost invariably followed that his client was entitled to prevail, for he never intended to ask the court to apply to the case an unsound legal or constitutional principle. Though uniformly faithful to his client, he was, nevertheless, true to the court, and never, for the sake of success, would consent to exert his forensic power to subvert sound principles of law, to mislead the court, or to confound the rules of right between man and man. Skillful advocates in such cases have often appeared here and in the supreme court, but none are remembered,

within the period mentioned, who excelled our deceased brother in dealing with large masses of complicated testimony, where it became necessary, in the opening of the case, to present a summary view of the whole in a succinct, clear, and at the same time sufficiently comprehensive form to convince the tribunal addressed that it embraced the whole substance of the principal matters in controversy between the parties. Such a statement, if made orally, in order to be effectual, must be comparatively brief and always clear, and it must be just, and embrace the substance of the matters in controversy, else it will fail to be convincing; but if it possess all of those requisites, it is oftentimes the best argument which can be addressed to a court. Success was often won by the subject of these remarks by such efforts, for which the character of his mind, aided by his great experience, was strikingly fitted. Much of his success in the great controversy as to the title of the quicksilver mine, in which he was opposed by one of the most effective advocates of our country, was due to the exercise of that high faculty of his mind. Beyond all doubt, it was the effective and masterly opening statement made by the deceased in the great impeachment trial that contributed very largely to give his distinguished associate an easy and triumphant victory in closing the case for the accused president. Examples of the kind almost without number might be given in which his success here and in the supreme court was due in a great measure to his superior power and skill in stating the case, but the occasion is not one for any such details. Logical force, clearness, and precision, and a ready perception characterized his intellect, as evidenced by his judicial decisions and by all of his forensic efforts at the bar. His rule, it is understood, was, before he entered upon an argument, to learn the whole substance of the material facts, which he did by consultation with his client or his associates, or by his own personal study of the record, without which not even his wonderful power of statement would have been of much avail, as it is difficult for an advocate to explain to the court what he himself does not understand. Having mastered the facts, his own reflection, aided by the inexhaustible stores of legal knowledge which he possessed, enabled him to accomplish the rest without much additional preparation, as he was able to see almost at a glance the legal weight and significance of every well-ascertained fact in the case, whether considered separately or as a whole. Instructive examples are remembered when, at the outset, he compressed the facts of the case into a statement so concise that it could not be forgotten, and yet so just, forcible, and exhaustive that it really left little occasion for further elaboration or enlargement of the argument. He seized, as it were, intuitively, the salient points of the case, which, in the clear illumination of his extensive learning, usually impressed the tribunal addressed with the conviction that the points made by him deserved consideration, and in doing so he uniformly dismissed all minor matters, and bent the whole energies of his mind to the propositions of law and fact which he believed should decide the controversy. Few men were better able to define a doubtful constitutional provision, or to interpret correctly an ambiguous statute, or to analyze a confused record, or to explain a complicated machine, or to ascertain the exact question presented in an agreed statement, or the precise effect of an obscure or intricate pleading, or the true construction of the conflicting and uncertain provisions of a written contract, deed, or will. Experience had made him familiar with every branch of jurisprudence, whether common law or equity, commercial law or admiralty, patent law or the law of insolvency and bankruptcy, and his experience as a judge, and his long practice in the federal courts, had also made him familiar with the law of prize, and the law of nations.

"Probably he never had much practice in criminal cases, but his reported decisions rendered in the circuit court during the six years he was in commission as an associate justice of the supreme court, fully justify the remark that he was also fa-

miliar with the criminal law, as well as with every branch of civil jurisprudence. Clearness, brevity, force, and good judgment characterized all his forensic efforts in the discussion of matters of fact or issues of law to the court. His address was dignified, calm, and thoughtful, and he never failed to impress the mind of the tribunal addressed that his propositions were entitled to weight, by the justness and logical force of his arguments, which were expressed in language so pure and appropriate that his sentiments never needed the adjunct of fervor or impassioned appeal to make his remarks effective, for the reason that neither fervor nor appeal could add anything to their force. Artifices he never employed, nor would it have been appropriate, as his power of reasoning was sufficiently great to render any appeal to sympathy, prejudice, or feeling quite unnecessary, and he seldom indulged in any such course of remark. But it is a mistake to suppose that his arguments were devoid of warmth and earnest conviction. On the contrary, occasions are remembered when, under the weight of heavy responsibility, and impelled by strong convictions, he, as it were, involuntarily gave utterance to passages of deep solemnity and impressiveness, which showed that he possessed a cultivated imagination as well as great logical resource. Marked success attended him both as a justice of the supreme court and in all his career as an advocate at the bar, in both of which callings he was at times exposed to great responsibilities. Few examples there are where a judge has been compelled to assume a greater responsibility than was devolved upon the distinguished jurist, whose death is the occasion of these observances, when he was constrained by a sense of duty to dissent from the majority of the court in the great case which was decided during the last term he ever sat in the supreme court bench. Judges and jurists may differ in opinion whether he was right or wrong, but all must agree that he acted from a sense of public duty, and that he vindicated his conclusion by an ability and a course of reasoning rarely ever surpassed. Courage is well-nigh as essential in a judge as in a military commander, and all must admit that the dissenting judge showed by his course on the occasion referred to that he was prepared to go wherever conscientious duty pointed out the pathway. Responsibilities of an unusual character were also assumed by him when he engaged to assist in conducting the defence of the president.

"Public men differed widely upon the subject, but no one who ever read the record of his masterly opening statement of the case will deny that he met the whole matter of the accusation in the most fearless manner, answering every part of the charge by a clear statement of the facts, and by a sound exposition of every legal and constitutional question involved in the case. Never, perhaps, did the great qualities of his mind shine brighter than on those two occasions,—the one showing his high qualifications as a judge, and the other his unrivaled powers as an advocate. It seems almost superfluous to speak of the character of our deceased brother, as all admit that it was spotless, and that he lived a life of uprightness and purity from his youth to the moment when he yielded up his spirit to the great Creator. Except for a brief period, his whole professional life has been spent here, and it must be gratifying to his immediate friends to know that all those who have known him most intimately are the freest to admit that in all their intercourse with him he was always actuated by a strict regard to what was right, and by a faithful adherence to every professional engagement. Such a vacancy creates a great void, which is deeply felt by the court as well as by the bar. Many years of intimate relations had endeared him to the court as an example of high professional honor, and as a friend always to be trusted without fear that any confidence reposed would ever be misplaced. Our loss, my brethren, is great; but the loss of his family is much greater, and to them we tender our sincere sympathies. Pursuant to the request of the bar,

it is ordered that the resolutions presented in their behalf, and the proceedings of the bar, together with the remarks made by the members of the bar in their support, and the remarks of the court, be entered in the record, and the court stands adjourned until to-morrow morning at ten o'clock."

DAVIS, DAVID.

[For brief biographical notice, see 30 Fed. Cas. 1369.]

The following proceedings upon his retirement from the bench are reprinted from 7 Biss. 15:

Hon. David Davis, justice of the United States supreme court, assigned to this circuit, having resigned his position on the bench of that court, for the purpose of filling the position of United States senator, to which he had been elected by the legislature of the state of Illinois, the members of the bar within this circuit took early occasion to express their sentiments toward the retiring justice.

Action of the Chicago bar: The Chicago Bar Association, at their regular meeting, passed the following resolutions: "The Honorable David Davis, one of the justices of the supreme court of the United States, after a service of more than a quarter of a century as judge of the circuit courts of Illinois, and of the federal courts, having recently retired from judicial life, the Bar Association of Chicago think the occasion fitting and proper for an expression of the sentiments of esteem and personal good will, entertained by its members, in common with the bar of the country, toward him. During his judicial career no member of the legal profession or the community in which his courts were held ever questioned his integrity and honor. He has those clear perceptions and that keen sense of right which made his judgment of facts presented better than precedents, and enabled him to administer the law according to its spirit. In his service of more than fourteen years upon the supreme bench at Washington and at the federal circuits, he was distinguished among his fellow judges for intellectual strength, sound judgment, and ability to analyze principles; and his opinions are models of directness, brevity, and force. In laying aside his judicial robes for another field of service to his country, Judge Davis carries with him the respect, the confidence, and the affectionate regard of the legal profession of the country."

The following were the proceedings of the southern Illinois bar:

Circuit Court of the United States, Southern District of Illinois, Thursday, July 12th, A. D. 1877.

Present, Hon. Thomas Drummond, Presiding Judge. Samuel H. Treat, District Judge.

This day comes into open court Hon. J. T. Stuart, who addresses the court as follows:

"May it please your honors: A meeting of the bar of this district and state was held in this court room on yesterday, in which almost every section of the state was represented, and to be remembered for its numbers and for the talent, learning, and reputation of its members; a meeting called to take action in relation to the retirement from the bench of Hon. David Davis. It was hoped and expected that the able lawyer, Hon. Stephen T. Logan, now venerable on account of his character and age, would perform the duty now devolved upon me of presenting to this honorable court and asking to be spread on its records these resolutions, passed by that meeting of the bar:

"Resolved, that the members of the bar of the state of Illinois view with sensibility the retirement of the Hon. David Davis from the bench of the supreme court of the United States, and express their profound regret that the country is deprived of the benefit of his services in that distinguished place, which he has so long adorned by his learning, his industry, his urbanity, and his conscientious devotion to duty.

"Resolved, that, in retiring from his eminent judicial station, he carries with him the confidence and high personal and professional respect and

regard of the members of the bar of the state of Illinois.

"Resolved, that a copy of these resolutions be forwarded by the chairman of this meeting to the Hon. David Davis, with an earnest expression of the hope that his future career may be as useful to his country and as honorable to himself as his past, while judge in the courts of the state of Illinois, and of the United States."

"The resolutions are expressive of the opinions of the bar in regard to that distinguished citizen, and I can add but little to their force. David Davis was elected judge of the eighth judicial circuit of the state of Illinois in the year 1848, that being the first election for judges under the constitution of 1847, making the office elective. The eighth circuit was then composed of the counties of Sangamon, Tazewell, Woodford, McLean, De Witt, Champaign, Piatt, Macon, Moultrie, Shelby, Christian, Logan, Vermillion, and Edgar; a large circuit, and embracing a fair average of the intelligence of the people of the state, and of the talent of the legal profession. The election of Judge Davis, then a young man, in such a circuit, was no inconsiderable compliment; but it was a higher compliment that for the ensuing six years he discharged the duties of that office so well, that in 1854 he was re-elected without opposition, and again re-elected in 1861 without opposition in a circuit somewhat changed. Mr. Lincoln was no mean judge of human nature; he had practiced law at the same bar with David Davis from 1835 to 1848, and before him as judge for the twelve years prior to his election as president; and when he became president he appointed David Davis to the second vacancy on the bench of the supreme court of the United States. Judge Davis was a justice of the supreme court of the United States, and presiding justice of this judicial circuit from 1861 to 1876, a period long enough to test his capacity as a man and a lawyer. It would, perhaps, be out of place for me, before your honors who have known him so long and well on the bench and in the conference room, to say how well he discharged the duties of that high office, the most important and dignified in the government; that from the time of his appointment to his retirement his capacity for judicial usefulness continued to grow and expand; that he administered the law and constitution faithfully, loved the truth and the right, followed fearlessly and boldly where his convictions pointed the way; that he was a just judge; that his retirement from the bench has been followed by the regrets of the profession and the country; and that, especially in the language of these resolutions, he carries with him in that retirement 'the confidence and high personal and professional respect and regard of the members of the bar of the state of Illinois.' In presenting these resolutions and confining myself to the judicial life of Judge Davis, I, perhaps, have said all that I ought to say; but I cannot refrain from adding, on my own account, that I have known David Davis intimately and well as a man and as a lawyer, and in his social relations, for these forty-two years past; and that in all these relations he is without a stain, and that in all he has been true to himself, honest and honorable, and that, from all his past life, he may be safely trusted to do, on all occasions, only what he believes to be true and right."

It is ordered, that the foregoing resolutions and the address of Hon. John T. Stuart thereupon, be spread upon the records of said court, and a certified copy thereof be transmitted to the Hon. David Davis.

Action of the Indianapolis bar: At the meeting called at the United States court room in Indianapolis, to take action expressive of the feelings of the bar, in regard to the retirement of Judge David Davis from the supreme bench, the following proceedings were had: Judge Walter Q. Gresham presided, and the Hon. John D. Howland acted as secretary. A committee on resolutions, consisting of the following gentlemen, was appointed: Hon. Joseph E. McDonald, Gen. Benj. Harrison, Judge S. H. Buskirk, Hon. Thomas M. Brown, Hon. J. D. Morris, Judge Sol. Claypool,

and Hon. W. P. Fishback. This committee retired and shortly reported the following resolutions:

"The members of the bar of the courts of the United States in this district, in view of the voluntary retirement of the Hon. David Davis from the supreme court, and the bench of this circuit, respectfully ask this court to accept and place upon its records this testimonial of respect and affection for the great judicial officer who has withdrawn from this department of the public service. We have, for the last fifteen years, had personal knowledge of Judge Davis as one of the associate justices of the supreme court, and as the justice assigned by that tribunal to hold the courts of the United States in the seventh judicial circuit, and we have fully appreciated his learning and ability as a judge, and his fearless, independent, and impartial administration of justice. His knowledge of affairs, his intuitive discernment of character, his rapid analysis of evidence, however voluminous and complicated, his robust sagacity in detecting the vital facts in a cause, and his broad and masterly application of principles have stamped his judicial career as one of singular usefulness, and have furnished an example of judicial service which can never be forgotten by those whose privilege it has been to assist in it as members of his court. And it is not the judge alone whose loss we deplore. The man whose society we have enjoyed, and whose confidence many of us have shared, is dearer to us than the officer. His liberal humanity, his ready recognition of the rights and feelings of all with whom he is brought in contact, his indifference to merely accidental distinctions, his kindly interest in the young, his evident anxiety to search out and vindicate the very right of a cause, and his contempt for all arts, appliances and influences by which the mind may be diverted from the direct channel of justice, have enriched and ennobled his career, and will make its memory precious to us forever."

Senator McDonald presented the resolutions. He referred to the time when Judge Davis came upon the bench as one particularly calculated to test the character of the man and the judge. Partisan strife ran high, and this had been intensified and embittered by Civil War. But when Judge Davis assumed the bench the partisan was lost in the judge. From the beginning to the end of his judicial career he was never known to swerve from the path of official duty.

General Harrison referred to the rare success of Judge Davis in winning and retaining the respect of lawyers, litigants and jurors. His attainments and personal character compelled the respect of all with whom he had intercourse as a judge or as a man. As a judge he was unsurpassed; his powers of analysis were especially marked in the manner in which he dissected intricate questions of evidence, and the clear and comprehensive way in which he presented such to juries. It is the expectation of his friends that he will pursue the same independence and unswerving integrity of character in the new position to which he has been called, as he ever manifested on the bench.

Hon. A. G. Porter said that Judge Davis was distinguished for the strong yet simple honesty of his character. He was intellectually and morally honest, and in his personal relations he was always honest and straightforward. He said some one had described him exactly when he remarked that "Judge Davis was big all over, intellectually, morally, and personally."

Hon. W. P. Fishback referred to the wonderful clearness and readiness of Judge Davis in grasping and analyzing legal questions. His was eminently a legal mind. He also referred to his rare social gifts, his kindness and simplicity of character. Hon. John Hanna, General Thomas Browne, Judge Buskirk, W. H. H. Miller, T. B. Buchanan and H. D. Pierce also made remarks, each paying tribute to the high qualities of Judge Davis as a judicial officer and a man.

The resolutions were then unanimously adopted and ordered spread upon the records of the circuit court, and a copy of the same sent to Judge Davis.

DAVIS, JOHN.

[For brief biographical notice, see 30 Fed. Cas. 1369.]

The following proceedings are reprinted from 1 Story, 618:

"Within the period of time embraced by the present Reports, the Honorable John Davis, the learned and venerable district judge for the district of Massachusetts, resigned the office, which for more than forty years had been graced by his dignity and wisdom. Upon an intimation that it was his intention to resign, a meeting of the Suffolk bar was held on the 9th of July, 1841, at which it was unanimously resolved:

"That the attorney of the United States be requested, in the name of this bar, to make known to Judge Davis the high sense we all entertain of the importance of his judicial labors, which for so many years have exhibited varied and accurate learning, sound and discriminating judgment, unwearied patience, gentleness of manners, and perfect purity; and that Mr. Attorney be requested to express our heartfelt wishes, that he may find in retirement that dignified repose, which forms the appropriate close of a long and useful life, and to bid him an affectionate farewell."

In accordance with these resolutions, Franklin Dexter, Esq., the district attorney of the United States, at the time appointed, rose and addressed Judge Davis as follows:

"May it please your honor:—By these resolutions I am requested, in the name of the Suffolk bar, to express to you their high sense of the value of your judicial labors, and their acknowledgment of the personal kindness, as well as the distinguished ability, with which they have been performed. This is, sir, to me a most grateful duty;—and yet I feel the difficulty of giving any adequate expression of the deep feelings of my brethren, without danger of offending the modesty, which, through a long life of usefulness, has adorned so many talents and so many virtues. I will not, therefore, depart from the simple but comprehensive language of the resolution in describing to you our general estimation of your judicial character and conduct. But let me assure you, sir, that these are not words of mere form, required by the occasion; but the sincere and spontaneous expression of the feelings and opinions of every member of the bar, and of this commercial community. It can rarely happen, that a judge, who is called upon to decide so many delicate and important questions of property and of personal right, should so entirely have escaped all imputation of prejudice or passion, and should have found so general an acquiescence in his results. It is not to be forgotten in the peaceful tenor of the present times, that your official career has been formerly marked with extraordinary difficulties. When you assumed its duties,—more than forty years ago,—before any of this fraternity had begun the active business of life,—the stores of judicial learning in that peculiar branch of the law, which you have been called most frequently to administer, were by no means so near at hand as at present;—then it was necessary to peruse the sources, and from those fountains your own decisions have, with those of your distinguished contemporaries in Europe and America, drawn down the principles of the admiralty law within the reach of comparatively easy exertion. A few years after that time the system of commercial restrictions, adopted by the general government, threw this portion of the country into a state of unparalleled distress and exasperation. An abundant and overflowing commerce was suddenly checked in all its issues and enterprises, and the revulsion threatened to break down the barriers of law by which it was restrained. It was in the district court, and under your administration, that this struggle took place; and although juries refused to execute the obnoxious restrictions in cases, required by the constitution to be submitted to them, yet the supremacy of the law suffered no detriment in the hands of the court. Few of us can remember this *civium ardor jubentium*, but all can imagine, how painful a duty it was to be

thus placed in opposition to the feelings and interests of this community. Perhaps I may be pardoned for recalling to the minds of the bar, in your presence, the beautiful language in which your own regrets were expressed, when you felt obliged to declare, that, disastrous as its consequences were to the country, the embargo was still the law of the land, and as such to be obeyed. I lament the privations, the interruption of profitable pursuits and manly enterprise, to which it has been thought necessary to subject the citizens of this great community. I respect the merchant and his employment. The disconcerted mariner demands our sympathy. The sound of the axe and of the hammer would be grateful music. Ocean, in itself a dreary waste, by the swelling sail and floating steamer, becomes an exhilarating object; and it is painful to perceive, by force of any contingencies, the American stars and stripes vanishing from the scene. Commerce, indeed, merits all the eulogy, which we have heard so eloquently pronounced at the bar. It is the welcome attendant of civilized man, in all his various stations. It is the nurse of arts; the genial friend of liberty, justice, and order; the sure source of national wealth and greatness; the promoter of moral and intellectual improvement; of generous affections and enlarged philanthropy. Connecting seas, flowing rivers, and capacious havens, equally with the fertile bosom of the earth, suggest, to the reflecting mind, the purposes of a beneficent Deity, relative to the destination and employments of man. Let us not entertain the gloomy apprehension, that advantages so precious are altogether abandoned; that pursuits so interesting and beneficial are not to be resumed. Let us rather cherish a hope, that commercial activity and intercourse, with all their wholesome energies, will be revived; and that our merchants and our mariners will, again, be permitted to pursue their wonted employments, consistently with the national safety, honor, and independence.' From that time, sir, down to this most interesting period, when you are about to surrender the high trust, you have so long holden, it is enough for me to say, that the bar have felt undiminished confidence in the ability and integrity of your administration of the law, and that our filial respect and affection for yourself has constantly increased with your increasing years. And while we acknowledge your right now to seek the repose of private life, we feel, that your retirement is not less, than it ever would have been, a loss to the profession and to the public. I am further instructed, sir, by the fraternity, to bid you an affectionate farewell, and to express to you their heartfelt wishes, that you may find in retirement that dignified repose, which forms the appropriate close of a long and useful life. May it be so, sir. May you live long and happily,—as long as life shall continue to be a blessing to you; and so long will that life be a blessing to your friends and to society."

Judge Davis was sensibly affected at this address, and it was some moments before he was able to respond. When he commenced his reply, the bar rose and gathered round the bench, while the venerable judge delivered the following address:

"Gentlemen of the Suffolk bar:—I receive gratefully and with deep sensibility your generous and kind expressions, communicated by a representative most justly entitled to that selection, and to whom I would tender my acknowledgments for his very acceptable performance of the duty, which it has been your pleasure to assign to him on this occasion. There are considerations, besides habitual taste and temperament, which would dispose me to meet the event of this day in silent soberness, with the full persuasion, which, I was assured, might be indulged, that our official relation would be dissolved with mutual friendly regards. But I yield to an arrangement, which is more consonant with your kind wishes, and in which there seems to be an obvious propriety and fitness. At all times, and especially in this place, we are bound to regard the fitness of things. Somewhat more than half of my life has been spent in the office, which I am now to relinquish.

With the members of this bar, and with their predecessors, I have had frequent, gratifying, and improving intercourse. Should I attempt to give expression to the recollections, which on this occasion arise rapidly and somewhat confusedly to my view, I could do it but imperfectly. If a history of my time should ever be sketched, it must be with more deliberate preparation. Some reminiscences, however, seem due to the occasion; the indulgence is among the privileges of age,—a privilege, I hope, which will not be abused.

"The Suffolk bar, at the commencement of the present century, was not numerous, though even then, I believe, solicitous aspirants were heard to complain, that the profession was crowded. The whole number was but thirty-three; five barristers; twenty attorneys of the supreme judicial court, and eight of the common pleas. The barristers were James Sullivan, Theophilus Parsons, William Tudor, Perez Morton, and Shearjashub Bourne.

"Attorneys of the supreme court: Thomas Edwards, Jonathan Mason, Christopher Gore, Rufus G. Amory, Joseph Hall, Edward Gray, John Davis, Harrison G. Otis, Joseph Blake, Jr., John Lowell, Jr., John Quincy Adams, John Phillips, George Blake, Ebenezer Gay, Josiah Quincy, Joseph Rowe, William Sullivan, Charles Paine, John Williams, William Thurston.

"Attorneys of the court of common pleas: Edward Jackson, Foster Waterman, David Everett, John Heard, Charles Davis, Charles Cushing, Jr., J. W. Gurley, H. M. Lisle. Of these, there remain nine fellow surviving associates;—Hall, Otis, Adams, George Blake, Gay, Quincy, Rowe, Williams, and Cushing. Messrs. Hall, Otis, and Blake have retired from the bar. Adams, Gay, Rowe, Quincy, and Cushing have changed their residence; and Mr. Williams is the only one of the number now having a place at the Suffolk bar.

"The officers connected with the United States courts in this district, in my time, besides the present occupants, are H. G. Otis, George Blake, Andrew Dunlap, and John Mills, attorneys; Nathan Goodale, William G. Shaw, and John W. Davis, clerks; Samuel Bradford, Thompson J. Skinner, James Prince, Samuel Harris, and Jonas Sibley, marshals. Mr. Otis was but a short time in office, being removed by President Jefferson, in a few months after the appointment received from President Adams. Mr. Blake held the office many years, some of them years of great and peculiar pressure and perplexity, with eminent ability and assiduity. His successor, Mr. Dunlap, performed his official duties with similar energies, and with his characteristic ardor, tempered with gentlemanly address. Many now present remember his signal exertions, when he stood alone in the arduous trial of the pirates, in 1834, the number of the men on trial for their lives, as was remarked by their junior counsel, being equal to the number of the jury, by whom their fate was to be decided. Mr. Mills, who succeeded Mr. Dunlap, has recently resigned. He left us with the cordial esteem of all, with whom he was connected,—faithful, accurate, and able in his official transactions. It was only regretted, that he did not find it convenient to make this, the place of his business in office, his place of abode. The discreet employment of a competent and very attentive assistant, in a great degree, was a sufficient substitute. It has always, I think, been important, and the urgency is continually augmenting, that the attorney, marshals, and clerks of the United States courts in this district, should reside in or near the place, where the business, to which their offices have relation, is almost wholly transacted. Of Marshals Bradford, Prince, Harris, and Sibley, I have spoken in deserved terms of commendation, when the present marshal, Mr. Lincoln, took the requisite official oaths in this place. Of his immediate predecessor, Mr. Sibley, I feel bound to say, in addition, that, to his attention and exertions, we are very much indebted for the ample and very acceptable accommodations for the United States courts, and all connected with them, in this edifice, by arrangements with the city government. There have been times, when there has been peculiar

embarrassment in this particular. Frequently, no place could be found for holding the courts of the United States, but in a hotel. And at one time, I recollect, Marshal Prince announced, that he had written, or should write to Washington, that he knew not, where to find a place for the court, but under the great tree on the common.

"Among the clerks of this court, the last-named was, as you know, most near and dear to me. I am happy to say, also, that most of you were witnesses of his carefulness and courtesy, and how faithfully and acceptably he discharged all the duties of his trust. When your obliging sentiments were read, and I listened to the interesting accompaniments, offered by a son of an esteemed friend and classmate, it brought to recollection a reply made at a council fire, in a talk in our forest border. 'Good words,' said an aged chief, 'Good words, and I will tell them to my children.' Your good words I cannot tell to my son, but I shall tell them to his children. Of his six sons, all now very young, some one or more may, at some future time, have the ambition to take a place in your corps. If so, I am sure, they will find a welcome, and be received with generous good will. Mr. Bassett, my son's assistant in his illness, and his tried friend and classmate, became his successor in the office. You well know his merits, his accuracy, and fidelity. Everything in his department is to my entire satisfaction. The connexion of the court with the present district attorney and marshal is quite recent. If I should have remained in office, I well know the satisfaction, with which my intercourse with them would be attended. It will be experienced, I am confident, in abundant measure by my successor, and by all, with whom they may have connexion, in the interesting offices committed to their charge. The Suffolk bar is greatly increased in the forty years of my judicial life. There are on its list more than six times the number of 1801. If we deduct from the list those, who are engaged in other pursuits, though their names still stand on the honorable roll, the acting number will still far exceed the rate of increase of population in the scene of action. There are other causes, prevailing in this very busy and flourishing portion of the community, greatly affecting and varying the statistics and condition of the bar, in this city and its vicinity, on which I cannot here enlarge, but which every intelligent observer must have perceived. They are considerations, which have brought here and well rewarded the transition of distinguished advocates from other counties and from sister states. The fair field has been occupied and honored by Dexter, Ward, Prescott, Jackson, Bigelow, Webster, Pickering, Choate, Jeremiah Mason, Fletcher, Sprague, Peabody, and others, who have been cordially received by those, whom I may term the home members. Men of eminent attainments, now in judicial office,—Story, Putnam, Shaw, and Thacher,—have appeared as advocates in this court, and occasionally distinguished counsellors from other counties, and from other states. If in my department I have been deserving of the commendation, which it has been your pleasure to bestow, much, very much, is due to my cherished intercourse with such men, as well as to my habitual respect and regard for your profession.

"It is a profession highly honorable, for it is highly useful. It has been embraced by the wisest and best of men, and in every country, having any pretensions to freedom or intelligence, the able, upright, well-instructed lawyer is of high consideration. The studies, in which he is accomplished, his knowledge of men in all their relations, his habits of research, reflection, and discrimination, the frank and independent tone of his character, inspired by the very genius of his profession, his unshaken fidelity to his trust, his varied intellectual acquisitions, his power of clear, forcible, and impressive communication,—all inspire confidence, respect, and esteem. In the various perplexities of life he is the safe and confidential counsellor. He enters the temple of justice, a representative of others, with rights, which all are bound to respect. Property, reputa-

tion, the peace and repose of families, the affairs of various associations, the dearest temporal interests, are occasionally committed to his charge. Too often does the sad occasion occur, when some forlorn being, in a state of awful uncertainty, leans on him for support, and life hangs trembling on his exertions. The learned author of *Eunomus* suggests the opinion of one of his friends, a respected veteran, who had retired from practice, in regard to the moral tendency of the profession, which, if it were just, would impair its estimation and cloud its brightest honors. That friend is represented, as declaring, that 'He would never breed up a son of his to the profession, if he could not leave him a competence, independent of it, because he doubted much, whether he could thrive in it, at all events without sacrificing more of his honor and conscience than a man of any delicacy would wish for.' Very different was the opinion of my excellent predecessor, the Hon. Judge Lowell, an ornament of his profession, the delight of every friend and admirer of virtue, genius, and intelligence. I remember to have heard him more than once express, in his emphatic manner, his persuasion, that the sentiments and habits, generated by legal studies and pursuits, were a precious security against wreck of character, and that they had a favorable tendency to invigorate and improve the moral sense, as well as the intellectual faculties. In this sentiment he is sustained by Lord Coke. 'For thy encouragement,' says that eminent jurist, 'cast thine eye upon the sages of the law, that have been before thee, and never shalt thou find any, that have excelled in the knowledge of the law, but hath drawn from the breasts of that divine knowledge, honesty, gravity, and integrity.' With such convictions and the eminent examples, which it has been my good fortune to witness, it has been my endeavor to maintain a corresponding deportment. We have all, I trust, been habitually mindful of our respective relations. Truth, says Malebranche, loves gentleness and peace. It has, I hope, been evinced, in our transactions together, sometimes of exciting tendency, that irritation and ill humor are not necessary incidents in legal controversies; but that the precious elements, truly and essentially appertaining to tribunals of justice, forbearance, moderation, and mutual civility, are the most favorable for full discussion and just decision, and in entire consistency with that manly character and uniform assertion of right, which it is the honor and the duty of the bar and the bench respectively to maintain.

"When I received my appointment, there was a distinct circuit court. The district judge had not a seat in that court. It was then my impression, abundantly confirmed since, that the alteration of the law in that particular is not an improvement. The employments of the district judge, of various descriptions in court, and of ministerial and miscellaneous character, are of such amount in this highly commercial district, that it seems neither reasonable nor advantageous to require his attendance and agency in another court. This consideration will be more especially urgent, if a bankrupt law should be enacted, and the jurisdiction of the court should be enlarged in reference to crimes and offences, one or both of which augmentations of the duties of the district judge, there seems reason to expect. By becoming connected with the circuit court, I had the satisfaction of an association and intimacy with the venerable Judge Cushing, and of affording, I believe, some acceptable aid in his decline of life; and I have, in my turn, received relief and great enjoyment with his distinguished successor, the Hon. Mr. Justice Story. In that connection I have found every thing that could be wished. In business, never asking nor expecting from me more than my engagements in my own special sphere would consistently admit. By his eminent ability and unwearied industry, in a great degree relieving a solicitude, which I might otherwise have experienced, from responsibilities in reference to the circuit court, and by his able decisions, as well as by his learned labors, inter sylvas academiae, affording salutary aid in various departments of my official

duty. I have noticed with pleasure the improving influence of the law school in the University. The professional publications from some of his young pupils at this bar are highly honorable to them and to their instructor. I must forbear, gentlemen, to enlarge, though there remain topics, connected with my position, which it would not be impertinent to consider. A great portion of the business, which we have been concerned in transacting, has been of admiralty jurisdiction, in which the trial rests wholly with the judge, as to fact as well as law. This characteristic, in regard to a large portion of the cases before him, is attended with peculiar solicitudes, requiring the candid consideration, which I have had the happiness to experience. It would be a great relief to the judge, and might be an improvement, though of this I am not certain, if facts in admiralty and maritime cases were made triable by jury, as they are rendered by statute in regard to seizures on land. The solicitudes of the bench, arising from the present law and practice in that particular, are, however, not of such character and degree as to call for the alteration suggested. In this respect, as well as in all other branches of practice, I have been relieved by the courtesies of the bar, which I have uniformly enjoyed, and for which you have my cordial thanks.

"Dr. Taylor, in his *Elements of Civil Law*, has a remark not inapplicable to my present position. It is relative to the passes or bridges, over which the voters in ancient Rome proceeded to give in their ballots. 'It was in this pass, that people of sixty years and upwards were objected to, and refused the right of suffrage: for, as sexagenarians could not be members of the comitia, as they could not be compelled to execute any public office after that age, so the younger sort thought it unreasonable, that they should be indulged their suffrage, and thrust them by, as they came along,—whence the phrase "deponant senes."' Upon this rigid system, I should long ago have been 'deponantus;' but am willing to believe my generous auditors would consent to give me still further grace. But the time of release has arrived, and meets with my acceptance. I bid you an affectionate adieu, thankful for all your kindness, and for the gratifying and improving opportunities, which it has been my favored lot to enjoy, in the connexion now to be dissolved. It is painful to employ the solemn word, 'dissolve.' Our official connexion will cease; but reciprocal esteem and good-will, will, I trust, remain in continued exercise. I shall rejoice in all I may see or hear of your prosperity and honor; and may the Father of Mercies, the giver of every good gift, sustain, animate, and guide you in your assiduous progress in the path of arduous duty."

Judge Davis then descended from the bench, and took leave of the members of the bar and the officers of the court individually. The character of this learned and able judge was marked by a wise patience of investigation and a clear discrimination of principles. Yet it was not alone in his judicial capacity, that he won the esteem of all around him, but rather that to the high intellectual powers which he displayed in all the labors of his office were superadded a mild urbanity of manner, an unprejudiced candor of judgment, and a uniform dignity of deportment, which rendered him as much beloved as respected.

DILLON, JOHN FORREST.

[For brief biographical notice, see 30 Fed. Cas. 1370.]

The following proceedings are reprinted from 5 Dill. 575:

On the 26th day of May, 1879, the circuit judge sent the following letter of resignation:

"Davenport, Iowa, May 26th, 1879. To the President: I hereby tender my resignation of the office of circuit judge of the United States for the eighth judicial circuit, to take effect on the 1st day of September, 1879. The date thus fixed will enable me to attend the rest of the summer cir-

culits to dispose of the unfinished business before me, and will likewise enable my successor, should he be nominated and confirmed before congress adjourns, to qualify in time to hold the earliest of the fall terms. In voluntarily terminating a judicial career of nearly twenty-one years on the state and federal bench, it seems fitting to add that I take this step not because I am dissatisfied with the duties of the office, but because I have recently been honored by an election to a place of commanding usefulness in Columbia College, where the labors are lighter, the compensation greater, and which also, in the leisure it affords as well as in the duties it requires, offers opportunities for the study and advancement of the law that may well satisfy the highest professional ambition. I have the honor to be, with the highest regard, your obedient servant, John F. Dillon."

The resignation was accepted in the following letter:

"Department of Justice, Washington, June 11th, 1879. Honorable John F. Dillon, United States Circuit Judge, Davenport, Iowa: Sir:—Yours of the 26th ult., tendering to the president your resignation of the office of circuit judge of the United States for the eighth judicial circuit, to take effect September 1st next, is received, and the resignation accepted according to its terms. The president desires me to express his regret that we are to lose you in the judicial service, and to wish you a most cordial and agreeable career in the other duties which you have decided to enter upon. In these expressions will you permit me also to concur. Very respectfully, Charles Devens, Attorney General."

Kansas.

On the 10th day of June, 1879, the members of the bar in Kansas in attendance at the June term of the United States circuit court, at Leavenworth, passed the following resolution:

"Resolved, that the Honorable A. L. Williams be authorized to present the accompanying address to the United States circuit court, and ask that it be spread upon the records; and that the Honorable Robert Crozier, on behalf of the state judiciary, and the Honorable George R. Peck, the United States district attorney, on behalf of the practicing attorneys of the United States circuit court for the district of Kansas, be requested to follow with appropriate remarks; and that the reporter be asked to insert the proceedings had in court in this behalf in the next volume of reports."

On the next day Mr. Williams presented, in open court, the following address on behalf of the bar, Mr. Justice Miller presiding:

"To the Honorable John F. Dillon: Sir:—At a meeting of the bar of the eighth circuit, assembled at the present term of the United States circuit court for the district of Kansas, it was unanimously ordered that an address be prepared and presented to you which should appropriately express the sentiments of the profession upon your voluntary retirement from the bench. In obeying that command, we feel that it is impossible by mere words to convey to you, and through this expression (which we shall ask to be made a matter of record) to the public, any adequate idea of our sense of inestimable loss in your retirement. For ten years past it has been the habit of the bar of this circuit to look forward to the recurrence of your terms with the highest anticipation of the pleasure of meeting you as a friend and the invaluable experience of attending upon your righteous and learned judgments. What has gone on so long and with unbroken regularity, and thus has been knit into a delightful custom, it had fondly seemed to us would end only with your earthly career. We can only look forward to the approaching close of this relation with sadness. It is seldom, we believe, that there is mingled in so great a degree the respect and admiration due to an able and upright judge with the tender regard which only characterizes sincere and intimate friendship as may be found in the case of the bar of your circuit towards yourself. It is a matter of public concern when a judge, with special aptitudes for his great calling,

ripened by twenty-one years of continuous experience, becomes emeritus and retires upon his well-earned honors. The loss is not ours simply, or chiefly, nor are we alone fully appreciative of it. But the connection of bench and bar is such that we can most appropriately testify to it. We desire to assure you, sir, with a sincerity that is unfeigned, that though this proceeding partakes somewhat of the formality of procedure in a court of justice, yet this is no formal leave-taking. It is a parting that touches the heart and suffuses the eye. We cannot hope to add by this tribute anything to your great fame as a chancellor and judge. Neither can we extend your reputation as a philosophic student and writer upon the law, already firmly established among all Anglo-Saxon people. We seek to express only our appreciation of your public services as a jurist as witnessed and known by ourselves, and our regrets that they are about to end.

"The bar of your circuit owe you a debt of gratitude for many things, and not the least for the uniform help and encouragement you have ever extended to young practitioners. Your unfailing patience, the stimulus of your approving smile, your genial obliviousness of the crudities of the young lawyer struggling for a place with his abler fellows, have endeared you to both young and old, and taught us all lessons of charity and forbearance. Not a few of the younger lawyers of your circuit owe and attribute the greater part of the success they have achieved to the direct personal interest you have taken in their careers. Nor should we omit gratefully to acknowledge the service we may all derive from the example of your professional and personal life. You have taught us not only that there is no excellence without great labor, but how marvelous a degree of excellence labor united to probity of conduct may attain. We behold in you one who owes nothing to fortune, and but little to preferment—one who has risen by force of merit alone. No envy or detraction can shadow any honors you have or may receive, or any fortune with which you may be endowed, for it must be admitted on all hands that every step in your ascending ladder has been fairly and industriously scaled. And, finally, we desire to thankfully testify to your ability and absolute fairness as a judge. You have ever impressed upon the laity no less than the bar, by your clear and comprehensive judgments, that law is a rational and coherent science, the end of which is justice. Your decisions have always been illustrated with clear and judicious expositions of the law, which satisfied the reason and convinced the judgment. Your practical intellect has always penetrated the husks of discussion to the kernel of controversy, and your conclusions have, for the most part, not only met the approval of the bar generally, but have been warmly acquiesced in even by the counsel whom your judgments have defeated. A term of this court has not only been regarded by the oldest and most experienced of our practitioners as a school where the better parts of their profession were ably taught, but it has been a source of pride to us all that, as counsellors here, we were assisting in as pure and efficient an administration of public justice as is possible anywhere. It is with the greatest satisfaction, however, that the bar of this circuit is credibly informed that your new avocation will indulge you in that studious leisure which, with the preservation of your strength, must result to the highest benefit of the philosophic student of the jurisprudence of this country. In conclusion, we would say that we hope and wish that every good fortune may attend you; that your physical and mental vigor may be long preserved for the sake of the noble science to which you have consecrated your life; and that you may preserve undimmed your recollection of the bar of the eighth circuit, who will ever remember you with the warmest affection and esteem.

W. H. Rossington,
"Edward Stillings,
"Robert Crozier,
"A. L. Williams,
"J. D. Campbell,
"Committee."

Following this came an address on behalf of the practicing attorneys of the United States circuit court, by Mr. George R. Peck:

"May it please the court: It would be obviously improper, in the performance of the duty assigned to me by my brethren of the bar, to mar the beauty and the appropriateness of the address just presented to the court by any formal or extended remarks. This is no time for praise, unless it comes from the heart. What I could wish to do is to impress upon this proceeding that it is a tribute, not to the judge, but to the friend. As has been so well suggested by my friend Mr. Williams, all motive for mere flattery is past. Whatever may be said here is the genuine and spontaneous feeling of the heart, or it is nothing. The court, like the king, never dies. Judge Dillon's place will be filled by another, and our contentions go on as before; but we shall miss the features of that familiar face, miss the tones of that familiar voice. If I were called upon to analyze Judge Dillon's character, I should place, where it properly belongs, the moral above the intellectual—the heart above the mind. Genius may inspire admiration, but it is only the kind and sympathetic heart that can win affection. Judge Dillon's crowning glory is that goodness and greatness which has endeared him to all, and especially to those who, by reason of their professional duties, know him best. I do not doubt that he is ambitious in common with other men, and I presume he is not insensible to the many honors which have been showered upon him, but we have all seen in that pure and blameless life, that in the heart of the great judge, dearer than ambition, dearer than fame, is that sentiment so beautifully expressed in the lines of Tennyson:

'Howe'er it be, it seems to me
'Tis only noble to be good.
Kind hearts are more than coronets,
And simple faith, than Norman blood.'

"I ought to speak of his learning, known and recognized by jurists and lawyers everywhere; of his legal writings, which are cited as authority in the rude court-room of the frontier and in the classic walls of Westminster Hall. I ought to speak of his industry, that devotion to the laborious duties of his station which has enabled him to do what I believe no other circuit judge has ever done—to hold two terms of court in each district of his circuit during every year of his administration of the judicial office; and when we remember that his circuit is an empire extending from the British possessions to Louisiana, from the Mississippi to the mountains and beyond, it seems almost marvelous. I ought to speak of that high sense of duty which governed all his judgments, and by which he measured all rights in the just and even balances of the law. I ought to speak of that clearness of vision which enabled him to see what we could not or would not see, which guided him straight through all our fallacies and all our sophistries to the very heart and truth of the matter. I ought to speak of that dignity mingled with human sympathy, which made it plain to all men that here was a man who never forgot that he was a judge; here was a judge who never forgot that he was a man. I ought to speak of that strong sense of justice and equity, that hatred of wrong and oppression, which were so marked in his judicial character, that I have thought if, like Sir Matthew Hale, he should enter unheralded the court-room of the unjust judge, robbed only in a miller's coat and hat, all heads would bow and all tongues exclaim, 'This is a judge!' I ought to speak of his firmness, which ever upheld the right and repressed the wrong with the same iron hand. I ought to speak of our pride—pardonable pride—that when that venerable institution of learning, seated at the commercial gateway of the continent, with wealth and power at its command, sought to find the one man who could fill a most important chair, she reached her hand across the prairies and plucked this flower of our western civilization. But I have no heart to speak of these things at this parting moment. I can think only of his good-

ness, his kindness, and his sympathy. I know not whether a lawyer's prayer can avail anything in the chancery above, but, speaking for all my brethren of the bar, if I would take him by the hand—that hand which has led us all so long—I would say, good bye, and may God give you peace, health, strength, and happiness, always."

On behalf of the members of the southern Kansas bar, the following address was delivered by Mr. A. A. Harris, of Fort Scott:

"May it please your honor: The members of the bar of the southern portion of the state feel that they cannot permit this occasion to pass without an expression of their approbation of every word of the address which has been reported and unanimously adopted. Accordingly, as their humble spokesman, I here declare, not only for them, but for the people of southern Kansas, irrespective of party, creed, or sect, that, in common with the enlightened people of the whole circuit, we greatly regret Judge Dillon's determination to retire from the bench. Upon one occasion, when a client of mine had a suit pending in this court which involved to him a very large sum, and an adverse decision of which would reduce him to poverty, I was asked by him what sort of a man Judge Dillon was, and what sort of a court we had to try our case in. I told him that Judge Dillon was a pure man, and an able man; that the court was the best one in which to try a good case that I had ever practiced in, and the worst one in which to try a bad case. I intended, sir, by that to say, that in the court where Judge Dillon presided law and justice were impartially administered. At the June term, 1878, on a motion to remand a cause to the state court, in which some exceedingly difficult points were to be determined, Judge Dillon, after argument by myself and my very able opponent, told us from the bench one morning that he would be glad to hear us further on the points involved. I could but say to him that about all I knew about the removal act of 1875 I had learned from him. Sir, I care not what may be the wisdom of the executive, or that body which has the power to confirm his nomination, we shall not find in Judge Dillon's successor the stout arm, the clear intellect, and full, complete learning upon which we have heretofore so implicitly relied. We part with him with great regret. We shall watch his future career with great interest, and, howsoever fortune may smile upon him, he may rest assured that he has no warmer, truer friends than we."

On behalf of the state judiciary, the following remarks were made by Mr. Robert Crozier: "I would have been satisfied to have abided by the report of the committee as embodying my own views of the subject under consideration, but having been chosen by the committee to speak on behalf of the judiciary of the state, in addition, a few words are appropriate. Being an old citizen of the state, and well acquainted with the judiciary thereof, from the origin, I feel at liberty to express that which I am fully advised are the views of the gentlemen occupying judicial positions in the state at the present time. Before the advent of Judge Dillon as judge of the eighth circuit, we were prepared, looking to his former reputation as a jurist, with which we were to a considerable extent acquainted, to welcome him with glad faces and open arms, and we did so. During the time of his administration of the law as judge of the eighth circuit, our expectations as to his manner of conducting the business of that position were and have been fully realized. We all have looked to the recurrence of his terms as seasons when we might be enlightened by his luminous exposition of the laws and the acknowledged justness of the decisions he made; and we were glad to be permitted, in the exercise of the functions devolving upon us, to sit under the rulings of one commanding the respect of the whole of us. After an experience of ten years, I can now say, for the judiciary of the state, that our highest expectations in this regard have been more than fully realized; and now that the fates have decreed there shall be a final separation, our admiration is as glowing as at the beginning. We welcomed him

with open arms upon his advent; and we bow him out at his exit with the same feelings of respect and kind regard that then influenced us. He goes to a place occupied by one of the distinguished sons of the republic—a position of commanding influence in moulding the jurisprudence of the nation; and although separated from us physically, we shall feel contented that we shall hear from him as one of the great brotherhood of lawyers, whose influence in moulding the destinies of the nation are superior to that of any other class of its citizens. Individually, I have been honored with his acquaintance and flattered with his personal friendship; and I can say for myself, and, I think, for that, for the judiciary of the state, that the regret at his departure will be considered not only a personal loss to us, but a deprivation to those with reference to whom we must administer the laws of the state. We take, however, to ourselves this consolation, that, though removed to another sphere, it will be one of such commanding influence that, although not binding upon us, we shall be compelled to respect his utterances. Whatever betide—whether we see him again speedily or otherwise—when he comes amongst us again, although disrobed of the ermine, we shall welcome him as cordially, respect him as thoroughly, and admire him as unreservedly, as at any stage of his career among us, when clothed with power to command us."

Response of Judge Dillon: "Gentlemen of the bar. I have no words fitting to respond to the addresses with which I have just been honored. My mind is burdened and saddened by the reflections which this parting scene suggests. How can I give them expression? I ought scarcely to attempt it. I feel bound to the state of Kansas by ties peculiarly strong. Ten years ago, although a stranger to them personally, the bar of this state, with great unanimity, recommended my appointment. Since 1869, I have been present at every term of the circuit court in Kansas, except in June, 1875. I have seen the docket grow from sixty cases to five hundred. I have given, relatively, more of my time to Kansas than to any other part of my circuit. My relations, therefore, with the bar which I see before me to-day, have not been distant and occasional, but constant and intimate.

"It gives me the sincerest pleasure to be publicly assured, at a time when no motive for flattery can be perceived, that my retirement from the bench is regretted. Your approving judgment, your words of kindness and generous praise, and your well wishes for my future welfare, are dear to my heart. No ordinary temptation has induced me to surrender my commission as the judge of this circuit. No surprise could have been greater than the offer of Columbia College, which I finally accepted. I saw from the first what a wide field of usefulness, and possibly of distinction, it opened before me. I perceived at once the advantages of its more liberal compensation, lighter labors, and greater opportunities. But I assure you that it cost me a painful struggle for more than two months to consent to leave the associations of a lifetime—to exchange old friends like those now present for new acquaintances, to leave the circuit I love so well to go to untried duties beneath a strange sky and among unfamiliar faces. If my health and strength are preserved, I shall strive to vindicate the wisdom of my decision by strenuously devoting my energies to the elevation and advancement of law. In the venerable institution to which I have been called, the great Chancellor Kent, pure and simple in his character and tastes as a child, after he had voluntarily closed his judicial career, and when the shadows of his life were cast towards the east, delivered the lectures which constitute his Commentaries on American Law, and which will cause his name to be known and cherished for generations to come, wherever, in its widening conquest, the English language shall carry the English law. Such an example may well tempt and inspire the humblest of his successors.

"The change I have made, although great, is not radical. It enables me the better to carry out

the fixed plan of my life. When called to the bench, nearly twenty-one years ago, the picture of the judicial office as drawn by Sidney Smith before the lawyers of the northern circuit made a deep impression on my mind. Even now I think I can recall it from memory: 'He who takes the office of an English judge as it exists at this time, takes into his hands a gem, great and glorious, perfect and pure. Shall he mar it? Shall he darken it? Shall it emit no light? Shall he find it a diamond? Shall he leave it a stone?' The ideal of an American judge should, I have always conceived, be equally high. I have had many and great controversies to decide. You know me well, and it is an estimable satisfaction to be assured, in this impressive and public manner, that, in your judgment, I do not surrender the jewel of the great trust which I have had in my keeping marred or dimmed or darkened. But I may not say more. I part from you with the most unfeigned regret. From the bottom of my heart I reciprocate your regard in the amplest measure. The richest legacy I carry with me, next to the consciousness that in the record of my judicial life there is not a single line that, living or dying, I would wish to blot, is the expression of your friendship, confidence, and regard contained in the address with which you have so signally honored me, and in the remarks which have accompanied it. I shall cherish it as long as I live, and its record here is one to which my children, and those who care for me after I am gone, will point with pride. Farewell!"

Mr. Justice Miller then said: "The court is in full sympathy with the bar in the sentiments which have just been expressed in regard to the retirement of one of its members. Judge Dillon's resignation is a loss which must be felt by the bar of the eighth circuit, by the people among whom he has administered justice so long and so well, and by his associates on the bench of which he is about to take leave. This loss, however, is not equal in its effects upon all these classes. His brethren in the courts, who have co-operated with him in the arduous duties of a judge, who have received his aid, who have been with him in council and shared his labors, are the heaviest losers. It is, therefore, eminently appropriate that they should join in testifying to their appreciation of the man and his services by directing that the communication from the bar be spread upon the records of the court. If I may be permitted, as the presiding justice for the circuit for a period including the entire time of Judge Dillon's service in the court, to indulge in a suggestion of my own special misfortune in the matter, I must say that it is greater than that of others; for he whom I had hoped, as he came later, might remain longer in this court than I, and to whom would have fallen the duty of making the sad comments appropriate to the severance of our official relations, is the first to leave our common sphere of official duty. Though in his case the cause is one which carries him to a less laborious, a more profitable, and let us hope a more agreeable and perhaps useful field of labor, and though this must, as it ought, mitigate the pains of separation, it remains true, as regards myself, that I cannot hope in any successor, however talented by nature or accomplished by learning, the same assistance in the performance of my own judicial duties, and the same relief from unnecessary responsibility as presiding justice, which have made my relations with him so pleasant. When you add to this the interruption, more or less, of our social relations—relations which are imperfectly expressed by the strongest terms of affectionate friendship and unlimited confidence—it will be seen with what emphasis I unite with the bar and other members of the court throughout the circuit in this cordial tribute of respect and expression of regret at the retirement of Judge Dillon from the bench."

Missouri.

"St. Louis, July 12th, 1879. Honorable John F. Dillon: My Dear Sir:—At a meeting of the bar

of this city a committee was appointed, consisting of George A. Madill, Alexander Martin, Thomas C. Reynolds, James Taussig, G. A. Finkelnburg, Joseph Shippen, and John R. Shepley, to prepare and submit an address to you upon the occasion of your retirement from the bench, to be subscribed by the members of the bar, placed before the circuit court for the district, and then transmitted to you. These were done, and now by their direction I enclose to you that address; and in so doing, permit me to say that there are few things in my professional life that have given me greater pleasure than to transmit to you this record of the high estimation in which you are held by your brethren of the bar in this district. You will find there the names of all those, except a few absent from the city, who have been connected with the court over which you have presided for so many years with such distinguished ability. Yours truly, John R. Shepley."

Address of the bar: "St. Louis, June 23d, 1879. Honorable John F. Dillon: Sir:—As members of the St. Louis bar, we desire to express our regret that your official connection with the United States circuit court for the eighth circuit is about to terminate. But your voluntary retirement from the bench to another field of professional honor and usefulness affords an opportunity, which we gladly embrace, of presenting to you this expression of our respect and confidence. To you, as an author, the profession recognizes its indebtedness for a work which is a permanent contribution to legal literature, and is accepted as a standard authority wherever the English language is spoken. To you, as a judge in high station for nearly twenty-one years, we bear testimony to a career distinguished by uniform dignity and courtesy, by marked ability, great industry, and perfect integrity. Questions of wide variety and of the gravest importance have engaged your attention, and found their solution in judicial opinions marked by clearness of statement, vigor of thought, and profundity of learning. To the discharge of onerous duties you have brought a mind gifted with sound judgment, fortified by varied experience and enriched by wide research. While your career has largely advanced and elevated the science of the law, it has also endeared you personally to the hearts of the people among whom your labors have been performed. Assured that you bear from the west to the east a public judgment of duty well and faithfully discharged, accept this our sincere testimonial to worth and ability." Signed by John R. Shepley, Thomas C. Reynolds, John W. Noble, D. P. Dyer, James O. Broadhead, Henry Hitchcock, Thomas T. Gantt, George A. Madill, John B. Henderson, John D. S. Dryden, Chester H. Krum, Joseph Shippen, Thomas C. Fletcher, and by one hundred and forty other members of the bar of St. Louis.

"Davenport, Iowa, July 14th, 1879. Honorable John R. Shepley: My Dear Sir:—I have the honor to acknowledge the receipt of your letter of the 12th inst., transmitting, by the direction of a committee, the address of the members of the bar of the city of St. Louis upon my retirement from the bench of the circuit court. This impressive testimonial of the respect and estimation in which I am held by the bar of the great city of St. Louis, where for the past ten years so considerable a part of my official duties have been performed, has given me the sincerest pleasure. I have read it with pride, and shall preserve it, with the autograph signatures, as a cherished memorial of my life on the circuit. I gladly avail myself of this occasion to express to the learned bar of St. Louis my grateful acknowledgments for their uniform kindness, respect, and consideration, and especially for the address with which they have honored me. I beg to assure them that I carry from the west to the east nothing which I more truly prize than their approving public judgment and friendly regard. Asking you personally to accept my thanks for the kind sentiments with which you accompanied the address, I remain as ever, very truly and sincerely yours, John F. Dillon."

There was subsequently presented, on behalf of the members of the bar and the citizens of St. Louis, the following invitation, engraved and elegantly illuminated:

"St. Louis, Mo., September 1st, 1879. To the Honorable John F. Dillon, United States Circuit Judge of the Eighth Circuit: Sir:—The undersigned, lawyers, business men, and others, citizens of St. Louis, Missouri, viewing with profound regret the prospect of your relinquishment of the judicial station you have so eminently adorned, desire to make a suitable demonstration of their high respect and regard for you personally, and of the veneration in which you are held as a wise, learned, and upright judge by them and the entire community of this city. They therefore tender you a public banquet, in St. Louis, at such time as you may be pleased to designate. We are, sir, your obedient servants, John R. Shepley, George A. Madill, John B. Henderson, John C. Orrick, Elmer B. Adams, A. M. Thayer, John W. Noble, William Patrick, James O. Broadhead, Nathaniel Holmes, James J. Lindley, David Wagner, Lucien Eaton, Newton Crane, Nathaniel Myers, Thomas E. Tutt, Scruggs & Barney, George Bain, Gerard E. Allen, Thomas C. Reynolds, Henry Hitchcock, John M. Krum, C. S. Hayden, Samuel T. Glover, John D. S. Dryden, Chester H. Krum, Thomas T. Gantt, Charles P. Johnson, S. D. Thompson, D. P. Dyer, Thomas C. Fletcher, M. Dwight Collier, R. J. Lackland, William Barr & Co., Samuel C. Davis & Co., E. O. Stannard, and ninety others."

To which was given the following response:

"Davenport, Iowa, September 15th, 1879. Gentlemen:—I have the honor to acknowledge the receipt of your communication of the 1st inst., in which, after expressing your regret at my retirement from the judicial station I have held among you so long, you offer me the compliment of a public banquet as a testimonial of your respect and regard. I perceive from the signatures to the invitation that it comes from many of the eminent lawyers, great merchants, and leading citizens of the city of St. Louis. Of the similar expressions which the event referred to has called forth in this judicial circuit, none has penetrated me more sensibly; and if anything could make me regret a step taken from a sense of duty to myself and my family, it would be that I was leaving a region in which my judicial labors are so generously viewed and parting from friends so devoted, to enter upon untried duties in a community in which I am personally almost a stranger. I had hoped until today that I might be able to accept the proffered honor, but, for reasons which I need not detail, I find that I must go east immediately, and it is quite uncertain when my duties and engagements there will allow me to return to the west. I am, therefore, most reluctantly obliged to forego the pleasure of meeting you in the manner you propose, and the privilege of expressing my profound sense of the many obligations under which the people of St. Louis have placed me, and saying my farewell to you and your citizens in person. Permit me to add yet another word. I look upon your invitation not simply as a compliment to me personally, but also as an expression of your sense of the supreme importance of the judicial office, not only to the great interests which you represent, but to the entire country. The fearless and independent discharge of the duties of a judge will inevitably bring him into frequent collision with private interests and public sentiment. In such a discharge of duty the judge needs at all times the consciousness of the support of the substantial interests of the community. It gives me pleasure to say that I have always noticed a sound, healthy, and enlightened public opinion on this subject among your citizens, and every judge in this country, of whatever grade, will be animated, cheered, and strengthened by your influence and example. I have the honor to be, as ever, most obediently yours, John F. Dillon.

"Messrs. John R. Shepley, Gerard B. Allen, George A. Madill, Thomas C. Reynolds, John B. Henderson, and others."

Arkansas.

A large meeting, composed of the Little Rock Bar Association and of members of the legal profession from other parts of the state now attending court at the capital, was held on Saturday morning, June 14th, 1879, at the supreme court-room, for the purpose of taking appropriate action in relation to the resignation of the Honorable John F. Dillon of the office of United States circuit judge for this judicial circuit.

Upon motion of the Honorable Henry C. Caldwell, judge of the United States district court for the eastern district of Arkansas, the Honorable E. H. English, chief justice of the supreme court of the state, was elected president of the meeting, and Mr. Eben W. Kimball secretary. The chief justice, upon taking the chair, cordially thanked the meeting for the honor conferred upon him on this occasion. He then briefly stated the object of the meeting, and said that he, in common with the whole bar of the state, exceedingly regretted that Judge Dillon had resigned his present position on the bench, which he had so long, so acceptably, and so honorably filled, and where he had won a national reputation; that Judge Dillon was a man of pure and exalted character—a judge of extraordinary attainments, application, and legal knowledge, and one whom the people of the west and of Arkansas regretted to see retire from the judiciary. But, he said, while he now leaves the bench, he will not be lost to the profession, for in his new vocation (a position which would do honor to any lawyer) he would not only be able to instruct the young men of the country in the science of the law, but also to write law books for the use of the profession generally—a work for which no one seemed better fitted than Judge Dillon. The chief justice spoke very feelingly and eloquently of the high character and great services of Judge Dillon, and was listened to with marked delight and approval.

Upon motion of Mr. U. M. Rose, the chair appointed a committee of three to draft resolutions properly expressing the sentiments of the bar of Arkansas in relation to the resignation of Judge Dillon. The committee consisted of Messrs. U. M. Rose, T. D. W. Yonley, and R. A. Howard. The committee reported the following resolutions. Before reading them, Mr. U. M. Rose read to the meeting the following extract from a letter recently received by him from Judge Dillon:

"Leavenworth, Kansas, June 8th, 1879. Dear Judge:—Your letter of the 24th ult. has followed me around the circuit and found me here. It anticipated an event which became a fact accomplished before it was received. I could easily perceive all the probable advantages of the offered exchange of places—the lightened labor, the increased compensation, and opportunities for professional gains or distinction, if, happily, I had the ability to achieve the latter; and yet I hesitated long in reaching a resolution. I hope I have decided wisely. It cost me a painful struggle to consent to leave the friends and associations of a lifetime, and particularly the bar of the circuit, to whom I feel so much indebted and so warmly attached. My thoughts and reflections are tinged with sadness whenever I think that I have severed the ties which connect me with the circuit, and go to new duties, in a strange and distant place. If my health remains to me, I shall try to demonstrate the soundness and wisdom of my judgment by doing more for my profession than it was possible for me to do on the tread-mill of the bench, with its ever-increasing weight of duties. I beg leave to add that I part with no district with more sincere regret than with yours, with Judge Caldwell, and the bar of Arkansas. I have always been treated by them with marked consideration and kindness. Very sincerely yours, John F. Dillon."

Resolutions:

"Resolved, that, having been advised of the resignation by the Honorable John F. Dillon of his position as judge of this circuit, we are impressed with a feeling of regret, and desire to convey to him in a respectful manner our sincere admiration for the great learning, impartiality, and uprightness displayed by him while on the federal bench,

the soundness and accuracy of his opinions, and his uniform kindness and courtesy to the bar; for a consistent administration of justice that has shed a lustre on the science of the law, and has in many ways conduced to its clearness and purification.

"Resolved, that, as Judge Dillon retires to another field of labor, we trust that he may find in it a wider usefulness, and some diminution of the arduous toil that has marked his judicial life, and which seemed to test the limits of physical and mental endurance; and we beg leave to assure him that he carries with him our best wishes for an easier and a long and prosperous life, during which he may, by his investigations, add to his valuable contributions to legal learning, which have already made his name a household word with the bar and the courts of the country.

"Resolved, that the secretary of this meeting be requested to forward to Judge Dillon a copy of these resolutions."

Upon motion of Mr. M. W. Benjamin, the resolutions were unanimously adopted. Upon motion of Honorable R. C. Newton, Judge Rose was requested to furnish the meeting with a copy of the abstract of Judge Dillon's letter, just read by him, and the same was made a part of its proceedings. It was moved by Mr. John McClure, and carried, that the secretary of this meeting be requested to furnish the papers of the city with a copy of its resolutions and other proceedings for publication. Upon motion of Mr. Yonley, the secretary was requested to present to the United States circuit court for this district a copy of the proceedings of this meeting, with the request that they be spread upon the records of that court. The meeting then adjourned.

A true copy. Attest: Eben W. Kimball, Secretary.

The following answer was given:

"Davenport, Iowa, July 9th, 1879. My Dear Sir:—I have the honor to acknowledge the receipt of the proceedings of the bar of Little Rock relative to my retirement from the bench. I am deeply sensible of the debt I owe to the bar of your state, and I fully prize this expression of their regard and friendship. I am grateful for it. It places me under a perpetual obligation. I part from them with unaffected regret. They have a sunny spot in my heart, and a cherished place in my memory. I beg you to accept, personally, my warm thanks for your kind expressions and well wishes. I am, very truly and sincerely yours, John F. Dillon.

"Eben W. Kimball, Esq., Secretary, Little Rock."

Nebraska.

At a session of the circuit court of the United States for the district of Nebraska, held at the court-house in the city of Omaha, on the 26th day of June, 1879—Honorable Elmer S. Dundy, district judge, presiding—Mr. E. E. Brown, a counsellor of the court, appeared and stated that on that day, at a meeting of the members of the bar, whereof he was president, a committee was appointed to express in fitting resolutions the sentiments of the meeting upon the occasion of the retirement of his honor, the circuit judge, from the bench, which committee consisted of Mr. J. M. Woolworth, Mr. E. Wakely, Mr. Clinton Briggs, Mr. J. H. Broady, and Mr. D. G. Hull; that the said committee had reported to the meeting certain resolutions, which were unanimously adopted; and that the said meeting had instructed him to present the same to the court and move that the same be spread at length upon its records. He thereupon presented the said resolutions to the court, and moved that the same be recorded in the record of its proceedings. Whereupon it was ordered that the motion be granted, and the clerk spread the said resolutions at length upon the records of the proceedings of the court. The resolutions are as follows:

"Whereas, the judge of this circuit, the Honorable John F. Dillon, is about to surrender his trust by resignation, to accept a high honor tendered to him by Columbia College, we, the members of the bar in attendance upon the United States cir-

cuit court, for ourselves and in behalf of the bar of this state, do resolve:

"First. That, during the whole of his service on the bench of this circuit, which was preceded by a judicial career of much honor, Judge Dillon has devoted to the discharge of his great and laborious duties the full measure of integrity, capacity, learning, industry, and impartiality demanded of the incumbent, as attested by the general judgment of the bar and the people.

"Second. As a jurist and legal author, he has advanced the profession, has won a national reputation, and reflected credit upon the west, where his work has been done.

"Third. As a citizen and man, he has secured the very high respect and confidence of the public, by the sincerity, uprightness, and purity of his life and character, his fidelity to obligation, and his sense and love of justice in the administration of his office.

"Fourth. In the new and responsible field of duty to which he is called, he will have our utmost faith in his ability to meet its demands with signal usefulness and success, and our earnest wishes that he may be in all things prospered.

"Fifth. That the circuit court be requested to cause these resolutions to be entered in the record of its proceedings, and that a copy thereof be transmitted to Judge Dillon."

Iowa.

"Des Moines, Iowa, August 22d, 1879. Honorable John F. Dillon, Davenport, Iowa: Dear Sir:—The bar of Iowa desire that you will accept at their hands, at such time as will suit your convenience, a complimentary banquet. We have been appointed a committee of the bar of the state to communicate this wish. Allow us to suggest some evening during the next term of the United States circuit court at this place. We sincerely hope you will accept this proffered compliment. So long identified with the profession and with the judiciary, so intimately connected with the growth and prosperity of Iowa, and so much esteemed and respected as you are by her bar and people, we shall regard it as a very great pleasure indeed to unite and extend to you our friendly greetings before you leave to enter, as we hope, upon even a larger field of usefulness. Be pleased to advise us of your pleasure in the premises. We are, judge, as ever, your friends, truly,

"George G. Wright, Des Moines,

"John H. Craig, Keokuk,

"E. H. Stiles, Ottumwa,

"W. F. Brannan, Muscatine,

"George J. Boal, Iowa City,

"O. P. Shiras, Dubuque,

"John N. Rogers, Davenport,

"N. M. Hubbard, Cedar Rapids,

"Committee."

The following response was made:

"Davenport, Iowa, September 13th, 1879. Gentlemen:—Your invitation to accept a complimentary banquet from the bar of the state came here in my absence and awaited my return. I have held it for some days unanswered, and have just definitely ascertained that it will not be practicable, in view of my other duties, to engage to accept it, as I am called east immediately, and the time of my return to the state is uncertain. I trust it is unnecessary to add that the invitation and the warm terms in which you have been pleased to refer to me and to my judicial and other labors are sensibly felt and fully appreciated, for I assure you that I am bound to the state of Iowa by no ordinary ties. For one and forty years I have lived within this state. As a boy I played upon the banks of her great river, and her noble prairies have become incorporate into my very existence. Here I was educated and married; here my children were born; here I have been honored by successive elections to high judicial station; and here, under her skies, my sun has already passed its meridian. Iowa has been to me a generous mother, and neither time nor distance can weaken my attachment to her. My relations, public and private, have been chiefly with the bar of the state, and I am truly sorry that I am

precluded by other engagements from accepting the most grateful, and in all probability the last, honor I shall ever receive at their hands. I remain, as ever, very sincerely and faithfully yours,
John F. Dillon.

"To the Honorable George G. Wright and others, committee."

Minnesota.

The members of the bar of the district of Minnesota, at the opening of the June term of the United States circuit court, at St. Paul, on the 16th day of June, 1879, held a meeting to determine what testimonial of their respect and esteem should be tendered to Judge Dillon on the occasion of his withdrawal from the bench of this circuit. A committee composed of Charles E. Flandrau, John B. Sanborn, George L. Otis, George B. Young, and Harvey Officer, was chosen, with full powers to represent the bar of the district and arrange such proceedings as in their judgment would be suitable and proper. It was decided to tender to Judge Dillon a banquet and an address.

The following correspondence ensued:

"St. Paul, Minn., June 20th, 1879. Honorable John F. Dillon: Dear Judge:—The bar of Minnesota, learning that you are about to terminate your judicial relations with this district, desires to manifest its very high esteem for you as a man, a friend, and a judge, and invites you to meet it at a dinner to be given in your honor at the Metropolitan Hotel, in this city, at such time as may be agreeable to you. We hope you will gratify us by accepting this invitation, and to designate such time as will best suit your pleasure and official engagements. With much respect, truly your obedient servants and friends,

"Charles E. Flandrau,

"John B. Sanborn,

"George L. Otis,

"George B. Young,

"Harvey Officer,

"Committee."

Reply:

"St. Paul, Minn., June 27th, 1879. Gentlemen:—Your invitation to a banquet proposed in my honor was received some days since. I have been waiting till some fortunate interval in my official duties would allow me to accept it. But it has turned out otherwise, and the demands upon my time are such that I must leave St. Paul on to-morrow. Much to my regret, I am compelled to decline, during my present stay, an invitation which, you scarcely need to be assured, it would have given me the sincerest pleasure to have accepted. I beg to tender to the bar my thanks for this renewed mark of their regard. With great respect, I am very truly and sincerely yours,
John F. Dillon.

"Messrs. Charles E. Flandrau and others, committee."

On the 28th day of June, 1879, the bar, having learned that Judge Dillon would take his departure from the city in the evening of that day, assembled in the court-room, under the call of the committee, in large numbers, at 3:30 P. M. On the opening of the court, Judges Dillon and Nelson being on the bench, Mr. Flandrau, who had been chosen by the committee to deliver the address of the bar, addressed the court as follows:

"May it please your honors: The great majority of the members of the bar of this district have grown up with it since its organization, and will probably continue to practise in it until their retirement. It is natural, therefore, that we should feel a deep interest in the question as to who shall be intrusted with the administration of its affairs. When the growth of the west rendered it necessary to increase the force of the federal judiciary by the creation of the circuit judges, we were all much rejoiced when we learned that Justice Dillon had received the appointment for this our circuit. He was no stranger to us—his fame as a jurist had preceded him. His services have so endeared him to us all that when we learned of his intention to resign his position, although in exchange for new honors, our regret was great, and we determined that he should take with him an avowal of our sentiments. A committee of the bar of the district

have prepared an address to be presented to Judge Dillon, and have conferred upon me the honor of bearing it to him. With the permission of your honors, I will now deliver it."

The address to Judge Dillon:

"Honorable John F. Dillon, United States Circuit Judge, Eighth Circuit: Dear Judge:—The members of the bar of this state have learned, with profound regret, that you have decided to sever your connections with the bench of this circuit. They have enjoyed, for the long series of years during which you have been its presiding justice, such agreeable relations with you personally and officially, and have held you in such high esteem as a man and a judge, that they desire to make some public expression of the sentiments universally entertained by them on the occasion of this their last opportunity of holding official communication with you. We will not ask you, or the world, to weigh our opinion by the standard of our professional consequence; we know that we represent a frontier district, and we have nothing to say as to our own importance, but we can, without egotism, affirm that we are a fearless and independent bar, and that nothing could induce us to give expression to what we did not conscientiously believe. Let the value of our views, then, be measured by their sincerity. We recognize in you a man of extraordinary learning in all the branches of knowledge that combine to make a thoroughly good judge. We also concede to you all those qualities of temperament which are essential to the same end. You have been patient, when we have been tedious; you have been amiable, when we have been irritable; you have always been clear, when we have been in doubt. It has been an edifying pleasure to us to listen to your lucid expositions of the many difficult questions, which we have, in the discharge of our professional duties, so often submitted to you for solution. The varied interests that have been referred to your decision have involved the welfare of the greatest enterprises of the northwest, and these contests have arrayed in antagonism forces of corresponding magnitude; yet your wisdom and impartial justice have enabled you to satisfy all interests and make your judgments respected by all parties. The highest tribute we can pay to your excellence as a judge is to say that in all the long years in which we have practiced before you, and in all the various contests which we have represented as counsellors in your court, the instances which any of us can recall in which we have suffered defeat are very rare indeed, where we have not, on reflection, been compelled to acknowledge the correctness of your decisions; and in no case have we ever had occasion to doubt your perfect impartiality and conscientious discharge of duty. We have, by our long and intimate association with you, ceased merely to respect and venerate you as a judge, but we have also learned to love you as a friend. Your departure from us, therefore, involves much more than the ordinary consequences of official change. The loss to the bench may be supplied, and the wheels of the law revolve as before, but the severance of the closer ties which unite us is irreparable. There could be no more fitting occasion than the present one of leave-taking, for us to assure you that nothing has ever occurred in the administration of your official duties in this district, or elsewhere in your circuit, which has in the slightest degree abated that perfect trust you early inspired, and which time has ripened into faith.

"We've seen the actions of your daily life
Scann'd with all the industrious malice of a foe,
And nothing meets our eyes but deeds of honor."

"It is gratifying, however, to know that the step you have decided upon does not wholly withdraw you from the profession, but merely changes the sphere of your usefulness. We hope to share the benefits of your labors in many valuable contributions to the literature of the law, which your learning, experience, and the dignified repose which will attend your future duties, will so eminently qualify you to produce. We congratulate the bar of the future on securing so competent an instructor. No word that we can utter could add

anything to the high compliment which has been paid you by the venerable institution which has chosen you to fill one of the highest places in its bestowal. The bar of the whole west will feel honored in your selection, and will take pride in your success. We bid you an affectionate farewell, and assure you that the best wishes of the whole bar of Minnesota will always follow you, wherever duty or pleasure may call you.

"Charles E. Flandrau,
"John B. Sanborn,
"George L. Otis,
"George B. Young,
"Harvey Officer,
"Committee."

After reading the address, which was richly engrossed in a handsomely ornamented morocco case, it was handed to Judge Dillon by Judge Flandrau, who then continued: "Allow me to present to you an engrossed copy of the address, with the compliments of the bar of the state. I am also commissioned to move his honor, Judge Nelson, on behalf of the bar, to allow the address to be entered upon the records of the court, which motion I now make, and ask that it may be granted."

In support of the motion, the following addresses were made:

Address of Mr. District Attorney Billson: "The address to which you have listened, Judge Dillon, portrays only in subdued colors, I am sure, the sentiment, not too strongly expressed by the word 'sorrow,' with which the bar of Minnesota have contemplated your withdrawal from the judicial office. So long, so rich, and so varied has been your experience as a minister of justice; so unremitting has been your industry; so ardent and exclusive your devotion to the law; so high have been your professional ideals, and so conspicuously conscientious and disinterested your pursuit of them, that, in our minds, the blind goddess and her scales are scarcely more intimately associated with the judicial function or more emblematic of its unerring discharge. I think I shall only give voice to the common experience of our bar, when I say that the opportunities we have enjoyed of observing your ample learning and your skillful methods in the dispatch of business have been the most stimulating and highly prized of our professional privileges. The patience and circumspection with which you have been cheerful to listen and inquire; the rapidity with which you have grasped, and the tenacity with which you have remembered, the most intricate statements of facts; your quickness to apprehend an argument of counsel, and to further illustrate its correctness, or to expose its fallacy; your happy combination of capacities for the widest generalization and for the most detailed and discriminating analysis; above all, the benevolent solicitude, the consummate skill, the sound discretion, and frequently the splendid success, with which you have ever striven to avert that sometimes inevitable but always deplorable catastrophe, an incompatibility between fixed principles of law and the equities of a particular case—all these are salient features of your official character, as we have learned it and loved it during ten years of professional contact, and as we shall bear it with us in perpetual remembrance.

"It has been your good though arduous fortune to preside over a circuit imperial in extent, resources, and variety of industrial pursuits—skirting, as it does, the Mississippi from its source almost to the gulf, with its western confines resting on the mountains. Vast and various as the ordinary litigation of such a circuit must have been, its dignity and difficulty during the last decade have been enhanced by three convulsions which have successively afflicted the several portions of your circuit. You have been called upon to administer upon the wreck of the confederacy in the south; upon the bankrupted railroad corporations in the north; and in the central part of your circuit upon the most formidable conspiracy against the public revenues which has been known to the new world. I refer to the late unlamented whiskey ring. Your decisions upon the grave and often novel questions thus precipitated on your court,

have been perused with admiration by the profession throughout the country, and, with a gratifying degree of confidence, are everywhere cited as authority by bench and bar alike. In a word, you have made solid and fame-worthy contributions to the noble science of the law, upon which have labored the closest thinkers of many ages, and which, with all its imperfections, is one of the finest creations of human reason. As representing a department of the public service co-ordinate and intimately associated with that from which you are about to retire, I wish before closing to give brief expression to the sense of loss which I know will be keenly felt throughout all branches of the federal service upon the retirement to another field of labor of one who has been confessedly among its brightest ornaments, and who has added new lustre to the already illustrious name of the federal judiciary."

Mr. C. K. Davis' address: Governor Davis said: "Judge Dillon:—The bar of this state received the announcement of your resignation with expressions of regret more touchingly eulogistic than words can here express, with due regard to the formality of this proceeding. Men of sensibility will not say in his presence concerning a person who is the object of their affection, nor can such a person hear without embarrassment, those words which fully satisfy the feeling which prompts them. History, even though it speaks with the voice of friendship, does not say, and cannot say, to him all that absence and the future will require. This bar cannot, however, forego the opportunity of this sad moment of parting, of this moment which gathers up into the heart its full sense of the fact that we are to stand before you as a judge no more, to cause you to feel how great is our esteem for you, how great our deprivation is. It so happened that we urged your appointment as circuit judge, many years ago. Of the many eminent names which were under consideration for that nomination, your own was preferred by us, not for any personal reasons, because few of us then enjoyed your acquaintance. We had, however, become familiarized with your judicial character by frequent applications in our courts of your decisions as judge of the supreme court of Iowa, and we were guided to our preference by them. We found in them learning always more than sufficient for the case; intellectual vigor, to which that learning was an armor, not an incubrance; mental independence creative in its character; a judicial conscience which dealt with the case and not with its consequences. With these, our prepossessions, you came to us, and there is not a member of this bar in whom they have not passed into convictions which are adorned and made forever beautiful by an abiding love and esteem for those personal traits which experience only can teach, and which absence cannot destroy or even dim. The resolution which you have taken, while it grieves, does not surprise us. There are limitations to all endeavor and ambition, and surely the administration of the laws of seven commonwealths, which hold six millions of people, which present diverse institutions, Codes which, though perhaps analogous, are yet so different as to perplex; where civilization and empire are so visibly overspreading a region where terminus has not yet set up his landmark; where a legal system must be created in a few years which will survive when the erasing finger of time has made illegible the decrees which establish it; surely these are boundaries which circumscribe the greatest capacity and resolution. It was for you, and not for us, to say when you should pause. It is our gain and your glory that so much of this vast work has been done. It will not pass away. It will endure in precedents, guiding human concerns when all recollection of us is lost. It is due to you to speak of one act of your judicial career which has benefited this state and is appreciated by our people more, perhaps, than has been signified to you. The financial catastrophe of 1873 afflicted us deeply. It left our future unsecured. Our great railway system, which had been projected and partially constructed towards the British possessions, was paralyzed at the moment when consummation

seemed very near. The land grant depended upon the completion of the enterprise, and it was not easy to see how this could be done in the war of disappointed and clamorous interests and in the debility of bankrupt corporations. But in this court the expansive and administrative forces of the system of laws here administered were fully proved. The settlement of private right was made instrumental to the public good, and both private right and public good were perfected and increased. The road was built, the lands were earned, the frontier was advanced, and the homes of thousands stand to-day where we feared the wilderness would be supreme for many years. By this the court has earned what courts seldom receive—the gratitude of a people for a judicial act. Our regret at your retirement from the bench would be greatly increased were we not assured that the new field of usefulness to which you have been invited affords an ampler verge for what you would necessarily have continued to contribute to had you remained in your present office. It has become apparent that our system of laws some time ago arrived at that stage of complexity and contradiction of precedent which demands a reformation and second growth. The time, which we can all remember, has passed when an authority in point, exhumed by mousing industry, was a kind of fetich before which judges bowed and opposing counsel were dumb. Principle, so long suffocated beneath the mass of cases, has been compelled to rise and to remit them to their auxiliary places. This is a time like those when the great civilians were ordered by Justinian to formulate the immense mass of the Roman laws; when commerce and the extending empire compelled Mansfield to project by a continuous judicial travail of thirty years the commercial code of all English-speaking people; when the failing feudal abuses, vicious in their last extremity, compelled D'Aguesseau to remodel the law of France. These works were done by judges. The work soon to be done in our day must principally be done by judges. We hope and expect that in your new vocation you will continue to contribute powerfully to that great result, which is destined to condense and make more certain and symmetrical our cumbrous jurisprudence. Nothing more remains for me to say, except to assure you of an abiding esteem, affection, and respect, and to hope that in all stations to which you may be called, your evening of life may be made pleasant by honor, love, and troops of friends, and by the gladsome light of jurisprudence."

Mr. Gordon E. Cole's remarks: "May it please your honor: In rising to express my cordial concurrence in the sentiments of the address of the committee, I know that I but give utterance to the universal expression of the bar of the district. The announcement of your determination to withdraw from the very arduous duties—none more so, I believe, in the world—of the judge of the eighth circuit, has elicited an unanimous expression of regret such as has rarely greeted retirement from judicial office. The patience and painstaking with which you have ever sought to solve the most difficult problems of both law and fact; the wisdom with which, under your administration, the harshest and most technical rules of the common law have been attempted by equity; the ripe legal learning and felicitous language which has enriched and adorned your judicial decisions; the uniform kindness and courtesy which has characterized the intercourse of the bench with the bar, have endeared you to the bar of this district in a vastly more than common degree. Every country and state has, or has had, its golden age of the law, to which the profession loves to recur. The era of Marshall in the nation, of Kent in New York, of Shaw in Massachusetts, of Gibson in Pennsylvania, of Mansfield in England, and of your honor's administration in the eighth circuit, were all such periods, and will alike be remembered as luminous epochs of judicial history. You go from us to enter upon a more remunerative and less laborious field of labor, clothed as with a mantle with our heartiest wishes for your abundant success, and followed by our profoundest re-

grets for the step which robs us of a judge whom we can love, honor, and respect, and the bench of one of its brightest ornaments."

Mr. Thomas Wilson followed with these remarks: "May it please your honor: I wish only to add a word. What one of us on this occasion says, is but the echo of what every other feels. Though it is but recently that you first came among us, we feel your loss as almost irreparable. Never before have I known a judge to secure, or, as I believe, deserve, more unreservedly and unqualifiedly, the admiration, confidence, and affectionate regard of the bar. You have come up to, yes, elevated, our most exalted ideal of a great and good judge, and at the same time you have bound us to you by a friendship that will be as lasting as our lives. Wherever you go our friendly eyes and hearty benedictions will follow you. I hope our loss may be your gain; that your afternoon of life may be cloudless, and your friends in your new home be as hearty and true as those who to-day so much regret to be compelled to say good-bye."

At this point, during a brief pause in the proceedings, Judge Nelson inquired, "Is there anything further, gentlemen?" and receiving no response, Judge Dillon himself said:

Judge Dillon's response: "Gentlemen of the bar: The address of the bar of Minnesota, and the remarks which have accompanied its presentation, fill me with sentiments of gratitude which any poor words of mine can but inadequately acknowledge and express. Nearly ten years ago I came to this city, bringing with me my commission as judge of this circuit. I was personally unknown to the entire bar of the state. You received me with characteristic cordiality and warmth. Since then I have attended nearly every term of the circuit for this district, and the relationship thus created has been to me one of uninterrupted satisfaction. You will, therefore, readily credit me that your public assurance that the relation has been satisfactory to you, and that you view its termination with regret, cannot be otherwise than extremely gratifying to me. We met as strangers, and I beg to say that no part of your address gave me such real pleasure as the assurance that we part as friends. It has fallen in the line of my duty to decide, in connection with my learned associates, many causes involving large interests, some of which have excited warm feeling, and have been conducted with zeal, and in which the result must at times have disappointed counsel as well as suitors. Yet, such has been the uniform respect and confidence of the bar, that, so far as I know or believe, my judgments have left no wounds which did not readily heal without a scar. You have been pleased to refer to my official conduct in decisions in very complimentary terms. I cannot but feel that this is largely due to the partiality of friendship. It is fitting that I should acknowledge that for whatever praise I may justly merit in this respect I am largely indebted to the wise counsel of my associates, and to your ability and learning. Fortunate is the judge who has the enlightened aid and the steady support of such a bar as I have been accustomed to meet at every term in the state of Minnesota. He who holds the office of judge of this circuit, holds a place of great responsibility and great difficulty. He who discharges all of its varied and exacting duties must shun delights and live laborious days. No man's unassisted judgment is equal to the work, and I feel that my obligations to the bar are far greater than theirs to me. I am your debtor, you are not mine.

"You refer to the new field of labor which I am about to enter. I forbear any extended allusion to it, and will only say that the action of the venerable university in coming to this remote circuit in the west to fill a chair in the institution which, with pardonable pride, points to the lectures of Chancellor Kent, delivered therein fifty years ago, could not have been more of a surprise to you than it was to myself. The increased leisure it gives, the nature of the duties it requires, the compensation it affords, and the great opportunities, direct and collateral, it presents, combined to con-

vince me that I ought to go. I do not seek it for a life of inglorious ease, but that I may the better be enabled to discharge that debt which Lord Bacon says every lawyer owes to his profession. Our official relations are practically dissolved. This is my last regular term. In this parting hour I love to contemplate you, not simply or chiefly as the trusted counsellors of the court, but as an assemblage of my friends. The bar has always been my constituency. I claim no merit but a strenuous and well-meant endeavor to discharge all my public duties. The regard and respect of the bar is the only reward I have coveted, or now prize. I bear with me nothing but the most pleasant memories. I carry away nothing so priceless as the public and impressive expression of the esteem in which I am held. I part from my faithful and generous associate—I part from you all—with tender regret. The reflection saddens me that as a judge I shall never again visit your beautiful city and prosperous state. But I shall never cease to think of you with affectionate kindness, and shall always regard my relations to you as among the most fortunate circumstances of my life. I hesitate to speak the sad word which makes me linger, but which must needs be spoken—farewell—and may the good Father of us all have you in His holy keeping."

Remarks of Judge Nelson: Judge Nelson closed with the following remarks: "I cannot permit the occasion to pass without expressing my hearty concurrence in the sentiments of the bar, uttered in such fit and appropriate language. The judicial circuit sustains a great loss by the retirement of Judge Dillon from the bench, of which he has been so bright and conspicuous an ornament. It is a great loss to us all. As a friend and associate for the past ten years, engaged in the common pursuit of administering justice in this district, I shall mourn his absence from the stated sessions of the court, and lament the loss of his counsels. His open, frank, and genial manners; his judgment, so well ripened; his learning, so varied, so extensive; and, above all, his love of truth and justice, so keen and instinctive, secured my respect at the outset; and I ever found I could rely upon his opinion with a confidence in its correctness which is rarely experienced. I will not speak of our social relations, which have been so pleasant and agreeable, but cannot forbear thus publicly acknowledging my esteem for him as a man, and my high appreciation of his services as a pure, just, and impartial judge. I have known him better than you have; my opportunities have been greater, my associations more intimate. Where you have seen the mature and well-considered judgment, I have witnessed the extensive research, the untiring labor, and the zeal for the truth brought to the investigation of difficult questions of law and fact. I entertain towards him the warm affection of a brother, and part with him, as we all must, with deep sorrow. It is very gratifying, however, to know that he enters a new field of usefulness, which he is well adapted to adorn, and where he will have ample opportunity to elevate and ennoble our profession. My best wishes go with him. May he be spared to continue his useful life, and may the bond of friendship cemented during his official connection with the court in this district remain unbroken in the future. The request is eminently proper, and these proceedings will be spread upon the minutes of the court. It is so ordered."

HOLMAN, JESSE LYNCH.

[For brief biographical notice, see 30 Fed. Cas. 1377.]

The following notice is reprinted from 2 McLean:

"In the spring of 1842, Judge Holman, of the district court of Indiana, deceased, and Judge Huntington was appointed in his place. Judge Holman was appointed district judge some years before Indiana was included in the seventh district. On the organization of the state government he was appointed one of the supreme judges.

of Indiana, and continued to serve in that capacity until a short time before he received the appointment of district judge. He commenced his professional life in Kentucky, but removed into Indiana several years before it became a state. Judge Holman was a sound lawyer, and a man of good mind. In all the relations of life he was most exemplary; and, as a judge, he was above reproach. His loss was regretted, universally, by the profession; and to his family and connections it was irreparable. He died as a good man would desire to die, in the full assurance of a blissful immortality."

HOPKINS, JAMES CAMPBELL.

[For brief biographical notice, see 30 Fed. Cas. 1377.]

The following obituary is reprinted from 7 Biss. 8:

The Honorable James Campbell Hopkins, late district judge of the United States for the western district of Wisconsin, departed this life at his residence in the city of Madison, Wisconsin, on the 3d day of September, A. D. 1877, during the June term of the circuit and district courts of the United States for that district. On the 4th day of September, 1877, a meeting of the bar was held in the United States court room at Madison, and was called to order by H. S. Orton, Esq., on whose motion S. U. Pinney, Esq., was made chairman, and Rufus B. Smith, Esq., secretary. On motion, a committee was named by the chairman, consisting of H. S. Orton, Geo. B. Smith, Wm. F. Vilas, J. C. Gregory and H. M. Lewis, Esquires, to draft and report suitable resolutions, expressive of the sense of the bar in respect to the death of Judge Hopkins.

The committee reported the following resolutions:

"Whereas, it has pleased Almighty God, in His inscrutable providence, to remove by death, our distinguished fellow citizen and professional brother, the Hon. James C. Hopkins; therefore,

"Resolved, that we especially condole with the bereaved and stricken family in their great affliction, and assure them of our deepest commiseration and sympathy, and while our weak words of well-intended consolation cannot assuage or mitigate their sorrow, we may be allowed to express the hope that he who has thus left them desolate, has passed into a happier existence, and that they will confidently submit to this painful dispensation of Providence, and put their trust in the 'Father of the fatherless, and in the widow's God.'

"Resolved, that in the death of our lamented friend, the bench has lost an able and an upright judge, our profession one of its most honored and distinguished lawyers, society one of its most useful and respected members, and the state one of its best and most prominent citizens.

"Resolved, that the community has seldom been called to mourn the loss of one so perfect in all the elements and accomplishments of manhood, whose mental structure and acquirements were so symmetrical and available, whose social qualities and manners were so agreeable and attractive, and who was alike able and eminent as a lawyer and a judge. He was cut off in the midst of his arduous judicial labors and in the full maturity of his intellect and judgment, and when he had already achieved high honors and attained great success in the high position he occupied, with the promise and prospect of still greater usefulness and higher eminence in the future. Our memories of Judge Hopkins will always be agreeable. In all social relations he was ever cheerful, courteous and kind, and it seemed to him a pleasure to render personal and professional favors. Upon the bench he was prompt, systematic, studious and attentive, patient and impartial, modest and forbearing, yet dignified and firm. He had great natural aptitude and vast and varied learning as a lawyer, uncommon mental strength and resources, readiness of apprehension and perception, clear and honest judgment, and remarkable powers of reasoning, analysis and discrimination in investigation of all

subjects and questions brought to the bar of the court or examined in judicial consultation.

"Resolved, that in Judge Hopkins and in his successful career in life, the young have an example worthy of imitation, in self-reliance, industry, patience, economy and success.

"Resolved, that a committee be appointed to present these resolutions to the circuit and district courts of the United States, and to the supreme court and circuit court of the state, in this city, and request their entry of record."

The resolutions were seconded, and appropriate remarks having been made by several of the members of the bar present, were then unanimously adopted. The chairman appointed H. S. Orton, Geo. B. Smith, and I. C. Sloan, Esquires, a committee to present the said proceedings to the courts named in the resolutions, to be there entered of record.

To the Hon. S. U. Pinney of Madison, Wisconsin, the reporter is indebted for the following sketch of the life of Judge Hopkins:

"James Campbell Hopkins was born in the town of Pawlet, Vermont, April 27th, 1819, and was at the time of his death in the fifty-ninth year of his age. His ancestors both paternal and maternal were Scotch-Irish. When about five years of age, he with his parents removed to the town of Hebron, Washington county, New York, and not long afterward to the town of Granville, where he resided until he commenced his professional career. He was educated at the academy in North Granville, and in the spring of 1840 entered upon the study of law in the office of James McCall, Esq., at Sandy Hill, New York, and afterward continued it in the office of Messrs. Bishop & Agan, at Granville. He was admitted to the bar at the January term of the supreme court, in Albany, in 1845, and immediately after began the practice of his profession with Mr. Agan, at Granville, continuing with him about two years, and then forming a law partnership with Mr. Bishop, which continued until he removed to Madison, Wisconsin, in the spring of 1856. He was postmaster at Granville for a period of five years, and in 1853, he was elected to the senate of New York, from the district then composed of the counties of Saratoga and Washington; he was an active, influential and efficient senator, and a member of the judiciary committee of that body. Upon his settlement in Wisconsin, he became associated in practice with Hon. Harlow S. Orton, and at once entered upon a large and successful business. Soon after his arrival in Wisconsin a Code of Practice substantially like that of New York, was adopted, and he performed the principal work in arranging it, and adapting it to the provisions of the constitution and judicial system of the state. Politically he was an ardent Whig, so long as that party existed, and on the formation of the Republican party, allied himself and acted with that organization; but during his residence in Wisconsin, he gave but little attention to politics, his time being entirely occupied with the duties of his profession. He manifested but little or no ambition for the doubtful honors in modern political life. He was an excellent lawyer, well read in his profession, and entirely devoted to its duties. With a clear discriminating mind, familiar with the practical affairs of business men, and the methods of business transactions, and with a judgment rarely at fault, he was a cautious, safe and reliable counselor. He was a close student, and prepared his cases for trial or argument with care, and was almost certain to be ready whenever they were reached, and for any emergency which might be reasonably anticipated. In the presentation of them, whether to the jury or the court, he was clear in statement, incisive, vigorous and able in argument, and keeping clearly in view the practical necessities of the case, he sought rather to instruct and convince, than to entertain or captivate his hearers, and whether at nisi prius or before the appellate court he was a wary, vigilant and formidable opponent. Quick to detect an error or mistake, he was certain to take advantage of and expose it. In his intercourse with his professional brethren he was obliging and courteous,

and with an extensive fund of general knowledge he was a pleasing and instructive conversationalist. Added to these advantages, his habits of great industry, and promptness in the discharge of his duties, personal as well as professional, enabled him to acquire an extensive and lucrative practice, and a prominent position in the front rank of the bar of the state.

"By act of congress of June 29, 1870, Wisconsin was divided into two judicial districts, the eastern and the western, and on the 9th of July, 1870, Mr. Hopkins was commissioned as district judge for the newly-created western district. He at once entered upon the discharge of the duties of his position, and until his last illness he devoted with unremitting zeal and industry all his learning, his extensive experience and distinguished ability to the requirements of his judicial station. A love of order and prompt and exact administration of the law, and his kindly courtesy and unwearied patience, rendered practice in the court in which he presided pleasant and attractive. Counsel never had occasion to complain that they had not been fully and fairly heard before him, or that even an implied restraint had been placed on an exhaustive discussion of all their points. In the hearing and decision of equity causes, and in the administration of the system of bankruptcy then in force, with which he became thoroughly conversant and skilled in its prompt and efficient administration, he had few, if any, superiors. He delivered many valuable opinions which stand deservedly high as authority on questions of bankruptcy law. Long familiarity with and wide and varied experience in business transactions, enabled him to easily master the details of a cause, and readily perceive the precise point upon which it depended. He was quick to detect any artifice, fraud, or sham, and prompt and resolute to expose and rebuke it. The resolutions of the bar give such full expression to his traits of character, personal, professional and judicial, that further statement seems superfluous. During the seven years of his judicial life, when not engaged in his own district, his time was almost constantly occupied in holding court in other districts of the circuit, and frequently at Chicago, where he was highly esteemed as an able judge, and wherever it was his fortune to preside, he won, as in his own district, the confidence and respect of the profession and all interested in the orderly, intelligent and impartial administration of justice. He was a genial gentleman, an excellent lawyer, and an able and faithful judge."

INGERSOLL, CHARLES ANTHONY.

[For brief biographical notice, see 30 Fed. Cas. 1378.]

The following is reprinted from 4 Blatchf. 517:

"The following proceedings took place at a meeting of members of the bar, held in the city of New York, on the 9th of February, 1860, on the occasion of the death of the Honorable Charles A. Ingersoll, district judge of the United States for the district of Connecticut. The Honorable Samuel R. Betts, district judge of the United States for the southern district of New York, presided at the meeting. The Honorable Josiah Sutherland, a presiding justice of the supreme court of the state of New York, the Honorable Joseph S. Bosworth, chief justice of the superior court of the city of New York, and the Honorable Charles P. Daly, first judge of the court of common pleas for the city and county of New York, were vice presidents of the meeting. Kenneth G. White, Esquire, clerk of the circuit court of the United States for the southern district of New York, and Robert D. Benedict, Esquire, were secretaries of the meeting. On motion of the Honorable Truman Smith, seconded by Daniel Lord, Esquire, the following resolutions were unanimously adopted, after the meeting had been addressed by the Honorable Truman Smith, Daniel Lord, Esquire, James T. Brady, Esquire, and the Honorable John McKeon:

"Resolved, that the bar has received with deep concern, information of the removal, by death, of the Honorable Charles A. Ingersoll, judge of the United States for the district of Connecticut, and, for several years past, and during his last judicial service, sitting as judge in the courts of the United States for this district, whereby not only the legal profession of the two states, but the public generally, have sustained an irreparable loss.

"Resolved, that we entertain a high sense of the uniform courtesy, firmness, industry, intelligence, great learning, and strict impartiality and rectitude with which he discharged his official duties, and that his example may well be propounded for the imitation of the youthful members of the legal profession, and especially of all such as aspire to a high place in the confidence and affection of their fellow-men.

"Resolved, that our sense of the disinterestedness of the deceased judge, and of his devotion to his public duties, is greatly enhanced by the circumstance that his exercise of judicial functions, in this city, was uncompensated, except that he earned in our midst a name and character of more value than riches.

"Resolved, that we proffer to the family and friends of the deceased, on this occasion, our heartfelt sympathies for the loss they have sustained. But we trust that they will, after referring this painful event to the dispensation of a wise Providence, find many consolations in the high name and spotless character which their departed relative left behind him.

"Resolved, that a copy of the proceedings of this meeting, signed by its officers, be transmitted to the widow of the deceased, and that the same be furnished for insertion in the newspapers, both of this city and of the city of New Haven."

On motion of the Honorable Gilbert Dean, it was ordered, that copies of the proceedings of the meeting be transmitted to the district court of the United States for the district of Connecticut, and to the circuit and district courts of the United States for the southern district of New York, with requests that they be entered on the minutes of those courts. The meeting was then adjourned.

JOHNSON, ALEXANDER SMITH.

[For brief biographical notice, see 30 Fed. Cas. 1379.]

The following proceedings of the bar are reprinted from 14 Blatchf. 555:

The members of the bar in the city of New York met in the United States circuit court room, on February 5, 1873, in pursuance of a call numerously signed, to take action with reference to the death of the Honorable Alexander S. Johnson, circuit judge of the second judicial circuit of the United States. The meeting was called to order by Hon. Henry E. Davies, who said: "I have been requested by a number of members of the bar to propose, as chairman of this meeting, the Hon. Samuel Blatchford." Judge Blatchford was unanimously elected president of the meeting.

Mr. Davies then said: "I have also been requested to propose, as vice-presidents of this meeting, the Hon. Charles L. Benedict, Hon. Nathaniel Shipman, Hon. William J. Wallace, Hon. Hoyt H. Wheeler, Hon. Noah Davis, Hon. William E. Curtis and Hon. Charles P. Daly; as secretaries, Hon. Stewart L. Woodford, John I. Davenport, Esq., and George F. Betts, Esq." The gentlemen named were elected unanimously.

The officers having taken their seats, William Allen Butler, Esq., spoke as follows: "Mr. Chairman,—I have been requested by the committee having charge of the arrangements for this meeting, to present resolutions expressive of the sentiments of the bar of New York in reference to the occasion which has led to this meeting. There are present, Mr. Chairman, eminent members of our bar, who were associates of Judge Johnson during his career as a lawyer, and others who were his associates upon the bench of the highest court of our state; and from these gentlemen we shall no doubt hear, in fitting terms, in reference

to the character, the attainments and the public service of Judge Johnson, which, necessarily, are only briefly alluded to in the resolutions which I shall have the honor to present. If I am permitted a single word of preface, I will take leave to say that a gathering like this seems to me to afford a very striking illustration of the community of interest—I might say the identity of interest—between the members of the bench and of the bar, as co-workers in the same sphere of duty. It is more than a quarter of a century since Judge Johnson left the active practice of the profession here in New York, to take his place as one of the judges of the court of appeals, as then constituted. And yet, during all the interval of time since he left us, until now that we meet to pay this tribute to his memory and to his public services, we have always claimed him as a member of this bar. We have seemed to be identified with him in the many occasions when it was our duty and his to act together in reference to great and important questions relating to commercial law, and to all the other interests which are so frequently involved in the discussions of the profession and in the decisions of the courts; so that we have been still his associates. We have been before him as advocates, and have had the opportunity of witnessing the impartiality, the candor, the learning, the integrity which he brought to the discharge of his official duties; and we have also felt that there never was any interruption of that kindly feeling which to so large a degree existed towards him on the part of all the members of the profession who were brought into contact with him when he was one of us, and which was continued on his part during his long judicial service. When we last saw him presiding in the circuit court a few weeks since, it was painfully apparent that he was yielding to the burden unwisely devolved upon a single judge, which he had only too willingly assumed, and under which he struggled to the utmost of his ability, in a manner which entitles us to say that his effort to sustain it was heroic. In the circumstances of his death we find abundant occasion for regret; but he has left us an example of untiring devotion to duty; and as we now, standing beside his bier, look back over this honorable and finished career, I think we may all take from it a high incentive to that continuance in patient, thorough and effective service which, alike for the humblest as the highest toiler in our ranks, is its own satisfaction and reward. By your leave, Mr. Chairman, I will now offer the following resolutions:

“The members of the bar of the city of New York, convened to take action in reference to the death of the Honorable Alexander S. Johnson, late circuit judge of the United States, for the second judicial circuit, hereby resolve as follows:

“Resolved, that we have learned with profound regret of the death of Judge Johnson, which deprives the bar of this city and state, and of the circuit of which he was the honored judicial head, of a wise and able judge and an upright man, eminent in the public service, and justly held in the highest esteem in all the relations of life.

“Resolved, that in the professional career of Judge Johnson, and in the various public positions filled by him—as a judge of the court of appeals, to which he was elected in 1851 for the full term of eight years; as a commissioner under the treaty of July 1st, 1863, with Great Britain; as a member of the commission of appeals, to which he was appointed in January, 1873; as a judge of the present court of appeals, from December, 1873, to January 1, 1875; and in the federal judiciary, as circuit judge of the second judicial circuit, from October, 1875, to the date of his death—the discharge of his high functions was marked by a constant and undeviating devotion to duty, by high intellectual ability and by absolute rectitude of purpose.

“In the retrospect of his public life we recall these conspicuous traits of his character, and of his judicial action, alike in justice to his memory, and in grateful recollection of his services to his state and country. Thoroughly grounded and versed in the science of the law, and with a large experience in its practice, it was his endeavor, as

a jurist, to apply those well established principles, which are the basis of the due administration of justice, so as to reach in each particular case a conclusion resting upon their sure foundations. This characteristic of his mind eminently fitted him for the duties of the bench of an appellate court, and is amply illustrated in his reported opinions, which are distinguished for clear and lucid expositions of legal principles, and their close and discriminating application to the most intricate and important questions of law and fact. While the reports of our highest state court abundantly attest the fulness of his learning, the breadth of his intellect and his ceaseless industry, the rare personal qualities which gave a peculiar charm to his character, evinced in the unvarying urbanity and patience, the genial courtesy and self-control, the cordial sympathy, without bias and interest, without partiality, which with him were inseparable from the discharge of duty, will be specially cherished by his associates and contemporaries, and should be perpetuated in this testimonial to his worth. Our sorrow at the termination of his useful and honorable life, heightened by the consciousness that it was hastened by the undue pressure of judicial labors and responsibilities against which he struggled with self-sacrificing toil, finds a solace in the reflection, that, to the last, he was an example of fidelity to duty, and that, as a minister of justice, he died in the service he imposed.

“Resolved, that a copy of these resolutions, attested by the officers of this meeting, be presented to the circuit court of the United States in this district, and to the court of appeals of this state, in such manner as shall be directed by the chairman, for entry on their minutes, and that a copy be also transmitted to the family of Judge Johnson.”

Hon. George F. Comstock spoke as follows: “I beg to second the resolutions which have been read. The attention of the bar, of the bench and the public has been arrested by the sad event which is the occasion of this meeting. We are met together as members of a common profession, to give expression to the sense of the loss which we feel in the death of Alexander S. Johnson. That event was unexpected to us; indeed, the intelligence of it came upon us with a startling suddenness. It is very well known that some two or three months ago his health had been giving way under the accumulated labors imposed upon him by the high judicial position which he so honorably and so usefully filled. It is also known, that, now only a short time ago, he went to the island of Nassau for the benefit of its mild and genial climate, in the hope and expectation, in which we shared, that his health would be restored, and his usefulness continued. The first news we hear from him is the sudden and sad announcement of his death. Judge Johnson was eminent as a lawyer, a jurist and a citizen. I had the rare good fortune to know him, I think I may say intimately, during nearly the last twenty-five years of his life; and it is to me a source of profound satisfaction to believe that I enjoyed his friendship, as I gave him, most unreservedly, my own. The impression made upon me by his talents and learning, by the purity of his life, by his genial nature and the graces of his character, are with me a recollection which will remain as long as memory lasts. His career at the bar was comparatively a brief one, and mainly, if not wholly, in the city of New York. I was never a witness of that career, but it must have been one of laborious study and practice, for it made him one of the most accomplished lawyers that I have ever known. At an unusually early age for elevation to the bench, the display of his learning and powers in the highest court of the state attracted to him the attention of the profession generally, and their appreciation of his rare qualities was exhibited by his nomination and election to that tribunal. He became a judge of the court of appeals at an earlier age than any other person upon whom that distinguished honor had been conferred; nor has it happened more than once, if at all, since that time. During the succeeding

eight years of his life, and while, according to ordinary experience, he had scarcely reached the full maturity of his powers, he served in that capacity, and, as the whole profession witnesses, served eminently and usefully. At the expiration of that period the mutations of politics, the shortness of judicial terms, and the elective system, deprived the state for a considerable number of years of his services in a judicial capacity. Retiring from the bench, he became a resident again in his native city of Utica. The well-earned reputation which he enjoyed for learning, ability, perfect independence and impartiality, marked him for selection as the voluntary judge or arbiter in cases of private submission to him by the parties. I happen to know very well that he became the standing referee of the interior of the state in many cases of unusual importance, submitted to him by the parties with the same confidence in his learning and in his judgment which they would have in the decisions of courts of the highest authority. The creation of the commission of appeals restored him to judicial life. He held a seat in that high tribunal by appointment, but for only about one year, when he was transferred, also by appointment, once more to the court of appeals, to fill a place made vacant by the tragic death of Judge Peckham, who was buried in the ocean by the sinking of the steamer Ville du Havre. At the expiration, or soon after the expiration, of that official term, Judge Johnson received, now about three years ago, from the president and senate of the United States, an appointment to the distinguished position of judge of this circuit, by far the most important of the circuits into which our federal jurisprudence is divided. He held that office to the close of his life, and we believe that he sank beneath the crushing weight of the labors which it imposed upon him. And in this connection I ought to mention the fact (which is contrary, I believe, to a received impression) that, when he ceased from his labors, prior to the October term, he had almost entirely cleared his docket of cases argued. During a considerable portion of Judge Johnson's judicial career, it happened to me to be associated with him. With him were also associated Denio and Selden, names which are high on the roll of judicial fame. The relation to him to which I refer enables me, I think, to form a just judgment of his rare and excellent qualities as a lawyer and a jurist. I have nothing to say of his mental peculiarities; for he had no peculiarities or eccentricities of mind. His mind was simple, direct and strong. If any quality or sentiment belonging to him as a judge was in predominance, it was his prevailing and pervading love of justice and of right, as ascertained by sound and beneficent rules of law. I think his purely intellectual faculties had their highest exercise in the quick and ready appreciation of the facts of a case in their true relation to the principles of law. He, more rarely than others, mistook mere resemblance in circumstances for analogy in principle. Few, if any, of his contemporaries had a more varied and extensive knowledge of the law. None had a more discriminative judgment. He had the rare common sense which looked through the false, and took in the true relations of a controversy; but it was a common sense cultivated and adorned by the learning of the books. The duty of impartiality in a judge is so plain that it is only feeble praise to say of a judge that he is impartial. But I think I can truly say of Judge Johnson, that his was the most absolutely impartial mind that I ever knew. The parties to a controversy were to him a mere abstraction. He looked always directly at the merits of a controversy without any distracting thought or wish. To me he seemed always to be inaccessible even to the subtlest of those influences which sometimes, it must be confessed, are a disturbing weight in the even balances of justice. The judicial opinions which he has left will be an enduring record. They will long be read and appreciated as models of neatness, simplicity and precision. Their characteristic and their charm is the utter absence of ambitious ornament and display. They are truly the reflex of that modest

and unassuming character which distinguished him in all the relations of life. He was wholly free from vanity or self assertion. If he had pride, it was only the pride which lifted him above all meanness and wrong. Such as I have most feebly portrayed him, was our deceased friend and brother. We shall see him no more, but his eminent and honorable career in the public service, illumined, as it was, by the radiance of his private virtues, will long be to us a memory to cherish, and an example of inestimable value. Our holy religion tells us to believe that he has exchanged earthly toil for eternal rest."

Hon. E. C. Benedict then said: "Mr. Chairman, —Although I knew Judge Johnson during all the time that he was at the bar in this city, and subsequently on the bench—I may say that I knew him very well, personally and familiarly, though not intimately—I do not rise to say anything with regard to his professional and judicial career, except that from the heart I shall vote for the resolutions which have been read, and that I concur in the very excellent remarks which have been made by Judge Comstock and Mr. Butler. I shall say only a word or two with regard to Judge Johnson in another aspect of his public and personal life. I had the honor to be associated with him during all the time that he was one of the regents of the University of the State of New York, and although the duties of that office are unostentatious, they are highly useful and important to the state. It is not always that gentlemen who follow the law with so much earnestness, so much zeal and so much real love for its principles, find time to step aside into the more graceful pursuits of literature and science. Judge Johnson came into the board of regents fully sensible of the importance of its duties; and he brought to their exercise not only that wisdom, acuteness and impartiality which characterized him as a lawyer and a judge, but the love of letters, also, and generous learning with which he was deeply imbued. He came into the board as the successor of the late eminent Rev. Dr. Campbell, of Albany, who decorated the metaphysical theology and earnest and devout faith of one of the strictest sects of our religion with the generous and refining influences of secular learning. Judge Johnson was immediately made the successor to Dr. Campbell on the committees on the state library and on the state cabinet of natural history. The state library was at that time, or a little before, put into the hands of the regents as trustees, to manage and care for it. They found it a library of some ten thousand volumes, with many broken sets and shattered bindings, carelessly kept and carelessly used. They have made it, to-day, one of the best, and best conditioned libraries in the country, containing more than a hundred thousand volumes. On that committee Judge Johnson's bibliographical knowledge, exquisite taste and great culture in books were made exceedingly useful in filling the gaps in the library, in adding to its stores, and in making it what it should be—a permanent and useful library in all departments of learning and literature. His position on the committee on the state cabinet was no less agreeable to him. Mr. Agassiz once said in my hearing, on a great public occasion, that the first question of a man of science in New York was, 'which is the way to Albany?'—the home of that great cabinet and of Professor Hall, the geologist and paleontologist of the most world-wide reputation, who is the curator of the cabinet. One of merely professional tastes might be long acquainted with Judge Johnson without finding out that natural history might have been all in all his study, so quietly did he indulge in the charm of those studies. He knew enough of them all to be even more than merely intelligent in their literature and science. He was himself a careful observer of objects, especially with the microscope, and he was a general reader of the literature of those subjects. He knew not only the theories that are now fresh, but also those that were fresh and believed in by everybody and exploded before he was born. His occasional hours, therefore, with his committee and with Professor Hall in the cabinet, were among the lux-

uries of his life. He exhibited the same qualities as a member of those committees and as an individual associate of the members of the board and in its meetings, which he exhibited on the bench and at the bar, and in social life, and which have been alluded to with such just feeling and truth by Judge Comstock and Mr. Butler; the same personal amenity, the same cheerfulness and the same quiet and unostentatious way of doing his duty under all circumstances. He left the board of regents by resignation, because the judicial appointment which he had received rendered him, as he thought, incompetent to hold the two offices; otherwise, as he often said to me, he would have been glad to continue in the board, and lamented that he could not be with us at our meetings and participate in our duties as he had formerly done. Although the office of regent is one of much labor, no pay, and little glory, still it is well to tell of such a man as Judge Johnson, that he considered usefulness as the best pay and the truest honor, and that he fulfilled all the duties of that non-professional and unsalaried office, with the same ability and faithfulness, and the same personal loveliness (if I may use such an expression) that he did the more distinguished public offices which he filled."

Edgar S. Van Winkle, Esq., said: "Mr. Chairman, and gentlemen of the bar—After the very expressive and eloquent resolutions, and after the just and extended remarks of the gentlemen who have spoken in regard to Judge Johnson's accomplishments and character, I shall not attempt to detain you by any repetition of the views which have been so well put before you; for in attempting to do so I should only display my own inferiority. Having been requested to make some remarks at this meeting, I have consented to do so; but, holding the same views as those gentlemen by whom the just character of Judge Johnson has been so well and so particularly set forth, it would seem that there was but little left for me to say; and there is but little, except generalities. The custom we have, bench and bar, of meeting as one body on the death of any distinguished member of our profession, whose character we have revered and whose talents we have esteemed, is a beautiful custom, I think; one which tends to keep alive in our hearts a feeling of affinity with one another, a feeling that our connection with our departed friends does not cease entirely on their death, and that in our memories their talents and their virtues are embalmed, and that they serve as an incentive to us to endeavor to follow in their footsteps. And more particularly when a prominent occupant of the bench, one who has worthily and successfully for a long period of time fulfilled the difficult duties and functions of that position departs, it seems more than ever proper that we should meet again together, the bench and the bar, and repeat in such meeting our estimate of the character of our departed brother. A judge in any part of this circuit, the territory embraced by this circuit of the United States court, has anything but a sinecure. We know and we see that in all the superior courts a judge has a burden upon him which few constitutions, mental or physical, can bear. And I often admire the courage which enables men who know what is awaiting them in a short time, to assume the burdens of such an office as this. Therefore, my friends, we should rally to the support of the custom, and speak a good word in behalf of every one of those gentlemen, those martyrs, who, having worthily fulfilled the office of judge, have then passed away. When, unexpectedly to me, I was requested to take a part in these observances, I felt inclined to refuse; but, upon consideration, it seemed to me I had no right to do so. And, moreover, I feel towards the worthy members of our profession that degree of respect and affection, I may say, that I would not refuse to contribute what little I could, however inconsiderable it might be, to the preservation of the custom which we have adopted in this country, and which we are now carrying out; and I feel a share of that loyalty which impels and justifies even the meanest clansman in casting his mite, however slight it may be, upon the cairn

of a fallen chieftain. And the judge whom we lament was a chieftain; he was a great judge; he had those qualities which belong more especially, in their influence and fitness, to the judicial office. He had honesty, he had industry, he had intelligence, he had learning, he had fearlessness, he had firmness, and he had a love for the duties he was called to perform. As to his learning, the decisions with which our books are filled bear testimony. It needs no further remarks on my part. I can add nothing to what has been so well said here to-day by gentlemen well able to speak of the value of those decisions, and to judge of the learning which they embalm. That he was industrious, I think cannot be doubted, apart from the asseverations of his friends to-day; because I am persuaded, from what I have seen, that a person who filled the judicial offices which he did—and more especially in this circuit—without industry could not with honor have survived a single term. So great and important were the interests before him, so pressing the necessity for decision. It is hardly necessary to extend the catalogue of qualities which I have named as those which constitute a great judge. As to the integrity and impartiality of Judge Johnson, I never heard the slightest impeachment of it; nor do I believe but that the persons the most inimical to Judge Johnson (for even the best men have their enemies) would abstain from making such a charge as that. If we look at his decisions, if we read them carefully, we shall see that, though he was a man, as we are, and subject to all the infirmities of human nature, yet when he entered the judicial office he became removed, as it were, from those infirmities. And you perceive all through his decisions, whatever they may be, that in his mind there stood, over and above all, the figure of justice with the flaming sword that would not permit anything unworthy to enter the sanctuary of his mind. There can be but few subjects more worthy of our consideration than that of a member of the profession who has reached the highest attainable honors it offers at the bar, and eminent judicial honor on the bench—I say there can be few subjects of contemplation pleasanter to the legal mind than that of such a man, subject to all the infirmities of nature, subject to all the influences that cunning or ability could spread around him, subject to be misunderstood and misrepresented, and yet who, by force of his inward contemplations and his own respect for virtue and right, has lifted himself above the fogs and tempests of the world, to a serene height, where he can look down upon the follies and weaknesses of the world as one who has passed through and over them, and can, from his elevation, announce the decrees with which law and equity, the twin offsprings of justice, inspire him. Well and ably did he fulfill all his functions; and I trust that all here are united in one feeling, that in renewing our friendship for each other we at once strengthen the bond which binds the bar and bench together, and raise a tribute of affection to the memory of our friend, and of admiration for his many virtues."

Luther R. Marsh, Esq., spoke as follows: "Mr. Chairman, and gentlemen—An early acquaintance with Judge Johnson, ere he came to the bar, and since continued, may give me warrant, perhaps, for a single word. Were I to state my thoughts in a condensed form, I should but re-word the resolutions. They express, I am persuaded, the sentiment of the bar—of the bar of this city and of the bar of the state—at this sad bereavement. He, to honor whose memory we have met, received an inheritance from his country which he was proud to maintain. His mother was the daughter of the second son of President John Adams. As early as 1797—ere Utica had received the christening of its present name—while yet it was known only as 'Old Fort Schuyler,'—his grandfather, Bryan Johnson, was a prominent and valued citizen, and contributed largely to the impulse the infant received in growth and prosperity. Concurrent with the present century, from the beginning down to recent date, his father, Alexander B. Johnson, was one of the foremost men of Utica, in commerce, in influence, in finance in literature.

And so it happened that the departed jurist came to his profession through a youth and education of uncommon advantage. All that could be done by affluence, by social position, by opportunity, by appliance, by stimulus to effort, was his; and these advantages fell not on unfruitful ground. He had an intuitive apprehension, a great intellectual capacity, and was quick to appropriate and assimilate the benefits that I have mentioned. He took delight in scientific research, and was a man of general culture and scholarly attainments. Not content with surface views, he liked to think out principles to their last analysis. He was peculiarly well fitted, as I think, for success at the bar, for forensic debate, and for the presentation and argument of the principles that obtain in the administration of justice. He was endowed with a sweet and magnetic voice, and a most winning manner. But he was not to stay in the arena long. The bench was his destiny. It was there that the largest portion of his business life was spent, in the manner narrated by the resolutions and by the gentlemen who have preceded me—in the exercise of the Godlike prerogative of applying the principles of law to the rights of men. That he performed this duty with inflexible integrity and rare ability, in recorded opinions which stand as landmarks in the troubled sea of controversy, and to the acceptance of all, is conceded by all. I have often thought, sir, that if fortune had given him a seat on the bench of the supreme court of the United States, at Washington, he would have been most admirably adapted for the wider range of that majestic tribunal, before which come, for adjudication, the conflicting interests of the whole country, and whose voice is authoritative to its utmost bounds. Sir, I have noticed, by the newspapers, that the bar of Utica, in his own native county of Oneida, are meeting to testify a similar honor to that which we render to his memory to-day. The city of Utica, as the city of New York, claims him as her own. That city, sir, has done credit to her position as the geographical centre of the state, by making it, from early time, the legal centre as well. She has produced the ablest lawyer, as such, whom our state, and, as I think, our country, has seen—Samuel A. Talcott. His scarcely less famous partner, William H. Maynard, has sent down to us a reputation for transcendent ability as a lawyer, and fabulous powers of memory. Since that time she counts, among her ornaments, Greene C. Bronson, Henry R. Storrs, Joseph Kirkland, Joshua A. Spencer, Samuel Beardsley, Hiram Denio, and William Curtis Noyes. She has furnished for our state, in succession, three attorney generals—Talcott, Bronson, and Beardsley. At the time of the death of the eminent jurist whom we mourn, she filled two seats on the bench of the highest courts of the United States: one in the circuit court, which his lamented death leaves vacant, and one on the supreme bench at Washington. And even now, at this very hour, the senatorial representation of the great state of New York is filled by her two citizens, Roscoe Conkling and Francis Kernan. Utica, so highly favored, now enrolls, with pride, while yet in sorrow, the name of Alexander S. Johnson on the bright scroll of her departed sons. We, of New York, claim him too; and there, as here, the bench and bar, laying this tribute on his tomb, in a common sympathy mourn their loss, and hold his memory in honor."

Calvin G. Child, Esq., then said: "Mr. Chairman, and gentlemen—I have heard the resolutions read, and although a stranger to most of you, I desire simply to express, in common with you of the New York bar, the sentiment which we of Connecticut, being so closely allied with you in the second circuit, feel upon the occasion which has called you together. The pressure of the judicial duties of Judge Johnson has kept him out of our state almost entirely, except in the matter of appeals. His predecessor, although a native of Connecticut, came to the bench of this circuit with a reputation acquired in your state. We knew him whom you mourn to-day by a like judicial reputation; and I could not keep silent, sir, with these proceedings before me, without taking advantage

of the opportunity to express our sympathy, and our participation in these ceremonies to-day, and the respect we all feel for the judge who has been loaned to us by the state of New York. There is an old Japanese custom, sir, that when the body of the dead passes, each neighbor shall carry it for a short distance, as a neighborly duty which they owe to the memory of him who has gone; and in that spirit, on behalf of the bar of Connecticut, I would to-day with you stand around the bier of Alexander S. Johnson, and speak for our bar the sentiments that we have of respect for his memory, his judicial talents and his judicial integrity."

The resolutions were adopted unanimously.

The president, in accordance with the resolutions, appointed Mr. Benjamin D. Silliman and Mr. William Allen Butler a committee to present the resolutions to the court of appeals of this state and the circuit court of the United States for the southern district of New York.

JOHNSON, BENJAMIN.

[For brief biographical notice, see 30 Fed. Cas. 1380.]

The following notice is reprinted from 1 Hemp. vii.:

The late Benjamin Johnson of Arkansas, who sat in those courts for nearly thirty years, and was their pride and ornament, generally wrote out his opinions, and before his death placed such as had been preserved in my hands. Of him I cannot speak without emotion; and when I remember that he died full of juridical honors, beloved by all, without an enemy in the world, admired for the purity of his public and private character and for his devotion as a Christian, respected for his unbending integrity and for a heart full of kindness to all, I cannot but say to myself we shall not see his like again. He was a safe, patient, and able judge; and the judicial distinction which he won extended far beyond the boundaries of his state, and we may well wish that the judiciary of our country was always represented by such men.

LEAVITT, HUMPHREY HOWE.

[For brief biographical notice, see 30 Fed. Cas. 1382.]

The following proceedings upon his retirement from the bench are reprinted from 2 Bond:

On Thursday evening, March 30, 1871, a banquet was given by the bar of the southern district of Ohio at the St. Nicholas Hotel, in Cincinnati, in honor of Judge Leavitt. It is certain that a company embracing more eminent legal talent never assembled in Ohio. The entertainment in all of its appointments was unexceptionable. At the head of the table was seated the Hon. Henry Stanbery, Judge Leavitt, the guest of the evening, and other distinguished persons. At 11 o'clock, Mr. Stanbery, rising, addressed the assembly.

Address of Mr. Stanbery: "Gentlemen: No more agreeable duty could have been assigned to me than that of presiding at this banquet. Lawyers seldom come together as a body except to pay a last tribute of respect to the memory of a departed brother. Hard-worked as a profession, it is a rare thing for us to meet together for social enjoyment. No other profession stands more in need of such recreation, and yet none sees less. I hail, therefore, with great pleasure, this gathering of the bench and bar. But, gentlemen, it is not that consideration alone that makes this meeting an agreeable one, so much as the particular occasion which brings us together. We are met to express our respect and esteem for our honored guest upon his retirement from the bench. Perhaps there is no one present who has for so many years stood in the relation of lawyer to judge as I have occupied toward the friend who sits by my side. I doubt not it was this consideration more than any other which moved the committee to place me at the head of this board. On July 21,

1834, I was present at a session of the district court at Columbus, when the commission of Judge Leavitt was read, and when he took his seat as judge of that court. I refreshed my recollection by examination of the journal of the court, yesterday. My impression then was, that during all the time which has since elapsed, Judge Leavitt was never absent from a regular term of the court. I again referred to the journal, with the assistance of an obliging deputy clerk, and must confess that the record did not sustain me. We did find one term at which Judge Leavitt was not on the bench, but it must be added that it appeared from the journal that at that very time, though unable to leave his distant residence, he was busily engaged in hearing cases 'at chambers.' Where shall we find another instance of faithful service so long continued and so punctually performed? But this is not all. The question is not merely how long, but how well. The answer to this question needs no reference to the journal, no profert of the record. I stand here as a living witness, surrounded by a cloud of witnesses, to give the answer. The judicial station requires something more than long continued services. It requires diligent study, patient attention, strict impartiality, purity of life, social as well as official, good temper, and courteous demeanor. I have practiced the law for many years and in many courts, and I can say, without hesitation, that I have never practiced before any judge in whom these virtues were more fully illustrated. After the long career of public duty, our venerable friend retires to private life without a stain upon the judicial ermine. In a few days another judge will sit in his accustomed seat. Let us hope that the coming man may enjoy as long a career of usefulness, and earn as good a title to the respect and affection of the bar as his predecessor."

Mr. Stanbery then proposed the first regular toast of the evening, as follows: "Our Honored Guest." In response, Judge Leavitt said:

Remarks of Judge Leavitt: "Mr. President and gentlemen: I have often, in the course of my life, had occasion to wish that I had some of the powers of an orator. I regret to say that this high qualification has never pertained to me, and now I feel greatly embarrassed and very much at a loss to respond in fitting terms to the kind utterances of my learned and excellent friend, the president of this meeting, and the sentiments contained in the toast. It was the remark of the celebrated Edward Burke, the English statesman and philosopher, that the legal profession had a contractile influence upon the intellect, as well as upon the social affections. This language, of course, was made applicable to the English bar. The learned orator had never known much about American lawyers. [Applause.] It affords me great pleasure to utter upon this occasion my entire dissent from the opinion expressed by the eminent Mr. Burke, in regard to the bar of this country. From my long association and intercourse with them, I have every reason to believe, and to infer that the sentiment uttered by the distinguished statesman to whom I have referred, has no application to the bar of the United States. There is not only the mental qualifications and accomplishments belonging to the American bar which pertain to any other calling or profession, even of the highest literary order, but in point of moral qualities they are not inferior to other classes and descriptions of persons. If I needed an evidence of the truth of my own position in this regard, I think I might properly point to the present assembly and the occasion upon which they have met. You are not here, my friends, to celebrate or memorialize the incoming of a new judge to an official position. You are not here under circumstances that show you to be actuated by selfish or interested motives. You are here simply to commemorate the fact that an old gentleman who has been very long upon the bench is about to retire from that office, to civil life, to a place and a position where he can never hope to exercise any official patronage or to confer favors upon others, professional or otherwise. In other words, you are doing honor to an ancient judge without expectation of favor from his hands

hereafter. I allude to this fact to show that your conduct upon this occasion is entirely devoid of any selfish motive or incentive, and hence I derive the argument that there is no defect in the heart of the American bar. [Applause.] Gentlemen, the compliment which has been uttered by my excellent and long-known friend, the president of this meeting, is one to which I can not respond. He has done me justice, and more than justice. If there is any merit in a very long judicial life—in discharging the duties of a judicial station with honest purposes and motives—then I grant that the compliment may not be undeserved. If, however, it is intended to accord to me the merit and the high distinction of great learning, great judicial ability, then I fear the compliment is not deserved. I have always endeavored to hold the scales of justice with a firm and equal hand. [Great applause.] I could not claim, without extreme arrogance, that I have not committed many errors and mistakes in my judgment. I have no doubt that I have; but as it is human to err, I have no right to claim any exemption from the common lot of humanity. I will remark, as the fact has been referred to by my learned friend, that in July, 1834, I first took my seat upon the bench of the district court. At that time the whole state of Ohio formed one judicial district, and the courts were then located at Columbus. Up to the time of the division of the state into two districts, in 1855, there was comparatively little business either in the circuit or the district courts of the United States. My friend will recollect distinctly that the more important cases that came before the circuit court prior to the division of the state, were cases involving controversies in relation to the title of land in the Virginia military district; and I may remark here that there were very few, if any, cases which came before that court during the period to which I refer, in which my learned friend was not counsel on one side or the other. [Applause.] After the year 1855, when the state was divided, and when the courts for the southern district were established in Cincinnati, a very changed state of things existed. That city being the great commercial center for the state, business came like an avalanche into both the circuit and the district courts, and from that period I have been actively and laboriously employed in the duties of my station. [Applause.] The district court of the United States, as you are aware, has exclusive and original jurisdiction in all cases of admiralty, and it has also the same jurisdiction in all seizures upon land, and all proceedings in rem against property for forfeiture for violations of law. It has the exclusive jurisdiction of all suits against public defaulters, and for the recovery of debts due the government. It has concurrent jurisdiction with the circuit court of the United States in all crimes. In addition to the matters of jurisdiction to which I have referred, there were occasional cases arising under the fugitive slave law—the act of 1793 at first, and then the act of 1850. In fact, there were cases of this description, more of them in my court, to be tried by me, than I was anxious to have; but it has been very well remarked that judges can not choose the cases which they will pass upon or try. During nearly all the terms of the circuit court the labor and responsibility of presiding devolved upon me, as the duties of the judge of the circuit did not often permit him to attend the terms of that court. Without dwelling upon this subject, so far as my learned friend has given me any credit for long and laborious service, I accept the compliment, for I think I have, perhaps, had a longer judicial term of life, with one or two exceptions, than any federal judge under the government of the United States. I know of few, indeed, that have exceeded me in length of term. [Applause.] One remark further, gentlemen, and I shall take my seat. In regard to my motives in judicial action, allow me to say for the benefit of the fraternity, that in early life I was forcibly impressed with the utterance of Lord Mansfield in the Case of John Wilkes, when, in deciding the points of error that were made, he said: 'I love popularity, but it is the popularity that follows, not that which

is run after; it is not the popularity that is gained without merit, and lost without crime.' [Applause.] From the bottom of my heart, I now express my thankful acknowledgments for the compliment which it has pleased the gentlemen of the bar of the southern district of Ohio to pay me upon this occasion. [Loud and prolonged applause.]

Mr. Murat Halstead, editor of the Cincinnati Commercial, an invited guest, appropriately responded to the toast, "The Press;" in conclusion, stating "that he had joined with very great sincerity in this testimonial toward a gentleman whose name was a synonym for all that was honorable and upright in the judiciary."

The following letter, from a distinguished member of the bar, since "freed from the toils which so long pressed upon him," was read, and elicited great applause:

Letter from Hocking H. Hunter:

"Lancaster, O., March 27, 1871.

"My Dear Sir: I truly regret that business engagements place it out of my power to participate in the entertainment on Thursday, to be given as a testimonial of esteem and regard to our venerable friend, Judge Leavitt, on the occasion of his retirement from the bench. I acknowledge myself, within the terms of your letter, to be one of those who have been 'longest associated,' professionally, in the exercise of his judicial functions, with the judge, extending, in fact, throughout the whole period of his service. And I assure you it would be very gratifying to me to be with the brethren in the expression of their approbation of his official life, now about to be brought to a close. It has been pure and faultless in purpose, just, upright, impartial, diligent; and now, at the advanced period of life which he has attained, it is my wish to assure him that I hope he may enjoy many happy days and years of life, freed from the toils which have so long pressed upon him, and when the end cometh that it may be to enter upon a new life of endless felicity. Hoping the occasion may be one to be followed by grateful recollections, I am, very respectfully, your obedient servant, H. H. Hunter.

"To W. M. Bateman, Esq."

McLEAN, JOHN.

[For brief biographical notice, see 30 Fed. Cas. 1325.]

The following proceedings are reprinted from 1 Biss. 9:

Hon. John McLean, associate justice of the supreme court of the United States, whose opinions form a large part of this volume [1 Biss.] and of whose reports this series is a continuation, died at Cincinnati on the 4th day of April, 1861, at the age of seventy-six years, being at that time the senior associate justice of that court. Judge McLean commenced the practice of the law in 1807, at Lebanon, in Warren county, Ohio, and five years afterwards was elected to congress in his district, which, at that time, included the city of Cincinnati. In 1814, he was, by the unanimous vote of his district, re-elected to congress, which position he resigned to accept a place in the supreme court of Ohio, to which he had been elected by the legislature of that state. He remained on the supreme bench of Ohio till 1822, when he was appointed commissioner of the general land office by President Monroe, and in the succeeding year he became postmaster general. On the 7th of March, 1829, he was appointed by President Jackson one of the justices of the supreme court of the United States, and at the January term, 1830, entered upon the duties of that office, which he continued to discharge for more than thirty years, and until the time of his death. The decisions of Judge McLean in the supreme court are reported in Peters' Reports, commencing with the third volume, and in the twenty-four volumes of Howard. His opinions on the circuit are found in the six volumes of Reports which bear his name, and are concluded in the present volume.

At a meeting of the members of the bar and officers of the supreme court of the United States,

held in the supreme court room, December 2d, 1861, Richard S. Coxe, Esq., on behalf of the committee appointed for that purpose, submitted the following resolutions:

"1. That the members of this bar and the officers of the court entertain a profound sense of the loss which, in common with the entire nation, they have sustained in the death of the late Mr. Justice McLean, so long known to the community, and in an especial manner to the profession, for his exalted legal accomplishments, the purity of his private character, and the eminent ability with which he discharged the duties of the high offices, judicial, administrative, and legislative, with which his name has been so long and honorably associated.

"2. That we will wear the accustomed badge of mourning during the present term of the court.

"3. That the chairman and secretary of this meeting transmit a copy of these proceedings to the family of the deceased, communicating, at the same time, the deep and sincere sympathy felt by its members in the affliction with which they have been visited by a wise and merciful Providence.

"4. That the honorable the attorney general be respectfully solicited to present these proceedings to the supreme court, now in session, and to ask that they may be entered on the minutes of the court."

At the opening of the supreme court on the following day, Mr. Bates, the attorney general, presented to the court the proceedings and resolutions of the meeting, and moved that they be entered on the minutes of the court, addressing the court, as follows:

"May it please your honors: I appear before you now not on my own motion, but at the request and by the authority of my brethren of this bar, who have desired me to say to you, in their behalf, a few words expressive of their feelings, and it is with an emotion of sadness, bordering upon melancholy, that I find myself constrained by circumstances to mark my first official appearance in this high court with the repulsive prestige of a bearer of bad news.

"For the heart of man will sympathize with surrounding facts, and will, often unconsciously, associate ugliness and vice with the messengers of evil, and will on the contrary, impute beauty and goodness to the agents and instruments of its pleasure. This is a sentiment known of old as a truth rooted in the human heart. 'How beautiful,' exclaims the holy prophet, 'how beautiful, upon the mountains, are the feet of Him that bringeth good tidings, that publisheth peace!' Oh! that to-day it were my delightful office to bring you good tidings, and to publish to you peace. But, unhappily, it is not so. Since the first organization of this court, no term has yet been held under circumstances so gloomy and sorrowful. I look up to that honored bench and behold vacant seats. Even this august tribunal, the co-equal partner in the government of a great nation, the revered dispenser of our country's justice, shares with us in feeling the common sorrow, and suffers in the common calamity. It is shorn of its fair proportions, and weakened and diminished in its strength and beauty, by the present loss of one entire third of its component members. And where are the wise, learned, and just men who used to fill those seats? Gone from this theater of their fame and usefulness, while all of us remember them with respect and gratitude, and mourn the loss of their valuable services. Two of them have been peacefully gathered to their fathers, and have left their fame safe and unchangeable, beyond the reach of malice, and secure against accident, embalmed in history, and hallowed by the grave. And one of them in the ripe vigor of his manhood, and in the pride of a noble and highly cultivated mind, has been swept away from his high position by the turbulent waves of faction and civil war. And this is not all. Your lawful jurisdiction is practically restrained; your just power is diminished, and into a large portion of our country, your writ does not run; and your beneficent authority to administer justice according to law, is for the present, suc-

cessfully denied and resisted. I look abroad over the country and behold a ghastly spectacle; a great nation, lately united, prosperous, and happy, and buoyant with hopes of future glory torn into warring fragments; and a land once beautiful and rich in the flowers and fruits of peaceful culture, stained with blood and blackened with fire. In all that wide space from the Potomac to the Rio Grande, and from the Atlantic to the Missouri, the still small voice of legal justice is drowned by the incessant roll of the drum, and the deafening thunder of artillery. To that extent your just and lawful power is practically annulled, for the laws are silent amidst arms. But let us rejoice in the hope that these calamities are only for a season; that the same Almighty hand which sustained our fathers in their arduous struggle to establish the glorious constitution which this court has so long and so wisely administered, will not be withdrawn from their children in a struggle no less arduous to maintain it. Now, indeed, we are overshadowed with a dark cloud, broad and gloomy as a nation's pall; but, thanks be to God, the eye of faith and patriotism can discern the bow of promise set in that cloud, spanning the gloom with its bright arch, to foreshadow the coming of a day of sunshine and calm, and to justify our hope of a speedy restoration of peace, and order, and law.

"This much, may it please the court, I have ventured to say as what seemed to me a fitting preliminary to the discharge of the duty, imposed upon me by my brethren of the bar. Of course all the members of the court know the fact that since the close of the last term, their old and honored associate, Mr. Justice McLean, has departed this life, for all men take sorrowful notice when 'a prince and a great man has fallen in Israel.' But the members of the bar, in pursuance of a worthy custom, long established, and stimulated, no doubt, by their personal reverence for the virtues and the learning of the departed judge, have held a meeting and passed a series of resolutions, which they have done me the honor to confide to me, with the request that I would present them here and ask that they may be entered upon the minutes of the court as a memorial of their profound veneration for the dead, and for the high tribunal of which he was so long a worthy member. I shall not take the risk of marring the strength or beauty of the resolutions by attempting to recite them, or to comment upon them. Let them speak for themselves, for they speak well. But I believe it is the custom here and I hope it will not be unseemly in me to say a few words of my own about that virtuous man, who, though he is dead, still lives in his good works and teaches by his bright example. I had not the honor of his intimacy, but I have known him personally for more than thirty years, and under circumstances which attracted and enforced my observation. I did not consider him a man of brilliant genius, but a man of great talents, with a mind able to comprehend the greatest subject, and not afraid to encounter the minutest analysis. He was eminently practical, always in pursuit of truth, and always able to control and utilize any idea that he had once fully conceived. In short, he was a sincere, earnest, diligent man. And this, I suppose, is the secret of his success, the reason why his course through life was always onward and upward. I am informed by those who have had good opportunity to know him in all the relations of life—as a lawyer, a judge, an executive officer, a neighbor, a friend, a professing Christian—that, in their belief, all his duties, in every relation, were fully performed. As a man, he lived a blameless life, and not blameless only, but sweet and attractive, by the habitual exercise of all those benevolent virtues which characterized and adorned his mild and gentle nature. And while he pursued with diligence every line of study which might serve to make him at once a blessing and an ornament to society, he looked steadily beyond this transient scene, knowing that this world is but a school of preparation for that eternity upon which his soul rested with undoubting faith. I think the outlines of his character may be sketched in a very few words. He was a ripe scholar; an

able lawyer, as you, his brethren must know; a bland and amiable gentleman; a strict moralist; a virtuous man; and, above all, a modest and unobtrusive Christian philosopher. It is not for us to judge of his final condition; but, as feeling and thinking men, when we view the spotless morality of his life, and the quiet meekness of his piety, we have good reason to hope that even now he is enjoying the rich reward of a well-spent life, in blissful communion with the spirits of the just made perfect. This much, at least, we do know, that his life has been a blessing to many individuals and a great benefit to his country, and that, dying in honored old age, he has left behind him the sweet savor of a good name."

Mr. Chief Justice Taney replied: "The members of the court unite with the bar in sincere sorrow for the death of the late Mr. Justice McLean. He held a seat on this bench for more than thirty years, and until the last two years of his life, when his health began to fail, was never absent from his duties here for a single day. His best eulogy will be found in the reports of the decisions of this court during that long period of judicial life, and these reports will show the prominent part he took in the many great and important questions which from time to time have come before the court, and the earnestness and ability with which he investigated and discussed them. They are the recorded evidence of a mind, firm, frank and vigorous, and full of the subject before him at the time. Before he occupied a seat on this bench, he filled the office of postmaster general of the United States, and in that post displayed an administrative talent hardly ever surpassed, with a firmness of character, and uprightness of purpose never questioned. Words of eulogy are hardly needed in memory of one so widely known and respected, eminent in political as well as judicial life. We deplore his loss, and join the members of the bar in paying due honor to his memory, and direct the motion of the attorney general, and the resolutions of the bar in relation to our deceased brother, to be placed on record, with this response from the court; and, as a mark of respect, we will adjourn to-day without transacting any of the ordinary business of the court."

The following is reprinted from 1 Bond, 607:

Proceedings of the United States circuit court within the southern district of Ohio, and of the bar of Hamilton county, Ohio, on the announcement of the death of Hon. John McLean, associate justice of the supreme court of the United States: "Thursday, April 4, 1861. It having been announced, that Mr. Justice McLean, the presiding judge of this court, departed this life, this morning, at his residence near Cincinnati, it is therefore ordered that business be suspended, and the court do stand adjourned until 9½ o'clock tomorrow morning.

"Thursday, April 11, 1861. Stanley Matthews, Esquire, presented the following proceedings, and moved the court that they be entered on its journal:

"At a meeting of the members of the Hamilton county bar, held in the United States circuit and district court room in Cincinnati, on Friday, April 5, 1861, on the occasion of the death of Judge McLean, Judge H. H. Leavitt was called to the chair, and William M. Dickson chosen secretary. Whereupon, on motion, Messrs. J. L. Minor, Judge Bellamy Storer, M. H. Tilden, Henry Stanberry, William Johnson, D. K. Este, C. D. Coffin, and George E. Fugh were appointed a committee on resolutions, who, after retiring, came in and reported the following, which were unanimously adopted:

"It has pleased God to terminate the mortal life of our friend and neighbor, John McLean, late an associate justice of the supreme court of the United States. He died at his late residence in Clifton, near this city, yesterday morning, full of years and of honors—a man without reproach—a distinguished statesman—a patriot, untouched by degeneracy—a learned,

laborious, patient, and upright judge—a benevolent and public spirited citizen—in all the relations of husband, father, friend, and neighbor, affectionate and faithful, a model Christian gentleman. We sincerely mourn his loss, and deeply sympathize with the family and relatives in this affliction, and as a mark of respect for his virtues, his talents, his attainments, his exemplary life and character, we will attend his funeral in a body.

“Resolved, that a copy of these proceedings be presented by the district attorney of the United States for this district to the circuit and district courts for entry on their minutes. That copies be presented by the chairman of this committee to the several courts of this county and city for entry on their minutes. That the chairman of this meeting communicate a copy to the family of the deceased. That the secretary furnish copies to the several newspapers of the city for publication.”

“Thereupon Judge Leavitt made the following remarks: “I have great pleasure in making known my cordial concurrence with the bar of this city in the well-deserved tribute of respect to the memory of Judge McLean embodied in the proceedings now presented. The terms of eulogy in which they have expressed their estimate of his high moral qualities and distinguished public services as a statesman and a judge are not exaggerated; and it is fitting that his ‘great example and his name’ should be honored by those who survive him. His life is deplored as a national loss; all feel that a great and good man is dead. To the members of the bar of this court, in which for more than thirty years he has presided with so much ability, and so greatly to the acceptance of the public, his loss must be felt with peculiar sensibility. It has made a breach which cannot easily be repaired. I sympathize deeply in the feelings of the bar, on the occasion of this afflictive dispensation of Providence. It is now nearly twenty-seven years since I became associated with Judge McLean on the bench of this court. His death has sundered a relation not only long continued, but which was throughout of the most friendly character. As his friend and surviving member of this court, it is not strange that my heart should be sorely pressed with a sense of bereavement and desolateness; and I am glad of the opportunity of placing upon the records of this court a testimonial of my exalted estimate of his vigorous intellect, his well-balanced judgment, his great judicial learning and acquirements, and the uniform courtesy and integrity which marked his long career as a judge.”

“The court orders the proceedings to be entered on its journal.”

McNAIRY, JOHN.

[For brief biographical notice, see 30 Fed. Cas. 1335.]

The following note is reprinted from 1 McLean, 560:

At the time of his resignation, Judge McNairy had been longer on the bench than any other judge in this country, or in England. By General Washington he was appointed a territorial judge, of the south-western territory; and on the organization of the state of Tennessee, he received the appointment of district judge of the United States, for that state. Increasing infirmities induced him to resign a short time before his decease. He was a man of sound understanding, and of sterling honesty. In the full vigor of his intellect, he was a good lawyer, and a safe judge. In all his views, and especially on legal subjects, there was a strong vein of common sense, which preserved him from error and led him to a correct conclusion. At no time of his life was he ambitious to be considered a technical lawyer; his aim was to understand and administer the spirit of the law, rather than its letter. Judge McNairy lived universally respected, and died universally regretted. He was an elevated and just magistrate, and a good citizen. He lived long, but as it regards his friends and his country, he did not live in vain.

MARSHALL, JOHN.

[For brief biographical notice, see 30 Fed. Cas. 1335.]

The following proceedings of the bench and bar are reprinted from 1 McLean, 555:

At July Term, 1835, the following proceedings took place in relation to the decease of Chief Justice Marshall: The United States circuit court, for the seventh circuit and district of Ohio, opened, Monday, July 13th—present, Judges McLean and Leavitt. Immediately upon the opening of the court, Mr. Hammond, the eldest member of the bar present, rose and announced the death of Chief Justice Marshall, in the following terms: “It has pleased Divine Providence to terminate the earthly career of John Marshall, late chief justice of the United States—a citizen without reproach—a patriot soldier of the Revolution—the friend, the companion, the biographer of Washington—the jurist, who, of all his compeers, has effected most to explain, to establish, and to vindicate a just interpretation of the constitution, its remedial bearings upon, and applications to, the individual rights and wrongs of the citizen. He departed this life at Philadelphia, on Monday afternoon, July 6th, in the 80th year of his age, surrounded by weeping relatives and mourning friends. He departed, as he had lived, an illustration to all around him of the Christian’s hope and the good man’s resignation. We must all feel the space made void by his departure. We must all deplore it—not for the departed, but for the country—for ourselves. Our consolation is, that he has left to us—to posterity—

“His great example and his name.”

Whereupon the court immediately adjourned.

Tuesday Morning, July 14. So soon as the court was opened, Mr. Scott rose and addressed it thus: “A tribute of respect is due to departed excellence, whether, whilst living, the excellent qualities of character were displayed in the unobtrusive exercise of those private virtues, which rendered him useful as a citizen and endeared him to his family and to his friends, or in the discharge of those high official responsibilities, which the constitution and laws of his country may have devolved upon him. The private and public virtues of the late Chief Justice Marshall, to whose memory we pay this last tribute of respect, cannot be too highly appreciated by us who survive him. As a jurist, he has never been surpassed, and but seldom, if ever, equalled. The labor, the care, the anxieties of a long life almost exclusively devoted to the service of his country, are ended. A great man has fallen: but he has left an imperishable monument of his fame. His decisions as a jurist belong to posterity, who will not fail to do him justice. The ultimate effects of these decisions, which evince such grasp of thought, on many of the great constitutional questions on which the politicians of his day were so much divided in opinion, remain to be tested. And although some may have entertained doubts whether their ultimate tendency might not be injurious, yet none, I presume, ever entertained doubts as to the purity of his intentions. He now rests from his labors, let us revere his memory, and imitate his virtues. The last tribute of respect must soon be paid to each of us; our life is as a vapour, which remaineth but a time, and then passeth away. I am constituted the organ of a bar meeting held yesterday, to present their proceedings to the court. I now present them, and move that they be entered on the journals.”

The proceedings of the bar meeting having been read by Mr. Scott, Judge McLean responded to the motion in the following terms: “The court feel great satisfaction in directing that the proceedings of the members of the bar, on this melancholy occasion, shall be placed upon their record. It is the highest respect which we can show, officially, to the memory of that exalted citizen, whose loss we all deplore. For more than six years, I have had the honor to be intimately associated with the deceased, in the discharge of public duties; and this has been more than sufficient, to

give me the highest admiration and respect for his eminent qualities, professional, intellectual, and moral. This is not the place nor the occasion, to speak at large of those great talents, and of that elevation of character, which, in the station he occupied, secured to him, beyond that of any other individual, the public confidence. His monument is seen in the judicial history of his country; and it is as imperishable as are those great principles, which, in so distinguished a manner, he contributed to establish. He has fallen, and though he has fallen ripe in years and full of honors, yet his whole country will lament the loss—the profession will lament it—and most of all will the loss be felt and deplored by those who were associated with him on that bench, of which he was the distinguished ornament.”

The following is reprinted from 1 Brock. 9:

Memoir of John Marshall, by Joseph Hopkinson, read on the third day of March, 1837, to the “American Philosophical Society.”

[Mr. John W. Brockenbrough, the reporter, appended the following foot-note to this memoir in the first volume of his reports: “The following brief sketch of the life, character, and services of the late Chief Justice Marshall, from the pen of a ripe and accomplished scholar, is now offered as an appropriate introduction to these volumes. It was, perhaps, inseparable from the preparation of such a memoir, that it should be tinged, in some degree, with the political opinions of the author, and it was also fit that the task of executing it should have devolved on one, who was not only eminently qualified for it in other respects, but whose political opinions fully accorded with those entertained, with remarkable consistency, and enforced with singular power, by the late chief justice of the United States. To that portion of the following paper which discusses the grave and, as some suppose, the very debatable question of the nature and scope of the powers conferred on the supreme court by the constitution of the United States, the editor does not deem it proper, in this place, to express either approbation or dissent; but has chosen to present it, unmutated and unaltered, as it came from the hands of Judge Hopkinson.”]

“The delay which has taken place in the performance of the duty, with which the society has honoured me, has been occasioned by various considerations which it is unnecessary now to explain. I need not assure you, that none of them will be found in an indifference to the appointment, and much less to the illustrious subject of it. The interest, the attention, which that commands, will not be impaired by the delay. There is nothing transient in the character and services of Chief Justice Marshall; nothing to be lost or forgotten in the lapse of months or years; nothing that time and reflection will not confirm and consecrate. They are inseparably connected with the institutions of our country; with its character and destinies. You will recognize and feel them now, as fully and freshly as on the day of his death. While it is the pride of our society to enrol on its list of members, the most distinguished and honoured citizens of our great republic, it is a consequence of this gratification that we are called upon, from time to time, to record also their death, and to lament the loss of their labours and virtues, of their lessons and example. Illustrated as our roll is with the names of the great and good, of the learned and wise, there is none that can claim pre-eminence over John Marshall. This great man, truly and emphatically so, was born in Virginia, in the county of Fauquier, in the month of September, 1755. During his boyhood and youth, this county was frontier territory, with a scattered and rude population, and the means of obtaining even an ordinary education, exceedingly imperfect and uncertain. Notwithstanding this disadvantage, the talents of young Marshall developed themselves at a very early age. He exhibited, as we are informed by one of his dearest friends and most eloquent eulogists, a decided taste for English literature, and especially poetry and history. It is worthy of observation that a mind of such

solid structure, of such capacities for profound and abstruse researches, of such gigantic powers, should first have attached itself to poetry. ‘He was enamoured,’ says the friend alluded to, ‘of the classical writers of the old English school of Milton and Shakspeare, Dryden and Pope.’ Even here his superiority appears. What a noble selection of masters? Here we had some assurance of the future man. He took his lessons of literature from deep and pure sources; his teachers were the princes and nobles of the art, who stand on pedestals of adamant with admiring ages rolling at their feet. How unlike the sickly, ephemeral, false, and impure models to which the young readers, (and some old ones,) of the present day devote themselves, corrupting their taste, debilitating their judgment, and touching their morals with dangerous principles and irregular passions! Some of these literati, know little more than the names of Milton and Shakspeare, Dryden and Pope, and are ignorant even of the names of some of the most illustrious poets of our language. This occasion will not suffice for tracing the progress of John Marshall from infancy to manhood. When he reached the age of twenty years, the struggle of his country against foreign oppression had assumed a serious and decided shape. ‘We must fight!’—said an intrepid patriot of the east. ‘We must fight,’ was the response of the brave and true spirits of the south. The animating call struck on the heart of Marshall, and electrified the whole man. The course of his education, the charms of literature, retirement, and study, were abandoned; and he betook himself to the field of mortal strife, where the victory was to be won, and his country saved, by strong arms and stout hearts. In the summer of 1775, he received a commission of lieutenant of a company of minute men, and was shortly after engaged in battle. He was in the severe and sanguinary conflicts of Brandywine, Germantown, and Monmouth. Does not this remind us of the best days of Greece and Rome, when their statesmen, their orators, poets and historians, however eminent, encountered the dangers and sufferings of the battle field on the call of their country? Yet we cannot but shrink and shudder to see such a life as that of John Marshall, placed in the balance against some hireling soldier, whose existence is of no value, and who is probably well paid for all the hazard to which he exposes it, by his shilling or six pence a day. But it was the cause, it was his country that demanded the sacrifice, by whatever hand he might fall. Thank heaven, he was reserved for higher and more essential services to that country. In the midst however of the stirring scenes of war, Mr. Marshall must have found some means and opportunities for study, for in 1780, he obtained his license to practice law. He then returned to the army, and continued in it to the termination of the contest. After this period his fellow-citizens seem to have understood the value of his character and talents, and to have taken possession of them. The people, until they become bewildered and maddened by the delusions and passions of party, are not blind to such gifts, nor to the worth of such men. Mr. Marshall, soon after the peace, was a member of the legislature of Virginia, and of the executive council of the state. In 1788, he was elected a representative of the city of Richmond, in the state legislature, and so continued until 1791. At this time he returned to his professional labours; but in 1795, he was again induced to take a seat in the legislative hall. He was offered by President Washington, the office of attorney general of the United States, which he declined; he withstood the solicitation of the same president to accept the appointment of minister to France, upon the recall of Mr. Monroe. In 1797, Mr. Marshall, yielding his private interests and decided inclination to the public service, accepted from President Adams, the place of one of the envoys to the court of France. The papers written on our behalf, and addressed to the French ministers, in the discussions of the grave and important subjects of the controversy between the two countries, have not been overlooked or forgotten by those who have taken an interest in the

history of the United States, at that embarrassing and perilous period. These documents are enduring monuments of the talents, knowledge, patriotism, and prudence, of Mr. Marshall, to whom the preparation of them was confided. Clear and impregnable in his principles of national law, faithful and firm to the rights of his country, he vindicated her claims with a sagacity and discretion, which gave no advantage to the adversary in the manner more than in the matter, of the dispute. On his return from this mission, he resumed his professional duties. In 1799, he was elected to congress. At this moment, he was offered a seat on the bench of the Supreme Court of the United States, but did not accept it. The time which the society may allot to me on this occasion, and which I fear I shall extend beyond my right, will not admit even of a cursory exhibition of the independent and brilliant career of Mr. Marshall in the legislature of the Union. His speech on the case of Jonathan Robbins, will never be forgotten or surpassed. It is a perfect model of argumentative eloquence. No attempt was made to reply to it. It could be assailed at no point. It was not possible to bring contradiction or doubt upon it; there was an end of the question. In 1800, Mr. Marshall was appointed secretary of war, and very soon afterwards secretary of state, which place he held but for a short time.

"We have now arrived at the period of Mr. Marshall's life which was to enlarge the foundations of his reputation, and give it an imperishable solidity. On the 31st day of January, 1801, an auspicious day for our country, John Marshall was appointed, by President Adams, chief justice of the United States. If our constitution is dear to us, if we should cherish the form and principles of a government suitable for a free and intelligent people, we should bless the day when it became the right and duty of this great and pure man to develop, define, and establish, the true and fundamental powers and character of our incomparable government, incomparable only when understood and administered by the principles which, from time to time, as occasions required, the chief justice, aided and sustained by his learned associates, has applied to its provisions; thus becoming part of itself, and necessary to its healthful, durable, and consistent action. Of the value of his clear, discriminating, and vigorous intellect; of his immaculate and independent integrity; of his comprehensive, but regulated views; of his cool and firm judgment in the exercise of his high powers, as the interpreter of the constitution and the law, and the administrator of justice, by and according to them, and them only, every one will truly judge, who can justly estimate the importance of the department of the government of which he was the head. The judiciary is the protecting, conservative power, not only of the rights of every citizen, but of the Union. It keeps every member of it in its right place, to the use of its proper functions, and no more. It compels each orb, the great as well as the small, to move in its prescribed sphere, and brings the wanderer back. It restrains the ambition and power of the strong, and defends and secures the rights of the weak. Should New York, with her two or three millions of citizens, and Rhode Island, with her few thousands, appear as adversary suitors, before this august tribunal, the one is no longer great and strong, her power is not seen or felt, nor the other feeble and small. Their territory is not measured, their numbers are not counted; their rights only are known and considered. The constitution and the law decide the question between them; and both are equally bound to submit to the award. To this court, then, is committed the harmony of the Union; the rights of states and citizens; the perpetuity of our government. The errors of the executive seldom reach beyond some single, immediate object; they are transient, and may be remedied without any ruinous shock to the great interests of the community. The legislature may promptly recall an inadvertent or impolitic act; but the decrees of the judiciary are written on brass; they are the enduring laws of the land, as binding as the con-

stitution itself. Rights become incorporated with, and founded on, them, which may not be shaken without disturbing and weakening every right. For this high trust, John Marshall, above all men, was constituted by every quality and acquirement necessary for its pure and perfect administration. Pardon me if, on this theme, I have enlarged too much. It is my solemn conviction, that it is a theme which should engage the deep and constant attention of every American. There is no safety for any right you enjoy, without an upright, learned, and independent judiciary; there is safety for every thing, and under all circumstances, while the judiciary is preserved, competent in knowledge, fearless in integrity, faithful to the constitution, steadfast in principles, and firm in public confidence. Having no connection with, or dependence on, the changes of parties and men, it is raised above the rough storms and fitful currents which agitate and befoul the lower atmosphere of politics and politicians. If it shall ever happen that changes on the bench are to change and unsettle fundamental principles of constitutional law; if new judges are to bring with them new doctrines, then the decrees of the court will be as vacillating as the votes of a popular assembly, and confidence and security will attend them no longer. The constitution will become a moving body of sand—a quicksand where no firm footing can be found—instead of a rock on which we may build and rest, without fear, for ages. How transcendent in power and dignity is this tribunal! It is the concentrated force of the whole Republic. There is nothing on earth like it. Its arms embrace the extremities of this vast empire; its voice is heard and obeyed in its remotest parts. Proud, powerful, and sovereign states submit to its decrees, and the assembled representatives of sixteen millions of freemen may stand rebuked before it. There is truly nothing on earth like it.

"The honoured gods
Keep Rome in safety, and the chairs of justice
Supply with worthy men."

"The judicial services of Chief Justice Marshall are recorded where they must remain undefaced, while the government and its institutions, which they have illustrated and invigorated, shall continue to exist. May they be perpetual! The people will be secure and happy under them, if they will learn the difficult and rare lesson, to 'know their own happiness.' In his political creed, the chief justice was a disciple, or rather an eminent teacher, of the Washington and Hamilton school. In that faith he lived and died, having found, it is presumed, nothing that he thought better. While the lawyer will review the judicial life of John Marshall, with admiration of his learned sagacity and profound judgment; of his wonderful powers of illustration and analysis; and remember with affection his encouraging and amiable deportment to the most humble advocate; while the statesman will reverence his clear and expansive views, and his unerring comprehension of cardinal principles; we must contemplate him, also, as a philosopher, and a man, and look to his more private virtues and accomplishments. He was an illustrious example of the truth, that simplicity is of the essence of greatness. It is so in man, in the arts, in every thing. He showed us, that domestic virtues and habits, in their most simple and amiable forms, may accompany and adorn the most powerful intellects, and exalted genius. Who excelled him as a husband and a father, as a kind, generous, and considerate friend? Whose cheerfulness was more unaffected and exhilarating? For more than twenty years, I enjoyed the personal acquaintance, I may say, the friendly regard of the chief justice. I have seen him in public and in private, on the bench of justice, and in the more endearing courtesies of social intercourse. In such moments, he was as playful as a boy. He was not afraid that his dignity would suffer, by the indulgence of a natural gaiety of temper. He was a hearty laugher, and caught and enjoyed a joke, beyond any other man I have known. It was delightful to see that leviathan intellect, sporting

with the playfulness of a child; indulging in the light and amiable charities of life; enjoying to his heart's core, its innocent amusements; taking an interest in its ordinary concerns, and mixing, without reserve, in the humours of the company, and the hour. This was a spectacle more rare, than the display of superior talents, and extraordinary attainments. This is to be truly a great man. I have seen him, listening eagerly to a pleasant story; catching with intense attention, every point and turn, and giving, from time to time, note of enjoyment in unrestrained bursts of hilarity. He made it no part of his dignity and self-respect, to wrap himself in a solemn reserve; to play the 'Sir Oracle;' to affect to be above the common feelings and excitements of his fellow-beings; to look with a cold and supercilious brow upon the occupations, interests, and pleasures of inferior men. I have seen his dark and penetrating eye, sparkle and flash with delight, at the recital of some anecdote of poignant and exciting humour. Lord Wellesley, in his account of the character and habits of William Pitt, says, that 'he seemed unconscious of his superiority;' that he 'plunged heedlessly into the mirth of the hour,' and was endowed with 'a gay heart and social spirit, beyond any man of his time.' But was not Chief Justice Marshall, a philosopher in the highest and best sense of the term? The character of his mind, was that of deep reflection, and close reasoning. He sought truth in great principles, and not in accidental circumstances, or the authority of names. Having found the principle, he brought it to the case before him, by a train of deductions, which it was impossible, to separate, terminating in the conclusion, with the most perfect conviction of its truth. He was, in jurisprudence, such a philosopher, as Sir Humphrey Davy was in chemistry. He never experimented at random, trusting to chance for a discovery. His object, and the means by which he sought, and expected to attain it, were philosophical, precise, and consecutive. He settled his principles, as the platform of his operations, and worked on them, step by step, until by, and through them, he reached the desired end. It was well observed to me, that there is philosophy in the judicial opinions of the chief justice, the philosophy of reasoning, of making clear and accurate deductions, from solid and established premises. This is, assuredly, a philosophy more useful and rare, than the impracticable theories, and wild visions, which are often called so.

"On the 6th day of July, 1835, in this city of Philadelphia, John Marshall died—with the same serenity in which he lived—

"Like one who wraps the drapery of his couch
About him; and lies down to pleasant dreams.

At a meeting of the judge, the members of the bar, and the officers of the circuit court of the United States, for the eastern district of Virginia, held in the court room, in the city of Richmond, on the 23d November, 1835, the Honourable Philip Pendleton Barbour, was called to the chair, and Mr. Henry Gibson, clerk of the circuit court, was appointed secretary to the meeting.

The following preamble and resolutions were proposed by B. F. Leigh, Esq., and were unanimously adopted:

"John Marshall, late chief justice of the United States, having departed this life since the last term of the federal circuit court for this district, the bench, bar, and officers of the court, assembled at the present term, embrace the first opportunity to express their profound and heartfelt respect for the memory of the venerable judge, who presided in this court for thirty-five years,—with such remarkable diligence in office, that, until he was disabled by the disease which removed him from life, he was never known to be absent from the bench, during term time, even for a day,—with such indulgence to counsel and suitors, that every body's convenience was consulted, but his own,—with a dignity, sustained without effort, and, apparently, without care to sustain it, to which all men were solicitous to pay due respect,—with such profound sagacity, such

quick penetration, such acuteness, clearness, strength, and comprehension of mind, that in his hands, the most complicated causes were plain, the weightiest and most difficult, easy and light,—with such striking impartiality and justice, and a judgment so sure, as to inspire universal confidence, so that few appeals were ever taken from his decisions, during his long administration of justice in this court, and those only in cases where he himself expressed doubt,—with such modesty, that he seemed wholly unconscious of his own gigantic powers,—with such equanimity, such benignity of temper, such amenity of manners, that not only none of the judges, who sat with him on the bench, but no member of the bar, no officer of the court, no juror, no witness, no suitor, in a single instance, ever found or imagined, in any thing said or done, or omitted by him, the slightest cause of offence. His private life was worthy of the exalted character he sustained in public station. The unaffected simplicity of his manners; the spotless purity of his morals; his social, gentle, cheerful disposition; his habitual self-denial, and boundless generosity towards others; the strength and constancy of his attachments; his kindness to his friends and neighbors; his exemplary conduct in the relations of son, brother, husband, father; his numerous charities; his benevolence towards all men, and his ever active beneficence; these amiable qualities shone so conspicuously in him, throughout his life, that highly as he was respected, he had the rare happiness to be yet more beloved. He was, indeed, a bright example of that true wisdom, which consists in the union of the greatest ability, and the greatest virtue.

"Resolved, that in addition to the reasons common to us, with the whole people of the United States, we have peculiar cause to regret the loss of this wise and just magistrate, and great and good man.

"Resolved, that for the purpose of rendering merited honour to his memory, and of perpetuating, as far as it is possible to perpetuate, this expression of our sentiments of love and veneration for the judge, and the man, the circuit court be requested to enter these proceedings on its records. And that the chairman and secretary of this meeting, be requested to communicate the same to his family."

NELSON, SAMUEL.

[For brief biographical notice, see 30 Fed. Cas. 1387.]

The following proceedings upon his retirement are reprinted from 10 Blatchf.:

The bar of the United States courts for the second circuit will meet in the United States circuit court room, on Friday, January 17th, 1873, at 2 o'clock, P. M., to take action upon the retirement of Mr. Justice Nelson from the supreme court of the United States. Edwards Pierrepont, Geo. Ticknor Curtis, George Gifford, Murray Hoffman, Erastus C. Benedict, William M. Evarts, James W. Gerard, Theo. W. Dwight, Charles O'Connor, Edwin W. Stoughton, Joshua M. Van Cott.

At a meeting held in pursuance of the foregoing notice, and on motion of Joseph S. Bosworth, Charles O'Connor was elected president. On motion of Sidney Webster, the following gentlemen were chosen to be vice presidents: James W. Gerard, Murray Hoffman, Edgar S. Van Winkle, Joseph S. Bosworth, Welcome R. Beebe, Henry Nicoll, John McKeon, Erastus C. Benedict, John K. Porter, Henry E. Davies, Edward J. Phelps, John Ganson, George B. Hibbard, Lyman Tremain, Francis Kernan, Henry R. Selden, Samuel Hand, Richard D. Hubbard, Charles R. Ingersoll and Henry E. Stoughton. Clarence A. Seward named as secretary of the meeting, Sidney Webster.

The meeting having been thus organized, the president said:—

"Brethren of the bar: The great lawyer who for half a century has been practically the very life and light of our jurisprudence, has retired from active duty. His illustrations of practical

justice remain for our enlightenment and will descend to posterity. In these—his gifts to man—the present and the future are participants alike; but in some things we are exclusively his beneficiaries. His magnificent demeanor on the bench was a model of all the judicial graces. In that high place his princely bearing and lion front inspired every honest suitor with confidence, while it paralyzed the most audacious guilt. These things we have witnessed and will ever remember; but neither tongue nor pen can convey to future times an adequate portraiture of them. These memories and the pleasure of contemplating him in the serenely tranquil retirement which closes his great career are our own. The Augustan age of our jurisprudence, when Wells and Emmet argued the causes which Kent and Spencer decided, is happily connected in history with all that is now recognized as best and purest by the period which Nelson adorned. Patriotism and professional pride can hope for no more than that the rising lawyers of to-day may sustain and transmit to worthy successors the great fame derived by their class from such high sources and through such a noble channel."

Edwin W. Stoughton then moved that a committee of five be appointed by the chair to prepare an address to be presented to Mr. Justice Nelson, which motion having been adopted, the following gentlemen were named by the president as such committee: Edwin W. Stoughton, Benjamin D. Silliman, Theodore W. Dwight, George Gifford, Cornelius Van Santvoord.

The committee, after consultation, presented the following address:

"To the Honorable Samuel Nelson: Sir:—Your retirement from the bench of the Supreme Court of the United States, after a judicial service of more than forty-nine years, is an event which the members of the bar of the federal courts cannot allow to pass into history without connecting therewith the expression of their profound sense of the solid benefits conferred by your labors and example upon the bar and people of this country. Appointed at an early age to the bench of the circuit court of the state of New York, you commenced your judicial career under a system which pledged to you a long and independent tenure; in return for which, you devoted to the discharge of your responsible duties, faculties and acquisitions which singularly fitted you to administer justice among men. You brought to this work great energy, a noble ambition, an earnest love of justice, absolute impartiality, an elevated conception of all the duties of a magistrate, united with a judgment of unsurpassed soundness. Acknowledging responsibility only to your conscience, to the law, and to your God, you early won the confidence of a bar, among whose members were numbered some of the greatest lawyers of the last generation. From the circuit court of the state you were advanced to the supreme court, and there you proved yourself worthy to sit in the place of the great masters of jurisprudence who had preceded you, and whose reputations will endure forever. Again you were advanced, and the bar, with pride, saw you robed as chief justice of the state. As such you presided for many years, and had your judicial career terminated with the resignation of that office, the records of jurisprudence would have transmitted your name to posterity as that of a great and just judge. Your labors were not thus to end. You had administered justice for the period of twenty-two years. During that time you had mourned the departure of many members of that illustrious bar, which had greeted your entrance into judicial life. Around you had grown up a younger bar, to whom you were an object of admiration and reverence. You had served the state of your nativity well, and well had you maintained the state and even national fame of the court over which you presided. Your opinions there delivered will long stand as examples of the right application of established legal principles, exact learning and sound common sense to the cases presented for judgment. More than twenty-seven years ago, in the full maturity of your powers, you were appointed an associate justice of the supreme court

of the United States. There, and at the circuit, you encountered new and untried questions. The law of nations, of admiralty, of prize, of revenue, and of patents, you mastered, and, as those who now address you can bear testimony, administered with unsurpassed ability. With critical accuracy you studied and applied a vast amount of legislation and a multitude of rules, comprised within the special branches of jurisprudence you were compelled to administer. The benefits you conferred did not consist solely in bringing, as you did, to the investigation and decision of causes, a deep insight—a judgment matured by long and varied experience and solid learning—the fruit of a life of study and reflection. Your kind and generous treatment of young lawyers ever encouraged them to renewed exertion; and, in struggling to deserve your approval, they were inspired by a worthy ambition, for they knew that your standard of professional excellence was high, and that to win your approval was an earnest of future distinction. Beyond all this, you have afforded to the bench of this country an example by which the wisest and best of its members have profited, and, by your long and spotless life as a magistrate, you have added dignity and lustre to the history of our jurisprudence; for, whilst the degradation and corruption of the judges of a nation inflict upon it an offensive, a revolting blot, their independence, their purity and their learning have ever written the proudest annals of national life.

"There are among those who now address you, many who have so long been accustomed to your presence upon the bench, that they will never be quite reconciled to your absence. They will sometimes earnestly wish that you could have remained to steady them in the performance of their duties, until the close of their professional career. Nevertheless, all who now address you will never cease to be thankful, that upon your retirement to your family and home, it can be said of you as was said of Lord Mansfield: 'It has pleased God to allow to the evening of an useful and illustrious life, the purest enjoyments which nature has ever allotted to it, the unclouded reflections of a superior and unfading mind over its varied events, and the happy consciousness that it hath been faithfully and eminently devoted to the highest duties of human society.' Earnestly hoping that these blessings may be enjoyed by you for many years, the members of the bar who unite in this tribute to your worth, remain forever your friends."

Edwards Pierrepont, in moving the acceptance of this report, addressed the chair as follows:

"Mr. Chairman: When eminent men have died, it has been the custom among civilized nations to take some public notice of the event. But the number of those who have voluntarily retired from a great office are so few, that it can hardly be said, that any custom touching such retirement has been established; the rarity of this occasion makes it the more noted, and for every reason it was most fit that you, Mr. Chairman, should have been selected to preside at this unusual meeting of the bar. When a man in his early prime resigns a high office to enter some broader field of ambition, or to seek new gratifications in the pursuit of wealth, he neither deserves nor receives any especial marks of approbation from his fellow-men. But when one has spent a long life in the public service, and has so borne himself in his great office as to command the respect of every honest citizen, and at the call of duty lets go his hold on power, while all his faculties remain, he is a man so rare as to attract more than a passing notice; and we have met to say something of this grand old man who was eighty years old the 8th of November last, and who, by continuing three months longer, would have had an uninterrupted career of judicial life full fifty years. We search in vain for a career like this! How nobler is it, than to have clung feebly to his place until death pulled him reluctant from his seat. How like the man, how in harmony with his high sense of duty, was his retirement from an office in which he, sooner than others, felt that the burden of his years might possibly diminish his usefulness. No pride, no love of power; no vanity stood for a

moment in his way; a lofty sense of duty governed him in the end as at the beginning, and as all through his life. It was well known, if Judge Nelson retained his office until April next, that the half century of his judicial life would then be complete, and many supposed that the natural desire to fill up the fifty years would prolong his stay upon the bench; but those well acquainted with Judge Nelson knew that the high tone of his character would not allow him to retain the office one day after he became satisfied that he could not fully discharge its duties. Lord Mansfield, the chief justice of the king's bench, resigned at the age of eighty-three. He had been upon the bench thirty-two years. Between Judge Nelson and the lord chief justice there were some striking points of resemblance. So noted was Lord Mansfield for preferring substantial justice to musty precedent, and so firmly did he believe in the flexibility of the common law, and that its rigid rules should bend to new exigencies in the advancement of commerce, of science, of civilization and humanity, that it was a common thing for the old lawyers to sneer at what they called 'Lord Mansfield's Equity Judgments;' and Junius, in a letter addressed to the lord chief justice, November 14th, 1770, says: 'Even in matters of private property, we see the same bias and inclination to depart from the decisions of your predecessors, which you certainly ought to receive as evidence of the common law. Instead of those certain positive rules by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice. Decisions given upon such principles do not alarm the public as much as they ought.' The public were not alarmed; the public saw that Lord Mansfield was right, and that 'equity and substantial justice' was what good men desired, and not inequity and injustice, in deference to worn-out precedents unsuited to the advancing times. In earlier years we heard the same criticisms from old lawyers about the rulings of Judge Nelson, and almost in the same language; but the names of those who censured Lord Mansfield and Judge Nelson for their adherence to 'equity and substantial justice' are already forgotten, while both of these great jurists will be held in reverence so long as the common law continues to be administered.

"In the construction of statutes of the United States, subtle and unsubstantial technicalities, interposed to defeat justice, had small chance of success where Judge Nelson was presiding. At the trial of the great frauds of Kohnstamm, I was employed by the government to conduct the prosecution; several of the eminent lawyers here present were engaged for the defence, and one, now no more—the lamented and much beloved James T. Brady—whose great legal abilities would have made him distinguished without the aid of his more brilliant and unparalleled rhetorical powers. Mr. Brady, with his usual eloquence and skill, summed up the case for the accused; but the jury found the defendant guilty; and upon remarking to Mr. Brady that the jury were prompt, and that I feared a disagreement, 'I had hoped it,' said Mr. Brady, 'until the charge, but what could I do against that old lion there?' turning towards the judge, as he sat kingly upon the bench, and looking like a veritable old lion, as he was.

"Nature did much to make Judge Nelson what he has been. Nature gave him a commanding presence, a strong constitution, and even balance of the passions and the intellectual faculties, a genial soul and great vital forces, a natural love of right and substantial justice, a resolute will and an honest heart; a mind, body, and a moral tone, healthy, manly and robust. Culture did greatly aid him; but his natural endowments were vast. He did not deserve much credit for being a great, just man; he could not help it very well. It was natural and easy; and his life flowed on as the strong current of a river. It would be interesting and instructive to have his brother judges of the supreme court give their estimates of Judge Nelson's characteristics and judicial abilities. I have

frequently heard several of them speak of their eminent associate, and quite recently the chief justice has expressed unmeasured admiration of the easy facility, wisdom, ability, and remarkable character of him whose retirement from the bench the chief justice considers an irreparable loss to himself personally, and to the public service generally.

"The influence of Judge Nelson upon the New York bar has been very great. The tone and manners of the bar will always depend upon the tone and manners of the bench. Good temper, courteous manners, and dignity of deportment are very important, if not essential, in the administration of justice. The bar and the bench will ever go hand in hand and quite abreast in every respect, and the community are quick to discover the fact; and great merchants and men of business will not entrust their important interests to a bench and a bar composed of inferior men; and so sure as you degrade the bench, you degrade the bar; and, with equal certainty, you thus drive the important business from the lawyers and the courts, and other means of adjusting differences of magnitude will be found.

"Judge Nelson took no active part in politics; but no man was a more close or more interested observer of public affairs. In the distracted times of 1860, when the Democratic party looked around for a candidate who could unite the north and south, and command the confidence of the entire country, Judge Nelson seemed to be the only man; the sole difficulty in the way was the fact that he was a member of the supreme court; and the sentiment of the people seemed then, as now, to be, that, when a man enters that temple of justice, and puts on the robes of office, he shall never make the sacred seat a stepping stone from which to ascend to any political place.

"When the governments of Great Britain and of the United States undertook a negotiation which resulted in the treaty of Washington, our sagacious secretary of state, with that good judgment for which he is distinguished, selected (by the approval of the president) Judge Nelson as one of the high commissioners; and the crowning act of a great career in the public service was the prominent part he took in concluding that treaty, by which enduring peace between these two great nations, speaking the same language, governed by similar laws, and worshipping the same God through the same religious forms, was secured. The Lord Chief Justice Mansfield lived five years after resignation of his office. May our equally great and equally respected Judge live many times those years, if he so wishes, and God wills; 'and when old Time shall lead him to his end, Goodness and he fill up one monument.'

On the conclusion of the remarks of Mr. Pierrepont, the meeting was addressed by Clarence A. Seward, who said:

"Mr. President: It is with unfeigned satisfaction that I concur in the adoption of the proposed address. It is meet and right that the evening of a well-spent life should be brightened, ere its close, by the commendation, 'Well done, good and faithful servant.' The utterances of approval are more timely now than if postponed until sorrow tempered them. Better is it to say to the living, 'Thou art worthy of honor,' than to reserve the recognition for eulogy and mausoleum.

"For thirty years have respect and friendship, formed in school-boy days at Cooperstown, grown stronger, and with them both is mingled an affection which, to-day, finds cause for regret that professional intercourse must henceforth cease. For many repeated words, kindly suggestive of patience, hope, and promise, I am to-day the debtor of him in whose honor we are gathered here. Therefore it is that I appreciate the privilege of acknowledging my obligations, and of uniting with those who are here assembled to testify to him the high regard in which he has been held by those among whom his lifetime has been spent.

"No one feels more grateful than I do, that we are not assembled here as a brotherhood in mourning, but to testify our affectionate regard for one

who still lives, as is so felicitously stated in the address, "to enjoy the happy consciousness that his life has been faithfully and eminently devoted to the highest duties of human society."

"It is not necessary that one should have passed away to insure an example worthy of emulation. There are three characteristics of Mr Justice Nelson, which conspicuously marked his judicial career, and which may be mentioned in his lifetime, without trenching upon propriety, as worthy of observance. They are his calmness, courtesy and dignity. His calmness was imperturbable, and never deserted him. Procrastination and ignorance could not disturb it. Ill temper could not ruffle it. It held himself in check, and restrained the ebullitions of others. It permeated the atmosphere of the forum, and insured confidence and decorum. His courtesy was natural, and therefore always manifest. It insured a patient hearing, and its silent influence, teaching by example, secured the courtesy of all. If it failed in so doing, a kindly word from him restored the broken harmony. His dignity was his own, not borrowed. It was nature's outward clothing of the gentleman within. It repelled familiarity, as it forbade insult, and it imparted itself alike to counsel, witnesses and jurors. It 'grew with his illustrious reputation, and became a sort of pledge to the public for security.'

"These three qualities are said to have been the attributes of Lord Mansfield, but his biographer assures us, 'that he had a serious defect, a want of heart.' No biographer of Samuel Nelson will ever make that charge against him. Contemporaries and tradition will alike refute it. That he has a large heart, filled with human kindness, those who knew him best can best attest. It acted like a magnet in the court room, and drew from every one respect, which, longer continued, ripened into affectionate regard. It insured for the younger members of the bar a manifestation of attention, precisely equal to that which was bestowed upon older and more able advocates. It sympathized with nervous inexperience, and was itself too tender to wound by biting sarcasm or harsher jest. It could be just to one not liked; more than that—it could be just to a friend, and in so doing rise superior to apprehensions of possible hostile comment. Of his logical understanding, quick perception, judicial abilities and juridical knowledge, there is no occasion now to speak. They are evidenced for ourselves and for posterity in the 'Reports,' and need no encomium now. I never heard but one criticism upon his conduct as a judge, and that was the old one made of a celebrated English judge, that 'he did not dispatch matters quick enough.' This complaint is to be answered now, as it was answered when made two hundred years ago: 'But the great care he used to put suits to a final end, as it made him slower in deciding them, so it had the good effect that causes tried before him were seldom, if ever, tried again.' When they were decided, whether verbally or in writing, the decision was couched in a few apt and expressive words, for he seemed to believe in the maxim of Lord Bacon, that 'a much-speaking judge is not a well-tuned cymbal.' Our regret here to-day is, that he will no longer preside among us; that he has asked for his 'writ of ease,' and to be relieved from the duties of his office, and almost in the language of one of the chief justices of England, addressed to Charles II., because 'he could not, in good conscience, continue in it, since he was no longer able to discharge the duty belonging to it.' In his retirement, so honorably sought, he carries with him the respect, the veneration, and the affection of that bar which knew him best.

"Mr. President, when Sir Matthew Hale died, his friend Baxter purchased a Bible, in which he placed a print of the deceased judge, and underneath it he wrote these words: 'Sir Matthew Hale: That pillar and basis of justice, who would not have done an unjust thing for any worldly prize or motive, entered on, used and voluntarily surrendered his place of judicature with the most universal love, and honor, and praise that ever did

English subject in this age, or any that just history does record.' What was true of England's most venerated chief justice is equally true now of New York's most venerated judge. Professional ties are broken here to-day, never to be reunited. Those of friendship still remain, and across them, as across the cable, we send our New Year's greeting to our retired chief in his country home, with our benedictions for his instruction and example. We can see the frosts of eighty years gathering upon his honored brow. It is our gratification, as it is his, to know that their whiteness and purity are rivalled by his judicial robes, worn for half a century, without spot or blemish."

In seconding the motion for acceptance, William M. Evarts spoke as follows: "It is our expectation, Mr. Chairman, that appropriate committees will be appointed to present this address to Judge Nelson, in the name of his brethren at the bar, to the United States circuit court of this district, and to the supreme court at Washington, and, in connection with the address and with these dispositions of it, appropriate to our feelings and our duty, I may be permitted to say a few words. When you notice that, in the year 1821, Judge Nelson was a member of the constitutional convention of this state, and that in the year 1871 he was a member of the great diplomatic body which disposed of all differences between Great Britain and his own country, you have included, as between the points of the compasses, a great span, I will not say in the life of a man, but in the life of this nation. And, in naming these two great public trusts that he has discharged, you have exhausted the list of all his public duties, all his public services, and all his public honors that do not belong exclusively to the profession of the law and the distinctions of the judiciary. Now, we must consider how large a combination of what constitutes the fame of very many celebrated men is united in the fame and the services of Mr. Justice Nelson. As the address has noticed, while exhausting the honors and filling out the services of the highest judicial stations of the state, he justly earned, by the manner in which he discharged these great duties, a place by the side of the most eminent lawyers and judges whom the state has produced. From the moment that he was transferred to the federal judiciary, until his retirement, the general judgment, not only of this bar and of this community, but of the bar of the United States, and the sense of the country at large, confirm his position as on a level with that of the most celebrated judges of the nation. Again, if we compare him with those who have gained great fame, among ourselves or in the mother country, in the different departments of the law—as common-law judges, as equity judges, as admiralty judges—who is there but must concede that in the number of his causes, in the magnitude of his judgments, in the wide comprehension of the principles which he applied in each of these different departments of the law, he stands now, in his old age, to be compared with such masters in those separate departments as Sir William Scott, Lord Eldon, Lord Mansfield, Dr. Lushington, Kent, Spencer, Tilghman and Shaw. We find also, in this extraordinary life, no defect apparent, and nothing wanting. We mark a collective force and strength of varied and prolonged service and of sustained credit in his career, which are not to be conceded to any single life of judicial distinction, either in England or with us. He had, by the lofty discharge of the great trusts confided to him, in the language of Lord Bolingbroke, 'built up about him that opinion of mankind, which, fame after death, is superior strength and power in life.' Whenever he moves, in whatever attitude he is regarded, these traits of dignity and force of character must always be accorded to him. My own personal observation, Mr. Chairman, covers the whole period of Judge Nelson's services in the judiciary of the nation, and carries me back through a few years of his latest service as chief justice of this state. He signed the warrant for my practice as an attorney. My first knowledge of him, probably, was at the term of the court at which I received it, and subsequently during the

three or four years while he remained on that bench, I had the good fortune to make his personal acquaintance, and the honor to make arguments before him in several suits. I argued, I think, before him one of the very first causes of much importance after he took his seat here, in the circuit court of the United States, being a re-argument of a cause which I had argued before Judge Thompson, and his death had left undecided. From that time to this, in New York, in Vermont, and at Washington, socially and professionally, I have enjoyed his kind friendship, and he has ever been present to my personal and professional admiration. Mr. Chairman, Archbishop Whately, in his notes to Lord Bacon's Essays—which, I believe, scholars and moralists regard as a not unworthy commentary on so celebrated a text—has drawn a contrast between the relations to the community of a great lawyer and of a great judge, that is more pointed than it is flattering to those of us who adhere to the bar—more pointed, perhaps, than is just. He says, in substance, for I quote only from distant memory, that when a pre-eminently great advocate dies, or is withdrawn from the service of the law, it by no means follows that the public or the administration of justice thereby suffers a loss. For, as he suggests, the great interests of society, demanding, and the whole judicial establishment existing for, the perfection of the administration of justice among men, where an advocate has so far outgrown his fellows as greatly to overmaster them by his eloquence, by his learning, by his will, by his fame, and so, suitors find at their service no equal weight to throw into the scales of justice against him, perhaps the community, instead of losing, gains something by the subtraction of this disturbing force. But, this critic adds, with regard to a great and eminent judge, there arises no such question. His talents, his powers, his authority, his name, his fame, are wholly committed to the general interests of the whole community, and when he is withdrawn from the scene of his labors, and from their beneficent distribution and activity, it is, for the moment, as if the sun were taken from the heavens. Do we not all agree that, if this be true of any judge, it is true of Judge Nelson? Now, Mr. Chairman, may we not all be permitted to feel, at this point in this remarkable life, and before the end, death, has set its coronation to its illustrious work, that we may assign to Judge Nelson a place by the side of Eldon and Mansfield, of Kent and Spencer, of Shaw, of Marshall, and Taney, among those who share the lustre of the Homeric eulogy of men 'renowned for justice, and for length of days.' Indeed, sir, in face of the classic caution against premature judgment, we still fear no imputation of rashness in pronouncing this life fortunate, although it has not reached its close."

The address presented by the committee having been adopted, it was then resolved, on motion of Edwards Pierrepont, that it be signed by the officers of this meeting, and presented to Mr. Justice Nelson. The following committee on presentation was appointed by the president: Edwards Pierrepont, Edwin W. Stoughton, Clarence A. Seward, Edward H. Owen, Charles M. Keller, William M. Evarts, Sidney Webster, Thomas C. T. Buckley, Joshua M. Van Cott, John E. Ward, Samuel L. M. Barlow, Aaron J. Vanderpoel, James Thomson, Augustus F. Smith, John Sherwood. It was then moved by Edwin W. Stoughton, that a committee be appointed by the president to present the address and the proceedings of this meeting to the United States circuit court for the southern district of New York. An amendment thereto was offered by Clarence A. Seward, that the president of this meeting be chairman of this committee, which having been put to vote by Mr. Seward, and accepted by the meeting, and the original motion having been adopted, the president, in pursuance thereof, added the following gentlemen as members thereof: James W. Gerard, John McKeon, Daniel D. Lord, Benjamin D. Silliman, Joseph H. Choate, Stephen P. Nash, James C. Carter, Charles Donohue, George Bliss, Jr., Charles M. Da Costa. A motion of William

M. Evarts was then adopted, that a committee be appointed by the president, to present the address and the proceedings of this meeting to the supreme court of the United States at Washington; and the following gentlemen were appointed to form such committee: William M. Evarts, Edwards Pierrepont, Edwin W. Stoughton, George Ticknor Curtis, Samuel J. Tilden, George Gifford, Charles M. Keller, Charles F. Blake, Sidney Webster. John K. Porter moved that a committee be selected by the president, of which Edwin W. Stoughton be chairman, to present the address and proceedings of this meeting to the court of appeals of the state of New York, at Albany, which having been carried, a subsequent motion was made by Mr. Porter and adopted, that the chair be authorized to name the members of this committee after the adjournment of this meeting. The following gentlemen were subsequently selected by the president: Edwin W. Stoughton, John K. Porter, Francis Kernan, Lyman Tremain, Samuel Hand. On motion of George Gifford, the meeting adjourned. Charles O'Connor, President. Sidney Webster, Secretary.

Presentation of the address: In fulfillment of the agreeable duty imposed upon the committee appointed to present the foregoing address, Mr. Stoughton, Mr. Seward, Mr. Owen, Mr. Keller, Mr. Webster, Mr. Buckley, Mr. Vanderpoel, and Mr. Thomson, waited upon Mr. Justice Nelson at his residence in Cooperstown, on Wednesday, the 12th day of February, 1873. The committee invited the circuit and district judges of the federal courts for the second circuit to accompany them as their guests. Judge Woodruff (the circuit judge) and Judges Benedict and Blatchford (district judges) accepted the invitation. Judges Shipman, Hall, and Smalley were unable to be present. Mr. Justice Nelson informed the committee that he would be pleased to receive them and the judges in his house at two o'clock. The attendance of Mr. Pierrepont, the chairman of the committee, having been prevented by illness, Mr. Stoughton was chosen in his place, and introduced the committee, and the purpose of its presence, by the following remarks:

"Honored Sir: We appear before you to-day as a committee of the bar of the second circuit, appointed at a large meeting of the members thereof, lately held in the city of New York, for the purpose of taking action upon your retirement from the bench of the supreme court of the United States, after an uninterrupted judicial service of nearly fifty years. That meeting was presided over by the leader of the bar, Mr. Charles O'Connor, and the members of the bar composing it unanimously adopted an address, which with their entire proceedings, as there recorded, they have instructed the committee to present to you. We are here to discharge that agreeable duty. We are here upon a mission of deep interest to the bar we represent, and, as we believe, to the bench and to the country,—to the bar, because it owes to you reverence and honor for your long, unwearied service in encouraging and instructing them; to the bench, because it is your debtor for the noble judicial example you have recorded for its guidance; to the country, because you deserve its gratitude for the devotion of your life to its service, in the performance of duties the most arduous and the most useful which man can perform for his fellow-man. That distinguished members of the bench share these sentiments with us, is illustrated by the appearance before you upon this occasion, of Judges Woodruff, Blatchford, and Benedict, whose reputations have already become national, and who, laying aside other pressing engagements and duties, have come to you from afar, at this inclement season of the year, to manifest by their presence the interest which they feel in this most unusual ceremony. The other federal judges of the circuit in which you so long administered justice would have also been here, had not imperative engagements elsewhere prevented, as they have signified by letters which this committee will hand you. The committee regret that the sudden illness of their chairman, Judge Pierrepont, has prevented his attendance

here. In consequence of this, he who addresses you has been appointed in his place; and now, in discharge of the duty imposed upon the committee, we read to you the address of the bar, which we are instructed to present."

Mr. Stoughton here read the address, and in delivering it to Judge Nelson, with a copy of the proceedings of the meeting, added: "In delivering this to you, as we now do, we tender to you our most heartfelt respect and reverence."

Judge Woodruff then addressed Mr. Justice Nelson as follows: "The members of the bench of the circuit over which, honored sir, you have so long presided, desire to express their cordial concurrence in the sentiments of the address tendered to you by the bar of that circuit. So truthfully and so well those sentiments are expressed in that address, that we should weaken its force and gracefulness, and diminish the pleasure of this occasion, if we were to attempt a reiteration, on our own behalf, of what has been there stated. As members of the bench, we may, however, add, that your long experience and the learning and wisdom you have brought to the discharge of the duties of your high position have lessened our labors, enlightened our understandings, eased the burden of our responsibilities, and greatly furnished us for the performance of the duties we have yet to discharge; which we have to discharge, I regret to say, without the present aid, counsel and advice we should receive from you had you deemed it wise to continue in the position from which you have now retired. Your learning has instructed us; your example has stimulated and encouraged us to a higher estimate of judicial worth, and has awakened a nobler ambition to do what belongs to our several duties so as to gain a kindred, though it be humbler, appreciation when our work shall be finished. By that example our pathway is made luminous, and the grace and dignity which adorn the judicial office is constantly presented to us. A judicial life of fifty years marked, all along its array of days and months and years, by learning, integrity and a pure conscience, and by the honor, respect and confidence of your fellow-men. Our sincerest wish can offer to you no higher or warmer expression of our admiration and regard than the earnest prayer that we may be able, in our stations, to deserve some reasonable proportion of the esteem now so justly and so cordially felt for you. I have, further, only to say: may the days be yet many in which you shall go in and out before us in reverence and in honor. May your last days be your best days; and may they be crowned with that reward which is the true aspiration and the blessed hope of a Christian life."

Mr. Justice Nelson made the following reply:

"Gentlemen of the committee: I cannot but feel extremely honored by this address of my brethren of the bar, on the occasion of my retirement from the bench, not more from the friendly and complimentary opinions therein expressed than on account of the unusual and extraordinary mark of respect and affection with which it has been presented; and I am the more deeply impressed with this manifestation from the consideration that the gentlemen of the bar who have originated and promoted this honor, some of whom are before me, have been themselves not only eye-witnesses of the judicial administration which they so favorably commend, but in which many of them largely participated in their professional capacity. I shall ever recur to the sessions of the United States circuit court held in the city of New York, extending over a period of more than a quarter of a century, with pride and pleasure. The calendar was large, and many of the causes important, involving great labor and responsibility. As an evidence of the magnitude of the business for many years, the court was held three months in the spring and three in the autumn of the year, and still left an unfinished calendar. But the gentlemen of the bar concerned in the trials were intelligent, faithful to their clients and to the court, whose learning and diligence in the preparation greatly relieved the judge of his labors, and whose professional de-

portment and respect banished from the courtroom every disturbing element, leaving free the full and undivided exercise of the faculties of court and counsel in their inquiry after the truth and justice of the case. No one knows better than the presiding judge how essential this state of feeling between the bench and the bar is, not only to the ease and pleasure, but to the sound and successful administration of the law. I have said that the gentlemen of the bar who have originated this unusual honor have been eye-witnesses of the judicial services so highly commended. On the other hand, I can say that I have witnessed their professional career from the beginning, and until their present eminence, many of whom hold my license to practice when chief justice of the supreme court of the state. The eminent chairman of the meeting, Mr. O'Connor, the eldest of them, is scarcely an exception. The first session of the supreme court of the state, after my appointment as associate justice, was the May term of 1831, held in the city of New York, more than forty-one years ago. He was then a young counsellor, just rising in the profession. He held a good many briefs in cases before the court from the young attorneys, and was struggling upward manfully and with youthful ardor, contending for the mastery, against the aged and elder counsellors at the bar—Jay, Ogden, Colden, Munro, the elder Slosson, Sherwood, Anthon, Duer and others, who then held almost a monopoly of the business before the courts. The prevailing impression had been, and to a qualified extent was then, among the junior members of the bar, that the experienced seniors had the ear of the court. This, according to tradition among them, had been undisguisedly so, and to a much larger extent, before the old and revered supreme court of the state. But even at the time I speak of, this feeling in the court, and which was perhaps not unnatural, had not entirely disappeared. It required, therefore, ability, courage, and resolution on the part of the junior to encounter this impression, which he must in some degree have felt in the trial of strength against the experienced and favored senior. In the country, where I have always resided, Talcott, a young counsellor, remarkable for intellectual power and legal learning at his age, led the way, under some discouragements, in the trial and argument of causes before the circuits and in banc. Other juniors, taking courage from his example, followed. He was afterward attorney general of the state, the youngest counsellor, I believe, ever appointed to that office in New York at the time, with, perhaps, the exception of Josiah Ogden Hoffman, among the earliest of the attorney generals. I was still young when advanced to the bench of the state, and, as was perhaps natural, my sympathies inclined toward the younger members of the bar, struggling upward and onward in their profession, and, as far as was fit and proper, they had my favorable consideration and kindness. I would do injustice to my feelings and convictions if I closed these few observations without making my acknowledgments to the bar of the second circuit, of my great indebtedness to them for any judicial standing to which I may be entitled. Since my first advancement to the bench, nearly half a century ago, I have had their uniform good-will and friendship, have been instructed by their learning and encouraged by the expression of their favorable opinions. They have ever been not only ready but forward to economize and lighten the labors of the court when the amount of the business pressed the hardest, even at the expense of their own personal convenience. So uniform and habitual were these exhibitions of respect and friendship, that I felt, when in court and engaged in the administration of the law, that I was surrounded, not in courtesy, but in reality, by professional brothers, and that every error would be charitably considered, and every act worthy of commendation would receive its full reward. This address of the bar of New York on the termination of my judicial labors, and in approbation of them, I look upon as the crowning reward, which will be a source of perpetual consolation in the decline of life, and so long as a

kind Providence shall permit the speaker to linger here on earth in the enjoyment of faculties unimpaired."

PITMAN, JOHN.

[For brief biographical notice, see 30 Fed. Cas. 1390.]

The following proceedings are reprinted from 2 Cliff. 628:

At an adjourned meeting of the members of the bar of the Rhode Island district, on Monday morning, November 21, 1864, the following resolutions, reported from the committee previously appointed upon the subject, were unanimously adopted:—

"Resolved, that the death of John Pitman, district judge of the United States for the Rhode Island district, though an event in the course of nature at his advanced age of fourscore years, has, by its suddenness, in the midst of his labors, unannounced, in the still night, when no man keepeth watch, filled us with awe and dread in presence of that august power in whose hands are the issues of life.

"Resolved, that in recalling the judicial career of Judge Pitman, whether as witnessed by and known to ourselves or as derived from those who knew him in earlier years, we behold only virtue and goodness, an enlightened intelligence, untiring industry, unwearied patience, a clear perception, a sound mind, a conscientious love of truth and justice, uncorruptible integrity, unblemished honor, and a true humanity.

"Resolved, that though it is our peculiar province, as members of the legal profession, to express our sense of the character and worth of the deceased as a lawyer and a judge, we would not fail to recognize the common bereavement of the whole community in the loss of an able, upright, and faithful magistrate, an exemplary citizen and a good man, whose unsullied public and private virtues won for him the respect and honor of all men throughout his long and useful life, and have secured for him an affectionate, lasting remembrance in death.

"Resolved, that while we would not intrude upon the sanctity of private grief, we respectfully tender our sincere condolence to the family of the deceased in their great bereavement.

"Resolved, that Wingate Hayes, Esq., be requested to present these resolutions to the United States circuit court now in session in Providence, with a request that they be entered upon the minutes of the court as a tribute of respect to the deceased.

"Resolved, that as a further mark of respect we will attend the funeral of the deceased in a body; and that these resolutions, signed by the chairman and secretary, be communicated to the family of the deceased, and published in the daily papers. Samuel Currey, Chairman.

"James Tillinghast, Secretary."

Proceedings in the United States circuit court:

The United States circuit court convened, pursuant to adjournment, in the court room, on Monday morning at 11½ o'clock, Judge Clifford presiding. There was a large attendance of the members of the legal profession. Hon. Wingate Hayes, at the request of his associates of the bar, presented and read to the court the foregoing series of resolutions, and made the following address:—

"May it please the court:—The members of the bar of this district have requested me to present to the court certain resolutions adopted by them as a tribute of their respect to the memory of the late Hon. John Pitman, judge of the United States district court for this district. In performing this duty it may not be improper for me to refer to some of the prominent events of his life, leaving to your honor, from whom the bar hope to have a response to their resolutions, and to my older brethren, who enjoyed a longer and more intimate acquaintance with Judge Pitman, to speak of those qualities of head and heart which particularly distinguished him. Judge Pitman was born in Providence, February 23, 1785. He graduated at Rhode Island College (now Brown Uni-

versity) in 1799, having entered that institution in the tenth year of his age. He received from the same University in 1843 his degree of doctor of laws, and at the time of his decease had been one of its trustees or fellows for more than thirty-six years. Upon leaving college he entered the law office of Hon. David Howell, who was afterwards his immediate predecessor as district judge, and pursued the study of the law there, and at Poughkeepsie, N. Y., and in New York city, for nearly seven years, when arriving at the age of twenty-one, and becoming eligible to admission to the bar, was admitted to practice in the mayor's court of New York in June, 1806,—De Witt Clinton signing his certificate of admission,—and in the supreme court of that state in the August following, his certificate then being signed by Chancellor Kent. He opened an office in New York city, but in the spring of 1807 went to Kentucky, where in the September following he was admitted to the bar, and practised law until September, 1809. He then returned to Providence and practised his profession until 1812, when he removed to Salem, Mass. There he formed the acquaintance of Judge Story, an acquaintance which ripened into an intimate friendship, and was terminated only by the death of that distinguished jurist. Mr. Pitman remained in Salem four years, and then opened an office in Portsmouth, N. H., where he practised law from 1816 to 1820. The events of the period during which he resided at Salem and at Portsmouth, and the associations and influences by which he was surrounded, were well calculated to develop those traits of mind and of character which marked him during the remainder of his life. The war between this country and Great Britain, and the complicated and important questions growing out of it, furnished a large business to those lawyers whose learning and skill commanded the confidence of the community. Mr. Pitman soon entered upon an extensive practice in the prize courts, and drew, it is said,—with what truth I do not know,—the first libel in prize under the constitution of the United States. The Reports of the United States circuit court and of the supreme court of the United States attest with what ability and success in the discussion of the law of prize he met in those forums; the leading advocates of the country, some of whom, like Mr. Dexter and Mr. Webster, became, and remained for life, his personal friends. At the New Hampshire bar he came in contact with such men as Mason, Jeremiah Smith, Bartlett, Sullivan, and the Bells,—names your honor will readily recognize, of lawyers in the front rank of their profession. In 1820 he returned to his native town, where he continued to reside ever afterwards, with the exception of a few years which he passed at his country residence on the shores of Narragansett bay. In December, 1820, he was appointed district attorney, and in 1824, district judge, which office he held for forty years, and until the time of his decease. On Tuesday last, in the absence of your honor, Judge Pitman presided in this court, and delivered the charge to the grand jury. On Wednesday and Thursday he sat by your side, attentive and interested as usual in all the business of the court. Thursday night his spirit passed away. The death of Judge Pitman, at any time, could not fail to be an event of melancholy interest to this community. Occurring as it did in the daily performance of his judicial duties, stricken down almost in our very presence, the public, and especially the members of this bar, have received the intelligence with the most profound emotion. While I would not intrude upon the province of others in attempting an estimate of the judicial character of Judge Pitman, I may be permitted the single remark that no man could see him upon the bench without being impressed with his perfect impartiality, firmness, and love of truth. He was 'justum et tenacem propositi virum.'"

Hon. Samuel Currey then addressed the court as follows:

"May it please your honor: I have much to regret the absence on this occasion of the Hon. Richard W. Greene, the senior practising member

of the bar in this district. I have just received a letter from him stating that illness prevents his attendance here, and requesting me to express to the court his regret at being absent on this melancholy occasion, as well as the deep sympathy that he felt with the court in its bereavement, and also his own sorrow at the loss of a personal friend, with whose career as a lawyer and a judge, and whose character as a man, he had been acquainted for a great number of years, and with whom he enjoyed the warmest friendship. Judge Pitman was an old man comparatively, when I first knew him. He had already sat a number of years upon this bench. I formed his acquaintance, and I recall it now with pleasure and with emotion, under his own roof, in the sanctuary of his own home, when I was a young man and a student in college here thirty years ago. I recall with pleasure and pride his kindness, his generous, urbane hospitality, his gracious deportment and manner to me as a young man, as gentle as a woman, as simple as a child. I have had the pleasure—and I have always esteemed it a great one—of enjoying his friendship from the first to the last of my acquaintance with him. Many changes have occurred within those thirty years, but none in Judge Pitman, except—the effect of advancing years—an increasing goodness and sincerity of character. I think, sir, I but express the sentiment of this whole community, and the entire circle of Mr. Pitman's friends and acquaintances in Rhode Island and out of it, when I say that he was a singularly pure, upright, and honest man,—the highest and the best attainment of humanity, and the noblest work of God. To say that he was an impartial judge, is only to say what was almost self-evident to every man. To say that he was an honest judge, is to say that he attained to the highest honesty of which human nature is capable. To say that he lived his long life, that he officiated in his long judicial career without blemish and without censure, without spot or imperfection of any kind, except what necessarily pertains to humanity, is but to say what every heart feels on this occasion.

"Judge Pitman's career was an enviable one. To be a judge is to fill a high place in human society. To be a judge and to render satisfaction to the community in which his magistracy is exercised is the greatest honor that can befall a man, as it is the highest attainment of our laborious profession. But to have been associated many years in his judicial career with such men as your honor's predecessors on this bench, with Judge Curtis, with Judge Woodbury, and for a much longer course of years with the illustrious Judge Story, was something to be written in any man's biography. I know from the testimony of the jurists to whom I have referred (and I never heard anything to the contrary from any of them), that he enjoyed in a singular manner the friendship, confidence, and love of your honor's predecessors on this bench. I am not able to go behind the period of my own experience, but that experience extends as a professional man over more than twenty-five years in this court; and during that period I have always admired the patience, the industry, the calmness, moderation, firmness, and dignity of Judge Pitman, both when he has been sitting with his associate chiefs and when he has been sitting alone. I remember an instance which I may be permitted on this occasion to mention. Some years since, when he had a laborious case to decide, he said to me, as I happened to be in his office on chambers business: 'Have you given attention to such a question of law? I have been trying to get at the foundation of that question; I believe the more I study into the law, the further I am from reaching the sources of its knowledge.' He stated to me what the question was and how much time he had bestowed upon it. And I recollect subsequently hearing his written opinion or decision upon the case, which embraced a very wide examination of statute and common law. This instance is but one of many I could mention, detailed to me by members of the profession older than myself and now passed away, by gentlemen who enjoyed his friendship, who were intimate

with him as a man and familiar with his character and his labors as a judge, and who entertained toward him the same high opinion which I had formed and have now endeavored feebly to express. To-day, your honor, we part with this eminent man forever. His place among the living is vacated. He has withdrawn. But the philosophic mind, and yet more the Christian mind, cannot help tracing him in a future life. And as we stand here to-day to do him honor, to recall the life that he lived here, the character he exhibited here, the virtues he possessed here, the purity and uprightness of the man, the sincerity of the Christian, we can feel no uneasiness as to his condition in the future and the better world. He died in a good, honored age. He died, as far as we know, without suffering and without a pang; and we can say, 'Peace and honor be to his grave, and immortal happiness to his spirit,' as we bid him, to-day, farewell."

Judge Clifford responded as follows: "The court cordially concurs in the resolutions presented by the bar as a tribute of respect to the memory of the late Judge Pitman, district judge of the United States for this district. Your request, also, that the proceedings of the bar may be placed upon the records of the court is a very proper one, and one which receives the ready assent of the court. Considering the kindly relations always subsisting between Judge Pitman and myself since our acquaintance commenced, I cannot suffer the occasion to pass without remarking upon the circumstances under which they have been sundered, and expressing my own deep sense of the loss which the court, the bar, and the public have sustained in his death. You all know that the present session of the court was opened by him in my absence on the 15th of the present month, and that he presided during its organization and delivered the charge to the grand jury. On the following day he sat by my side during the greater portion of the session, and concurred in the opinion which was read at the opening of the court. Towards the hour of adjournment, but before the session closed, he signified his intention to retire on account of ill health. Pursuant to his usual course on such occasions, he requested that the trial of the cause before the court should proceed, leaving it to be inferred that he would shortly return. Supposing that he would presently resume his seat on the bench, I acquiesced in the suggestion, and the trial of the cause proceeded. When he left his seat I have no doubt he expected to find relief in the open air, and that he in a brief period would be able to return; but he was disappointed in that expectation. Failing to find the expected relief, he left and went to his residence, and at the usual hour in the evening retired to rest. Whether he slept or not is not known, but when morning came it was found that his spirit had fled to Him who gave it, and it may confidently be hoped to receive the reward of an upright, faithful, and unoffending life. Such, in brief, are the circumstances under which your and my official relations to the deceased have been suddenly terminated; and I cannot but think that they are such as should admonish us all that in the midst of life we are in death, and that no one here knows who will next be called to give his final account. Happy indeed will it be for that one, whoever he may be, if he can hopefully expect to be as well prepared for the solemn event as was the subject of these remarks. Judge Pitman was born in this city on the 23d of February, 1785, about two years after the treaty of peace. Nativity, however, was by no means the only tie which bound him to your locality. On the contrary, it was here that he received his classical education, and it was here also that he pursued the study of the legal profession as the chosen pursuit of his life. Having completed his preparatory studies, he entered Brown University in September, 1795, and graduated there with the degree of bachelor of arts in four years after he was admitted. Shortly after he graduated he entered the office of David Howell, Esq., afterwards district judge of the United States for this district, and completed his studies in his office. Like most young men, when first ad-

mitted to the bar, his first inclination was to leave his native city and to endeavor to earn success and distinction in some other locality. Accordingly he practised law for a short time in the city of New York, and afterwards at Salem, in the commonwealth of Massachusetts, and then removed to Portsmouth, in the state of New Hampshire, where he remained for four years. During the period last mentioned, he was brought in contact with some of the ablest jurists in the United States. Rockingham bar at that period had enrolled among its members such men as Webster, Mason, Smith, Sullivan, and Bartlett, as well as many others of great learning and experience. Contemporaries of that day agree with one accord that Judge Pitman even in that circle sustained a high rank in his profession, and that his personal character was above reproach. All who knew him concurred in the opinion that he was a lawyer of good judgment, high attainment, and much esteemed by the court. Actuated, however, by the attachments of early manhood, he accepted, in September, 1820, an invitation to return to his native city, where he has ever since resided in the midst of the friends of his youth. President Monroe appointed him district attorney of the United States for this district on the 9th of December, 1820, and he continued to discharge the duties of that office with distinguished success until the 4th of August, 1824, when he was appointed district judge of the United States for this district. Forty years and more have elapsed since he entered upon the duties of that important office, and there lives not a man to say that he has been guilty of intentional error. Better things need no man have said of him than can be truly said of the subject of these remarks, that his whole course as district judge of the United States was such for the period of forty years that all knowing him agree that he was a good man and a just magistrate. Prior to my appointment to the bench of the supreme court, I had no personal acquaintance with my lamented associate. Since that time our relations have been intimate and cordial. Gone to the grave in the midst of a community where he was born, and where he has lived for the last forty years, he needs no commendation from any quarter. Justice, however, requires me to say that for the six years during which we have been associated together in this bench, I have always found him faithful to his duties, and anxious, in the decision of cases submitted to our determination, to reach the justice of the cause without the least bias, prejudice, or partiality. His example of purity and uprightness is a good one, which all may well seek to emulate, but which few or none can hope to excel. Pursuant to the request contained in the resolutions, let the proceedings of the bar be placed upon the records of the court."

POPE, NATHANIEL.

[For brief biographical notice, see 30 Fed. Cas. 1391.]

The following obituary notice is reprinted from 4 McLean:

Since the publication of the third volume of these Reports, it has pleased God to call from life the Honorable Nathaniel Pope, district judge of Illinois. He died, after a brief but severe illness, at St. Louis, shortly after the adjournment of his court, at Springfield, in June, 1849, about sixty-six years of age. Judge Pope was among the early settlers in Illinois. He first established his residence at Kaskaskia, and continued to reside there until within a few years before his death. The place was abandoned by him, probably, from the repeated floods in the Mississippi, of late years, which inundated the town and rendered it unhealthy. When he first made Kaskaskia his residence, it was, in population and intelligence, the first place in Illinois. It was the seat of government for the territory. On the organization of the Illinois territory, in 1809, he was appointed, by Mr. Jefferson, secretary of the territory; which office he filled with credit to himself, and usefulness to the public. In 1819 the state of Illinois was or-

ganized, and Judge Pope accepted the appointment of district judge of the United States. At the time of his death, he had been thirty years on the bench, a length of time, of which we have few examples in our country. While secretary of the territory, and until he was appointed to the bench, Judge Pope practiced his profession; and, from the first, stood at the head of the bar in the territory. He had influential connections and friends in Kentucky, and elsewhere, which, with his own high standing, gave him no small influence with the earlier administrations of the general government. And in his territory and state, he was a very prominent and leading citizen. His independence and strict adherence to the political principles he avowed, which may be classed with the Jefferson school, left him behind the progress of others, who professed to be of the same school.

He was a man of decided talent. He never sought to become conspicuous as a speaker on the stump, at the dinner table, or in any such ephemeral exhibitions. But he was a man of much research, and of deep thought. He had a very strong and vigorous mind. In conversation, and in his opinions on the bench, and elsewhere, he was distinguished for the soundness of his positions, and the force of argument by which he maintained them. His arguments were drawn more from the resources of his own mind, than from the hackneyed views of others. Whilst, in his legal opinions, he showed great respect for authority, he was never satisfied where his own judgment did not lead to the same conclusion. I was associated with him twelve years on the bench, and I seldom differed from him, in an opinion pronounced, without feeling solicitude in regard to my own views. He was an able common lawyer, and there were but few persons, in any part of our country, whose constitutional opinions were entitled to higher respect. With the history of the constitution he was well acquainted; and he understood well the respective powers of the federal and state governments. He seemed to be more desirous of discharging his duty faithfully, than of leaving memorials of his acts. He reported but few of his judicial opinions, two or three of which give value to this volume. No man entertained loftier views of the duties of a judge, and no one ever exercised a purer judgment in the decision of causes. Firm in his convictions, he never yielded them without being convinced of error; and then no one conformed to right and justice more cheerfully than he did. In this he set a beautiful example of an unbiased judgment, however strong and firm, ready to yield to the force of argument. He was above the infirmity of narrow minds, which considers a change of opinion as evidence of weakness. The state sustained a great loss in the death of this distinguished man. To his family the loss was irreparable, as he lived in their affections in no common degree. And associated with him as I had been, for so many years, I heard of his death with the deepest sensibility, and sincerely deplore his loss.

SPRAGUE, PELEG.

[For brief biographical notice, see 30 Fed. Cas. 1395.]

The following address of the bar on his retirement is reprinted from 2 Spr. 352:

To the Honorable Peleg Sprague:—Sir: The members of the bar of the courts of the United States, in which you have presided during the last twenty-three years, cannot allow you to withdraw yourself from the office of judge without an expression of their high estimate of your public services, their profound respect for your judicial qualities and attainments, and their grief for the physical disability which has caused your retirement. They esteem it to be due to their country, to you, and to themselves that they should bear their testimony to the great value of those services and to the rare combination of intellectual and moral powers which alone could make them possible. They have found you to be not only thoroughly instructed in the common law, but

master of those special branches of jurisprudence and legislation which it has been your peculiar province to administer. They have found in you such power of analysis as they have not known surpassed, united with sound judgment to weigh its results. They have found in you that absolute judicial impartiality which can exist only when a tender and vigilant conscience is joined to an instructed and self-reliant intellect and a firm will. And these great powers and attainments have been used by you so steadily, so patiently, so continuously, through more years than are comprised in the professional life of most of us, that we have scarcely known, and your patience and courtesy have never allowed us to realize, that, during much of the time, you have been a sufferer from physical pain, and, during all the time, that you have been in a great measure unaided by that precious sense of sight, without which such labors as yours would have seemed impossible. We are heartily thankful for the great benefits you have conferred, not on us only, but on this community, and on our country, whose judicial bench you have strengthened and illustrated. We deplore the cause which has seemed to render your retirement necessary. Would that it were in our power to do something to alleviate your condition, instead of giving expression to our sorrows and to our affectionate respect!

B. R. Curtis,
Charles G. Loring,
Sidney Bartlett,
J. H. Clifford,
T. D. Elliot,
George Lunt,

G. S. Hillard,
H. W. Paine,
John C. Dodge,
R. H. Dana, Jr.,
C. L. Woodbury,
S. H. Phillips,
Committee of the Bar.

Boston, March 27, 1865.

STORY, JOSEPH.

[For brief biographical notice, see 30 Fed. Cas. 1395.]

The following proceedings are reprinted from 1 Woodb. & M. 9:

At a meeting of the bar of the circuit court, on the 1st of October, 1845, Hon. Stephen Longfellow, the president of the bar, in the chair, the following resolutions, which had been drawn under previous appointment by Charles S. Davis, Esq., were presented and adopted:

"Resolved, that the members of the bar of the circuit court of the United States in Maine, do not meet for the first time since the lamented decease of the Honorable Joseph Story, late presiding judge, without deep emotions of sorrow and sympathy. That although they were not sure that they should ever see him again upon the circuit, and experience the continued benefit of his eminent judicial talents, and invaluable labors upon this bench, they hoped that the sphere which had been so long enlivened by his active presence, would be still animated by his living spirit; and from the vigor and vitality of his constitutional temperament, the vividness of his intellect, and his undiminished interest in the cultivation of his favorite science, they had looked forward to an extended period, in which the public and the profession should enjoy the prolonged light of his powerful and comprehensive mind, and the genial influence of his instructions and example, among the emanations that should most gracefully adorn, in its grateful coming on, the mellow evening of his life.

"Resolved, that while in common with the rest of their professional brethren, and the great community of the wise and good, throughout the country, they share the sense of this immeasurable and universal loss, so much deplored by the lovers of justice, virtue, and order, everywhere in our land, they cannot but feel, in the most lively manner, the portion which falls to their own lot; nor cease to recall the gratification inspired, and the cheering and instructive impulses imparted, by his spring and autumnal visits to this part of the circuit during the space of near a quarter of a century. And that the brief moment which has elapsed since his lamented decease, has not abated

their earnest desire to offer and record their imperfect expression of admiration for his departed worth, and cherished attachment to his memory.

"Resolved, that in coming together from distant parts of this district, on the morning of the fall term which forms the commencement of the eastern circuit, so suddenly ensuing upon this striking termination of his unexpired judicial labors, while they do not feel that they can add anything of weight to the first spontaneous tributes that have already been so worthily paid by older bars, and especially that which was pronounced with so much force and feeling upon the immediate announcement of the mournful event, by the assembly of the bar of the metropolis of New England, to his consummate character as a judge, an author, a teacher, a citizen, and a friend, it may not be unbecomingly that they should embrace the occasion thus presented, and thus bringing home to them the abrupt and affecting close of their late relation, to declare their consciousness of the distinguished privilege they have enjoyed in its having subsisted so long and with so much cordiality and satisfaction, and with so much advantage, as they persuade themselves, to the advancement and dignity of the profession, and the illustration of the doctrines of the legal science, in the high administration of justice in all its appropriate departments upon sea and land; and that they should indulge their own sincere feeling, in summing up in such expression as may be in their power, the high sense they entertain of his singular excellence and endowments as a jurist, a magistrate, and a man. As no one was more generous in his own awards to the merits of others, or poured more faithful tributes to those whom he has lamented, it is meet that his memory should not want the meed which it has so richly earned, and that full measure of acknowledgment and appreciation, of which, however amply accorded by contemporary testimony, the delicate propriety of professional relations may have suppressed the unrestrained utterance during his official life. To him, no longer living, we only pay due honors.

"Resolved, that while many of us remember the lively satisfaction with which the extension of his circuit to this district was hailed, and recall the occasion of his cordial greeting upon the erection of our eastern section of the ancient commonwealth into an independent state, and some still recollect the period of his original elevation to the bench, we may all rejoice that the day has more than fulfilled the auspicious dawn, and has created such a clear and steady light, so broad, illumining, and vivifying, wherever it has spread, and upon whatever subjects it has shone, that although the living orb may be withdrawn, no night can follow.

"Resolved, that we regard his advancement to the highest seat of our American judicature, in conjunction with his eminent associates upon the supreme tribunal of the nation, and his able coadjutors upon the circuit, as marking an epoch from which we may date an era in the annals of our jurisprudence, of which our time shall, happily, not see the end; one, as we may properly feel, on the part of the American bar, of which his vast and various learning, the affluence of his juridical attainments, the universality and splendor of his accomplishments, the munificent gifts which he has laid upon the altar of the law, the attractive graces with which he has attired its service with those elaborate and abundant expositions, of which he was the author, to us its breathing oracles,—have been among the most authentic and important elements. And when we call to mind his zeal in the cause of its science, his unwearied and exhausting labors in deepening and clearing the sources, conducting the streams and enlarging the limits of legal knowledge, the mature developments, and disciplined energies which he has brought to it, of his intellect—and summon up that signal capacity of grasping the most abstruse, complicated, and difficult subjects—that quickness of conception, almost amounting to intuition, outstripping the process of logical deduction, and anticipating the results of profound and laborious reflection—that vigor of comprehension from

which nothing escaped—that fervent and intense analysis, of which nothing could elude the keenness or resist the force—that eminent sagacity and judgment to which his other faculties were subservient, and all other operations and resources only ministering—the copiousness and clearness of living eloquence with which he has illustrated, explained and enforced the strictest and purest doctrines of law and equity—the charms he has given to the study, and the captivations with which he has invested the pursuit—the elevation he has imparted to the practice—the scale of legal attainment, and standard of professional excellence, which he has done so much to raise and to improve—the exalted tone of morality which he has infused, and the enthusiasm which he has inspired, especially in the breasts of younger votaries, and the undecaying glow which he has lighted up again in the bosom of those who have longest cultivated the profession, at once kindled and fed by the treasures of legal lore which he has lavished upon it—and when we add again the kindred fields of philosophy and literature which he has delighted to explore, and from which he has won so many appropriate wreaths—and more than all, when we bring up to our thoughts that true, enlarged and essential humanity which was the life-spring of his nature, and gave such energy to his indignant denunciations of all the darker violations of its natural dictates, that genuine love of liberty which he cherished with religious devotion, and the intrepid firmness with which at the same time he upheld the most rigid sanctions of private law, and the most grave and sacred injunctions of public justice—we deem all these to have given a splendor to his name and time, and to have thrown a glory around them, which, while it has illuminated our own hemisphere, has cast its effulgence with no measured radiance, or mere reflected lustre, abroad—and have made him by all confession among ourselves, and the consenting suffrage of enlightened foreigners, one of the greatest masters of the legal science in the world, and the most illustrious genius of the jurisprudence of the age.

“Resolved, that while we thus partake in no common share the sensibility with which society in all its circles surveys its loss, in him who sleeps beneath the tranquil shades of Mount Auburn, now consecrated anew by receiving his remains; and while we mourn with those who mourn it most, and forget not the goodness of his heart, the gentleness and united ardor of his nature, the genuineness and instinctiveness of his sympathies, and pass not over what has been termed, with more than classic purity, the daily beauty of his life, and all those blended graces in his character, which were among its most expressive lineaments; and while we may be allowed to call to mind especially the cordial charm which he threw over his constant intercourse with his professional brethren, like that which pervaded his whole familiar converse; we may well rejoice, and with devout gratitude, above all, we do rejoice, that his great powers were bestowed upon some of the best and weightiest interests of the social state, the most grave and important objects to which the highest active, moral, and intellectual powers can be applied, the most vital concerns to the well-being and condition of mankind, in the established reign of justice, equity, and order. We rejoice that it was eminently his fortune to carry out so near to its natural close, a career rarely equalled in the judicial life of a single individual, rewarded by so many results, and crowned with such celebrity. The sun knoweth his going down. And although painful and unexpected, we may not feel it to be otherwise than a final, harmonious felicity, in keeping with his single lot, that he should have breathed his last before he retired from the bench: ‘Felix non vitæ tantum claritate, sed etiam opportunitate mortis.’ We rejoice, too, that faculties which could have never been imparted in vain, and seldom granted with more prodigality, should have been thus exerted for some of the noblest earthly purposes to which they could have been appointed—that he should have exercised so large and

beneficent an agency in the most useful affairs of society, and varied interests of mankind—that trusts of the most important and comprehensive character, such as are implied by Providence in the talents given, and their highest principles in the capacity for their discharge thus committed, should have been so far fulfilled—that he should have left such invaluable legacies of his wisdom and learning to the profession and the world, in works of which we cannot weigh the worth, and which those who come after us, will not willingly let die. And we may well rejoice, moreover, that he should not have been called to pay the great debt to nature, until he had so largely and so nearly discharged that which it was his pride to acknowledge himself to owe to the science and the profession; one which he felt within himself such a conscious power to discharge, so far as it should be compatible with the sovereign dispensations of the divine will. And most devoutly do we rejoice that the record of his fidelity should have so fully been completed. ‘Quicquid ex illo amavimus, quicquid mirati sumus, manet, mansurumque est in animis hominum, in æternitate temporum, fama rerum.’ While we are thus called to feel, in his own expressive words, that ‘there is an excellence over which death hath no power, but lives on through all time, still freshening with the lapse of age;’ and are also led to read the solemn sentence inscribed upon the portals of the grave, ‘Then shall the dust return to the earth as it was, and the spirit shall return unto God who gave it,’ and are drawn to listen to the closing requiem of mortal labors, in the divine voice, ‘Blessed are the dead, that die in the Lord, for they rest from their labors, and their works do follow them;’ we follow with this parting tribute of our affection and admiration the departure of his immortal spirit, entering upon that reversion of fame which awaits illustrious worth in this world, and, as we humbly hope, that high reversion which faith assigns to the pure and just in the future.

“Resolved, that these resolutions be communicated to the Court at the opening of the term, and that a copy be also forwarded to the family of the deceased by the President.

“Stephen Longfellow, Pres’t.

“Phineas Barnes, Sec’y.”

On the opening of the circuit court, on the same day, in pursuance of the foregoing, the attorney of the United States, Augustine Haines, Esq., presented these resolutions to the court, with an appropriate address. To these proceedings, his honor, Judge Ware, the associate presiding judge, responded as follows.

“Gentlemen of the bar: On my part, as one of the court, I receive with profound sensibility, and cordially respond to the terms in which you have expressed yourselves in regard to the late presiding judge of this court. Having been associated with him for more than twenty years in the performance of judicial duties in this district, on this occasion, which brings back fresh to my recollection the incidents occurring in an official connection of such a length of time, in all respects so pleasant and instructive, and now forever dissolved; I should do injustice to my own feelings, if I should confine myself to a mere formal response to the sentiments which have been so appropriately expressed by the gentlemen of the bar.

“Since the last term of this court, by the dispensation of an all-wise Providence, he has been called to the world of his fathers, prematurely, we shall be ready to say, when we regret the loss of what a few years more of life and health, if they had been spared, might have given to our common country, and especially to the profession to which his life had been devoted; but we can hardly say prematurely when we look to the monuments of learning and industry which he has left, or to the widespread fame which rests as a living glory on his memory. He has been called from the scene of his labors, full of honors and ripe with the fruits of a well-spent life. Judge Story, with an intellectual temperament which perhaps originally inclined him to the more graceful and attractive pursuits

of general and polite literature, early applied himself to the severer studies of the law; and without wholly abandoning the cultivation of elegant letters as a graceful ornament in every profession of life, devoted the main energies of his mind to his chosen science. From the commencement of his professional studies, this became the great business of his life, and was continued with unwearied perseverance to its close. From such long and persevering devotion, continued with a zeal that never cooled, I may say with an enthusiasm that never faltered, much might be naturally expected even from common powers of mind. But when that patience of labor that asked for no repose, was united as it was in him with extraordinary quickness of apprehension, a remarkable tenacity of memory and rare maturity of judgment, great effects might naturally be expected. The result certainly has not disappointed what might have been the most sanguine anticipations of his friends. He has placed himself among the very greatest lights of jurisprudence. If we may rank him with a Parsons, a Marshall and a Kent, of our own country, without apprehension that he will suffer by the comparison, so we may place him in company with the greatest names in jurisprudence that have adorned the annals of that country from which we have derived the body of our common law. There are few who will not admit that he was a fit companion for the Hales and Holts, the Hardwickes and Mansfields, who have illustrated the law in the land of our fathers. In the monuments of learning and industry which he has left behind him, he far excels any of them. His juridical works, including his judgments pronounced in litigated causes argued before him in the circuit court, together with his elementary treatises on various titles of the law, fill nearly thirty large volumes, the exclusive productions of his own mind, exclusive of his numerous and often very elaborate opinions comprised in the series of the Reports of the Supreme Court, extending through a period of thirty-four years. Few men, of whatever fertility or industry, in any department of human learning have ever written more. No magistrate and no author in any age has enriched the jurisprudence of the common law by so great an addition to its treasures, whether we regard his works in their actual amount or the variety of the subjects which they treat. Called upon by his official station to administer every branch of the law, his judicial opinions cover the whole ground of jurisprudence, and he has treated them all with such affluence of learning and accuracy of discrimination, that it is difficult to say with what department of the law he was most familiar. Whether he is dealing with the abstruse and technical points of the old common law, or the complicated and subtle, as well as the liberal and enlarged principles of equity, or again with the delicate and difficult constitutional questions which arise out of our mixed and complex system of simple and complex governments, or with those great subjects of international law which grow out of a state of war, and arise in the prize jurisdiction of the admiralty, his knowledge seems to be equally intimate and exact in all. On all these matters, so various and important, he has been called upon officially to form and deliver opinions in which private rights were involved and complicated, not only with great principles of law, but often with great public and national interests. It would be giving high praise to any magistrate to say that he exhibited intellectual endowments equal to the work. But in saying so much, I shall, I trust, be justified in adding that this would not be awarding the full measure of praise that may justly be given. On all of these he has exhibited a depth of learning, an acuteness of discrimination, a profoundness of judgment, and a fertility of illustration, which, all together, have been equaled by few magistrates of any age, and been surpassed by none.

"It may be too much to expect of any man, however wide his learning and however penetrating his judgment, that every decision made in the course of a long and laborious judicial life, should

be free from all error. Never to fail in judgment does not belong to the condition of humanity. And if it shall hereafter appear on a more profound and critical examination, that error has in some cases crept into his judicial opinions, it will, I believe, also be found that he has left as great a number of judgments behind him, which will remain to future ages permanent landmarks of the law, as any other judge that ever sat on the bench in this country or in England. But there is one quality in the judicial opinions of Judge Story, in which, if they are not altogether permanent, they are not surpassed by those of any other judge in the annals of jurisprudence. If there be a latent error in them, they usually themselves furnish the means by which it may be detected. For such was his conscientious diligence, the extent and profoundness of his learning, and the fertility of his mind, that the subject was seldom dismissed until it had been analyzed with the most thorough exactness, until all its analogies and distinctions had been critically examined, the whole dissected by a most subtle and accurate logic, and over all had been thrown the light of all the learning that pertained to the matter. So that if the reader hesitates as to its conclusion, the exuberant learning with which the opinion overflows will lead him to all the law which is applicable to the subject. So thorough and exhausting is the examination in some of his opinions, that they may be studied and relied upon, both as elementary and didactic commentaries, and as copious and complete disquisitions on the particular points of law involved in the cases, so that the most careful researches into the sources of the law will add nothing to the fullness of the discussion. It may well be doubted whether any magistrate in any age ever has pronounced more judgments of this character, equally distinguished for the variety and extent of learning, by which they were illustrated, and the profound analysis by which both the rules of law and the judicial decisions bearing upon them have been reduced to their simple elementary principles. But it is not only by profound and learned judgment that this eminent magistrate has enriched the science to which he devoted his life. He has given to the profession a large number of elementary treatises or commentaries on various titles of the law, at once so simple and clear in the method, that the unlearned may read them with the most easy and perfect comprehension of the whole matter that is treated, and at the same time so copious, exact and searching in the analysis and discussion of principles and cases as leaves nothing to be desired by the learned. It is when we regret the loss of other works of the same character which we were led to expect from his learning and diligence, that we are constrained to say, in our deep regret and sorrow, that this great light and ornament both of his country and of his profession has been prematurely taken from the scene of his labors. From the contemplation of the great learning and laborious diligence which distinguished him as a magistrate, we may turn with singular satisfaction to the manner in which he discharged the various duties of his high and responsible office. All who have practiced in his court will bear witness to the uniform urbanity of his manner of presiding at trials. It was an urbanity that was extended to all. But to the younger and more inexperienced members of the bar, on their first introduction to the court, it was something beyond mere official civility. It was marked with that gentleness and indulgence that seemed to belong more to the partial favor of a parent than the severe gravity of a judge. And it was perhaps owing to this gentleness and suavity of manner in the presiding judge, that in the sharp conflicts which so frequently arise in the contentions of the bar, so few occurred before him which left any root of bitterness behind them. On this occasion it belongs more appropriately to me to speak of him as a magistrate; but I cannot conclude this imperfect tribute to the memory of a good and great magistrate without adding a few words of his character as a man. Great talents and great acquirements extort our admiration to a certain extent, with

whatever moral qualities they may be combined. But we render our homage with cheerfulness and pleasure only when we find them united with purity of personal character, unspotted integrity of life and elevation of moral sentiment that bear a just proportion to the endowments of the mind. On the unstained purity and moral elevation of Judge Story's character as a private individual and a member of society, the memory of his friends may dwell with unmixed pleasure. The moral frame of his mind had its foundations deeply laid in religious principle. He lived and died in the faith of a Christian, with a deep and habitual persuasion that he was both an accountable and an immortal being. It was this deep and abiding faith that lent its soft and beautiful colors to the whole tenor of his life, which gave energy to every effort which might improve and elevate the moral dignity of his fellow-men, which in the evening of life led him to seek a place of repose for the dead, which by its rural and tranquil beauties might associate images of gentle and melancholy tenderness with the most solemn feelings that ever enter into the heart of man, and finally prompted him, when the spirit was in his last moments flickering over his mortal and expiring body, in the last audible words he uttered, to commend his soul to the God who gave it. On a life thus spent and thus closed, surely his friends may look back with unmingled pleasure. The death of such a man at any period of his life, is felt with deep sensibility, and more so, when as we fondly hoped that his days might have been prolonged through many years of usefulness. It was the will of Providence that it should be otherwise, and all that is left for us is to follow him to his grave with unavailing regret, and accumulate honors so richly due to his merits, the justice of which I trust will be acknowledged by a distant posterity."

Judge Woodbury then observed, in substance, as follows: "These resolutions, gentlemen of the bar, shall be entered upon the records. The appropriate tribute to the memory of my predecessor, which has been paid by you on this occasion, is most fully concurred in by the whole court. My associate has responded in feelings, common to us both, on account of the lamented decease of Judge Story, and also in those remembrances and delineations of his character, on which a longer and closer intimacy with him qualified and rendered it more fit for my associate to dwell. All of the profession, however, in this circuit, and to some extent in the Union, and indeed, wherever an enlarged jurisprudence, connected with commercial, constitutional and national topics, exists, may well take the liberty to express, what they cannot but feel, a deep sense of the great loss, they have sustained. The eloquence and learning, which in him have adorned this bench for near a quarter of a century, and still longer that of the supreme court of the United States, the tomb has now closed over forever. You will no more listen to the tongue, that so long and so ably vindicated here the jurisdiction and powers of the general government; and while it defended innocence with ardor, and relieved the oppressed by a most liberal exercise of equitable principles, lost no fit occasion to expose injustice and punish guilt. But it is some consolation, that such men do not live in vain for the future any more than the past in respect to their fellow-men. The courtesy and blandness of manner in the deceased must long be remembered by most of us as models for imitation. His pure life, unspotted as the ermine of the justice he administered—his useful toils in serving his country and his profession—have sown seeds, which will long yield to both a rich harvest, and have met with those rewards from grateful millions, which will long encourage our youth as well as more advanced age to emulate his example. It is fortunate, that the records of much of his various labors will remain for the edification of us all. And, painful to many as has been the death of one distinguished by so many excellencies and so much usefulness, it is a source of gratitude, that his efforts were spared to the world so long, and till they had accomplished so much and

that the fruits of them can never die, while the law endures as a science, and genius, industry and ambition, nobly employed, are held in veneration among men."

Similar resolutions were passed in the other districts of the first circuit, and to all of them a similar reply in substance was made. They are omitted for want of room. The circuit court for the district of Maine was the first one held by Judge Woodbury under his appointment as associate justice of the supreme court of the United States.

The following is reprinted from 1 Newb. 315:

District Court of the United States. Fifth Judicial Circuit. District of Louisiana. New Orleans, November 3d, 1845. Hon. Theodore H. McCaleb, Presiding.

On the opening of the court, this morning, at 10 o'clock A. M., E. Warren Moise, Esq., rose, and after a few eloquent and appropriate remarks, moved an adjournment of the court, as a tribute of respect to the memory of the late Mr. Justice Story. This motion was seconded by C. Roselius, Esq., late attorney-general of this state. In granting the motion, his honor, Judge McCaleb, made the following remarks: "In yielding, as I do, a ready compliance with the motion which has just been made, I shall, I trust, be excused for making a few remarks. I am not so presumptuous as to imagine that I can add anything to the praise so justly merited, which has already been bestowed upon the character of him whose memory it is the object of the motion to honor. The duty of portraying the character and recounting the services of Mr. Justice Story, has already devolved upon those who, from intellectual superiority and from long personal acquaintance with his character, were peculiarly well qualified to perform it. It is my wish, simply, that on the present occasion the sentiments of admiration and gratitude for the long and signal services of the great jurist, expressed in such eloquent and pathetic terms by his immediate neighbors and friends, may find in our bosoms a cordial response. Though far from the scene of his active and zealous efforts to advance the great interests of the science in which he was long known and recognized as one of the ablest preceptors, we have, as Americans, been equally sharers in the benefits which his unequalled labors have diffused over our vast Union. It is peculiarly fit and proper that the bench and the bar throughout our widely extended country, should do honor to the memory of Mr. Justice Story. They are daily and hourly constrained to acknowledge the obligations under which he has placed them, by the prodigal liberality with which he has everywhere dispensed the inexhaustible treasure of his great intellect; and it is impossible for those of us who are called to minister at the altar of justice, within the range of federal jurisdiction, adequately to express the gratitude we must ever feel for the benefits which his matchless assiduity through a long life, has conferred on every branch of legal science. It is a source of pride to us as Americans, to know that his opinions are cited as authority before the highest common-law tribunals of England. He has long since, in admiralty law, taken his place with Stowell, Tenterden and Robinson, who have shed so much light upon this particular branch of jurisprudence. As a chancellor, he will descend to posterity in the 'glorious company' of a Loughborough, an Eldon, a Cottenham, a Brougham, and a Lyndhurst—eminent among all, inferior to none. While we express the solemn conviction that his place cannot soon be supplied, even from our widely extended country, rich as it may be, and as it undoubtedly is in intellectual greatness and legal learning, let us hope that those who are called to minister at the altars of justice, while they cannot expect to equal him in his comet-like velocity, will strive at least to imbibe his wisdom and follow in the luminous 'track of his fiery car.' While, however, we award honors so justly due to the memory of this distinguished jurist, we should beware lest our regret for his sudden loss

should betray us into unjust comparisons; and I trust it will not be deemed inconsistent with the occasion, but on the contrary as a simple act of justice, if I express my dissent from the opinion of one¹ who has written an eloquent and, I think, except in one important particular, a just eulogium on the life and services of him whom we now honor. That opinion elevates the judicial character of Mr. Justice Story above that of the late venerable Chief Justice Marshall. They were, we know, for many years associates on the bench of the supreme court of the United States, and I think it may be safely asserted that the latter was universally acknowledged to be without an equal in this country. The industry and research of the former have long been proverbial, and so far as relates to these attributes, so essential to a magistrate, he doubtless excelled his illustrious and venerable friend. But in the development of great principles, in a lucid and systematic arrangement of an argument by which error is most clearly exposed or truth most easily discerned, in all the qualities which distinguish the sound logician, the latter still stands pre-eminent among the great legal names of our country. We are told by the elegant author of the *Decline and Fall of the Roman Empire*, that 'an indulgent edict of the younger Theodosius excused the judge from the labor of comparing and weighing discordant arguments of jurists, who, in the age of the Antonines disclaimed the authority of a master and adopted from every system the most probable doctrine. Five civilians, Caius, Papinian, Paulus, Ulpian and Modestinus, were established as the oracles of jurisprudence. A majority was decisive; but if their opinions were equally decided, a casting vote was ascribed to the superior wisdom of Papinian.' There are few American jurists who, when impeded and embarrassed by discordant authorities, do not feel irresistibly inclined to turn with the like veneration to the opinions of Marshall. Though gone from the stage of action, he is yet, and would that he could continue to be through all time, regarded as the Papinian of American constitutional law. Even in those cases in which he felt compelled to differ in opinion with a majority of his brethren on the bench, there are few I believe who, upon an attentive and impartial examination of the comparative strength of the reasons advanced for and against the propositions upon which a difference has arisen, are not forced to the conclusion that truth, justice and law have been compelled to yield to the power and authority of numbers. It is in such cases, when the opinion of the majority is cited as law, and the opinion of the minority is necessarily to be treated as error, that we are led to sympathize with the great Roman orator when, under the influence of his enthusiastic admiration of the Athenian philosopher, he exclaimed, 'Errare malo cum Platone, quam cum istis vera sentire.' Happily, however; through a long judicial career there was no material conflict of opinion between Marshall and Story. And although we are constrained to acknowledge that 'one star is greater than another star in glory,' let us be thankful that two such orbs were so long permitted to reign 'lords of the ascendant' in our American firmament. Let us be thankful that we have hitherto been guided by examples so pure and by wisdom so unerring. Let us continue to pursue with alacrity and pride a noble profession adorned by such venerable names. Let us yield an unreluctant homage to the majesty of law, and ever feel with the eloquent Hooker, that 'her seat is the bosom of God and her voice the harmony of the world.'" Upon the conclusion of the above remarks from the judge, Isaac T. Preston, Esq., attorney-general of the state, moved that the motion made by Mr. Moise, with the accompanying remarks of the judge, be spread upon the record, and that the same be published. The court then immediately adjourned until to-morrow morning, at 10 o'clock A. M.

¹Mr. Sumner, author of remarks on the funeral of Mr. Justice Story, published in the October number of the *Law Reporter*.

The following is reprinted from 3 Story, VII., (Preface:)

At a meeting of the Suffolk bar, held in the circuit court room, on the morning of the 12th of September, the day of the funeral of Mr. Justice Story, Mr. Chief Justice Shaw having taken the chair, and announced the object of the meeting, the Honorable Daniel Webster arose and spoke nearly as follows:

"Your solemn announcement, Mr. Chief Justice, has confirmed the sad intelligence, which had already reached us, through the public channels of information, and deeply afflicted us all. Joseph Story, one of the associate justices of the supreme court of the United States, and for many years the presiding judge of this circuit, died on Wednesday evening last, at his own house in Cambridge, wanting only a few days for the completion of the sixty-sixth year of his age. This most mournful and lamentable event has called together the whole bar of Suffolk, and all connected with the courts of law, or the profession. It has brought you, Mr. Chief Justice, and your associates of the bench of the supreme court of Massachusetts, into the midst of us, and you have done us the honor, out of respect to the occasion, to consent to preside over us, while we deliberate on what is due, as well to our own afflicted and smitten feelings, as to the exalted character, and eminent distinction of the deceased judge. The occasion has drawn from his retirement, also, that venerable man, whom we all so much respect and honor, (Judge Davis,) and who was, for thirty years, the associate of the deceased, upon the same bench. It has called hither another judicial personage, now in retirement, (Judge Putnam,) but long an ornament of that bench, of which you are now the head, and whose marked good fortune it is, to have been the professional teacher of Joseph Story, and the director of his early studies. He is here, also, to whom this blow comes near,—I mean the learned judge, (Judge Sprague,) — immediately from whose side it has struck away a friend, and a highly venerated official associate. The members of the school, to which the deceased was so much attached, and who returned that attachment with all the ingenuousness and enthusiasm of educated and ardent youthful minds, are here also, to manifest their sense of their own severe deprivation, as well as their admiration of the bright and shining professional example, which they have so loved to contemplate; an example,—let me say to them, and let me say to all, as a solace, in the midst of their sorrows,—which death hath not touched, and which time cannot obscure.

"Mr. Chief Justice, one sentiment pervades us all. It is that of the most profound and penetrating grief, mixed, nevertheless, with an assured conviction, that the great man whom we deplore, is yet with us, and in the midst of us. He hath not wholly died. He lives in the affections of friends, and kindred, and in the high regard of the community. He lives in our remembrance of his social virtues, his warm and steady friendships, and the vivacity and richness of his conversation. He lives, and will live still more permanently, by his words of written wisdom, by the results of his vast researches and attainments, by his imperishable legal judgments, and by those juridical disquisitions, which have stamped his name, all over the civilized world, with the character of a commanding authority. 'Vivit, enim, vivetque semper; atque etiam latius in memoria hominum et sermone versabitur, postquam ab oculis recessit.'

"Mr. Chief Justice, there are consolations which arise to mitigate our loss, and shed the influence of resignation over unfeigned and heartfelt sorrow. We are all penetrated with gratitude to God, that the deceased lived so long; that he did so much for himself, his friends, the country and the world; that his lamp went out, at last, without unsteadiness or flickering. He continued to exercise every power of his mind, without dimness or obscurity, and every affection of his heart, with no abatement of energy or warmth, till death drew an impenetrable veil between us and him. Indeed, he seems to us now, as in truth he is, not ex-

tinguished, or ceasing to be, but only withdrawn: as the clear sun goes down at its setting, not darkened, but only no longer seen. This calamity, Mr. Chief Justice, is not confined to the bar, or the courts, of this commonwealth. It will be felt by every bar, throughout the land, by every court, and indeed by every intelligent and well-informed man, in or out of the profession. It will be felt still more widely, for his reputation had a still wider range. In the high court of parliament, in every tribunal in Westminster Hall, in the judicatories of Paris and Berlin, Stockholm and St. Petersburg, in the learned Universities of Germany, Italy, and Spain, by every eminent jurist in the civilized world, it will be acknowledged, that a great luminary has fallen from the firmament of public jurisprudence.

“Sir, there is no purer pride of country, than that in which we may indulge, when we see America paying back the great debt of civilization, learning, and science to Europe. In this high return of light for light, and mind for mind, in this august reckoning and accounting between the intellects of nations, Joseph Story was destined by Providence to act, and did act, an important part. Acknowledging, as we all acknowledge, our obligations to the original sources of English law, as well as of civil liberty, we have seen, in our generation, copious and salutary streams turning and running backward, replenishing their original fountains, and giving a fresher and a brighter green to the fields of English jurisprudence. By a sort of reversed hereditary transmission, the mother, without envy or humiliation, acknowledges that she has received a valuable and cherished inheritance from the daughter. English justice admits, with frankness and candor, and with no feeling but that of respect and admiration, that he, whose voice we have so recently heard within these walls, but shall now hear no more, was of all men who have yet appeared, most fitted by the comprehensiveness of his mind, and the vast extent and accuracy of his attainments, to compare the codes of nations, to trace their differences to difference of origin, climate, or religious or political institutions, and to exhibit, nevertheless, their concurrence in those great principles, upon which the system of human civilization rests.

“Justice, sir, is the great interest of man on earth. It is the ligament, which holds civilized beings, and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice, with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name, and fame, and character, with that which is and must be as durable as the frame of human society. All know, Mr. Chief Justice, the pure love of country, which animated the deceased, and the zeal, as well as the talent, with which he explained and defended her institutions. His work on the constitution of the United States, is one of his most eminently successful labors. But all his writings, and all his judgments, all his opinions, and the whole influence of his character, public and private, leaned strongly and always, to the support of sound principles, to the restraint of illegal power, and to the discouragement and rebuke of licentious and disorganizing sentiments. ‘Ad rempublicam firmandam, et ad stabilendas vires, et sanandum populum, omnis ejus pergebat institutio.’ But this is not the occasion, sir, nor is it for me to consider and discuss at length, the character and merits of Mr. Justice Story, as a writer or a judge. The performance of that duty, with which this bar will, no doubt, charge itself, must be deferred to another opportunity, and will be committed to abler hands. But, in the homage paid to his memory, one part may come with peculiar propriety and emphasis from ourselves. We have known him in private life. We have seen him descend from the bench, and mingle in our friendly circles. We have known his manner of life, from his youth up. We can bear witness to the

strict uprightness and purity of his character; his simplicity, and unostentatious habits; the ease and affability of his intercourse; his remarkable vivacity, amidst severe labors, the cheerful and animating tones of his conversation, and his fast fidelity to friends. Some of us, also, can testify to his large and liberal charities, not ostentatious or casual, but systematic, and silent,—dispensed almost without showing the hand, and falling and distilling comfort and happiness, like the dews of heaven. But we can testify, also, that in all his pursuits and employments, in all his recreations, in all his commerce with the world, and in his intercourse with the circle of his friends, the predominance of his judicial character was manifest. He never forgot the ermine which he wore. The judge, the judge, the useful and distinguished judge, was the great picture which he kept constantly before his eyes, and to a resemblance to which all his efforts, all his thoughts, all his life, were devoted. We may go the world over, without finding a man who shall present a more striking realization of the beautiful conception of D’Aguessau, ‘C’est vain que l’on cherche, à distinguer en lui la personne privée et la personne publique; un même esprit les anime, un même objet les réunit; l’homme, le père de famille, le citoyen, tout est en lui consacré à la gloire du Magistrat.’

“Mr. Chief Justice, one may live as a conqueror, or a magistrate; but he must die as a man. The bed of death brings every human being to his pure individuality; to the intense contemplation of that deepest and most solemn of all relations, the relation between the creature and his Creator. Here it is, that fame and renown cannot assist us; that all external things must fail to aid us; that even friends, affection, and human love and devotedness, cannot succor us. This relation, the true foundation of all duty, a relation perceived and felt by conscience, and confirmed by revelation, our illustrious friend, now deceased, always acknowledged. He revered the scriptures of truth, honored the pure morality which they teach, and seized hold on the hopes of future life, which they impart. He saw enough in nature, in himself, and in all that can be known of things seen, to feel assured that there is a Supreme Power, without whose Providence not a sparrow falleth to the ground. To this gracious Being he trusted himself, for time and for eternity; and the last words of his lips, ever heard by mortal ears, were a fervent supplication to his Maker to take him to Himself.”

The following resolutions, drawn up by George S. Hillard, Esq., and Charles Sumner, Esq., were then submitted to the meeting by Mr. Webster:

“Resolved, that the members of the Suffolk bar have learned with deep regret the death of the Honorable Joseph Story, one of the justices of the supreme court of the United States, and Dane Professor of Law in Harvard University.

“Resolved, that we acknowledge with the liveliest gratitude, the vast debt which we and our whole country owe to his labors and services as a judge. He was elevated to the bench in early manhood, and his judicial life was prolonged to a period almost unexampled in the annals of the common law. The wisdom of the selection was immediately indicated, by the distinguished ability which he displayed, and each succeeding year has added to the splendor and extent of his judicial fame. He moved with familiar steps over every province and department of jurisprudence. All branches of the law have been illustrated and enlarged by his learning, acuteness, and sagacity, and of some he has been the creator. His immortal judgments contain copious stores of ripe and sound learning, which will be of inestimable value in all future times, alike to the judge, the practitioner, and the student. We, too, who have had such ample opportunities of witnessing his judicial presence, can give our emphatic tribute of admiration to the gentle dignity with which he administered the law, to his untiring industry, his firm impartiality, his uniform courtesy, and recognition of the rights of all who approached him, his quickness and tact in the dispatch of business, the readiness with which he applied his

vast learning, and his humanity in the treatment of those towards whom he was called upon to direct the powers and frowns of the law.

"Resolved, that in regarding the deceased as an author, jurisprudence mourns one of her greatest sons—one of the greatest not only among those of his own age, but in the long succession of ages, whose fame has become a familiar word in all lands, where the law is taught as a science; whose works have been translated and commented on in several of the classical languages of the European continent; and have been revered as authorities throughout the civilized world. It was his rare lot while yet alive, to receive, as from a distant posterity, the tribute of foreign nations to his exalted merit as a jurist.

"Resolved, that we mourn his loss as a teacher of jurisprudence, who brought to the important duties of the professor's chair the most exuberant learning, the most unwearied patience, a native delight in the great subjects which he expounded, a copious and persuasive eloquence, and a contagious enthusiasm, which filled his pupils with love for the law, and for the master who taught it so well; who illumined all his teachings by the loftiest morality, and never failed to show that whosoever aspired to the fame of a great lawyer must be also a good man.

"Resolved, that we recall with gratitude and admiration, his character as a man and a member of society. We have seen and felt the daily beauty of his life. We honor his memory for his domestic virtues, his warm affections and generous temper, the purity, elevation, and simplicity of his life and conversation, and the spontaneous sympathy which gave so cordial a charm to his looks, his tones, and his greetings. The approach of age never chilled the impulses of his heart, nor deadened his interest in life. We respect, too, his activity of mind, the literary attainments which his systematic industry enabled him to acquire, and the unaffected conscientiousness which made him so ready to assume and so prompt to discharge the common duties of life.

"Resolved, that the death of one so great as a judge, as an author, as a teacher, and so good as a man, is a loss which is irreparable to the bar, to the country, and to mankind.

"Resolved, that a committee of twelve be appointed by the chair, to consider and determine the proper tribute of respect to the deceased, and to make the necessary arrangements for carrying the same into execution.

"Resolved, that the bar tender their heartfelt sympathy to the family of the deceased, and request permission to join in the funeral ceremonies.

"Resolved, that the president of this meeting be requested to communicate a copy of these resolutions to the family of the deceased; and the attorney of the United States be requested to communicate the same to the circuit court of the United States, over which the deceased has so long presided, and ask to have them entered on the records of the court."

The resolutions were adopted, and the chair appointed as the committee provided for in the seventh resolution, Judge Davis, Hon. Jeremiah Mason, Judge Putnam, Judge Jackson, Benjamin Rand, Judge Sprague, Charles G. Loring, Franklin Dexter, B. R. Curtis, Judge Warren, Charles Sumner, and Robert Rantoul, Jr. Mr. Jeremiah Mason introduced the following resolution, with a few appropriate remarks:

"Resolved, that Mr. Webster be requested to pronounce a discourse on the life and judicial character of the late Mr. Justice Story, at such time and place as shall be designated by the committee of the bar."

Mr. Webster has not fulfilled this office.

At subsequent meetings of the bar, called on the opening of the circuit court in the other circuits over which Mr. Justice Story had presided, and also upon the opening of the supreme court of the United States at the succeeding term, other resolutions were passed, and addresses made, expressive of the deepest sense entertained by the bar and bench of the great loss which jurispru-

dence had sustained in his death. But, however grateful the publication of these would be to the feelings of the reporter, he feels constrained to omit them, for reasons wholly apart from their merit and his own wishes.

TANEY, ROGER BROOKE.

[For brief biographical notice, see 30 Fed. Cas. 1397.]

The following proceedings of the bench and bar at the time of his death are reprinted from 2 Cliff. 609:

At the opening of the circuit court of the United States for the first circuit, holden at Boston, on the term day, Saturday the 15th of October, A. D. 1864, Judge Clifford, stating that he understood that the members of the bar desired to take some notice of the death of the late Chief Justice Taney, proceeded for that purpose, without transacting other business, to adjourn the court to Monday, the 17th of October, A. D. 1864, at twelve o'clock, M. At the opening of the court on Monday, the 17th of October, A. D. 1864, Richard H. Dana, Jr., Esq., attorney of the United States, rose and addressed the court as follows:—

"May it please your honor:—The members of the bar of this court, desiring to notice in the most reverential spirit the death of the head of the judiciary of the United States, have assembled this morning and passed certain resolutions, which they have instructed me, as the law officer of the United States, to present to the court, with a request that they may be entered upon its records. Permit me, sir, also to express the hope entertained by the bar, that your honor, as the associate and friend of the late chief justice, will be pleased to reply to the address from the bar. Some of our members have had the acquaintance of Chief Justice Taney in private life. They cherish the recollection of his extreme courtesy, his simple dignity, and the fulness and charm of his instructive conversation. Those of us, who have appeared before the high tribunal over which he presided, desire to place on public record our sense of the gratification afforded to us individually, and of the benefits conferred on the administration of public justice, by his peculiar faculty as a presiding officer, his great administrative abilities, and by the patient and unbroken attention he always gave to counsel addressing the court. And all the members of this bar, whether their knowledge of him has been official or personal, or only derived from the study of his judicial decisions, unite in acknowledging the purity of his private life, and those extraordinary intellectual qualities, working upon a fund of deep and rich legal learning, acquired by the enlightened industry of early and middle life, which have placed him in the very foremost rank of American jurists. In the presence of your honor, and of gentlemen who have known him so intimately in official and private relations, it is most becoming in me, whose acquaintance with him has been slight and recent, to do no more than to present the resolutions of the bar, and ask your honor's permission to have them entered upon the records of the court."

Mr. Dana then read the proceedings of the bar, as follows:—

"At a meeting of the members of the bar of the first circuit, held at Boston, on Saturday, the 15th of October, A. D. 1864, to take measures for giving expression to the feelings of the bar on occasion of the death of Chief Justice Taney, the meeting having been called to order by Richard H. Dana, Jr., attorney of the United States, Sidney Bartlett was appointed chairman, and Elias Merwin, secretary. On motion of Mr. Dana, a committee, consisting of Benjamin R. Curtis, Caleb Cushing, Richard H. Dana, Jr., and Sidney Bartlett, was appointed to prepare and report resolutions for the consideration of the bar. At an adjourned meeting, held Monday, the 17th of October, A. D. 1864, the following resolutions, reported

by Benjamin R. Curtis, in behalf of the committee, were unanimously adopted, namely:—

“Resolved, that the members of this bar render the tribute of their admiration and reverence for the pre-eminent abilities, profound learning, incorruptible integrity, and signal private virtues exhibited in the long and illustrious judicial career of the late lamented Chief Justice Taney.

“Resolved, that the attorney of the United States be requested to communicate these proceedings to the court, and ask to have them entered on the records of the court.

“Sidney Bartlett, Chairman.

“Elias Merwin, Secretary.”

Mr. B. R. Curtis then addressed the court:—

“May it please the court: I have been requested to second the resolutions which Mr. Attorney has presented. I suppose the reason for this request is, that for six years I was in such official connection with the late chief justice as enabled me to know him better than the other members of this bar. My intimate association with him began in the autumn of 1851. He was then seventy-three years old; a period of life when, the Scripture admonishes us, and the experience of mankind proves, it is best for most men to seek that repose which belongs to old age. But it was not best for him. I observe that it has been recently said, by one who had known him upwards of forty years, that during all those years there had never been a time when his death might not reasonably have been anticipated within the next six months. Such was the impression produced on me, when I first knew him. His tall, thin form, not much bent with the weight of years, but exhibiting in his carriage and motions great muscular weakness, the apparent feebleness of his vital powers, the constant and rigid care necessary to guard what little health he had, strongly impressed casual observers with the belief that the remainder of his days must be short. But a more intimate acquaintance soon produced the conviction that his was no ordinary case, because he was no ordinary man. An accurate knowledge of his own physical condition and its necessities: an unyielding will, which, while it conformed everything to those necessities, braced and vivified the springs of life; a temper which long discipline had made calm and cheerful; and the consciousness that he occupied and continued usefully to fill a great and difficult office, whose duties were congenial to him, gave assurance, which the event has justified, that his life would be prolonged much beyond the allotted years of man. In respect to his mental powers, there was not then nor at any time while I knew him intimately, any infirmity or failure whatever. I believe the memory is that faculty which first feels the stiffness of old age. His memory was and continued to be as alert and true, as that of any man I ever knew. In consultation with his brethren he could, and habitually did, state the facts of a voluminous and complicated case, with every important detail of names and dates, with extraordinary accuracy, and I may add with extraordinary clearness and skill. And his recollection of principles of law and of the decisions of the court over which he presided was as ready as his memory of facts. He had none of the querulousness which too often accompanies old age. There can be no doubt that his was a vehement and passionate nature; but he had subdued it. I have seen him sorely tried, when the only observable effects of the trial were silence and a flushed cheek. So long as he lived, he preserved that quietness of temper and that consideration for the feelings and wishes of others which were as far as possible removed from weak and selfish querulousness. And I believe it may truly be said, that though the increasing burden of years had somewhat diminished his bodily strength, yet down to the close of the last term of the supreme court, his presence was felt to be as important as at any period of his life. I have been long enough at the bar to remember Mr. Taney's appointment; and I believe it was then the general impression, in this part of the country, that he was neither a learned nor a profound lawyer. This was certainly a mistake. His mind was thoroughly imbued with the rules

of the common law and of equity law; and, whatever may have been true at the time of his appointment, when I first knew him, he was master of all that peculiar jurisprudence which it is the special province of the courts of the United States to administer and apply. His skill in applying it was of the highest order. His power of subtle analysis exceeded that of any man I ever knew; a power not without its dangers to a judge as well as to a lawyer; but in his case, it was balanced and checked by excellent common sense and by great experience in practical business, both public and private. His physical infirmities disqualified him from making those learned researches, with the results of which other great judges have illustrated and strengthened their written judgments; but it can be truly said of him that he rarely felt the need of them. The same cause prevented him from writing so large a proportion of the opinions of the court as his eminent predecessor; and it has seemed to me probable, that for this reason his real importance in the court may not have been fully appreciated, even by the bar of his own time. For it is certainly true, and I am happy to be able to bear direct testimony to it, that the surpassing ability of the chief justice, and all his great qualities of character and mind, were more fully and constantly exhibited in the consultation-room, while presiding over and assisting the deliberations of his brethren, than the public knew, or can ever justly appreciate. There, his dignity, his love of order, his gentleness, his caution, his accuracy, his discrimination, were of incalculable importance. The real intrinsic character of the tribunal was greatly influenced by them, and always for the better. How he presided over the public sessions of the court some who hear me know. The blandness of his manner, the promptness, precision, and firmness which made every word he said weighty, and made very few words necessary, and the unflinching attention which he fixed on every one who addressed the court, will be remembered by all. But all may not know that he had some other attainments and qualities important to the prompt, orderly, and safe despatch of business. In the time of his predecessor the practice of the court is understood to have been somewhat loosely administered. The amount of business in the court was then comparatively so small, that this occasioned no real detriment, probably no considerable inconvenience. But when the docket became crowded with causes, and heavy arrears were accumulated, it would have been quite otherwise. The chief justice made himself entirely familiar with the rules of practice of the court and with the circumstances out of which they had arisen. He had a natural aptitude to understand, and, so far as was needed, to reform the system. It was almost a necessity of his character to have it practically complete. It was a necessity of his character to administer it with unyielding firmness. I have not looked back to the reports to verify the fact, but I have no doubt it may be found there, that even when so infirm that he could not write other opinions, he uniformly wrote the opinions of the court upon new points of its practice. He had no more than a just estimate of their importance. The business of the supreme court came thither from nearly the whole of a continent. It arose out of many systems of laws, differing from each other in important particulars. It was conducted by counsel who travelled long distances to attend the court. It included the most diverse cases, tried in the lower courts in many different modes of procedure. Some according to the course of the common law; some under the pleadings and practice of the courts of chancery in England; some under forms borrowed from the French law; many under special laws of the United States framed for the execution of treaties; and many more so anomalous that it would not be easy to reduce them to any classification. And the tribunal itself, though it was absolutely supreme, within the limits of its powers, was bounded and circumscribed in its jurisdiction by the constitution and by acts of congress, which it was necessary constantly to regard. Let it be remembered

also, for just now we may be in some danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several states. The practice of the court therefore involved, not merely the orderly and convenient conduct of this vastly diversified business, drawn from a territory so vast, but questions of constitutional law, running deep into the framework of our complicated political system. Upon this entire subject the chief justice was vigilant, steady, and thoroughly informed. Doubtless it would be the tendency of most second-rate minds, and of not a few first-rate minds, to press such a jurisdiction out to its extreme limits, and occasionally beyond them; while for timid men, or for those who might come to that bench with formed prejudices, the opposite danger would be imminent. Perhaps I may be permitted to say, that though on the only important occasions on which I had the misfortune to differ with the chief justice on such points, I thought he and they who agreed with him carried the powers of the court too far, yet, speaking for myself, I am quite sure he fell into neither of these extremes. The great powers intrusted to the court by the constitution and laws of his country he steadily and firmly upheld and administered; and, so far as I know, he showed no disposition to exceed them.

"I have already adverted to the fact that his physical infirmities rendered it difficult for him to write a large proportion of the opinions of the court. But my own impression is that this was not the only reason why he was thus abstinent. He was as absolutely free from the slightest trace of vanity and self-conceit as any man I ever knew. He was aware that many of his associates were ambitious of doing this conspicuous part of their joint labor. The preservation of the harmony of the members of the court, and of their good-will to himself, was always in his mind. And I have not the least doubt that these considerations often influenced him to request others to prepare opinions, which he could and otherwise would have written. As it was, he has recorded many which are important, some of which are very important. This does not seem to me to be the occasion to specify, still less to criticise them. They are all characterized by that purity of style and clearness of thought which marked whatever he wrote or spoke; and some of them must always be known and recur to as masterly discussions of their subjects. It is one of the favors which the Providence of God has bestowed on our once happy country, that for the period of sixty-three years this great office has been filled by only two persons, each of whom has retained, to extreme old age, his great and useful qualities and powers. The stability, uniformity, and completeness of our national jurisprudence are in no small degree attributable to this fact. The last of them has now gone. God grant that there may be found a successor true to the constitution, able to expound and willing to apply it to the portentous questions which the passions of men have made."

Caleb Cushing, Esq., then addressed the court as follows:—

"May it please your honor:—I, also, have been placed in official and personal relations with the late Chief Justice Taney, which although not so close as those of Mr. Curtis, his associate on the bench, yet sufficient to render it an act of public duty on my part, as well as of individual respect, to address the court on this occasion, and to manifest in imperfect words my profound reverence of the person and the memory of the venerable and venerated chief justice. I do this, I undertake to speak of his life and character, with something of the same emotion as if that great magistrate, in all the gravity of his rank and station, were now before me in corporal presence on the bench. He had presided over the majesty of the supreme court during the long period of almost a complete historical generation of the human race, so that for us of this day he had become the living voice of the law,—'republicæ lex loquens.' He was one of those men who possess such tenacity of vitality as half to suggest that the human body may sometimes endure to extreme old age by the mere

force of a great mind within it, as if the will had power to withstand physical decay, and repel the attacks of death. He had inducted into office nine presidents of the United States; and as he stood on that historic eastern front of the capitol, the republic's 'giant steps,' in the lofty dignity of his great form and office, year after year witnessing and assisting at the rise and fall of parties, of administrations, of dynasties, all else seemed to be transitory as day and night, evanescent as dream-spectres, whilst he and it were stable and monumental alone in this government. Take him for all in all, it is not too much to say that he worthily filled the high place, which Jay and Ellsworth and Marshall had already rendered illustrious, exhibiting in his life, like them, that supreme type of nobleness, which no hereditary charters of greatness can bestow, but which consists in the unmistakable impress of genius stamped upon his human work by the master-hand of God. Compared with them, his intellectual character had more of unity and simplicity, because it was more exclusively juridical; as he never entered congress, and as no part of his life was occupied with political debate or agitation; and he exercised functions other than legal only during the brief period, that, accidentally as it were, and not from chosen vocation, he filled the office of secretary of the treasury. With this exception, and with some further exception as a member of the legislature of his state, his long life was passed either at the bar of the state of Maryland or of the United States, or on the bench of the supreme court.

"His professional career was nearly contemporaneous with the judicial career of Chief Justice Marshall, to whose political school he belonged; and as Marshall and he together held the office of chief justice for more than sixty-three years, Marshall upwards of thirty-four years, and Taney upwards of twenty-eight years, they together, and their learned associates, may be said to have built up the great construction of our federal jurisprudence, of which the foundations only were laid in the time of Jay and Ellsworth. As a member of the bar and as attorney-general of Maryland, and as a member of the bar and attorney-general of the United States, he prepared himself, as your honor has since done, for the discharge of the higher and larger duties of the bench. His opinions, therefore, as they appear in the six last volumes of Peters, in the twenty-four volumes of Howard, and in the three volumes of Black, compose the great records of his judicial life; and they constitute a monument of usefulness, and a title of fame deserving to be placed on a level at least with the opinions of any of the most renowned magistrates of France, of England, or of the United States. As matter, and as reasoning, they are distinguished by completeness of learning, by comprehensiveness of grasp, and perspicacity of thought, by logical precision, clearness and perfection of argument, and by conclusions which command our respect, and not seldom our assent, even when contrary to those of the majority of the court. As rhetorical style, they are of unsurpassed excellence, and perfect models of judicial composition. The diction is pure and chaste, without solecisms of word or grammar; the sentences are well constructed; the thoughts are systematically arranged; the propositions are symmetrical, with their conditions or qualifications, not patched on rudely, or loosely scattered about, but incorporated into the sentence or paragraph; and the whole show signs of the limæ labor of a skillful hand and well-trained intellect. In illustration of all these qualities, we may point to his opinion in the case of *The Genessee Chief*, which reversed the law of the court, as laid down by Marshall, on the question of admiralty jurisdiction in the navigable fresh waters of the United States; his dissenting opinion in *Smith v. Turner*, and *Norris v. Boston*, commonly called the 'Passenger Cases;' and his opinions in the case of *Luther v. Borden*, and the case of *Ableman v. Booth*.

"His deportment towards the bar was uniformly attentive, courteous, and kind, self-respecting, and, therefore, respectful; which was the

more important, not only because he, of course, spoke for the court in its official communications with the bar, but because he generally pronounced the law on all questions of the practice of the court. Of the inner qualities of the judicial character of the chief justice, as observed by his associates on the bench, who alone could see and appreciate those qualities, Mr. Curtis has spoken in terms of cordial praise befitting himself and the subject; and your honor cannot fail to bear similar testimony to the exalted virtues of a cherished friend and respected chief. I speak of the private character of the chief justice only to say that it was such as became his public life; tender and affectionate in domestic relations, courteous with a sort of gentle stateliness of courtesy in social intercourse, dignified and yet of unaffected simplicity in all things, so that in his presence one felt the sense of his greatness, not oppressively but pleasantly, as a force that warmed and cheered, while it also attracted and elevated all within the scope of its influence. You forgot, then, the great and lofty magistrate, and saw only the high-toned gentleman, the wise and good man, on whose ordinary life the weight of conscious power rested as gracefully as the robes of office which invested him on the bench. May it please your honor, such, after twenty-eight years of personal observation and knowledge, are my impressions of the judicial career and public and private character of Chief Justice Taney. And permit me now in conclusion to touch, and but to touch, a class of considerations, which are in all men's minds, and of which not to speak at all might be taken to imply that nothing can be appropriately spoken. We live in a country of republican institutions, where debate, oral and written, is free even to licentiousness; where political parties or factions occupy the field of public affairs; and where all conspicuous persons are subject alike to unmeasured praise or unmeasured blame according to the prevalent passions of the hour. If, as Lord Palmerston once said, the agitations of opinion are the consumers of life, so they are also the creators of life, in all elective governments. They are the drawbacks on the blessing of liberty, they are the price at which greatness is purchased. None, therefore, traverse the troubled sea of political affairs without being tossed or buffeted by the waves or winds of party opinion.

"Thus it happened to Taney: but so also it happened to Jay, to Ellsworth, and to Marshall. Each of them passed from political life to the bench. Nay, more, Jay held the appointment of envoy extraordinary to Great Britain, and Ellsworth that to France, each while continuing for a while to be chief justice; and Marshall exercised at the same time the functions of secretary of state, and of chief justice. Be sure that each of these great men, either before, or after, or during his tenure of the chief justiceship, performed some political act not less unacceptable to adversary parties than any performed by Taney while secretary of the treasury. Be sure, also, that if it were worth one's while, on a solemn occasion like this, to deal seriously with any of these futilities of bygone controversy, it would be easy for me to cite opinions of Marshall, to say nothing of Jay and Ellsworth, which occasioned at the time not less of party sensibility than any one of Taney's. But enough of this. If we refuse to be just even to the great men of our country while they are living, we can afford to be generous to them when they are dead, and when they cease to stand in the pathway of our convictions, our interests, and our ambitions. When their human forms no longer move and speak and act, but come to be fixed and silent on the canvas of history, when the mortal man has put on immortality, and he but appears to us in memory like one of the disembodied shadows of statesmen and heroes in the divine visions of Dante, then, if living he were truly great, he looms up the more grandly in death, his proportions magnified in the haze of the distance, the faulty points shaded over and filled up, but the mighty outlines imaged to the eye with tenfold distinctness and vividness of perception. Thus,

in my judgment, will the world see Taney hereafter, as it now does Jay and Ellsworth and Marshall. And he, like them, so long as the memory of present time endures, will stand secure on the pedestal of the ages, statuesque in his erminent dignity, colossal in his intellectual lineaments, to be admired and honored,—and may we not hope to be emulated?—as one of the greatest among the great men of America."

Charles L. Woodbury, Esq., then addressed the court as follows:—

"May it please your honor:—The eulogy upon the intellectual ability of the late chief justice I may well leave to abler hands than mine, to the leaders of this bar, whose discrimination and experience so well fit them to the duty. I have risen simply as one who probably has known the late chief justice longer than any other member of this bar, to offer the tribute of my respect. In my youth the residence of my father was for many years in close proximity to his, and in the daily intercourse of families it was my privilege to see him frequently in his domestic circle. Afterwards, when called to the bar, I had occasions in the supreme court to feel his personal kindness, and to observe that it was extended considerably to all the younger members of the bar. As a student and young lawyer in that section, I always found the local fame of Mr. Taney as the first lawyer of Maryland, since the palmiest days of Luther Martin, an axiom of belief. The late chief justice was not merely the calm, dignified, and untiringly laborious cabinet minister and judge as all saw him. That placid exterior was not the result of apathy, nor did it denote an emotionless nature. Within the depths of his character there was a great and stormy energy; within his heart there was a depth and power of passion that stirred and woke his intellectual nature to the highest efforts of his genius. He knew how to govern himself. Like General Washington, his entire self-control, and that perfect self-command to which his iron will had subjected his whole physical nature, gave him that loftiest of moral dignity, inspiring awe as well as admiration at his equitable and emotionless conduct. He was a chief. Had he been a soldier he would have been a hero. For forty years that great man has occupied most distinguished positions in the state, with a personal bearing as unruffled as if no storm could sweep the surface. And yet amid all this native strength of character and powerful self-control, his domestic virtues were most fully developed and of the kindest nature.

"Mr. Taney accepted his judicial position as an end; and it is, I think, safe to say that he had no political ambition. His highest eulogy, and the one most befitting the lofty station that he filled, was that in all his official and private intercourse his conduct was always becoming the high-toned gentleman, and believing Christian, which he professed himself to be before the world. Heaven grant that in the future our country may have other chief justices as great and good as him."

His honor Judge Clifford then spoke as follows:—

"The court cordially concurs with the members of the bar in their testimony of respect to the memory of Chief Justice Taney, and will cheerfully, but with heartfelt sorrow, comply with their request to place the resolutions they have adopted upon the records of the court. Death has removed from the high sphere of his duties the venerable chief justice of the supreme court of the United States, and it is eminently fit and proper that the members of this bar should pause in the midst of their usual avocations and give public expression to their sense of the great loss they have sustained, and to the profound respect and veneration they entertain for the exalted private virtues and distinguished public services of the great magistrate, whose earthly career is now closed forever. Rest assured that the court fully approves the resolutions you have adopted, and will heartily unite with you in responding to the sentiments which they contain. Such a manifestation of the sense of the great loss which has been sustained in his death, not only by the bench and

the bar, but by the whole people of the United States, is no more than what is befitting this occasion, and entirely accords with my own views and feelings upon the subject. Having enjoyed his confidence for more than a quarter of a century, and for six years last past been associated with him in the bench of the supreme court, I should do injustice to my own feelings if I omitted to say that none can fully appreciate the extent of the loss which the surviving members of the supreme court have sustained, except those who have known him intimately, and often met him at the private consultations and conferences of the court. All such must forever feel that the whole country has peculiar and lasting cause to mourn his loss as a great and good man, and as a learned, wise, and just magistrate. Unreal greatness of every kind always diminishes as you approach it, but true judicial greatness shines even brighter in the conference-room than in the bench or in the forum of public discussion. Those who have often met him in those weekly conferences best know the great value of his public services, because the best opportunities were afforded there to witness his unerring love of justice, the exhibitions of his profound experience, and the clearness, strength, and comprehension of the logical resources of his mind. Justice requires me to say that, in his hands, the most complicated causes were made plain, and the weightiest and most difficult questions became of ready and easy solution, and yet he was as willing to concede to his associates the right of independent judgment as to exercise it himself; and in cases of real doubt and difference of opinion was as prompt as any of them to modify or even yield his first impressions. Extended remarks upon his recorded judgments are unnecessary, as that duty has been well performed at the bar. Undoubtedly they constitute the great legacy he has left to his country, and it does not require the gift of prophecy to foretell that they will have the effect to preserve his memory in grateful remembrance as long as the constitution of the United States, and the institutions of free government which it ordains, shall endure. Suffice it to say upon this subject, that, in my judgment, the opinions delivered by the chief justice during the long period he presided in the supreme court of the United States, are unsurpassed as clear, logical, and correct expositions of law, if due regard be had to their number, to the magnitude of the controversies, and the scope and variety of the questions which the controversies involved.

Chief Justice Taney was a native of Maryland, and was born on the 17th of March, 1777, in Calvert county, in that state. His ancestors were among the earliest settlers of the state, having emigrated from England to that colony in the time of the Protector. Most of them were Catholics, and for many years they experienced the disabilities incident to their religious faith, under the intolerant legislation of the parent country. Better times, however, were approaching, and when the people of Maryland adopted their constitution, in 1776, they abolished all such distinctions, and established full equality of political privilege, irrespective of religious opinion. Subsequent to that period, the father of the subject of these remarks was repeatedly elected to represent his native county in the lower house of the legislature, and ever after enjoyed the full benefits of religious toleration. Influenced, perhaps, by those considerations he afterwards sent his son, Roger B. Taney, to Dickinson College, in the state of Pennsylvania, which was under the superintendence of Protestant professors. Persons who knew him well have often remarked that it was there that he learned his views of religious toleration, and it was there, also, that he completed his classical education. Choosing the law for his profession, he commenced his study at Annapolis, in 1796, the year after he graduated. As is well known, he read law with Jeremiah T. Chase, chief justice of the general court of the state, and was admitted to practice in three years after he commenced the study. When admitted to the bar he immediately returned to his native county to practise his pro-

fession, and in the autumn of the same year, when but twenty-three years of age, was elected a delegate to the general assembly of the state. Contemporaries agree that he displayed in the assembly an intrepidity of character and an uprightness of motive which secured for him the esteem and admiration of his associates, but he declined a reelection with a view of applying himself more closely to the practice of his chosen profession. Actuated by the motive of enlarging his business, he left his native county and removed to the county of Frederick, where he resided for twenty-two years. While residing there, in 1816, he was elected to the senate of the state, and served with great distinction as senator for the term of five years. Politics, however, had not sufficient charms to tempt him to abandon the favorite pursuit of his life. On the contrary, the universal testimony is, that during the period he resided there he very much increased his practice, and that it embraced the widest range of subjects and every description of civil and criminal jurisprudence, which, doubtless, had the effect to lay even more deeply than had been done in his preparatory studies, the foundations of those solid professional attainments, which so eminently fitted him for the performance of the still higher class of duties which devolved upon him in after life. Evidence is not wanting to show that his competitors at the bar, during that period, were jurists and advocates of the very highest order of talent, as will abundantly appear by a reference to the judicial reports of the state. Mention need only be made of Pinkney, Martin, Harper, and Winder, but there were a host of others of less age, just advancing into the first rank of the legal profession. Powerful as was the competition, still his practice, as has been well remarked by a distinguished writer, was constantly increasing, and in a brief time became both extensive and lucrative, 'not only in the county courts in the judicial district where he resided, but also in the court of appeals.' Considerations, growing out of the increase of his business, induced him, upon the death of Mr. Pinkney, to accept an invitation to remove to the city of Baltimore, from which came a large portion of his commercial practice. One who knew him well says that the field was too tempting to be shunned, and that he 'entered upon it in the full vigor of his faculties, with an established reputation and with talents and attainments that fitted him to maintain it against all opposition.' After his removal to Baltimore the field of his professional practice was very much enlarged. Several of his former competitors had been removed by death, and his services were now sought, on one side or the other, in most of the controversies of great magnitude, litigated in the tribunals of the state, and he at once entered upon the more enlarged sphere of practice in the supreme court at the city of Washington, over which he has since presided for so many years. Additional labor was also devolved upon him a few years later by his acceptance of the appointment of attorney-general of the state. The appointment was made in 1837, and it appears that he continued to hold the office until June, 1851, when he resigned it upon receiving the appointment to the same office under the federal government. Power of appointment, when he was commissioned as attorney-general of the state, was vested in the governor and council, and the fact that he was known to be opposed to those functionaries when the office was tendered to him furnishes but one among many evidences which exist to show that a high estimate was placed upon his personal character and professional qualifications. Beyond doubt he was, at that period, the leading advocate at the bar of his native state. Old competitors had passed away or been left behind, and he remained without a rival; but in a few years a new and equally accomplished competitor appeared to compete for the first honors of that distinguished bar. William Wirt removed to Baltimore in 1829, still possessing all the power and eloquence which he had displayed in his earlier practice in that city, and which had characterized his brilliant efforts as attorney-general in the supreme court of the United States. Comparison

between those distinguished advocates will not be attempted, as it is well known that 'their professional talents were as diverse as their manner at the bar and their style of elocution.' Reference to the judicial records will show that they often met, and it will be sufficient to say that the exact and comprehensive legal knowledge of the chief justice, together with his calm and clear logic, made him a full match for his polished and impassioned competitor, and that he came out of the contest with a reputation greatly increased, as all his contemporaries freely admit. But circumstances over which he had no control soon opened a new field for the employment of his professional talents. Difficulties in the cabinet of General Jackson induced Mr. Berrien to resign the office of attorney-general of the United States, and in June, 1831, the president having come to the conclusion to reconstruct the cabinet, tendered Mr. Taney that office, which he accepted; and he continued to discharge its duties with unsurpassed ability and success until, at the earnest solicitation of the president, he resigned it to accept the office of secretary of the treasury. His appointment as secretary of the treasury was made in September, 1833, and on the 23d of the same month he issued the celebrated order for the removal of the deposits. By that order he gave great offence to a majority of the senate, in consequence of which his nomination was rejected, and he returned to the city of his residence to practise his profession. Whatever explanations of these events are necessary have already been given at the bar, and need not be repeated. Enjoying the confidence of the president, as he did, it was hardly to be expected that he would long remain in private life, and, accordingly, upon the resignation of Mr. Justice Duval, in January, 1835, he was nominated as an associate justice of the supreme court of the United States, but the senate refused to entertain the nomination, except to postpone it indefinitely on the last day of the session. Chief Justice Marshall died on the 6th of July, 1835, and on the 28th of December following, the president sent to the senate the name of Roger B. Taney for the office of chief justice of the supreme court, made vacant by the death of that illustrious magistrate. But the senate did not act upon the nomination until the 15th of March following, when it was confirmed by a large majority. Further comment upon his judicial opinions will not be attempted, except to say that they are invariably based on principle more than on decided cases, as may readily be seen by consulting any one of the thirty-three volumes where they are to be found. Taken as a whole they constitute an imperishable monument to his memory, which needs no further inscription to insure its transmission to future ages. Great as is his loss to the country, it is even greater to the surviving members of the court over which he so long presided, because to them it is irreparable. Irreparable, I repeat, not only on account of his great experience and profound knowledge, but also on account of his pre-eminent ability and success in presiding over the deliberations of the court. Some of the duties incident to that position are as delicate as they are important, and yet he always performed them to entire acceptance. Indeed, his whole intercourse with his associates was characterized by such a sense of justice and impartiality, and by such an unrivaled equanimity, exemplary benignity of temper, and amenity of manners, that no one of the number ever had the slightest cause of offence. Nothing need be said of his private life, as all concede that it was eminently worthy of the exalted character he sustained in all the public stations which he filled. Attempts have been made to call in question his patriotism; but I think it my duty to say, what I sincerely believe, that the charges were as unfounded as they are now harmless to the object of their attack. Gone to the grave in the full fruition of his honors, his reputation is above the reach of any such reproach. Reverence for the constitution of the United States was a leading characteristic of his judicial life, as every one knows who was ever associated with him in the bench, and as all others may know if they will but consult his judicial opinions upon

constitutional questions. He revered the constitution as the great result of the Revolution, and as having been ordained 'to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty;' and I have no hesitation in declaring that there is not an act of his life inconsistent with that profession. Pursuant to the request of the members of the bar it is ordered that the resolutions which have been read shall be placed upon the records of the court."

The following is reprinted from 5 Blatchf. 552:

The following proceedings took place in the circuit court of the United States for the northern district of New York, at the city of Albany, before Mr. Justice Nelson and Judge Hall on the 14th of October, 1864:

The Death of Chief Justice Taney.

Mr. John V. L. Pruyn addressed the court as follows:

"May it please the court: I am sure that the duty I am about to perform is one which will meet the cordial approval of your honors. I wish to announce in form, in order that a proper record of the event may be made, by your direction, on the minutes of the court, the sad news which we all heard yesterday, of the death of the chief justice of the supreme court of the United States. His feeble health for several years past, had, at his great age, rendered this event one to which his friends and the country had looked forward as likely, in the course of nature, soon to occur, and the weight of the blow has thus been somewhat lessened by the premonitions of its occurrence. Looking at the large powers vested in the supreme court of the United States—much greater under our form of government than those lodged with tribunals occupying relatively the same position in other countries—the extent and character of its jurisdiction, and the high respect in which its judgments have been held, the loss of its presiding judge is an event of very great importance in the constitutional and judicial history of our country. In this case that importance is unusually marked. The deceased chief justice had held his high office for the long space of twenty-eight years and upwards, discharging its duties with an ability and integrity which was admitted by the whole country. During this extended period many constitutional questions of great importance were passed upon by the court, after their discussion by the most distinguished counsel in the land, and most of the vexed points which disturbed our early judicial history were disposed of. In their decision the clear and luminous mind of the chief justice appears in every page, and his opinions will hereafter be referred to, as worthy of the reputation of a court which has numbered among its judges so many illustrious names. In the few hours which have passed (and those interrupted by other cares) since I was requested to discharge the duty I am so imperfectly attempting to perform, I have only had time to bring together a few of the events in the life of the late chief justice, which may be of interest to us who survive.

"Roger Brooke Taney was born in Calvert county, Maryland, on the 17th of March, 1777, and thus was, at the time of his death, in the 88th year of his age. He graduated at Dickinson College, Pennsylvania, in the year 1795, studied law at Annapolis, was admitted to the bar in 1799, and in the same year was elected to the house of delegates in Maryland, being the youngest member of that body. He declined a re-election to this office, preferring to give his whole time and energies to his profession. In the year 1800 he removed from his native county, where he had commenced practice, to Fredericktown, where he pursued his profession most laboriously for twenty-two years, when he changed his residence to Baltimore. During this period he attained a high position at the bar;

and the Maryland Reports of that time show that he was engaged in many of the important cases which were brought before the courts of that state, meeting in argument such men as Pinkney, Williams, Martin, and others of the eminent lawyers of that commonwealth. In some of these cases, with that firmness of purpose for which he was so distinguished, Mr. Taney stood up manfully for what he believed the right, without regard to public opinion. In no instance was this more conspicuous than in that of the Reverend Mr. Gruber, a Methodist clergyman, who had been indicted for an attempt, by his preaching at a camp-meeting, to stir up an insurrection among the slaves. By the cleverness and ability displayed by Mr. Taney on the trial, the prisoner was acquitted. For a long period (I quote from one of his biographers) 'the Methodists of that section entertained the kindest feelings for the Roman Catholic advocate, who had successfully defended their pastor against popular excitement and judicial power.' Mr. Taney served one term in the senate of his native state—from 1816 to 1821. In 1823 he removed to Baltimore, where he almost immediately entered upon a large practice in the federal courts. The then recent death of Mr. Pinkney, Mr. Martin, Mr. Harper, and others of the leading members of the bar, had left the space to be filled, which Mr. Taney entered upon with all that zeal, industry and ability which had already secured him a wide reputation. In 1827 he was appointed, by the governor and council, attorney general of Maryland. The estimation in which he was then held, may be inferred from the fact that he was politically opposed to the appointing power. It was during his professional career, while residing in Baltimore, that Mr. Taney and Mr. Wirt often met in professional struggles, and to the honor of the latter it should be said, that he never hesitated to speak in the highest terms of the great ability of his adversary. In June, 1831, Mr. Taney was appointed by General Jackson attorney general of the United States. Most exciting questions arose during this administration, especially those of nullification, and the recharter of the United States Bank. The attorney general stood firmly by the president in all these controversies, and, on the resignation of Mr. Duane, as secretary of the treasury, growing out of the question as to the removal of the government deposits from the Bank of the United States, Mr. Taney, in 1833, was transferred to the treasury department. His celebrated order, removing the deposits, led to the rejection of his nomination as secretary of the treasury by the senate, and, in June, 1834, he resigned. The term of about nine months during which he held this office, was, it is believed, the only time during which he was entirely withdrawn from professional life. In the early part of 1835 General Jackson nominated Mr. Taney to the senate as one of the associate justices of the supreme court, in the room of Judge Duvall, deceased. The senate did not act on the nomination, and, Chief Justice Marshall having died in the summer of 1835, the president, on the 23th of December of that year nominated Mr. Taney as chief justice, which nomination was confirmed on the 15th of March, 1836. Mr. Clay, it is said, strenuously opposed the confirmation of the nomination, but frankly admitted to Judge Taney, years afterward, that he regretted his course, adding, with a cordial shake of the hand, that he regarded him as a worthy successor of Chief Justice Marshall. What higher praise could have been asked for?

"Judge Taney held the circuit court in Maryland, during the year 1836, and took his seat on the bench of the supreme court in January, 1837. From that time to the day of his death, the history of the chief justice is known to the world. The published reports of the decisions of the high tribunal over which he so ably presided, speak of and for his labors far more emphatically than anything I could say. Did time allow me, I might refer to the great learning and ability displayed in many of the opinions he pronounced, and especially of the luminous character of those which related to constitutional questions. But I must pass this by, and proceed to other topics. I will not undertake

to speak at length of the professional ability and mental characteristics of the departed judge. That duty will no doubt be more ably and more appropriately performed in another place, and under circumstances which will give the occasion a national character. He was a well read and profound lawyer, strong in his convictions as to great principles, and firmly adhering to them. In the clearness and logical character of his judgments, he was not excelled by any jurist of our country. It was beautifully remarked of him, by Mr. Wirt, that he was 'the man of moonlight mind; I mean,' he said, 'the moonlight of the Arctics, where you have all the light of day without its glare.' His deportment on the bench was beyond all praise. The quiet dignity of his manner, and the ease and grace with which he presided over the deliberations of the court, can never be forgotten by those who witnessed them. And how can I speak of his conduct to the bar? Never was a judge more kind, more considerate, more patient than he. Every one who addressed him, while impressed with the presence in which he stood, still felt that he was speaking, as it were, to a friend—one who would overlook the imperfectness of his argument, and patiently weigh and consider every view presented. But the chief justice was that without which acquirements, learning, all other attainments, are of little moment—a thoroughly incorruptible, fearless and honest judge. Little did those who only saw him presiding in court, where the kindness and childlike gentleness of his manner were so apparent, know how brave a heart beat under that quiet and calm exterior. He was one of the few—alas! how few there are—who had the moral courage to do what he believed to be right, and I am firmly convinced, that rather than yield his views on any of the great questions of constitutional law which form the groundwork of our institutions, he would readily have sacrificed his life. But you, sir, [addressing Mr. Justice Nelson] who were associated with him so many years in the discharge of your high official functions, knew him so well, you so thoroughly understood his many excellent qualities both of heart and mind, his great attainments and his elevated character, that I feel that, in your presence, I ought not to say more on this subject.

"The daily beauty and simplicity of the private life of the chief justice I believe to have been almost without parallel along the great men of our country. In his conversation he was most attractive, winning and instructive, and I never left, after an interview with him, without increased regard for his virtues and character. Of his religious life I cannot venture to speak, except perhaps to say that which is known to us all, that he was one of the most prominent members of the Roman Catholic Church in this country—devoted, in the broad spirit of Christianity, to its institutions and its interests. But he comprehended all classes of men in his sympathies, and showed his faith by a life of duty, integrity and Christian devotion here, which, we reverently trust, has secured for him an eternal reward in that blessed state to which he has gone. 'Clarum et venerabile nomen'—long may the influence of the ability, the integrity, and the pure and elevated character of the great departed judge, remain with the members of that august tribunal over which he so long and honorably presided. May it please the court, I now move that an appropriate entry of the death of Chief Justice Taney, be made by the clerk on the records of this court, and that the court do now adjourn."

Mr. Justice Nelson responded as follows: "The death of Chief Justice Taney, from his great age, in his eighty-eighth year, and bodily infirmities, was not unexpected. For several years past he has been, physically, so feeble as to excite, constantly, the serious apprehension of his family and friends. But his mind, during all these years, and at all times, has been unimpaired. The life and public services of this venerable and eminent judge have been so long and so conspicuously before the country, that it can hardly be necessary to do more than to allude to them. He

was one of the most learned and able lawyers of the nation, while engaged in the practice of the law, and well earned and achieved the highest honors of his profession; and, in all the public offices and employments which he has filled—attorney-general of the United States, secretary of the treasury, and chief justice of the supreme court of the nation—his clear intellect and unpretending habits, both in public and private life, were always distinguished characteristics. There never was a public functionary, in this or any other country, who brought to the investigation of the great questions that came before him, political or judicial, or to the discharge of his high duties, a clearer understanding, or purer heart, or greater patience and devotion in the pursuit of right and justice. Few men possessed a more well balanced mind in the discharge of varied duties and responsibilities, and in the application of it to the business affairs of life. In his nature and temperament, there were fewer disturbing elements than ordinarily fall to the lot of humanity. His disposition was kind and generous; and his intercourse and association with his brethren and the bar were most courteous and friendly. He was always ready and willing to give them the benefit of his counsel and advice. In his death, the country has lost a public servant, a large portion of whose life has been devoted to her service—the bench and the bar, their best friend and brightest ornament. Those of us who have been long and intimately associated with him feel most deeply his loss. He was our friend and brother. Our best consolation is in the memory of his virtues and of the good deeds that filled the measure of his life."

THOMPSON, SMITH.

[For brief biographical notice, see 30 Fed. Cas. 1398.]

The following notice is reprinted from 2 Paine, (Preface):

To Justice Thompson, however, we are chiefly indebted for the learned, clear, and satisfactory decisions which are contained in this volume. In the long list of eminent jurists whom the state of New York is proud to enroll among her sons, none, perhaps, were more conspicuous for those sterling qualities of head and heart which constitute the able and efficient judge than Smith Thompson. He possessed a mind of remarkable clearness and vigor, and powers of analysis and close reasoning of no ordinary kind. Modest in his deportment, and plain in his manners, he yet had a firmness of purpose and an independence of spirit, which, in the pursuit of truth and right, were inflexible. His opinions, so lucid and concise, and expressed in language so simple, yet so pointed, are models of judicial composition. Called to the bench of the supreme court of New York so early as 1802, and having for his official associates no less distinguished personages than James Kent, Morgan Lewis, and Ambrose Spencer, he at once took a prominent position, which he ever after, during a long judicial career, maintained. He subsequently filled the post and discharged the duties of chief justice of the state of New York; and on the 18th of March, 1823, a vacancy having occurred on the bench of the supreme court of the United States, by the lamented death of the Hon. Brockholst Livingston, one of the associate justices and presiding judge of the circuit court in the second circuit, on the 9th of December of the same year Judge Thompson was appointed his successor.

THRUSTON, BUCKNER.

[For brief biographical notice, see 30 Fed. Cas. 1398.]

Circuit Court of the District of Columbia for the County of Washington. At a meeting of the bar and officers of the court on the 30th day of

August, 1845, on motion, Richard S. Coxe, Esq., was appointed chairman and William Brent secretary.

On motion of Joseph H. Bradley, Esq., the following resolutions were unanimously adopted: "Resolved, that this meeting have heard with deep and sincere emotion of the death of the Hon. Buckner Thruston, for many years a judge of the circuit court of the District of Columbia. Resolved, that we lament the death of an individual with whom we have been long associated in the administration of justice, and in the intercourse of society, distinguished by his elegant attainments as a scholar, for his extensive erudition, for his integrity on the bench, and his accomplishments as a gentleman. Resolved, that we sincerely sympathize with his afflicted family in the death of Judge Thruston, full of years and ripe in character. Resolved, that the district attorney be requested to submit these proceedings to the circuit court, and to ask the court to permit them to be entered on their minutes and to unite with the bar and officers of the court in paying respect to the memory of the deceased; and that we will wear the usual badge of mourning for thirty days. Resolved, that a copy of these proceedings be respectfully communicated to the family of the deceased, and be published in the several newspapers in this district."

James Hoban, Esq., district attorney, submitted the above proceedings to the court. To which the Hon. William Cranch, chief judge, made the following reply in behalf of the court: "The court has received with great sensibility information of the death of Hon. Buckner Thruston, one of the judges of this court. Having been long associated with him in the discharge of our judicial duties, we cannot but deeply feel the loss we have sustained. His judicial life has been prolonged beyond the usual term of human life, and has been uniformly marked with strict integrity. But this is not the time or place to pronounce his eulogy. His long and faithful services are well known and appreciated in the community and will be long remembered. The surviving judges deeply sympathize with the gentlemen of the bar, officers of the court, and the afflicted family of the deceased, and will join them in the testimonials of respect proposed by the bar and the officers of the court, and will order their proceedings to be entered on the minutes of the court. The court will now adjourn. Test: Wm. Brent, Clerk."

John Buckner Thruston was born in Virginia, in 1763. He was the son of Charles Mynn Thruston, a distinguished Revolutionary officer. He emigrated in early life to Kentucky. Studied law, was admitted to the bar, and practiced his profession at Frankfort. Being possessed of superior talent he was called into public service by being appointed United States judge for the courts of the territory of Orleans in 1805; but on his election to the senate of the United States from Kentucky, he declined the appointment of judge. He served as senator from December 2, 1805, to July 1, 1809. Although elected for six years, he resigned on being appointed by President Madison judge of the United States circuit court of the District of Columbia. This office he held until his death at Washington, D. C., August 30, 1845, in the 83d year of his age, having occupied the bench 36 years. He was a gentleman in every sense of the word; that is, superior attainments combined with his urbane manners in private life, made his company pleasing, instructive and procured for him general esteem.

TRIGG, CONNALLY F.

[For brief biographical notice, see 30 Fed. Cas. 1399.]

The following proceedings of the bar are reprinted from 1 Flip. v.:

The Honorable Connally F. Trigg, United States district judge for the eastern and middle districts of Tennessee, died at his home in Bristol, on Sun-

day, April 25, 1880. He was born in Abingdon, Virginia, March 8, 1810. Was appointed by President Lincoln to the position he held at the time of his death, July 2, 1862. A meeting of the members of the Memphis bar was held, when a committee, composed of W. Y. C. Humes, M. P. Jarnagin, George Gantt, Luke W. Finlay, and S. P. Walker, was appointed, who reported resolutions highly complimentary to the deceased. These were seconded by Mr. Jarnagin, and unanimously adopted. Henry Craft, Esq., on a subsequent day, delivered a eulogy upon the deceased, saying among other things:

"As Judge Trigg came to judicial position in stormy times, and presided in the federal courts of this state in the convulsion and in the reconstruction, it was natural and proper that these bar resolutions should direct attention to his bearing in those troublous days. When those who had been out in the Confederate ranks returned, they became a host of witnesses to the equanimity, the courage, and the fine intelligence which characterized his discharge of duty. It fell to his lot to be the pioneer in judicial action upon many novel and important questions growing out of the war, and out of the legislation which it engendered; and it must have been highly gratifying to him that the supreme court of the United States affirmed his rulings. Because of his action, I have often said, and the assertion is not too strong, that Tennessee owes to Judge Trigg more than to any other judge. I knew him well, and in the most intimate social relation, while these trying questions were being presented, and I can say that I never saw him when he seemed to feel the slightest perplexity, or doubt, or hesitation, as to his course. He seemed to be guided by a sort of innate sense of what was right, and to go straight forward almost without need for deliberation. I presented the application of the lawyers returning from the war, for admission to his court without taking the test oath. Some of them were surprised that I did not consider it necessary to make elaborate argument, or to adduce a great array of authority. I told them I had become too familiar with his habit of thought and feeling to entertain a moment's apprehension as to what he would do. His opinion [delivered May 10, 1865] in that matter virtually covered the very ground upon which the supreme court afterwards rested a similar decision. As far as he was from the weakness of concession to the passion and prejudice of one side, he was equally far from encouragement or approval of what was done on the other. He was loyal in his whole being to the constitution and the Union, and ready and anxious to exert all his power to maintain them. He made no compromise with secession, and looked with sternest disapproval upon the effort to tear the flag in twain; but he was utterly a stranger to malice or vindictiveness toward those who upheld the Confederate cause. He earnestly desired to see their efforts thwarted, and their military power crushed; but when this was done, it was not in his nature, nor in his construction of the law, to inflict punishment by confiscation of their property, nor by proceeding against them as criminals. I heard him say from the bench, in dealing with confiscation cases: 'The informer does not commend himself to the favorable consideration of this court.' I repeat that the state owes to Judge Trigg a debt of gratitude greater than to any other man who has exercised judicial functions within her boundaries.

"As I think now of Judge Trigg in the discharge of his official duty; as I recall his benignant face so finely put upon the canvas that hurls in your honor's chamber; as I remember him in social intercourse, and as my mind runs rapidly over the retrospect of the fifteen years during which he went and came among us, I recognize a guileless, straight-forward simplicity as the prominent trait of his character. To do right, to be just, to indulge the largest charity, to be alive to all human sympathy, and to administer the law as one who could be touched with the feeling of human infirmity, seemed to be so natural to him as to require no effort. Utterly devoid of affectation and egotism and selfishness, he never seemed to think

that there was anything he could do other than just what he did. He claimed no credit, sought no applause, but walked calmly along his judicial path, apparently unconscious that he was exhibiting the highest qualities of our manhood. This simplicity of character was conspicuous in his steadfast adherence to the fundamental principles, and his abiding faith in the rudimental truths of jurisprudence—principles and truths with which he was very familiar. He was not a learned judge in the sense of knowing what a hundred courts had decided upon a thousand questions. He could not rattle off the names of cases and books, nor stuff an opinion with precedents and quotations; but there were great lights, older than the books and steadfast as the stars, towards which his mind turned as the needle turns to the pole. Judge Trigg lived out the allotted three-score years and ten, in the ripeness of age; in charity with all the world; without blot or stain upon his private or judicial robes; loyal to country, to friends and to family; loyal to duty and truth, he has calmly gone away. Those loved him most who knew him best. He was a good judge, a good citizen, and a good man. This is a truthful eulogy. Is it not eulogy enough?"

WARE, ASHUR.

[For brief biographical notice, see 30 Fed. Cas. 1400.]

The following proceedings upon his resignation and death are reprinted from 3 Ware, 329, 337:

The members of the Cumberland bar met by invitation at the United States court room in Portland, on Wednesday, the 23d day of May, 1866, to determine what expression of their esteem and respect for Judge Ware would be appropriate to the occasion of his retirement from the bench of the district court of the United States, a position which he had resigned after a judicial service of more than forty-four years. Hon. Thomas A. Deblois, Hon. George Evans, and District Attorney Geo. F. Talbot, were appointed a committee to prepare resolutions expressive of the sentiments of the bar on the occasion. At an adjourned meeting, Mr. Talbot, from this committee, presented the following resolutions, which were unanimously adopted:

"Resolved, that the members of Cumberland bar, ask leave, on the occasion of the retirement of Judge Ware from the bench of the district court of the United States, to express their high appreciation of the important labors and studies, by which, through his long career of judicial service, the principles of maritime equity and international law have been established, and the interests of commerce have been secured and extended; and to signify their pride and satisfaction in the just eminence, which the pure style, the exhaustive learning, and the logical candor of his published opinions have gained for him among jurists throughout the world.

"Resolved, that we shall ever cherish in grateful remembrance, the patience, impartiality, and courtesy, which have marked the official conduct of Judge Ware towards the members of the bar, and the amiable frankness and dignified simplicity, which in his intercourse with us individually, have formed the basis of the friendship and veneration in which he has long been held; and that we tender to him our cordial wishes that he may find in the retirement he has chosen as the appropriate close of his protracted labors, that calm satisfaction, which the retrospect of important service to his age and to the world, faithfully performed, cannot fail to give, and that peace of mind which flows out of a pure and blameless life."

It was then voted, that the resolutions be presented by the U. S. district attorney to Judge Ware, at the coming in of the court on Thursday, May 31st, at 11 o'clock A. M., being the last day previous to that on which his resignation was to take effect, with such remarks as the attorney

might deem appropriate. A few minutes after 11 o'clock the venerable judge came in, and taking his seat upon the bench, the court was formally opened, the area assigned for the accommodation of the bar being filled with the members of the legal profession, anxious to participate in the official leave-taking. The district attorney then came forward and read the resolutions, accompanying the presentation with the following address:

"May it please your honor: In presenting these resolutions in behalf of the Cumberland bar, I perform a task at the same time sad and grateful. It is sad to be obliged to defer to that judgment of yours which has constrained you to terminate the pleasant official relations that have so long subsisted between the court and the legal profession practicing in it, and to feel that the bench you are about to vacate, will be deprived of the confidence and veneration your character has given it in the popular heart. But it is grateful to review your long career as a judge, paralleled by no other in judicial history, and to remember how its foundation was laid in thorough classical, historical, and legal study, how its progress has been signal-marked with the lights of jurisprudence, and how it has culminated in the eminence which has crowned your prolonged labors. It is grateful, too, to know that you have arrived at that goal which fitly divides labor from repose with natural vigor so little abated, that those tastes for intellectual investigation, which have been at the same time your employment and your diversion, have not lost their relish. You took your seat upon the bench of this court very early in the independent existence of our state. Maine, by her seaboard position and the enterprise and hardihood of her people destined to become a commercial and maritime state, counts herself happy in having had you for so many years at the head of her maritime and admiralty court. The people who have been the most resolute in attempting to subdue and control the sea, have from the earliest times dictated its laws. While powerful chiefs subjected to their sway such territories of the land as they could occupy and defend with their arms, the sovereignty of the ocean was for them who were bravest in defying its dangers. While on the northern coasts of the Mediterranean, and on the south shores of the Baltic and North seas, merchants were gathering wealth, and mariners finding exciting adventures, thoughtful minds were collecting and expanding those principles of natural equity, and those customs and usages to which traffic had learned to accommodate itself, which, still for the most part unenacted, form the body of the commercial law of the world. As citizens of our state, we feel no more pride in the rank among commercial and maritime communities our merchants and ship-builders and seamen have won, than in the high repute your labors and studies have gained for you, in interpreting and developing the principles of maritime jurisprudence. It was the pious surmise of the Psalmist, that 'they who go down to the sea in ships, and do business in great waters, see the works of the Lord and his wonders in the deep.' However these wonders may affect a refined and elevated spirit, it would seem as if the effect of the storms of the sea upon ordinary men was to arouse the storms of evil passion, and that the lawlessness of the open ocean begat in them a feeling that they had sailed beyond the constraints of human law, and crossed the line that bounds the jurisdiction of conscience and of God. Certain it is that the sea has been the theatre of some of the darkest deeds of which human nature is capable, and its unfathomed caves hold the secrets of the bloodiest cruelties ever perpetrated by man upon his kind. The early commerce, half traffic and half plunder, though it drew civilization in its train, was scarcely above the grade of statute piracy; nor could we believe, unless compelled by history, —looking at the quiet, civil, and decent social life of the thriving communities on the new continents and islands, in the massacres, enslavements, and extortions, that accompanied their discovery and colonization. Even now that necessarily despotic system of mastery, which places the persons and lives of unarmed seamen on shipboard under the

custody of one doubly-armed man, whose ferocious passions may be stimulated by intoxication, sometimes brings back as freightage from far-off seas, horrors that afflict the human heart in the recital. The ocean, that seems almost to defy its maker, the last of chaos to feel the coercion of creative order, has hitherto baffled man.—But every age it yields to his daring and inventive spirit. Long ago he found means to venture out upon its open wastes, using its currents and its very storms as propulsion for his travel and transportation. Within our time, in the steamboat, he has subjected it to forces more completely within his control, and defying its own. He is just about to span it with a line upon which his whispered messages shall make themselves heard beneath all its uproar from continent to continent. Not less remarkable than these physical achievements, by which science and skill have made the sea docile to the uses of man, are the moral agencies, which have carried the majesty and sanction of law to the loneliest waters of the most barbarous coasts. This law, written in part only in those axioms of natural equity which a large, liberal, and candid mind can read, it has been your province to explain, and to apply to the settlement of controversies, and that too, without aid from the deliberations of a jury. How justly and wisely you have done it, the confidence and respect of this commercial community, whose claims you have decided, and whose property has been controlled by your decrees, is ample testimonial. The shipmaster, in the port of a foreign land, has been made to feel that the charter-party defining the due compensation for his toil and risk, the interest of the ship in its proportion of the gains of commerce, and of the merchants in profits of his venture, would be enforced against his goods and his person upon his return from however prolonged a voyage. The sailor, the proper ward of the admiralty, has found in the humane patience, with which you have listened to the recital of his wrongs, his beatings, his tyings-up, his privations of food and wages, that your guardianship was something more than a maxim. And the coaster and adventurous landsman, who have braved the storms of our own rocky coast to rescue wrecked ships, wrecked goods, and periled lives, have been encouraged by your bounty to venture again upon a like beneficence.

"We congratulate ourselves that your Reports, to be further enlarged, as we trust, by the publication of your manuscripts, will be enduring monuments of your humane feelings, your cultivated sense of justice, and your learning. I need not characterize in other terms than those used in the resolutions we have adopted, books quoted in all the admiralty courts of the world, and never but with deference and respect, and attractive to the general scholar by their perspicuous statements, their vivid style, and the cogency and conviction of their arguments. There is one obligation, however, I ought to acknowledge due from counsel for the uniform fullness and appreciative fairness, with which in your opinions you state, and the candor, with which you defer to, arguments of theirs, which you found yourself compelled upon a closer analysis or a more comprehensive review to overrule. Your powers as a court have been large, —your responsibilities great. You lay them down, I apprehend, without a suspicion on the part of any man, however his fortunes may have fared at your hands, that those powers and responsibilities were ever abused, that a decision was ever rendered that did not reflect a delicate and elevated sentiment of justice, and that did not commend itself to the approbation of the public good sense. But I must not recount further the obligations this bar and this entire community are under to you for the dignity of your example, and the honor you have conferred upon this high position, you are now to vacate, lest I give offence to that modesty, and those simple tastes of yours, that would repel extravagance as instinctively as insult. Let me bid you only in an official sense an affectionate farewell, hoping that those habits of recreation and employment, you may find it more difficult to lay aside, than the dignity of your office, will continue to bring you daily to these precincts, that

will long be haunted by the attractive and venerable influence of your presence and character."

Judge Ware was much affected by this expression of the feeling and appreciation of the bar, with which he had been so long connected, and with emotion only partially controlled, made the following response, all the bar coming forward and standing around the bench, and listening with reverent attention:—

"Gentlemen of the bar: The expression on the part of the bar practicing in this court, wholly unsought for and unexpected on my part, deserves from me and is received with the deepest gratitude. It is a source of great gratification that the course of the court during the protracted period I have had the honor to sit in it, has received the approbation of men learned in the law, who have been familiar with its practice, from whom nothing has been or could be concealed, and has called forth such an expression. In every case one party or the other must be disappointed, in almost every instance of reasonable, and in some perhaps of just expectations, especially as the jurisdiction and practice of the court were in some degree uncertain and unsettled. In admiralty the prevailing opinion of the soundest and most learned juriconsults of this country is that our courts have a larger jurisdiction than the high court of admiralty in England. Of course the English decisions, to which we habitually look as a safe guide, fail. The halting practice and the imperfect reports of our own court afford but an imperfect substitute. We are, therefore, left to find our way as well as we can by looking to general principles. When these are our only guide there will be of course different opinions. It cannot be expected that there will always be an entire agreement, and the most that can be hoped for is integrity of intention, and this, I trust, has never been doubted. To err is the common frailty of humanity, and I cannot too highly value the calmness with which these errors have been received, and the tenderness with which they have been handled. The unvarying courtesy and kindness on the part of the bar which for so long a period has been uninterrupted, in full measure and beyond what would reasonably be expected, call imperiously for my grateful acknowledgments. They can never be forgotten by me, and will live as long as the pulsation of life lasts. It only remains, that with the best wishes for your happiness in this life and that which is to come, I bid you a final farewell."

At the close of the judge's remarks the court adjourned.

Proceedings of the Cumberland Bar on the Occasion of the Death of Judge Ashur Ware, Which Occurred Sept. 10th, A. D. 1873.

The members of the Cumberland Bar Association met in the United States district court room, at 3 o'clock on the 22d of September, 1873, agreeably to a previous notice, and Hon. Nathan Webb, the vice president, in the absence of Judge Howard, the president, took the chair. M. M. Butler, Esq., on behalf of a committee appointed for that purpose at an earlier meeting, reported resolutions expressive of the sentiments of the bar, in reference to Hon. Ashur Ware, for many years judge of the United States district court for Maine district, lately deceased, and the same were unanimously adopted. At three and one-half o'clock, the court was announced, and Judge Fox took his place upon the bench. The court having been opened, Hon. George F. Talbot arose and spoke as follows:

"May it please your honor: Since its last session, the eminent man, whose personal virtues and judicial authority this court must always honor, has laid aside the burdens and infirmities of a protracted old age, and peacefully passed on to test the mysteries of the life beyond. Judge Ware, who, for more than forty-four years, presided over the district court of the United States for the state of Maine, in the seat to which you have so worthily succeeded, died peacefully at his residence in this city, on Wednesday, the 10th of September inst., at half-past eleven in the morning, in the ninety-second year of his age.

"In announcing this event all sorrow and regret will be out of place. When a life endowed with rare physical and mental vigor, ennobled by worthy and patient labor, adorned and enriched by varied study and learning, dignified by simple and guileless manners, ends, there is no occasion to mourn or deplore. Its ending is rather the fit occasion to sum up and contemplate its excellences, and admire its rare good fortune. His fearless and adventurous spirit, long before it was weakened by the infirmities that oppressed and beclouded it, had frequently testified his satisfaction with the full measure of years allotted to him, and had come to look upon life without regret, and upon death as a problem that fascinated his curiosity and invited his experience. Those of us, who were permitted to look upon the calm face after death had composed it to the grand and beautiful expression which belonged to its maturity, who saw how, from the placid brow and composed countenance, all traces of feebleness and pain had passed away, could but think more kindly of that dread agent, which, seeming to crush all our hopes, leaves on the blank face, before it begins to decay, the gleam and promise of a better life, just as the sun, after it has set, gilds the clouds and sky with its continued light. While we accept trustfully such an omen of his fate, we find how it typifies a process of apotheosis, by which the bowed frame and the briefly clouded mind give place, in our memory and thought, to the dignified presence and clear and capacious intellect, strengthened and expanded by thought and learning, by which our revered friend will hereafter ever be remembered. A life like Judge Ware's, so happily and nobly lived, so rich in substantial, if not conspicuous benefits conferred upon society, a mind so well endowed with intellectual and moral culture, is of historic value, and deserves commemoration in a fitting biography. I know the fact, that he had been often urged to lay the proper foundation for such a work, by furnishing personal memoranda of the leading incidents of his life. Late in his old age he seems, partially, to have complied with such a request; but his life was a contemplative, rather than an active one, and, having few changes or events personal to himself to record, his unique and characteristic history, as told by himself, gives us only the processes by which his mind was trained, the relations which he recognized as connecting himself with God and the universe, and the growth of opinions, mainly theological, which his contemplation and study had compelled him to adopt. The proprieties of this occasion will allow me only to speak briefly of the work he has done in the world, and the traits of mental and moral excellence developed in doing it. He has given this description of his dominant mental passions: 'I had always a love of knowledge. This I believe was innate and instinctive. It had its origin in a natural curiosity, and was wholly independent of the consequences that flowed from it.' He had a quiet contempt for the prevalent taste among his competitors in scholarship, whose efforts seemed to be stimulated by the desire to obtain honors, and who had more thirst for the reputation and rewards of learning than they had for learning itself. He says, moreover: 'My taste and inclination led me more to grave and solid studies, that improved the understanding, than to the lighter graces of polite letters. An important fact, or a principle which is a mere generalization of facts, had always more charms for me than a mere expression of happy elegance.'

"To the shaping and strengthening of his mind, metaphysical studies largely contributed; in relation to this he observes: 'Nothing contributes so much to sharpen the mind, and nothing to discover the weakness of an adverse argument on any subject, nothing to make nice distinctions and just discrimination, nothing to detect as well as practice sophistry; to comprise the whole in one word, nothing so well teaches us the use of language, whether employed to express or, as it sometimes is, to conceal our meaning, as the study of metaphysics.' But although he recognized the value of these studies as discipline, he complained that the knowledge they furnished was uncertain, and that

the modern mind, after all its efforts, had been baffled by the same uncertainties and the same limitations that had arrested the researches of the ancient philosophers two thousand years ago. So he turned to mathematics as more attractive and solid ground, and in touching their fixed and certain data, laid his hand upon the laws and methods of the creation. To quote his own language: 'If there be any merit in the essays I have written, either miscellaneous or professional, or judicial opinions, in the selection and arrangement of the thought and matter, I have been more indebted to geometry than to all other studies. I think I may safely say this, when one of the greatest men ever bred in America, great at the bar, great on the bench, and great in political movements (though this was the less seen by the public,) a man who would be, rather than seem great,—said that whatever merits his arguments at the bar might have had, they were all derived from Euclid; and juries, to whom these arguments were addressed, familiarly said of him that other advocates were plausible, but Parsons made a case plain and intelligible. I never studied a subject so well, or understood a science so thoroughly, as the elementary principles of geometry, and none of my juvenile studies had so deep and permanent an influence on my habits of mind.'

"For a mind, whose leading characteristic is a love of knowledge, free of the ambition of distinction, and the meaner ambition of reward, strengthened by the severe and abstract processes of metaphysical and mathematical studies, one career naturally opens itself. It will seek truth—not in the department of man's material and animal life, but in those higher relations which subsist between man as a spirit, and the source from which he sprang, and the destiny to which he is to attain. So we are not surprised to hear Judge Ware confess, that favoring influences aided the natural bent of his genius, to invite him to enter upon the study of theology, and devote his life to the office of preaching. From this project, however, he was deterred by the perhaps unexpected results to which he arrived, in turning his scientific and severe methods of investigation, to the prevalent religious beliefs of his time. These results he perhaps wisely concluded would be a too great innovation upon the cherished convictions of the religious mind of New England, to justify him in publicly proclaiming them. He had no taste for controversy. Notoriety only annoyed him. A wise skepticism, rather than a dogmatic and arrogant assurance, and a thorough respect for the genuine convictions of thinkers who honestly differed from him, compelled him to turn away from his favorite studies, and to use them ever afterwards as the recreations and solace of a life devoted to adjusting, upon far lower grounds, the controversies of men as to their natural rights and obligations. While these opinions of his may have well seemed heretical in the narrow prejudice which held New England sixty years ago, the expanded thought of later times has comprehended and embraced them within the limits of a Christian charity and sympathy. For, after his severe and candid inquiry into the grounds of religious faith, his written confessions show that he held firmly to these conclusions; that the Universe proceeded from the hand of an intelligent Creator, who holds and governs it in the interests of justice and goodness; that man is amenable to the law of right, which is equivalent to the will of God, and is destined to an existence beyond his earthly life, where his condition will depend upon the fruits of virtue he has been able to gather from the good and evil influences, in the midst of which he had lived; and that Christianity, whose essence is the doctrine of the Fatherhood of God, and the equality of man, and whose highest sanction of virtue is furnished in its most clearly stated doctrine of a future life, if not a supernatural and miraculous revelation, is a historical and providential development of the progressive religious attainment of man, the best, as it is the last fruit of his religious aspirations. Turning regretfully away from these high subjects, literature seemed naturally open to him;

but sixty years ago literature was not recognized in our country as a profession. His mind had been trained to dwell only in realities, to seek for truth more than for beauty, and to grasp substance rather than form. He disclaimed for himself ideality and a strong poetic fancy, and so what he called the 'lighter and more ornamental graces of polite letters,' had no attractions for him. In this, too, he must be considered to have judged himself too severely, for that very fondness for precise and unequivocal statement, that orderly and logical method, that candid appreciation of all adverse argument, supplied by his metaphysical and mathematical studies, aided as they were by familiar converse with the models of classic oratory and poetry, laid the foundation for a style of expression eloquent in its simplicity and perspicuity. The vividness of his personal and historical sketches, the clearness and picturesqueness of statement in his judicial reports of the facts and incidents upon which he bases his judgment, and the charm of language which, in his private conversation, often arrested the attention even of uneducated persons, showed that he had mental qualities that would have rendered him conspicuous in literature. So, steadily and without regret or misgiving, he turned his well-furnished mind to the study of law. An appointment, never more fittingly made, placed him upon the bench of this court, in a position that exempted him permanently from the cares of getting a livelihood, and preserved his pure and unsophisticated character from those intrigues and ambitions which work among our ablest public men such deplorable demoralization and deterioration. The field itself was sufficiently unpromising of anything but ease and obscurity. It was just the place for an indolent and superficial man to subside into routine and self assumption. What Judge Ware has done in this field, by putting genius and high intellect into his work, may now be seen in the published reports of his judgments,—important contributions to the splendid system of maritime jurisprudence, that regulates the commercial intercourse of civilized nations, and ever to be remembered as the best monuments of his fame.

"The law of the sea, he was called upon to pronounce, must be as liberal and comprehensive as its own compass and extent. The common law, whose maxims had been derived from the feudal system, a highly artificial and aristocratic form of society, would never serve to regulate and restrict a commerce, inviting the freest competition among the most daring and adventurous, nor could the codes or legal principles derived from the consent or custom of a single people, accommodate themselves to the notions of rectitude and fair dealing, recognized by an international comity. It was left to the enlightened sense of justice, to determine the natural principles of law applicable to each case as it arose. Each court was put upon its conscience to pronounce a decree that should accord with the universally accredited sense of justice, or else it would nowhere be respected as the sentence of law. If local prejudice or patriotic feeling blinded its candor, it rightfully lost its authority. At the time Judge Ware took his place upon the bench, the English precedents in admiralty were rare, and only partially applicable to this country, where we had given our admiralty courts a more liberal jurisdiction; and as to the precedents of other countries and treatises, though the work of men of great genius and learning, it must be remembered how soon they would become obsolete, by the expansion and transformation of commerce, through the discovery of new countries, the production of new materials, the invention of more powerful forces of propulsion, and the new commercial usages which would grow out of more frequent and rapid commercial intercommunication. A capacious and well-poised mind to define, for new situations and new relations, the law of natural right, which should not only decide the case in controversy, but be an authority for like cases at home, and receive the respect and acquiescence of the courts of foreign nations, was what was required. For

such an office, with such opportunities, the natural and acquired qualifications of Judge Ware were peculiarly adapted. The very taste that had inclined him to theological studies, made him a just and upright judge. The pure and ethical ideas, by which he had regulated his own life, the keen moral sense that defined in his soul so sharply the boundary between right and wrong, gave him a power of moral perception, able to detect under most plausible disguises, every form of oppression and fraud. His metaphysical discipline enabled him to see the weakness of an adverse argument on any subject, to make nice distinctions and just discriminations, and to detect sophistry, and he had learned from geometry how to 'select and arrange,' in his judicial opinions, 'the thought and the matter.' When to this was added an elegance of style, derived from his classical and general reading, we can understand why the reports, which, when completed, will contain the judicial labors of his life, are everywhere held in such high estimation as authority by the courts, and as attractive to the professional and general scholar. There was another mental trait which peculiarly fitted him to be the vindicator of the wrongs and oppressions of seamen. Few men have more heartily believed in the idea of the natural equality of men. He refused to assume any artificial dignity. It was with difficulty that he conformed to the prescribed etiquette and decorum of his own court. It offended his simple taste to assume any badge or drapery, or to take a place in any procession. He liked to come quietly and unheralded, and take his seat in court, clothed only in the natural dignity of his own character and intellect; and if his seat was raised above the level of his friends, the officers of the court and members of the bar, the exclusion and elevation seemed a constant annoyance to him. This democratic feeling crops out everywhere in what he has written. His comments upon history, though mainly dispassionate and critical, grow fervid with indignation at the oppressions and exactions which tyrants and rulers practiced upon the people; and his hearty attachment to Christianity seems largely due to its recognition of the brotherhood of man, and to the solace its high hopes offer to the sufferers and sorrows of the poor and down-trodden.

"Assuming no artificial dignities for himself, he could not defer to any assumptions of rank among those to whom he dealt out justice. Different positions determined different scales of responsibility and duty, but these fairly considered, a man was a man, and below the rank and rights of a man he would never allow a human being to be placed, whatever might be his race or color, or however limited his intellect or education. When at the end of a term of judicial service, rare in the annals of any people, and unprecedented in ours, he resigned his high office, this bar assembled in this court to express a just appreciation of the long official service he had so ably performed. We are now assembled when the long life itself, so successful and happy beyond the common lot, is rounded to a measure of years seldom allotted to man, to do honor to his character, and to give our testimony of his high worth, and to commend him, as an example of rare excellence, to the emulation of the generation of young men who are to succeed us. We may point to his, on the whole, happy old age, as a fit illustration of the noble language of Cicero: '*Aptissima omnino sunt arma senectutis artes exercitationes—que virtutum, quæ in omni ætate cultæ, quum diu multum que vixeris munificos efferunt fructus, non solum quia numquam deserunt, ne extremo quidem tempore ætatis—quamquam id quidem maximum est—verum etiam quia conscientia bene actæ vitæ multorumque bene factorum recordatio jucundissima est.*'"

At the close of these remarks, M. M. Butler, Esq., rose to offer the resolutions of the bar, and said:

"May it please your honor: Accompanying the announcement, which has just been made, in so fitting terms, of the decease of Judge Ware, I have

been deputed by the Bar Association of Cumberland County, to present to this honorable court, over which he so long and so worthily presided, the resolutions which have been unanimously adopted in view of the occasion, expressive of our veneration of the man, and our appreciation of his virtues and public services. In discharging the duty assigned me, naught indeed can be added, by any poor words of mine, to the beautiful tribute—alike appreciative and discriminating—which has just been paid to 'his memory; naught certainly should be taken away therefrom.

"I am sure that our brother Talbot has not, in any degree, overestimated the importance and influence of Judge Ware's judicial labors. The estimate which Judge Story put upon them, when he said that he regarded Judge Ware as one of the ablest and most learned, if not the ablest and most learned of the then living admiralty lawyers, was concurred in by the voice of contemporary assent, and has been confirmed by the later judgment of the bar of this generation. Among the great lights, by which the paths of admiralty and maritime law have been illumined, his name will shine serene,—a star of the first magnitude. His recorded decisions, beautiful in structure, adorned with grace, and resting on the solid foundations of principle, have raised an enduring monument to his fame. His services in the cause of enlightened jurisprudence have already conferred, and will continue to confer, so long as justice shall be dispensed, lasting benefits on mankind. The allusions to Judge Ware as a scholar have been most happy. It was certainly not alone in professional learning that his attainments were remarkable. He cultivated almost the whole boundless field of human knowledge—metaphysics— theology—polite literature—the classics—modern languages—the sciences—mathematics. He was scholarly in all his tastes and habits. He was one of those deep, quiet, unobtrusive students, of which our country has more in number, I believe, than we get credit for across the Atlantic. Any review of the life of Judge Ware would be incomplete without reference to him as a citizen and member of society. His participation—so far as was befitting his position—in the business enterprises of our city, his connection with our educational interests, his selection, at different periods of his life, as president of two different banking institutions, and as director in another; his identification with the growth of the public improvements of the state, as early president of one of our leading railroad companies,—these attest at once that Judge Ware was no recluse, and the confidence which was reposed in him by the community. He ever took a lively interest in public affairs. In early life, before his elevation to the bench, he wielded a most trenchant pen in the discussion of the important political questions of the day, and afterwards throughout his judicial life, he never ceased to feel, and manifest on proper occasions, his deep interest in all that pertained to the welfare of his beloved country, the state of his adoption and the city of his home. He was a good citizen, a pure patriot, a genuine lover of liberty, a true Democrat, in the higher and nobler sense of the word. But we, especially the older members of our number, who have been brought into more intimate relation with him, would hold in remembrance with enduring regard, Judge Ware, not alone as a great jurist, a ripe scholar, and good citizen, but as the modest, genial, true-hearted man that he was—possessing a tenderness of nature almost feminine,—a simplicity of character almost child-like. In our intercourse with him, none can recall an unkind act or a harsh word. No man had less occasion to repeat the beautiful prayer of the liturgy: 'From hatred, envy, and malice, and all uncharitableness, Good Lord deliver us.' After having gone in and out before us in his judicial career for more than forty years, having passed beyond the extreme limit allotted by the Scriptures to human existence—life's labors faithfully performed, his earthly tasks fully accomplished—this righteous judge, this great jurist, this pure-minded citizen, this excellent man has gone in fullness of

time to his reward. Peace be with his ashes. May we not reverently inscribe over his grave:

“*Cujus est so'um, ejus est usque ad coelum.*”

“May it please your honor: I move that the resolutions to which I have referred, and which, with your honor's permission, I will now read, may be received and entered upon the records of the court:

“Resolved, that we, the members of the Cumberland county bar, deem the recent death of the Honorable Ashur Ware, formerly, and for more than two score years, judge of the district court of the United States for the district of Maine, an appropriate occasion for us, who enjoyed with him the kindest and most friendly relations, both professional and personal, to pay our affectionate tribute of respect to his memory, and to testify our grateful appreciation of his virtues and public service.

“Resolved, that the eminence of Judge Ware, in those branches of jurisprudence to which he devoted the labors of his life, has been so universally recognized, as not to need commemoration at our hands. But now that he has gone from us, we would fain give expression to our renewed sense of the importance and influence of his judicial labors, which have left so lasting an impression on the jurisprudence of his times, and our increased admiration of those luminous and erudite judgments, recorded in the reports which bear his name, which for sound learning, depth of research, logical acumen, felicity of illustration, and mastery of the English language, in a style of simple grace and beauty, are models of their kind in judicial literature, and have served no mere temporary purposes, but have become, to a great extent, the foundation of the practice and administration of admiralty and maritime law throughout the land, and precedents for future jurists forever.

“Resolved, that as members of the bar, we shall ever cherish in affectionate veneration the recollection of the modesty, simplicity, and courtesy that distinguished Judge Ware's social and official intercourse with us; of the cordial affability that was always ready to communicate to us his varied stores of thought and learning, and of the many virtues which endeared him to the community in which he lived.

“Resolved, that a copy of these resolutions be communicated to the family of the deceased, and that the same be presented to the court over which he has so long presided, with a request that they be entered of record.”

Hon. Nathan Webb, United States district attorney, seconded the resolutions, and said:

“May it please your honor: In rising to second the resolutions of respect to the memory of Judge Ware, which have now been offered by the Cumberland Bar Association, I cannot but feel regret that I never enjoyed to any considerable extent his personal acquaintance, and am consequently unable, out of my own experience, to add anything to the tribute of affection for the man, contained in this expression of the bar. On every side are met those, who for many years associated with him on terms of friendly intimacy. All unite in their testimony to the kindness of his nature, his purity and simplicity of character, his accurate scholarship and extensive and varied attainments. Companionship with him they esteem among their most valued opportunities. Those of us, who knew him only in his judicial relations, recognize the fruits of those traits of character, and of his thorough and various culture in his official life and service. Whoever studies the published opinions of Judge Ware will not fail to be impressed with the clearness of his intellectual perceptions, the precision and order of his statements, the rigor of his logic, the fullness of his research, the grace of his style, and his conscientious zeal to discern and to uphold truth and justice. Those opinions are widely known and valued: they have been known and valued, and held in ever increasing honor since they were promulgated. It is not easy for us, who have pursued our researches in those branches of law in which he was so illustrious, to measure the sum of our obligation to his labors

under the guidance of which we walk. Neither is the toil of those who have come after him, and walk in the paths he has cleared, to be compared with his task in making those paths plain and easy. While he diligently devoted his powers to those pursuits appropriate to his position as a judge, he never lost his relish for the studies of his earlier years, but throughout his long life found leisure to gratify his love of literature and science. He ever turned with delight to the classics, of which, in his prime, he had been a critical student and an ardent lover. He did not, therefore, become indifferent to the interests of his own days, but was a constant and thoughtful observer of men and events, often with his pen giving important counsel and assistance in securing a wise direction of affairs. Remembering him, and the history of his life, we may account him happy, as well in the number of his years, as in the experiences they brought, and for ourselves, to whom he was so long spared, and who have the benefit of his bright example, we may, as we turn to our duties, reverently say:

“Why weep we then for him, who having won
The bound of man's appointed years, at last,
Life's blessings all enjoyed, life's labors done,
Serenely to his final rest has passed;
While the soft memory of his virtues yet
Lingers like twilight hues, when the bright sun is set.”

Hon. John Mussey, for many years clerk of the circuit and district courts, while Judge Ware presided in the latter, arose, and with much feeling said:

“May it please your honor: Having long known the distinguished jurist, whose recent decease is the occasion of this meeting of the brethren, it seems right that I should say a few words about one, with whom for a long period I was so intimately connected. The high stand he occupied for many years as the exponent of maritime and admiralty law, is well known to you and the community at large. When he took the bench of the United States district court of Maine, in 1822, the rights and duties of seamen, the authority and responsibility of officers and owners of our merchant marine, were alike in great measure unknown and unrecognized by both the employers and employes. The clear head of the judge soon evinced the determination and ability to bring order out of confusion and misconception. At first, many of his rulings clashed with the prejudices of owners and masters, but as case after case came before him, the mists of prejudice and shortsightedness lifted and dispersed. Soon those of the community interested looked up to him in confidence, that good common sense—a just appreciation of their needs, would be furnished by Judge Ware as opportunity offered, and they were not disappointed. The most violent opponents to his teachings gave way, and all felt, if they did not acknowledge the fact, that he was truly a public benefactor; that law as delivered by him was sound, reasonable, well-grounded, and would stand the severest scrutiny; and so it proved to be, by the voluntary acknowledgment of many eminent jurists in the Union. A few words of his social and home life. Modest and unobtrusive, he was ever ready to aid and encourage the efforts of the young practitioner in this court. No one, I think, ever left his chambers without being instructed and pleased. To myself, the recollections of the past are most grateful. His manner was always simple, unaffected, and childlike, and his heart full of the milk of human kindness. During a period of more than twenty-six years of official intimacy, never a hasty, cross, or angry word ruffled our friendship. A kinder or more constant friend and companion on the journey of life, I never had nor could desire to have. Such was Ashur Ware as he ever appeared to me.”

The following is the response of Judge Fox, [this may also be found in 2 Hask. 542:]

“Gentlemen of the bar: Judge Ware was appointed district judge of Maine, in February, 1822, and he continued in the discharge of the duties of the office, until the spring of 1866, his resignation taking effect in May, I believe, being then com-

pelled by the infirmities of years to withdraw from this place which he had, by his learning and ability so ably filled for more than forty-four years. Although eight years have not elapsed since his retirement, I think a large proportion of the members of the bar now present, never enjoyed the satisfaction of practicing in the court whilst he here presided, and many of those who were then with us, distinguished in their high professional positions, have since passed away from us. The remembrance of the Fessendens, Evans, Deblois, Barnes, and others, is still vivid with many of us, and at last, this good old judge, so endeared to all who ever held personal intercourse with him, has gone to his reward, after years of feebleness and suffering, and it is just and due to his memory, that the records of this court should, so long as they exist, transmit to those who shall follow us, the expression of the great respect and attachment entertained for him by this bar. Having, for nearly thirty years, practiced before Judge Ware, I trust that in the presence of so many of the bar who have not been thus favored, I may be excused for referring briefly to the manner in which he discharged the duties of his position, and in acknowledging the heavy indebtedment we are under to him for his studious labors in the admiralty law, and the information he has imparted to us upon this branch of jurisprudence. In 1822, Peters' and Bee's were the only reports of decisions in the district courts of the United States, and most of the opinions contained in these volumes were quite brief and meagre of authority, so that Judge Ware, in almost every question of admiralty and maritime law, was compelled to depend on his own researches into the ancient laws of the sea and maritime codes, and his own wisdom and judgment, for his conclusions, as the cases were presented before him for decision. Fortunately for him, his practice in the courts of common law had been of but little moment. His mind was not trammelled by the harsh and unyielding rules of Lord Coke and his followers, and being naturally of a broad Catholic tendency, it was with the greatest satisfaction that he found himself at full liberty to adopt, modify, and apply the pliant rules of equity and admiralty, as the law of his court, according to the circumstances of each particular case. The strict rules of the law of evidence did not always receive his sanction and approval, as some of us may well recollect his readiness to hear almost all that a witness might press into the case, although much of the statement would not have been received in a court of common law. Judge Ware's literary acquirements were second to no man's in this district. He was conversant with the Greek and Latin, as well as with the French, languages, and could thus investigate and examine for himself their authorities without depending on the assistance of others. His extensive acquaintance with the Roman law and the various French writers on commercial and admiralty law is manifest in almost every one of his opinions, which we now possess. He most thoroughly enjoyed the investigation of questions of admiralty and maritime law, making the most diligent search and examination among the rules and sea laws of the ancient marts of commerce, and he pursued his studies and explorations until he was complete master of the subject, so that nothing remained for him, but to present his conclusions in that clear and beautiful manner which is so distinguishing a characteristic of all his opinions, and in which he has never been surpassed, either at home or abroad. Quite often his opinion was not restricted to a mere determination of the rights of the parties in the cause, but, conscious of the importance of his labors, and of the benefit to be derived from the knowledge he would thus impart, he made his opinion a most elaborate and finished exposition of the great principles of admiralty and maritime law involved in the matter in controversy, in relation to which at that time, the entire profession was almost universally ignorant. So complete and thorough were his examinations, so convincing his judgments, that in many cases since his time, the most learned and eminent ju-

rists have referred to them as conclusive authority on the questions he so well investigated, being convinced that their own researches would shed no new light upon a matter which had received the careful and diligent investigation of Judge Ware. His written opinions were deemed so valuable, both to the public and the profession, that they were generally made public through the press immediately on their announcement, and they at once were accorded by the entire profession, the very front rank in admiralty and maritime jurisprudence. In the year 1839, the first volume of his reports was published, followed by a second in 1849, and the demand for these works has been so great as to require a second edition of each of them. A large number of treatises upon admiralty law, and volumes of decisions of various courts of admiralty, both in England and this country, have since that time issued from the press, but all, I believe, are under great obligations to Judge Ware, and no one can acquire a knowledge of admiralty law, without an intimate acquaintance with his decisions. It is quite extraordinary, the multiplicity of questions which he examined, and upon which we enjoy the fruits of his labors. Since I have occupied this chair, hardly a maritime question has been presented to me, in which I have not at once turned to his reports, and derived great assistance from them. In a large majority of the cases, I think I may truly say, I have found in his opinions principles there laid down, applicable to the case I was investigating, and so clearly stated that my own labors were at an end, and nothing further remained for me but to acknowledge my obligations and recognize their authority. I believe no treatises or reports are now extant which are at this moment more useful to the profession, or more frequently acknowledged as authority, or which can afford more knowledge and information than these reports. There is not a judge administering the admiralty law, either in this country or in England, who has not profited by the labors of Judge Ware, and gratefully acknowledged the obligations thereby conferred. The debt due from us all to the profession, according to Lord Bacon, was more than paid by Judge Ware. It was not discharged by any depreciated currency, but was paid in full in pure coin, both principal and interest.

"Judge Ware was of marked simplicity of character, and was always actuated by entire singleness of heart and purpose. The kindest and most friendly relations ever existed between him and the members of this bar. His intercourse with us was ever free and informal, never in the least pretentious; and it always was a pleasure to him, to assist us by his advice in relation to his own decisions, as well as to principles of law upon which we desired information; and I have very frequently in this manner received from him most valuable assistance which it would have been extremely difficult, if not impossible, to have procured from any other source. He had no favorites. Every one who appeared in his court, whether young or old, was certain that all stood on an equality in his presence. With courtesy and the greatest patience, he listened to the views which counsel saw fit to present, the manifest purpose of the judge being to obtain light, to aid him in his determination of the cause, without regard to the source whence it was derived. No one ever took part in a trial before the judge, without becoming attracted to him, and feeling the highest respect for him, as well for the kindness of heart ever exhibited to whatever counsel a party might select to advocate his rights, as for his diligent attention, for his acute wisdom and judgment, and the learning and research manifested in his elaborate opinions. Many of the causes brought before a court of admiralty, such as claims for wages, torts, etc., are of small amount, and of such a nature that any protracted delay of judgment therein, is tantamount to a denial of justice. In this class of cases, the court, under the conduct of Judge Ware, always sat 'velis levatis.' Most of these causes were decided upon the conclusion of the arguments, and those which were retained for advisement, were at once examined, and an

opinion prepared and announced in a very few days. The researches I have made do not indicate, that in any admiralty cause presented to him for decision, his opinion was delayed for more than thirty days, and generally it was announced the week succeeding the hearing.

"Judge Ware was alike attentive and diligent in the discharge of his duties as a member of the circuit court for this district, always attending the sessions of that court as long as his health would permit. He frequently presided at jury trials, but his enunciation was not clear and distinct, and his charges were not so fascinating and effective as those of his eminent associate, Mr. Justice Story, but his rulings and instructions were almost invariably sustained when presented for re-examination, and on one occasion I remember, against his own convictions, he having become satisfied that they were erroneous, whilst his associate was of opinion that they were strictly correct, his honesty of purpose leading him to insist on his ultimate opinion and for the reversal of his rulings at nisi prius—and no judge ever strove more firmly to correct what he believed to have been an error committed by himself, than did Judge Ware on this occasion. In another case he could not concur in an opinion prepared by Mr. Justice Story, and although no jurist ever existed whose opinion was, with Judge Ware, of so high authority as that of Judge Story, he felt obliged to prepare a dissenting judgment, which upon appeal to the supreme court received the sanction and approval of that tribunal.

"For some time before his resignation, it was quite manifest to all, that the infirmities of old age were gathering around him. His hearing was so impaired that for a number of years he was under the necessity of taking his seat within the bar with the witnesses in close proximity, that he might understand their testimony. No one was so conscious of his weakness and infirmity as the judge, and I know that his resignation would have been presented at a much earlier day, if he had not, with strict sense of justice, realized, that he had claims upon the public, after expending so many years in its service, which it had no right to expect him to surrender so long as he could attend to the duties of his office. A year or two since, some of you, believing it but a partial recompense for the benefit he had conferred upon the profession, as well as upon the whole mercantile community, endeavored to induce congress to allow Judge Ware the advantages of the retray provisions, which have since been conferred upon the judges of the federal courts. The house of representatives almost unanimously acceded to the proposal, but it was defeated in the senate. This kind-hearted, learned, and good judge, has finished his labors on earth, and it only remains for us, who have been so profited thereby, and who have been so highly favored by his wisdom and learning, to testify our acknowledgment of our great obligations, by the open record in this tribunal, where he so long and so eminently presided, of our testimonial in respect and honor of his memory."

At the close of these remarks, the court adjourned.

Such eloquent tributes, so appropriately paid to the character and labors of the eminent judge, the closing chapter of whose official service has been committed to the reporter for supervision, leave nothing to be added of public interest. But the pen (of one who for many years, as clerk of the circuit court, was associated with Judge Ware) still lingers over the memory of virtues better observed in those daily walks where true character is best exemplified. While the commercial world owes gratitude for his judicial labors, the little circle near by his chambers, could best appreciate the kindness of his nature, and have profited most by the charm of his conversation. Though largely retired from public observation, except when in court, Judge Ware always delighted in a cordial intercourse with those whose official relations presented frequent opportunity for it. To be in companionship with one whose sense of justice was the crowning excellence of his char-

acter, and to listen to the words of one whose genial nature added lustre to the wealth of his learning on almost every subject, was no ordinary privilege. While all properly may have been eager to twine a wreath of laurels for his fresh-made grave, one sprig at least, and that, providentially the last, may well be added by G. F. E.

WOODRUFF, LEWIS B.

[For brief biographical notice, see 30 Fed. Cas. 1403.]

The following proceedings of the bar are reprinted from 13 Blatchf. 535:

The members of the bar in the city of New York met in the United States circuit court room, on Wednesday, September 15th, 1875, in response to a call, of which the following is a copy: "The members of the bar are requested to meet in the United States circuit court room, on Wednesday, the 15th inst., at 2 o'clock P. M., to give expression to their sense of the loss which the profession and the community have suffered in the death of the Honorable Lewis B. Woodruff, circuit judge of the United States: William M. Everts, George Gifford, John E. Burrill, Welcome R. Beebe, Henry E. Davies, Edward H. Owen, Joseph H. Choate, William Stanley, Edmund Randolph Robinson, George T. Curtis, Enoch L. Fancher, Erastus C. Benedict, Francis F. Marbury, George Bliss, Burr W. Griswold, Joseph S. Bosworth, Charles F. Sanford."

Hon. E. C. Benedict nominated as chairman of the meeting, Hon. Samuel Blatchford, judge of the district court of the United States for the southern district of New York. The following additional officers were elected, on motion of George Bliss: Vice-presidents—Charles L. Benedict, Nathaniel Shipman, William J. Wallace, William D. Shipman, Murray Hoffman, Charles P. Daly, Noah Davis, Claudius L. Monell, Charles A. Rapallo, Daniel P. Ingraham. Secretaries—John E. Burrill, Aaron J. Vanderpoel, Charles F. Sanford, Benjamin K. Phelps. Joseph H. Choate, Esq., on behalf of the committee who called the meeting, offered the following resolutions:

"The members of the bar of New York have heard with deep and general sorrow of the death of Mr. Justice Woodruff. Identified with the administration of justice in this community for a period of forty years, his career was a continued progress of ever-increasing honor and power. Entering upon life with every advantage of education, and a mind enriched by the fruits of severe study, he attained, in early manhood, a conspicuous and responsible position, and thenceforth to the end pursued the practice of the law as a science and not as a trade, and did his part always to maintain and uphold it as a dignified and liberal profession. He scouted the low arts that would debase it, and abhorred and denounced every attemptor tendency to prostitute it to unworthy purposes. He had a conscience that never slept, and he followed its light through all the mazes of the law. His laborious and absorbing devotion to the cause of his client was proverbial, and this, with his ample learning and honest and manly character, made him always a leading figure among his brethren, an ornament of the profession, and a most valuable member of society.

"But great as were his merits and virtues at the bar, his rich and varied services to the state and nation for twenty-five years, as an able and upright judge, are now his chief title to reverence and eulogy. His idea of what constitutes a judge was that old-fashioned standard which exacted of him the richest learning, the deepest study, the liveliest conscience, and absolute honesty, and he did his best to live up to it as nearly as human infirmity would permit. In whatever court he sat, the authority of his decisions was powerful with his associates, and recognized by the bar. Serving successively in the court of common pleas, the superior court, and the court of appeals, he did his full share to shape and frame the body of the law as it prevails among us to-day; and his rich and growing experience, and the widely-extended rep-

utation of his ability and learning, attracted to him a large measure of public attention; so that when, upon the reorganization of the circuit court of the United States, a judge was to be found to exercise its vast powers and responsible duties in this great circuit, the general sense of the profession and the community approved the judgment of the president in selecting Judge Woodruff as the proper man. How well the choice was justified the record of his judicial labors in that court for the last six years will testify. In bidding farewell at the grave to this eminent and useful lawyer and judge, the members of the bar desire to put on record their high estimate of his mind and character; to cherish the memory of his life and labors; and to commend to one another and to those who follow them, his excellent example.

"Resolved, that a committee of three be appointed by the chair to present these resolutions to the circuit court and the court of appeals, at the next session, and to ask, on behalf of the bar, the entry thereof upon their minutes.

"Resolved, that a copy of these resolutions be transmitted to the family of the deceased."

Hon. Joseph S. Bosworth then addressed the meeting, as follows: "The members of the bar and of the bench have met on this occasion to express their regard for the virtues, their admiration of the learning and official usefulness, and their sorrow for the loss, of one of the most worthy and eminent of their number. It was my good fortune to have been personally acquainted with our deceased brother for many years, as a neighbor and friend, before he was elevated to the bench; to have been officially associated with him for the term of six years in active judicial service; and to have maintained relations of friendship and intimacy with him since our official association was ended. In his own home he was hospitable and genial. He never seemed happier than when his house was filled with his relatives and friends; and I do not believe that any one of them ever had any occasion, from one act or look of his, to suspect that he thought the visit was unnecessarily protracted, whatever may have been its length. The first office to which he was elected was that of judge of the court of common pleas of this city and county, a court which has always had among its judges men of mark and decided ability. His associates in that court were Mr. Justice Ingraham, an industrious, able, learned, and efficient judge, and the present scholarly and accomplished chief justice of that court, Mr. Charles P. Daly. So worthy did he acquit himself in that position, that his associates expressed extreme regret that he should be disposed, as it drew to a close, to accept a nomination for the office of judge in another court in this city, of co-ordinate jurisdiction. But he did accept such nomination, and was elected a justice of the superior court of this city, in the fall of 1855, for the term of six years. His associates in that court, naming them in the order in which they were elected, were Chief Justices Oakley and Duer, and Judges Bosworth, Hoffman, Pierrepont, White, Moncrief, Slosson, and Robertson. Of these nine associates of his, only three survive—Messrs. Hoffman, Pierrepont, and Bosworth. Of these three associates, only Judge Pierrepont, the present distinguished and efficient attorney-general of the United States, was younger than Judge Woodruff. As a member of the superior court, no judge was more laborious or painstaking than Judge Woodruff. His powers of analysis were great, his logic was compact and convincing, and whether examining the papers on a motion, or the questions of law and of fact in a case tried before him, or a case on appeal, he gave to each the most careful attention and deliberate consideration. He was learned in the law, and although, occasionally, his opinions were disapproved by the court of last resort (a fate which quite as often befell the opinions of each of his associates), they expressed, as all his opinions expressed, the honest conclusions of a well-instructed judgment. He was eminently conscientious. His manner on the bench has been criticised by some as being, at times, austere and harsh. I cannot resist the in-

clination to say one word upon this topic, although conscious of the delicate ground on which I tread. His feelings were kind and strong. He was sincere, earnest, and energetic in his work, whatever it might be and wherever to be performed. This sincerity, earnestness, and energy may, at times, have permeated and given color to his manner and action in disposing of questions arising at the trial, or in banc, requiring prompt and summary decision. But this sincerity, earnestness and energy were, in his case, the marked qualities of a true man and of a fearless, able, and upright judge. They were not—I feel that I can say I know they were not—imbued with any feeling of unkindness to any suitor, his attorney or counsel. It would have been a most painful thought to him that he had ever given just occasion to be suspected of a conscious want of courtesy to any member of the profession in his intercourse with them. After 1861, he was actively engaged as a member of our profession in heavy and important causes, until, at the close of 1867, he was appointed judge of the court of appeals. His opinions in that court attest his industry, great ability, and extensive legal erudition. Of the manner in which he discharged the duties of the office which he held at the time of his death I cannot personally speak. My humble duties did not bring me into the circuit court of the United States for this circuit while he presided as its judge. But the concurring testimony of all whose practice in that court was extensive, is, that his industry, ability, and efficiency were as conspicuous there as in any of the other judicial positions which he had held and adorned. It may be said of our deceased brother, that his life was useful, active, and distinguished. He was eminently useful to his family, to his relatives, to the bench, to the bar, and to the community at large. But his life and his example were not useful to the community merely as the efficient life and instructive example of a learned and laborious lawyer, and of an able, fearless, and upright judge. He believed, and acted on the belief, that humanity has interests and a destiny which do not terminate when the individual man has ceased to breathe. In the relations which he held, in consequence of this faith which was in him, he discharged all the duties growing out of them, worthily and well. He has gone to his rest, after a well spent life, beloved, respected, and honored by all who knew him, and by a goodly company who personally knew him not. The community in which he lived, which he served, and in which he died, will remember, with admiration and gratitude, his life of personal and official purity, and will appreciate the worth of his example, in the influence it may be hoped to exert over those who survive and shall succeed him in their personal, social, and official labors. All, whether relatives or friends, who now or shall hereafter think of our deceased brother, will contemplate a husband, father, citizen, lawyer, judge, and Christian gentleman, possessing a character of finely developed proportions, exercising wisely and well all his good and great qualities in the various relations of his distinguished career. All of us will feel, and will be made happier by the consoling assurance, that, in the world to which our deceased brother has gone, all is well with him now, and forever will be."

George Gifford, Esq., then addressed the meeting, as follows: "After the much that has been said, and well said, respecting the excellencies of our departed judge, I will simply add, in a few words, my testimony to his having possessed in a high degree those characteristics which rendered him eminently qualified for the special duty of administering patent laws. My specialty being practice in patent cases, and his court having original jurisdiction in patent suits, gave me special opportunity of becoming well acquainted with the ability which he manifested in dealing with such cases. I was in the first patent cases which he heard after coming to the bench of the circuit court, and was one of the counsel who argued the last case he heard, which was commenced in the court-room and concluded at his residence, after he was unable to return to the court-room. Judge

Woodruff was richly endowed with properties of mind which were well calculated to insure that distinction in the administration of the patent laws which he so rapidly acquired. He had no prejudices either for or against patents. His sympathies ran neither too high nor too low for inventors. His mind was an even balance in which their merits were correctly weighed. He was free from bias in his deliberations respecting the products of inventive genius. He was patient to hear counsel, and willing to be instructed by the results of their researches. He never allowed his first impressions of a case, however strong or vivid, to lead him to rash conclusions, or to prevent needful examination to insure correctness. He was a learned judge in science and in law. He was an able, theoretical mechanic. He had a natural taste for mechanism, and a great power in discriminating between similarities and differences in machinery. His ability in analyzing mechanism and identifying what was essential therein, was unusually great. His power of drawing a line and discriminating between the essential parts and non-essential parts of an invention was unsurpassed. Appreciating the danger of making mistakes in disposing of the different mechanical questions which often arise, and the disastrous consequences to parties which sometimes follow, it was his habit not to dispose of such questions hastily, but to carefully deliberate, and, sometimes, subject himself to great labor and fatigue to be sure he was right. The recorded decisions of Judge Woodruff, rendered in patent cases, are remarkable for their clearness and soundness, and are very properly much respected as reliable authority in all the federal courts. We were fortunate in having him called to the bench of the court in which he presided at the time of his death, but we have been still more unfortunate in having him so soon removed from us."

Hon. Richard Goodman, of Lenox, Massachusetts, then addressed the meeting, as follows: "Having been notified only a moment or two ago, that I was expected to make any remarks on this occasion, of course I must confine myself almost entirely to such reminiscences of my connection with Judge Woodruff as occur to me at this time. My acquaintance with Judge Woodruff commenced early in my professional career. After leaving the Law School at New Haven, I entered the office of George W. Strong, Esq., then one of the leading lawyers of this city; but finding that he was mainly consulting counsel and had little practice in his office, I looked around for an office where I could learn the practice as it then existed. I was introduced by a fellow-student to Mr. Woodruff, not then a judge. I found him in a building on Broadway, I think, between Cedar and Pine streets, upstairs, occupied in part by the Express newspaper, and his office was on the second story, and below, of all things in contact with a lawyer, was a mock auctioneer's establishment. My surprise was great that any lawyer could occupy an office with the continual sound of that hammer in his ears, and the din of the street coming up through the large rotunda of the building. But Mr. Woodruff then displayed that great concentration of mind and devotedness to his studies that always controlled him, and he was not easily diverted by extraneous objects.¹ We continued there during nearly all the period of my student-ship with him, and from thence removed to 88

¹[Note by Mr. Goodman:] During the utterance of these remarks I remembered an anecdote current among the Judge's relatives, but which I did not relate, as I could not vouch for its authenticity. But after the bar meeting I was assured of its truth by a member of his family, and now, while correcting the stenographer's report, add it as an illustration of Judge Woodruff's absorption in the performance of his duties. Given, like all American judges, to the custom more honored in the breach than the observance, of writing long opinions, he became so engaged in that, to him, pleasurable occupation, one night, at his residence in Twenty-Ninth street, as to become unaware how many of the small hours had passed, and, hearing a noise in the hall, rushed out of his library, expecting to confront a midnight robber, and astonished the housemaid, who had come down to her usual morning work, and was opening the front doors for the day. (R. G.)

Cedar street. An examination at the bar was then very different, as I understand, from the examination at the present time, for my learned Brother Bosworth, with Mr. Ward Hunt, now one of the justices of the supreme court of the United States, and the late President Fillmore, then examined the students, who had already passed through a seven years' course of study. So severe was that examination that, I think, only one in three of the class was at first admitted. On getting through the fire of that examination successfully, I returned to the city of New York, and entered into business for myself. About a year after that, Mr. George Wood—who had recently come from New Jersey, in which state and in the United States courts he had an exalted reputation—was here retained in some very important suits, among others, eminently, the suit of Ogden vs. Astor, in which Mr. Daniel Lord, with whom our associate, Mr. Evarts, was then, or lately had been, a student, was counsel on the other side. When retained in those suits, Mr. Wood, looking for a man who could conduct them successfully and intelligently as attorney and junior counsel, selected Mr. Woodruff; and Mr. Woodruff, finding that those suits would occupy a great portion of the time which he would otherwise bestow upon his general practice, requested me to unite with him, and we formed a partnership about May, 1842. That connection continued with Mr. Woodruff until his elevation to the bench in 1850, and with Mr. Wood until his decease. During that time Mr. Woodruff's business was extensive; and, although he was not then as well known to the bar, or to the community, as afterwards, yet, by those with whom he associated he was especially prized; and it was the connection of Mr. Lord and himself with the case of Ogden vs. Astor which gave the former so high an estimate of Mr. Woodruff's abilities, and caused the promotion of Mr. Woodruff to the bench, for I think that Mr. Lord was the active agent in having his name brought before the nominating convention. Mr. Woodruff, during his professional career, especially during my connection with him, was that dangerous man, the man of one book. His library was select, but, until he became a judge, was not extensive, the main elements in it being 'Gould's Lectures,' in six volumes, copied by himself; and, whenever he had occasion to refer to authorities, those lectures were his principal assistance. But, although he was not a reading man, not a student, not a literary man, in the ordinary phrase, as expressed by us, either in law or in literature, yet there were few men so well posted in all the advanced theories on whatever subject might be circulating through the community. He was a troublesome man to discuss with, even when you were very well advanced in what you were talking about; and, whether it was a question of table-tipping or a question of science in any shape, or a question arising in the courts, or in literature, he always seemed to have thought much on the subject, to have great acquaintance with it, and to be well able to discuss it in all its elements. In addition to that, Mr. Woodruff, from my earliest connection with him—and, as I have understood, long prior to that—appeared a man who always had his principles fixed, and never swerved from them. It is a very easy thing for a man to say he has fixed principles, but it is a very difficult thing, in the midst of business or temptations—and they come thick and fast upon the lawyer in active practice—it is a very difficult thing to carry out those principles on all occasions. When the late Edward Kellogg, of Brooklyn, (so well known for his original theories on banking and finance), at the time when there was an excessive speculation in real estate, first employed Mr. Woodruff, who was then just commencing practice and anxious for employment, he came to him and said, 'I have a large real estate business; I want your assistance, but I don't think I can afford to pay you five dollars for every deed you draw.' Mr. Woodruff's reply to him was—'Sir, I shall be very happy to have your business, but I cannot underbid my professional brethren. I understand the charge at the bar is five dollars for every deed drawn, and whatever business of that kind you bring me, sir,

that will be my charge.' Mr. Kellogg afterwards became his devoted friend as well as client, and Mr. Woodruff received from him and his friends a large amount of business. On another occasion a high official from Washington came on, post haste, on Saturday, to employ Mr. Woodruff. I think he had some acquaintance with him during their collegiate course. He arrived on Saturday night. He said his business was urgent, and requested an interview with Mr. Woodruff on the succeeding Sunday. Mr. Woodruff courteously but firmly responded, 'Sir, aside from my conscientious scruples on the subject, I devote that day to my family. I will attend to your business on Monday, but not to-morrow.' The applicant, although at first rather rebuffed, received the rejection courteously, came on Monday, the business was done, and both parties, I believe, were entirely satisfied. And that was the kind of man that Judge Woodruff was from beginning to end—a man of firm, fixed principles, which he carried out without regard to cost or inconvenience to himself. And Mr. Woodruff, although, I am happy to say, a man who, of late years, has lived comfortably, somewhat in affluence—though certainly not arising from the salary received from his office during the last six years—yet, during his long course of professional life, he never seemed to regard the amount of his fees as anything compared to the business to be done, to the principles which he was to carry out, and to the success of his client. It made no difference to him whether his client was a poor man or a rich man; the only point was the success of the suit in which he was engaged. He spent as much time and engaged in as laborious devotion to his business in the little matters for which he received a limited amount, as he did upon those in which he received a larger sum. And I know it was often a laughing remark of our associate, Mr. Wood, that Mr. Woodruff seemed to spend a great deal of time in his office elucidating subjects with clients who were boring him, which he (Mr. Wood) thought beneath Mr. Woodruff's attention. It is said—and I have heard that remark before to-day—that Judge Woodruff, upon the bench, was somewhat austere. I have been absent from the bar so long that it has not come under my personal observation. With me there was never any austerity. During my long intercourse with him, he always treated me as a younger brother, and I found as kind a care in his house, as much fraternal affection from him, as much assistance whenever required, as I could have had from any devoted relative. But, if there was any austerity, it arose, in a great measure, if not entirely, from the earnestness of his nature. Within my recollection, there was a time when there was more cause than now, even, for apprehension on the part of lawyers, and austerity upon the part of judges, on account of young men coming to the bar unprepared, leaping over the barrier without adequate examination, and threatening to fill our courts with ignorance. There have been two evils under which we have been suffering—the election of judges, and the admission of lawyers without proper examination; and I think we have found out that the latter is the greater, as without a learned bar we cannot have honest and capable judges; and I have no doubt, that a man like Judge Woodruff, well versed in the law, armed with the full panoply of science, when on the bench he met gentlemen coming before him, as they had been accustomed to come in some courts, for the purpose of having orders corrected, or papers prepared by the judge, would allow his impatience to exceed its bounds, and treat those suitors in a different light from what he would if they had presented their cases as good lawyers should. But to my knowledge, although Judge Woodruff may, in the discharge of his duties, have had an earnestness which perhaps looked to outsiders like austerity, yet beneath that there was always a great kindness of disposition; and those who, as Judge Bosworth has said, have shared the hospitality of his house and become cognizant of the under-current of his nature, have never failed to recognize the noble qualities of the man. At the time referred to by Judge Bosworth, Mr. Woodruff lived in Nineteenth street, before he moved to his

late residence in Twenty-Ninth street, where, united to a lady accomplished in all particulars, and with mental characteristics corresponding to his own, with an interesting family, with a large circle of friends, by marriage and by relationship, his house was always filled, he was the centre of an enlarged hospitality, and no man ever delighted to unbend, and to make all about him happy, more than our late associate. I look back to the time when I was in the habit of being in his house, sometimes for days at a time—I look back to those as the happiest days of my life passed out of my own family. And I am always willing to respond to and endorse any remarks such as have been made by our brother Bosworth, as to the geniality and hospitality of Judge Woodruff. I have, perhaps, exceeded the bounds to which I ought to have been confined on this occasion. I only intended to say a few words here with reference to the gentleman who has been so long associated with us, so long known to the whole community, who goes down to his rest as an upright judge. His career as a lawyer has been that of an able man; his career as an individual has been that of an honest man. I never, in all my reading, found but two men, and those living at a great distance from each other, as to time, who were willing to say, as they departed from this life, 'I am content. I have enjoyed to the full all that life affords, and I am ready for another sphere. I have had enough.' Judge Woodruff would hardly have said that. He would rather have said that he would like to remain longer upon the bench, to linger a little longer among his life associates. He would undoubtedly have liked to continue to dispense justice some years longer, so far as his health allowed him to do so, but at the same time, as we heard yesterday, he was a man of that character that when the time came that he saw his physical usefulness was gone, he was willing to give up and say—would not say, perhaps, but would feel—'I have done my part in this world as an honest man, as a good lawyer, as an upright judge, and I am not afraid to meet the greater Judge above.'

Hon. William M. Everts then addressed the meeting, as follows:

"Our profession has not unfrequently been called together at the close of the vacation, before renewing our service in the courts and to the community, to commemorate the loss of some distinguished lawyer or eminent judge. I am sure all of us can recall some suitable instances of this experience. Sometimes we have been criticised for assuming that there was matter of public interest in these occasions, and that our profession was distinguishable, in this regard, from other useful and honorable employments. Certainly no such observation can justly be made when the loss that we deplore is, even in a greater degree, the loss of the community, or when the lawyer whose career we celebrate was an eminent magistrate and judge. We cannot but feel that, though Judge Woodruff's life, public and eminent as it was in the general esteem, was wholly occupied in professional service, at the bar and on the bench, yet among his contemporaries who have pursued the more active or brilliant paths of political employment, few can be said, either in fact or in the recognition of the community, to have been more distinctly or more usefully public servants than he. His life was, indeed, useful, distinguished, prosperous, public, and in all that makes up the sum of human experience, whether personal, domestic, civic, or official, the full measure of prosperity in all marked his career. He gained no inconsiderable distinction at the bar, and, had he adhered to its employments, we cannot doubt, he would have added to his powers and his repute as an advocate and a counsellor. Yet there is no doubt that his preferences, no doubt that the special aptitudes of his intellect and moral character, fitted him, more especially, for that highest and most honorable employment among men, known in civilized society, that of a judge. And how fortunate he was in the adequate preparation to assume, quite early in life, and to adhere, with but slight interruptions, to the end, to this course of judicial service! Well educated, brought here at an age suitable to bear the more strenuous labors of the bar, he had

the good fortune to be associated, thus early in his professional career, with a lawyer than whom, I think I may safely say, our experience or our recollections do not recall any one possessing greater natural powers, or more completely disciplined in all the faculties of a great forensic reasoner—I mean Mr. George Wood. And brought early into such a relation, he was by that connection brought into forensic opposition to eminent lawyers older than himself, men on the same level with Mr. Wood. When he had attracted the approval of the great leaders in the profession, by the display of his qualities of eminent fitness for the public service on the bench, he was, readily and by the consent of all, raised to that position. He first took a seat upon the bench, then and now the most ancient and venerable in our judicial history, a bench having the jurisdiction of the common law, and called by one of the favorite names of the common law, the 'Court of Common Pleas.' His next judicial service was as a judge of the most celebrated commercial court, perhaps, that we have ever had in this country, the superior court of the city of New York. He there filled out, by a somewhat new experience of judicial service, his preparation for the highest station in the political service of the state, a place in the court of appeals. For it seemed as if he was so well fitted to serve us as a judge, that the chances or derangements of courts or of politics were not long to deprive the community of his services. In the court of appeals, Judge Woodruff completed the round of judicial honors of the state, and by this varied experience was fully fitted for new judicial station. And when, by the defeat of his election to the court of appeals, he was thrown out of political place, and there came up a new court of great importance and dignity—the federal circuit judgeship—to be filled, by the general consent of the profession, he first occupied that eminent seat which he has just left. When he came to this new office, there was some feeling that his professional course had not made him specially familiar with the subject of federal jurisprudence, with admiralty or patent law, and not much, if at all, with revenue law. But, sir, a man as well instructed in the common law as Judge Woodruff was, by his experience at the bar and on the bench, has the best and only necessary preparation for any and all the special departments of jurisprudence. Those who have had the most experience in the round of those special employments and special jurisdictions best understand that the common law is wider and deeper, more various and more exacting in its demands and its discipline, than any specialty can ever be. And he who has proved himself to possess the great powers of legal reason, and the great diversity for judicial faculty, that the common law exacts, may well encounter untried special jurisdictions without fear. But Judge Woodruff had some personal fitness for each of these specialties that every judge does not possess. He had a very thorough and profound knowledge of mathematics, which served him in the admiralty jurisdiction and in the patent jurisdiction. He had a very thorough knowledge of the philosophies of the natural sciences, and, if he had no particular or special qualities that should fit him for the other departments of jurisprudence, the force of his intellect was adequate for them all.

"And, yet, all of us that have known Judge Woodruff at the bar and on the bench have felt, and all of us have exhibited this feeling to-day, that his moral qualities as a judge fitly expanded and dignified a great judicial character. That he sought distinction in the profession, and desired the promotions of the bench, is an honor to him, as it would be to any one; but no man ever found him seeking elevation by any unworthy arts, or pursuing competition with his rivals by any secret or dubious means. When there was an office for which himself and his friends might justly think him suitable, he was ready to avow his disposition to accept the office, but not to run after it. To that limit of desire he always adhered. He regarded the career of human life, not as a game, but as the discharge of a duty, and the constant observance of duty through life as the highest and

best success permitted to man. He relished thoroughly the full meaning of that noble proposition of the sacred Scriptures, 'Now, if a man also strive for masteries, yet is he not crowned unless his strife be lawful.' "

The chair announced that he had received from a gentleman who was for several years an associate with Judge Woodruff, upon the bench, who was unable to be present at the meeting, a communication which, under the circumstances of the case, and in view of Judge Shipman's former relations to Judge Woodruff, it had been deemed not improper should be read as a portion of the proceedings of the meeting, and be published as a part thereof. The resolutions having been unanimously adopted, on motion of Robert D. Benedict, Esq., it was voted that the following letter of Hon. William D. Shipman be incorporated in the proceedings of the meeting:

"New York, Sept. 14th, 1875. Hon. Samuel Blatchford.—Dear Sir: Other and imperative engagements will prevent my being present at the meeting of the bar of this city, to be held to-morrow, to do honor to the memory of the late Hon. Lewis B. Woodruff, who, for nearly six years, has occupied the high position of United States circuit judge for the second circuit; but I am unwilling to allow the occasion to pass without a brief expression of my sense of the great loss which the bar, the bench, and the public have sustained by his death. My personal acquaintance with Judge Woodruff commenced at the date of his appointment to the office which he last held, though I had long known him by reputation, through his career at the bar, and on the bench of the common pleas, the superior court, and the court of appeals. I knew he was an able lawyer, and an upright judge of large experience and unblemished character. But early in 1870 I was brought into close personal and official relations with him, which continued more than three years, and gave me constant opportunity of observing his character as a man and judge. I soon came to admire his zealous and conscientious devotion to his duties, the strength of his understanding, and the never-absent labor and energy with which he discharged the constantly pressing and heavy responsibilities of his great office. No toil or self-denial, however severe or exacting, for a moment deterred him from a thorough examination of every case which was submitted to his decision. He fully appreciated his position, and well understood the functions of a judge to be, to administer justice according to settled rules. This was the guide to his judicial conduct, and in this he magnified his office. He had, indeed, a high sense of equity, and was always delighted when a sound conclusion was reached that would operate beneficially in the particular case before him. But he would never weaken established rules, nor unsettle the foundation of principles, in order to relieve the exceptional hardship of an isolated cause. He knew too well that both law and equity, to be of any value to an enlightened community, must be administered with steady uniformity, and to this end he spared neither time nor toil in the investigations which preceded his judgments, and in the preparation of his opinions which announced them. To this duty he brought a vigorous intellect, an enlightened reason, and a firm will. To say that he sometimes erred, is merely to pronounce him human. Judge Woodruff was a man of massive and hardy nature. He was not one to reverence overmuch the lighter graces and ornamental accomplishments of a fine gentleman. But no man ever gave a higher regard or a heartier recognition to the solid virtues which constitute the essential riches of character. Within his strong and rugged frame beat a warm, gentle, and manly heart, whose sympathies were limited by no partisan or sectarian lines. He was open, frank, and generous. All who knew him will regret his departure, and mourn the loss of a just man, and an able and incorruptible magistrate. Yours, very respectfully, Wm. D. Shipman."

The chair appointed as the committee to present the resolutions to the court of appeals and the circuit court, Messrs. Henry E. Davies, George Bliss, and Joseph H. Choate.

BIOGRAPHICAL NOTES

OF THE

FEDERAL JUDGES.

INCLUDING A BRIEF ACCOUNT OF THE PUBLIC CAREER OF ALL OF THE FEDERAL JUDGES APPOINTED PRIOR TO THE PUBLICATION OF THE FEDERAL CASES, JANUARY 25, 1894. THESE NOTES HAVE BEEN COMPILED FROM ORIGINAL HISTORICAL RESEARCHES, AND AN EXTENSIVE CORRESPONDENCE WITH THE JUDGES, RELATIVES OF DECEASED JUDGES, CLERKS OF THE UNITED STATES COURTS, AND MANY OTHERS.

ACHESON, MARCUS W. Born in Pennsylvania. Received a collegiate education. Admitted to the bar and practiced in Pittsburgh, Pa. United States district judge for the western district of Pennsylvania, commissioned Jan. 14, 1880. United States circuit judge for the third circuit, commissioned Feb. 9, 1891.

ADAMS, GEORGE. Born in Virginia, in August, 1784. Educated in his native state. United States district judge for the district of Mississippi. Commissioned Jan. 20, 1836. Resigned in 1839. Died at Jackson, Miss., Aug. 14, 1844.

ALDRICH, EDGAR. Born at Pittsburg, N. H., Feb. 5, 1843. At the age of 14 he entered the academy at Colebrook, and afterwards commenced the study of law in the office of Ira A. Ramsey. Subsequently entered the law department of the University of Michigan, graduating in March, 1868, at the age of 20. Returning to Colebrook, he was admitted to the bar of Coös county, and continued in practice alone until Jan. 1, 1882, when he formed a partnership with William H. Shurtleff, under the firm name of Aldrich & Shurtleff, which continued four years. Later he was similarly associated with James I. Parsons, and at Littleton with the Honorable George A. Bingham and others. Was twice appointed solicitor for Coös county. Was a member of the state legislature in 1884, and speaker of the house. United States district judge for district of New Hampshire, commissioned Feb. 25, 1891. M. A. Dartmouth, 1891.

ALLEN, WILLIAM J. Born in Wilson county, Tenn., June 9, 1829. Brought by his parents to Illinois the following year. Studied law at the Louisville, Ky., Law School. Admitted to the bar in 1850. Member of the legislature 1855. U. S. district attorney 1855 to 1859. Circuit judge 1859 to 1861. Representative in congress 1862 to 1865. Member of the Illinois constitutional convention of 1862 and 1870. United States district judge for the southern district of Illinois, commissioned April 18, 1887.

BAKER, JOHN H. Born in Parma township, Monroe county, New York, Feb. 28, 1832. Educated at Wesleyan University, Delaware, Ohio. Studied law, and commenced practice in Goshen, Ind., in 1857. State senator (Ind.) 1862. Representative in congress of United States, 1874. Was appointed a member of the committee on elections. Again elected to congress in 1876-1878. Was member of committee on appropriations. United States district judge for the district of Indiana, commissioned March 29, 1892.

BALDWIN, ALEXANDER W. Born in Alabama, 1835. Studied law. Settled in Virginia City, Nev. United States district judge for the district of Nevada, commissioned March 11, 1865. Was killed in a railway accident at Alameda, Cal., Nov. 15, 1869.

BALDWIN, HENRY. Born in New Haven, Conn., Jan. 14, 1780. Was graduated at Yale in 1797. Removed to Pittsburgh, Pa. Member of congress 1817-1822. Associ-

ate justice of the United States supreme court. Assigned to the third circuit, commissioned Feb. 11, 1830. LL. D., Yale, 1830. Author of "A General View of the Constitution." Died in Philadelphia, April 21, 1844.

BALLARD, BLAND. Practiced law in Louisville, Ky. United States district judge for the district of Kentucky, commissioned Oct. 16, 1861. Died July 29, 1879.

BARBOUR, PHILIP PENDLETON. Born in Orange county, Va., May 25, 1783. Studied law at William and Mary. Member of legislature (Va.) 1812-1814, and of congress 1814. Speaker of the house of representatives 1821. Re-elected to congress in 1827. President of the Virginia constitutional convention in 1829. Resigned his seat in congress May 31, 1830. United States district judge for the eastern district of Virginia, commissioned Oct. 8, 1830. Associate justice of the United States supreme court, commissioned March 15, 1836. Candidate for the Democratic nomination for vice president in 1832. Died in Washington, D. C., Feb. 24, 1841.

BARNES, DAVID LEONARD. Born in Scituate, Mass., Jan. 28, 1760. After graduating at Harvard commenced the practice of law at Taunton, Mass., removing soon after to Providence, R. I. Was a member of the legislature. United States district judge for district of Rhode Island, commissioned April 30, 1801. Died at Providence, Nov. 3, 1812.

BARR, JOHN W. Born in Versailles, Ky., Dec. 17, 1826. Educated at private schools. Was graduated from the law department of the Transylvania University in 1847. Began practice in Versailles. Removed to Louisville. United States district judge for the district of Kentucky, commissioned April 16, 1880. He organized the present board of sinking fund for the city of Louisville, and served as president of the board for several years after its organization.

BASSETT, RICHARD. Born in Delaware. Member of congress 1787. Member of the federal constitutional convention 1787. United States senator 1789-1793. Presidential elector (Federalist) in 1797. Governor of Delaware 1798-1801. United States circuit judge for the third circuit, commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. Died in September, 1815.

BAXTER, JOHN. Born in Rutherford county, N. C., March 5, 1819, and educated there. Licensed to practice law in 1841. Member of legislature 1842, 1846, and 1852-1857. Presidential elector 1844 and 1848. Removed to Knoxville, Tenn., 1857. Member of state constitutional convention 1870. United States circuit judge for the sixth cir-

cuit, commissioned Dec. 13, 1877. Died at Hot Springs, Ark., April 2, 1886.

BEATTY, JAMES H. Born at Lancaster, and educated at Delaware, Ohio. First lieutenant of the 4th Iowa battery during the last half of the civil war. Commenced the practice of the law at Lexington, Mo., Sept., 1865. Was register in bankruptcy until removal to Salt Lake City in 1872, where he remained until his removal to Hailey, Idaho, in 1882. Chief justice of Idaho, 1889, removing to Boise City in 1890. Was a member of the territorial legislature and constitutional convention of Idaho, and assistant United States attorney in Utah. United States district judge for the district of Idaho, commissioned March 7, 1891.

BEDFORD, JR., GUNNING. Born in Philadelphia, Pa., 1747. Was graduated at Princeton 1771. Aide de camp to Washington. Member of legislature, (Del.) Member of congress in 1783-1786. Member of the federal constitutional convention 1787. Presidential elector in 1789 and 1793. Attorney general of Delaware before 1789. United States district judge for the district of Delaware, commissioned Sept. 26, 1789. Died March 30, 1812.

BEE, THOMAS. Born in South Carolina 1729. Member and speaker of the colonial assembly and privy council. Member of committee of safety. In the continental congress 1780-1782. Lieutenant governor of South Carolina. United States district judge for the district of South Carolina, commissioned June 14, 1790. Ceased to be district judge in 1812. Published "Reports of the District Court of South Carolina" 1810.

BELLINGER, CHARLES B. Born at Maquon, Knox county, Ill., Nov. 21, 1839. Removed to Oregon with his parents in 1847. Admitted to the bar in 1863. Member of the Oregon legislature in 1868. Served in the Modoc Indian war in 1873. Clerk of the supreme court of Oregon, 1875-1878. Judge of state circuit court of Oregon, 1878-1880. Lecturer on equity, Law School, University of Oregon, since 1889. United States district judge for the district of Oregon, commissioned April 15, 1893.

BENEDICT, CHARLES L. A resident of Brooklyn, N. Y. Studied law and practiced there. Member of legislature 1868. The first United States district judge for the eastern district of New York, commissioned March 9, 1865. Offered a position on the bench of the New York court of appeals in 1881.

BENSON, EGBERT. Born in New York city, June 21, 1746. Was graduated at Kings College (Columbia) in 1765. Member of Revolutionary committee of safety. Attorney general of New York 1777-1789. Member of legislature 1777. Member of congress 1784-

1788, 1789-1793, and 1813-1815. Judge of the supreme court of New York 1794. United States circuit judge for the second circuit, commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. Regent of New York University 1789, 1802. LL. D., Harvard, 1808; Dartmouth, 1811. President of the New York Historical Society. Died in Jamaica, L. I., Aug. 24, 1833.

BETTS, SAMUEL ROSSITER. Born in Richmond, Berkshire county, Mass., 1787. Was graduated at Williams in 1806. Studied law in Hudson, N. Y. Served in the war of 1812, and was appointed judge advocate by Gov. Tompkins of New York. Elected to congress 1815. District attorney for Orange county, N. Y. United States district judge for the southern district of New York, commissioned Dec. 21, 1826. Retired in May, 1867. During his first 20 years on the bench it is said that no appeal was taken from any of his decisions. LL. D., Williams, 1830. Published a work on admiralty in 1838. He exerted a powerful influence upon the development of American admiralty law. Many of his decisions are now published for the first time in this work. He died in New Haven, Conn., Nov. 3, 1868.

BIGGS, ASA. Born in Williamstown, Martin county, N. C., Feb. 4, 1811. Member of the North Carolina constitutional convention of 1835; of legislature 1840-1845; of congress in 1845. One of the commissioners appointed in 1850 to prepare the Revised Code of North Carolina. Elected United States senator in 1854. Resigned in 1858. United States district judge for the district of North Carolina, commissioned May 3, 1858. Resigned April, 1861. Elected to the convention which passed the secession ordinance in May, 1861. District judge, Confederate States of America, 1861-1865. Resumed practice after the war. Died in Norfolk, Va., March 6, 1878.

BILLINGS, EDWARD COKE. Born at Hatfield, Mass., Dec. 3, 1829. Graduated at Yale in 1856. Practiced law in New York city until 1863, when he removed to New Orleans. United States district judge of the district of Louisiana, commissioned Feb. 10, 1876. LL. D., Yale, 1890. Died Dec. 2, 1893, in New Haven, Conn.

BLAIR, JOHN. Born in Williamsburg, Va., 1732. Was graduated from William and Mary College. Studied law at the Temple, London. Member of legislature 1765. Signed the nonimportation agreement in 1769. Member of committee on provisional government and of the council 1776. Judge of the Virginia court of appeals 1777, (afterwards chief justice.) Judge of the high court of chancery in 1780. Member of the federal constitutional convention in 1787, and of the Virginia convention to ratify the federal

constitution. Associate justice of the United States supreme court, commissioned Sept. 30, 1789. Resigned Jan. 27, 1796. Died in Williamsburg, Va., Aug. 31, 1800.

BLAND, THEODORICK. Born in 1777. Judge of the county court of Baltimore. United States district judge for the district of Maryland, commissioned Nov. 23, 1819. Ceased to be district judge, June 5, 1824. Chancellor of Maryland for 22 years. Died at Annapolis, Md., Nov. 16, 1846. Published Maryland Chancery Reports, (1826-1841.)

BLATCHFORD, SAMUEL. Born in New York, March 9, 1820. Was graduated at Columbia in 1837. Private secretary to Gov. Seward 1839-1841. Admitted to the bar in 1842. Settled in Auburn as law partner of William H. Seward and Christopher Morgan in 1845. Removed to New York city 1854. Declined a place on the state supreme bench in 1855. United States district judge for the southern district of New York, commissioned May 3, 1867. United States circuit judge for the second circuit, commissioned March 4, 1878. Associate justice of the United States supreme court, commissioned March 22, 1882. Assigned to the second circuit. Died July 7, 1893. Published Blatchford's Circuit Court Reports, (second circuit.) Trustee of Columbia since 1867.

BLODGETT, HENRY WILLIAM. Born in Amherst, Mass., July 21, 1821. Removed to Illinois about 1831. Studied law in Chicago with Jonathan Y. Scammon and Norman B. Judd. Admitted to the bar 1845. Practiced in Waukegan, Ill. Member of legislature 1852, (Free-Soil.) Counsel of the Chicago & Northwestern Railroad 1855. President and attorney of the Chicago & Milwaukee Railroad. United States district judge for the northern district of Illinois, commissioned Jan. 11, 1870. Retired Dec. 5, 1892, to become counsel before Bering Sea Arbitration Commission at Paris 1892 and 1895.

BOARMAN, ALECK. Born in Yazoo City, Miss., Dec. 10, 1839. Educated at the Kentucky Military Institute. Studied law. Officer in the Confederate army. Began practice in 1866. Settled in Louisiana. Member of the forty-second congress. Judge of the state district court. United States district judge for the western district of Louisiana, commissioned May 13, 1881. Resides at Shreveport.

BOICE, HENRY. United States district judge for the western district of Louisiana, commissioned May 9, 1849. Ceased to be district judge, Jan. 21, 1861. Died about 1866.

BOND, HUGH LENNOX. Born in Baltimore, Md., Dec. 16, 1828. Removed to New York city. Was graduated from the University of the City of New York in 1848. Studied law with Dobbin & Talbot, of Baltimore. Ad-

mitted to the bar in 1851. Judge of the Baltimore criminal court 1860-1868. United States circuit judge for the fourth circuit, commissioned July 13, 1870. Died Oct. 24, 1893. Among the noted trials in which Judge Bond presided were the Ku Klux Cases, in South Carolina, the Virginia Coupon Cases, and the Navassa Murder Cases.

BOURN, BENJAMIN. Born in Bristol, R. I., Sept. 9, 1755. Was graduated at Harvard 1775. Studied law and practiced at Providence, R. I. Quartermaster of the second Rhode Island regiment in 1776. Member of congress 1790. Resigned 1796. United States district judge for the district of Rhode Island, commissioned Oct. 13, 1796. United States circuit judge for the first circuit, commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. Died Sept. 17, 1808.

BOYLE, JOHN. Born in Botecourt county, Va., Oct. 28, 1774. Educated in Kentucky. Began practice in Lancaster 1797. Member of congress 1803-1809. Declined the governorship of Illinois territory. Judge of the Kentucky court of appeals. Chief justice of that court 1810-1826. United States district judge for the district of Kentucky, commissioned Oct. 20, 1826. Died Jan. 28, 1834.

BOYNTON, THOMAS JEFFERSON. Born in Amherst township, Lorain county, Ohio, Aug. 31, 1838. Educated in the common schools of his native place. Studied law with Hon. Philemon Bliss, and began practice at St. Joseph, Mo., in 1858. Appointed United States district attorney for the southern district of Florida in 1861. United States district judge for the southern district of Florida, commissioned Oct. 19, 1863. Resigned in 1870. Died in New York City in May, 1871.

BRADFORD, EDWARD G. Born in Maryland. Settled in Wilmington, Del. Member of state legislature in 1849. Deputy attorney general for several years. Appointed United States district attorney for Delaware in 1861. Resigned in 1866. United States district judge for the district of Delaware, commissioned Dec. 12, 1871. Died Jan. 16, 1884.

BRADLEY, JOSEPH P. Born in Berne, Albany county, N. Y., March 14, 1813. Was graduated at Rutgers in 1836. Studied law with Arthur Gifford, Esq., of Newark, N. J. Admitted to the bar 1839. Practiced in Newark 1840-1870. Argued the New Jersey Bridge Case in the United States supreme court in 1860. Candidate for congress 1862. Presidential elector 1868. Lecturer in Rutgers College on political economy and constitutional law. LL. D., Lafayette, 1859. Associate justice of the United States supreme court, commissioned April 4, 1870. Assigned to the third circuit, Dec. 21, 1880. Member of the electoral commission in 1877. He married in 1844 Miss Mary Hornblower,

daughter of the chief justice of New Jersey. He died Jan. 22, 1892.

BRAWLEY, WILLIAM H. Born in South Carolina, in 1841. Was graduated at the South Carolina College in 1860. Attended lectures at the College de France, in Paris, 1865. Admitted to the bar in 1866. Was solicitor (prosecuting attorney) for the sixth circuit for two terms, resigning in 1874. Was a member of the state legislature for eight years. Was a member of the 52d and 53d congresses of United States. Resigned upon being appointed United States district judge for the district of South Carolina, commissioned Jan. 18, 1894.

BREARLY, DAVID. Born near Trenton, N. J., June 11, 1745. Practiced law in Allentown, N. J. He was once arrested for treason in the excitement of the ante-Revolutionary troubles. Member of the first constitutional convention of New Jersey. Lieutenant in a New Jersey regiment in the Revolution. Chief justice of New Jersey 1779-1789. Member of the federal constitutional convention 1787. President of the New Jersey convention which ratified the federal constitution 1788. Presidential elector 1789. United States district judge for the district of New Jersey, commissioned Sept. 26, 1789. One of the compilers of the Episcopal prayer book in 1785. Died in Trenton, Aug. 16, 1790.

BREWER, DAVID JOSIAH. Born in Smyrna, Asia Minor, June 20, 1837. Studied for a time at Wesleyan. Graduated from Yale in 1856. Studied law for a time with his uncle, David Dudley Field, of New York city. Was graduated from the Albany Law School, and admitted to the New York bar in 1858. Removed to the west the same year, and settled in Leavenworth, Kan. United States commissioner 1861-1864. Judge of probate and of Leavenworth county criminal court 1863-1865. Judge of first judicial district of the state 1865-1869. County attorney 1869-1871. Judge of the Kansas supreme court 1871-1884. United States circuit judge for the eighth circuit, commissioned March 31, 1884. Associate justice of the United States supreme court, commissioned Dec. 20, 1889. LL. D., Iowa College, 1894; Washburn, 1890; Yale, 1891.

BRISTOL, WILLIAM. Born in Hamden, Conn., 1779. Was graduated at Yale 1798. Admitted to the bar and practiced in New Haven, Conn. Was at one time mayor of New Haven. Was United States district attorney about 1812. Judge of the state superior court 1819-1826. United States district judge for the district of Connecticut, commissioned May 22, 1826. Died in New Haven, March 7, 1836.

BROCKENBROUGH, JOHN WHITE. Born in Virginia, Dec. 23, 1806. United States district judge for the western district of Vir-

ginia, commissioned Jan. 14, 1846. Resigned June, 1861, on the secession of Virginia. Was elected a member of peace congress by the legislature. Was a member of the Confederate congress. For many years was professor at Washington and Lee University. Also conducted a law school at Lexington, Va. Died Feb. 20, 1877.

BRONSON, ISAAC H. Born in Rutland, N. Y., Oct. 16, 1802. Admitted to the bar in 1822. Practiced in Watertown, N. Y. Member of congress 1836; chairman of committee on territories. Judge of territorial court of Florida 1838. United States district judge for the district of Florida, commissioned Aug. 8, 1846. United States district judge for the northern district of Florida, commissioned Feb. 23, 1847. Died at Palatka, Fla., Aug. 13, 1855.

BROOKS, George W. Born in Elizabeth City, N. C., March 16, 1821. Educated at the high school of Gates county. At the age of 21 was appointed clerk of the superior court of Pasquotank county. While in that office he read law under the direction of Charles R. Kenney. Admitted to the bar in 1845. Represented his county in the house of commons at the session of 1852-1853. In 1861 he opposed the secession of his state, and during the civil war was a prominent Unionist. United States district judge of the district of North Carolina, commissioned Aug. 19, 1865. He was a member of the reconstruction convention in 1866. Died January 6, 1882, at his home in Elizabeth City.

BROWN, ADDISON. Born at West Newbury, Mass., Feb. 21, 1830. Was graduated at Harvard in 1852, and from the Harvard Law School in 1854. Removed to New York city. Admitted to the bar 1855. United States district judge for the southern district of New York, commissioned June 2, 1881.

BROWN, HENRY BILLINGS. Born at South Lee, Berkshire county, Mass., March 2, 1836. Was graduated at Yale in 1856. Admitted to the bar in Detroit, Mich., 1860. United States deputy marshal 1861. United States district attorney 1863-1868. Circuit judge for Wayne county, Mich., 1868. United States district judge for the eastern district of Michigan, commissioned March 19, 1875. Associate justice of the United States supreme court, commissioned Dec. 31, 1890. Compiler of Brown's Admiralty Reports. LL. D., University of Michigan, 1887; Yale, 1891. Lecturer on admiralty law in the law department of the University of Michigan, 1888.

BROWN, MORGAN W. Native of Tennessee. Was editor of one of the leading papers at Nashville. Is brother of W. L. Brown, judge of supreme court. United States district judge for the eastern and western districts of Tennessee, commissioned Jan. 3, 1834. United

States judge for the eastern, middle, and western districts of Tennessee, commissioned Jan. 18, 1839. Ceased to be district judge, March 6, 1853.

BRUCE, JOHN. Born in Sterlingshire, Scotland, Feb. 16, 1832. Removed to Wayne county, Ohio, 1840. Was graduated from Franklin College, Ohio, in 1854. Removed to Iowa. Admitted to the bar 1856. Practiced at Keokuk as the partner of Hon. Geo. W. McCrary, later a circuit judge. Brevet brigadier general in the Union army. Settled in Alabama as a cotton planter. Member of legislature 1872 and 1874. United States district judge for the district of Alabama, commissioned Feb. 27, 1875.

BRYAN, GEORGE S. Born at Charleston, S. C., May 21, 1809. Educated in his native city. Was lieutenant of the Volunteer Troops of the Florida war of 1836. Trustee of public schools of Charleston, high school of Charleston, Charleston College, Charleston Library, and Carolina Art Association. United States district judge for the district of South Carolina, commissioned March 12, 1866. Resigned Sept. 5, 1886. Died at Flat Rock, S. C., Sept. 28, 1895.

BRYANT, DAVID E. Born in La Rue county, Ky., Oct. 19, 1849. Moved with his parents to Grayson county, Tex., in Jan., 1853. Was graduated from Trinity College, N. C., in June, 1871. Returning to Grayson county, was admitted to the bar, and commenced the practice of law in Oct., 1873. United States district judge for the eastern district of Texas, commissioned May 23, 1890.

BUFFINGTON, JOSEPH. Born at Kittanning, Armstrong county, Pa., Sept. 5, 1855. Entered Trinity College, Hartford, Conn., in 1871, and graduated in 1875. Studied law in his native town, and was admitted to the bar in 1878. United States district judge for the western district of Pennsylvania, commissioned Feb. 23, 1892.

BUGBEE, JOHN S. Born May 31, 1840, at Sackville, N. B. Removed in early life to Boston. Admitted to practice in the superior court of Massachusetts, July 19, 1862. Removed to San Francisco, and admitted to practice in supreme court of California, Oct., 1862. Assistant city and county attorney of San Francisco, 1885-1886. United States district judge for district of Alaska, commissioned Dec. 7, 1889. Served till April 21, 1892. Practices law at Juneau, Alaska.

BULLOCK, JONATHAN RUSSELL. Born in Bristol, R. I., Sept. 6, 1815. Was graduated at Brown in 1834. Studied law in his father's office. Admitted to the bar 1836. Practiced in Alton, Ill., until 1843. Returned to Rhode Island. Appointed collector in 1849. Member of legislature 1844-1846. Member of the state senate 1859. Lieutenant governor

1860. Member of special commission to adjust accounts between Rhode Island and the United States 1861. Judge of the state supreme court 1862. United States district judge for the district of Rhode Island, commissioned Feb. 11, 1865. Resigned in Sept., 1869.

BUNN, ROMANZO. Born in South Hartwick, Otsego county, N. Y., Sept. 24, 1829. Removed to western New York in 1832, and to Wisconsin in 1854. Educated at a common school and at Springville Academy, N. Y. Studied law. Admitted to the bar in 1853. Practiced at Ellicottville, N. Y. District attorney in Trempealeau and Monroe counties, Wis. Member of the legislature in 1860. From 1869 to 1877 circuit judge of the sixth circuit, Wis. United States district judge for the western district of Wisconsin, commissioned Oct. 30, 1877.

BUSTEED, RICHARD. Born in Cavan, Ireland, Feb. 16, 1822. His father, a barrister in Dublin, emigrated to Canada, and later to the United States. The son worked on a newspaper in New York. Was a local preacher in the Methodist Church. Admitted to the bar in 1846. Corporation counsel of New York city 1856-1859. Brigadier general of volunteers in 1862. Resigned March 10, 1863. United States district judge for the district of Alabama, commissioned Nov. 17, 1863. Decided the test oath as to attorneys in federal courts unconstitutional, which the supreme court affirmed. Resigned Oct. 20, 1874, and resumed practice in New York city.

BUTLER, WILLIAM. Born in Chester county, Pa., Dec. 22, 1822. Attended the schools of the county until 15 years of age, when he entered the office of the Village Record, a newspaper published in West Chester, where he remained until his nineteenth year, when he purchased an interest in the Norristown Herald and Free Press. While assisting to edit and publish this paper he studied law, and was admitted to the bar in December, 1845, returning soon afterwards to West Chester. Was elected district attorney in 1856; president judge for the 15th judicial district of Pennsylvania in 1861. Re-elected in 1871. United States district judge for the eastern district of Pennsylvania, commissioned Feb. 19, 1879.

BYRD, CHARLES WILLING. Born at Westover, on the James river, below Richmond, July 26, 1770. Was a grandson of Col. William Byrd, founder of the city of Richmond. His father dying in 1777, he was sent to Philadelphia, where he was placed in charge of relatives, and where he received his education and early training. In 1794 he went to Kentucky as the agent of Robert Morris, and located at Frankfort, where he engaged in the practice of law, and also at Lexington, and is said to have been successful. Removed to Cincinnati, Ohio, in 1799, when he was ap-

pointed secretary of the Northwest Territory by President Adams, his commission being dated Dec. 1, 1799. Was a member of the first constitutional convention in Ohio, and the second governor of that state. United States district judge for the district of Ohio, commissioned March 3, 1803, which position he held until his decease, Aug. 11, 1828. Is said to have been a personal friend of Thomas Jefferson.

GADWALADER, JOHN. Born in Philadelphia, Pa., April 1, 1805. Was graduated at the University of Pennsylvania 1821. Studied law with Horace Binney. Admitted to the bar 1825. His kinsman, Nicholas Biddle, then president of the United States Bank, gave him the place of solicitor for that institution. Member of congress (Democrat) 1855-1857. United States district judge for the eastern district of Pennsylvania, commissioned April 24, 1858. Died in Philadelphia, Jan. 26, 1879. LL. D., University of Pennsylvania, 1870.

CALDWELL, ALEXANDER. United States district judge for the western district of Virginia, commissioned Oct. 28, 1825. Died in Wheeling, Va., (W. Va.) April 8, 1839.

CALDWELL, HENRY CLAY. Born in Marshall county, Va., Sept. 4, 1832. Educated at common schools in Iowa. Studied law in Keosauque, Iowa. Admitted to the bar 1852. Prosecuting attorney of Van Buren county, Iowa, 1856-1858. Member of legislature 1859-1861. Colonel of volunteers during the Civil War. Resigned June 4, 1864. United States district judge for the eastern and western districts of Arkansas, commissioned June 20, 1864. United States district judge for the eastern district of Arkansas, commissioned March 3, 1871. United States circuit judge for the eighth circuit, commissioned March 7, 1890.

CAMPBELL, JOHN ARCHIBALD. Born in Washington, Wilkes county, Ga., June 24, 1811. Was graduated at the University of Georgia in 1826. Admitted to the bar while still a minor in 1829, by special act of the legislature. Practiced in Montgomery, Ala. Member of legislature. Associate justice of the United States supreme court, commissioned March 22, 1853. Assigned to the fifth circuit. Resigned May 21, 1861. Opposed secession. Secretary of war for the Confederate States, and peace commissioner on their behalf in 1865. After the war he was arrested and confined in Ft. Pulaski. Released on parole. Practiced in New Orleans.

CAMPBELL, JOHN WILSON. Born in Augusta county, Va., Feb. 23, 1783. His parents removed with him to Ohio. Received a common school education, was admitted to the bar in 1808, and began practice in West Union, Ohio. Prosecuting attorney for Adams county and Highlands county. Member of legislature. Member of congress 1817-

1827. United States district judge for the district of Ohio, commissioned March 7, 1829. Died in Delaware county, Ohio, Sept. 24, 1833.

CARPENTIER, GEORGE MOULTON. Born at Portsmouth, R. I., April 22, 1844. Was graduated at Brown in 1864. Reporter for newspapers and in the courts. Studied law. Admitted to the bar in 1867. Practiced in Providence, R. I. Commissioner to revise the laws of the state in 1830. Justice of the state supreme court 1882. United States district judge for the district of Rhode Island, commissioned Dec. 18, 1884.

CATRON, JOEN. Born in Wythe county, Va., 1778. Educated in common schools. Removed to Tennessee in 1812. Studied law there. Served in the New Orleans campaign under Jackson. Elected state attorney by the legislature. Removed to Nashville. Chosen to the supreme bench of the state in 1824. Chief justice 1830-1836. Associate justice of the United States supreme court, commissioned March 8, 1837. Assigned to the eighth circuit. Assigned to the sixth circuit, March 10, 1863. Opposed secession, and had to leave the state. Held the office until his death, May 30, 1865.

CHASE, SALMON PORTLAND. Born in Cornish, N. H., Jan. 13, 1808. Was in the family of his uncle (bishop of Ohio) 1820-1823. Returned to New Hampshire 1823. Was graduated from Dartmouth in 1826, and established a classical school in Washington, D. C., studying law with William Wirt, Esq. Admitted to the bar 1830. Practiced in Cincinnati. Joined the liberty party in 1841. Famous for defending fugitive slaves. Chairman of the Free-Soil party convention at Buffalo in 1843. Elected to the United States senate in February, 1849, by Democratic and Free-Soil coalition. Elected governor of Ohio 1855; re-elected 1857. Candidate for Republican presidential nomination at Chicago in 1860. United States senator in 1860. Appointed secretary of the treasury March 4, 1861. Resigned June 30, 1864. Member of the peace commission in 1861. Chief justice of the United States supreme court, commissioned Dec. 6, 1864. Assigned to the fourth circuit. Presided over the impeachment trial of President Johnson in 1868. Mentioned for the Democratic presidential nomination in 1868. Died May 7, 1873.

CHASE, SAMUEL. Born in Somerset county, Md., April 14, 1741. Studied law at Annapolis. Admitted to the bar in 1761. Member of colonial legislature. Prominent in the stamp-act agitation. Member of congress 1774-1778. Signer of Declaration of Independence. United States commissioner to Canada with Franklin and Carrol. Delegate to England from Maryland in 1783 to recover certain moneys from the Bank of England. Removed to Baltimore in 1786. Chief justice

of the criminal court of Baltimore in 1788. Member of the Maryland convention to ratify the federal constitution, which he thought not democratic enough. Chief justice of the general court of Maryland 1791. Associate justice of the United States supreme court, commissioned Jan. 27, 1796. Assigned to the old middle circuit, July 1, 1802. He held this office until his death. He was impeached in 1804, by the house of representatives, under the leadership of John Randolph. Acquitted by the senate (the two thirds requisite for conviction not being obtained) March 5, 1805. The grounds of the impeachment were his conduct in the trials of Fries and Callender for sedition four years before, and a charge delivered to the grand jury for the district of Maryland. He was of imperious temper, and given to express his political opinions on the bench. Died June 19, 1811.

CHIPMAN, NATHANIEL. Born in Salisbury, Conn., Nov. 15, 1753. Was graduated from Yale in 1777. Lieutenant in the Revolutionary army. Resigned 1778, and removed to Litchfield, Conn. Admitted to the bar 1779, and removed to Timmouth, Vt. Member of legislature 1784-1785. Judge of state supreme court 1786. Chief justice 1789. Commissioner on behalf of Vermont to adjust differences with New York 1789, and to negotiate for admission of Vermont to the Union 1791. United States district judge for the district of Vermont, commissioned March 4, 1791. Resigned 1793. Chief justice of the state supreme court 1796. United States senator 1797-1803. Member of legislature 1806-1811. Censor 1813. Chief justice of the state supreme court 1813-1815. Professor of law at Middlebury from 1816 until his death, in Timmouth, Vt., Feb. 15, 1843. Published "Sketches of the Principles of Government," and "Reports and Dissertations."

CHOATE, WILLIAM GARDNER. Born at Salem, Mass., Aug. 30, 1830. Was graduated from Harvard in 1852, and from the Dane Law School in 1854. United States district judge for the southern district of New York, commissioned March 25, 1878. Resigned June 2, to take effect June 6, 1881. Resumed practice in New York city.

CLARK, DANIEL, Born in Stratham, Rockingham county, N. H., Oct. 24, 1809. Was graduated at Dartmouth in 1834. Began practice in 1837 at Epping, N. H., where he had studied law. Removed to Manchester, N. H., 1839. Member of legislature 1842. United States senator 1857. Resigned July, 1866. President pro tem. of the senate 1864-1865. United States district judge for the district of New Hampshire, commissioned July 27, 1866. President of the New Hampshire constitutional convention of 1876. Died Jan. 2, 1891.

CLAY, JR., JOSEPH. Born in Savannah, Ga., Aug. 16, 1764. Was graduated from

Princeton at the head of his class in 1784. Studied law in Savannah. United States district judge for the district of Georgia, commissioned Sept. 16, 1796. Resigned May, 1801. United States circuit judge for the fifth circuit, commissioned Feb. 24, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. Professed religion and joined the Baptist Church in 1803. Ordained to the ministry 1804. Pastor of the First Baptist Church of Boston, Mass., 1807. Died in Boston, Jan. 11, 1811.

CLIFFORD, NATHAN. Born in Rumney, Grafton county, N. H., Aug. 18, 1803. Educated in Haverhill, N. H., Academy, and Hampton Literary Institution. Practiced in York county, Me., 1827. Member of legislature 1830-1834. Speaker 1832-1834. Attorney general of Maine 1834-1838. Member of congress 1838-1843. Attorney general of the United States 1846. Minister to Mexico to arrange a treaty of peace, Sept. 6, 1849. Resumed law practice in Maine. Associate justice of the United States supreme court, commissioned Jan. 12, 1858. Assigned to the first circuit. President of the electoral commission in 1877. Died in Cornish, Me., July 25, 1881. Published Circuit Court Reports for the first circuit, (Boston, 1869.)

COLT, LE BARON BRADFORD. Born in Dedham, Mass., June 25, 1846. Was graduated at Yale in 1868, and at the Columbia Law School in 1870. Admitted to the bar of New York 1870. Practiced in Chicago. Removed to Bristol, R. I., in 1875. Member of legislature 1879-1881. United States district judge for the district of Rhode Island, commissioned March 21, 1881. United States circuit judge for the first circuit, commissioned July 5, 1884.

CONKLING, ALFRED. Born in Suffolk county, N. Y., Oct. 12, 1789. Was graduated from Union College in 1810. Admitted to the bar 1812. District attorney for Montgomery county. Member of congress 1812-1823. Removed to Albany. United States district judge for the northern district of New York, commissioned Dec. 14, 1825. Resigned Aug. 6, 1852, to accept the position of minister to Mexico. Settled in Geneseo, 1864. LL. D., Union, 1847. Died in Utica, N. Y., Feb. 5, 1874. Author of treatises on "United States Courts," on "Admiralty," on "Executive Powers," and of the "Young Citizens' Manual."

COXE, ALFRED CONKLING. Born in Auburn, N. Y. Was graduated at Hamilton College in 1868. Admitted to the bar in 1868. Practiced in Utica, N. Y., in partnership with Senator Roscoe Conkling and Ex-Judge Sidney T. Holmes. Appointed in 1880, by the governor of New York, one of the managers of Utica State Hospital. United States district judge for the northern district of New York, commissioned May 4, 1882. He is a grandson of

Judge Alfred Conkling, of the same court. Is lecturer at Cornell University on the law of shipping and admiralty.

CRANCH, WILLIAM. Born in Weymouth, Mass., July, 1769. Was graduated at Harvard in 1789. Admitted to the bar in 1790. Practiced in Braintree and Haverhill, Mass. Removed to what is now Washington, D. C., in October, 1794. His kinsman, President John Adams, appointed him judge of the circuit court for the District of Columbia, commissioned March 3, 1801. Chief judge of the same court, commissioned Feb. 24, 1806. He published nine volumes of United States Supreme Court Reports and six volumes of Circuit Court Reports. He also prepared a Code for the District of Columbia, and published a memoir of John Adams, (1827.) He died in Washington, D. C. Sept. 11, 1855.

CRAWFORD, WILLIAM. Born in Virginia in 1767. Was graduated at William and Mary College. Removed to Alabama in 1810. Was receiver of public moneys, and had charge of the United States land office at St. Stephens, Ala. Was United States district attorney at Mobile. United States district judge for the districts of Alabama, commissioned May 22, 1826. Died April 28, 1849. He was author of a work on "Equity Jurisprudence."

CREIGHTON, JR., WILLIAM. Born in Berkeley county, Va., Oct. 29, 1778. Was graduated from Dickinson College, Pa., with distinction, 1795. Studied law in Martinsburgh, Va., and in 1797 visited the Northwest Territory. Settled at Chillicothe, Ohio, in 1799, where he was admitted to practice law. Was secretary of state of Ohio. Elected by the general assembly, March 5, 1803. Re-elected in 1805. Resigned Dec. 8, 1808. Was United States attorney for the district of Ohio in 1808. In 1814 was elected to the thirteenth congress. Was re-elected to the fourteenth congress in 1816, and to the twentieth congress in 1824. Also re-elected to the twenty-first and to the twenty-second. United States district judge for the district of Ohio, commissioned Nov 1, 1828. His term of office expired Dec. 31st of the same year, his nomination having failed of confirmation. Died Oct. 1, 1851. As secretary of state was designer of the great seal of the state. He was a brother-in-law of his predecessor, Judge Byrd, in the office of district judge.

CURTIS, BENJAMIN ROBBINS. Born in Watertown, Mass., Nov. 4, 1809. Was graduated at Harvard in 1829. Practiced in Northfield, Mass. Removed to Boston, and attended the Harvard Law School. Member of legislature, (Whig.) Associate justice of the United States supreme court, commissioned Sept. 22, 1851. Assigned to the first circuit. He wrote a dissenting opinion in the famous Dred Scott Case. Resigned Sept. 30, 1857, and practiced in Boston. Counsel for President Johnson in the impeachment trial,

1868. Died at Newport, R. I., Sept. 15, 1874. He published "Decisions of the United States Supreme Court," (an abridgment of the official reports.) A memoir and a volume of his writings have been published by his brother, George Ticknor Curtis.

CUSHING, WILLIAM. Born in Scituate, Mass., March 1, 1732. Was graduated at Harvard in 1751. Studied law with Jeremy Gridley. Attorney general of Massachusetts. Judge of probate for Lincoln county, Mass., (Me.) 1768. Judge of Massachusetts superior court in 1772. Chief judge 1777. Chief justice of Massachusetts under the state constitution 1780. Associate justice of the United States supreme court, commissioned Sept. 27, 1789. Assigned to the eastern circuit, July 1, 1802. Commissioned chief justice 1796, but declined. Vice president of Massachusetts convention to ratify the federal constitution, 1788. Founder of the American Academy of Arts and Sciences. Died in Scituate, Sept. 13, 1810.

CUYLER, JEREMIAH. Born in Savannah, Ga., June 4, 1768. United States district judge for the district of Georgia, commissioned June 12, 1821. He was one of those that welcomed La Fayette to Savannah. He laid the corner stone for Nathaniel Greene's monument. Died in Savannah, May 6, 1839.

DALLAS, GEORGE M. Born at Pittsburg, Pa., Feb. 7, 1839, but always resided in Philadelphia. He studied law with St. George Campbell, Esq., and was admitted to the bar, Oct. 13, 1860. Was a delegate at large to the constitutional convention which framed the existing constitution of Pennsylvania, and served upon the committees on the judiciary and on legislation. United States circuit judge of the third circuit, commissioned March 17, 1892. Professor of law of torts, evidence, and practice in law department, University of Pennsylvania.

DANIEL, PETER VIVIAN. Born in Stafford county, Va., April 24, 1784. Was graduated at Princeton in 1805. Studied law in the office of Edmund Randolph, whose daughter he married in 1811. Admitted to the bar in 1808. Member of legislature. Member of Virginia privy council 1812-1835. Lieutenant governor of Virginia. Declined the place of attorney general of the United States, offered him by President Jackson. United States district judge for the district of Virginia, commissioned April 19, 1836. Associate justice of the United States supreme court, commissioned March 3, 1841. Assigned to the ninth circuit, March 3, 1845. Ceased to be circuit justice, May 31, 1860. Died in Richmond, Va., June 30, 1860.

DAVIES, WILLIAM. Born in Savannah, Ga., July 8, 1775. Educated at the public schools, and at first was a clerk in a commercial house. Studied law in the office of Judge

Stephens. Represented Liberty county in the state legislature. Received the highest municipal honors in Savannah, and frequently represented Chatham county in both branches of the legislature. Impaired health compelled him to retire from the labors of private practice. United States district judge for the district of Georgia, commissioned Jan. 14, 1819. Resigned in June, 1821, to actively engage in the practice of law. Was chosen to preside in the eastern judicial district of his state in 1828. Died April 30, 1829.

DAVIS, DAVID. Born in Cecil county, Md., March 9, 1815. Was graduated at Kenyon College, Ohio, 1832. Studied law in Massachusetts and at Yale. Removed to Illinois. Practiced in Bloomington. Elected to the legislature 1844. Member of the state constitutional convention 1847. State circuit judge 1848. Resigned October, 1862. Member of Republican nominating convention 1860, and accompanied Lincoln to Washington. Associate justice of the United States supreme court, commissioned Oct. 17, 1862. Assigned to the eighth circuit, March 10, 1863. Assigned to the seventh circuit, April 8, 1867. Administrator of Lincoln's estate. Held with minority of the court, in 1870, that the legal tender acts were constitutional. Candidate for the Liberal Republican nomination, and received the Labor Reform (Greenback) nomination in 1872, but withdrew from the canvass. Resigned from supreme bench to take his seat in the United States senate, March 4, 1877. President pro tem. of the senate 1881. Resigned 1883, and retired to Bloomington, Ill., where he died, June 26, 1886.

DAVIS, JOHN. Born in Plymouth, Mass., Jan. 25, 1761. Was graduated at Harvard, 1781. Tutor in the family of General Otis. Began practice in Plymouth, Mass., 1786. Member of the legislature. Member of the Massachusetts convention to ratify the federal constitution. Comptroller of the United States treasury 1795. United States district attorney for Massachusetts 1796. United States judge for the district of Massachusetts, commissioned Feb. 20, 1801. Retired July, 1841. Died in Boston, Jan. 14, 1847. Author of addresses, etc., and editor of "Morton's Memorial of New England."

DAWNE, EDWARD J. United States district judge for the district of Alaska, commissioned Aug. 28, 1885. Ceased to be judge, Dec. 3, 1885. Was never confirmed by the senate.

DAWSON, LAFAYETTE. Born in McLean county, Ill., where he was educated. Removed to Maryville, Mo., in 1866, where he commenced the practice of law. United States judge for the district of Alaska, commissioned Dec. 3, 1885. Ceased to be district judge, Aug. 25, 1888. Later published a digest or pamphlet of his decisions. Died in Maryville, Mo., Jan. 29, 1897.

DEADY, MATTHEW P. Born near Easton, Talbot county, Md., May 12, 1824. Removed to Virginia, and thence to Ohio. Educated at Barnesville Academy. Admitted to the bar in Ohio 1847. Removed to Oregon 1849. Taught and practiced there. Member of legislature in 1850. President of the upper house 1851. Associate justice of the territorial supreme court 1853. President of state constitutional convention 1857. On the admission of Oregon to the Union he was appointed district judge for the district of Oregon, commissioned March 9, 1859. Prepared the Codes of the state in 1862-1864. Published the general laws of the state 1865. Assisted in the same work 1874. Died March 24, 1893.

DELAHAY, MARK W. Born June 24, 1817, near Easton, Talbot county, Md. Educated at Easton Academy, and inherited quite a fortune from his parents. Emigrated to Illinois in 1838, locating at Naples. Removed to Winchester, Ill. Entered the law office of John P. Jordan. Subsequently engaged at Virginia, Cass county, Ill. During the Mormon war he held a commission as captain under John J. Hardin. Removed to Leavenworth, Kan., in 1855. Practiced law and edited the Kansas Territorial Register. Was appointed surveyor general of Kansas and Nebraska in 1861. Was chief clerk of the territorial legislature of Kansas in 1860. District judge for the district of Kansas, commissioned Oct. 6, 1863, which office he held until his resignation, Dec. 10, 1873. Died May 9, 1879, at Kansas City, Mo.

DICK, JOHN. A citizen of Louisiana. United States district judge for the district of Louisiana, commissioned March 2, 1821. Died at New Orleans, April 23, 1824.

DICK, ROBERT P. Born in Greensboro, N. C., Oct. 5, 1823. Graduated from the University of North Carolina in 1843. Admitted to the bar 1846. District attorney for the district of North Carolina 1853-1861. Member of the state constitutional conventions of 1861 and 1865. Member of council of state 1861-1864. Member of state senate 1864-1865. Associate justice of the state supreme court 1868-1872. United States district judge for the western district of North Carolina, commissioned June 7, 1872 LL. D., University of North Carolina, 1869, and 1889.

DICKERSON, MAHLON. Brother of Judge Philemon Dickerson. Born in Hanover county, N. J., April 17, 1770. Was graduated at Princeton 1789. Admitted to the bar 1793, and practiced in Philadelphia. Quartermaster general of Pennsylvania 1805-1808. Recorder of the city court of Philadelphia 1808-1810. Returned to New Jersey. Judge of New Jersey supreme court and chancellor. Member of the legislature 1814. Governor 1815. United States senator 1817-1833. Secretary of the navy 1834-1838. United States district judge for the

district of New Jersey for a few months. commissioned July 23, 1840. Member of the state constitutional convention 1844. Died 1853.

DICKERSON, PHILEMON. Born in Morris county, N. J., 1788. Received a liberal education. Practiced law in Paterson, N. J. Member of congress 1833. Resigned to accept governorship of New Jersey, 1836. Again elected to congress 1838. United States district judge for the district of New Jersey, commissioned March 2, 1841. Died in Paterson, Dec. 10, 1862.

DILLON, JOHN FORREST. Born in Montgomery county, N. Y., Dec. 25, 1831. Removed to Iowa. Was graduated in medicine at Iowa University, and practiced six months. Studied law. Admitted to the bar 1852. Prosecuting attorney 1852. State district judge 1858. Twice elected judge of the state supreme court. United States circuit judge for the eighth circuit, commissioned Dec. 22, 1869. Resigned Sept. 1, 1879, and accepted a professorship in Columbia Law School, which he held for three years. Practiced in New York City. Author of treatises on "Municipal Corporations," "Removal of Causes," and "Municipal Bonds;" also of Circuit Court Reports (eighth circuit); "Laws and Jurisprudence of England and America," being a series of lectures in Yale University. Member of L'Institute Detroit International, and of the Association for the Reform and Codification of the Law of Nations. Resides in New York City.

DRAYTON, JOHN. Born in South Carolina, 1766. Son of William Henry Drayton, the Revolutionary statesman. Educated at Princeton and in England. Practiced law in Charleston, S. C. Lieutenant governor in 1798. Governor in 1800 and 1808-1810. South Carolina College was established under his governorship. United States district judge for the district of South Carolina, commissioned May 7, 1812. Died in Charleston, in November, 1822. Author of "Memoirs of William Henry Drayton," (his father,) "A Tour through the Northern and Eastern States," and "A View of South Carolina."

DRAYTON, WILLIAM. Born in South Carolina, 1733. Studied law four years in the Middle Temple, London. Returned to America 1754. Chief justice of the province of East Florida, 1768. Lost his office during the Revolutionary war, but was reinstated. Spent some time during the war in England. Returned to South Carolina after the war. Judge of the admiralty court of South Carolina. Associate justice of the state 1789. First United States district judge for the district of South Carolina, commissioned Nov. 18, 1789. Died May 18, 1790.

DRUMMOND, THOMAS. Born in Bristol Mills, Lincoln county, Me., Oct. 16, 1809.

Was graduated at Bowdoin in 1830. Studied law in Philadelphia. Admitted to the bar 1833. Removed to Galena, Ill., 1835. Member of legislature 1840. United States district judge for the district of Illinois, commissioned Feb. 19, 1850. Removed to Chicago in 1854. United States circuit judge for the seventh circuit, commissioned Dec. 22, 1869. Resigned in July, 1884. Died in May, 1890.

DUANE, JAMES. Born in New York city, Feb. 6, 1733. Married a daughter of Robert Livingston in 1759. Grantee of land in the "New Hampshire Grants," (afterwards Vermont,) and a bitter partisan in that struggle. Elected to the continental congress by the committee of 51 in 1774 as a conservative. Protested against the resolution of Oct. 8, 1774, to support Massachusetts in her resistance to parliament. Opposed the Declaration of Independence as premature. Member of New York provincial congress and committee of safety. Member of state constitutional convention 1777. First mayor of New York after the British evacuation. Member of state legislature, council, and convention to ratify the federal constitution. United States district judge for the district of New York from 1789 until 1794, commissioned Sept. 26, 1789. Resigned in April, 1794. Died at Duaneburg, N. Y., Feb. 1, 1797.

DUCKETT, ALLEN BOWIE. Born in Maryland. Became a citizen of the District of Columbia. Judge of the United States circuit court for the District of Columbia, commissioned March 17, 1806. Died in August, 1809.

DUNDY, ELMER S. Born in Trumbull county, Ohio, March 5, 1830. Educated in the common schools. Taught for several years. Studied law at Clearfield, Pa. Admitted to the bar in 1853. Practiced there until 1857, when he removed to Nebraska. Member of territorial legislature, and associate justice of the territorial supreme court. United States district judge for the district of Nebraska, commissioned April 9, 1868.

DUNLOP, JAMES. Born in Georgetown, D. C., March 28, 1793. Was graduated at Princeton, 1811. Studied law with Francis S. Key, and was afterward his partner. Recorder of Georgetown. Judge of the United States circuit court for the District of Columbia, commissioned Oct. 3, 1845; commissioned as chief judge Nov. 27, 1855; and served until March 3, 1863, when the court was abolished. Died near Georgetown, May 6, 1872.

DURELL, EDWARD H. Born in Portsmouth, N. H., July 14, 1810. Son of Chief Justice Durell, of New Hampshire. Studied at Phillips Exeter; was graduated at Harvard, 1831. Studied law with his father and at Harvard. Removed to Pittsburgh,

(Grenada,) Miss., 1834, and to New Orleans 1836. Opposed secession, and lived in retirement during the Civil War. Helped construct the temporary government after the capture of New Orleans in 1862. Mayor of New Orleans 1863. United States district judge for the eastern district of Louisiana, commissioned May 20, 1863; and for the whole state July 27, 1866. President of the state constitutional convention 1864. Declined a position on the supreme bench of the United States 1865. Mentioned as candidate for the vice presidency in 1868. Resigned from the bench 1874. Resided in Schoharie, N. Y., from 1875 until his death, March 29, 1887. Author of "Sketches." Translator of P. C. Roux's "Essay on the History of France." Was engaged on a history of the war and reconstruction at the time of his death.

DUVAL, GABRIEL. Born in Prince George county, Md., Dec. 6, 1752. Received a classical education. Clerk of the colonial legislature. Member of congress 1794. Resigned in March, 1796. Presidential elector in 1796 and 1800. Judge of the Maryland supreme court 1796. Comptroller of the United States treasury 1802. Resigned in 1811. Associate justice of the United States supreme court, commissioned Nov. 18, 1811. Assigned to the fourth circuit. Resigned in January, 1835. Died in Prince George county, Md., March 6, 1844.

DUVAL, THOMAS H. Born Nov. 4, 1813, in Buckingham county, Va. Educated at St. Joseph's College, Bardstown, Ky. Studied law with Hon. Charles A. Wicliffe. Was secretary of Florida territory. Emigrated to Texas, locating in Austin, in 1845. Served two terms as district judge. Was secretary of state under Gov. P. H. Bell, and one of the first two reporters of the supreme court. United States district judge for the western district of Texas, commissioned March 3, 1857. Died Oct. 10, 1880.

DYER, CHARLES E. Born in Cicero, Onondaga county, N. Y., Oct. 5, 1834. Removed to Ohio in 1835, and to Wisconsin in 1839. Educated by a private tutor. Entered a newspaper office in Chicago 1849. Removed to Sandusky, Ohio, 1851. Studied law. Admitted to the bar 1858. Removed to Racine, Wis., 1859. City attorney 1859-1860. Member of legislature 1866-1867. United States district judge for the eastern district of Wisconsin, commissioned Feb. 10, 1875. Retired May 4, 1888.

DYER, JOHN S. Born in Franklin, Pendleton county, Va., July 26, 1809. Educated at a classical school near Richmond, and at the University of Virginia, and later in the law school of Judge B. B. Baldwin. Admitted to the bar and practiced in his own and adjoining counties. Removed to Dubuque, Iowa, about 1846. United States district judge of

the district of Iowa, commissioned March 3, 1847. Died Sept. 14, 1855.

EDGERTON, ALONZO J. Born at Rome, N. Y., June 7, 1827. Was graduate of Wesleyan University in 1850. Taught school. Studied law three or four years. Settled in Minnesota 1855. Was a member of the first legislature of that state. Entered the army in 1862 as captain. Mustered out as brigadier general in 1867. Was presidential elector in 1876. Was senator from Minnesota 1881. Chief justice of Dakota in 1882. Member of constitutional convention of South Dakota in 1885, and again in 1889. Was president of each convention by unanimous vote of the members. United States district judge for the district of South Dakota, commissioned Nov. 19, 1889. LL. D. from Alma Mater, 1891. Published "Railroad Laws of Minnesota" 1872, also edited "Constitutional Debates of South Dakota." Died Aug. 9, 1896.

EDWARDS, PIERREPONT. Son of Jonathan Edwards. Born in Northampton, Mass., April 8, 1750. Was graduated at Princeton, 1768. Began to practice law in New Haven, Conn., 1771. Member of the legislature. Administrator of Benedict Arnold's estate at the time of his treason. Served in the Revolutionary army. Member of congress 1787-1788, and of the Connecticut convention to ratify the constitution. Founder of the toleration party in Connecticut. United States district judge for the district of Connecticut, commissioned Feb. 24, 1806. Died in Bridgeport, Conn., April 5, 1826.

ELLIS, POWHATAN. Born in Virginia about 1794. Was graduated at William and Mary in 1813. Emigrated to Mississippi territory, and practiced there. Judge of the supreme court of Mississippi 1818. United States senator 1825. United States district judge for the district of Mississippi, commissioned July 14, 1832. Charge d'affaires in Mexico Jan. 5, 1836. Minister to Mexico 1839-1842. On his return he resided in Virginia, and died in Richmond about 1844.

ELLSWORTH, OLIVER. Born in Windsor, Conn., April 29, 1745. Entered Yale in 1762, but left and went to Princeton. Was graduated 1766. Studied theology a year; then law. Admitted to the bar of Hartford county, Conn., 1771. Was farmer and lawyer for three years. State's attorney in 1775, and removed to Hartford. Member of the legislature; committeeman on finances of the state. Member of congress 1778-1783; of governor's council 1780-1784. Declined commissionership of the United States treasury in 1784. Judge of Connecticut superior court 1784-1787. Member of the federal constitutional convention in 1787, and of the state convention to ratify the constitution. United States senator in 1789. Chairman of the judiciary committee, and reported the judiciary act of 1789, substantially as passed.

Federalist leader in the senate. Called the "Cerberus of the Treasury" for his zeal for economy. Chief justice of the United States supreme court, commissioned March 4, 1796. Was sent to France with Patrick Henry and William Davie in 1799 to secure a treaty. Resigned chief justiceship while in Europe, Sept. 30, 1800. Member of governor's council (the court of last resort of Connecticut) 1802. Presidential elector 1804. On reorganization of the Connecticut judiciary in 1807, he was made chief justice of the supreme court. LL. D., Yale, 1790; Dartmouth and Princeton, 1797. Died Nov. 26, 1807.

EMMONS, HALMOR HULL. Born in Glens Falls, N. Y., 1815. Educated at Rutland, Vt. Assisted his father as a journalist. Studied law. Removed to Detroit, Mich., and practiced law with his father there. Partially retired from practice in 1853. United States circuit judge for the sixth circuit, commissioned Jan. 17, 1870. Died in Detroit, May 14, 1877.

ERSKINE, JOHN. Born in Strabane, Tyrone, Ireland, Sept. 13, 1813. Came to America in 1821. Returned to Ireland to school in 1827. Returned to America 1832. Located in Florida, teaching school there. Studied law, and was admitted to the Florida bar in 1846. Removed to Atlanta, Ga., 1855. United States district judge for the Northern and Southern districts of Georgia, commissioned July 10, 1865. When the Southern district of Georgia was set off he remained judge of the Southern district from April 25, 1882, until he resigned, Dec. 19, 1883. Died Jan. 27, 1895.

FIELD, RICHARD STOCKTON. Born in White Hill, Burlington county, N. J., Dec. 31, 1803. Was graduated at Princeton 1821. Studied law with his uncle, Richard Stockton. Admitted to the bar 1825. Member of New Jersey legislature. Attorney general of the state 1838. Resigned 1841. Member of the New Jersey constitutional convention in 1844. Professor in New Jersey Law School 1847-1855. President of the trustees of the State Normal School in 1855. United States senator 1862. United States district judge for the district of New Jersey, commissioned Jan. 14, 1863. Member of the "Loyalists' Convention" of 1866. Died in Princeton, N. J., May 25, 1870. Author of "The Provincial Courts of New Jersey," (volume 3 of the "Collections of the New Jersey Historical Society.")

FIELD, STEPHEN JOHNSON. Born at Haddam, Conn., Nov. 4, 1816. At the age of 13 went to Smyrna, Turkey, to learn Oriental languages. Was gone three years, spending one winter in Athens. On his return he entered Williams College. Was graduated in 1837 with highest honors. Went to New York, and studied law in office of his brother, David Dudley Field, and entered bar in 1841. Was law

partner of his brother from 1841 to 1848. Traveled one year in Europe, and went to California, arriving there Dec. 28, 1849, and established himself in practice in Marysville. In 1850 became first alcalde or judge of the town, continuing in that position until establishment of American institutions. Was elected member of first legislature, and took leading part in molding judiciary of state, and establishing Codes of Civil and Criminal Practice. In 1857 was elected judge of supreme court. Was chief justice in 1859, and held that office until he was appointed associate justice of the United States supreme court, commissioned March 10, 1863. Was one of commission to amend Code in 1873. Was member of electoral commission in 1877. LL. D., Williams College, 1864. In 1869 was appointed professor of law, University of California. His sister is mother of Mr. Justice Brewer. Two attempts have been made to assassinate him.

FISHER, JOHN. Born in Maryland, May 23, 1771. Was clerk of the senate, and later secretary of state, and a leader in the Democratic party. United States district judge for the district of Delaware, commissioned April 23, 1812. Died at Smyrna, April 23, 1823.

FITZHUGH, NICHOLAS. Born in Virginia, May 10, 1764. Married Miss Sally Ashton, a near relative of George Washington. Removed to the District of Columbia. Judge of the United States circuit court for the District of Columbia, commissioned Nov. 25, 1803. Died Dec. 31, 1814.

FOSTER, CASSIUS G. Born at Webster, Monroe county, N. Y., Jan. 22, 1837. Removed to Michigan. Teacher for a time. Returned to his birthplace in 1857. Studied law in Rochester and Le Roy, N. Y. Admitted to the bar 1859. Removed to Atchison, Kan., 1859. Served with the state troops in the Civil War. Member of legislature 1863-1864. Mayor of Atchison 1867. United States district judge for the district of Kansas, commissioned March 10, 1874. Removed to Topeka in 1879.

FOX, EDWARD. The following note is reprinted from 1 Haskell:

Edward Fox was born at Portland, Maine, July 10, 1815. He graduated from Harvard College in 1834. He pursued his preparatory legal studies in the office of Willis & Fessenden at Portland and at the Dane Law School, taking the degree of LL. B. in 1837, and was admitted to the bar. He at once became a copartner with Randolph A. L. Codman, with whom he continued as Codman & Fox until 1847, when he took his younger brother Frederick a partner, under the firm name of E. & F. Fox. In the latter association he continued for the remainder of his practice, though it was once interrupted in the effort to restore the health of his wife by removal to more favorable climate, and again by a brief service on the supreme bench of the state. He was appointed associate justice of the supreme judicial court of Maine, Oct. 24, 1862, and resigned in March, 1863. He was appointed judge of the district court of the United States for the district of Maine by President Johnson May 31, 1866. On the 13th of December, 1881, he sat during a jury trial, and closed the day by a charge marked

with characteristic clearness and strength. He died while asleep on the night following, after judicial service of fifteen years in the seat honored for more than forty-four years by his predecessor, the illustrious Ashur Ware.

FRASER, PHILIP. Born at Montrose, Susquehanna county, Pa., Jan. 27, 1814. Educated at Hamilton Academy, in New York, and later at Union College, from which he received an honorary degree of M. A. in 1854. Removed to Florida. Was mayor of the city of Jacksonville, 1847-1848, declining re-election. United States district judge for the northern district of Florida, commissioned July 17, 1862. Died July 26, 1876, at Montrose, Pa.

FULLER, MELVILLE WESTON. Born in Augusta, Me., Feb. 11, 1833. Was graduated at Bowdoin 1853. Studied law in Bangor with his uncle, George M. Weston, and at Harvard. Began practice in Bangor 1855. On the editorial staff of the Age. President of the common council. City attorney 1856. Removed to Chicago 1856, and rose to eminence in the profession there. Counsel in many important cases, among them the National Bank Tax Cases, the Cheney Ecclesiastical Case, the Park Commissioners' Case, and the Lake Front Case. Member of state constitutional convention in 1862, of the legislature 1863-1865. Leader of the Douglas Democrats in that body. Member of Democratic national conventions 1864, 1872, 1876, and 1880. Chief justice of the United States supreme court, commissioned Dec. 17, 1888. Assigned to the fourth circuit. LL. D. Northwestern University and Bowdoin, 1888. LL. D. Harvard, 1890.

GAYLE, JOHN. Born in Sumter district, S. C., Sept. 11, 1792. Was graduated at South Carolina University. Admitted to the bar. Removed to Mobile, Ala., 1813. Member of territorial legislature 1817. Solicitor for the first judicial district 1819. Judge of the Alabama supreme court 1823. Member of legislature; speaker 1829. Governor of Alabama 1831-1835. Presidential elector 1836 and 1840. Member of congress 1847-1849. United States district judge for the Northern, Southern, and Middle districts of Alabama, commissioned March 13, 1849. Died in Mobile, July 21, 1859.

GHOLSON, SAMUEL JAMESON. Born in Madison county, Ky., May 19, 1808. Removed to Alabama 1817. Educated in common schools. Studied law in Russellville, Ala. Moved to Athens, Miss., in 1830. Member of the Mississippi legislature 1833-1836. Member of congress 1837. United States district judge for the northern and southern districts of Mississippi, commissioned Feb. 13, 1839. Resigned Jan. 9, 1861. Active in the secession convention. Enlisted as a private in the Confederate army. Major general of the Mississippi troops and brigadier general of the Confederate army. Member of

legislature 1866. Speaker 1878. Died in Aberdeen, Miss., Oct. 16, 1883.

GILBERT, WILLIAM B. Born in Fairfax county, Va., July 4, 1847. Was graduated from Williams College in 1868. From the Law School University of Michigan in 1872. Removed to Oregon. Was a member of the state legislature in 1889. United States circuit judge for the ninth circuit, commissioned March 18, 1892.

GILCHRIST, ROBERT BUDD. Born in Charleston, S. C., Sept. 28, 1796. Studied at Columbia. Was graduated from South Carolina College in 1814. Admitted to the bar 1818. District attorney for South Carolina 1831, and argued the Bond Case, turning on the constitutionality of the tariff. United States district judge for the district of South Carolina, commissioned Oct. 30, 1839. Died in Charleston, May 1, 1856.

GILES, WILLIAM FELL. Born in Harford county, Md., April 8, 1807. Educated in Baltimore. Studied law there. Admitted to the bar 1829. Member of legislature 1837 and 1839. Member of congress 1845. United States district judge for the district of Maryland, commissioned July 18, 1853. Died March 22, 1879.

GLENN, ELIAS. Born at Elkton, Md., in 1770. Appointed United States district attorney by President Madison in 1812, and continued by President Monroe. United States district judge for the district of Maryland, commissioned Aug. 31, 1824; resigned March 28, 1836. Died at Baltimore, Jan. 6, 1846.

GLENN, JOHN. Born at Baltimore, Md., Oct. 9, 1795. United States district judge for the district of Maryland, commissioned March 19, 1852, to succeed Judge Heath. Died at Hilton, Baltimore county, Md., July 8, 1853.

GOFF, NATHAN. Born in Clarksburg, W. Va., Oct. 9, 1843. Educated at Georgetown College and the University of New York. Enlisted in the Third Virginia volunteers (Union) in 1861, and rose to the rank of major. Admitted to the bar 1865, and elected to the legislature the same year. United States district attorney for the district of West Virginia 1868-1881. Secretary of the navy 1881. He was again district attorney from 1881-1882. Elected to congress as a Republican in 1884 and 1886. United States circuit judge for the fourth circuit, under the act of March 3, 1891, commissioned March 7, 1892.

GRAY, HORACE. Born in Boston, Mass., March 24, 1828. Was graduated at Harvard in 1845, and at the Harvard Law School in 1849. Admitted to the bar 1851. Reporter for the Massachusetts supreme court for seven years. Associate justice of the Massachusetts supreme court, Aug. 23, 1864; chief justice Sept. 5, 1873. Associate

justice of the United States supreme court, commissioned Jan. 30, 1882. Assigned to the first circuit.

GREEN, EDWARD T. Born in Trenton, N. J., June 8, 1837. Was graduated at Princeton in 1854, and at Harvard Law School 1858. Admitted to the New Jersey bar the same year. Practiced in Trenton. Was city solicitor 1860-1861. Counsel for Pennsylvania Railroad Company 1872-1889. Elected trustee of Princeton College 1892. United States district judge for the district of New Jersey, commissioned Oct. 24, 1889.

GRESHAM, WALTER Q. Born near Lanesville, Harrison county, Ind., March 17, 1832. Spent one year in the State University at Bloomington. Studied law at Corydon, Ind. Admitted to the bar 1853. Member of legislature 1860. Resigned 1861, and became lieutenant colonel in an Indiana regiment. Brevetted major general of volunteers March 13, 1865. Resumed practice in New Albany, Ind. Financial agent of Indiana in New York 1867-1868. United States district judge for the district of Indiana, commissioned Sept. 1, 1869. Postmaster general 1882. Secretary of the treasury 1884. United States circuit judge for the seventh circuit, commissioned Oct. 28, 1884. Candidate for the presidential nomination (Republican) 1888. Secretary of state in President Cleveland's cabinet, March 6, 1893. Died May 28, 1895.

GRIER, ROBERT COOPER. Born in Cumberland county, Pa., March 5, 1794. Was graduated at Dickinson in 1812. Taught there one year. Principal of Northumberland Academy 1815. Studied law in leisure moments. Admitted to the bar 1817. Practiced in Bloomsburg, Pa. Removed to Danville. Removed to Alleghany City 1838. Appointed judge of the district court of Alleghany in the same year. Associate justice of the United States supreme court, commissioned Aug. 4, 1846. Assigned to the third circuit. Removed to Philadelphia 1848. Sent in his resignation 1869, but held the office until his death, in Philadelphia, Jan. 31, 1870.

GRIFFIN, CYRUS. Born in Virginia, 1749. Educated in England. Member of legislature. Member of congress 1778, 1781, and 1787-1788. President of congress 1788. President of the federal court of admiralty appeals from its creation to its abolition. Commissioner to the Creek Nation 1789. United States district judge for the district of Virginia, commissioned Nov. 28, 1789. Died in Yorktown, Va., Dec. 14, 1810.

GRIFFITH, WILLIAM. Born in New Jersey. United States circuit judge for the third circuit, commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802.

Mayor of Burlington, N. J. Died there 1826. Author of the United States Law Register. An obituary note, containing extracts from the resolutions of the New Jersey bar on his decease and other matters, will be found in Wallace's Reporters (4th Ed.) p. 563.

GROSSCUP, PETER S. Born Ashland, Ohio, Feb. 15, 1852. Educated in high school at Ashland and Wittenberg College, graduating June, 1872. Graduated from Boston Law School. City solicitor of Ashland, Ohio, from 1874 to 1881. Republican candidate for congress 1876, but defeated. United States district judge for the northern district of Illinois, commissioned Dec. 21, 1892.

HAIGHT, FLETCHER M. Born at Elmira, N. Y., Nov. 28, 1799. Graduated from Hamilton College in 1818. Admitted to the New York state bar 1820. Represented Monroe county in the state legislature 1833. Practiced law at Rochester, N. Y. Removed to St. Louis, Mo., and later to San Francisco, Cal., where he was appointed United States district judge for the southern district of California, commissioned Aug. 5, 1861. Died Feb. 23, 1866.

HALL, DOMINICK AUGUSTINE. Born in South Carolina, 1765. Began practice in Charleston, S. C. United States circuit judge (chief judge) for the fifth circuit, commissioned July 1, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. United States district judge for the district of Orleans, commissioned Dec. 11, 1804. United States district judge for the district of Louisiana, commissioned June 1, 1812. Resigned to accept a place on the Louisiana supreme bench, March, 1813. Again appointed United States district judge for the district of Louisiana, commissioned June 1, 1813. Died in New Orleans December 19, 1820. In December, 1814, he was ordered by the military authorities to adjourn court for two months. In March, 1815, New Orleans being under martial law, he granted a writ of habeas corpus to a member of the legislature then under arrest by Gen. Jackson's order, who refused to recognize the writ, and committed the judge to jail. On the next day he was released, summoned Gen. Jackson to answer for contempt, and fined him in the sum of \$1,000. This was refunded to Jackson by congress in 1844, with interest.

HALL, NATHAN KELSEY. Born in Marcellus, Onondaga county, N. Y., March 10, 1810. Moved to Erie county, 1818. Educated at country district schools. At the age of 18 entered the office of Millard Fillmore in Aurora, N. Y. Admitted to the bar 1832, and became a partner of Fillmore in Buffalo. Deputy clerk of Erie county 1831-1832. Clerk of the board of supervisors 1832-1838. City attorney 1833-1834. Alderman 1837. Appointed master in chancery by Gov. Seward in 1839, and judge of common pleas

1841. Elected to assembly 1845. Member of congress 1847-1849. Postmaster general 1850. United States district judge for the northern district of New York, commissioned Aug. 31, 1852. Died in Buffalo, N. Y., March 21, 1874.

HALL, WILLARD. Born in Westford, Mass., Dec. 24, 1780. Was graduated at Harvard 1799. Studied law with Samuel Dana, of Groton. Admitted to the bar 1803. Removed to Dover, Del., and practiced there. Secretary of state for Delaware 1811-1814 and in 1821. Member of congress 1817-1821. Member of legislature 1822. United States district judge for the district of Delaware, commissioned May 6, 1823. Resigned Dec., 1871. Revised the state laws by order of the legislature in 1829. Member of the state constitutional convention of 1831. Died in Wilmington, Del., May 10, 1875.

HALLETT, MOSES. Born in Illinois, July 16, 1834. Studied law in Chicago. Was admitted to the Illinois bar, Jan., 1858. Removed to Colorado in the spring of 1860. Was a member of the territorial council 1863-1865. Appointed chief justice of Colorado territory, April 10, 1866, which office he held until the territory was admitted as a state in 1876. United States district judge for the district of Colorado, commissioned Jan. 12, 1877. LL. D., Colorado University. Dean of the law school, University of Colorado, and professor of American constitutional law and federal jurisprudence.

HALYBURTON, JAMES D. Born in New Kent county, Va., Feb. 23, 1803. Was graduated at Harvard College, and in law at the University of Virginia. Was a member of the general assembly of Virginia. Practiced law for several years in New Kent county, and was attorney for the circuit. United States district judge for the eastern district of Virginia, commissioned June 15, 1844. Resigned April 17, 1861. Died at Richmond, Va., Jan. 26, 1879.

HAMMOND, ELI SHELBY. Born at Brandon, Miss., April 21, 1838. Was graduated at Union University, Tenn., in 1857, and at Lebanon Law School in 1858. Served in the Confederate army 1861-1865. United States district judge for the western district of Tennessee, commissioned June 17, 1878.

HANFORD, CORNELIUS HOLTGATE. Born at Winchester, Iowa, April 21, 1849. Was United States commissioner. Member of the council of Washington Territory one term. City attorney of Seattle three terms. Chief justice of Washington Territory at the time of its admission as a state. United States district judge for the district of Washington, commissioned Feb. 25, 1890. Judge Hanford has lived on the Pacific coast since 1853.

HARLAN, JOHN MARSHALL. Born June 1, 1833, in Boyle county, Ky. Was graduated

at Centre College, in that state, in 1850. Appointed by Gov. Helm adjutant general of Kentucky in 1851. Admitted to the bar in 1853. Elected presiding judge of the county court of Franklin county, Ky., in 1858. Was Whig candidate for congress in the Ashland district in 1859, and defeated by only 67 votes. Elector for Bell and Everett in 1861. Colonel of the 10th Kentucky Union infantry in 1861, and subsequently commanded a brigade in the 1st division of the Army of the Ohio. In 1863 elected on Union ticket attorney general of Kentucky. In 1871, and again in 1875, was the Republican candidate for governor of Kentucky. In 1877 a member of the Louisiana commission appointed by President Hayes. Associate justice of the supreme court of the United States, commissioned April 22, 1878. In 1890 he accepted the position of lecturer on constitutional law in Columbian University at Washington, D. C. In 1892 he was appointed by President Harrison, in connection with Hon. John T. Morgan, as one of the arbitrators between the United States and Great Britain, in the dispute relating to the Bering seal fisheries. LL. D., Bowdoin College, Me., and Centre College, Ky.

HARPER, SAMUEL A. United States district judge for the district of Louisiana, commissioned March 7, 1829. Died at Madisonville, La., July 19, 1837.

HARRIS, EDWARD. United States circuit judge for the fifth circuit, commissioned May 3, 1802. The act under which the appointment was made was repealed, to take effect July 1, 1802.

HARVEY, MATTHEW. Born in Sutton, N. H., June 21, 1781. Was graduated at Dartmouth, 1806. Studied law under John Harris. Admitted to the bar 1809. Practiced in Hopkinton, N. H. Member of legislature 1814-1820; speaker 1817-1820. Member of congress 1821-1825. President of the state senate 1825-1828. Councilor 1828-1830. Governor of New Hampshire 1830-1831. United States district judge for the district of New Hampshire, commissioned Nov. 2, 1830. Died in Concord, N. H., April 7, 1866. LL. D., Dartmouth, 1855. President of New Hampshire Historical Society.

HAWLEY, THOMAS P. Born in Ripley county, Ind., July 30, 1830. Received a common-school education. Removed to California in 1852. Deputy county clerk of Nevada county in 1855. Admitted to practice law in 1857. District attorney in 1863. Removed to Nevada in 1868. City attorney, Treasure City, Nev., 1869. Elected justice of the supreme court of Nevada in 1872. Re-elected in 1878 and 1884. Resigned in Sept., 1890, upon having been appointed United States district judge for the district of Nevada, commissioned the 15th of that month.

HAY, GEORGE. Member of the Virginia legislature. United States district attorney for the district of Virginia. Prosecuted Aaron Burr. United States district judge for the eastern district of Virginia, commissioned July 5, 1825. Married a daughter of President Monroe. Wrote political essays over the name "Hartensius," a "Treatise on Usury Laws," a "Life of John Thompson," and a "Treatise on Expatriation." Died in Richmond, Va., Sept. 21, 1830.

HAYS, WILLIAM H. Born in Washington county, Ky., Aug. 26, 1820. Educated in the select schools of his county. Commenced the study of law at Elizabethtown in 1843, under James W. Hays. Attended law lectures at Glasgow, Ky. Was admitted to the bar in 1845. Practiced his profession at Springfield, Ky. Elected county judge in 1851. Re-elected in 1854. Elected to the state legislature in 1861, and in the same year entered the United States army as lieutenant colonel of the 10th volunteer infantry. Became colonel of his regiment in 1862. Served three years, participating in the battles of Chicamauga, Missionary Ridge, Atlanta, Jonesboro, and others. Appointed inspector general of Kentucky by the governor in 1865. Engaged in the oil business on the Cumberland river, and in 1867 returned to Springfield, resuming the practice of law. United States district judge for the district of Kentucky, commissioned Sept. 6, 1879, which office he held until his decease, at Louisville, March 7, 1880.

HEATH, UPTON S. Born in Maryland about 1785. Was liberally educated, the contemporary of Pinkney, Martin, Wirt, Winder, Hooper, Harper, and other noted members of the Maryland bar. United States district judge for the district of Maryland, commissioned April 4, 1836. Was distinguished for his firmness, impartiality, and probity as a public officer. Although he never married, he was the head and support of a large family of relatives. Died at his residence in Baltimore, Feb. 21, 1852.

HILL, ROBERT A. Born in Iredell county, N. C., March 25, 1811. Removed to Tennessee in 1816. He received a meager education. Was a school teacher in 1833-1834. Justice of the peace 1836-1844. Began practice in Waynesborough. Attorney general of Tennessee 1847 and 1853. Removed to Jacinto, Tishomingo county, Miss., in 1855. He was a Whig, and took no part in secession. Member of state convention in 1865. Chancellor after the war. United States district judge for the northern and southern districts of Mississippi, commissioned May 1, 1866. Retired Aug. 1, 1891. Prepared the articles on the judiciary in the Mississippi constitution of 1870. Trustee of the University of Mississippi, and lecturer in the law school.

HILLYER, EDGAR W. Born in Granville, Ohio, Dec. 3, 1830. Was graduated at Denison University. Removed to California 1852. Admitted to the bar in Placer county, 1857. Member of legislature 1861. Resigned and enlisted as a private. Became judge advocate and lieutenant colonel. Resigned 1865. Removed to Nevada. District attorney of Storey county. United States district judge for the district of Nevada, commissioned Dec. 21, 1869. Died May 10, 1882. The proceedings of the bench and bar upon his decease will be found in 8 Sawy. 5.

HITCHCOCK, SAMUEL. Born in Brimfield, Mass., March 23, 1755. Graduated at Harvard 1777. Read law at Brookfield, Mass., with Hon. Jedediah Foster. Moved to Burlington, Vt., about 1786, and practiced law. Was first state's attorney in Chittenden county, holding office from 1787 to 1790. Was representative from Burlington from 1789 to 1793. Was member of convention of delegates of the people of Vermont, held at Bennington, Jan. 10, 1791, to ratify constitution of United States. Was a trustee of the University of Vermont from its start until his death, and was its secretary from 1791 to 1800. He is also said to have drafted its charter. Attorney general of the state 1790-1793. Presidential elector at second presidential election in 1793. Member of first electoral college of Vermont in 1792, and cast vote for Washington and Adams. Was one of revisors of laws in 1797. United States district judge for the district of Vermont, commissioned Sept. 3, 1793, and United States circuit judge for second circuit, commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. Married, May 26, 1789, Lucy C. Allen, daughter of Ethan Allen. Pronounced a eulogy on Washington, which is probably preserved in manuscript. Died at Burlington, Vt., Nov. 30, 1813.

HOBART, JOHN SLOSS. Born in Fairfield, Conn., 1733. Was graduated at Yale 1757. Practiced in New York state. Member of the New York Revolutionary congress. One of a committee to draft a state constitution Aug. 1, 1776. Judge of New York district court July, 1777. Judge of the New York state supreme court. Elected United States senator in January, 1798. Resigned 1798. United States district judge for the district of New York, commissioned April 12, 1798. Died Feb. 4, 1805.

HOFFMAN, OGDEN. Born in Goshen, Orange county, N. Y., Oct. 15, 1822. Was graduated at Columbia in 1840. Studied law at Harvard, and was admitted to the bar of New York, where he practiced. Removed to California 1850, where he continued his practice of law. United States district judge for the northern district of California, commissioned Feb. 27, 1851. United States district judge for the district of California from July

27, 1866, until the abolishment of that district, Aug. 5, 1866, when he was again assigned to the northern district, where he remained until his death, Aug. 9, 1891.

HOLMAN, JESSE LYNCH. Born in Danville, Ky., Oct. 24, 1784. Received a limited education. Studied law in the office of Henry Clay. Removed to Indiana 1808. Circuit judge of Indiana territory. Member of territorial legislature 1813. President of the council 1814. Judge of the Indiana supreme court 1816-1830. United States district judge for the district of Indiana, commissioned Sept. 16, 1835. Died in Aurora, Ind., March 28, 1842. Served as Baptist clergyman in Aurora from 1834 until his death. One of the founders of Indiana College and of Franklin College.

HOPKINS, JAMES CAMPBELL. Born in Pawley, Vt., April 27, 1819. Removed to New York in 1823. Was graduated at the academy in North Granville in 1843. Was admitted to the bar in 1845. Postmaster in Granville for five years. Elected to the senate of New York state in 1853. Removed to Madison, Wis., in 1856. Assisted in arranging the Wisconsin Code of Practice. United States district judge for the western district of Wisconsin, commissioned July 9, 1870. Died at Madison, Sept. 3, 1877.

HOPKINSON, FRANCIS. Born in Philadelphia Sept. 21, 1737. Educated at the College of Philadelphia. Studied law under Benjamin Chew. Admitted to the bar 1761. Went to England 1766, and sought the place of commissioner of customs in the colonies. Practiced law in Philadelphia. Collector of customs at Newcastle 1772. He was removed because of his Republicanism. Resided in Bordentown, N. J. Member of New Jersey provincial council 1774-1776. Member of congress 1776. Signer of the Declaration of Independence. On the committee to draft the articles of confederation. Head of the navy department. Treasurer of the continental loan office. Judge of admiralty for Pennsylvania 1779-1789. Impeached for misdemeanor in office and acquitted. United States district judge for the district of Pennsylvania, commissioned Sept. 26, 1789. Died May 9, 1791. He was skilled in science, painting, and music. Author of essays and poems, among them "The Battle of the Kegs," "The New Roof," "The Political Catechism."

HOPKINSON, JOSEPH. Son of Judge Francis Hopkinson. Born in Philadelphia Nov. 12, 1770. Was graduated at University of Pennsylvania 1786. Began practice at Easton, Pa., 1791. Removed to Philadelphia. Counsel for Dr. Rush in his libel suit against William Corbett in 1799. Counsel for the Western insurgents in the treason trials before Judge Chase, and for Judge Chase in his impeachment trial. A Federalist in poli-

tics. Member of congress 1814-1819. Resumed practice 1823. United States district judge for the eastern district of Pennsylvania, commissioned Oct. 23, 1828. Died Jan. 13, 1842. Member of the Pennsylvania constitutional convention of 1839. Served on the committee on the judiciary. Trustee of University of Pennsylvania. President of the Academy of Fine Arts. Vice President of the American Philosophical Society. Author of the song, "Hail Columbia," which was very effective in stirring popular resentment against French aggression in 1798.

HOUSTON, JAMES. Born in Chestertown, Kent county, Md., Oct. 10, 1767. Educated at the public schools of Chestertown. Admitted to the bar, March 17, 1806. Appointed United States district judge for the district of Maryland, April 21, 1806. Died in June, 1819.

HOWE, JAMES H. Born in Turner, Me., Dec. 5, 1827. Was educated at Saco, Me., and Green Bay, Wis. Was attorney general from 1860 to 1862. Colonel of 32d Wisconsin infantry from 1862 to 1864. United States district judge for the eastern district of Wisconsin, commissioned Jan. 3, 1874. Resigned Jan. 1, 1875. Died in 1893.

HOWELL, DAVID. Born in New Jersey, Jan. 1, 1747. Was graduated at Princeton in 1766. Removed to Rhode Island. Professor of mathematics and law in Brown University 1790-1824. Attorney general of Rhode Island. Judge of the state supreme court. Member of congress 1782-1785. Commissioner for the United States to settle their eastern boundary. United States district judge for the district of Rhode Island, commissioned Nov. 17, 1812. Died July 29, 1824.

HUGHES, ROBERT WILLIAM. Born in Powhatan county, Va., June 6, 1821. Educated at Caldwell Institute, Greensboro, N. C. Tutor in Bingham's High School, Hillsborough, 1840-1843. Practiced law in Richmond from 1846 to 1853. Editor of Richmond Examiner 1850-1857. Joint Editor with John M. Daniel 1861-1865. Editor of Richmond Republic 1865-1866, and of Richmond State Journal 1869-1870. United States attorney for the western district of Virginia 1871-1873. Republican candidate for the governor of Virginia in 1873. United States district judge for the eastern district of Virginia, commissioned Jan. 14, 1874. Author of biographies of Gen. John B. Floyd and Gen. Joseph E. Johnston. Published "Lee and his Lieutenants" in 1867. Author of "The Currency Question" (Putnam's: New York), 1879, and of the "American Dollar" 1885, and of five volumes of United States Circuit and District Court Reports 1879-1885. Delivered the opinion in the famous Arlington Estate Case, which was affirmed by the supreme court.

HUMPHREYS, WEST H. Born in Montgomery county, Tenn., in 1805. Studied law

with Foster & Fogg, of Nashville. Afterwards attended a course of law lectures, delivered by Charles Humphreys, at Lexington, Ky. Was granted a license to practice law in 1828. Practiced successively at Charlotte and Clarksville. Moved to Fayette county in 1832. In 1834 he was sent as a delegate to the constitutional convention. Subsequently represented his county in the legislature, and was the youngest member of that body. In 1839 he became a member of the board of internal improvements, and was elected by the legislature attorney general for the state, and reporter of the decisions of the supreme court. Re-elected in 1844. Declined re-election at the expiration of his term of office in 1851. United States district judge for the districts of Tennessee, commissioned March 26, 1853, which office he held until June 26, 1862. At the breaking out of the war he was appointed district judge for the Confederate States of America, which position he held until Tennessee came under the control of the Union forces, when Judge Humphreys moved south, where he remained until the close of the war. From that period until a short time before his death was engaged in practice, though not actively. Died in 1881 in Tennessee. He was the brother-in-law of Gen. Gideon J. Pillow, Maj. Granville A. Pillow, and others of large estate in ante bellum days. He was the author of Humphrey's Reports, and of various essays on internal improvements, law reform, and temperance.

HUNT, SAMUEL WARD. Born in Utica, N. Y., June 14, 1810. Was graduated at Union in 1828. Studied law in Litchfield, Conn. Practiced in Utica. Member of legislature 1839. Mayor of Utica 1844. Judge of the New York court of appeals 1865. Associate justice of the United States supreme court, commissioned Dec. 11, 1872. Allocated to the second circuit. Retired Jan. 7, 1882. LL.D., Rutgers and Union. Died in Washington, D. C., March 24, 1886.

HUNTINGTON, ELISHA MILLS. Born in Otsego county, N. Y., March 26, 1806. Removed to Indiana. Admitted to the bar there. Prosecuting attorney 1829. Member of legislature 1831. President judge of his circuit. Commissioner of general land office in Washington, D. C., 1841. United States district judge for the district of Indiana, commissioned May 2, 1842. Died in St. Paul, Minn., Oct. 26, 1862.

INGERSOLL, CHARLES ANTHONY. Born in New Haven, Conn., Oct. 19, 1798. Studied law in the office of his father, Judge Jonathan Ingersoll. Was judge of the probate court for the probate district of New Haven, 1829-1838. State's attorney 1849-1853. Clerk of United States courts for the district of Connecticut 1820-1853. United States district judge for the district of Connecticut, commissioned April 8, 1853. Died at New Haven Feb. 7, 1860. M. A., Yale, 1827.

INNIS, HARRY. Born in Caroline county, Va., 1752. Land commissioner for Virginia 1779. Judge of the supreme court of Virginia for the district of Kentucky 1783. Attorney general for Kentucky 1785. United States district judge for the district of Kentucky, commissioned Sept. 26, 1789. Declined chief justiceship of Kentucky 1792. Favored a separate arrangement by Kentucky with Spain for the navigation of the Mississippi. An attempt to impeach him in 1808 for complicity in the Spanish intrigue failed. He died in Frankfort, Ky., Sept. 20, 1816.

IREDELL, JAMES. Born in Lewes, Eng., Oct. 5, 1750. Removed to North Carolina. Deputy collector of the port of Edenton. Studied law with his brother-in-law, Samuel Johnson. Began practice in 1775. Resigned the collectorship on the outbreak of the Revolution. Judge of the superior court 1777. Resigned 1778. Attorney general of North Carolina 1779. Resigned soon after. Commissioner to revise the laws of the state, (Iredell's Revisal, 1791.) A Federalist leader. Member of the state convention which refused to ratify the federal constitution 1788. Associate justice of the United States supreme court, commissioned Feb. 10, 1790. Assigned to the southern circuit. Wrote dissenting opinion in *Chisholm v. Georgia*, denying the right of a private citizen to sue a state. Dissented also in *Wilson v. Daniels*, touching writs of error, and his view was ultimately adopted by the court. His addresses to grand juries often published. Author of a treatise on Pleading, which was never published. Died in Edenton, N. C., Oct. 20, 1799.

IRWIN, THOMAS. Born in Philadelphia, Feb. 22, 1785. Educated at Franklin College, but was not graduated. Editor of Philadelphia Repository 1804. Admitted to the bar 1808. Indian agent at Natchitoches, La., and practiced law there. Settled in Uniontown, Fayette county, N. Y., 1810. Member of legislature 1824-1826; of congress 1828. United States district judge for the western district of Pennsylvania, commissioned April 14, 1831. Resigned Jan. 4, 1859. Died in Pittsburgh, Pa., May 14, 1870.

JACKSON, HOWELL EDMUNDS. Born in Paris, Tenn., April 8, 1832. Moved to Jackson, Tenn., in 1840. Was graduated from the West Tennessee College 1848. Studied at the University of Virginia two years. Removed to Memphis 1859. Judge of Tennessee supreme court for two terms. Again moved to Jackson 1876. Member of legislature 1880. United States senator (Democrat) 1881-1886. United States circuit judge for the sixth circuit, commissioned April 12, 1886. Associate justice of the United States supreme court, commissioned Feb. 18, 1893. Died Aug. 8, 1895.

JACKSON, JOHN GEORGE. Born in Virginia 1774. Surveyor of public lands in what is now Ohio in 1793. Member of legislature 1797-1801 and 1811. Member of congress (Democrat) 1795-1797, 1799-1801, 1807-1809, and 1813-1817. United States district judge for the western district of Virginia, commissioned Feb. 24, 1819. Died in Clarksburg, Va., March 29, 1825.

JACKSON, JOHN J., Jr. Born at Parkersburg, W. Va., Aug. 4, 1824. Graduated Princeton College, N. J., in June, 1845. Admitted to the bar in Virginia, Nov., 1847. Three years attorney for the state in Ritchie and Wirt counties. Four years a member of the Virginia legislature, from Jan., 1852, to Dec., 1856. Whig elector on four presidential tickets,—Taylor, Scott, Fillmore, and Bell. Was strongly opposed to the secession of Virginia, and took a very active part in the public discussion against the ordinance of secession when it was submitted. United States district judge for the western district of Virginia (now West Virginia), commissioned Aug. 3, 1861, which position he still holds.

JAY, JOHN. Born in New York city Dec. 12, 1745. Was graduated at Kings College (Columbia) 1764. Studied law with Benjamin Kissam. Lindley Murray was his fellow-student. Admitted to the bar 1766. Member of Revolutionary committee of correspondence and recommended a congress 1776. Member of congress 1774-1779. One of a committee of three to prepare an address to the people of Great Britain, an address to the people of Canada and Ireland, and a petition to the king. Member of many Revolutionary committees. Drafted the New York state constitution of 1777. First chief justice of New York 1777. President of congress 1778. Minister to Spain 1779. Commissioner with John Adams and Franklin to negotiate the peace of 1783, and did much to thwart the designs of France at that time. Secretary of foreign affairs 1784-1789. Joint author of the Federalist with Hamilton and Madison. First chief justice of the United States supreme court, commissioned Sept. 26, 1789. Candidate for the governorship of New York 1792, but was unfairly "counted out." Special envoy to England 1794, when he negotiated "Jay's Treaty." Elected governor of New York while in England. Re-elected 1798. Reappointed chief justice by President Adams in 1801, but declined. Spent the rest of his life in retirement. Married the eldest daughter of Gov. William Livingston. Died in 1829.

JENKINS, JAMES G. United States district judge for the eastern district of Wisconsin, commissioned July 2, 1888. Circuit judge of the United States for the seventh circuit, commissioned March 23, 1893.

JOHNSON, ALEXANDER SMITH. Born in Utica, N. Y., July 30, 1817. Was gradu-

ated at Yale in 1835. Began practice in New York city. Judge of the New York court of appeals 1846-1860. Resumed practice in Utica in 1860. United States commissioner for settlement of the Puget sound controversy in 1864. Member of the New York commission of appeals 1873-1875. United States circuit judge for the second circuit, commissioned Oct. 20, 1875. Regent of the University of the state of New York. Died in Nassau, New Providence, Jan. 26, 1878.

JOHNSON, BENJAMIN. Born in Scott county, Ky., Jan. 22, 1784. Was judge of Lexington circuit. Appointed judge of the superior court of the territory of Arkansas, Jan. 23, 1820, which office he held until his appointment as United States judge for the district of Arkansas. Commissioned June 29, 1836. Died at Little Rock, Oct. 2, 1849.

JOHNSON, THOMAS. Born in St. Leonard's, Calvert county, Md., Nov. 4, 1732. Educated by private tutors. Member of the colonial legislature 1762-1773. A leader in opposing the stamp act. Member of the committee of correspondence 1773, and of the convention to elect delegates to congress 1774. Member of the committee of safety, of the provincial convention, and of congress, 1775. Nominated Washington for commander-in-chief June 15, 1775. Senior general of the Maryland forces, and in charge of all measures of public defense, 1776. Member of congress 1776-1778. Elected first governor of Maryland Feb. 14, 1777. Re-elected 1778 and 1779. Member of legislature 1780-1781. Largely through his influence Maryland joined the Confederacy in 1781. Member of congress 1781-1787, and introduced a bill to sell the western lands. An ardent supporter of the constitution, and a member of the Maryland convention to ratify it. Declined the United States district judgeship for the district of Maryland in 1789. Chief judge of the general court of Maryland April 20, 1790. Resigned 1791. Associate justice of the United States supreme court, commissioned Aug. 5, 1791. Declined the chief justiceship offered him by Washington after Rutledge's retirement. Resigned March 3, 1793. Declined the office of secretary of state Aug. 14, 1795. One of three commissioners to lay out the city of Washington. Died at Rose Hill, Frederick county, Md., in October, 1819.

JOHNSON, WILLIAM. Born in Charleston, S. C., Dec. 27, 1771. Was graduated at Princeton in 1790, with the highest honors in his class. Studied law in the office of Charles Cotesworth Pinckney. Admitted to the bar 1793. Member of legislature 1794-1798. Speaker 1796-1798. Judge of the court of common pleas. Associate justice of the United States supreme court, commissioned March 26, 1804. Assigned to the sixth circuit. An ardent Democrat. Decided Jefferson's embargo unconstitutional 1808.

Used all his influence against the extension of the admiralty jurisdiction. Opposed nullification, and resided in Pennsylvania during that agitation. He died in Brooklyn, N. Y., August 11, 1834. LL.D., Princeton, 1818. He edited the "Life and Correspondence of General Nathaniel Greene."

JONES, JAMES M. Born in Kentucky about 1821. Removed to Plaquemine, Iberville parish, La., when quite young, and at the age of 17 began to study law in the office of Mr. Edwards of Plaquemine. His health being delicate, he traveled in Europe for about a year, and after his return resumed the study of law, and began practice in Louisiana. Went to California soon after the gold discovery, and located in San Joaquin district. Was delegate to constitutional convention of 1849, in which year he located in San Jose, and formed law partnership with Hon. John B. Weller. His name was spoken of in connection with United States senate when he was too young to be eligible. United States district judge for Southern district of California, commissioned Dec. 26, 1850, but died about Dec. 15, 1851, before he had taken his legal residence at Los Angeles.

JONES, WILLIAM GILES. Came to Alabama in 1834, and held a position in the land office at Demopolis. Moved to Greensboro. Representative from Green county in 1842. Moved to Mobile, and in 1849 was elected to the house from Mobile county. United States district judge for the northern and southern districts of Alabama, commissioned Sept. 29, 1859. Resigned Jan. 11, 1861, to accept same position from President Davis. Resides at Mobile, Ala.

JUDSON, ANDREW THOMPSON. Born in Ashford, Conn., Nov. 29, 1784. Admitted to the bar 1806. Removed for a time to Montpelier, Vt. Settled in Canterbury, Conn. Member of legislature 1816. Prominent in the toleration party, and the movement for a state constitution in place of the old charter, 1818. State's attorney for Windham county 1819. Member of legislature several years. Member of congress 1834-1837. United States district judge for the district of Connecticut, commissioned July 4, 1836. Died in Canterbury, Conn., March 17, 1853.

KANE, JOHN KENTZING. Born in Albany, N. Y., May 16, 1795. Was graduated at Yale in 1814. Studied law with Joseph Hopkinson. Admitted to the bar 1817. Practiced in Philadelphia. A Federalist in politics. Member of legislature 1823. Joined Democratic party. Solicitor for Philadelphia 1808-1830. Commissioner under the convention of indemnity with France 1832. Published "Notes" of the proceedings. Attorney general of Pennsylvania 1845. Resigned 1846. United States district judge for the eastern district of Pennsylvania, commis-

sioned June 17, 1846. Prominent in the Presbyterian Church. Member of the American Philosophical Society. Died in Philadelphia Feb. 21, 1858.

KEATLEY, JOHN H. Born near Bellefonte, Pa., Dec. 1, 1838. Received education in common schools and printing office. Studied law under Gov. Andrew G. Curtin. Admitted to bar in 1860. District attorney in 1863, when in military service. Re-elected 1865. Removed west 1867. Mayor of Council Bluffs, Iowa, 1876. Iowa house representative 1885. Was one of the managers on part of house in impeachment of State Auditor Brown. Chief of law division, second comptroller's office, treasury department, 1887. United States district and circuit judge for district Alaska, commissioned Aug. 25, 1888. Resigned Dec. 8, 1889. Commandant Iowa Soldiers' Home, Oct. 1, 1892. Resigned Oct. 1, 1894.

KETCHUM, WINTHROP W. Born in Wilkes-Barre, Pa., June 29, 1820. Received a classical education. Teacher for four years. Admitted to the bar in 1850. Prothonotary of Luzerne county for three years. Member of legislature 1858. Solicitor of the United States court of claims 1864-1866. Member of congress (Republican) 1875-1877. United States district judge for the western district of Pennsylvania, commissioned June 26, 1876. Died in Pittsburgh Dec. 6, 1879.

KEY, DAVID McKENDREE. Born in Greene county, Tenn., Jan. 27, 1824. Was graduated at Hiwassee College, Tenn., in 1850. Admitted to the bar 1850. Moved to Chattanooga 1853. Presidential elector 1856 and 1860. Opposed secession. Lieutenant colonel of Forty-Third Tennessee infantry (Confederate) during the Civil War. Pardoned by President Johnson. Member of Tennessee constitutional convention in 1870. Chancellor of the third division of the state until 1875. United States senator 1875. Postmaster general 1877-1880. United States district judge for the eastern and middle districts of Tennessee, commissioned May 27, 1880. Resigned Jan. 28, 1895.

KEY, PHILIP BARTON. Born in Cecil county, Md., 1757. Was liberally educated in England. Took the Tory side in the Revolution, and served in the British army with the rank of captain. Returned to Maryland 1785. Settled in Annapolis 1790, and rose to eminence at the bar. Member of legislature 1794. Removed to Georgetown, D. C., 1801. United States circuit judge for the fourth circuit, commissioned Feb. 20, 1801. Commissioned chief judge of the circuit March 3, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. Member of congress (Federalist) 1807-1813. Died in Georgetown, D. C., July 28, 1815.

KILTY, WILLIAM. Practiced law in Maryland. In 1799 prepared the Acts of Assembly. Chief judge of the United States circuit court for the District of Columbia, commissioned March 23, 1801. Resigned in Jan., 1806. Chancellor of state of Maryland. Prepared collection of British statutes.

KNOWLES, HIRAM. Born at Hamden, Me., Jan. 18, 1834. Educated at Denmark Academy, Iowa, and Antioch College, Ohio. Graduated at Harvard Law School in 1860. Appointed prosecuting attorney for Humboldt county, Nev., in 1863. Elected probate judge in the fall of the same year. Associate justice of the supreme court of Montana territory in July, 1868. Resigned Aug. 1, 1879. Elected and served as a member of the convention which framed the constitution of the state of Montana, 1889. District judge for the district of Montana, commissioned Feb. 21, 1890.

KNOWLES, JOHN POWER. Born at Providence, R. I., June 13, 1808. Educated at his native place, at the Harvard Law School, and South Reading. Admitted to the bar in 1837. Was reporter of decisions of the supreme court of Rhode Island, 1855-1856, 1865-1867. United States district judge for the district of Rhode Island, commissioned Oct. 9, 1869. Ceased to be district judge March 8, 1881. Died Aug. 3, 1887.

KREKEL, ARNOLD. Born in Germany, March 12, 1815. Removed to America 1832. Settled in Missouri. Educated in Germany and at St. Charles College, Mo. Admitted to the bar 1844. Member of legislature 1852. President of the Missouri constitutional convention of 1865. Colonel Missouri Home Guard 1863-1864. United States district judge for the western district of Missouri, commissioned March 9, 1865. Died June 8, 1888.

LACOMBE, EMILE HENRY. Born in New York City, in 1846. Was graduated from Columbia College in 1863. Columbia Law School in 1865, taking the prize for an essay on constitutional law. Was counsel to the corporation of New York City from June 1, 1884, to June 30, 1887. United States circuit judge for the second circuit, commissioned May 26, 1887. LL.D., Columbia, 1894.

LAMAR, LUCIUS QUINTUS CINCINNATUS. Born in Putnam county, Ga., in September, 1825. Moved to Oxford, Miss. Was graduated at Emory College, Ga., 1845. Studied law in Macon, Ga. Admitted to the bar 1847. Returned to Oxford, Miss., 1849. Professor of mathematics in the University Mississippi. Resumed practice in Covington, Ga. Member of Georgia legislature 1853. Returned to Mississippi 1854, and settled at Lafayette. Member of congress (Democrat) 1857-1860. Resigned. Member of the Mississippi secession convention. Colonel in

Confederate army, and commissioner to Russia in 1863. Returned to Mississippi after the war. Professor of political economy and social science in University of Mississippi 1866; professor of law 1867. Resigned, and resumed practice. Member of congress (Democrat) 1872-1877. United States senator 1877. Secretary of the interior March 5, 1885. Associate justice of the United States supreme court, commissioned Jan. 23, 1888. Assigned to the fifth circuit. Died in Macon, Ga., Jan. 23, 1893.

L^{AURANCE}, JOHN. Born in Cornwall, Eng., 1750. Removed to New York 1767. Admitted to the bar 1772. Aide de camp to Washington. Presided over Andre's trial as judge advocate general. Member of congress 1785-1786. Member of legislature and of congress 1789. United States district judge for the district of New York, commissioned May 6, 1794. Ceased to be district judge in December, 1796. United States senator 1796-1800. Presided over the senate in 1798. Died in November, 1800.

L^{AW}, RICHARD. Son of Jonathan Law, chief justice and governor of Connecticut colony. Born in Milford, Conn., March 17, 1733. Was graduated at Yale, 1751. Studied law with Jared Ingersoll. Admitted to the bar in 1754. Practiced in New London. Judge of the county court. Member of general assembly, of the council, 1776-1786; of congress 1777-1778 and 1781-1784. Revised and codified the statutes of Connecticut with Roger Sherman. Judge of the state supreme court 1784. Chief justice May, 1786. Mayor of New London 1784. United States district judge for the district of Connecticut (commissioned Sept. 26, 1789) until his death in New London, Jan. 26, 1806. LL.D., Yale, 1802.

L^{AURENCE}, PHILIP K. Born in New York. United States district judge for the district of Louisiana, commissioned Sept. 12, 1837. Died May 19, 1841, at New Orleans, La.

L^{AVITT}, HUMPHREY HOWE. Born in Suffield, Conn., June 18, 1796. Removed with his parents to Warren, Ohio, in 1799. Served in the war of 1812. Received a classical education, and was admitted to the bar in 1816. Commenced the practice of his profession at Cadiz, Ohio, and in the second year of his residence there was elected justice of the peace. Removed to Steubenville. Was prosecuting attorney, which position he held for ten years. Elected a member of the legislature from Jefferson county in 1825, and a member of the state senate in 1827. Appointed clerk of the court of common pleas and supreme court of the county in 1829. Elected a member of congress in 1830. Re-elected twice, but before taking his seat for his third term was appointed United States district judge for the district of Ohio, com-

missioned June 30, 1834. Upon the division of the state into two districts he was assigned to the southern district, removing to Cincinnati. Resigned March 30, 1871. Appointed a representative of the prison reform congress at London, in 1872. Died in the same year.

L^{EE}, THOMAS. Born in Charleston, S. C., Dec. 1, 1769. Educated in his native city, and was admitted to the bar in 1790. Was soon elected a member of the legislature, and in 1794 was appointed one of the three circuit solicitors. Was clerk of the house of representatives from 1798 to 1804. Elected one of the associate law judges of the state. Became comptroller general shortly after, holding this office for 12 years. President of State Bank from 1817 until his decease. In 1822 was chairman of the committee of ways and means in the legislature. District judge for the district of South Carolina, commissioned Feb. 17, 1823. Died at Charleston, Oct. 23, 1839.

L^{EWIS}, WILLIAM. Born in Chester county, Pa., in 1751. Studied law with Nicholas Wain of Philadelphia, with whom he subsequently practiced for several years, having been admitted to the bar in 1773. United States district attorney for the district of Pennsylvania, Oct. 6, 1789. United States district judge for the same district, commissioned July 14, 1791. Ceased to be district judge in 1792. Died Aug. 20, 1819. He was a member of the Society of Friends, and was the author of the act of 1780 abolishing slavery in Pennsylvania.

L^{IVINGSTON}, HENRY BROCKHOLST. Son of Gov. Livingston of New Jersey. Born in New York city, Nov. 26, 1757. Was graduated at Princeton in 1774. Lieutenant colonel in the Revolution. Private secretary to his brother-in-law, John Jay, in Spain, 1779-1782. Captured on the return voyage. Studied law at Albany with Peter Yates. Admitted to the bar 1783. Removed to New York city. Dropped his first name. Puisne judge of state supreme court 1802. Associate justice of the United States supreme court, commissioned Nov. 10, 1806. Assigned to the second circuit. LL. D., Harvard, 1818. Wrote political articles for the press under the name of "Decius." Died in Washington, D. C., March 18, 1823.

L^{OCKE}, JAMES W. Born in Wilmington, Vt., Oct. 30, 1837. Received an academic education. Studied law with Hon. William Stark, Manchester, N. H. Was an officer in the United States navy 1861-1865. Subsequently practiced his profession at Key West, Fla. Appointed clerk of the United States courts for the southern district of Florida in 1866. Became county judge in 1868. Elected to the state senate in 1870. District judge for the southern district of Florida, commissioned Feb. 1, 1872.

LONGYEAR, JOHN WESLEY. Born in Shandaken, Ulster county, N. Y., Oct. 22, 1820. Educated at Lima, N. Y. Removed to Michigan 1844. Admitted to the bar in 1846. Settled in Lansing. Member of congress (Republican) 1862-1867. Member of the loyalist convention in Philadelphia 1866. Member of Michigan constitutional convention 1867. United States district judge for the eastern district of Michigan, commissioned Feb. 13, 1870. Died in Detroit, Mich., March 11, 1875.

LOVE, JAMES M. Born in Fairfax county, Va., 1820. Removed to Muskingum county, Ohio, 1833. Studied law with his brother in Virginia, and with Judge Richard Stillwell at Zanesville, Ohio. Practiced in Coehocton county, Ohio. Captain in the Mexican War. Resumed practice in Ohio 1847. Removed to Keokuk, Iowa. Member of legislature 1852. United States district judge for the district of Iowa, commissioned Oct. 5, 1855. United States district judge for the southern district of Iowa, commissioned July 20, 1882. Died July 2, 1891.

LOWELL, JOHN. Born in Newburyport, Mass., June 17, 1743. Was graduated at Harvard in 1760. Admitted to the bar 1762. Member of legislature 1776-1778. Moved to Boston 1777. Member of the Massachusetts constitutional convention of 1780, and was active in securing the clause indirectly abolishing slavery. Member of congress 1782-1783. Appointed by congress one of three judges to try appeals in admiralty 1782. Member of Massachusetts and New York boundary commission 1784. United States district judge for the district of Massachusetts, commissioned Sept. 26, 1789. United States circuit judge for the first circuit, commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. LL. D., Harvard, 1792. Member of the Harvard Corporation. One of the founders of the American Academy of Arts and Sciences. Died in Roxbury, Mass., in May, 1802.

LOWELL, JOHN. A descendant of Judge John Lowell (1742-1802.) Born in Boston, Mass., Oct. 13, 1824. Was graduated at Harvard in 1843. Admitted to the bar 1846. Practiced in Boston. United States district judge for the district of Massachusetts, commissioned March 11, 1865. United States circuit judge for the first circuit, commissioned Dec. 18, 1873. Resigned May 1, 1884. His decisions have been published in two volumes.

LURTON, HORACE H. Born in Campbell county, Ky., Feb. 26, 1844. Educated at Douglass University, Chicago, and Cumberland University, Tenn. Removed to Clarksville, Tenn., in Aug., 1861. Served in the Confederate army. Practiced law at Clarksville, Tenn., from 1867 to 1874, in copartner-

ship with Hon. James E. Bailey. Appointed chancellor of the sixth chancery division of Tennessee, Feb. 1, 1874. Elected to the same position in August, 1876. Resigned in 1878 to resume the practice of his profession with Hon. C. G. Smith at Clarksville. Elected associate justice supreme court of Tennessee, Aug. 1886. Elected chief justice, Jan., 1893. United States circuit judge for the sixth circuit, commissioned March 27, 1893.

McALLISTER, MATTHEW HALL. Born in Savannah, Ga., Nov. 26, 1800. Educated at Princeton. Admitted to the bar about 1820. Practiced in Savannah. United States district attorney for the district of Georgia 1827. Opposed nullification in 1832. Member of legislature and secured the establishment of the court for the correction of errors. Unsuccessful Democratic candidate for governor 1845. Mayor of Savannah, and a friend to the negroes. Member of the Democratic national convention of 1848. Removed to San Francisco in 1850, and practiced there. United States circuit judge for California, commissioned March 3, 1855. Resigned April 7, 1862. Energetic in suppressing the vigilance committee. Author of a eulogy on President Jackson. His opinions were published by his son. Died in San Francisco, Cal., Dec. 19, 1865. LL.D., Columbia.

McALLISTER, WARD, JR. Born at Newport, R. I., July 27, 1855. Educated at Princeton. Graduated at Albany Law School, and was admitted to the New York bar. Studied at Harvard Law School for four years. Removed to California, and in 1882 was appointed assistant United States attorney, which office he held for two years. First United States district judge for the district of Alaska, commissioned July 5, 1884, which office he held until Aug. 28, 1885. Returned to San Francisco, and was appointed by Judge Ogden Hoffman a special commissioner in Chinese habeas corpus cases. He subsequently resigned this position to become counsel for the Pacific Mail Steamship Company. His grandfather, Matthew Hall McAllister, was first United States judge of California.

McCALEB, THEODORE H. Born in Pendleton District, S. C., Feb. 10, 1810. Educated at Phillips' Exeter Academy and at Yale. Removed to New Orleans in 1833, and was later admitted to the Louisiana bar. United States district judge for the district of Louisiana, commissioned Sept. 3, 1841. Held this position until Jan. 26, 1861, at the breaking out of the civil war. Died at Claiborne county, Miss., April 29, 1864. He was for three years president of the University of Louisiana, and for nearly seventeen years professor of admiralty and international law in the same institution. Was an accomplished linguist, and delivered an oration on the dedication of the Lyceum, and eulogies upon his friends Henry Clay and S. S. Prentiss. It is said that he was the only federal judge in the

South who was not commissioned a Confederate justice by the Confederate States government.

McCANDLESS, WILSON. Born in Pittsburgh, Pa., June 19, 1810. Was graduated at the Western University of Pennsylvania. Admitted to the bar in 1831. United States district judge for the western district of Pennsylvania, commissioned Feb. 8, 1859. Resigned July 24, 1876. Died in Pittsburgh, Pa., June 30, 1882.

McCAY, HENRY KENT. Born in Northumberland county, Pa., Jan. 8, 1820. Was graduated with distinction at Princeton in 1839. Removed to Lexington, Oglethorpe county, Ga.; taught school and studied law. Removed to Americus, Ga., 1842. Admitted to the bar and practiced there. Lieutenant in the Confederate army during the Civil War. Resumed practice in Americus. Became a strong Republican. Member of Georgia constitutional convention, 1868. Justice of the state supreme court. Resigned, and practiced in Atlanta. United States district judge for the northern district of Georgia, commissioned Aug. 4, 1882. Died at Atlanta, Ga., July 30, 1886.

McCLUNG, WILLIAM. United States circuit judge for the sixth circuit, commissioned Feb. 24, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802.

McCORMICK, ANDREW PHELPS. Born in Brazoria county, Tex., Dec. 18, 1832. Was graduated from Center College, Ky., in 1854. Admitted to the bar 1855. Practiced in Brazoria. Judge of probate 1865-1866. Member of the Texas constitutional conventions of 1866 and 1868. Judge of state circuit court 1871-1876. Member of legislature 1876-1879. United States district attorney for the eastern district of Texas 1878, but did not qualify. United States district judge for the northern district of Texas, commissioned April 10, 1879. Removed to Dallas 1879. Thence to Graham 1883. United States circuit judge for the fifth circuit, commissioned March 17, 1892, under the judiciary act of March 3, 1891.

McCRARY, GEORGE WASHINGTON. Born in Evansville, Ind., Aug. 29, 1835. His parents removed with him to what is now Iowa in 1836. Educated in a public school and an academy. Admitted to the bar in Keokuk, Iowa, 1856. Member of legislature 1857 and 1861-1865; chairman of committee on military affairs. Member of congress (Republican) 1868-1877. Introduced the bill for the electoral commission of 1877. Secretary of war March 12, 1877. Resigned 1879. United States circuit judge for the eighth circuit, commissioned Dec. 9, 1879. Resigned March, 1884. Practiced law in Kansas City,

Mo. Author of "The American Law of Elections."

McDONALD, DAVID. Born in Bourbon county, Ky., May 8, 1803. Educated at the common schools of Indiana, where he removed with his parents. Studied law in Bloomington, and was admitted to the bar in 1830. Elected a member of the legislature in 1833, and prosecuting attorney in 1834. Appointed judge of the tenth judicial circuit of Indiana in 1838, serving 14 years. United States district judge for the district of Indiana, commissioned Dec. 13, 1864. Died Aug. 25, 1869. Was the author of "McDonald's Treatise," a work on practice in Indiana, and held a professorship in the Indiana University, from which institution he had received the degree of LL.D.

McINTOSH, McQUEEN. Native of Georgia. An early emigrant to Florida. Was presidential elector. United States district judge for the northern district of Florida, commissioned March 11, 1856. Ceased to be judge, Jan. 10, 1861. Was member of secession convention of Florida. Died in Pensacola in 1868.

McKENNA, JOSEPH. Born in Philadelphia. Removed to San Francisco in 1855. Educated in common schools of San Francisco, and St. Augustine College, at Benicia. Admitted to the bar at the age of 22. Elected district attorney of Solano county the same year. Sent to the legislature from that county in 1875. Was elected to congress, which office he held for four consecutive terms. United States circuit judge for the ninth circuit, commissioned March 17, 1892. Appointed attorney general of the United States by President McKinley March 4, 1897.

McKENNAN, WILLIAM. Born in Washington, Pa., Sept. 27, 1816. Educated at Jefferson College, graduating in 1833, subsequently taking a post graduate course at Yale. Studied law with his father, Thomas M. T. McKennan, and was admitted to practice in 1837. United States circuit judge for the third circuit, commissioned Dec. 22, 1869, having, it is said, declined a position upon the supreme bench of the United States offered him by President Grant. Retired from the bench Jan. 3, 1891. Died at his home in Pittsburgh, Oct. 27, 1893. He was a delegate to the peace congress in 1860. Presidential elector same year, and has been a delegate to the Republican state and national conventions a number of times.

McKINLEY, JOHN. Born in Culpepper county, Va., May 1, 1780. Began practice in Louisville, Ky. Removed to Huntsville, Ala. Member of Alabama legislature. United States senator 1826-1831. Removed to Florence, Ala. Member of congress 1833-1835. In 1835 he was again elected for the senate, from which place he was transferred

by President Van Buren to the supreme court, commissioned April 22, 1837. Assigned to the fifth circuit, March 3, 1845. Died in Louisville, Ky., July 19, 1852.

McKINNEY, JOHN McDOWELL. Born in Lycoming county, Pa., in 1829. Was graduated from Princeton in 1848. Studied law at Williamsport, Pa., and was admitted to the bar, Sept. 3, 1850. Soon after the election of President Lincoln he was appointed to a clerkship in the solicitor's office of the treasury department at Washington, and was the author of the first internal revenue laws. United States district judge for the southern district of Florida, commissioned Nov. 8, 1870. Died Oct. 12, 1871.

McLEAN, JOHN. Born in Morris county, N. J., March 11, 1785. Removed to Warren county, Ohio, 1799. Studied law in Cincinnati, while engaged as a deputy in the clerk's office. Admitted to the bar 1807, practicing in Lebanon. Member of congress (Democrat) 1812-1816. Judge of the Ohio supreme court 1816-1822. Commissioner of the land office 1822. Postmaster general 1823-1829. Declined secretaryship of war and navy 1829. Associate justice of United States supreme court, commissioned Feb. 11, 1830. Assigned to the seventh circuit. Candidate for presidential nomination (Free Soil) in 1848, and in the Republican conventions of 1856 and 1860. Wrote a dissenting opinion in the Dred Scott Case. Died in Cincinnati, April 4, 1861.

McNAIRY, JOHN. Born in North Carolina in 1762. Removed to Tennessee in 1789. Was member of constitutional convention, Jan. 11, 1796. United States district judge for the district of Tennessee, commissioned Feb. 20, 1797. Upon the abolishment of that district was assigned to the eastern and western districts of Tennessee, commissioned July 1, 1802. Resigned 1834. McNairy county was named from him. Died at Nashville, Nov. 12, 1837.

MAGILL, CHARLES. United States circuit judge for the fourth circuit, commissioned March 3, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802.

MAGRATH, ANDREW GORDON. Born in Charleston, S. C., Feb. 8, 1813. Educated at the private school of Bishop England. Was graduated from South Carolina College with the highest honors in 1831. Studied law in the office of James L. Petigru and at Harvard Law School. Elected a member of the state legislature in 1840, serving two terms. United States district judge for the district of South Carolina, commissioned May 12, 1856. Resigned upon the election of Mr. Lincoln as president, Nov. 7, 1860, and was thereafter appointed Confederate district judge for the same district. Elected governor of South Carolina in Dec., 1864, and at the end of the

civil war was imprisoned with other Confederates in Fort Pulaski. After his release he returned to the bar, and for many years enjoyed a large practice. Died at Charleston, April 9, 1893.

MARCHANT, HENRY. Born in Martha's Vineyard, Mass., in April, 1741. Was graduated at Philadelphia College 1762. Studied law under Edmund Trowbridge, at Cambridge, Mass. Settled in Newport, R. I. Attorney general of Rhode Island 1770-1777. Member of legislature. An ardent Whig in the Revolution. Member of congress 1777-1780 and 1783-1784. Member of state convention to ratify the constitution. United States district judge for the district of Rhode Island, commissioned July 3, 1790. Died in Newport Aug. 30, 1796. LL. D., Yale, 1792.

MARSHALL, JAMES. Brother of Chief Justice Marshall. Born in Farquier county, Va., March 12, 1764. Lieutenant in Alexander Hamilton's regiment in the Revolution. Went to Kentucky 1785. A vigorous opponent of the "Spanish intrigue" there. Returned to Virginia 1795. Married the daughter of Robert Morris. Appointed by Washington to negotiate for the release of Lafayette during the French Revolution. Purchased the Fairfax estates in Virginia. Judge of the United States circuit court for the District of Columbia, commissioned March 3, 1801. Resigned 1803. Died in Farquier, Va., April 26, 1848.

MARSHALL, JOHN. Born in Farquier county, Va., Sept. 24, 1755. Educated at home. Captain in Revolutionary army. Attended law lectures by George Wythe in Richmond, 1780, while on duty there. Admitted to the bar 1780. Resigned in January, 1781, and studied law. Began to practice as soon as the courts reopened. Member of legislature and executive council. Removed to Richmond 1783. Member of the Virginia convention to ratify the federal constitution, of which he was an enthusiastic supporter, and with Madison had great influence in securing the ratification. Declined attorney generalship of the United States 1795. Argued the case of the British debts (Ware v. Hylton,) before the United States supreme court in 1796. Declined the place of minister to France 1796. Joint envoy to France with Charles C. Pinckney and Elbridge Gerry, June, 1797. Talleyrand attempted to bribe the envoys, and they withdrew from France. The publication of this correspondence, called the "X. Y. Z." letters, aroused great Federalist enthusiasm in the United States. Marshall was elected to congress (Federalist) in April, 1799. Made a famous speech on extradition relative to the case of Thomas Nash. Nominated secretary of war, but before confirmation was made secretary of state. Chief justice of the United States, commissioned Jan. 31, 1801. Assigned to the fifth circuit. Died in Philadelphia, July 6, 1835. His decisions

on the supreme bench are found in the United States Reports from 1 Cranch to 9 Peters; those delivered on circuit are contained in Brockenbrough's Reports. Presided at the trial of Aaron Burr in 1807. Member of Virginia constitutional convention 1829. Author of a "Life of Washington," of which the first volume is sometimes called "A History of the American Colonies."

MARVIN, WILLIAM. Born at Fairfield, Herkimer county, N. Y., in 1808. Received his early training on a farm. Was educated in the common schools and at Homer Academy. Taught school. Afterwards studied law, and was admitted to the bar in 1834. United States district attorney for the southern district of Florida in 1835. While holding this office he was twice elected a member of the legislative council. Was also a member of the first constitutional convention of the state of Florida. On the resignation of Judge Webb, in 1839, he was appointed judge of that court, and after the admission of Florida into the Union he was appointed United States district judge for the southern district of Florida, commissioned March 3, 1847. Resigned July 1, 1863. In 1865 he was appointed provisional governor of Florida to assist in the reconstruction of the state government. Resides at Skaneateles, N. Y. He is the author of a "Treatise on the Law of Wreck and Salvage," a small work on "International General Average," and the "Authorship of the Four Gospels."

MASON, JOHN YOUNG. Born in Greenville, Sussex county, Va., April 18, 1799. Was graduated at the University of North Carolina in 1816. Studied law in Litchfield, Conn. Admitted to the bar 1819. Practiced in Southampton county, Va. Member of legislature, of the Virginia constitutional convention of 1827; of congress, (1831-1837;) being chairman of the committee on foreign affairs. United States district judge for the eastern district of Virginia, commissioned March 3, 1841. Resigned March 5, 1844. Secretary of the navy 1844. United States attorney general 1845. Transferred to the navy department again. Removed to Richmond, Va., 1849, and resumed practice. President of the Virginia constitutional convention of 1850. United States minister to France from 1850 until his death, in Paris, Oct. 3, 1859. LL.D., University of North Carolina.

MATTHEWS, STANLEY. Born in Cincinnati, Ohio, July 21, 1824. Was graduated at Kenyon College 1840. Admitted to the bar. Settled in Maury county, Tenn., but returned to Cincinnati. Anti-slavery editor 1846-1849. Common pleas judge 1851. State senator 1855. United States district attorney for the southern district of Ohio 1858-1861. Colonel of the fifty-seventh Ohio regiment during the Civil War. Resigned 1863. Judge of the Cincinnati superior court 1863. Resigned 1864. Presidential elector for Lincoln

1864, and for Grant 1868. Republican candidate for congress 1876. Counsel (Republican) before the electoral commission in 1877. United States senator 1877. Associate justice of the United States supreme court, commissioned Jan. 30, 1882. Assigned to the sixth circuit. Died at Washington, D. C., March 22, 1889.

MAXEY THOMAS S. Born in Brandon, Miss., Sept. 1, 1846. Educated at the University of Mississippi and University of Virginia. Was in the Confederate army in 1864-1865. Received the degree of B. L., University of Virginia, 1869. Elected a member of the Mississippi legislature in the fall of the same year. Removed to Jefferson, Tex., in Dec., 1870. Was city attorney in 1873-1874. Removed to Austin in Feb., 1877. United States district judge for the western district of Texas, commissioned June 25, 1888. LL.D., University of Mississippi, 1888.

MERRICK, WILLIAM MATTHEWS. Born in Charles county, Md., Sept. 1, 1818. Liberally educated. Admitted to the bar in Baltimore, 1839. Settled in Frederick, Md., 1844. Deputy attorney general for that county 1845-1850. Moved to Washington, D. C., in 1854 and became a judge of the United States circuit court for the District of Columbia, commissioned Dec. 14, 1855. After the court was abolished, March 3, 1863, he practiced in Maryland. Member of legislature 1870; of congress (Democrat) 1871-1873; of state constitutional convention 1867. Associate justice of the supreme court of the District of Columbia, May 4, 1885.

MILLER, ANDREW G. Born at Carlisle, Pa., Sept. 18, 1801. Was educated at Dickinson College, and at Washington College, from which institution he was graduated with honors in 1819. Studied law with Andrew Caruthers, Esq., of Carlisle. Was admitted to the bar of Cumberland county in 1822. Practiced law for 16 years, during which time he held the office of deputy attorney general. Appointed associate justice for Wisconsin territory, Nov. 8, 1838. Reaching Milwaukee in 31 days, he took the oath of office on the 10th of December. He was assigned by the governor and legislature to the eastern territorial district, comprising Green Bay, Milwaukee, and the Lake Shore. United States district judge for the eastern district of Wisconsin, commissioned June 12, 1848. Resigned Dec. 31, 1873. Died Sept. 30, 1874.

MILLER, SAMUEL FURMAN. Born in Richmond, Ky., April 5, 1816. Was graduated in medicine at Transylvania University in 1838, and practiced for a time, but afterwards became a lawyer. Favored emancipation. Removed to Iowa in 1850, and became a leader of the Republican party there. Associate justice of the United States supreme court, commissioned July 16, 1862. Assigned to the eighth circuit, April 8, 1867.

Orator at the constitutional centennial celebration in Philadelphia, Sept. 15, 1887. Died Oct. 13, 1890.

MONROE, THOMAS B. Born in Albemarle county, Va., Oct. 27, 1791. Educated in Scott county, Ky. Elected member of the legislature from Barren county in 1816. Began the study of law in 1819. Removed to Frankfort in 1821. Was graduated from Transylvania University in 1822. Secretary of state of Kentucky in 1823. Reporter of the court of appeals in 1825. United States district attorney from 1833 to 1834. United States district judge for the district of Kentucky, commissioned March 8, 1834, resigning in 1861. Died at Pass Christian, Miss., Dec. 24, 1865. He was a relative of President Monroe. He published Monroe's Kentucky Reports in seven volumes. In 1848 he was professor in the University of Louisiana. Filled the chair of civil, international, and criminal law in Transylvania University. Professor of rhetoric, logic, and history of the law at the Western Military Academy at Drennon Springs. LL.D., University of Louisiana, Centre College, and Harvard University.

MOORE, ALFRED. Born in North Carolina, May 21, 1755. Was educated in Boston, Mass. Captain in the Revolutionary army. He was appointed attorney general of North Carolina in 1790, without previous legal education. State judge 1798. Appointed associate justice of the United States supreme court Dec. 10, 1799. Assigned to the sixth circuit July 1, 1802. Resigned March, 1804. Died in Blair county, N. C., Oct. 15, 1810.

MORRILL, AMOS. Born in Salisbury, Mass., Aug. 25, 1809. Was graduated at Bowdoin in 1834. Studied law at Salisbury. Removed to Tennessee 1836, and to Texas 1839. Judge of Texas supreme court 1867. Chief justice. United States district judge for the eastern district of Texas, commissioned Feb. 5, 1872. Ceased to be district judge in March, 1884. Died 1885.

MORRIS, ROBERT. Born in New Brunswick, N. J., 1745. First chief justice of New Jersey under the constitution of 1776. Appointed Feb. 5, 1777. Resigned 1779. United States district judge for the district of New Jersey, commissioned Aug. 28, 1790. Died May 2, 1815, in New Brunswick, N. J. His bad health prevented his attendance in court in the latter part of his life, but there was so little business that this caused no inconvenience.

MORRIS, THOMAS J. Born in Baltimore, Md., Sept. 24, 1837. Was graduated at Harvard in 1856. Admitted to the bar in Maryland, 1859. Practiced in Baltimore. United States district judge for the district of Maryland, commissioned July 1, 1879.

MORROW, WILLIAM W. Born near Milton, Wayne county, Ind., July 15, 1843. Removed with his family to Illinois in 1845. Upon the death of his father he returned to Indiana in 1853, and again to Illinois in 1855. Removed to California in 1859. Appointed to a clerkship in the United States treasury department in Washington in 1863. As a member of the National Rifles in the District of Columbia he was called into service in 1863-1864. Was sent to California as a special agent of the treasury department in 1865, serving four years. Studied law in Washington and in California, and was admitted to the bar in the latter state in 1869. Appointed assistant United States attorney in 1870, serving four years. Elected chairman of the Republican state central committee in 1879. Elected attorney for the board of state harbor commissioners in 1880. Was special counsel for the United States before the French and American claims commission 1881 to 1883; also for the Alabama claims commission 1882-1885. Delegate to the Republican national convention in 1884, and was chairman of the California delegation. Elected to the 49th congress from the San Francisco district in Nov., 1884. Re-elected in 1886 and in 1888. Declined a nomination in 1890. While a member of the house of representatives he served on the committees on commerce, immigration, foreign affairs, and appropriations, and frequently as speaker pro tem. Became an honorary member of the San Francisco Chamber of Commerce, July 9, 1889, and became an honorary member of the Mechanics' Institute of San Francisco, June 8, 1889. United States district judge of the northern district of California, commissioned Sept. 18, 1891. Lecturer on admiralty jurisdiction in the United States in Leland-Stanford University.

MORSELL, JAMES SEWALL. Born in Calvert county, Md., Jan. 10, 1775. Practiced in the District of Columbia. Served in the war of 1812. Associate judge of the circuit court for the District of Columbia commissioned Jan. 11, 1815. Held office until the abolition of the court, March 3, 1863. Died in Prince George county, Md., Jan. 11, 1870. Friend of Francis Scott Key and Judge Taney.

NELSON, RENSSELAER RUSSELL. Son of Justice Samuel Nelson. Born in Coopers-town, N. Y., May 12, 1826. Was graduated at Yale in 1846. Admitted to the bar in native city in 1849. Removed to St. Paul, Minn., 1850. Associate justice of the territorial supreme court from April 23, 1857, to May 11, 1858. United States district judge for the district of Minnesota, commissioned May 20, 1858. Retired May 16, 1896. He was, in point of service, the oldest federal district judge in the United States.

NELSON, SAMUEL. Born in Hebron, Washington county, N. Y., Nov. 10, 1792.

Was graduated at Middlebury in 1813. Studied law at Salem, N. Y., under Chief Justice Savage. Admitted to the bar in Madison, N. Y., 1817. Presidential elector 1820. Member of the state constitutional convention 1822. Circuit judge 1823-1831. Associate justice of the New York supreme court 1831. Chief justice 1837-1845. Member of the state constitutional convention of 1844. Associate justice of the United States supreme court, commissioned March 3, 1845. Assigned to the second circuit. Concurred in the Dred Scott decision. Resigned Dec. 1, 1872. Member of the Alabama arbitration commission 1871. Died in Cooperstown, N. Y., Dec. 13, 1873. LL. D., Columbia, 1841; also Middlebury and Geneva Colleges.

NELSON, THOMAS LEVERETT. Born in Haverhill, N. H., March 4, 1827. Entered Dartmouth 1842. Removed to Burlington, Vt., 1844. Was graduated at the University of Vermont in 1846. Civil engineer 1846-1853. Studied law in Worcester, Mass.; admitted to the bar in 1855, and practiced there. Member of legislature 1869. Chairman of judiciary committee. City solicitor of Worcester 1870-1873. United States district judge for the district of Massachusetts, commissioned Jan. 10, 1879. LL.D., University of Vermont, 1885. Member of the American Antiquarian Society.

NEWMAN, WILLIAM T. Born in Knoxville, Tenn., June 23, 1843. Educated in his native city. Entered the Confederate army in the spring of 1861. Was a lieutenant of cavalry during the war. Studied law in Atlanta, Ga., and was admitted to the bar in 1866. Was city attorney 1871-1883. United States district judge for the northern district of Georgia, commissioned Aug. 13, 1886.

NICOLL, JOHN C. Born in Savannah, Ga., about 1794. He removed with his parents to New Jersey, and, on attaining his majority, returned to Savannah, and engaged in the practice of the law. Was recorder of the city. Served several years as member of the legislature. Was at one time captain of the Republican Blues. Was judge of the city court of Savannah, mayor of the city, and judge of the superior court. United States district judge for the district of Georgia, commissioned May 11, 1839. Ceased to be district judge, Jan. 19, 1861. At the breaking out of the war he was appointed Confederate States district attorney, which office he held until his decease, in the city of Savannah, Nov. 16, 1863.

NILES, HENRY C. Born in Kosciusko, Miss., Oct. 21, 1850. Was representative in state legislature in 1878 and 1886. United States district attorney for the northern district of Mississippi from June 24, 1889, to Aug. 17, 1891. United States district judge for the northern and southern districts of Mississippi, commissioned Aug. 17, 1891.

NIXON, JOHN THOMPSON. Born in Fairton, N. J., Aug. 31, 1820. Was graduated at Princeton in 1841. Admitted to the bar of Virginia 1844, and of New Jersey 1845. Practiced in Bridgeton, N. J. Member of the legislature 1848-1849. Speaker 1849. Member of congress (Republican) 1859-1863. Member of the Philadelphia Loyalists' convention 1866. United States district judge for the district of New Jersey, commissioned April 28, 1870. Trustee of Princeton. Prominent in the Old School Presbyterian Church. Edited "Nixon's Digest of the Laws of New Jersey." Author of a treatise on "New Jersey Procedure." Died Sept. 28, 1889.

OGIER, ISAAC S. K. Born in Charleston, S. C., July 27, 1819. Educated in native city. Studied and practiced law in New Orleans. Removed to California. Settled in Los Angeles. Was a member of the first California legislature. United States district judge for the southern district of California, commissioned Jan. 23, 1854. Died in July, 1861.

PACA, WILLIAM. Born at Wye Hall, Harford county, Md., Oct. 31, 1740. Of an old Maryland family. Was graduated at Philadelphia College, 1759. Studied law in the Middle Temple, London, beginning Jan. 14, 1762. Admitted to the bar 1764. Practiced in Annapolis, Md. Opposed the stamp act. Member of the legislature 1771-1774; of the committee of correspondence 1774; of congress 1774-1779. Signer of the Declaration of Independence. State senator 1777-1779. Chief judge of the Maryland superior court 1778-1780. Chief judge of the (federal) court of appeals in prize and admiralty cases for two years, beginning 1780. Governor of Maryland 1782-1786. Member of the Maryland convention to ratify the federal constitution 1788. United States district judge for the district of Maryland, commissioned Dec. 22, 1789. Died at Wye Hall, in Oct., 1799.

PAINE, ELIJAH. Born in Brooklyn, Conn., Jan. 21, 1757. Was graduated at Harvard 1781. Admitted to the bar 1784. Practiced in Vermont. Member and secretary of the Vermont constitutional convention of 1786. Commissioner to adjust the differences between New York and Vermont 1789. Member of legislature 1789-1791. Judge of state supreme court 1791-1795. United States senator (Federalist) 1795-1801. United States district judge for Vermont, commissioned March 3, 1801. Resigned March, 1842. Died April 28, 1842. Member of the American Academy of Arts and Sciences and of the American Antiquarian Society. Trustee of Dartmouth and Middlebury Colleges and of the University of Vermont. First Phi Beta Kappa orator at Harvard 1782. A. B., (Hon.) Dartmouth, 1786. LL. D., Harvard, 1812; and University of Vermont, 1825. Resided at Williamstown.

PARDEE, DON A. Born at Wadsworth, Ohio, March 29, 1837. Entered the United States Naval Academy 1854. Resigned 1857. Admitted to the bar 1859. Served in the Union army during the war. Brevet brigadier general. Settled in New Orleans, La., 1865. Register in bankruptcy 1867. State judge of the second judicial district 1868-1880. Member of the Louisiana constitutional convention 1879. United States circuit judge for the fifth circuit, commissioned March 13, 1881.

PARKE, BENJAMIN. Born in New Jersey in 1779. Was the first attorney general for the territory of Indiana, and its first delegate in congress. Captain of cavalry company in Indian war, and participated in the battle of Tippecanoe. Was Indian agent under the territorial government, and member of the state constitutional convention. Was president of State Historical Society. United States district judge for the district of Indiana, commissioned March 6, 1817. Died July 12, 1835.

PARKER, ISAAC C. Born in Belmont county, Ohio, Oct. 15, 1838. Received academic education. A school teacher for four years. Admitted to the bar 1859. Removed to St. Joseph, Mo. City attorney 1862-1867. Served with the state troops during the war. Presidential elector 1864. State circuit judge 1868. Member of congress 1871-1875. Chief justice of Utah territory 1875. United States district judge for the western district of Arkansas, commissioned March 19, 1875. Was a celebrated judge in criminal cases, the number docketed having reached the enormous total of 13,490. Died Nov. 17, 1896.

PARLANGE, CHARLES. Born in New Orleans, La., July 23, 1851. Educated at home by private tutors during the war. Afterwards at Centenary College, Jackson, La. Was honorary United States commissioner for Louisiana to Paris Exposition in 1878. Delegate to constitutional convention in 1879. Member of state senate 1880-1885, when he resigned, to accept position of United States attorney for eastern district of Louisiana, for four years. Was elected lieutenant governor in 1892. Resigned 1893, to become justice of Louisiana supreme court. Resigned on being appointed United States district judge for eastern district Louisiana, commissioned Jan. 15, 1894.

PARRIS, ALBION KEITH. Born in Auburn, Oxford county, Me., Jan. 19, 1788. Was graduated at Dartmouth in 1806. Admitted to the bar in 1809. Began practice in Paris, Me. Prosecuting attorney for Oxford county, 1811. Member of legislature (Massachusetts) 1813-1814; of congress (Democrat) 1815-1819. United States district judge for the district of Maine, commissioned Jan. 28, 1818. Ceased to be district judge, Jan., 1822. Moved to Portland. Member of Maine constitutional

convention 1819. Resigned Dec., 1821. Judge of probate for Cumberland county 1820. Governor 1821-1826. United States senator 1826. Resigned 1828. Judge of the supreme court of Maine 1828-1836. Second comptroller of the United States treasury 1836-1850. Retired to Portland 1850. Mayor 1852. Died there, Feb. 11, 1857.

PATERSON, WILLIAM. Born at sea 1745. His parents were Irish, and brought him to America when two years old. Was graduated at Princeton in 1763. Studied law with Richard Stockton. Admitted to the bar in 1769. Member of New Jersey constitutional convention, and of the legislative council. Attorney general for the state in 1776. Member of congress 1780-1781. Prominent in the federal constitutional convention of 1787, and introducer of the "New Jersey plan." United States senator 1789. Governor of New Jersey 1791. Associate justice of the United States supreme court, commissioned March 4, 1793. Died in Albany, N. Y., Sept. 19, 1806. LL. D., Harvard, 1806, and Dartmouth. Published a revised edition of the laws of New Jersey, by authority of the legislature.

PAUL, JOHN. Born in Rockingham county, Va., June 30, 1839. Served in the Confederate army during the Civil War. Was graduated in law at the University of Virginia, 1867. Commonwealth attorney 1870-1877. Member of legislature 1877. Member of congress 1881. United States district judge for the western district of Virginia, commissioned March 3, 1883.

PEABODY, GEORGE A. Provisional judge for the district of Louisiana, commissioned Oct. 20, 1862. Ceased to be judge, July 28, 1866.

PECK, JAMES H. Born in Tennessee. Removed to Missouri. Impeached in 1826, because of difficulties with Luke C. Lawless. Acquitted. United States district judge for the district of Missouri, commissioned April 5, 1822. Retired March 8, 1836. Died in St. Charles, Mo., May 1, 1837.

PENDLETON, NATHANIEL. Born in Culpepper county, Va., 1756. Was a major on Gen. Greene's staff in the Revolutionary War. Removed to Georgia, and studied law. United States district judge for the district of Georgia, commissioned Sept. 26, 1789. Ceased to be district judge in 1796. Removed to New York. Judge of Dutchess county, N. Y. He was a member of the federal constitutional convention in 1787, but did not sign that instrument. Was Hamilton's second in the fatal duel with Burr. Died in New York city, Oct. 20, 1821.

PENDLETON, PHILIP C. Born in Berkeley county, Va. (now W. Va.), Nov. 24, 1779. Was educated in Culpeper, Va., Dickinson College, Carlisle, Pa., and Princeton, where he

graduated, sharing first honors with the late Judge William Gaston, of North Carolina. United States district judge for the western district of Virginia, commissioned May 6, 1825. On account of his extreme diffidence, he resigned shortly afterwards. Died April 3, 1863.

PENNINGTON, WILLIAM SANDFORD. Born in Newark, N. J., 1757. Major of second New Jersey artillery in the Revolutionary War. Member of the legislature. Associate justice of the supreme court of New Jersey Feb. 28, 1804. United States district judge for the district of New Jersey 1815-1826. Commissioned June 19, 1815. Governor of New Jersey 1813-1815. Chancellor of New Jersey. Publisher of New Jersey Supreme Court Reports, (1803-1816.) Died in Newark, Sept. 26, 1826.

PENNYBACKER, ISAAC SAMUELS. Born in Shenandoah county, Va., Sept. 12, 1807. Educated at Washington College, Va. Studied law in the Winchester Law School. Practiced in Harrisburg, Va. Member of congress (Democrat) 1837. United States district judge for the western district of Virginia, commissioned April 23, 1839. Offered the place of attorney general by President Van Buren, but declined. United States senator 1845. Died in Washington, D. C., Jan. 12, 1847.

PETERS, RICHARD. Born at "Belmont," Philadelphia, June 22, 1744. Son of Judge William Peters. Was graduated at the College of Philadelphia (University of Pennsylvania) 1761. Admitted to the bar 1763. Register of admiralty 1771. Resigned on outbreak of the Revolution. Officer in the army. Member of the continental board of war June 13, 1776. Commissioner of war. Resigned 1781. Member of congress 1782-1783; of state assembly 1787; speaker 1788-1790. Speaker of state senate 1791. Declined comptrollership of the treasury on the formation of the federal government in 1789. United States district judge for the district of Pennsylvania, commissioned Jan. 12, 1792. Died at "Belmont," Philadelphia, August 22, 1828. Active in securing the passage of the act of secession by the British parliament for the Episcopal Church in America. Went to England in 1785 to secure the ordination of American bishops. Published Admiralty Decisions for the district of Pennsylvania, (1780-1807.) His estate "Belmont" is included in Fairmount park.

PHILLIPS, JOHN F. Born in Thrall's Prairie, Boone county, Mo., Dec. 31, 1834. His early training was on the farm, and at the select schools of the neighborhood. He matriculated at the Missouri State University in 1851. Entered Center College, Ky., in 1853, graduating from that institution in 1855. Returning home, he at once entered upon the study of law, and entered the office

of Gen. John Clarke, of Fayette, Mo., in 1856. Was admitted to the bar in 1857. Engaged in the practice of the law at Georgetown, Mo. Was assistant presidential elector upon the Bell and Everett ticket, in 1860, and in 1861 was nominated as a delegate from the senatorial district to the state convention called to consider the relations of the states to the federal Union, making his canvass as a pronounced Union man. He recruited the 7th cavalry, and was commissioned as colonel of the regiment. Served in Missouri and Arkansas during the war, and was repeatedly recognized in field orders by division commanders for his gallantry and hard fighting. In 1864 he received special commendation of Maj. Gen. Pleasanton for gallant conduct, and was placed by Gen. Rosecrans in charge of the central district of Missouri, and was brevetted brigadier general by Gov. Willard P. Hall, but was not confirmed. At the close of the war he engaged in the practice of law at Sedalia, Mo., and soon after entered into partnership with Judge Russel Hicks. Hon. George G. Vest, afterwards United States senator from Missouri, was soon admitted to the firm, and Judge Hicks retired in 1869, so that for nearly 10 years thereafter the firm was Philips & Vest. Was a delegate to the presidential convention in Nov., 1868. Was Democratic candidate for congress in the same year, and was again nominated for congress in 1874 and 1876. Removed to Kansas City in the spring of 1882. Was supreme court commissioner in March, 1883, and was later appointed judge of the Kansas City court of appeals. United States district judge for the western district of Missouri, commissioned June 25, 1888. In 1877 he was a delegate from the United States to the Pan Presbyterian convention, at Edinburgh, Scotland. LL. D., Missouri State University, Center College, Ky., and Central College, Mo.

PICKERING, JOHN. Born in Newington, N. H., Sept. 22, 1737. Removed to Portsmouth. Graduated from Harvard 1761. Member of the provincial assembly before the Revolution. Member of the legislature during the Revolutionary period. Member of the New Hampshire constitutional convention 1781. Member of the conventions of 1791-1792, and of the convention of 1788, which ratified the federal constitution. Attorney general from Feb. 22, 1786, to June 5, 1787. Presidential elector 1788-1792. President of the state senate. Chief justice of the New Hampshire supreme court. United States district judge for the district of New Hampshire, commissioned Feb. 11, 1795. Removed in March, 1804, having become insane. Died in Portsmouth, N. H., April 11, 1805. LL. D., Dartmouth, 1792.

PITMAN, JOHN. Born in Providence, R. I., Feb. 23, 1785. Graduated from Rhode Island College, now Brown University, 1799, with degree of B. A. Admitted to the bar in

New York in 1806; in Kentucky in 1807. Removed to Kentucky, where he practiced until 1809, when he returned to Rhode Island. In 1812 he removed to Massachusetts, and, later, from there to New Hampshire, where he resided from 1816 to 1820, returning to his native city. United States district judge for the district of Rhode Island, commissioned Aug. 4, 1824. Died Nov. 17, 1864. United States district attorney for Rhode Island 1820-1824. President of the Rhode Island Society for the Encouragement of Domestic Industry 10 years. President of Providence Athenæum 1839-1857. Trustee Brown University 1828-1834. Fellow 1834-1864.

POPE, NATHANIEL. Born in Louisville, Ky., Jan. 5, 1784. Was graduated at Transylvania University, 1806. Began practice at St. Genevieve, Mo. Removed to Vandalia, and later to Springfield, Ill. Secretary of Illinois territory 1809. Delegate to congress 1816-1818. Register of the land office at Edwardsville, Ill., 1818. United States district judge for the district of Illinois, commissioned March 3, 1819. Died at St. Louis in 1849. Was instrumental in fixing the present northern boundary of Illinois.

POTTER, HENRY. Born in Granville county, N. C., 1765. United States circuit judge for the fifth circuit. Commissioned May 9, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. United States district judge for the districts of North Carolina, commissioned April 7, 1802. Trustee of the University of North Carolina 1799. One of the revisors of the state statutes, (Laws of the State of North Carolina 1821.) Published "The Duties of a Justice of the Peace." Died in Fayetteville, N. Y., Dec. 20, 1857.

PRENTISS, SAMUEL. Born in Stonington, Conn., March 31, 1782. Removed to Worcester, Mass.; thence to Northfield, Mass. Studied law in Northfield and in Brattleboro, Vt. Admitted to the bar 1802. Began practice in Montpelier, Vt., 1803. Member of legislature 1824-1825. Chief justice of Vermont supreme court 1829. United States senator (Whig) 1831. Resigned April 11, 1842. United States district judge for the district of Vermont, commissioned April 3, 1842. Died in Montpelier, Jan. 15, 1857. LL. D., University of Vermont.

PUTNAM, WILLIAM LE BARON. Born in Bath, Me., May 26, 1835. Graduated at Bowdoin in 1855. Admitted to the bar in Bath, Me., 1858, and practiced at Portland. Mayor of Portland 1869. Twice nominated judge of the state supreme court, but declined. He was in Sept., 1887, appointed commissioner to settle the differences of the United States and Great Britain as to the rights of American fishermen in Canadian waters. LL. D., Bowdoin, 1884, and Brown, 1893. United

States circuit judge for the first circuit, commissioned March 17, 1892.

RANDALL, ARCHIBALD. Born in Philadelphia, Pa., 1800. Admitted to the bar 1818. Judge of the court of common pleas at Philadelphia, 1834. United States district judge for the eastern district of Pennsylvania, commissioned March 8, 1842. His bankruptcy decisions are in the "Pennsylvania Law Journal," 1842-1846. Died at Philadelphia, June 8, 1846.

RANDOLPH, PETER. Descendant of the Randolphs, of Roanoke. Born in Virginia about 1780. Was educated at William and Mary College. Removed to Mississippi in 1820, and settled near Woodville. United States district judge for the district of Mississippi, commissioned June 25, 1823. Died Jan. 30, 1832.

RECTOR, JOHN B. Born in Jackson county, Ala., November 24, 1837. Graduated from Yale in 1859. Removed to Texas. Was elected district attorney in Austin in 1866. Appointed state district judge, thirty-first judicial district, in Feb., 1871. United States district judge for the northern district of Texas, commissioned March 30, 1892.

REED, JAMES H. Born Allegheny City, Pa., Sept. 10, 1853. Graduated from Western University in 1872. Commenced study of law with his uncle, Hon. David Reed, July 19, 1872. Admitted to bar, July 17, 1875. Formed partnership with C. P. Knox in 1881. United States district judge for the district of Pennsylvania, commissioned Feb. 20, 1891. Resigned Feb. 15, 1892. Resides at Shady Side, Pittsburg.

RICKS, AUGUSTUS J. Born in Stark county, Ohio, Feb. 10, 1843. Graduated from Massillon High School and Kenyon College. Enlisted as private in the 100th Ohio volunteer infantry in 1862. Later commissioned first lieutenant, and was specially recommended by Maj. Gen. J. D. Cox for a commission as captain and aid de camp. Removed to Knoxville, Tenn. Studied law with the late United States circuit judge, John Baxter, and entered into partnership with his preceptor. Was editor of the Knoxville Daily Chronicle, 1870, then the only Republican paper in the South below Louisville. Returned to Massillon in 1875, where he resumed the practice of law. Appointed clerk of the United States circuit court, March 20, 1878, and clerk of the United States district court, June 22, 1886, holding both positions until his appointment as United States district judge for the northern district of Ohio, commissioned July 2, 1889.

RINER, JOHN A. Born in Preble county, Ohio, 1850. Studied law at the University of Michigan, graduating in 1879. Removed to Wyoming. Was attorney for city of Cheyenne in 1881. Was United States district at-

torney for the territory of Wyoming, 1884. Elected a member of the upper house, tenth legislative assembly of Wyoming territory, in 1886. Elected member of the constitutional convention in 1889. Elected member of the state senate, 1890, but resigned before the legislature convened, to accept appointment as United States district judge for the district of Wyoming, commissioned Sept. 23, 1890.

RINGO, DANIEL. Born in Kentucky about 1800. Removed to Arkansas in 1830. Was clerk of Clark county from 1825 to 1830. Elected chief justice of the supreme court in 1836, which position he held until 1844. United States district judge for the district of Arkansas, commissioned Nov. 5, 1849, holding this position until the commencement of the civil war. Died at Little Rock, Sept. 3, 1873.

RIVES, ALEXANDER. Born in Nelson county, Va., June 17, 1806. Educated at Hampden-Sidney, Harvard, and University of Virginia. Settled in Albemarle county. Member of legislature 1855-1861. Judge of the Virginia court of appeals 1866. Resigned 1867. United States district judge for the western district of Virginia, commissioned Feb. 6, 1871. Resigned Aug. 1, 1882.

ROBERTSON, THOMAS BOLLING. Born near Petersburg, Va., 1773. Was graduated at William and Mary in 1807. Studied law. Appointed secretary for Louisiana territory, and removed to New Orleans. Member of congress (Democrat) 1812-1818. Governor of Louisiana. United States district judge for the district of Louisiana, commissioned May 26, 1824. His "Events in Paris" described the last days of the first empire, of which he was an eye-witness. He died at White Sulphur Springs, Va., Nov. 5, 1828.

ROSS, ERSKINE MAYO. Born at Belpre, Culpeper Co., Va., June 30, 1845. Graduated Virginia Military Institute. Was admitted to the bar at Los Angeles, Cal., in 1869. Justice of the supreme court of California 1879-1886. First United States district judge for southern district of California, commissioned Jan. 13, 1887. Appointed United States circuit judge for ninth circuit, Feb. 22, 1895.

ROSSELL, WILLIAM. Born in New Jersey in 1761. Judge of the supreme court of New Jersey. United States district judge for the district of New Jersey, commissioned Nov. 10, 1826. Died at Mt. Holly, June 20, 1840.

RUTLEDGE, JOHN. Born in Charleston, S. C., 1739. Studied law at the Temple, England. Member of the stamp act congress in 1765; the continental congress 1774. President of South Carolina March 27, 1776. Resigned 1778. Governor 1779, and proposed that South Carolina be neutral during the rest of the war, when the British advanced on Charleston. After the capture of Charleston in 1780 he accompanied Green's army.

Member of congress 1782-1784. In 1783 he was appointed minister plenipotentiary to Holland, but declined the office. Chancellor of South Carolina 1784. Member of federal constitutional convention in 1787. Offered the place of associate justice of the United States supreme court 1789, but declined, in order to become chief justice of South Carolina. Chief justice of the United States supreme court, commissioned July 1, 1795, and presided in the August term; but in December the senate refused to confirm his appointment, his mind having become diseased. Died in Charleston, July 23, 1800.

SABIN, CHAUNCEY BREWER. Born in Oneonta, Otsego county, N. Y., Aug. 6, 1824. Liberally educated. Admitted to the bar in Albany, Jan., 1846, and practiced there. Removed to Houston, Tex., in December, 1847. A Unionist during the Civil War. Fled the state in 1863. Resumed practice in Houston 1865. State judge for the third judicial district 1867-1868. Removed to Galveston 1871. State district judge 1871-1872. City attorney 1872. Member of legislature 1873. United States district judge for the eastern district of Texas, commissioned April 5, 1884. Ceased to be district judge, March 30, 1890.

SABIN, GEORGE M. Born in Cuyahoga county, Ohio, Sept. 18, 1835. Was graduated at Western Reserve College, Ohio, in 1856. Removed to Wisconsin, and studied law. Admitted to the bar in 1858. Enlisted, and served throughout the Civil War. Removed to Nevada 1868. United States district judge for the district of Nevada, commissioned July 26, 1882. Ceased to be district judge, May 13, 1890.

SAGE, GEORGE R. Born at Erie, Pa., Aug. 24, 1828. Removed to Ohio 1835. Was graduated at Granville College, Ohio, in 1849, and at the Cincinnati Law School in 1852. Practiced in Cincinnati 1852-1858. Practiced at Lebanon, Ohio, 1858-1865. Prosecuting attorney there. Returned to Cincinnati 1865. United States district judge for the southern district of Ohio, commissioned March 20, 1883.

SANBORN, WALTER H. Born at Epsom, N. H., Oct. 19, 1845. Was graduated from Dartmouth at the head of his class, June, 1867. Studied law with Senator Wadleigh, at Milford, N. H. Removed to St. Paul, Minn., 1870. Admitted to the Minnesota bar in 1871. Practiced law with his uncle, Gen. John B. Sanborn, from 1871 until his appointment as United States circuit judge for the eighth circuit, commissioned March 17, 1892. He was a member of the city council of St. Paul from 1878-1880 and 1885 to 1892. Was eminent commander of Damascus Commandery, No. 1, of the Knights Templar of St. Paul, from 1885 to 1888, and grand commander of the Knights Templar of the state of Minnesota in 1889. Was president of the St. Paul Bar

Association in 1890. LL. D., Dartmouth, 1893.

SAWYER, LORENZO. Born in Le Roy, Jefferson county, N. Y., May 23, 1820. Removed to Pennsylvania; thence to Ohio. Educated at Western Reserve College. Admitted to the bar 1846. Removed to Illinois; to Wisconsin; thence to California in 1850. Worked in the mines. Practiced in Sacramento. Removed to San Francisco in 1853. City attorney 1854. Judge of the state district court 1862; of the state supreme court 1863. Chief justice 1868-1870. United States circuit judge for the ninth circuit, commissioned Jan. 10, 1870. LL. D., Hamilton, 1877. Trustee of Leland Stanford University. Died Sept. 7, 1891.

SEAMAN, WILLIAM H. Born in New Berlin, Wisconsin territory, Nov. 5, 1842. Educated in common schools, and served apprenticeship as printer. Served in the civil war 1st Wisconsin infantry. Studied law at Sheboygan, Wis. United States district judge of the eastern district of Wisconsin, commissioned April 3, 1893. Has been president of Wisconsin State Bar Association.

SETTLE, THOMAS. Son of Judge Thomas Settle of the supreme court of North Carolina. Born in Rockingham county, N. C., Jan. 23, 1831. Was graduated at the University of North Carolina in 1850. Admitted to the bar in 1854. Member of the legislature 1854-1859. Speaker 1859. Presidential elector (Democrat) 1856. Supported Douglass in 1860. Opposed secession. Captain in the Confederate army for the first year of the war. Solicitor for the fourth judicial circuit. Member of convention and speaker of the state senate (as a Republican) in 1865. Active in the reconstruction. Judge of the state supreme court 1868-1871. United States minister to Peru in 1871. Defeated for congress in 1872. President of the Republican national convention of 1872. Judge of the state supreme court 1873. Defeated for governor 1876. United States district judge for the northern district of Florida, commissioned Jan. 30, 1877. Died Dec. 1, 1888.

SEVERENS, HENRY F. Born at Rockingham, Vt., May 11, 1835. Fitted for college at Saxton's River Seminary, and graduated from Middlebury College in 1857. Admitted to the Vermont state bar in 1859. Removed to Michigan, and entered upon the practice of his profession in that state in 1860. United States district judge for the western district of Michigan, commissioned May 25, 1886.

SEWALL, DAVID. Born at York, Mass., (Me.,) 1735. Was graduated at Harvard in 1755. A classmate of John Adams. Began practice at York 1759. Justice of the peace 1762. Register of probate 1766. Active in the Revolution. Member of the legislature and councillor. Judge of the Massachusetts

superior court 1777. United States district judge for the district of Maine, commissioned Sept. 26, 1789. Resigned Jan., 1818. LL. D., Bowdoin, 1812. Died at York, Me., Oct. 22, 1825.

SEYMOUR, AUGUSTUS SHERILL. Born in Ithaca, N. Y., Nov. 30, 1836. Was graduated at Hamilton College in 1857, and from the Columbia Law School in 1858. Practiced in New York city. Removed to Newbern, N. C. Criminal judge there 1868. Member of legislature 1868-1870. Member of the North Carolina constitutional convention of 1871. Member of legislature 1872-1874. Judge of state superior court 1874-1882. United States district judge for the eastern district of North Carolina, commissioned Feb. 21, 1882. Is the author of "Seymour's Digest."

SHEPLEY, GEORGE FOSTER. Son of Judge Ether Shepley, of the supreme court of Maine. Borne in Saco, Me., Jan. 1, 1819. Was graduated at Dartmouth in 1837. Studied law at Harvard. Began practice in Bangor, Me., in 1840. Removed to Portland 1844. United States district attorney for the district of Maine, 1848, 1853-1861. Member of the Democratic national convention in 1860. Colonel of Maine volunteers in 1861. Brigadier general 1862. Military governor of Louisiana 1862-1864. Commander of the military district of eastern Virginia 1864-1865. Military governor of Richmond when occupied by the Union troops. Declined an appointment as associate justice of the supreme court of Maine. United States circuit judge for the first circuit, commissioned Dec. 22, 1869. Died in Portland, July 20, 1878. LL. D., Dartmouth, 1876. His decisions are contained in Jabez Holmes' Reports.

SHERBURNE, JOHN SAMUEL. Born in Portsmouth, N. H., in 1757. Was graduated from Dartmouth in 1776. Studied law at Harvard. Practiced in Portsmouth. Was an officer in the Revolutionary war. United States district attorney for the district of New Hampshire, Sept. 26, 1789. Resigned Dec. 1, 1793, upon his election to congress. Again appointed United States district attorney Jan. 26, 1802, resigning March 26, 1804, upon his appointment as United States district judge for the district of New Hampshire. Died in Portsmouth, Aug. 2, 1830. His name was Samuel Sherburne, Jr., but by act of legislature, Dec. 31, 1789, it was changed to John Samuel Sherburne.

SHERMAN, CHARLES TAYLOR. Born at Norwalk, Conn., Feb. 3, 1811. Brother of General W. T. Sherman and Senator John Sherman. Removed to Lancaster, Ohio, in infancy. Was graduated from Ohio University, at Athens, Ohio, in 1830. Studied law at Dayton and Mansfield, Ohio. Admitted to the bar in 1833. Practiced at Mansfield. Commander of a drilling camp at Mansfield during the Civil War. Member of commission

to adjudicate war claims at St. Louis, Mo. Government director of the Union Pacific Railroad. United States district judge for the northern district of Ohio, commissioned March 2, 1867. Resigned Nov. 28, 1873. Died at Cleveland, Ohio, Jan. 1, 1879.

SHIELDS, WILLIAM BAYARD. Native of Delaware. An early emigrant to Mississippi. He participated as attorney general in the arrest of Aaron Burr. Was a leading member of the legislature. United States district judge for the district of Mississippi, commissioned April 20, 1818. Ceased to be district judge in 1823.

SHIPMAN, NATHANIEL. Born in Southbury, Conn., Aug. 22, 1828. Removed to Norwich 1836; thence to Jewett City 1842. Was graduated from Yale in 1848. Admitted to the bar 1850. Removed to Hartford 1851. Member of legislature 1857. Governor Buckingham's secretary 1858-1862. United States district judge for the district of Connecticut, commissioned April 16, 1873. United States circuit judge for the second circuit, commissioned March 17, 1892. LL. D., Yale, 1886.

SHIPMAN, WILLIAM D. Born in Chester, Conn., Dec. 29, 1818. Educated at the common school. Was engaged in mechanical labor from age of 17 to 24. Afterwards taught school until 1850, during which time he studied law. Admitted to the bar in the latter year in Middlesex county, Conn., and settled in East Haddam, in that state. Elected judge of probate for the district of East Haddam in 1852. Member of the lower house of the legislature in 1853. Same year was appointed United States district attorney for the district of Connecticut, and held that office until March 12, 1860, when he was commissioned United States district judge for the same district. Resigned May 1, 1873, and became the senior partner of the firm of Barlow, Larocque & MacFarland, of New York City. A. M. and LL. D., Trinity College, Hartford.

SHIRAS, Jr., GEORGE. Born in Pittsburg, Pa., Jan. 26, 1832. Educated at the Ohio University and at Yale, from which institution he was graduated in 1853. Was admitted to the Allegheny county bar in 1856. Practiced in Pittsburg. Was presidential elector in 1888. Associate justice of the United States supreme court, Oct. 7, 1892. LL. D., Yale, 1883.

SHIRAS, OLIVER P. Born at Pittsburg, Pa., Oct. 22, 1833. Was graduated from the University of Ohio in 1853. Entered the scientific school of Yale University. Was graduated from Yale Law School in 1856. Removed to Dubuque, Iowa, 1856. Admitted to the bar there. Aid-de-camp and judge advocate in the frontier army 1862-1863. Resumed practice at Dubuque. The first United States district judge for the

northern district of Iowa, commissioned Aug. 4, 1882. LL. D., Yale, 1886.

SIMONTON, CHARLES H. Born at Charleston, S. C., July 11, 1829. Educated at the high school in Charleston, and at South Carolina College, from which institution he was graduated in 1849. Was admitted to the bar in 1852. A member of the legislature from 1856 to 1860. Entered Confederate army in 1861. Was member of constitutional convention of the state in 1865, and was elected to the legislature and made speaker of the house in the same year. Again elected to the legislature in 1877, and was chairman of the judiciary committee of the house until 1886. United States district judge for the district of South Carolina, commissioned Sept. 3, 1886. Appointed United States circuit judge for the fourth circuit, Dec. 19, 1893. LL. D., South Carolina College, and D. C. L., University of the South.

SITGREAVES, JOHN. Born in New Berne, N. C., about 1740. Studied law and practiced there. An officer in the Revolutionary War. Member of congress 1784-1785; of the legislature 1786-1789. United States district judge for the district of North Carolina, commissioned Dec. 20, 1790. Ceased to be district judge, Feb. 13, 1801. Died in Halifax, N. C., March 4, 1802.

SKINNER, ROGER. United States district judge for the northern district of New York, commissioned Nov. 14, 1819. Ceased to be district judge, Aug. 27, 1825.

SMALLEY, DAVID A. Born in Middlebury, Addison county, Vt., April 6, 1809. Received academic education. Admitted to the bar in Franklin county, in 1831, and practiced there. Removed to Burlington. Member of legislature 1842. Vice president of Democratic national convention at Baltimore, 1852. Collector of customs for Vermont 1853. Delegate to the Cincinnati convention of 1857. United States district judge for the district of Vermont, commissioned Feb. 3, 1857. Resigned March, 1877. Died March 10, 1877, at Burlington.

SMITH, CALEB BLOOD. Born in Boston, Mass., April 16, 1808. Removed to Ohio 1814. Educated at Cincinnati and Miami Colleges. Studied law in Cincinnati and Connorsville, Ind. Admitted to the bar 1828. Practiced in Connorsville and edited the Sentinel. Member of legislature 1833-1836. Speaker 1836. Member of congress (Whig) 1843-1849. Presidential elector 1840 and 1856. Mexican claims commissioner. Resumed practice in 1850 in Cincinnati. Removed to Indianapolis. Influential in procuring Lincoln's nomination in 1860. Secretary of the interior 1861. United States district judge for the district of Indiana, commissioned Dec. 22, 1862. Died in Indianapolis, Jan. 7, 1864.

SMITH, JEREMIAH. Born in Peterborough, N. H., Nov. 29, 1759. Enlisted in the Revolutionary army. Fought at Bennington under Stark. Was graduated at Rutgers in 1780. Admitted to the bar in Dover, N. H. Member of New Hampshire constitutional convention 1791-1792. Member of congress (Federalist) 1791-1797. United States district attorney for the district of New Hampshire 1798-1801. United States circuit judge for the first circuit, commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. Chief justice New Hampshire superior court of judicature 1802-1809. Governor of New Hampshire 1809. Presidential elector 1809. Trustee of Phillips Exeter Academy. Member of State Historical Society. LL. D., Dartmouth, 1804; Harvard, 1807. Chief justice New Hampshire supreme judicial court 1813-1816. Patron and friend of Daniel Webster. Died in Dover, Sept. 21, 1842.

SPEER, EMORY. Born at Cullodea, Ga., Sept. 3, 1848. Was graduated at the University of Georgia in 1869. Served in the Confederate army. Began practice at Athens, Ga., 1869. Solicitor general for the western judicial circuit of the state 1873. Resigned in 1876. Member of congress 1879-1883. Trustee of the University of Georgia 1877-1885. Now dean law faculty Mercer University. United States district judge for the southern district of Georgia, commissioned Feb. 13, 1885. Author of work on "Removal of Causes."

SPRAGUE, PELEG. Born in Duxbury, Mass., April 27, 1793. Was graduated at Harvard in 1812. Studied in the Litchfield (Conn.) Law School. Admitted to the bar 1815. Practiced in Augusta, Me., and afterwards at Hallowell. Member of the Maine legislature 1820-1821; of congress (Whig) 1825-1829. United States senator 1829. Resigned Jan. 1, 1835, and practiced in Boston. Presidential elector (Whig) 1840. United States district judge for the district of Massachusetts, commissioned July 16, 1841. Retired March, 1865. LL. D., Harvard, 1847. Died in Boston, Oct. 13, 1880. His "Decisions in Admiralty," etc., are edited by F. E. Parker.

STEPHENS, WILLIAM. Born at Bulie, near Savannah, Ga., in 1752. At the beginning of the Revolutionary war he was appointed the first attorney general of Georgia, and was colonel of the Chatham county militia. Has repeatedly filled the office of chief magistrate of the city of Savannah. Was judge of the superior court of Georgia for several years. United States district judge for the district of Georgia, commissioned Oct. 22, 1801. Died in the city of Savannah, Aug. 6, 1819. He was at one time president of the Union Society, and also held the office of grand master Mason for the state of Georgia.

STOKES, JOHN. Born in North Carolina. Brother of Gov. Montford Stokes, of North Carolina. Colonel in the Revolutionary army. Member of state legislature in 1786. United States district judge for the district of North Carolina, commissioned Aug. 3, 1790. Died at Fayetteville, N. C., in Oct., 1790, after holding his first court. Stokes county was named for him.

STORY, JOSEPH. Born in Marblehead, Mass., Sept. 18, 1779. Was graduated at Harvard in 1798. Studied law under Samuel Sewall and Samuel Putnam. Began practice in Salem, Mass., 1801. Member of legislature 1805, and Republican leader in that body. Defended the embargo in 1808 as a temporary measure. Member of congress 1808, and secured the repeal of the embargo. Speaker of the Massachusetts house of representatives in 1811. Associate justice of the United States supreme court, commissioned Nov. 18, 1811, being then 32 years old. He had great influence upon the development of American admiralty, prize, and patent law, and, with Kent, of equity jurisprudence. His charges to the grand juries in 1819 were influential in stopping the slave trade in New England. Wrote the opinion in the Dartmouth College Case. Denounced the Missouri compromise. Member of Massachusetts constitutional convention in 1820. First "Dane Professor" of law at Harvard, 1829. Removed to Cambridge. A popular and able teacher. Declined the chief justiceship of Massachusetts in 1831. Presided over the United States supreme court in the interregnum between Marshall and Taney, and during Taney's illness in 1844. Marshall wished Story to succeed him as chief justice. Overseer of Harvard 1818. LL. D., Harvard, 1821; Brown, 1815; Dartmouth, 1824. A bank president in Salem for many years. Author of many legal works, among them "Bailments," "The Constitution," "Equity Jurisdiction," "Equity Pleading," "Agency," "Partnership." His works are of high authority in America, in England, and on the European continent. His decisions are contained in the reports of Cranch, Wheaton, and Howard. Next to Marshall, the greatest judge of the formative period of our federal jurisprudence. Died in Cambridge, Sept. 10, 1845.

STORY, WILLIAM. Born in Brookfield, Wis., April, 1844. Was educated in his native city and at Salem, Mass. Graduated from the University of Michigan in 1864. Enlisted in the 39th Wisconsin volunteer infantry, and at the close of the war entered the law office of Carter, Pitkin & Davis, of Milwaukee. Removed to Fayetteville, Ark., in 1866. Appointed to the bench of the state circuit court in 1867, and again to the same position in 1868, on the adoption of a new state constitution. United States district judge for the western district of Arkansas, commissioned March 3,

1871. Resigned in 1874, removing to Colorado to engage in the practice of the law. In 1890 he was elected lieutenant governor of Colorado. Resides at Ouray. His father was a nephew of Hon. Joseph Story, for 24 years associate justice of the supreme court of the United States.

STRONG, WILLIAM. Born in Somers, Tolland county, Conn., May 6, 1808. Educated at the Plainfield Academy, and was graduated at Yale in 1828. A teacher at Burlington, N. J., where he studied law under Garret D. Wall. Spent six months in the Yale Law School. Admitted to the bar in Pennsylvania in 1832. Settled in Reading. Member of congress (Democrat) 1847-1851. Chairman of committee on elections. Justice of the Pennsylvania supreme court 1857. His opinions are contained in volumes 30-60 Pennsylvania State Reports. Resigned 1868, and practiced in Philadelphia. Associate justice of the United States supreme court, commissioned April 4, 1870. Assigned to the third circuit. Resigned Dec. 14, 1880. Member of the electoral commission 1877. Prominent in the Presbyterian Church. President of the American Tract Society. Lectured in the University of Pennsylvania, and in the Columbian University, Washington, D. C. LL. D., Lafayette, 1867; Yale and Princeton, 1870.

SULLIVAN, JOHN. Born in Somersworth, part of Old Dover, N. H., Feb. 17, 1740. Of Irish parentage. Practiced law in Durham, N. H. Member of first continental congress in 1774. Member of first college of presidential electors in New Hampshire. Brigadier general in the Continental army 1775. Major general 1776. He was captured in the battle of Long Island, but was soon exchanged. In command in Rhode Island 1778, and in Iroquois county 1779. Resigned. Member of congress 1780-1781. Resumed practice in New Hampshire. Member of state constitutional convention 1781. Major general of the New Hampshire militia 1784-1786. Attorney general of state 1782-1786. Councillor 1785. Speaker of house 1785-1786. President of New Hampshire 1786, 1787, and 1789. Saved his state from anarchy at the time of an uprising similar to the rebellion of Shays in Massachusetts. Commissioned to settle disputes with Vermont. President of convention, and active in securing New Hampshire's ratification of the federal constitution in 1788. United States district judge for the district of New Hampshire, commissioned Sept. 26, 1789. Died in Durham, N. H., Jan. 23, 1795, while holding office. LL. D., Harvard, 1780; Dartmouth, 1789.

SWAN, HENRY H. Born in Detroit, Mich., Oct. 2, 1840. Educated at the University of Michigan. Studied law in Stockton, Cal., and Detroit, Mich. Was admitted to the bar in Oct., 1867. Was assistant United States district attorney for the eastern district of Michigan from 1870 to 1877. United

States district judge for the eastern district of Michigan, Jan. 21, 1891. Lecturer on admiralty law, University of Michigan.

SWAYNE, CHARLES. Born at Guyencourt, New Castle county, Del., Aug. 10, 1842. Educated at the public schools and higher academy. Taught in high school from 1864 to 1870. Was graduated from the law department of the University of Pennsylvania, June, 1871. Admitted to the Philadelphia bar in the same month. Admitted to the bar of the supreme court of Pennsylvania in 1873, and of the United States in 1876. Removed to Florida in March, 1885. Was a candidate on the Republican ticket for supreme judge in the state of Florida, and was defeated. United States district judge for the northern district of Florida, commissioned May 17, 1889.

SWAYNE, NOAH HAYNES. Born in Culpepper county, Va., Dec. 7, 1804. Educated in Waterford, Va. Studied law in Warrenton. Admitted to the bar 1823. Removed to Coshocton, Ohio. Prosecuting attorney 1826-1829. Member of legislature, (Jackson Democrat.) United States district attorney for Ohio 1831-1841. Removed to Columbus 1831. Declined the place of presiding judge of common pleas in 1833. Member of a commission to restore the credit of the state, and of another to settle the Michigan boundary line. Joined the Republican party at its formation. Associate justice of the United States supreme court, commissioned Jan. 24, 1862. Resigned July 24, 1881. LL. D., Dartmouth and Marietta, 1863; Yale, 1865. Died in New York city, June 8, 1884.

SWING, PHILIP B. Born in Miami township, Clermont county, Ohio, Oct. 23, 1820. Was educated at the common schools of his county. Prosecuting attorney in 1847. United States district judge for the southern district of Ohio, commissioned March 30, 1871. Died at Batavia, Ohio, Oct. 30, 1882.

TAFT, WILLIAM HOWARD. Born in Cincinnati, Ohio, Sept. 15, 1857. Was graduated from Yale in 1878. As second in his class, delivered the Latin oration. Was also class orator, and delivered his class oration. Studied law at Cincinnati Law School, and divided first prize on graduation. Was admitted to the bar in May, 1880. Was appointed assistant prosecuting attorney of Hamilton county, Ohio, in Jan., 1881. Resigned in March, 1882, to become United States collector of internal revenue for the first Ohio district. Resigned to resume the practice of the law in Jan., 1883. Was appointed assistant county solicitor of Hamilton county, Jan., 1885. Resigned to become judge of the superior court of Cincinnati in March, 1887, by appointment of Gov. Foraker. Was elected to the same bench for five years in April, 1888. Resigned in Feb., 1890, to become solicitor general of the United

States. United States circuit judge for the sixth circuit, commissioned March 17, 1892. LL. D., Yale, 1873.

TAIT, CHARLES. Born in Louisa county, Va., 1768. Removed to Georgia. Admitted to the bar. State judge of the western circuit of Georgia 1803-1809. United States senator 1809-1819. Removed to Alabama. The first United States district judge for the district of Alabama, commissioned May 13, 1820. United States district judge for the northern and southern districts, commissioned March 10, 1824. Resigned in 1826. Died in Wilcox county, Ala., Oct. 7, 1835.

TALLMADGE, MATTHIAS BURNET. Born in Stanford, Dutchess county, N. Y., March 1, 1774. Was graduated at Yale in 1795. Studied law with Ambrose Spencer, the chief justice of New York, at Hudson. Practiced in Herkimer. Member of the New York legislature. United States district judge for the district of New York, commissioned June 12, 1805. Removed to New York city. United States district judge for the northern district of New York, commissioned April 9, 1814. Married a daughter of Gov. George Clinton. Prominent in the Baptist Church. Died in Poughkeepsie, N. Y., Oct. 7, 1819.

TANEY, ROGER BROOKE. Born in Calvert county, Md., March 17, 1777. Son of a Roman Catholic planter. Was graduated at Dickinson in 1795. Read law at Annapolis with Judge Jeremiah Chase. Admitted to the bar in 1799. Member of legislature (Federalist) 1799, the youngest in that body. Removed to Frederick in 1801. Married a sister of Francis Scott Key in 1806. Defended Gen. Wilkinson before a court-martial in 1811, and became unpopular thereby. A War Federalist, during the war of 1812. Member of the legislature in 1816. Increased his unpopularity by defending a Methodist minister charged with inciting insurrection among the blacks. Removed to Baltimore 1822, and became the leader of the bar there. Became a Jackson Democrat in 1824. Counsel for Maryland in the Lord Baltimore Case before the United States supreme court. Attorney general of Maryland 1827. Attorney general of the United States Dec. 27, 1831. When Duane refused to remove the government deposits from the United States bank he was removed, and Taney made secretary of the treasury in his place, (in September, 1833.) For this he was bitterly attacked, and the senate refused to confirm his nomination June 23, 1834. Nominated as associate justice of the United States supreme court in January, 1835, but the senate refused to confirm him. Nominated chief justice Dec. 28, 1835, and confirmed by a vote of 29 to 15; commissioned March 15, 1836. Assigned to the fourth circuit. Sat on circuit in April, and presided over the full court in January, 1837, succeeding Chief Justice Marshall in

the office. His accession to the bench was followed by a tendency to extend the rights of the states rather than those of the federal government, in contrast with the decisions of Marshall. He revised the latter's decision in *Briscoe v. Bank of Kentucky*, touching the right of a state to establish a state bank. Justice Story soon after resigned. Taney held in a dissenting opinion in the Massachusetts and Rhode Island boundary dispute that the court had no right to settle questions of jurisdiction between states. Wrote the opinion in the *Dred Scott Case*. His decision in the case of Booth, a fugitive slave, overruling a decision of the Wisconsin supreme court, was declared "void and of no force" by the legislature of that state. He denied the jurisdiction of the court to compel by mandamus a governor of a state to deliver up a fugitive slave. In the *Case of Merryman* he denied the right of the president to suspend the writ of habeas corpus. Died in Washington, D. C., Oct. 12, 1864. His opinions in the supreme court contained in Howard's and Black's United States Reports. Those delivered on circuit are reported by Campbell.

TAPPAN, BENJAMIN. Born in Northampton, Mass., May 25, 1773. Apprenticed to learn engraving. Studied law. Began practice in Steubenville, Ohio, in 1799. Member of legislature 1803. Served as aid in the war of 1812. Presiding judge of the fifth Ohio circuit. United States district judge for the district of Ohio, commissioned Oct. 12, 1833. Ceased to be district judge, Dec. 26, 1833. Presidential elector 1833. United States senator (Democrat) 1839-1845. Joined the Free-Soil party at its beginning. Died in Steubenville, April 12, 1857.

TAYLOR, GEORGE K. United States circuit judge for the fourth circuit, commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802.

TEAYER, AMOS M. Born in Chautauqua county, N. Y., Oct. 10, 1841. Was graduated from Hamilton College in 1862. Entered the army as second lieutenant, 112th New York volunteers, July, 1862. Commissioned first lieutenant United States signal corps in 1863. Studied law in St. Louis, Mo., and was admitted to the bar in March, 1868. Elected circuit judge of the eighth judicial circuit, state of Missouri, in Nov., 1876. Re-elected in Nov., 1882. United States district judge for the eastern district of Missouri, commissioned Feb. 26, 1887. United States circuit judge for the eighth circuit, commissioned Aug. 9, 1894. LL. D., Hamilton College, 1892.

THOMAS, ALFRED D. Born in Walworth county, Wis., Aug. 11, 1837. Read law with Judge Olauson H. Barnes at Delevan, Wis., and Butler & Cotterill, at Milwaukee. Edu-

cated at Brown University, graduating in the class of 1861. Was married Oct., 1864, to Miss Fanny C. Barnes, daughter of Judge Barnes, territorial judge of Dakota. Was district attorney of Walworth county from 1872-1878. Removed to North Dakota in the latter year. United States district judge for the district of North Dakota, commissioned Feb. 25, 1890. Died Aug. 8, 1896.

THOMPSON, SMITH. Born in Stamford, Dutchess county, N. Y., Jan. 17, 1768. Was graduated at Princeton in 1788. Taught in Poughkeepsie, N. Y., and studied law there under Chancellor Kent. Admitted to the bar in 1792. Member of legislature 1800; of the state constitutional convention 1801. Declined the office of attorney for the middle district of New York 1801. Associate justice of state supreme court 1802-1814. Chief justice 1814-1818. Secretary of the navy 1818. Associate justice of the United States supreme court, commissioned Sept. 1, 1823. LL. D., Yale and Princeton, 1824; Harvard, 1835. Died in Poughkeepsie, N. Y., Dec. 18, 1843.

THRUSTON, BUCKNER. Born near Winchester, Va., in 1763. Son of Charles Mynn Thruston, a distinguished Revolutionary officer. Removed to Kentucky in early life. Received a classical education. Studied law, and was admitted to the bar, practicing in Frankfort. Was appointed United States judge for the territory of Orleans, which he declined on his election to the United States senate from Kentucky. He served in the senate from December 2, 1805, to July 1, 1809, when he resigned, on being appointed United States circuit judge for the District of Columbia, commissioned Dec. 14, 1809. Died in Washington, D. C., Aug. 30, 1845.

TILGHMAN, WILLIAM. Born in Talbot county, Md., Aug. 12, 1756. Studied law under Benjamin Chew. Admitted to the Maryland bar 1783. Member of legislature. Practiced in Philadelphia after 1793. Chief judge of the United States circuit court for the third circuit, commissioned March 3, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. President of the court of common pleas 1805. Chief justice of the Pennsylvania supreme court 1806. By order of the legislature, published the English statutes in force in Pennsylvania 1809. President of the American Philosophical Society 1824. Died in Philadelphia, April 30, 1832. LL. D., Harvard, 1814. A memoir of him is to be found in 15 *Serg. & R.* 437.

TODD, THOMAS. Born in King and Queen county, Va., Jan. 23, 1765. Was educated at Manchester, where he resided until 1782. Was a member of the Manchester troop of cavalry in 1781, during the invasion of Virginia by Arnold and Philips. Was a matriculate in 1782-1783 of Liberty Hall

Academy, now Washington and Lee University, Va. Removed to Danville, Ky., to engage in the practice of the law. Was a tutor in 1783, studying law at night. He was a member of all the 10 conventions held by the people from 1784 to 1792. Was clerk of the federal court for the district of Kentucky for the same period. Was appointed lieutenant colonel commandant of Lincoln county, June, 1792. Appointed clerk of the court of appeals, serving until 1801, when he was appointed judge of the court of appeals, and chief justice in 1806. Associate justice of the supreme court of United States, commissioned March 3, 1807. Died at Frankfort, Ky., Feb. 7, 1826.

TOULMIN, HARRY T. Born in Mobile county, Ala., 1838. Educated at the common schools, and at the universities of Alabama and Virginia. Began the practice of the law in Mobile in 1860. Was presidential elector in 1868. Member of the state legislature in 1870 and 1872. Was judge of the state circuit court from 1874 to 1882. United States district judge for the southern district of Alabama, commissioned Jan. 13, 1887.

TOWNSEND, WILLIAM K. Born in New Haven, Conn. Was graduated at Yale in 18—, and at the Yale law school in 18—. United States district judge for the district of Connecticut, commissioned March 28, 1892. He holds the Edward J. Phelps professorship of law in Yale University.

TREAT, SAMUEL. A cousin of Judge Samuel Hubbel Treat. Born in Portsmouth, N. H., Dec. 17, 1815. Was educated at the public schools of his native town, and at the age of 16 was employed as assistant teacher in the high school. Was graduated from Harvard in 1837. Commenced the study of the law in 1838 in the office of Jeremiah Mason and Charles B. Goodrich; also was engaged in teaching at the same time in the Weld school at Jamaica Plains, near Boston. Was elected to take charge of the Temple Hill Academy in the Genesee Valley, N. Y., and while there continued his legal studies under Gov. John Young. Resigned in November, 1840, and in 1841 removed to St. Louis. Was admitted to the bar, but devoted several years thereafter to editorial work. Spent the winter of 1848 in Cuba. Returning to St. Louis, he was appointed judge of the court of common pleas, Aug., 1849. Was elected to the same office in Aug., 1851, and held office until 1857. United States district judge for the eastern district of Missouri, commissioned March 3, 1857. Resigned March 5, 1887. Was member of the corporation of the Washington University of St. Louis. LL. D., Washington University, 1879.

TREAT, SAMUEL HUBBEL. A descendant of Robert Treat, the colonial governor of Connecticut. Born in Plainville, Otsego

county, N. Y., June 21, 1811. Studied law and was admitted to the bar in Richfield. Walked to Springfield, Ill., in 1834, and began the practice of law there. Judge of state circuit court 1839-1841; of state supreme court 1841-1855. United States district judge for the southern district of Illinois, commissioned March 3, 1855. Retired Feb. 15, 1887. Died in Springfield, Ill., March 27, 1887. Prominent in the Episcopal Church. Compiler with W. B. Scates and R. S. Blackwell of Illinois Statutes.

TRIGG, CONNALLY F. Born in Abingdon, Va., March 8, 1810. Removed to Bristol, Tenn., and engaged in the practice of the law. United States district judge for the districts of Tennessee, commissioned July 17, 1862. Died in Bristol, Tenn., April 25, 1880.

TRIMBLE, ROBERT. Born in Berkeley county, Va., in 1771. His parents removed to Kentucky when he was three years old. He was self-educated. Was a school teacher for a time. Began practice in Paris, Ky., 1803. Member of legislature 1803. Judge of the Kentucky court of appeals 1808; chief justice 1810. United States district attorney for the district of Kentucky 1813. United States district judge for the district of Kentucky, commissioned Jan. 31, 1817. Associate justice of the United States supreme court, commissioned May 9, 1826. Died Aug. 25, 1828.

TROUPE, ROBERT. Born in New York city in 1757. Was graduated at Columbia in 1774. Studied law under John Jay. Aid in the Revolutionary army. Captured in the battle of Long Island, and confined on the prison-ship "Jersey." Secretary of the board of war 1778-1779. Completed his law studies with Judge William Paterson, of New Jersey. A Federalist in politics. United States district judge for the district of New York, commissioned Dec. 10, 1796. Resigned in April, 1798. Was a member of the state legislature. Published a letter in 1822 on the lake canal policy of New York; "Vindication of the Claim of Elkanah Watson," in 1821; "Remarks on Trinity Church Bill," in 1813. Died in New York city, Jan. 14, 1832.

TRUITT, WARREN. Born in Green county, Ill., July 4, 1846. Entered McKendree College at Lebanon, Ill., graduating in 1868, ranking high in mathematics and philosophy. Commenced the study of the law in the office of Judge Snider, of Belleville, Ill. Was admitted to the bar in 1870. Removed to Oregon in 1871, locating in Polk county. Was elected judge in 1874, and, after serving four years, declined a renomination. Was a member of the legislature in 1883. Was on the Republican state ticket in 1884, and was selected as electoral messenger to carry the presidential vote of Oregon to Washington City. Was appointed register of the land office at Lake View, Or., in 1885. Again ap-

pointed register of the land office at Lake View, in 1889. United States district judge for the territory of Alaska, commissioned Jan. 15, 1892. His successor was appointed Nov. 8, 1895. He is at present engaged in the practice of the law in San Francisco, Cal.

TUCKER, ST. GEORGE. Born in Port Royal, Bermuda, July 10, 1752. Removed to Virginia in 1771. Was graduated from William and Mary College in 1772. Studied law in the office of George Wythe. Was admitted to the bar, April 4, 1774. Served in the Revolutionary army on the staff of Gen. Nelson. Was major of militia, Feb. 25, 1781. Was wounded at Guilford Court House. Was lieutenant colonel, Sept. 12, 1781. Member of the privy council of the state in 1781-1782. Member of the Annapolis convention of 1786-1788. Was judge of the general court 1787-1804. Was professor of law at William and Mary 1789-1804. President judge of the Virginia court of appeals 1804-1813. United States district judge for the district of Virginia, commissioned Jan. 19, 1813. Resigned June 30, 1825. Was author of "A Dissertation on Slavery; with a Proposal for a Gradual Abolition of it in the State of Virginia" (Philadelphia, 1796; New York, 1861); "Probationary Odes of Jonathan Pindar, Esq." (Philadelphia, 1796); "How Far the Common Law of England is the Common Law of United States"; "Commentaries on Blackstone," five volumes (Philadelphia, 1804); essays, poems, plays, etc. Died at Edgewood, near Warminster, Nelson county, Va., Nov. 10, 1827. LL.D., William and Mary, 1790.

TURNER, EZEKIEL B. Born at Putney, Vt., May 24, 1825. Was educated at a local academy. Removing to Michigan in 1843. Admitted to the bar, Jan. 14, 1850. Prosecuting attorney for St. Joseph county 1850. Removed to Texas 1853. District attorney for the western district of Texas 1866. Attorney general of Texas under the reconstruction acts. State judge for the thirty-second judicial district 1871-1876; sixteenth judicial district 1876-1880. United States district judge for the western district of Texas, commissioned Nov. 18, 1880. Died at Austin, June 2, 1888.

TYLER, JOHN. Born in James City, Va., Feb. 28, 1747. Was educated at William and Mary College. Studied law in the office of Robert Carter Nichols. Was judge of the state admiralty court in 1776, but resigned to accept a seat in the legislature 1778. Was speaker of the house of delegates during the Revolution. Was re-elected judge of the state admiralty court in 1786, and was also judge of the state supreme court. Was vice president of the Virginia convention in 1788. Was elected judge of the general court of Virginia in the latter year. Was elected governor of Virginia in 1808. United States district judge for the district of Virginia, commissioned Jan. 7, 1811. Died Jan. 6, 1813.

UNDERWOOD, JOHN CURTISS. Born in Litchfield, Herkimer county, N. Y., in 1808. Was graduated at Hamilton in 1832. Removed to Clark county, Va. Married a cousin of Gen. Stonewall Jackson. Member of the Republican national convention of 1856. He became unpopular in Virginia, and removed to New York in 1860. Refused consulship to Callao, Peru, 1861. Fifth auditor of the treasury 1861. United States district judge for the district of Virginia, commissioned March 27, 1863. Refused to admit Jefferson Davis to bail, June, 1866. Upheld the confiscation acts and the civil rights of negroes. Died in Washington, D. C., Dec. 7, 1873.

VAN NESS, WILLIAM PETER. Born in Ghent, N. Y., 1778. Was graduated at Columbia, 1797. Settled in New York city. Friend of Aaron Burr, and his second in the Burr-Hamilton duel, for which he was hated by the Federalists. United States district judge for the southern district of New York, commissioned May 27, 1812. Died in New York City, Nov. 7, 1826. Published "An Examination of the Charges against Aaron Burr," "Laws of New York, with Notes," (with the collaboration of John Woodworth,) and "Jackson's First Invasion of Florida."

WAITE, MORRISON REMICK. Son of Chief Justice Waite, of Connecticut, (1787-1869.) Born in Lyme, Conn., Nov. 29, 1816. Was graduated at Yale in the famous class of 1837, of which William M. Everts, Benjamin Silliman, and Samuel J. Tilden were members. Studied law in his father's office. Completed his legal education in the office of Samuel M. Young, of Maumee City, Ohio, whose partner he became after his admission to the bar, in 1839. The firm removed to Toledo, Ohio, in 1850. He formed a partnership with his brother, Richard. Leader of the Ohio bar. Member of the legislature 1849. Counsel for the United States, with Caleb Cushing and William M. Everts, before the Geneva arbitration commission, 1871-1872. (His argument was published.) Member and president of the Ohio constitutional convention of 1874, elected by both parties. Chief justice of the United States supreme court, commissioned April 1, 1874. Many great questions were before the court during his term, among them the war amendments, the civil rights act, the legal tender acts, the Virginia "readjustment" acts. He was assigned to the fourth circuit, including Virginia and the Carolinas, and was very popular with the bar in those states. LL. D., Yale, 1872; Kenyon, 1874; University of Ohio, 1879. Died in Washington, D. C., March 23, 1888.

WALLES, LEONARD B. Born in Wilmington, Del., Nov. 26, 1823. Was graduated at Yale in 1845. Admitted to the bar in 1848. Practiced in Wilmington. Judge of the state

superior court for New Castle county 1864. Resigned 1884. United States district judge for the district of Delaware, commissioned March 20, 1884.

WALKER, JONATHAN H. Born in Cumberland county, Pa., in 1756. Was educated at Dickinson College. Graduated from that institution in 1787. Studied law at Carlisle with Stephen Duncam, and in 1776 joined the colonial army under Gen. St. Clair, and was sent to support Arnold in the expedition against Quebec. He also took part in the campaign against the Indians in western Pennsylvania in 1779. Was appointed president judge of the fourth judicial district of Pennsylvania, March 1, 1806. United States district judge for the western district of Pennsylvania, commissioned April 20, 1818. Died at Natchez, Miss., in Jan., 1824. His son Robert J. Walker was secretary of the treasury during the administration of President Polk.

WALLACE, WILLIAM JAMES. Born in Syracuse, N. Y., April 14, 1838. Educated by private tutors. Studied law at Hamilton College. Admitted to the bar in July, 1859. Mayor of Syracuse 1873-1874. United States district judge for the northern district of New York, commissioned April 7, 1874. United States circuit judge for the second circuit, commissioned April 6, 1882. LL. D., Hamilton, 1875; Syracuse University, 1882. Resides at Albany.

WARE, ASHUR. Born in Sherburne, Mass., Feb. 10, 1782. Was graduated at Harvard in 1804. Tutor there 1807-1811. Professor of Greek 1811-1815. Admitted to the bar in Boston 1816. Removed to Portland, Me., 1817. First secretary of the state of Maine 1820. Editor of the Portland Argus. United States district judge for the district of Maine, commissioned Feb. 15, 1822. Resigned May 31, 1866. Author of articles on admiralty in Bouvier's Law Dictionary. Died in Portland, Sept. 10, 1873. LL. D., Bowdoin, 1837.

WASHINGTON, BUSHROD. Nephew of George Washington. Born in Westmoreland county, Va., June 5, 1762. Was graduated at William and Mary, 1778. Studied law in Philadelphia with James Wilson. Served as a private in the Revolution. Member of the legislature 1787; of the Virginia convention to ratify the federal constitution 1788. Removed to Alexandria, and thence to Richmond. Associate justice of the United States supreme court, commissioned Sept. 29, 1798. Assigned to the third circuit Feb. 13, 1801. Died in Philadelphia, Nov. 26, 1829. He inherited Mount Vernon. First president of the Colonization Society. He published Reports of the court of appeals of Virginia and of the United States circuit court for the third circuit.

WATROUS, JOHN C. Born in Colchester, Conn., 1806. Was graduated at Union, 1828. Practiced in Tennessee and Alabama. Removed to Texas 1842. Attorney general of the republic of Texas. When the state was admitted to the Union, he became United States district judge for the district of Texas, commissioned May 29, 1846. Assigned to the eastern district of Texas, Feb. 21, 1857. Resigned Jan., 1869. There was an unsuccessful attempt to impeach him. Removed to Baltimore, Md. Died there June 17, 1874.

WAYNE, JAMES MOORE. Born in Savannah, Ga., 1790. Was graduated at Princeton 1808. Admitted to the bar 1810. Practiced in Savannah. Member of legislature. Mayor of Savannah 1823. Judge of superior court 1824-1829. Member of congress 1829-1835, (Jackson Democrat.) Associate justice of the United States supreme court, commissioned Jan. 9, 1835. Assigned to the fifth circuit, March 10, 1863. Member of two Georgia constitutional conventions. Active in removing the Indians from Georgia. His admiralty decisions are of high authority. LL. D., Princeton, 1849. Died in Washington, D. C., July 5, 1867.

WEBB, NATHAN. Born in Portland, Me., May 7, 1825. Was graduated at Harvard in 1846. Admitted to the bar in 1849. Practiced in Portland. Member of legislature 1864-1865. County attorney of Cumberland county 1865 and 1868. United States district attorney for the district of Maine 1870. Declined reappointment in 1878. United States district judge for the district of Maine, commissioned Jan. 24, 1882.

WELKER, MARTIN. Born in Knox county, Ohio, April 25, 1819. Common-school education. Admitted to the bar in 1840. Clerk of common pleas for Holmes county 1846-1851. State judge of common pleas for the sixth district 1851. Served five years. Removed to Wooster, Wayne county, 1857. Lieutenant governor 1857. Judge advocate 1861. Assistant adjutant general 1862. Superintended the draft in Ohio. Member of congress 1865-1871. Member of the loyalist convention of 1866. United States district judge for the northern district of Ohio, commissioned Dec. 2, 1873. LL. D., Wooster University, Ohio, 1874. Professor of political science, constitutional and international law, in Wooster University. Resigned June 1, 1889.

WELLS, ROBERT W. Born in Frederick county, Va., Nov. 29, 1795. Received his early education at Winchester. Removed to Ohio, where he commenced the study of the law in the office of Judge Vinton at Marietta, Ohio. While engaged in the study he removed to the territory of Missouri at the solicitation of Mr. Rector, then principal deputy surveyor for that territory, and engaged in 1866 in the public surveys of the

territory, which was then inhabited mostly by Indians. He afterwards settled in St. Charles, capital of the territory, and engaged in the practice of law. Was elected a member of the first general assembly of the state, and took an active part in the adoption of the constitutional amendments then made relating principally to the judicial system. Subsequently became attorney general of the state, removing to Jefferson City with the removal of the state capital. United States district judge for the district of Missouri, commissioned June 27, 1836. Died at Bowling Green, Ky., Sept. 22, 1864. He was the author of "Wells' Code (Mo.) Practice," 1849.

WHEELER, HOYT H. Born at Chesterfield, N. H., Aug. 30, 1833. Admitted to the bar in 1859. Commenced practice at Jamaica, Vt. Member of legislature 1867-1869. Judge of the state supreme court 1869-1877. United States district judge for the district of Vermont, commissioned March 16, 1877. Removed to Brattleboro, 1884. LL. D., University of Vermont, 1886.

WHITE, ALBERT SMITH. Born in Blooming Grove, Orange county, N. Y., Oct. 24, 1803. Was graduated at Union in 1822, in the class of William H. Seward. Admitted to the bar in 1825. Moved to Indiana, and practiced in Lafayette. Member of congress (Whig) 1837-1839. United States senator 1839. Resumed practice 1845. Was active in railroad construction and management in Indiana. Member of congress (Republican) 1860. United States district judge for the district of Indiana, commissioned Jan. 18, 1864, but held the office only a few months, dying in Stockwell, Ind., Sept. 4, 1864.

WILKINS, ROSS. Born at Pittsburg, Pa., Feb. 19, 1799. Was educated at Dickinson College, graduating from that institution in 1818. Was prosecuting attorney at Pittsburg 1821-1823. Was territorial judge of the territory of Michigan 1832-1837. Was recorder at Detroit 1837. United States district judge for the district of Michigan, commissioned Jan. 26, 1837. Resigned Feb. 18, 1870. Died at Detroit, May 17, 1872.

WILKINS, WILLIAM. Born in Carlisle, Pa., December, 1779. Was in Dickinson College for a little time. Studied law at Carlisle. Admitted to the bar at Pittsburgh, Pa., Dec. 28, 1801, and practiced there. Member of the city common council 1816-1819; of the legislature 1820. President judge of the fifth judicial district of the state Dec. 18, 1820. United States district judge for the western district of Pennsylvania, commissioned May 12, 1824. Ceased to be district judge in March, 1831. United States senator (Jackson Democrat) 1831. Pennsylvania gave her electoral vote to him for vice president in 1833. Minister to Russia 1834. Member of congress 1842-1844. Secretary of war 1844-

1845. Member of legislature 1855. Died in Homewood, Allegheny county, Pa., June 23, 1865.

WILLIAMS, ARCHIBALD. Born in Montgomery county, Ky., June 10, 1801. At an early age he supported himself, first by manual labor, and afterwards by teaching school, devoting all his leisure to his own cultivation and improvement. He studied law. Was admitted to the bar in Tennessee 1828. Removed to Quincy, Ill., in 1829. He soon became a member of the state senate, and was ranked among the ablest men of the state, and was twice elected to the lower house. Was also a member of the convention of 1847. Was United States attorney for Illinois in 1849. Soon after the inauguration of President Lincoln, March, 1861, he was tendered the appointment to the supreme bench of the United States, which he declined. United States district judge of the district of Kansas, commissioned March 12, 1861. Died at Quincy, Ill., Sept. 21, 1863.

WILLIAMS, JOHN A. Born at Remsen, Oneida county, N. Y., May 1, 1835. Was educated at Lowville Academy, Lewis county, N. Y. Clerk of courts of Waukesha county, Wis., 1856-1861. Entered the Union army during the war as captain, and was discharged as major. Settled at Pine Bluff, Ark. Was a member of the Arkansas constitutional convention of 1874. Was judge of the state circuit court for 11 years. Resigned to engage in the practice of law at Pine Bluff. United States district judge of the eastern district of Arkansas, commissioned Sept. 25, 1890.

WILLSON, HIRAM V. Born in Madison county, N. Y., April, 1808. Was graduated from Hamilton College 1832. Studied law with Hon. Jared Willson, Canandaigua, N. Y., and in the office of Francis S. Key, Washington, D. C. Removed to Cleveland, Ohio, in 1833, and became partner of Hon. Henry B. Payne, and later with Hon. Edward Wade and Reuben Hitchcock. Was an unsuccessful candidate on the Democratic ticket 1832. United States district judge for the northern district of Ohio, commissioned Feb. 20, 1855. Died Nov. 11, 1866, at Cleveland, Ohio.

WILSON, JAMES. Born near St. Andrews, Scotland, Sept. 14, 1742. Educated at St. Andrews, Glasgow, and Edinburgh Universities. Came to New York in 1763. Removed to Philadelphia in 1766. Tutor in the City College, (University of Pennsylvania.) Studied law with John Dickinson. Admitted to the bar. Began practice in Reading. Removed to Carlisle. Member of the provincial convention and of congress 1775. Hesitated about declaring independence, but signed the Declaration. Commissioner of Indian affairs for the middle department 1775. One of the committee to hear appeals in admiralty cases. Colonel in the campaign of 1776. Practiced

in Annapolis a year, but returned to Philadelphia. Advocate general for France in the United States 1779. Director of the Bank of North America 1781. Unpopular for his conservative views, and for acting as counsel for Tories. Once mobbed, and left the city for a time. Brigadier general of militia 1782. Counsel for Pennsylvania before the court of arbitration in the Connecticut-Pennsylvania dispute 1782. Member of congress 1775-1778, 1782-1783, and 1785-1789. Member of the federal constitutional convention in 1787, on committee on details, and had great influence in forming the constitution, and in securing its ratification by Pennsylvania. Leader of the Federalists in the state. Member of state constitutional convention 1789-1790, and prepared the form of the new Pennsylvania constitution. Associate justice of the United States supreme court, commissioned Sept. 29, 1789. Died in Edenton, N. C., Aug. 28, 1798. Professor of law in Philadelphia College 1790. LL. D., Philadelphia College, 1790. Published commentaries on the United States constitution.

WINCH, JOEL C. C. Born in Vermont. Enlisted in the United States army, and at the close of the war engaged in the practice of law at Houston, Tex. Was a prominent member of the Republican party in his state. Appointed district attorney for the counties of Harris and Galveston in 1869. United States district judge for the eastern district of Texas, commissioned Oct. 4, 1870, his term of office expiring March 4, 1871, by reason of the failure of the senate to confirm his appointment. Died at Houston, Tex., about 1877.

WINCHESTER, JAMES. Born in Maryland 1756. United States district judge for the district of Maryland, commissioned Oct. 31, 1799. Ceased to be district judge in March, 1806. Removed to Tennessee. Brigadier general in the war of 1812. Defeated and surrendered at the River Raisin in January, 1813. Confined for a year in Quebec. Served at Mobile under Gen. Jackson. Resigned from the army in March, 1815. Lived in retirement in Tennessee. Died July 27, 1826.

WITHEY, SOLOMON L. Born at St. Albans, Vt., April 21, 1820. Removed to Ohio 1835, thence to Grand Rapids, Mich., 1838. Began to study law 1839. Admitted to the bar in 1844. Judge of probate 1848. Member of legislature 1860. United States district judge for the western district of Michigan, commissioned March 11, 1863. Declined circuit judgeship for the sixth circuit December, 1869. Bank president in Grand Rapids. Died April 25, 1886.

WOLCOTT, OLIVER. Son of Oliver Wolcott, the governor of Connecticut, and signer of the Declaration of Independence. Born in Litchfield, Conn., Jan. 11, 1760. Was gradu-

ated at Yale in 1778. Served as aid and quarter master in the Revolution. Studied law in Litchfield. Admitted to the bar in 1781. Removed to Hartford. Member of the state "committee of the pay table." Joint commissioner with Oliver Ellsworth to adjust the claims of Connecticut and the United States. Comptroller of state accounts 1788. Auditor of the national treasury 1789. Comptroller 1791. Declined presidency of United States Bank in 1791. Secretary of the treasury (following Hamilton) 1795. Disagreed with President Adams, and resigned Nov. 8, 1800. His enemies accused him of burning the treasury building in Washington to cover speculation. Nominated United States circuit judge for the second circuit, and unanimously confirmed; commissioned Feb. 20, 1801. The act under which the appointment was made was repealed, to take effect July 1, 1802. Merchant and banker in New York. Democratic candidate for governor of Connecticut 1815. Elected 1817. Re-elected for 10 years. Member state constitutional convention 1818. Afterwards resided in New York city, where he died June 1, 1833.

WOODBURY, LEVI. Born in Frankestown, N. H., Dec. 22, 1789. Was graduated with the highest honors at Dartmouth in 1809. Studied at the Litchfield, Conn., Law School. Admitted to the bar 1812. Practiced in Frankestown. Clerk of the state senate 1816. Judge of the state supreme court 1817. Removed to Portsmouth 1819. Governor of New Hampshire 1823-1824. Speaker of the state house of representatives 1825. United States senator (Democrat) 1825-1831. Secretary of the navy 1831-1834, and of the treasury 1834-1841. Refused the chief justiceship of the New Hampshire supreme court. United States senator 1841-1845. Voted to annex Texas 1844. Declined the English mission 1845. Associate justice of the United States supreme court to succeed Justice Story, commissioned Sept. 20, 1845. I.L. D., Dartmouth and Wesleyan, (Conn.) Died in Portsmouth, Sept. 4, 1851.

WOODRUFF, LEWIS B. Born in Litchfield, Conn., June 19, 1809. Was graduated from Yale with special honors in 1830, and from Litchfield Law School in 1832. Was admitted to the bar in Connecticut, in the autumn of that year, removing soon afterwards to New York city, where he entered the office of Hon. Willis Hall. Was judge of court of common pleas, Jan., 1850. Was

judge of superior court 1856. Resumed practice in 1861. Appointed judge of the court of appeals in Jan., 1868. United States circuit judge for the second circuit, commissioned Dec. 22, 1869. Died in Litchfield, Sept. 10, 1875.

WOODS, WILLIAM ALLAN. Born near Farmington, Marshall county, Tenn., May 16, 1837. Removed to Davis county, Iowa, in 1847. Was graduated from Wabash College in 1859. Tutor there 1859-1860. Teacher in Marion, Ind., and studied law there 1860. Admitted Dec., 1861. Commenced practice in Goshen, Ind., March 17, 1862. Member of legislature 1867. State judge for the thirty-fourth judicial circuit 1873-1881. Judge of the state supreme court 1881. Chief justice. United States district judge for the district of Indiana, commissioned May 2, 1883. Removed to Indianapolis. Circuit judge for the seventh circuit under the judiciary act of March 3, 1891, commissioned March 17, 1892.

WOODS, WILLIAM BURNHAM. Born in Newark, Licking county, Ohio, Aug. 3, 1824. Educated in part at Western Reserve College. Was graduated at Yale in 1845. Studied law in Newark, Ohio, and practiced there. Mayor 1856-1857. Member of legislature 1857-1869. Speaker 1858. Served in the Civil War. Brigadier general of volunteers. Mustered out May 5, 1866. Cotton planter and lawyer in Alabama. Active in the reconstruction. Chancellor of the state 1868. United States circuit judge for the fifth circuit, commissioned Dec. 22, 1869. Associate justice of the United States supreme court, commissioned Dec. 23, 1880. Died in Washington, D. C., May 14, 1887. Compiler and preparer of Woods' Circuit Court Reports.

WOOLSON, JOHN SIMSON. Born in Tonawanda, N. Y., Dec. 6, 1840. Removed to Mt. Pleasant, Iowa, in June, 1856. Graduated from Iowa Wesleyan University in June, 1860. Was appointed assistant paymaster, United States navy, March, 1862. Resigned in Dec., 1865, to pursue the study of law. Completed preparatory law studies with his father at Mt. Pleasant, and was admitted to practice, Sept., 1866. Was a member of Iowa state senate from 1876 to 1882 and 1886 to 1891. Was chairman of its judiciary committee 1880, 1888, and 1890. United States district judge for the southern district of Iowa, commissioned Aug. 17, 1891.



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Under the Indiana Code of 1838, a neglect to record a mortgage within the prescribed time did not invalidate it, except as to a subsequent bona fide purchaser or mortgagee whose deed or mortgage was first recorded 748

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A mortgagee has no right or authority to take possession of the mortgaged premises and hold the same for the satisfaction of his debt, without the consent of the mortgagor 398

A mortgage given to secure the payment of four promissory notes made to raise means to work a plantation is valid, and, upon the negotiation of the notes, relates back to the date of execution. 811

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A mortgagee of lands to which the mortgagor has no present title is entitled in equity to the benefit of an after-acquired title 699

A mortgage given to secure a debt due and payable, no time of payment being specified, may be redeemed or foreclosed at any time. 699

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In a proceeding to foreclose a mortgage, all persons holding the equity of redemption of the lands, or any part thereof, must be made parties. 748

A general notice calling upon prior mortgagees to present their claims will not make them parties or bind them, but they must be served with process or voluntarily appear 850

Where the court has taken possession of the property by the appointment of a receiver in a suit by junior mortgagees, the senior mortgagees cannot gain possession by a suit subsequently begun until the first is ended 850

In a suit by assignees of a note and mortgage, if the assignment is denied it must be proved. 748

The presumption that an equity of redemption is released after 20 years' possession by a mortgagee does not apply to a case where the mortgagee was in possession under an absolute deed, with an agreement that the mortgagor might redeem when he found it convenient; no specific time being fixed, and the mortgagee having no notice or request to redeem. 741

MUNICIPAL CORPORATIONS.

See, also, "Counties"; "Railroad Companies."

Under the authority to issue bonds in payment of a subscription to be made payable to "the president and directors of the

railroad company, and their successors and assigns," bonds made payable to "the railroad company or bearer" are valid. 544

Negotiable municipal bonds issued under a law authorizing their issue, which recite that the conditions required by law have been complied with, are unimpeachable in the hands of an innocent holder for value. 544

A city, which has power to borrow money and has issued bonds therefor, which were void because antedated and unregistered, is liable to the purchaser of such bonds or his assignee, for money had and received, for the amount actually paid to the corporation for the bonds, with simple interest thereon 442

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Proceedings on an inquisition under Act March 3, 1805, in relation to opening, extending, and regulating streets in Washington county, D. C. 676

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See, also, "Bridges."

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The paramount right of the public to use a navigable river as a highway does not prevent the state legislature, in the absence of a conflicting enactment of congress, from authorizing the construction of public improvements upon the stream, although they may involve a partial obstruction or inconsiderable detention to navigation 503

Under the constitution and laws of Wisconsin, any obstruction to the use of a navigable stream by the public for purposes of navigation, which is erected without a constitutional legislative authority, is a nuisance, and liable to be abated either at the suit of an individual or at the instance of the state. 503

The right to cross a navigable water by a railroad bridge must be given by the sovereign power, by a special or general act. 626

Where a company is authorized to construct a railroad between two points, "over" a navigable water, a right to construct a bridge over that water is implied, as a necessary means of carrying into effect the power granted. 626

The decision of the acting commissioner of the board of public works, under the Ohio statutes, approving the plan or structure of a proposed bridge over navigable waters, is final and conclusive. 626

NAVY.

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NE EXEAT.

A ne exeat bond only binds the sureties to the extent of the final decree; and if defendant continually remains in the district, according to the condition of the bond, they will be discharged all together.. 913

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Section 12 of the act of 1838 (5 Stat. 304), which declares that every captain, engineer, pilot, or other person employed on board of any steam vessel, by whose misconduct, negligence, or inattention to duty the lives of any persons on board may be destroyed, shall be deemed guilty of manslaughter, makes the negligence, etc., in question, a crime, when followed by the consequences named, without regard to the question of motive or intent on the part of the persons charged..... 990

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Act April 20, 1818, § 6 (3 Stat. 449), forbidding military expeditions by individuals against countries with which the United States are at peace, commented on.....1017

To constitute the offense of beginning or setting on foot a military expedition against a friendly power, within section 6, it is not necessary that the expedition shall be actually set on foot. It is sufficient if such preparations are made for it as show an intent to set it on foot.....1018

Any combination of individuals to carry on an expedition is "setting it on foot," within the meaning of the statute, and the contribution of money or anything else which shall induce such combination may be a beginning of the enterprise.....1021

To "provide or prepare the means for any military expedition or enterprise," within the meaning of section 6, such preparation must be made as shall aid the expedition. The contribution of money, clothing for the troops, provisions, arms, or any other contribution which shall tend to forward the expedition or add to the comfort or maintenance of those engaged in it, is a violation of this provision..... 1018, 1021, 1023

The overt act is not an invasion of a foreign country, but taking the incipient steps in the enterprise, such as providing the means for the expedition, furnishing munitions of war or money, enlisting men, and, in short, doing anything and everything that is necessary to the commencement and prosecution of the enterprise.....1020, 1021

Where a privateer was illegally fitted out and commissioned in this country by the French minister, but was afterwards dismantled and her register canceled, then sold to a foreigner, and fitted out and commissioned in a foreign port, held, that her proceedings under the latter commission were not in violation of the neutrality laws 7

To constitute the offense of accepting and exercising a commission to serve against a foreign prince, state, etc., with whom the United States are at peace, under the first section of the act of congress, some overt act under the commission must be done, such as raising men for the enterprise, collecting provisions, munitions of war, or any other act which shows an exercise of the authority which the commission was supposed to confer..... 1018

NEW TRIAL.

Where a jury has had a case before it and disagreed, a second trial cannot be had by another jury from the residue of the panel. The case must go over, in order that it may be tried on a new venire..... 101
In granting a new trial for defendant, the court will make it a condition that the verdict shall stand until another shall be rendered 913

NUISANCE.

A person who owns properties, such as tanneries and mills, located upon a navigable steam, for which he depends in part for his trade, may sue to enjoin the obstruction of the navigation of the bay in which the river empties by a private corporation, where the same would injure his trade.... 626
It is an indictable offense to inflict punishment on a servant or slave, to the annoyance or nuisance of citizens whose pleasure or business carry them near the scene of infliction.....1087
The question of nuisance or no nuisance is one of fact, exclusively for the jury to decide1087

OBSTRUCTING JUSTICE.

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Any obstruction to the free action of an officer or his lawful assistants in the service of process, willfully placed in their way, is sufficient to constitute the offense. Actual or threatened violence is not necessary 983
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A state which is an indorser of bonds secured by a statutory mortgage is not a necessary party to a suit brought by holders of the bonds to foreclose the mortgage 850
In a suit by a creditor of a corporation to reach a fund which has been distributed among its stockholders, all the stockholders need not be made parties, the impossibility of bringing all before the court being sufficient to dispense with the ordinary rule of making all persons in interest parties 435
In suits in rem in admiralty, all persons having claims of a like nature against the thing may join in a single libel for the purpose of having that question decided, whether the claims arise from tort or contract 879

Where a vessel is arrested by a lien creditor, all other lien creditors may intervene by summary petition, without having the vessel arrested again, and have their claims allowed 879

Where a person is a necessary party, in consequence of an act performed by himself after the commencement of the suit, the proper proceeding to bring him into court is an original bill in the nature of a supplemental bill 331

PARTNERSHIP.

A partner in a milling firm, who permits his co-partner to hold the firm out as a dealer in grains by the use of cards and letter heads indicating such business, will be liable on contracts for the sale and purchase of grain for future delivery, made in the name of the firm. *38

A partnership cannot be proved by evidence of general reputation. 119

PARTY WALLS.

A party wall, though built wholly on one lot, after it has remained there 12 years cannot be pulled down by the owner of such lot and rebuilt on the surveyed line. . . 139

Where a nine-inch party wall is torn down, it cannot be rebuilt by a 14-inch party wall 139

Where the defendant uses a party wall in the erection of his adjoining store, and is put to necessary expense in making the party wall fit for his use, the jury, in assessing the damages, may take into consideration such extra expense, unless the party, or those under whom he claims, waived the defects. 1073

PATENTS.

The commissioner of patents.
The chief clerk is the acting commissioner as well in the necessary absence of the head of the office as in case of a vacancy de jure 577

Patentability.
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The result alone, even when shown to be more economical, useful, and beneficial to the public, in the manufacture of a better article, is not sufficient evidence of novelty and invention 798

A mere principle may be the subject of a patent, where embodied and applied so as to afford some result of practical utility in the arts and manufactures. 367

The date of invention is the time when the patentee conceives the idea of doing the thing in substantially the way in which he patents it 507

The true test of invention is not whether an ordinary mechanic can make the combination, if it is suggested, but whether he would make the combination without suggestion, by means of his ordinary knowledge 507

The principle or essential character of an invention involves two elements: (1) The object attained; (2) the means by which it is obtained; and if either of these be new, it may be the subject of a patent. 258

The claim of the art of cutting ice by means of an apparatus worked by any other power than human is a claim of an abstract principle, and void. 723

The application to railway carriages of an improvement in axles or bearings which

was well known as applied to other carriages, held not patentable. 259

A new and improved method of producing a useful result or effect is as much the subject of a patent as an entire new machine 367

The fact that the inventor of a feature in a machine which anticipates the patented invention did not understand nor have in view the particular advantage of, or function performed by, such feature, will not prevent its invalidating the patent. 489

Prior machines relied upon to defeat a subsequent patent must have been working machines, which have either done work or been capable of doing it. They must not be mere experiments, afterwards abandoned 507

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An invention of a flour paste containing corrosive sublimate to prevent putrefaction, but in such small quantities in proportion to the flour that its poisonous and corrosive qualities are neutralized by the flour and the paste thus rendered innocuous, is not anticipated by a flour paste in which a larger proportion of corrosive sublimate was used for the purpose of making the paste poisonous and corrosive. 556

Where an anticipating device has been changed so that by the change the thing which is produced is practically a new structure, the new device, though subsidiary to the former one, is patentable. 907

A ruffle made by machinery at one operation, which theretofore required two or more, is not for that reason patentable. 610

A patent for a design for a reel, consisting of the making of the reel in the shape of a well-known mathematical figure,—the reel itself, as an article of manufacture, being old,—is not valid, under Act March 2, 1861, § 11. 612

A patent for cooked meat put up in a solid form, in its natural state, without disintegration or desiccation, in hermetically sealed packages, cannot be sustained as a new article of commerce. 251

The method of cutting up meat, preparing it with antiseptics, pressing, putting into cans, pressing afterwards, and then hermetically sealing the cans, is not patentable, for want of novelty. 251

The rule that a claim for a combination of old instrumentalities in a machine is not anticipated by a prior invention in which the combination of equivalent instrumentalities appears, when the inventor of the second patent has changed the mechanism so as to produce new and valuable results, stated. 43

The previous construction of a machine resembling that of a patent, but which proved unsatisfactory in operation, and was therefore abandoned, does not operate as an anticipation of the patent. 261

A combination, to be patentable, must disclose something new, either in the combination itself or in the result achieved. 517

Who may obtain patent.
It is not the person who has produced an idea, but he who has embodied it into a practical machine, and reduced it to practical use, who is entitled to protection. 273

The original inventor of a machine, who has reduced his invention to practice, is entitled to a priority of patent right, although subsequently the same machine may have been invented by another person 491

The fact that another first conceived the idea and embodied it in a machine will not prevent a later inventor obtaining a pat-

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An inventor who does not reduce his invention to practice, or apply for a patent till after 18 months, others in the meantime having invented the same thing, and reduced it to practice, cannot recover for a breach of his patent..... 258

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A foreign patent is not admissible as evidence to anticipate an American patent of a date anterior to the enrollment of the foreign patent 43

Abandonment: Laches.
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<p style="text-align: center;">SALVAGE.</p> <p>The relief of property from an impending peril of the sea by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the property, constitute a case of salvage.</p> <p>A vessel, out of sight of land, amid dangerous shoals, with master and both officers sick with a deadly, infectious disease, and with no navigator aboard, flying a signal of distress, is in a position to have salvage service rendered her.</p> <p>Leading the way safely out to sea for a sail vessel anchored among the shoals off Cape May, and in danger of going ashore if her cable should part, after an unsuccessful attempt to tow her, is a salvage service entitled to a liberal reward.</p> <p>The court will prohibit the payment of any part of the salvage to the crew of a stranded vessel who refused to assist in getting her off after wreckers were employed except upon the promise of extra compensation out of the salvage.</p> <p>One who recovers and carries off, against the express commands of the master, cargo accidentally fallen overboard in the salvage operation, which the authorized salvors intend to save at their earliest convenience, cannot recover salvage thereon.</p> <p>A vessel employed for a stipulated sum by the principal salvors with the acquiescence of the master of the wrecked ship, cannot, under any circumstances, recover salvage in addition to the sum agreed.</p> <p>Damages caused by grounding to a steamer which, being delayed by a salvage service rendered by her, reached her destination at low water, and struck in going over Pollock Rip, are too remote, and cannot be recovered against the salvaged vessel.</p> <p>Where the net proceeds of a derelict towed into port by a salvor were only \$206, and the owner, after notice, failed to appear, the whole proceeds were decreed to the salvors.</p> <p>Forty-three per cent. allowed upon gross valuation of \$41,924 for saving cargo, mainly by diving, from a vessel totally wrecked on Florida Reefs.</p> <p>\$5,000 awarded to a steamer worth, with her cargo, \$500,000, for piloting out to sea without any considerable danger to herself, a sailing vessel worth \$122,500, from a position of considerable peril among the shoals off Cape May.</p>	<p style="text-align: center;">SCIRE FACIAS.</p> <p>A scire facias is an action to which a party may plead, and it may be executed in the same manner as a summons.</p>
<p style="text-align: center;">SEAMEN.</p> <p>Protection and relief.</p> <p>"Vessel of commerce," within Act Sept. 28, 1850, abolishing flogging, includes vessels engaged in whale and other fisheries.</p> <p>The provisions of the act, imposing a penalty on masters of vessels in the merchant service for shipping seamen without articles, extend to the merchant marine upon the lakes and public navigable waters connecting the same.</p> <p>A female shipped as cook and steward is entitled to all the rights, and subject to all the disabilities, of a mariner; and the provisions of the statute as to shipping articles apply equally to her.</p> <p>In an action of debt, to recover several penalties under Act 1790, c. 29, § 1, against the master of a vessel for shipping seamen without articles, a single count for all the penalties is sufficient.</p>	<p style="text-align: center;">SEAMEN.</p> <p>The contract of shipment.</p> <p>The description of a voyage, as "from Boston to Valparaiso or other parts of the Pacific Ocean, at and from thence home direct, or via ports in the East Indies or Europe," is not sufficiently certain, and the articles do not bind the seamen.</p> <p>In the case of ambiguous shipping articles, the construction most favorable to the seamen is to be adopted.</p> <p>Under shipping articles authorizing the master to touch at certain intermediate ports, "or as he may direct," he may stop at places not named, without violating the contract with the seamen.</p> <p>Where a seaman is appointed to act as mate of a vessel, by the master, during the voyage, he may be removed by the master for incompetency, and is not entitled to any other wages than those originally contracted for.</p> <p>A master has no right to degrade his mate in a foreign port for an alleged offense, and make him do seaman's duty; and, if the mate refuse to do duty as a seaman, the master is bound to offer him a passage home.</p>
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The meaning of the words "overt act" as used in the constitutional definition of treason and in the statute, is an act of a character susceptible of clear proof, and not resting in mere inference or conjecture.....1036

Words, oral, written, or printed, however treasonable, seditious, or criminal of themselves, do not constitute an overt act of treason1034

In a civil war, persons who adhere to their allegiance are not, although they reside in an insurrectionary district, regarded as enemies; and trade with such persons, in good faith and without collusion with the enemy, is lawful, unless interdicted by the government1034

To be employed in actual service in an army raised to oppose the government in its action, or directly or indirectly to aid or assist in the levying or embodying of a military force for the subversion of the government, are plainly acts of "levying war," and involve the commission of the crime of treason. The constitutional definition of treason, however, is of broader signification, and includes all those who join a hostile army after war is begun.....1036

The words, "adhering to their enemies, giving them aid and comfort," include, in general, any act committed after war actually exists which indicates a want of loyalty to the government and sympathy with its enemies, and which, by fair construction, is directly in furtherance of their hostile designs1036

After war actually exists, it is treasonable to sell to, or provide arms or munitions of war, or military stores and supplies, including food, clothing, etc., for the use of, the enemy; to hire, sell, or furnish boats, railroad cars, or other means of transportation, or to advance money or obtain credits for the use and support of the hostile army; and to communicate intelligence to the enemy by letter, telegraph, or otherwise, relating to the strength, movements, or position of the army.....1036

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question whether another paper is the last will of testator. 953

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A devise expressly for life or in tail cannot be enlarged into a fee by other words of doubtful import. 63

A devise to A., and, if he die without heir or issue, the estate to go to B., his brother, gives an estate tail to A. by implication 63

A direction by a testator that his estate shall be held in trust for his daughter and her heirs, free from the control or disposal of any husband she might have, and exempt from his debts, contracts, or engagements, does not refer to the right of guardianship of the husband over the children after the death of the wife. 1069

A devise to an only daughter and her husband, "to them, their heirs begotten of their bodies, or assigns, forever, or, for want of such heirs or assigns, then to the heirs begotten by, or either of them, and to their assigns forever," gives an estate tail to the daughter and her husband, which, in the event of their death without issue, is to go to the heirs of the body of the survivor. 694

Under a devise to testator's wife of all his property, except outstanding debts, which he directs that she shall collect as executor and give to three persons as thereafter to be directed by him, where he dies without making such direction, the wife does not take title under the will to such debts or their proceeds. 388

Testator bequeathed a certain sum of money to a person in trust to invest in lands in the names of six grandchildren, to be conveyed and vested in them in fee simple, and, in case of the death of any of them, the share of the child so dying should go to the survivors. *Held*, that the will had reference only to a death during the lifetime of testator. 433

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The general rule of law is that a party to a suit cannot be a witness. This rule is founded on the interest the party has in the suit, and when that interest is removed the objection ceases to exist. 55

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